



United States Department of State

*United States Permanent Mission to the
Organization of American States*

Washington, D.C. 20520

April 3, 2019

Dr. Paulo Abrão
Executive Secretary
Inter-American Commission on Human Rights
Organization of American States
Washington, D.C. 20006

**Re: Eastern Navajo Diné against Uranium Mining, P-654-11
Response of the United States**

Dear Dr. Abrão:

The United States Government has the honor of submitting to the Inter-American Commission on Human Rights this response to the Petition your office transmitted to us on July 26, 2017. The Petition, with exhibits, was submitted by Eastern Navajo Diné against Uranium Mining and Mitchell Capitan, Rita Capitan, Christine Smith, Keithlynn Smith, Kenneth Smith and Larry King, on their own behalf, and forwarded to the United States as Petition No. P-654-11 ("Petition"). The Petition was apparently submitted to the Commission in May 2011. The United States appreciates the extension granted by the Commission on October 24, 2017, to file a response to the Petition. Please find enclosed the United States' response to the Petition. We trust this information is useful to the Commission and thank the Commission for its attention to this matter.

Please accept renewed assurances of my highest consideration.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Carlos Trujillo', written over a light blue horizontal line.

Carlos Trujillo
Ambassador

Enclosures: as stated

Attachments:

1. Map of proposed HRI sites.
2. Final Environmental Impact Statement (“FEIS”), NUREG-1508 (February 1997).
3. Marylyn Morris, et al., v. U.S. Nuclear Regulatory Commission, 598 F.3d 677 (10 Cir. 2010).

PETITION NO. P-654-11
EASTERN NAVAJO DINÉ AGAINST URANIUM MINING
RESPONSE OF THE UNITED STATES

The Government of the United States appreciates the opportunity to submit these observations on the May 13, 2011, “Eastern Navajo Diné against Uranium Mining and Mitchell Capitan, Rita Capitan, Christine Smith, Keithlynn Smith, Kenneth Smith and Larry King, on their own behalf, against the United States of America” petition (“Petition”), forwarded by the Inter-American Commission on Human Rights (“Commission”) via a letter dated July 5, 2017, as Petition No. P-654-11.¹ The Petition alleges various violations of provisions of the American Declaration of the Rights and Duties of Man (“American Declaration” or “Declaration”), including the rights to life, health, religion, cultural participation, and property, that may result from certain uranium mining should it commence.²

The Petition is inadmissible and does not demonstrate a failure by the United States to live up to its commitments under the American Declaration. Accordingly, the United States respectfully requests that the Commission find the Petition

¹ The United States is grateful for the extension granted by the Commission on October 24, 2017, to file a response to the Petition.

² The United States has consistently maintained that the American Declaration is a nonbinding instrument and does not create legal rights or impose legal duties on member states of the Organization of American States (“OAS”). U.S. federal courts of appeals have independently held that the American Declaration is nonbinding and that the Commission’s decisions do not bind the United States. *See* *Garza v. Lappin*, 253 F.3d 918, 925 (7th Cir. 2001); *accord, e.g.*, *Flores-Nova v. Attorney General of the United States*, 652 F.3d 488, 493–94 (3rd Cir. 2011); *In re Hicks*, 375 F.3d 1237, 1241 *n.* 2 (11th Cir. 2004). As explained by the U.S. Court of Appeals for the Seventh Circuit in *Garza*, “[n]othing in the OAS Charter suggests an intention that member states will be bound by the Commission’s decisions before the American Convention goes into effect. To the contrary, the OAS Charter’s reference to the Convention shows that the signatories to the Charter intended to leave for another day any agreement to create an international human rights organization with the power to bind members. The language of the Commission’s statute similarly shows that the Commission does not have the power to bind member states.” *Accord* Commission Statute, art. 20 (setting forth recommendatory but not binding powers). For a further discussion of the U.S. position regarding the nonbinding nature of the American Declaration, see Request for an Advisory Opinion Submitted by the Government of Colombia to the Inter-American Court of Human Rights Concerning the Normative Status of the American Declaration of the Rights and Duties of Man, Observations of the United States of America, 1988. As the Commission is aware, the United States respects its political commitment to uphold the American Declaration. As a result of the nonbinding nature of the American Declaration, the United States understands the term “violation” in reference to the American Declaration as meaning an allegation that a country has not lived up to its political commitment to uphold the Declaration.

inadmissible. Should the Commission nevertheless declare the Petition admissible and examine its merits, or should it defer its examination of the Petition's admissibility until its review of the merits under Article 36(3) of the Rules of Procedure ("Rules"), the United States urges it to find the Petition without merit and deny the Petitioners' request for relief.

A. FACTUAL AND PROCEDURAL BACKGROUND

In 1988, Hydro Resources, Inc. ("HRI")³ filed an application for a license to conduct *in situ* leach ("ISL") recovery operations at several locations near the towns of Church Rock and Crownpoint, New Mexico.⁴ After a technical review, the NRC Staff issued the requested license and several parties, including Petitioners, filed an administrative challenge to the license.

The NRC referred the challenge to its administrative hearing division (the Atomic Safety and Licensing Board Panel), which assigned a Presiding Officer to conduct the hearing. During the proceeding, the parties presented evidence on each of the contested issues. Two separate (and successive) Presiding Officers conducted an administrative proceeding that lasted approximately 10 years in this case. The Presiding Officer then issued a decision and the losing side appealed that decision to the NRC itself, *i.e.*, the five-member body that administers the agency.

The NRC stayed the effectiveness of the license and held that the license could not be used until NRC Staff approved the restoration action plans for each project site. Ultimately, the NRC approved the issuance of the license. However, the NRC also issued several conditions (discussed below) to modify the license in response to the issues raised by the challengers, including Petitioners. In addition, HRI agreed to a restoration demonstration project on the first project site as a prerequisite to conducting full uranium recovery operations at any other project site. The challengers appealed the NRC's decision to the U.S Court of Appeals for the Tenth Circuit, which is the regional appellate court that encompasses the state

³ HRI is now NuFuels, Inc. We will use HRI in this Response as that is the name used in the documents in this matter.

⁴ The acronyms "ISL" for *in situ* leach and "ISR" for *in situ* recovery are used interchangeably and refer to the same process. This submission will use "ISL" because that was the convention at the time of the relevant proceedings.

of New Mexico, where HRI's sites are located. The court of appeals ruled unanimously for the NRC on all but one issue (on which the court ruled 2-1 for the NRC).⁵ Petitioners asked the U.S. Supreme Court to review the case but the Supreme Court denied their request. Petitioners then filed the Petition, raising the same issues that had been raised in U.S. judicial proceedings.

I. Domestic Legal Framework

Three statutes governed the judicial proceedings reviewing Petitioners' claims before United States courts. First, the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.*, requires all Federal agencies, including the U.S. Nuclear Regulatory Commission ("NRC") to review and analyze the environmental consequences of any "major action" that the agency takes. Depending on the analysis, the agency must prepare a statement of those consequences and publish it for public comment. But NEPA only requires a public analysis of the action; it does not prevent the agency from taking the action if the agency determines that the benefits of the action outweigh the environmental consequences.

Second, the basic substantive law governing the uranium recovery process is found in the Atomic Energy Act ("AEA") of 1954, as amended, and the regulations that the NRC has adopted under its authority. The statute, and relevant regulations, provide (1) a procedural framework to process applications for licenses to extract uranium using the *in situ* leach process, and (2) substantive guidelines that the license applications must meet.

In addition, the NRC publishes Regulatory Guides, Standard Review Plans, and other guidance to assist applicants and licensees on methods and processes that the NRC staff finds acceptable to meet the requirements of the statute and the regulations. For example, in 1982, the NRC published Regulatory Guide 3.46, "Standard Format and Content of License Applications, Including Environmental Reports, for In Situ Uranium Solution Mining." This Regulatory Guide provided

⁵ This issue involved contamination on the surface of Section 17 from ore mining operations in the 1950s and 1960s. These materials are not regulated by the Atomic Energy Act and, as such, are beyond the jurisdiction of the NRC. The petitioners argued that the NRC should require HRI (the owner and licensee) to clean up the contamination as a condition of issuing the license. The NRC found that the waste did not fit the definition of material that was subject to the NRC's regulations; thus, it denied the petitioners' request. A majority (2-1) of the Court agreed with the NRC's decision.

specific guidance on the format and content of an ISL application, including an environmental report. An applicant for a commercial-scale ISL license, such as HRI, would use this Regulatory Guide to obtain guidance about the scope of information on the facilities, equipment, and procedures that should be included in an application, as well as the content of an environmental report that discusses the operation's impact on the health and safety of the public and on the environment.

In 2001, while the hearing was in progress, the NRC issued NUREG/CR-6733, which described the commonly accepted best practices for licensing and operating an ISL facility. For example, this document examined operations associated with extracting and processing uranium into yellowcake as well as restoring groundwater quality following ore extraction activities. In the process, the document defined the risks associated with ISL facility operations including hazard identification and consequence analysis.⁶ Subsequently, while the hearing in this case was ongoing, the NRC published NUREG-1569, the Standard Review Plan ("SRP"), which described how the NRC Staff performed safety and environmental reviews of ISL facility applications. The NRC prepared the document to assure the quality and uniformity of staff reviews and issued it publically to inform licensees and applicants about the NRC's requirements and expectations. The document also provided a well-defined base from which to evaluate changes in the scope and requirements of a review for new license applications, renewals, and amendments.⁷ The NRC has also published NUREG/CR-6780, which discussed the NRC's requirements for groundwater restoration at the end of the life of an ISL facility. For example, this document discussed common restoration methods (including historical information), analytical techniques for estimating future restoration costs, and the main geochemical processes that ISL operators should consider during restoration.⁸

⁶ NUREG/CR-6733, "A Baseline Risk-Informed Performance-Based Approach for in Situ Leach Uranium Extraction Licensees" (Center for Nuclear Waste Analyses) (2001), *available at* < <https://www.nrc.gov/docs/ML0128/ML012840152.pdf>>.

⁷ NUREG-1569, "Standard Review Plan for In Situ Leach Uranium Extraction License Applications" (June 2003), *available at* < <https://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1569/sr1569.pdf>>.

⁸ NUREG/CR-6870, "Consideration of Geochemical Issues in Groundwater Restoration at Uranium In-Situ Leach Mining Facilities" (U.S. Geological Survey) (January 2007), *available at* < <https://www.nrc.gov/docs/ML0706/ML070600405.pdf>>.

