New Mexico Mining Association

January 20, 2006

David Albright
Groundwater Office Manager
U. S. Environmental Protection Agency
Region 9
75 Hawthorne Street, Mail Code: WTR-9
San Francisco, CA 94105

Re: Underground Injection Control Program, Determination of Indian Country Status for Purposes of Underground Injection Control Program Permitting – Hydro Resources, Inc.

Dear Mr. Albright:

The New Mexico Mining Association ("NMMA") was organized in 1939. Its membership is composed of (a) companies that explore for, produce and refine metals, coal and industrial minerals; (b) companies that manufacture and distribute mining and mineral processing equipment and supplies; and (c) individuals engaged in these various phases of the mineral industry. NMMA serves as a spokesman for the mining industry in New Mexico. Former operator members of NMMA operated uranium mines and mills in the Grants Uranium Mineral Belt, including Hydro Resources Inc.'s ("HRI") Section 8 property, which was the largest uranium producing district in the United States. Members of the Association currently conduct operations and own land positions in the Checkerboard Area within which EPA is seeking comments on HRI's Section 8 property concerning "Indian Country" land status.

The 160 acre tract located in Section 8 that is subject to EPA's determination is owned in fee (surface and mineral rights) by HRI. In New Mexico, the mineral estate is the dominant estate, and the surface the subservient estate. Even without surface ownership, HRI would have the right to access and use the surface estate as necessary to mine its mineral estate. *Transwestern*

Pipeline Co. v. Kerr McGee Corp., 492 F.2d 878 (10th Cir. 1974). However, surface use and access are not at issue in this determination because HRI privately owns both the surface and minerals on the 160 acre Section 8 property.

NMMA concurs with the New Mexico Environmental Department's March 3, 2005 letter that maintains *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998) establishes the criteria by which the jurisdictional status of Section 8 should be determined. The *Venetie* case examined the 18 U.S.C. § 1151 definition of Indian Country. While this statute by its terms related only to federal criminal jurisdiction, its definition has also been applied to civil jurisdiction matters. *Blatchford v. Sullivan*, 904 F.2d 542, 543 (10th Cir. 1990) (observing that regardless of whether a case is criminal or civil, resolving whether the land in question is in Indian Country is the same legal issue). Because Section 8 is fee land, there can be no question that the land was never set aside by the federal government for the exclusive use of Indians. Further, the land in question is administered by its owner, HRI, not the federal government. Thus, according to the *Venetie* factors of federal set aside and federal superintendence, HRI's Section 8 property is not Indian Country.

Prior multi-factor tests for Indian Country were rejected by the Supreme Court in *Venetie*. The Supreme Court rejected the *Watchman* test followed at one time in the Tenth Circuit because it reduced federal set aside and superintendence requirements to mere considerations rather than being the determinative factors. 522 U.S. 527, 531 n. 7.

The *Venetie* federal set aside and federal superintendence factors have been followed by the Ninth Circuit in *Blunk v. Arizona Department of Transportation*, 177 F.3d 879 (9th Cir. 1999). The *Blunk* case makes it very clear that fee land such as HRI's Section 8 property was never set aside by the federal government for Indian use, and therefore, cannot be Indian Country. *Id.* at 883. *See also United States v. M.C.*, 311 F.Supp.2d 1281 (D.C.N.M. 2001), *Thompson v. County of Franklin*, 127 F.Supp.2d 145 (N.D.N.Y. 2000) and *Dark-Eyes v. Commissioner of Revenue Services*, 276 Conn. 559 (2006) for other post *Venetie* applications of the federal set aside and federal superintendence factors as the sole issue of review for a determination of what does or does not constitute Indian Country.

The New Mexico Supreme Court adopted the teachings of *Venetie* in *State v. Frank*, 53 P.2d 404 (N.M. 2002). This case involved the proper venue for criminal charges from a car accident that occurred on BLM land in the Checkerboard Area. The New Mexico Supreme Court, following *Venetie*, explicitly rejected the dicta of *HRI, Inc. v. Envtl. Prot. Agency*, 198 F.3d 1224 (10th Cir. 2000) by declining to incorporate a community of reference test into New Mexico case law. *Id.* at 549. The court stated that under New Mexico law it is error to require a community of reference threshold inquiry. *Id.* at 549. As recognized by the *Venetie* court, other courts have addressed the dependent Indian community issue without trying to answer the

threshold question of the appropriate community to use. The *Venetie* federal set aside and federal superintendence review redirects the proper attention to specific land and its title and away from the more nebulous issue of community cohesiveness. *Id.* at 549.

While NMMA does not feel that there is any need for EPA to look beyond the federal set aside and federal superintendence factors regarding HRI's Section 8 property, we are aware that in past actions involving the status of HRI's 160 acres in Section 8, the Navajo Nation has taken the position that the 160 acre property is somehow part of the Churchrock Chapter. This position has been overruled by the New Mexico State Engineer and the McKinley County District Court in water right adjudications involving this tract of land. Any analysis of the status of HRI's Section 8 property must be confined to this tract alone. This is consistent with *Venetie*, *Blunk* and *United States v. Roberts*, 185 F.3d 1125, 1133, n. 5 (10th Cir. 1999). HRI's Section 8 property is the land in question, and it is not occupied by Indians. To extend any community of reference designation to surrounding lands outside of HRI's 160 acre tract would render the mandatory federal set aside and federal superintendence factors meaningless.

Given the clear direction of *Venetie* and decision following it in *State v. Frank*, NMMA believes the non-Indian Country status of HRI's fee land is the only legal result for EPA. The finding that Section 8 is not Indian Country is so simple that NMMA would urge EPA to issue a prompt decision without further delay to this effect, so that HRI can commence its operations and produce fuel for our nation's growing nuclear requirements.

Sincerely,

Mike Bowen
Executive Director
New Mexico Mining Association