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**REPORT No. 67/21**  
**PETITION 654-11**  
REPORT ON ADMISSIBILITY

NAVAJO COMMUNITIES OF CROWNPOINT AND CHURCH ROCK  
UNITED STATES OF AMERICA

Approved electronically by the Commission on March 28, 2021.

**Cite as:** IACHR, Report No. 67/21, Petition 654-11. Admissibility. Navajo Communities of Crownpoint and Church Rockl. United States of America. March 28, 2021.

**I. INFORMATION ABOUT THE PETITION**

Petitioners:	Eastern Navajo Diné Against Uranium Mining (ENDAUM), Mitchell Capitan, Rita Capitan, Christine Smith, Keithlynn Smith, Kenneth Smith, and Larry King
Alleged victims:	Mitchell Capitan, Rita Capitan, Christine Smith, Keithlynn Smith, Kenneth Smith, and Larry King, Communities of Crownpoint and Church Rock
Respondent State:	United States of America <sup>1</sup>
Rights invoked:	Articles I (Right to life and personal security), XI (Right to the preservation of health and to well-being), XIII (Right to the benefits of culture), and XXIII (Right to property) of the American Declaration on the Rights and Duties of Man

**II. PROCEEDINGS BEFORE THE IACHR<sup>2</sup>**

Filing of the petition:	May 13, 2011
Additional information received at the stage of initial review:	May 17, 2011; October 19, 2011; March 8, 2012; February 11, 2014; and February 22, 2019
Notification of the petition to the State:	July 26, 2017
State's first response:	April 22, 2019
Notification of the possible archiving of the petition:	October 2, 2018
Petitioner's response to the notification regarding the possible archiving of the petition:	November 6, 2018

**III. COMPETENCE**

Competence <i>Ratione personae</i> :	Yes
Competence <i>Ratione loci</i> :	Yes
Competence <i>Ratione temporis</i> :	Yes
Competence <i>Ratione materiae</i> :	Yes, American Declaration (ratification of the OAS Charter on June 19, 1951)

**IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL RES JUDICATA, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION**

Duplication of procedures and International <i>res judicata</i> :	No
Rights declared admissible	Articles XIII (benefits of culture), XVIII (fair trial) and XXIII (property) of the American Declaration
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, on November 15, 2010
Timeliness of the petition:	Yes, on May 13, 2011

**V. ALLEGED FACTS**

1. This petition alleges multiple violations of the American Declaration because of a license granted by the United States Nuclear Regulatory Commission ("NRC") to Hydro Resources, Inc. ("HRI")<sup>3</sup> to conduct uranium mining in the Navajo communities of Crownpoint and Church Rock, located in Northwestern New Mexico. Church Rock and Crownpoint are communities comprising mainly Navajo (Diné) peoples and are located within the boundaries of the Navajo Nation.

<sup>1</sup> Hereinafter "United States."

<sup>2</sup> The observations submitted by each party were duly transmitted to the opposing party.

<sup>3</sup> The Petitioners indicate that a Canadian company called Laramide, acquired HRI in January 2017 and subsequently renamed the company NuFuels, Inc. For the purpose of consistency and clarity, this report will refer to HRI only as the licensee.

2. According to the petitioners, in 1998 the NRC granted a source and byproduct materials license to HRI to conduct uranium mining by the use of in situ leach technology<sup>4</sup> (hereafter ISL mining). This license authorized mining at four sites in Church Rock and Crownpoint. The two mining sites in Church Rock are called “Section 8” and “Section 17” sites; and the two mining sites in Crownpoint are called the “Crownpoint” and “Unit 1” sites. The petitioners object to the grant of the license, having particular regard to previous uranium mining activities in or close to Church Rock and Crownpoint. In this regard, the petitioners contend that the Navajo Nation in New Mexico has generally suffered adverse consequences of previous uranium mining operations. In this regard, the petitioners claim that the Navajo Nation hosts 520 abandoned uranium mine sites and three uranium mill sites that have contaminated tens of millions of gallons of groundwater and countless acres of land.<sup>5</sup> According to the petitioners, these sites are also the cause of significant illnesses and death in nearby indigenous communities; and that exposure to uranium and its decay products causes an array of adverse health effects, which includes kidney disease, birth defects and cancer. The petitioners also submit that a disproportionate number of unremediated uranium mine sites in New Mexico are located on lands traditionally used and occupied by the Navajo people. Additionally, a disproportionate amount of pollution from uranium mill sites occurs in Navajo communities. Consequently, the petitioners allege that the Navajo bear a disproportionate number of health problems that are a direct result of the State’s past and ongoing acts and omissions.<sup>6</sup> The petitioners also mention that Church Rock is the site of the largest nuclear disaster in U.S. history. According to the petitioners, on July 16, 1979, the tailings dam at the United Nuclear Corporation uranium mill broke and released 93 million gallons of radioactive liquid into the Rio Puerco, a river that runs through Church Rock. The flood of radioactive and toxic liquid killed livestock and destroyed crops. It also left a wake of radioactive waste and heavy metals in the Rio Puerco’s bed and banks that has yet to be remediated.