Finally, the AEA provides for judicial review of NRC licensing decisions under the Administrative Orders Review Act, 28 U.S.C. 2341, *et seq.*, commonly known as the Hobbs Act. This statute provides for judicial review of NRC decisions in the various courts of appeals around the United States. Those cases are heard by a panel of three federal appeals court judges who decide the case based upon the factual record established in the agency licensing proceeding. The losing party in these cases may seek review in the U.S. Supreme Court.

II. The Environmental Impact Statement

As noted above, NEPA requires all U.S. governmental agencies to consider the environmental consequences of any “major” actions that they consider taking – such as (in this case) issuing a license. Initially, the governmental agency must assess the potential impacts of the proposed action and determine whether those impacts are “significant.” If the impacts are not significant, the agency may comply with NEPA by publishing a “Finding of No Significant Impact,” or FONSI.

If the agency determines that the proposed action might have “significant” impacts, the agency must then publish a document describing the potential impacts so that decision-makers can evaluate whether the benefits of taking the proposed action outweigh the environmental costs of the action. Such a document is called an “Environmental Impact Statement” (or “EIS”). Preparation of this document requires the agency to take a hard look at the environmental consequences of any proposed action and understand the consequences of any decision. U.S. courts have also held that NEPA imposes procedural rather than substantive requirements. In other words, as long as the agency fully and correctly analyzes the potential consequences, it can determine that the benefits of the proposed action outweigh the environmental consequences and authorize the proposed action. Normally, the agency will publish a “draft EIS” (or “DEIS”) for public comment.⁹ The agency will then review the public’s comments and issue a “final EIS” (or “FEIS”), which will include the agency’s response to the public’s comments. The NRC followed that process in this matter.

⁹ An agency will generally not publish either a Draft or Final EIS if it adopts another agency’s environmental analysis. Otherwise, the agency is required to conduct its own analysis.

a. HRI Application

In April, 1988, HRI filed an application with the NRC seeking a license to construct and operate ISL facilities at its Church Rock site in McKinley County, New Mexico. HRI subsequently amended the application to include additional ISL locations near Crownpoint, New Mexico and a central processing facility in Crownpoint.

In October 1994, the NRC published NUREG-1508, a DEIS, which addressed the potential environmental impacts that could result from the issuance of the license to conduct ISL recovery operations at the Crownpoint site.¹⁰ The DEIS was approximately 150 pages long and addressed a number of topics related to the potential environmental impacts of the proposed license. The DEIS was prepared by an interagency review group comprising staff from the NRC, the Bureau of Indian Affairs, and the Bureau of Land Management. After evaluating the environmental impacts of the proposed action in the DEIS, the reviewing agencies concluded that the appropriate action was to issue the requested license and proposed leases authorizing HRI to proceed with the project.

First, the DEIS described the proposed action as well as two separate alternative methods of uranium recovery and a “no action” alternative. The DEIS then reviewed the affected local environment in detail, analyzing a number of issues including (but not limited to) local land use practices, the local geology and hydrology, air quality, soils, cultural resources, and socioeconomic conditions.

Second, the DEIS reviewed the potential environmental consequences, including (but not limited to) the impact on the area’s groundwater, radiological impacts, the effects of potential accidents, potential mitigation measures, any unavoidable adverse environmental impacts, and any cumulative impacts. The DEIS also had a list of conditions that the NRC Staff proposed to add to the license. These conditions would either limit the scope of the license or add additional requirements to mitigate potential adverse consequences.

As noted above, the NRC issued the DEIS in October 1994 and invited members of the public to comment on it. The NRC established a public comment

¹⁰ NUREG-1508, Draft Environmental Impact Statement (October 1994), *available at* < <https://www.nrc.gov/docs/ML0821/ML082170248.pdf> >.

period ending in early January, 1995, but accepted comments afterwards as long as they could be considered without delaying release of the FEIS.¹¹

The NRC conducted three public comment meetings to solicit oral and written comments on the DEIS. Two public comment meetings were held in Crownpoint, New Mexico, on February 22, 1995, and one was held in Church Rock, New Mexico, on February 23, 1995. A total of 76 participants provided oral comments at the meetings, and the NRC received 52 sets of written comments. Appendix A of the FEIS contains the responses to written comments, and the FEIS incorporates revisions of the DEIS in response to both oral and written comments as appropriate.

b. Final Environmental Impact Statement (FEIS)

In February, 1997, the NRC published the FEIS, which is approximately 450 pages long, including maps and appendices.¹² The FEIS reevaluated the proposed licensing action on the basis of written and oral comments received on the DEIS and on additional information obtained in 1995 and 1996. The FEIS is appended to this submission for the convenience of the Commission.

First, the FEIS discusses the purpose and need for the proposed action and any alternatives, including both alternative sites and two alternative licensing actions, as well as the “no action” alternative. This discussion includes a detailed description of both the sites at issue and the ISL process, the proposed waste management system, the restoration and reclamation of both the water and land, and the decommissioning of the recovery facility.¹³

Second, the FEIS spends approximately 90 pages discussing the affected environment. This discussion not only covers the meteorology, geology, hydrology, and ecology of the area, but also describes the local land use practices, as well as the area’s socioeconomics and cultural resources. Finally, this Chapter

¹¹ 59 Fed. Reg. 56557 (Nov. 14, 1994).

¹² NUREG-1508, Final Environmental Impact Statement (“FEIS”) (February 1997), *available at* <<https://www.nrc.gov/docs/ML0821/ML082170248.pdf>> (Note that both the DEIS and the FEIS are designated as NUREG-1508. That is NRC practice because they both address the same issue. For that reason, we cite them as DEIS and FEIS, not by NUREG number.).

¹³ FEIS at 1-1, 2-2, 2-14, and 2-19.

of the FEIS discusses how issues related to environmental justice impact the decision to grant or deny the license.¹⁴

Chapter 4, which is the major FEIS Chapter, devotes 127 pages to the environmental consequences of the action as well as the efforts to monitor and mitigate any damages to the environment at each of the proposed sites. Chapter 4 also reviews evaluates the environmental consequences of each of the four proposed alternatives, including the “no action” alternative. In sequence, the FEIS reviews the impact of the proposed license on the air quality and noise of the region, the geology and soils, the groundwater, and the surface water. The FEIS then reviews the impact of transporting the uranium, including both the local transportation of the slurry from the recovery fields to the processing facility and then the transportation of the refined yellowcake from the processing facility to an out-of-state manufacturing center.

Next, the FEIS analyzes the health physics and radiological impacts of the license as well as the impacts on the area’s ecology, land use practices, and socioeconomics. The latter section analyzes the impact of the license on local employment and income as well as the impacts on the local government tax collections. The FEIS also reviews the impact of the license on the area’s esthetics and cultural resources. The FEIS then reviews the impacts of licensing in light of the issues related to environmental justice and then discusses the cumulative impacts of the license of licensing uranium recovery activities at all four sites.

The last major FEIS chapter (Chapter 5) analyzes the both the benefits of the proposed project, such as the benefits from employment and royalty income and the increased local tax revenue, and the environmental costs of the proposed project.

Finally, the FEIS has five major Appendices, including: (A) the NRC’s response to comments on the Draft Environmental Impact Statement (DEIS); (B) proposed license conditions and other recommendations by the NRC Staff; consultations under (C) the National Historic Preservation Act and (D) the Endangered Species Act; and (E) concurrence letters from other cooperating

¹⁴ “Environmental justice” refers to consideration the practice of placing manufacturing or mining operations in low income or otherwise disadvantaged communities.

agencies, which included the U.S. Bureau of Land Management and the U.S. Bureau of Indian Affairs.

As noted above, Appendix A to the FEIS (which was 58 pages long) contained the NRC staff's response to the comments on the DEIS. The NRC grouped the comments together by topic, listed the commenters, summarized the issues raised by the commenters, and then provided the response by the agency to the comments. Mitchell Capitan, one of the petitioners in this case, commented on four separate issues raised in the DEIS,¹⁵ and nothing prevented the other petitioners here from commenting on the DEIS and raising any issue before the agency.

Appendix B of the FEIS contains the NRC staff's proposed license conditions and additional recommendations for the proposed project. These requirements and recommendations were developed as a result of the environmental analyses described in Section 4 of the FEIS.

III. The Four Proposed Sites Involved in This Case¹⁶

HRI proposed to conduct ISL operations at four different sites in the vicinity of Churchrock and Crownpoint, New Mexico. They are designated as Section 8 and Section 17, which are located near Churchrock, and Unit 1 and Crownpoint, which are both located near or in Crownpoint. Each of the four HRI sites have different mix of private and governmental ownership of surface rights and mineral rights, which is typical for land in the western New Mexico area. A map of the four sites is appended to this response.

Churchrock Section 8, which is the site that would be developed first and where the performance objectives would be demonstrated according to License provisions,¹⁷ is owned by HRI in fee simple. HRI owns both the surface of the

¹⁵ These issues were radiation risks and dose limits, air releases, contaminating municipal water supply and local emergency response capabilities.

¹⁶ For maps of the proposed sites involved in this case, *see* FEIS, *supra* n. 12, at p. 1-2 (Figure 1.1). *See also* pp. 2-13 (Figure 2.6), 2-25 (Figure 2.8), and 2-27 (Figure 2.9).

¹⁷ HRI will not conduct operations at Section 17 until after it completes operations at Section 8 and conducts a demonstration that it can restore groundwater. But, as noted above, NRC regulations do not require HRI to conduct remediation of past mining contamination, because the type of material that is present on the surface of Section 17 is not regulated by the NRC.

land as well as the mineral rights under the land. HRI also owns the mineral rights to Churchrock Section 17, which is adjacent to Section 8, in fee simple. But the United States holds the surface of the land in trust for the Navajo Nation, with the surface rights specifically reserved for development in the Deed of conveyance.

The Unit 1 site is composed of nine parcels of land. But each parcel is “Allotted” for both the mineral rights and surface ownership. In the case of Unit 1, Allotments are parcels of land that were severed to individual Indians by the U.S. President pursuant to the Dawes Act of 1887 (also known as the General Allotment Act or the Dawes Severalty Act of 1887). Minerals on these lands are managed by the Bureau of Indian Affairs.

Finally, the Crownpoint site is composed of five parcels of land. For three of the parcels, the mineral rights are owned by the Bureau of Land Management (“BLM”), while HRI owns the mineral rights of the other two parcels in fee. As for surface ownership, HRI owns the surface rights to one parcel where the BLM owns the mineral rights, while the BLM owns the surface rights to the other two parcels to which it owns the mineral rights. As for the two parcels owned by HRI, the United States holds the surface rights in trust for the Navajo Nation, but has not removed the surface rights from development.

