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January 31, 2006

VIA ELECTRONIC MAIL AND FACSIMILE

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Re: EPA "Indian Country" Determination of Hydro Resources, Inc. Property

Dear Mr. Albright:

On November 2, 2005, the U.S. Environmental Protection Agency ("EPA" or "Agency") requested comments on whether any of the approximately 160 acres of land owned by Hydro Resources, Inc. ("HRI") in the southeast portion of Section 8, Township 16N, Range 16W, in the State of New Mexico constitutes dependent Indian community and, therefore, "Indian country" under 18 U.S.C. § 1151(b).[1] *See* 70 Fed Reg. 66,402 (Nov. 2, 2005). NZ Legacy, LLC, along with its sister company, NZ Uranium, LLC (collectively "NZ Uranium") own property in New Mexico and Arizona and conduct real estate investment and development in connection with that property. We hereby submit, on behalf of NZ Uranium, the following comments in response to EPA's request.

NZ Uranium supports a determination by EPA that the HRI property does not qualify as dependent Indian community. As you know, in 1998, the U.S. Supreme Court in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), established the framework governing this analysis. The Court held that "dependent Indian communities" must "satisfy two requirements—first,

[1] "Indian country" is defined by federal statute to include three types of land: (1) "land within the limits of any Indian reservation"; (2) "dependent Indian communities"; and (3) "Indian allotments." 18 U.S.C. § 1151.

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." *Id.* at 527.

It is our understanding that no part of the HRI property has ever been set aside by the federal government for the use of Indians, nor is any part of the property subject to federal superintendence. Moreover, both the surface and mineral rights of the property are entirely owned in fee by HRI. Thus, based on the two-prong test of *Venetie*, EPA should determine—with ease—that the HRI property does not qualify as dependent Indian community and, consequently, is not "Indian country" under 18 U.S.C. § 1151(b).[2] The Agency requested comment, however, on a much broader range of issues:

> To ensure EPA has all possible relevant information for making its determination on the Section 8 land status, EPA requests that the public submit information on the following items: the nature of the area in question; Indian and non-Indian land uses; relevant aquifer uses; land ownership patterns; use of area infrastructure and services by Indians and non-Indians; the relationship of inhabitants in the area to Indian tribes and to the Federal government; activities of government agencies toward the area; elements of cohesiveness manifested either by economic pursuits in the area, common interests, or needs of inhabitants supplied by the locality; whether any lands have been set apart for the use, occupancy, and protection of dependent Indian peoples; whether that land is subject to Federal supervision; and any other relevant information that might assist EPA in making its determination.

70 Fed Reg. at 66,403.

Only the final items in this series are related to the two-prong test established by the Supreme Court in *Venetie*. The other factors apparently are general considerations derived from Tenth Circuit case law, which suggests that courts should continue to identify the relevant "community of reference" before conducting the Supreme Court's "dependent Indian community" analysis. *See HRI, Inc. v. Envtl. Prot. Agency*, 198 F.3d 1224 (10th Cir. 2000); *see also Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531 (10th Cir. 1995). Such a precursory analysis, however, is unnecessary and likely improper. The Supreme Court conducted no "community of reference" analysis in *Venetie*, and that analysis has been expressly rejected by at least one court. *See New Mexico v. Frank*, 52 P.3d 404, 409 (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 law.").

Moreover, the factors employed in the "community of reference" analysis, such as elements of community cohesiveness and relationship of the surrounding area, are simply irrelevant to whether the federal government has set aside a specific parcel of land for Indian use or whether the government supervises that property. Thus, the Tenth Circuit's focus on the relevant community is irrelevant, at a

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[2] The Supreme Court made clear that these two factors cannot be satisfied through mere circumstantial evidence: "The federal set-aside requirement also reflects the fact that because Congress has plenary power over Indian affairs, *see* U.S. Const., Art. I, § 8, cl. 3, <u>some explicit action</u> by Congress (or the Executive, acting under delegated authority) <u>must be taken to create or to recognize Indian country</u>." *Venetie*, 522 U.S. at 531 n.6 (emphasis added).

minimum, in light of the clear framework established by the Supreme Court in *Venetie*. For example, in *United States v. M.C.*, 311 F. Supp. 2d 1281 (D.N.M. 2004), the District Court of New Mexico conducted the "community of reference" analysis as directed by the Tenth Circuit in *HRI*, but the court found that property transferred by the federal government to the Bureau of Indian Affairs for use as a school for Native American students had not been set aside for the use of Indians as Indian land and, therefore, was not "Indian country." *Id.* at 1295-97; *see also id.* at 1295 ("As a review of the case law makes clear, there has never been a finding of a dependent Indian community unless the community at issue was located on tribal lands or land held in trust for Native Americans."). In addition, the year after the issuance of *Venetie*, the Tenth Circuit in *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999), held that tribal complex property was "dependent Indian community" because it had been validly set aside for the tribe and was under the superintendence of the federal government. *Id.* at 1133. The *Roberts* court, however, conducted no "community of reference" analysis at all, and, notably, the judge that authored *Roberts* had also authored *Watchman*, 52 F.3d 1531, wherein the "community of reference" analysis was established four years earlier.[3]