3. According to the petitioners, pursuant to the license granted to HRI, ISL mining will not only aggravate previous ill effects of uranium mining, but will cause groundwater contamination that will make water that is currently potable unfit for consumption. Further, the petitioners contend that it will also make these same sources of water unfit for ceremonial and other cultural purposes. The petitioners also claim that the land that will be disturbed by HRI’s operations, to the extent that it has not already been impacted by past uranium mining and milling “will carry the indelible stain of desecration”; and that it will no longer be fit for ceremonial practices or for gathering plants and herbs used in religious ceremonies.<sup>7</sup> Further, the petitioners contend that any ISL mining carried out pursuant to the license granted to HRI would deprive them and the Church Rock and Crownpoint communities of the minimum conditions for a dignified life. They also contend that ISL mining would also reflect a failure on the part of the State to protect the integrity of the petitioners’ ancestral lands and natural resources. They argue that, by its nature, ISL mining uranium contaminates groundwater; and that as an industry, the environmental record of ISL uranium mining is poor. According to the petitioners, there are often spills and leaks that introduce radioactive and toxic chemicals into soil and water. The petitioners also claim that the NRC, to a limited extent, has acknowledged the poor record of spills and leaks associated with ISL mining. Further, the petitioners allege that the ISL industry’s record of remediating groundwater at mined aquifers is also very poor.<sup>8</sup>

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<sup>4</sup> According to the petitioners, ISL mining is conducted by injecting a solution of water, dissolved oxygen, and sodium bicarbonate through injection wells and into the discrete areas of uranium mineralization, called “ore zones”. The solution dissolves the uranium in the ore zone, which is then extracted.

<sup>5</sup> Based on the petition, it appears that the previous uranium mining did not use ISL technology, but other more conventional means such as open pit mining, and milling.

<sup>6</sup> In support of its contention, the petitioners cite reports/studies such as one entitled *Uranium Exposure And Public Health On The Navajo Nation And In New Mexico: A Literature Summary* (Compiled by Chris Shuey, MPH, Southwest Research and Information Center); initially compiled on February 27, 2007, and later revised on July 8, 2010.

<sup>7</sup> In support of its claims, the petitioners cite or rely on international instruments/jurisprudence such as the International Covenant on Economic, Social and Cultural Rights, the International Labor Organization Convention 169, the United Nations Declaration on the Rights of Indigenous Peoples, and the International Covenant on Civil and Political Rights.

<sup>8</sup> According to the petitioners, in 2009 the United State Geological Survey (“USGS”), an administrative arm of the State, evaluated the groundwater restoration results of ISL mines in Texas, where ISL mining has been conducted for over thirty years. That report concludes that based on restoration efforts in Texas --the state with the longest history of ISL mining and with the most comprehensive database of restoration information-- no ISL uranium mine restored groundwater to pre-mining conditions, even if one considers the inflated pre-mining average contaminant levels as a legitimate representation of baseline, confirming the claims the petitioners have made for years.

4. The petitioners argue that the grant of the license to HRI must be seen within the historic context of the NRC's failure to acknowledge the scope and severity of the ongoing contamination from past uranium mining and milling; and that this status quo will be aggravated by the license granted to HRI. Given this context, the petitioners contend that any mining done by HRI pursuant to the license granted would pollute community aquifers with uranium and other heavy metals and cause contamination to air, soil, and other natural resources on lands traditionally used and occupied by the Navajo people, particularly in Crownpoint and Church Rock. The petitioners also argue that ISL mining by HRI would also generate elevated radiation levels that would be harmful to the communities in which the mining is to take place.