We note that the Navajo Nation itself has not opposed the license at issue. Although it had ample opportunity to join the case, the Nation was not a party to proceedings before the NRC and is not a petitioner in this matter before the Commission.

IV. The In Situ Leach Recovery Process

The FEIS¹⁸ for the HRI project contains a description of the ISL uranium recovery process.¹⁹ The licensee injects a leach solution called “lixiviant” (a mixture of groundwater charged with oxygen and bicarbonate) through wells located in the zone containing uranium oxide ore (“ore zone”). The uranium oxide ore, which occurs as coatings on grains of sand within a sandstone rock host,

¹⁸ FEIS, *supra* n. 12.

¹⁹ See generally FEIS, *supra* n. 12, at 2-2 – 2-12; see also NUREG-1569, “Standard Review Plan for In Situ Leach Uranium Extraction License Applications” (“SRP”) (June 2003), *available at* <<https://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1569/sr1569.pdf>>.

dissolves when it comes into contact with the lixiviant and forms a uranium carbonate compound.

A licensee will operate production wells located inside a pattern of injection wells. Production wells create a reduced pressure in the ore zone by withdrawing slightly more water from the ground than is injected, causing the “pregnant” lixiviant (*i.e.*, the lixiviant that now contains dissolved uranium carbonate compound) to flow to the production wells where it is pumped to the surface.²⁰

At the surface, the licensee separates the uranium carbonate compound from the pregnant lixiviant. The now-barren lixiviant is re-charged as necessary with oxygen and bicarbonate, and is re-injected into the ore zone to repeat the cycle. The carbonate compound is processed to precipitate the uranium oxide, which is filtered and dried to produce uranium oxide concentrate, or “yellowcake,” which is then shipped to other facilities for conversion and enrichment for reactor fuel.

a. Regulatory Framework

The NRC regulates ISL operations under the AEA; but a number of other entities also have regulatory authority over these operations under other statutes. Thus, while an ISL project requires an NRC license for its development and operation, it is not the only authorization an ISL operator must obtain. For example, the Environmental Protection Agency (“EPA”) has statutory authority over ISL operations through the Safe Drinking Water Act (“SDWA”). Each ISL operator must obtain an “aquifer exemption” for the underground aquifer, or portion thereof, from the EPA (or the affected state) in which they plan to operate prior to operations as well as permits for the wellfields. In addition, ISL operators must also obtain EPA Underground Injection Control (“UIC”) permits from the EPA (or the affected state) for the injection wells used in each wellfield to conduct the ISL operations.

The EPA can grant states “primacy” in SDWA matters, which allows the state to manage the programs within the state. Generally speaking, in a state that has been granted primacy, an ISL operator submits a request for such an aquifer exemption to the state and the state then applies to EPA for the requisite exemption. In a state that does not have SDWA primacy, an ISL operator must

²⁰ See, e.g., Figure 2.1, FEIS, *supra* n. 12, at 2-3.

apply directly to EPA Regional office for each exemption. The State of New Mexico, where HRI's sites are located, is a primacy State. Thus, HRI applied to the State of New Mexico, which sought and obtained the exemption from EPA.

An exception to the general rule for obtaining permits is made for land classified by federal statute as "Indian country."²¹ In that case, even in primacy states, the EPA retains jurisdiction over permitting at the site. In this case, EPA retains jurisdiction over Churchrock Section 17, which is Indian Tribal trust land, and Unit One, which is "allotted land." Those definitions are discussed in the section describing the ownership of the four HRI parcels in question.

b. Aquifer Exceptions and Permitting

An aquifer exemption means that the identified aquifer or portion thereof cannot now nor ever in the future serve as a source of drinking water. In other words, either the EPA or the state must find that the water in an aquifer or portion of an aquifer that is to be used for ISL operations is undrinkable before issuing an aquifer exemption. The EPA has adopted specific, objective criteria for granting aquifer exemptions.²²

HRI currently has an aquifer exemption for Section 8, which means that it has already been determined that water from the aquifer associated with Section 8 does not currently serve as a source of drinking water; and it cannot now and will not in the future serve as a source of drinking water because the mineral levels in the water make it unsafe to drink. But HRI does not have an aquifer exception for the other three sites. Thus, it will have to obtain an exemption for each site before starting operations there.

ISL operators must also obtain UIC permits for different classes of wells to be used in an ISL wellfield. Injection and production wells are typically called Class III wells and both are constructed to UIC permit requirements so the operator can use them interchangeably if needed. Waste water disposal wells are generally termed Class I or Class V wells. UIC permits are obtained from EPA in non-

²¹ See 18 U.S.C. § 1151. See also 40 C.F.R. § 144.3; 40 C.F.R. § 145.21. The Navajo Nation has adopted a law addressing uranium mining and ISL operations on tribal lands. But that law is preempted by the federal Atomic Energy Act.

²² See 40 C.F.R. § 146.4.

primacy states and from the state in primacy states. HRI maintained a UIC permit for Section 8 until it expired in 2014. HRI would now be required to re-apply for its UIC permit (as well as permits for the other three sites if they attempt to start operations there) and each permit application requires a public comment process and an opportunity for an administrative hearing.

c. Water at HRI Sites not Drinkable Now or Ever

The four HRI sites contain what are commonly known as “roll-front” uranium deposits which generally make water undrinkable in the mineral producing zone. These fronts develop when uranium bearing groundwater flowing within an aquifer moves from areas with oxidizing chemical conditions to areas with reducing chemical conditions.²³ Dissolved uranium in the groundwater will precipitate out of solution when the groundwater encounters reducing conditions in the aquifer. This chemical reaction causes the uranium, and other “redox sensitive” elements such as selenium and vanadium, to precipitate out of the water onto the surface of sand grains in the aquifer.²⁴ Over long periods of time enough uranium precipitates out to form a “roll-front deposit, which take on a characteristic crescent shape.”²⁵

Prior to recovery operations, the groundwater quality in the roll-front deposit will generally contain elevated concentrations of uranium and its decay products such as radium and radon, along with other parameters.²⁶ The elevated concentrations generally will not meet drinking water standards.²⁷ For example, Table 3.19 of the FEIS lists some of the substances that are found in the Westwater Canyon aquifer at the Church Rock Site (which includes Section 8). The EPA – as well as the Navajo Nation EPA – have adopted Maximum Contaminant Levels (MCLs) that give the legal threshold limit on the amount of a substance that is allowed in public water systems under the Safe Drinking Water Act (SDWA).²⁸

²³ NUREG/CR-6733, *supra* n. 3, at 2-1.

²⁴ *Id.*

²⁵ See generally FEIS, *supra* n. 12, at 3-12 – 3-13.

²⁶ The FEIS uses the term “parameter” to refer to the various elements in the water. This submission will use “parameters” unless quoting a document or argument.

²⁷ See FEIS, *supra* n. 12, at 4-37.

²⁸ The EPA’s MCLs legally apply only to public water systems, not private wells, such as those in rural areas like most of the sites at issue in this case. But most agencies look to the MCL levels as “safe”

As shown in Figure 3.19 (Page 3-36) of the FEIS, the “mean” (or average) water quality for radium-226 at the Church Rock site is 10.225 pico Curies per Liter (“pCi/L”), which is approximately twice the EPA (and Navajo Nation EPA) MCL of 5.0 pCi/L. Thus, the radium-226 levels at this site alone make the water undrinkable.²⁹ But because these parameters are generally confined to the ore zone, groundwater quality immediately outside the roll-front deposit may be of good quality and not contain significant amounts of uranium and/or radium.³⁰

d. Advantages of *In Situ* Leach Recovery Operations

The ISL process has several advantages over the traditional, or conventional, mining process, regardless of whether deep mining or open pit mining is used for comparison purposes. First, because the ground is not disrupted the structure of the aquifer is not impacted so that the aquifer within the production zone is preserved for future use. Traditional mining, whether deep mining or open pit mining, can either permanently alter the groundwater flow path within the aquifer or even destroy the mined aquifer and any overlying aquifers. This process may also adversely impact the water quality and quantity in the mined aquifer or any overlying aquifer within the mined area.

Moreover, the ISL production process recirculates native groundwater through the ore zone and generally removes no more than one percent of the water circulated. Traditional mining can interrupt normal water flow and change groundwater flow directions in the aquifer and lower water levels in the aquifer that is outside of and adjacent to the mining area. This process can result in the dewatering of the aquifer in the mining area as well as nearby areas. Thus, use of the ISL process minimizes dewatering of the aquifer.

when taking samples from private wells. And states can use these levels to regulate private wells and many states do so.

²⁹ In addition, the uranium mean, or average, water quality at the Unit 1 site is 1.8 mg/L, which is above the EPA MCL of 0.03 milligrams per Liter (mg/L). The EPA promulgated its radionuclide rule on December 7, 2000, and the rule did not go into effect until 2003. Both dates are after the FEIS was written. But the NRC’s Atomic Safety and Licensing Board ordered the NRC Staff to amend the license based on the new rule to incorporate the new EPA standard, and the Staff complied.

Note that the EPA uses different measures (pCi/L and mg/L) depending on the primary toxicity of the contaminant. Here, the primary toxicity from radium is radioactivity, while the primary toxicity for uranium is chemical (its effects to the kidneys). But both the radium and uranium levels make the water at this site undrinkable.

³⁰ See FEIS, *supra* n. 12, at 3-25.

Second, because there are no excavations or underground tunnels, significant surface disturbance of the land does not occur. For example, there is no need for mine pits, haul roads, waste dumps, and tailings ponds. And the lack of heavy equipment, haul roads, waste dumps, etc., results in minimal air quality degradation at ISL recovery operations. Furthermore, there are no excavations because the ore body stays in place. This eliminates the presence of mine waste, such as that left from previous mining operations in Section 17.