In short, the *Venetie* decision directs the analytical focus not toward a balancing of abstract and subjective factors involving the nature, relationship, and use of the land but rather to the formal treatment of the land by the federal government, as manifest in the explicit "set aside" and "superintendence" requirements. 522 U.S. at 527; *see also New Mexico v. Dick*, 981 P.2d 796, 798 (N.M. App. 1999) (noting that the "*Venetie* opinion indicates a change in the focus of the 'dependent Indian community' analysis by shifting the emphasis from the inhabitants and their day-to-day relationship with the government to a land-based inquiry") (citations omitted).

We understand that the "community of reference" analysis from *Watchman* remains an issue that must be taken into account as EPA determines whether any of the HRI property constitutes dependent Indian community. We are concerned, however, that the factors to be considered by the Agency may be afforded improper weight. Even assuming that it is appropriate to apply the *Watchman* test, the factors involved in that analysis should not be evaluated equally with the factors of federal set aside and superintendence. *See Blunk v. Ariz. Dep't of Transp.*, 177 F.3d 879, 883 (9th Cir. 1999) (stating that in *Venetie*, the Supreme Court "rejected a 'textured' approach that defined Indian country through a multi-factor balancing test" and instead adopted the "narrow" two-prong "set aside" and "superintendence" test) (quoting *Venetie*, 522 U.S. at 527, 531 n.7). Indeed, any "community of reference" factors can only establish the relevant community; they cannot work to replace—or even impact—the two *Venetie* requirements. It is the position of NZ Uranium, then, that regardless of EPA's conclusion with respect to relevant aquifer uses, the nature of the land, elements of cohesiveness, or any other factors stemming from the "community of reference" analysis, the HRI property has not been set aside by the federal government for the use of Indians, is not subject to federal superintendence, and thus is not dependent Indian community.

A contrary conclusion would not only be inconsistent with federal case law but would also establish a precedent with far-reaching negative implications on owners of real property located in the Southwest. Property ownership is a basic constitutional right; to allow a laundry list of subjective

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[3] The author of *Roberts*—Judge Porfilio—had authored *Watchman* under the name of Moore. *See Roberts*, 185 F.3d 1125; *Watchman*, 52 F.3d 1531.

factors to govern the status of property will erode confidence in that right and, as a practical matter, will create significant uncertainty in the minds of property owners who have acquired legitimate title to their property, whether recently or long ago.

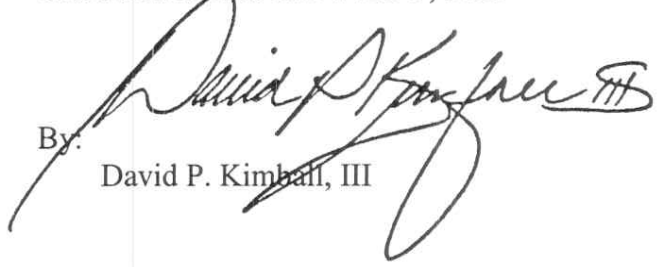
NZ Uranium, for example, obtained title to its property through a series of transactions originating with land grants from the federal government that were made in connection with the construction of the transcontinental railroad in the 19th century. Like the property under consideration by EPA, the property owned by NZ Uranium (including both surface and mineral rights) is owned privately in fee, has never been set aside by the federal government for the use of Indians, and is not subject to federal superintendence. Under *Venetie*, the property plainly is not Indian country. However, if EPA were to determine that the HRI property is dependent Indian community, companies such as NZ Uranium will necessarily doubt the validity of a title that was properly acquired and that has never before been called into question.

The Supreme Court's clear focus on the federal government's formal treatment of the land in *Venetie* fully protects the rights and expectations of private property owners. NZ Uranium urges the Agency, therefore, to apply the straightforward two-prong analysis established in *Venetie* and to conclude that no part of the HRI property at issue constitutes dependent Indian community.

We appreciate the opportunity to submit comments on EPA's consideration of whether the HRI property qualifies as "Indian country" under 18 U.S.C. § 1151(b). Should you have any questions with respect to these comments, please do not hesitate to contact us.

Very truly yours,

GALLAGHER & KENNEDY, P.A.



By:
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