5. Having regard to the foregoing, the petitioners filed an administrative challenge to the license, following which the NRC referred the challenge to its administrative hearing division, the Atomic Safety and Licensing Board Panel. According to the record, NRC licensing proceedings are governed by the provisions of the Atomic Energy Act (AEA) of 1954, which requires the NRC to grant a hearing upon the request of any person who has an interest in the proceeding. Consequently, a hearing was convened by the NRC to address the challenge filed by the petitioners. According to the petitioners, this hearing process lasted for over a decade and culminated in a decision by the NRC to uphold the license granted to HRI. Following this decision, the petitioners applied to the United States Court of Appeals for the Tenth Circuit for a review of the NRC's decision. This application was heard on the merits and dismissed on March 8, 2010. Following this dismissal, the petitioners applied to the United States Supreme Court for a review of the NRC's decision, but this application was refused on November 15, 2010. The petitioners submit that there are no further domestic legal processes available to challenge the NRC license.

6. For its part, the State contends that the petition is inadmissible because it fails to state facts that might amount to colorable claims under the American Declaration; that it is outside of the Commission's competence by virtue of the fourth instance formula; and that the petitioners failed to exhaust all available domestic remedies.

7. The State submits that the licensing process was conducted in compliance with the prevailing legal and regulatory framework, which provided many opportunities for the petitioners to participate and fully took into account the input and concerns of the petitioners. In this regard, the State notes that administrative proceedings took place over a period of more than ten years. The State contends the ISL mining project in question was thoroughly evaluated from both a public safety and environmental perspective; and that to this end, during the course of administrative proceedings, the NRC ultimately imposed substantive requirements to the license at issue in this matter to protect local citizens. The State also indicates that 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 near future.

8. The State submits that the Atomic Energy Act ("AEA") of 1954 and the regulations that the NRC has adopted under its authority provide a procedural framework to process applications for licenses to extract uranium using the in situ leach process, and substantive guidelines that the license applications must meet. Additionally, the National Environmental Policy Act ("NEPA") requires all federal agencies, including the NRC, to review and analyze the environmental consequences of any "major action" that the agency takes. Finally, the AEA provides for judicial review of NRC licensing decisions under the Administrative Orders Review Act, 28 U.S.C. 2341, *et seq.* The State explains that in 1998 the HRI<sup>9</sup> filed an application for a license to conduct ISL mining at four sites in or near the towns of Church Rock and Crownpoint, New Mexico. After a technical review, the NRC issued the requested license and several parties, including the petitioners, filed an administrative challenge to the license. Two separate and successive Presiding Officers conducted an administrative proceeding in this case that lasted approximately 10 years. The Presiding Officer then issued a decision and the losing side appealed that decision. During the administrative hearing, the petitioners raised concerns about the potential impact of the license – including possible contamination of groundwater and the emission of airborne radiation. The petitioners argued that the ISL mining to be conducted by HRI would add to previous airborne radiation generated by previous conventional uranium mining. The NRC ultimately approved the issuance of the license but also issued several conditions to modify the license in response to the

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<sup>9</sup> The State indicates that (due to a change in corporate ownership) HRI is now known as NuFuels, Inc. For the purpose of clarity and consistency, this report will refer only to the name "HRI".

issues raised by the challengers, including the petitioners.<sup>10</sup> These conditions were largely informed by an Environmental Impact process conducted by the HRC. Under this process, the NRC in October 1994, published a Draft Environment Impact Statement (“DEIS”), which addressed the potential environmental impacts that could result from the issuance of the license to HRI to conduct ISL mining<sup>11</sup> and on which members of the public were invited to comment.<sup>12</sup> In February 1997, the NRC published a Final Environmental Impact Statement (“FEIS”) concluding that the potential significant impacts of the proposed project could be mitigated, and that HRI should be issued a license from NRC subject to additional conditions prescribed by the latter as well the commitments originally made by HRI in its license application. The FEIS also found that HRI’s ISL mining would have “negligible” impact on the current airborne radiation emissions levels. The presiding officer also upheld this position during the administrative challenge brought by the petitioners.