In sum, as compared to the use of open pits or tunnels to mine uranium, the ISL process preserves both the mined aquifer and any overlying aquifers for future use, minimizes the disruption of groundwater flow and water quality during and after the mining process, does not dewater the aquifer, and creates much less radioactive waste. This means that less radioactive materials are pulled to the surface, which means (in turn) far less radon emanation and less radioactive exposure from radioactive material at the surface area. And because ISL uranium recovery does not involve underground tunneling or the excavation of open pits, it is much safer for the workers. Simply put, the workers are not placed in physical danger (from collapsing tunnels or falling rock) and face far less exposure to radioactive materials.

e. Restoration Obligations of Licensees

After uranium production within a wellfield has ended, the NRC requires licensees to take “reasonable steps” to restore groundwater quality to a pre-production “baseline” standard.³¹ But a possible environmental impact associated with ISL recovery is that even after groundwater restoration activities there is the potential for some groundwater quality constituents within the production zone to be at a higher level at the end of the groundwater restoration process than at the start of production activities. Specifically, it is possible to find elevated levels of trace metals in groundwater. Again, it must be noted that *prior* to starting production activities, either the state or the EPA had to determine that the water quality within the area of aquifer to be mined was *already* undrinkable and would always be undrinkable. Only then could an ISL operator receive an aquifer exemption allowing it to start ISL operations.

³¹ 10 C.F.R. Part 40, Appendix A, Criterion 5.5.

An ISL operator cannot start drilling a wellfield and establishing the “baseline” standard or goals until after the NRC issues a license.³² As each new well is constructed, the licensee obtains additional data about the location of the ore body within the aquifer. The licensee uses this information to plan the location of additional wells. Thus, the design of the wellfield is not known until the wellfield is complete. A mine area may have any number of wellfields within it with each wellfield at a different stage of operation.

The licensee establishes restoration baseline goals by taking groundwater samples after drilling the wellfield, but before injecting lixiviant into the wellfield. The ISL process and uranium extraction do not begin until lixiviant is injected into the wellfield and recovered.³³ Within the wellfield, the NRC requires licensees to average groundwater readings from across the ore zone to obtain a representative reading to establish a baseline for groundwater restoration.³⁴ Licensees are required to take separate readings from “monitoring wells” outside the ore zone so that “excursions” of lixiviant outside the ore zone can be detected and controlled.³⁵

f. Restoration is an Ongoing Activity

The restoration of groundwater quality does not wait until after the licensee has extracted all the uranium from the entire mine area. As noted above, a mine area will have a number of different wellfields in it. After uranium recovery in a particular wellfield ends, groundwater restoration activities in that wellfield begin. Thus, restoration activities at an ISL site may be taking place at portions of the mining area where production has ended, while other portions of the mining area are still engaged in production activities or are being constructed.³⁶

Groundwater restoration is accomplished by injecting clean water to flush out the lixiviant and restore the groundwater to primary or secondary goals.³⁷ The cost of restoration is directly related to the amount of water needed to restore groundwater quality.³⁸

³² 10 C.F.R. § 40.32(e).

³³ FEIS, *supra* n. 12, at 4-15. *See also* SRP, *supra* n. 19 at 2-24 (2000).

³⁴ *Id.* at 5-36 – 5-41.

³⁵ *Id.*

³⁶ FEIS, *supra* n. 12, at 2-19.

³⁷ *Id.* at 2-20; NUREG/CR-6870, *supra* n. 5, at 15.

³⁸ FEIS, *supra* n. 12, at 4-29.

The NRC requires licensees to post a financial surety arrangement to insure that the NRC will have sufficient funds available to restore groundwater within the wellfield should the licensee fail to undertake groundwater restoration.³⁹ NRC reviews the surety annually to check for depletion by inflation, increased costs, or changes in uranium extraction operations, *i.e.*, the surety will increase as new wellfields start production and decrease as the water quality in depleted wellfields is successfully restored and the surface reclaimed.⁴⁰ The surety includes all the costs for groundwater restoration and final site decommissioning. This review also ensures that new financial assurance estimates for sites not yet evaluated are maintained as current.

As previously explained, the licensee will not know the exact size of the wellfield, or the precise baseline goals for water restoration, until the wellfield has been drilled and testing completed. Thus, the initial surety amount is, by definition, an estimate.

V. Groundwater Restoration and Surety Requirements for HRI

License Condition (“LC”) 10.21A requires HRI to restore groundwater to baseline as a primary goal.⁴¹ If groundwater quality levels cannot be returned to average pre-lixiviant injection levels, it requires a secondary goal of returning groundwater quality to maximum concentration limits as specified in EPA primary and secondary drinking water regulations.⁴²

The amount of water used in this process is measured in terms of “pore volumes.”⁴³ A “pore volume” represents the water that fills the void space inside a certain volume of rock or sediment – a measure of the volume of water that must be pumped or processed to restore groundwater quality.⁴⁴ The volume is calculated based on the porosity of the aquifer and estimated vertical and lateral extent of the aquifer. This volume of water is then used to calculate the amount of restoration surety.

³⁹ 10 C.F.R. Part 40, Appendix A, Criterion 9.

⁴⁰ *Id.*

⁴¹ See Materials License, SUA-1508, LC-10.21A, *available at* <
<https://www.nrc.gov/docs/ML1815/ML18155A199.pdf>> (as amended).

⁴² *Id.*

⁴³ SRP, *supra n.* 19, at 6-2 – 6-3.

⁴⁴ FEIS, *supra n.* 12, at 4-29.

HRI originally estimated that it would take four pore volumes of water to bring the groundwater in each of the proposed sites to restoration standards.⁴⁵ The NRC Staff found that estimate to be insufficient. Instead, NRC Staff estimated it would take nine pore volumes of water to restore the groundwater at the proposed project sites.⁴⁶ Accordingly, the FEIS “calculated groundwater impacts [at each of the proposed sites, including all of Church Rock] assuming the use of 9 pore volumes for groundwater restoration.”⁴⁷

The Staff based its nine pore volume initial estimate primarily on the results of a large-scale pilot project – termed the Section 9 Pilot Project – conducted by the Mobil Oil Company in 1979, approximately one mile north of the Unit 1 site.⁴⁸ The NRC Staff considered the Mobil data to be the most reliable indicator of the number of pore volumes needed to restore groundwater quality at Section 8.

The NRC Staff recognized that a large-scale, site-specific groundwater restoration demonstration would provide added confidence and emphasized that more site-specific information would be necessary to demonstrate that restoration standards could in fact be achieved at the HRI sites on a large, production-scale level.⁴⁹ The NRC Staff also determined that it would be prudent to obtain this commercial-scale information before HRI proceeded with operations “beyond Church Rock” (which at the time of the NRC Staff’s review included both Sections 8 and 17).

Accordingly, LC-10.28 requires HRI to conduct a demonstration, “on a large enough scale, acceptable to the NRC,” to determine the number of pore volumes required to restore a production-scale well field, which would include a number of production and injection wells.⁵⁰ LC-10.28 also bars HRI from injecting lixiviant beyond the Section 8 site – *e.g.*, at either Section 17, Unit 1, or Crownpoint – unless the NRC has approved the results of the Section 8 groundwater demonstration. The Presiding Officer (“PO”) held that the “Section 8 production well field demonstration [will] give . . . the absolute best information” to make any

⁴⁵ See, *e.g.*, FEIS, *supra* n. 12, at 4-40.

⁴⁶ *Id.*

⁴⁷ *Id.* See also *id.* at 4-58 to 4-60, 4-122.

⁴⁸ See FEIS, *supra* n. 12, at 4-33 – 4-34, 4-37 – 4-40.

⁴⁹ FEIS, *supra* n. 12, at 4-62, 4-113.

⁵⁰ *Id.* See also *id.* at 4-15.

necessary adjustments to the number of pore volumes required for groundwater restoration at the other sites.⁵¹

The license also specifies that surety for the restoration of HRI's initial well fields at the Church Rock Section 8 site be based on the initial nine pore volume estimate and maintained at this level until the number of pore volumes required to restore the groundwater quality of a production-scale well field has been established by the restoration demonstration required by LC-10.28.⁵² LC-9.5 stresses that if "at any time it is found that well field restoration requires greater pore volumes or higher restoration costs, the value of the surety will be adjusted upwards."

Moreover, HRI committed to performing additional "concurrent" restoration demonstrations at each site.⁵³ These smaller demonstrations are in addition to the large project required by LC-10.28. While smaller than the restoration project required by LC-10.28, these demonstration projects will provide additional information for NRC to consider when reviewing HRI's surety.⁵⁴ This commitment is now a requirement under HRI's license.

VI. The NRC Proceedings on the HRI License

a. Legal Framework

NRC licensing proceedings are governed by the provisions of the Atomic Energy Act (AEA) of 1954, as amended.⁵⁵ Section 189 of the AEA requires the NRC to grant a hearing "upon the request of any person who has an interest in the proceeding."⁵⁶ The NRC interprets this phrase to mean any person who satisfies the requirements of "standing" under U.S. law.

When an organization such as HRI files an application for a license, the NRC Staff reviews the application and offers members of the public a chance to

⁵¹ See *Hydro Resources, Inc.*, LBP-04-03 (2004), 59 NRC at 95, available at <<https://www.nrc.gov/docs/ML0534/ML053480432.pdf>>.

⁵² See Materials License, SUA-1508, LC-9.5, available at <<https://www.nrc.gov/docs/ML1815/ML18155A199.pdf>> (as amended).

⁵³ FEIS at 4-39.

⁵⁴ *Id.*

⁵⁵ 42 U.S.C. § 2011, *et seq.*

⁵⁶ 42 U.S.C. § 2239.

challenge the application if and when the application is accepted for formal review. The NRC publishes a notice of the application and the opportunity to request a hearing in the Federal Register and provides a certain period of time within which any person “who has an interest” may ask for a hearing. If a person does request a hearing, the NRC typically refers that request to the Chief Judge of the Atomic Safety and Licensing Board Panel, who appoints a Presiding Officer (“PO”), *i.e.*, an administrative judge, or a panel of administrative judges, to rule on the hearing request and, if the request is granted, to conduct a hearing.⁵⁷

Under the NRC’s rules of practice, hearings on license requests such as HRI’s are conducted almost completely by written presentations, although the PO may hold an oral hearing if it would help resolve any disputed issues. The PO may appoint special assistants with specific technical expertise to assist in reviewing the technical issues. The PO’s rulings and ultimate decision are appealable to the NRC. The NRC will accept written presentations by the parties and can provide for oral presentations if the NRC determines that those presentations will help it reach a decision. The NRC will then issue a final agency decision either granting or denying the challenge to the license.

