January 31, 2006

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

Dear Mr. Albright:

RE: Determination of Indian Country Status

The National Mining Association (NMA) submits these comments in response to the Environmental Protection Agency's (EPA) request for comments regarding the possible Indian country status of certain land located in the southeast portion of Section 8, Township 16 N, Range 16 W, in the State of New Mexico ("Section 8). 70 Fed. Reg. 66402 (November 2, 2005). This land does not constitute a dependent Indian community under 18 U.S.C. § 1151 or the test outlined by the United States Supreme Court in *Alaska v. Native Village of Venetie Tribal Government,* 522 U.S. 520 (1998).

NMA represents producers of most of America's coal, metals, industrial and agricultural minerals; manufacturers of mining and mineral processing machinery and supplies; transporters; financial and engineering firms; and other businesses related to coal and hardrock mining. These comments are submitted by NMA on behalf of its member companies who engage in uranium mining near Indian country and would need underground injection control (UIC) permits from either a State or EPA under the Safe Drinking Water Act (SDWA).

Background

Section 8 is owned by Hydro Resources, Inc. (HRI) in fee simple. It is not currently, nor has it ever been part of an Indian reservation. No Indian Nation nor any individual Indian has any property interest in Section 8. HRI proposes to operate an *in-situ* leach (ISL) uranium mine on Section 8. To operate the mine, HRI must apply for and receive an UIC permit under the SDWA. If Section 8 is private land and not Indian country, the State of New Mexico would issue the SDWA UIC permit. For Indian country, only EPA is authorized to issue the permit.

HRI sought and received an UIC permit from the State of New Mexico for Section 8 authorizing the recirculation of mining fluids into the aquifer in which HRI will be performing its mining activities. The permit was challenged by the Navajo Nation, which claimed that Section 8 is within Indian country and therefore, EPA must administer the UIC program. EPA determined that Section 8 was in "dispute" and thus, EPA was the appropriate agency to issue the UIC permit. The State of New Mexico and HRI challenged EPA's determination. The United State Court of Appeals for the Tenth Circuit ("Tenth Circuit") upheld EPA's determination that Section 8 was in dispute but remanded the matter to EPA to make a final administrative decision on the Indian country status of the disputed land. *See HRI v. EPA,* 198 F. 3d 1224 (2000). Furthermore, the State of New Mexico formally requested that EPA make a decision on the Indian country status of Section 8. Hence, the request from EPA for comments on the possible Indian country status of Section 8.

Statutory Definition of Indian Country

"Indian Country" is defined at 18 U.S.C. § 1151 to mean "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States government . . . (b) all dependent Indian communities within the borders of the United States . . . and (c) all Indian allotments, the Indian titles to which have not been extinguished . . . ." Because Section 8 is owned by HRI in fee simple, is not and never has been part of a reservation, and is not allotted lands, only one question remains: is Section 8 part of a dependent Indian community?

***Venetie* is Controlling Supreme Court Authority for Determining Dependent Indian Community**

In *Venetie,* the Supreme Court answered the question of what land constitutes a dependent Indian community under 18 U.S.C. § 1151(b). The Supreme Court held that for lands to be considered a dependent Indian community they must:

> satisfy two requirements – first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence.

522 U.S. at 527. The Supreme Court reviewed the legislative history of section 1151(b) as well as prior case law to determine that federal set-aside and federal superintendence requirements are mandatory and cannot be reduced to "mere considerations." Id. at 531 n.7. Thus, it is clear that *Venetie* mandates a two-prong test for determinations of dependent Indian community. Neither prong has been met for Section 8. Section 8 has not been set aside by the federal government as part of a reservation or for any other use by the Indians. Neither is "the land in question occupied by an Indian community." Id. at 531. Section 8 is owned by HRI in fee simple. Thus, the first prong of *Venetie* is not met.

Since Section 8 cannot satisfy the first prong of *Venetie,* EPA need not address the second prong since *Venetie* requires both prongs to be met. However, we note that Section 8 does not meet the second prong of *Venetie*. Section 8 is not under

federal superintendence since the federal government has not "actively controlled the lands in question" by "acting as a guardian for the Indians." Id. at 533. HRI, not the government, owns and "controls" Section 8. Since Section 8 does not meet either prong of the *Venetie* requirements, EPA must determine that Section 8 cannot constitute a dependent Indian community and therefore cannot constitute Indian country.

The Pre-Venetie Tenth Circuit Test Is Inapplicable

The multi-part test adopted by the Tenth Circuit in *Pittsburg & Midway Coal Mining Co. v. Watchman,* 52 F.3d 1531 (1995), is no longer applicable to determining whether lands constitute a dependent Indian community.[1] The *Watchman* test is very similar to the Ninth Circuit test the Supreme Court struck down in *Venetie.* The Tenth Circuit recognizes that *Venetie* "require[s] some modification of the emphases in the second step of our dependent Indian community test in W*atchman.*" In dicta, however, the Tenth Circuit suggests that "nothing in *Venetie* speaks to the propriety of the first element of that [Watchman] test – determination of the proper community of reference." 198 F.3d at 1236. The Tenth Circuit, however, cannot ignore binding Supreme Court precedent. *See Hutto v. Davis*, 454 U.S. 370, 375 (1982) ("unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be").

Use of the *Watchman* community of reference test directly conflicts with the *Venetie* two prong test by relegating the mandatory federal set-aside and superintendence requirements to mere considerations. The two *Venetie* requirements must be met before land can be considered a dependent Indian community. *See Carcieri v. Norton*, 398 F.3d 22 (1st Cir. 2005) ("The Supreme Court has held that a federal set-aside <u>and</u> a federal superintendence requirement must be satisfied for a finding of a dependent Indian community.)(Emphasis in the original); *see also New Mexico v. Frank,* 52 P.3d 404 (N.M. 2002*) (*"in light of the clear guidelines in the *Venetie* opinion, we decline to incorporate a community of reference inquiry into our case

[1] The first part of the *Watchman* test requires a determination of a proper community of reference by looking to the status of the area in question as a community and the relationship of the area in question to the surrounding area. The next part of the test involves analysis of four additional factors: (1) whether the United States has retained title to the lands which it permits the Indians to occupy and authority to enact regulations and protective laws respecting this territory; (2) the nature of the area in question, the relationship of the inhabitants in the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area; (3) whether there is an element of cohesiveness manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality; and (4) whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples. The *Watchman* test uses essentially the same factors as the Ninth Circuit six-part test rejected by the Supreme Court in *Venetie*.

law."). Since Section 8 does not meet the criteria mandated by the Supreme Court in *Venetie,* EPA need not and should not undertake an analysis of Section 8 as a dependent Indian community under the Tenth Circuit *Watchman* test.

Conclusion

EPA's notice requests public input regarding whether Section 8 is part of a dependent Indian community under 18 U.S.C. § 1151(b) and thus considered to be Indian country. As stated above, NMA believes this question is appropriately and properly answered by application of the two-prong test enunciated by the United States Supreme Court in *Venetie.* Since Section 8 fails both prongs of the *Venetie* test, it cannot be a dependent Indian community and therefore, it cannot be considered Indian country. The Tenth Circuit multi-prong test for determining a dependent Indian community is contrary to *Venetie* and cannot stand. Since Section 8 is not Indian country, the New Mexico Environment Department, not EPA, is the appropriate agency to issue the UIC permit to HRI.

Sincerely,

Katie Sweeney
Associate General Counsel