9. The State furthermore asserts that 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. In this regard, the State submits that because the ground is not disrupted the structure of the aquifer is not impacted so that its use within the production zone is preserved for future use; that 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; and that this process may also adversely impact the water quality and quantity in the mined aquifer or any overlying aquifer within the mined area.

10. Additionally, the State contends that the petition fails to set forth a cognizable violation of any provision of the American Declaration because the alleged violations remain inchoate. In this regard, the State submits that 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 that the petitioners hypothesize. Further, the State argues that the petitioners 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; and that as a factual matter, any potential violation of the American Declaration at some point in the future remains wholly speculative. 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 near future. Therefore, the petitioners’ allegations do not set forth any cognizable violation of the American Declaration.

11. Additionally, while the State acknowledges that the petitioners anchor their claims in specific provisions of the American Declaration, it contends that they have attempted to expand the competence of the Commission by invoking an array of other international instruments that are beyond its competence. Further, the State submits that it is not a party to instruments cited by the petitioners, such as the ICESR and ILO Convention No. 169. As a result, the State contends that the Commission lacks the *ratione materiae* competence to entertain the claims contained in the petition.

12. Moreover, the State argues that there are administrative remedies that the petitioners have failed to exhaust and that would have allowed them to raise the same arguments that they advanced during the NRC licensing process. In this regard, the State indicates that while an ISL project requires an NRC license for

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<sup>10</sup> Some of these conditions included the restoration of groundwater to pre-mining levels. In addition, the 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. Another condition imposed on HRI was 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.

<sup>11</sup> According to the State, the DEIS 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.

<sup>12</sup> The State also indicates that 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

its development and operation there are other authorizations required, namely aquifer exemptions and Underground Injection Control (“UIC”) permits. According to the State, HRI has an aquifer exemption for one of four sites covered by the HRI license, but does not have aquifer exemptions for the other three sites. The State indicates that the administrative process<sup>13</sup> for procuring aquifer exemptions provides the opportunity for a public hearing and, therefore, public input. The State also indicates that 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. According to the State, each permit application requires a public comment process and an opportunity for an administrative hearing.

13. Finally, the State contends that the petitioners raise the same issues before the Commission that were raised in their U.S. judicial proceeding. The State submits that the HRI license has been subjected to robust administrative and judicial procedures—procedures in which petitioners actively participated. Dissatisfied with the outcome of these exhaustive domestic proceedings, the 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 protections reflected in the American Declaration. The State contends that the Commission should dismiss the petitioners’ claims because it 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”, the so-called “fourth instance formula. To the extent that the petitioners seek to challenge that license, the issues they raised have been fully adjudicated before the courts of the United States and there has been no failure by this country to live up to its political commitments under the American Declaration with respect to that license.

## **VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION**

14. The parties are at variance on the issue of exhaustion of domestic remedies. The petitioners contend that domestic remedies were exhausted on November 15, 2010, when the U.S. Supreme Court dismissed their application for further review subsequent to the ruling of the US Court of Appeals for the Tenth Circuit. On the other hand, the State argues that the petitioners failed to exhaust certain administrative remedies relating to aquifer exemptions and Underground Injection Control permits.

15. The rule on exhaustion of remedies establishes that remedies generally available and appropriate in the domestic legal system must be pursued first. Such remedies must be accessible and effective in resolving the situation in question. The IACHR has established that such requirement does not necessarily mean that alleged victims are obligated to exhaust all remedies at their disposal, but rather that they must pursue the matter through one of the valid and appropriate options in accordance with the domestic legal system, and the State had the opportunity to remedy the matter in its jurisdiction, the objective of international law has been achieved.<sup>14</sup> The petitioner filed an administrative challenge to the granting of the license. The record does not show any other remedy that would have specifically allowed for the free, informed and prior consultation of the indigenous peoples affected by the license and that would have been appropriate in relation to the matter presented in this petition. Accordingly, the Commission considers that the petitioners exhausted domestic remedies on November 15, 2010, when the U.S. Supreme Court declined to address the claim.

16. The petition was submitted to the IACHR on May 13, 2011. Accordingly, the Commission deems that it was filed within the six-month deadline prescribed by Article 32.1 of its Rules of Procedure.