Congress has enacted provisions for judicial review of agency decisions of this kind. NRC decisions are subject to review under the Administrative Orders Act.⁵⁸ Under these provisions, any person who is “aggrieved” by an NRC decision, *i.e.*, who loses before the NRC, may challenge that decision in the appropriate Federal appellate court. Any challenge must be based on the record created in the administrative proceeding.

b. Administrative Challenge of the HRI License

In this case, several individuals and one organization challenged the license issued by the NRC Staff to HRI. The Eastern Navajo Diné Against Uranium Mining (“ENDAUM”), one of the petitioners here, was a petitioner in the administrative proceeding. The Chief Judge of the Licensing Board Panel assigned a PO who found that all challengers had standing and initiated the hearing process.

⁵⁷ The NRC has since amended its Rules of Practice to authorize appointment of a 3-member panel, which would include technical experts as judges, as the “Presiding Officer.” But that rule was not in place at the time of this proceeding.

⁵⁸ 28 U.S.C. § 2341, *et seq.*

The PO separated the proceeding into two separate phases. Phase 1 of the proceeding reviewed issues related to Church Rock Section 8, which is the first section where HRI planned to begin operations, and issues challenging the overall validity of the license. Phase II proceedings reviewed issues related to the other three sites covered by the license. In each case, the NRC ultimately upheld the license, although in some cases after remanding certain issues for more hearings.

The main issue in Phase 1 was the initial nine pore volume estimate as a standard for calculating surety requirements. The petitioners argued that two other projects had required more than nine pore volumes. But the PO found that the petitioners had not provided any expert information or opinion that overcame the NRC Staff's analysis.⁵⁹ On review, the NRC found that the petitioners had not explained why those two projects should be considered analogous to the Section 8 site. For example, petitioners had not demonstrated that the geology of the other projects was similar to the geology of Section 8. The NRC did prohibit HRI from using its license until it had submitted a financial assurance plan that had been approved by the NRC Staff.⁶⁰

The PO approved HRI's groundwater restoration plan and the NRC declined to take review of the decision.⁶¹ HRI and the NRC had relied on a prior test conducted at a nearby location. The PO found that in the prior test only six of the 26 parameters that were measured were not restored to their original levels. First, the PO noted that three of these parameters were not considered hazardous to humans. Second, the PO noted that a hazardous parameter (arsenic) that was not restored to its prior level in the test was much more abundant at the test site than at Section 8 and that it had only narrowly missed being restored to its prior level at the test site. In addition, the PO found that even if the other two parameters

⁵⁹ *Hydro Resources, Inc.*, LBP-99-13, 49 NRC 233 (1999), available at <<https://www.nrc.gov/docs/ML0205/ML020560606.pdf>>. The NRC uses "LBP-Year- number" to designate decisions by the Atomic Safety and Licensing Board and "CLI-Year-number" to designate decisions by the Agency.

⁶⁰ *Hydro Resources, Inc.*, CLI-00-08, 51 NRC 227, 244 (2000), available at <<https://www.nrc.gov/docs/ML0205/ML020560610.pdf>>.

⁶¹ *Hydro Resources, Inc.*, LBP-99-30, 50 NRC 77 (1999), available at <<https://www.nrc.gov/docs/ML0205/ML020560609.pdf>>; *Hydro Resources, Inc.*, CLI-00-12, 52 NRC 1 (2000), available at <<https://www.nrc.gov/docs/ML0205/ML020560612.pdf>>.

(uranium and radium) were not restored to prior levels, they would not migrate offsite because they would precipitate out in the reducing zone.⁶²

Finally, both the PO and the NRC found that the HRI restoration action plan was sufficient.⁶³ Petitioners again challenged the nine pore volume estimate, but the PO ruled that the NRC had already decided that issue.⁶⁴ On appeal, the NRC affirmed that decision and pointed out that if the required restoration demonstration project indicated the need for more water, HRI would be required use that additional water and increase the amount of the surety that it was providing.⁶⁵ Moreover, petitioners would have hearing rights with regard to any amendment to the license that would reflect the results of the demonstration project.⁶⁶

Phase II of the proceeding primarily focused on the other Church Rock site, Section 17. The central issue in this portion of the proceeding was the radiological emissions at the site. This section contains an abandoned conventional uranium mine intermittently operated by a previous owner from the 1950s through 1982. Surface waste and debris from this abandoned mine are a source of radon gas emissions. ISL recovery operations can also cause radiological emissions. Petitioners argued that the emissions from the licensed operations combined with the emissions from the waste from the abandoned mine exceeded the allowable limits.

The PO disagreed, pointing out that to be covered by the license, the radiation had to come from “licensed operations.”⁶⁷ Here, the radiation from the abandoned mine waste was not from HRI’s “licensed operations.” Moreover, the radiation from the mine waste was also considered background radiation because it was not regulated by the Commission.⁶⁸ On appeal, the NRC agreed with both

⁶² See generally *Hydro Resources, Inc.*, LBP-99-30, 50 NRC 77 (1999), available at <<https://www.nrc.gov/docs/ML0205/ML020560609.pdf>>.

⁶³ *Hydro Resources, Inc.*, LBP-04-03 (2004), 59 NRC 84, available at <<https://www.nrc.gov/docs/ML0534/ML053480432.pdf>>; *Hydro Resources, Inc.*, CLI-04-33 (2004), 60 NRC 581, available at <<https://www.nrc.gov/docs/ML0607/ML060740237.pdf>>.

⁶⁴ LBP-04-03, 59 NRC at 92-93, available at <<https://www.nrc.gov/docs/ML0534/ML053480432.pdf>>.

⁶⁵ CLI-04-33, 60 NRC at 584-87.

⁶⁶ Because the requirement is expressed as a license condition, any change to the license would require a formal amendment, which in turn requires the opportunity for a hearing.

⁶⁷ *Hydro Resources, Inc.*, LBP-06-01, 63 NRC 41, 54-55 (2006), available at <<https://www.nrc.gov/docs/ML0815/ML081510741.pdf>>.

⁶⁸ *Id.* at 55-71.

findings.⁶⁹ First, the NRC agreed that the radiation did not result from the “licensed operations.” Second, the NRC found that the radiation was “naturally occurring” in the sense that it was neither artificially produced nor did it result from uranium ore that had been processed for its radioactive content.

c. Judicial Challenge of the HRI License

As noted above, the petitioners challenged the NRC’s decision in the United States Court of Appeals for the Tenth Circuit. A three-judge panel reviewed the parties’ written submissions and heard oral argument from the parties’ attorneys. The Court of Appeals ruled 3-0 for the NRC on all issues submitted by the parties except (as noted above) for the one issue of whether the license should require HRI to remediate waste from the earlier mining, on which the Court of Appeals ruled 2-1 for the NRC.⁷⁰ That decision is appended to this response for the convenience of the Commission. The Petitioners filed a petition for a writ of certiorari with the United States Supreme Court, but the Supreme Court denied the petition.⁷¹ Petitioners subsequently submitted the Petition.

* * *

HRI has still not started operations at any of the four sites and there is no indication that it will do so at any time in the foreseeable future.

B. DISCUSSION

The Petition Is Inadmissible Under Article 34(a) of the Commission’s Rules for Failure to State Facts That Tend to Establish a Violation of the American Declaration, Is Meritless, and Is Unreviewable Under the Fourth Instance Formula

For a petition to be admissible before the Commission, it must satisfy the requirements of the Rules. Article 34(a) of the Rules provides that “[t]he Commission shall declare any petition or case inadmissible when ... it does not state facts that tend to establish a violation of the rights referred to in Article 27 of

⁶⁹ *Hydro Resources, Inc.*, CLI-06-14, 63 NRC 510, 515-520 (2006), available at <<https://www.nrc.gov/docs/ML0815/ML081510741.pdf>>.

⁷⁰ *Marylyn Morris, et al., v. U.S. Nuclear Regulatory Commission*, 598 F.3d 677 (10 Cir. 2010).

⁷¹ *Marilyn Morris, et al, v. U.S. Nuclear Regulatory Commission*, 562 U.S. 1045 (2010).

these Rules of Procedure” Article 27, in turn, directs the Commission to “consider petitions regarding alleged violations of the human rights enshrined in the American Convention on Human Rights and other applicable instruments” For the United States, the American Declaration is the only “applicable instrument.”⁷²

Petitioners raise three primary arguments. First, Petitioners claim that HRI mining pursuant to the NRC license at issue would, should it commence, have the effect of infringing upon their rights to life and health under Articles 1 and 11 of the American Declaration on the basis of environmental contamination that may arise from the proposed mining. Second, Petitioners claim, *inter alia*, that such mining would, should it commence, have the effect of infringing upon their rights to religion and cultural participation under Articles 3 and 13 of the American Declaration because possible environmental contamination that may arise from the proposed mining could negatively impact Petitioner’s ability to participate in traditional practices. Finally, Petitioners argue that such mining would, should it commence, infringe upon Petitioners’ right to property under Article 23 of the American Declaration.

As explained below, the Commission should declare the Petition to be inadmissible because Petitioner has not stated facts that tend to establish a violation of any rights in the American Declaration. Additionally, the arguments presented in the Petition are unreviewable in light of the Commission’s “fourth instance formula” as they amount to a mere disagreement with determinations of domestic authorities on these same issues, rendered in compliance with the American Declaration. To the extent further administrative proceedings remain, Petitioners have failed to exhaust their domestic remedies as required by Article 31 of the Rules.

Should the Commission nevertheless declare the Petition admissible and choose to examine the claims presented by petitioners on their merits, or should it defer its examination of the Petition’s admissibility until its review of the merits under Article 36(3) of the Rules, it should deny the requested relief because the

⁷² Article 20 of the Commission’s Statute and Article 23 of the Rules identify the American Declaration as an applicable instrument with respect to nonparties to the American Convention. Although Article 23 of the Rules lists several additional instruments, the United States is not a party to any of those other instruments.

Petition does not demonstrate a failure by the United States to uphold its commitments under the American Declaration. The reasons the Petition is inadmissible under Article 34(a), the reasons the Commission lacks competence to review it, and the reasons it is meritless in any event, are discussed in parallel throughout this response.

I. The competence of the Commission is limited

Although Petitioners anchor their claims in specific provisions of the American Declaration, in every instance, they attempt to expand the competence of the Commission by invoking an array of other international instruments. This reflects the reality that, even if the future acts articulated by Petitioners come to fruition, they do not implicate provisions of the American Declaration, requiring Petitioners to look to other instruments in their attempt to construe cognizable claims. As a result, the Commission lacks the competence *ratione materiae* to entertain the claims contained in the petition.

