



The Honorable Anthony Tanner
The Honorable Carol Bowman-Muskett
The Honorable Genevieve Jackson
207 West Hill Avenue
Gallup, New Mexico 87301

Re: Ordinance No. Nov.-16-04; An Ordinance Establishing a Moratorium on Uranium Mining, Processing and Exploration; Objections of the State Land Commissioner

December 12, 2016

Dear Members of the McKinley County Commission:

On behalf of McKinley Collaborative for Health Equity, I write to respond to the December 8, 2016 letter from the State of New Mexico Commissioner of Public Lands ("Land Commissioner") to the McKinley County Commission ("Commission"). In his letter, the Land Commissioner makes a series of objections to the Commission's proposed moratorium on uranium mining and processing. However, the bulk of the Land Commissioner's objections are baseless. Both New Mexico and federal law are clear that the Commission is well within its authority to enact and enforce the proposed ordinance as currently written.

Of the Land Commissioner's four primary objections, perhaps the most reckless is his objection based on the assertion that the proposed ordinance will effect a regulatory taking. Dec. 8 Letter at 3. Not only is this assertion legally incorrect under the current circumstances, it seems calculated to intimidate, rather than inform, the Commission.

In support of his assertion, the Land Commissioner the U.S. Supreme Court case *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S 302 (2002). While the Court in that case outlined the factors to be considered in a regulatory taking, it ultimately held that a 32 month moratorium on real estate development in the Lake Tahoe area was **not** a taking under the 5th Amendment to the U.S. Constitution. *Id.* at 342. See also, *Santa Fe Village Venture v. City of Albuquerque*, 914 F. Supp. 478, 483 (N. M.

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1995)(30-month moratorium on development of lands within the Petroglyph National Monument was not a taking). In other words, the government in that case did not take the plaintiff's property and therefore did not incur any financial liability. Thus, the very case the Land Commissioner cites in support of his objection simultaneously undermines it. Moreover, the 36 month moratorium in the proposed ordinance is squarely within the range of time which the U.S. Supreme Court and Tenth Circuit court of appeals has deemed within a government's authority to enact without effecting a taking.

Perhaps more troubling than the inconsistency in the Land Commissioner's argument is its apparent intent. As an agency of state government, the Land Commissioner does not, and cannot ever have, standing to advance a takings case. The Land Commissioner's intent, therefore, seems calculated solely to intimidate the Commission.

Second, the Land Commissioner asserts that the proposed ordinance would be unenforceable on state trust lands. Dec. 8 Letter at 1-2. Further, the Land Commissioner asserts that the proposed ordinance must explicitly state this limitation of authority. *Id.* Finally, the Land Commissioner makes the incredible - and unsupported - assertion that the proposed ordinance would be unenforceable on lands adjacent to state trust lands. *Id.* at 2.

While it may be the case that the proposed ordinance would be unenforceable on state trust lands, there is no requirement that such a limitation on County authority be expressed in an ordinance. However, should the Commission be inclined to make such an express limitation, it would be free to do so.

Whether or not the ordinance would be enforceable on state trust lands, it would clearly be enforceable on non-state trust lands, except tribal lands, that are adjacent to or contiguous with state trust lands. The New Mexico Constitution expressly limits the Land Commissioner's authority to the direction, control, care and disposition of **public lands**. N.M. Const. Art. XIII, § 2 (emphasis added). By its express terms, the New Mexico Constitution limits the Land Commissioner's authority to state trust lands. The Land Commissioner cites no authority to the contrary, and none exists. The Land Commissioner's incredible and audacious assertion that he could exercise authority over non-trust lands adjacent to state trust lands is wholly without substance.

Finally, the Land Commissioner erroneously asserts that the New Mexico Mining Act would pre-empt the Commission's ordinance. Dec. 8 Letter at 2. However, given

the current circumstances, the New Mexico Mining Act, NMSA 1978, § 69-36-1 *et. seq.* ("Mining Act") would not pre-empt the proposed ordinance.

In *San Pedro Mining Corp. v. Bd. of County Commissioners*, the New Mexico Court of Appeals held that the Mining Act did not pre-empt a Santa Fe County ordinance regulating mining. *Id.*, 1996-NMCA-002, ¶ 14. The Court of Appeals based its decision on the fact that the Mining Act does not address issues that are traditionally the concern of county governments such as traffic impacts, land use, and nuisances. *Id.*, ¶ 12.

The proposed ordinance clearly addresses these areas of traditional county concern. Moreover, the halt in mining activities that the proposed ordinance contemplates does not prohibit anything the Mining Act permits because of the temporary nature of the moratorium.

In sum, while the Land Commissioner is unquestionably within his right to "object" to the Commission's proposed ordinance, those objections do not carry any more weight than the opinions of any other New Mexico resident and should not dissuade the Commission from carrying out the will of McKinley County residents. Thank you for your attention to this matter and please do not hesitate to contact me with any questions or concerns.

Sincerely,



Eric Jantz
Staff Attorney

cc: Anthony Dimas , Jr.
Douglas W. Decker, Esq.