17. With respect to the State’s submission on non-exhaustion of certain administrative remedies relating to aquifer exemptions and Underground Injection Control permits, the Commission notes that these remedies would be entirely contingent on HRI applying for the exemptions and permits mentioned. In the absence of any applications by the HRI in this regard, it would be impossible for the petitioners to access these

<sup>13</sup> The State indicates that this process is governed by 40 C.F.R. § 144.7 (U.S. Code of Federal Regulations).

<sup>14</sup> See IACHR, Report No. 16/18, Petition 884-07. Admissibility. Victoria Piedad Palacios Tejada de Saavedra. Peru. February 24, 2018, para. 12.

remedies, much less exhaust them. Accordingly, the Commission considers that these remedies are ultimately unavailable and ineffective, and that the petitioners are not obliged to exhaust them.

## VII. ANALYSIS OF COLORABLE CLAIM

18. The petitioners allege violations of the rights to life, property and health, as well as to the benefit of culture, arising out of the grant of a license to conduct ISL mining in or close to the Navajo communities of Church Rock and Crownpoint. They further claim that the Navajo Nation in New Mexico has generally suffered adverse environmental and other consequences of previous uranium mining operations, including water contamination and detrimental impact on the lives and health of the members of the communities, as well as affecting the natural resources in a way that made them unfit for ceremonial and other cultural purposes. Additionally, they allege that there are a number of un-remediated uranium mine sites located on lands traditionally used and occupied by the Navajo people. The State does not dispute the history of uranium mining as presented by the petitioners, but rejects their claims partly on the basis that they are inchoate and that they are largely predicated on a speculative assumption that the grant and activation of the ISL mining license to HRI will cause harm. The State further contends that the licensing process was conducted in compliance with the prevailing legal/regulatory framework, which provided many opportunities for the petitioners to participate; and that it fully took into account their input and concerns.

19. The Commission recognizes that it is not entitled to review judgments issued by domestic courts acting within their jurisdiction and in accordance with due process of law and judicial safeguards. Nonetheless, the Commission reiterates that, under its mandate, it is competent to declare a petition admissible and rule on the merits of the case when the matter concerns domestic proceedings where any of the rights protected by the American Declaration might have been violated. The Commission notes that a State may restrict the use and enjoyment of the right to property of indigenous peoples under certain circumstances, where the restrictions are previously established by law, necessary, proportional, and with the aim of achieving a legitimate objective in a democratic society<sup>15</sup>. However, in order to ensure the use and enjoyment of the right to indigenous collective property, in relation to the utilization or exploitation of natural resources in their traditional territory, the Commission recalls that the State must put in place special and differentiated mechanisms for the effective consultation of the indigenous peoples affected in accordance with their own traditions and decision-making methods, at the early stages of a development or investment plan.<sup>16</sup> To that extent, the Commission concludes that it is competent to review whether the administrative remedies available to the petitioners in the present case were in line with Inter-American standards.

20. In view of the allegations by the parties and the nature of the matter brought to its attention, the Commission considers that, if proven, the facts of the petition could characterize violations of the rights protected in Articles I (life and personal security) and XI (preservation of health and well-being) XIII (benefits of culture), XVIII (fair trial) and XXIII (property) of the American Declaration.

21. The Commission takes note of the State's submission that the petitioners' claims have been effectively neutralized *ratione materiae* by citing other international instruments. However, in the Commission's view, the record plainly demonstrates that the petitioners have grounded their claims in the American Declaration and that, accordingly, it does have jurisdiction *ratione materiae* with regard to these claims.

## VIII. DECISION

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<sup>15</sup> Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, par. 127.

<sup>16</sup> Case of the Kalina and Lokono peoples v Suriname, Merits, reparations and costs, Judgement, November 25, 2015, par. 203. See also Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, par. 129; Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and reparations, Judgement, Inter-Am. Ct. H. R., June 27, 2012, par. 159 ff.

1. To find the instant petition admissible in relation to Articles I (life, and personal security), XI (preservation of health and well-being), XIII (benefits of culture), XVIII (fair trial) and XXIII (property) of the American Declaration

2. To notify the parties of this decision; to continue with the analysis on the merits; and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 28<sup>th</sup> day of the month of March, 2021. (Signed:) Antonia Urrejola, President; Julissa Mantilla Falcón, First Vice-President; Flávia Piovesan, Second Vice-President; and Margarete May Macaulay, Commissioners.