Under Article 34(a), the Commission may only consider petitions that state facts tending to establish a violation of the rights referred to in Article 27 of the Rules. Article 27, in turn, directs the Commission to “consider petitions regarding alleged violations of the human rights enshrined in the American Convention on Human Rights [(‘American Convention’)] and other applicable instruments” Article 20 of the Commission’s Statute and Article 23 of the Rules identify the American Declaration as an “applicable instrument” with respect to nonparties to the American Convention such as the United States. The United States is not a party to any of the other instruments listed in Article 23, and in any event, Article 23 does not list the ICESCR, ICCPR, UNDRIP, or ILO Convention No. 169. Consequently, the Commission lacks competence to apply any instrument beyond the American Declaration with respect to the United States.⁷³ As such, Petitioners’ claims, which at base are rooted in these instruments, are inadmissible under Article 34(a) as outside the Commission’s competence.

⁷³ See, e.g., U.S. Hearing Presentation, *Ameziane v. United States*, Case No. 12.865, 164th Period of Sessions, Mexico City, Sept. 7, 2017 (“*Ameziane* U.S. Hearing Presentation”), available at <https://www.youtube.com/watch?v=sbN4tBcBbtQ> (U.S. delegation providing legal reasons for Commission’s lack of competence over extraneous instruments).

II. The “Fourth Instance Formula” precludes review of domestic licensing proceedings

As a factual matter, it is the potential future mining operation of a private entity, HRI, rather than the Federal licensing procedures administered by the NRC under the Atomic Energy Act (AEA), that forms the basis of Petitioners’ claims. Even so, Petitioners’ ostensible hook to implicate a failure on the part of the United States to live up to its commitments under the American Declaration lies with the NRC’s administration of the AEA and, specifically, the license granted to HRI. To the extent that Petitioners seek to challenge that license, the issues raised by Petitioners have been fully adjudicated before the courts of the United States and there has been no failure by the United States to live up to its political commitments under the American Declaration with respect to that license.

As described above, the HRI license has been subjected to robust administrative and judicial procedures—procedures in which Petitioners actively participated. The Commission should dismiss Petitioners’ claims because the Commission lacks competence to sit as a court of fourth instance. The Commission has repeatedly stated that it may not “serve as an appellate court to examine alleged errors of internal law or fact that may have been committed by the domestic courts acting within their jurisdiction”—a doctrine the Commission calls the “fourth instance formula.”⁷⁴

The fourth instance formula recognizes the proper role of the Commission as subsidiary to States’ domestic judiciaries,⁷⁵ and indeed, nothing in the American Declaration, the OAS Charter, the Commission’s Statute, or the Rules gives the Commission the authority to act as an appellate body. The Commission has elaborated on the limitations that underpin the fourth instance formula in the following terms: “The Commission ... lacks jurisdiction to substitute its judgment for that of the national courts on matters that involve the interpretation and explanation of domestic law or the evaluation of the facts.”⁷⁶

⁷⁴ Marzioni v. Argentina, Case No. 11.673, Report No. 39/96, Inadmissibility, Oct. 15, 1996, ¶ 51 (“*Marzioni* Inadmissibility Report”).

⁷⁵ See Castro Tortrino v. Argentina, Case No. 11.597, Report No. 7/98, Admissibility, Mar. 2, 1998, ¶ 17.

⁷⁶ Macedo García de Uribe v. Mexico, Petition No. 859-03, Report No. 24/12, Inadmissibility, Mar. 20, 2012, ¶ 40 (“*Macedo* Inadmissibility Report”). The Commission has interpreted and applied the

It is not the Commission's place to sit in judgment as another layer of appeal, second-guessing the considered decisions of a State's domestic courts in weighing evidence and applying domestic law, nor does the Commission have the resources or requisite expertise to perform such a task. The United States' administrative process, including the availability of judicial review of administrative decisions, afforded petitioners the opportunity to participate in, and indeed challenge, the NRC license to HRI. Petitioners, over an extended period of time spanning more than a decade, both participated in the NRC licensing process and appealed the outcome of that process in Federal court.

Specifically, after the NRC Staff issued the requested license to HRI following a technical review, several parties, including Petitioners, filed an administrative challenge to the license. The NRC referred the challenge to its administrative hearing division (the Atomic Safety and Licensing Board Panel), which assigned a Presiding Officer to rule on whether the petitioners had filed a viable challenge, and if so, to conduct a hearing. Two separate and successive Presiding Officers conducted a two-phase hearing that lasted approximately ten years. The Presiding Officers issues multiple initial decisions that were each appealed to the NRC itself. Ultimately, the NRC approved the issuance of the HRI license, subject to several conditions to modify the license in response to the issues raised by Petitioners during those domestic proceedings. Petitioners challenged the NRC's decision in the U.S Court of Appeals for the Tenth Circuit, which ruled for the NRC on each issue. Petitioners asked the U.S. Supreme Court to review the case but the Supreme Court denied their request.

Dissatisfied with the outcome of these exhaustive domestic proceedings, Petitioners now ask the Commission to reexamine issues already heard by the Atomic Safety and Licensing Board Panel, the NRC, and the U.S. Court of Appeals for the Tenth Circuit, which acted in full conformity with the due process

fourth instance formula in the same way for OAS Member States that are parties to the legally binding American Convention and for those, including the United States, for which review is instead undertaken pursuant to the nonbinding American Declaration, where there must be even more deference. *See, e.g., id.* ("The judicial protection afforded by the [American] Convention [on Human Rights] includes the right to fair, impartial, and prompt proceedings which give rise to the possibility, *but never the guarantee*, of a favorable outcome. Thus, the interpretation of the law, the relevant proceeding, and the weighing of the evidence is, among others, a function to be exercised by the domestic jurisdiction, which cannot be replaced by the IACHR." (emphasis added)).

protections reflected in the American Declaration. Petitioners raise the same issues before the Commission raised in their U.S. judicial proceeding. These decisions are cited throughout this response, and o of them are appended as annexes, so that the Commission may see for itself the rigor and thoroughness that characterized the administrative and judicial consideration of Petitioners' claims. The Commission has long recognized that "if [a petition] contains nothing but the allegation that the decision [by a domestic court] was wrong or unjust in itself, the petition must be dismissed under [the fourth instance] formula."⁷⁷

The Commission must consequently decline Petitioner's invitation to sit as a court of fourth instance. Acting to the contrary would amount to the Commission second-guessing the legal and factual determinations of U.S. administrative authorities and federal courts at all levels, conducted in conformity with due process protections under U.S. law, U.S. commitments under the American Declaration, and otherwise in accordance with U.S. commitments and obligations under international human rights instruments. It would also require the Commission to reweigh evidence, something the Commission, by its own admission, cannot do.⁷⁸

Petitioners received abundant opportunity to raise the very issues presented to the Commission in domestic proceedings and fully availed themselves of that opportunity. The administrative proceedings in this case alone took over ten years and required weighing extraordinarily complex evidence. While petitioners are unhappy with that outcome, as well as the result of subsequent judicial appeals, the domestic administrative process functioned as it should have in this matter. This is a compelling case for the application of the fourth instance formula.

III. Failure to exhaust other domestic remedies in connection with the HRI operation

Article 31(1) of the Rules only allows the Commission to consider a petition after it has verified that domestic remedies have been exhausted. The Petitioners

⁷⁷ *Marzioni* Inadmissibility Report, *supra* n. 74, ¶ 51; *accord* *Maldonado Manzanilla v. Mexico*, Petition No. 733-04, Report No. 87/07, Inadmissibility, Oct. 17, 2007, ¶ 58 (reiterating that "the fact that the outcome was unfavorable ... does not constitute a [rights] violation") (quoting and citing *Rodríguez v. Argentina*, Case No. 10.382, Report No. 6/98, Inadmissibility, Feb. 21, 1998, ¶ 71).

⁷⁸ *Macedo* Inadmissibility Report, *supra* n. 76 **Error! Bookmark not defined.**, ¶ 40.

have failed to exhaust domestic administrative remedies, thus rendering their Petition inadmissible before the Commission.

Although, as described in greater detail above, the NRC regulates ISL operations under the AEA, a number of other entities also have regulatory authority over these operations under other statutes. Thus, while an ISL project requires an NRC license for its development and operation, it is not the only authorization an ISL operator must obtain. Critically, these remaining administrative procedures relate precisely to the issues raised by Petitioners and have not yet been pursued, much less exhausted.

One such administrative proceeding pertains to “aquifer exemptions.” Although HRI has an aquifer exemption for one of four sites covered by the HRI license, HRI does not have aquifer exemptions for the other three sites. This administrative process, set out at 40 C.F.R. § 144.7, is a complicated one that provides, in part, that the identification of additional exempted aquifers is subject to notice and opportunity for a public hearing. Aquifer exemptions are subject to public input. Therefore, significant administrative proceedings before the EPA remain and Petitioners would have the opportunity there to raise the same arguments raised during the NRC licensing process (and presented to the Commissioner in the Petition).

Another such administrative proceeding pertains to Underground Injection Control (“UIC”) permits, which an ISL operator must obtain for the injection wells used in each wellfield to conduct the ISL operations. HRI maintained a UIC permit for Section 8 until it expired in 2014. HRI will now be required to re-apply for its UIC permit, as well as apply for permits for the other three sites when they attempt to start operations there. Each permit application requires a public comment process and an opportunity for an administrative hearing. Again, significant administrative proceedings remain that provide an avenue for petitioners to raise the same arguments raised during the NRC licensing process (and presented to the Commissioner in the Petition).

The Commission has repeatedly emphasized that petitioners have the duty to pursue all available domestic remedies. Article 31(1) of the Rules states that “[i]n order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and

exhausted in accordance with the generally recognized principles of international law.” The Rules do not require that these domestic remedies be judicial in nature in order to require their exhaustion before a petitioner may have recourse to the Commission, and the Commission has previously considered non-judicial remedies as remedies that need to be properly exhausted in order for a matter to become admissible under Article 31.⁷⁹

As a result, because Petitioners have available to them additional domestic remedies in the event that HRI seeks the outstanding administrative approvals and exemptions necessary prior to commencing operations in connection with the NRC license—remedies that could provide Petitioners the relief they currently seek from the Commission—Petitioners have also failed to exhaust domestic remedies within the meaning of Article 31 of the Rules. The Petition is therefore inadmissible. The Commission must, in line with past practice, dismiss it.

IV. Failure to state a claim under the American Declaration

For purposes of admissibility, the Commission must decide whether the facts laid out in the petitions tend to establish a violation, as stipulated in Article 47(b) of the American Convention, whether the petition is “manifestly groundless” or “obviously out of order” in terms of subparagraph (c) thereof. At this procedural stage, the Commission is to undertake a *prima facie* evaluation, not for purposes of establishing alleged violations of the American Declaration, but rather for examining whether the petition denounces facts that may potentially constitute violations of rights ensured under said instrument.⁸⁰

Petitioners raise three primary arguments. First, Petitioners claim that HRI mining pursuant to the NRC license at issue would, should it commence, have the effect of infringing upon their rights to life and health under Articles 1 and 11 of

⁷⁹ See, e.g., *Vázquez & Gil Rendón v. Mexico*, Petition Nos. 1352-06 & 580-07, Report No. 67/14, Inadmissibility, July 25, 2014, ¶¶ 39–44 (stating that the petitioners had exhausted domestic remedies even though they had not pursued a special administrative remedy, not because the administrative remedy would not have constituted a domestic remedy, but because that particular special administrative procedure could not have yielded an effective remedy for the petitioners); *Cortina González v. Mexico*, Petition No. 700-04, Report No. 25/12, Inadmissibility, Mar. 20, 2012, ¶¶ 29–34 (declaring petition inadmissible for failure to exhaust domestic remedies because the petitioner sought *amparo* relief for violations of constitutional principles rather than the proper domestic remedy through the Conciliation and Arbitration Tribunals).

⁸⁰ Report No. 67/14, Petition Nos. 1352-06 and 580-07, Report on Inadmissibility, Bernardo Romero Vázquez and Raymundo Gil Rendón, Mexico, ¶ 48 (July 25, 2014).

the American Declaration on the basis of environmental contamination that may arise from the proposed mining. Second, Petitioners claim, *inter alia*, that such mining could, should it commence, have the effect of infringing upon their rights to religion and cultural participation under Articles 3 and 13 of the American Declaration because possible environmental contamination that may arise from the proposed mining would negatively impact Petitioners' ability to participate in traditional practices. Finally, Petitioners argue that such mining would, should it commence, infringe upon Petitioners' right to property under Article 23 of the American Declaration.

As an initial matter, and before considering each argument in turn, the petition fails to set forth a cognizable violation of any provision of the American Declaration because the alleged violations remain inchoate. As the Commission has previously explained:

Within its mandate the Commission receives petitions alleging violations of human rights, evaluates the allegations to determine if *a cognizable violation of a protected human right* is set forth, and examines the petition for procedural compliance; petitions not impeded by substantive or procedural impediments are then considered.⁸¹

In this case, however, “a cognizable violation of a protected human right” has not been set forth by Petitioners. Instead, the claims presented in the Petition are predicated upon a series of interdependent assumptions of future events: that HRI will successfully complete the necessary regulatory stages to commence mining operations; that HRI will actually commence such mining operations in the future; and that such mining operations will cause the harm through contamination and non-remittance that Petitioners hypothesize. In fact, almost eight years have passed since Petitioners submitted this petition to the Commission and they are no more able today to substantiate the speculative harms upon which their claims are based than they were at the time the Petition was filed. As a factual matter, any potential violation of the American Declaration at some point in the future remains wholly speculative. Therefore, Petitioners allegations do not set forth any cognizable violation of American Declaration. This fundamental defect precludes an affirmative admissibility finding by the Commission.

⁸¹ Report No. 14/94, Case 10.951, Report on Admissibility, United States, Analysis, ¶ 5 (Feb. 7, 1994).

a. No Violation of Right to Life (Art. 1) or Right to Health (Art. 11)

To the extent that Petitioners argue that the NRC license to HRI itself caused the United States to fail to live up to political commitments under Articles 1 and 11 of the American Declaration, that claim is plainly without merit.

Even if the hypothetical facts alleged by Petitioners were to come to pass as depicted, they would still fail constitute a cognizable claim under Articles 1 or 11 of the American Declaration. Article 1 of the Declaration provides that “[e]very human being has the right to life,” however the scenario presented by Petitioners is not one in which the United States has failed to live up to its political commitment to respect that right. Similarly, Article 11 provides that “[e]very person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.” Again, under the plain language of the Declaration, even assuming the future factual scenario contemplated by Petitioners were to occur, Petitioners have failed to articulate a cognizable claim.

In order to overcome this failure, Petitioners attempt to import standards from the American Convention and the ICESCR to broaden the scope of the rights of the Declaration.⁸² However, as discussed in Section I above, the Commission lacks competence to apply any instrument beyond the American Declaration with respect to the United States. Therefore, these other instruments cannot be applied to expand the scope of the rights contemplated under Articles 1 and 11 of the Declaration.

Petitioners similarly look to case law from the Inter-American Court of Human Rights (IACtHR) to effectuate a similar expansion. Proceedings before the IACtHR involving acts committed by State officials are wholly distinguishable from the facts of this matter. Although those proceedings relied upon by Petitioners are discussed below, it bears reiterating at the outset that the United States has not accepted the jurisdiction of the IACtHR, nor is it a State Party to the American Convention. Accordingly, the jurisprudence of the IACtHR interpreting the American Convention does not govern U.S. commitments under the American Declaration.

⁸² See, e.g., Petition at 31, 35-36.

Petitioners place great weight on the *Yakye Axa* case, which concerned efforts by an indigenous community in Paraguay to reclaim ancestral lands.⁸³ In that case, the Court found that the Yakye Axa community was made to live in extremely destitute conditions in a precarious, temporary roadside settlement.⁸⁴ Although this settlement was meant to be temporary, lasting only so long as necessary for the government to resolve the Yakye Axa community's pending land claim, the situation resulted in the deterioration of "minimum standards of living" in the community. These conditions, which impacted the nutrition, medical treatment, and food subsistence available to the community, as well as restrictions on rights to work and education, indicated, according to the Court, a failure by Paraguay to take measures to afford the possibility of having a decent life.⁸⁵

Although Petitioners rely on *Yakye Axa* to claim that the United States has analogously "failed to guarantee minimum conditions for a dignified life,"⁸⁶—a standard imported from the American Convention that is not applicable to the United States—Petitioners' claims here could not be more distinguishable from the facts of the *Yakye Axa* case. Petitioners allege no dispossession of property in connection with the NRC licensing procedure. Nor have Petitioners articulated deterioration of "minimum standards of living" of a community with respect to nutrition, medical treatment, and food subsistence, or restrictions on rights to work and education. In fact, the speculative hardships proposed by Petitioners, *even if they were* to come to pass, bear no resemblance to the plight of the Yakye Axa community. The allegation that the United States has failed to live up to its commitments under Article 1 or 11 of the American Declaration is baseless.

Petitioners, in order to bolster their claim under Article 11, also rely upon the *San Mateo* case, which is similarly distinguishable.⁸⁷ In that case, a representative of the Community of San Mateo de Huanchor alleged that Peru was responsible for violating Article 11 of the American Declaration in connection with environmental pollution produced by a field of toxic waste sludge. Petitioner

⁸³ Case of the Yakye Axa Indigenous Community v. Paraguay, Judgment (Merits, Reparations and Costs) (June 17, 2005).

⁸⁴ *Id.* ¶ 164.

⁸⁵ *Id.* ¶ 176.

⁸⁶ Petition at 32.

⁸⁷ San Mateo de Huanchor Community v. Peru, Report No. 69/04, OEA/Ser.L/V/II.122, Doc. 5, rev. 1 (2004).

alleged that the mining company, whose mine produced the field of toxic waste, had violated Peruvian law addressing mining concessions. Petitioners cited various official and academic studies documenting high concentrations of various pollutants, including lead, zinc, and arsenic, in a dump and in farming areas in the community. In August 2004, the Commission granted precautionary measures requesting Peru to take immediate steps to provide medical assistance and prepare an environmental impact study pursuant to the removal of the toxic waste sludge. The Commission found that “[t]he administrative decisions that were taken were not observed, more than three years have elapsed, and the toxic waste sludge of the Mayoc field continues to cause damage to the health of the population of San Mateo de Huanchar, whose effects are becoming more acute over time.”⁸⁸ In finding the petition admissible, the Commission considered that that the environmental pollution from the toxic waste sludge “created a public health crisis in the population of San Mateo de Huanchar.”

Although Petitioners are correct when they observe that the Commission has issued precautionary measures to protect the right to health encompassed in the American Convention,⁸⁹ the United States is not bound by the Convention. Moreover, even if Article 11 of the American Declaration could be expanded as Petitioners propose, Petitioners’ reference to *San Mateo* only serves to illustrate the dissimilarity of their position to that of the population of San Mateo de Huanchar. In that case, a mining company had allegedly violated provisions of domestic law pertaining to mining concessions and pollution; here, Petitioners are challenging the issuance of the NRC license but allege no violation of domestic law by HRI. In *San Mateo*, Peru had failed to take measures to remove the toxic waste sludge in connection with those domestic law violations; in this case, however, there is no toxic waste from mining which has not commenced to be removed, much less a failure on the part of the United States to do so (nor could there be). There is certainly no “public health crisis” arising from the issuance of the NRC license, as the Commission had found in the case of the population of San Mateo de Huanchar. Petitioners’ invocation of the *San Mateo* case is unavailing and serves

⁸⁸ *Id.* ¶ 59.

⁸⁹ Petition at 35.

only to underscore their failure to articulate a cognizable claim under Article 11 of the American Declaration.

Petitioners have failed to allege facts in the petition tend to establish a violation of Article 1 or 11 of the American Declaration. Therefore, the Commission must find these claims inadmissible.

b. No Violation of Right to Religious Freedom (Art. 3) or Right to the Benefits of Culture (Art. 13)

To the extent that Petitioners argue that the NRC license to HRI itself caused the United States to fail to live up to political commitments under Articles 3 and 13 of the American Declaration, that claim is plainly without merit. Article 3 provides that “[e]very person has the right freely to profess a religious faith, and to manifest and practice it both in public and in private.” Article 13 provides, in relevant part, that [e]very person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries.” Petitioners simply have not stated facts that tend to establish a violation of either of these provisions of the American Declaration and, accordingly, the Commission must find these claims inadmissible.

Petitioners claim, *inter alia*, that HRI mining would, should it commence, have the effect of infringing upon their rights to religion and cultural participation under Articles 3 and 13 of the American Declaration because possible environmental contamination that may arise from the proposed mining would negatively impact Petitioners’ ability to participate in traditional practices. To the extent that Petitioners link this hypothetical environmental harm to the NRC license itself, the robust administrative process described in Section 1 above renders any such allegation baseless. Issuance of the license at issue followed extensive assessment of environmental considerations and, in fact, incorporated conditions that take into account the very environmental concerns raised in this Petition.⁹⁰ Petitioners might not be satisfied with the outcome of the administrative

⁹⁰ It should be reiterated that, in order for HRI to begin mining operations at the sites in question, HRI must first obtain aquifer exceptions. An aquifer exemption means that the identified aquifer or portion thereof cannot now nor ever in the future serve as a source of drinking water. *See supra*, §§ A,IV.b-A,IV.c.

process, however such dissatisfaction is not sufficient to substantiate a colorable claim of violations of rights to religious freedom or the benefits of culture. The factual record in this matter does not support the proposition that the United States failed to live up to political commitments under Articles 3 and 13 of the American Declaration.

Moreover, Petitioners' claims with respect to religious freedom and benefits of culture are not admissible because the American Declaration does not speak to collective rights and the Commission lacks competence to expand its review beyond the Declaration. Petitioners frame their claims under Articles 3 and 13 in terms of "the intimate ties between indigenous cultural and religious practices and land in the context of interpreting indigenous peoples' right to property."⁹¹ Petitioners support this claim by references to the International Labor Organization Convention No. 169 (ILO Convention No. 169) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), as well as the Commission's merits report in *Mayan Indigenous Communities of the Toledo District v. Belize*.⁹²

The American Declaration sets forth human rights, fundamental freedoms, and duties of individuals, not of collectives. This fact is evidenced in the Declaration's plain text. The articles cited in the Petition begin with the words "[e]very human being,"⁹³ "[a]ll persons,"⁹⁴ "[e]very person,"⁹⁵ or "[e]very accused person."⁹⁶ All of the other rights, and all of the duties, similarly begin with language referring to individual persons.⁹⁷ As such, these articles, on their face, do not set forth rights pertaining to the Navajo Nation, nor is the Navajo Nation a

⁹¹ Petition at 38.

⁹² Petition at 38-40.

⁹³ American Declaration, art. I.

⁹⁴ *Id.* at art. II.

⁹⁵ *Id.* at art. III, XIII, XIX.

⁹⁶ *Id.* at art. XXVI.

⁹⁷ Because the United States is not a party to the American Convention, the Commission's jurisdiction with respect to the United States is limited to claims grounded in the American Declaration. *See, e.g.*, Commission Statute, art. 20. Even if the Commission were to look to the American Convention, it would have to conclude that the American Convention is similarly limited to safeguarding the human rights and fundamental freedoms of individual human beings, and does not apply to collectives such as indigenous peoples. American Convention, art. 1(2) (defining "person" as every human being).

party to this Petition or in any way attempting to assert here its rights under other instruments.

Moreover, the Commission must decline to review the Petition through the rubric of the UNDRIP or ILO Convention No. 169 because it lacks competence to apply any instrument beyond the American Declaration with respect to the United States.⁹⁸ *A fortiori*, the Commission lacks competence to apply provisions in such instruments setting forth collective rights, such as the many articles of the UNDRIP and ILO Convention No. 169 declaring collective rights of indigenous peoples—*pueblos indígenas*. These collective rights, while important, must be contrasted with the human rights enjoyed and exercised by indigenous *individuals* and all other individuals by virtue of having been “born free and equal, in dignity and in rights, ... endowed by nature with reason and conscience,” and which are the rights recognized and protected by the American Declaration.⁹⁹

Furthermore, the UNDRIP consists of aspirational statements of political and moral commitment, and are not binding under international law. The instrument was not intended to create new international law, nor does it reflection

⁹⁸ See, e.g., U.S. Hearing Presentation, *Ameziane v. United States*, Case No. 12.865, 164th Period of Sessions, Mexico City, Sept. 7, 2017 (“*Ameziane* U.S. Hearing Presentation”), available at <<https://www.youtube.com/watch?v=sbN4tBcBbtQ>> (U.S. delegation providing legal reasons for Commission’s lack of competence over extraneous instruments).

⁹⁹ American Declaration, pmbl. ¶ 1. See also, e.g., “U.S. Announcement of Support for the United Nations Declaration on the Rights of Indigenous Peoples,” reprinted in *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 265 (Elizabeth R. Wilcox ed., 2010) (“U.S. Announcement of Support”), available at <<https://www.state.gov/documents/organization/179316.pdf>>. See also, e.g., U.N. GAOR, 61st Sess., 107th plen. mtg. at 21, U.N. Doc. A/61/PV.107 (Sept. 13, 2007) (“UNDRIP Vote Record Part I”) (United Kingdom at UNDRIP’s adoption stating that “since equality and universality are the fundamental principles underpinning human rights, we do not accept that some groups in society should benefit from human rights that are not available to others,” and that “[w]ith the exception of the right to self-determination, we therefore do not accept the concept of collective human rights in international law”); *id.* at 24–25 (“The Swedish Government has no difficulty in recognizing collective rights outside the framework of human rights law” but “it is the firm opinion of the Swedish Government that individual human rights prevail over the collective rights mentioned in the Declaration.”); U.N. GAOR, 61st Sess., 108th plen. mtg. at 5, U.N. Doc. A/61/PV.108 (Sept. 13, 2007) (“UNDRIP Vote Record Part II”) (Slovakia stressing that “international human rights protection is based on the principle of the individual character of human rights”; that the UNDRIP “clearly distinguishes between the individual character of the human rights of indigenous individuals and the collective rights indispensable for their existence, well-being and integral development as peoples”; and that “[t]hose collective rights should not be considered as human rights”).

States' existing obligations under conventional or customary international law.¹⁰⁰ The United States supports the instrument as explained in its December 2010 Announcement of Support, recognizes its significant moral and political force, and looks to the principles of the UNDRIP in its dealings with federally recognized tribes.¹⁰¹ However U.S. support for the UNDRIP did not change the U.S. domestic legal framework with respect to tribal rights.

With respect to ILO Convention No. 169, the United States is not a party to that instrument. Therefore, even if the Commission had competence with respect to that instrument, which it does not, its provisions could not be applied to the United States.

c. No Violation of the Right to Property (Art. 23)

To the extent that Petitioners argue that the NRC license to HRI itself caused the United States to fail to live up to political commitments under Article 23 of the American Declaration, that claim is plainly without merit. Article 23 provides that “[e]very person has a right to own such private property as meets the essential needs of decent living and help to maintain the dignity of the individual and of the home.” Again, Petitioners have failed to state facts that tend to establish a violation of this provision of the American Declaration and, accordingly, the Commission must find this claim inadmissible.

The NRC license to HRI have not impacted private rights to property ownership. The property rights implicated by the four proposed sites covered by the HRI license are complex, as explained in detail above.¹⁰² Crucially, however, the issuance of that license did not adversely impact Petitioners' private rights of

¹⁰⁰ See e.g., “Indigenous Issues,” DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 264 (Elizabeth R. Wilcox, ed., 2010) (“U.S. Announcement of Support”) (“The United States supports the Declaration, which—while not legally binding or a statement of current international law—has both moral and political force.”); “American Declaration on the Rights of Indigenous Peoples,” DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 251–52 (CarrieLyn D. Guymon ed., 2016) (“U.S. Objections to OAS DRIP”) (noting that the OAS DRIP is not legally binding and does not create new law), available at <<https://www.state.gov/documents/organization/272128.pdf>>. See also, e.g., UN Vote Record Part I, *supra* n. 99, at 12–15, 17, 22, 26 (United Kingdom, Colombia, Guyana, Australia, Canada, and New Zealand stating that UNDRIP is not binding); *id.* at 12–13, 17 (Australia, Colombia, and Canada adding that UNDRIP does not reflect customary international law); UN Vote Record Part II, *supra* n. 99, at 3, 5 (Nepal and Turkey delegates stating that UNDRIP is not binding).

¹⁰¹ See U.S. Announcement of Support, *supra* n. 100, at 264.

¹⁰² See *supra*, § A.III.

ownership and, tellingly, Petitioners make no such claim. Accordingly, Petitioners fail to articulate a claim under Article 23 of the Declaration.

Instead, Petitioners posit a failure on the part of the United States to “protect the integrity of the Petitioners’ ancestral lands and natural resources.”¹⁰³ To support this theory, Petitioners invoke the American Convention, IACtHR jurisprudence interpreting the Convention, and collective rights provisions of the UNDRIP. However, as discussed in the previous section, the Commission must decline to review the Petition through the rubric of the UNDRIP because it lacks competence to apply any instrument beyond the American Declaration with respect to the United States and the American Declaration sets forth human rights, fundamental freedoms, and duties of *individuals*, not of collectives.

Even if claims under these other instruments could be raised against the United States and did fall within the competence of the Commission—neither of which is the case—these claims are predicated on unsubstantiated factual assertions. Petitioners’ allegation that the United States has “failed to . . . meaningfully regulate[] uranium mining and milling and address[] continued contamination concerns” is flatly refuted by the decade-long administrative process described in Section A above. Moreover, Petitioners’ claims of potential “groundwater contamination” and “radioactive air emissions” by possible future HRI operations are not only hypothetical and speculative, but they also fail to substantiate a theory that the United States has failed to live up to commitments to respect private property ownership rights under Article 23 of the Declaration.

Petitioners have failed to allege facts in the petition tend to establish a violation of Article 23 of the American Declaration. Therefore, the Commission must find this claim inadmissible.

C. CONCLUSION

For the foregoing reasons, the Petition fails to satisfy the threshold for consideration under Articles 31 and 34 of the Rules. Accordingly, the United States respectfully requests that the Commission find the Petition inadmissible. Should the Commission nevertheless find the Petition admissible and proceed to examine its merits, it should find the Petition meritless for the reasons described

¹⁰³ Petition at 41.

above. In this regard, it bears reiterating that the NRC, and other federal agencies, dedicated an extraordinary amount of study and resources to reviewing the license application at issue in this matter. As demonstrated by this response, the sheer breadth and volume of this undertaking evidences the efforts by the United States to ensure that the project in question was thoroughly evaluated from both a public safety and environmental perspective. To this end, during the course of administrative proceedings, the NRC imposed substantive requirements to the license at issue in this matter to protect local citizens. The administrative proceedings related to this matter spanned more than ten years and required weighing extraordinarily complex evidence. Petitioners' allegations that their rights under the American Declaration have been violated during the course of this process are simply without merit. While the United States reserves the right to provide further views on the merits in such an eventuality, it reiterates that none of the conduct alleged in the Petition implicates—much less violates—any of the rights set forth in the American Declaration.