**No. 07-9506**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

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**HYDRO RESOURCES, INC,**

**Petitioner,**

**v.**

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

**Respondent,**

**NAVAJO NATION,**

**Intervenor.**

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**ON PETITION FOR REVIEW OF A FINAL ACTION OF THE**
**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

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# EPA'S MERITS BRIEF

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**ORAL ARGUMENT REQUESTED**

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## STATEMENT OF JURISDICTION

Petitioner Hydro Resources, Inc. ("HRI") challenges EPA's determination that EPA is the appropriate agency to consider any underground injection control ("UIC") permit applications under the Safe Drinking Water Act ("SDWA"), with respect to approximately 160 acres of land located in the southeast portion of Section 8, Township 16 North, Range 16 West, in New Mexico ("Section 8 land") upon which HRI plans to operate a uranium mine. EPA determined that it is the appropriate permitting authority because the Section 8 land is part of a dependent Indian community under 18 U.S.C. § 1151(b).

Under 42 U.S.C. § 300j-7(a)(1), the courts of appeals have jurisdiction over petitions challenging final EPA actions under the SDWA if brought within 45 days of the challenged EPA action. 42 U.S.C. § 300j-7(a)(2).[1/] While HRI's petition was timely filed, this Court lacks jurisdiction over the petition because HRI lacks standing to challenge EPA's determination.

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[1/] Certain specific challenges, not relevant here, may be brought only in the United States Court of Appeals for the District of Columbia Circuit, or in the district courts. See 42 U.S.C. §§ 300j-7(a)(1), (b).

## STATEMENT OF THE ISSUES

1. Whether HRI has standing to challenge EPA's determination that EPA is the appropriate SDWA UIC permitting authority for HRI's uranium mine on the Section 8 land when there is no question that a permit is required, and when EPA has taken no action to issue or deny a permit?

2. Whether HRI is collaterally estopped from asserting that a community of reference analysis is not allowed when determining whether the Section 8 land is within a dependent Indian community under 18 U.S.C. § 1151(b) when this Court held in HRI v. EPA, 198 F.3d 1224 (10th Cir. 2000), that such an analysis is required?

3. Whether EPA's determination that the Section 8 land is within a dependent Indian community under 18 U.S.C. § 1151(b) is consistent with the statute and this Court's case law, and supported by the administrative record?

## STATEMENT OF THE CASE

### I. Nature of the Case

#### A. Introduction

This case follows from the Court's decision in previous litigation involving HRI, EPA and the New Mexico Environment Department ("NMED"). HRI v. EPA, 198 F.3d 1224. HRI plans to operate a uranium mine on the Section 8 land,

which is located within the Church Rock Chapter of the Navajo Nation in northwestern New Mexico. See id. at 1231; AR 16b (map showing location of Section 8 land within Church Rock Chapter). HRI must obtain a permit under the SDWA UIC program in order to operate its proposed mine. See HRI v. EPA, 198 F.3d at 1232-35.[2/]

### B. Statutory and Regulatory Background

Congress enacted the SDWA, 42 U.S.C. §§ 300f - 300j-26, in 1974 to ensure that the nation's sources of drinking water are protected against contamination. Part C of the SDWA, 42 U.S.C. §§ 300h - 300h-8, established a regulatory program "to prevent underground injection which endangers drinking water sources." 42 U.S.C. § 300h(b). Among other things, the SDWA directed EPA to promulgate regulations containing minimum requirements for State UIC programs, 42 U.S.C. § 300h, and required all States that had been identified by EPA to submit UIC programs that met those minimum requirements. Id. at § 300h-1; see also 40 C.F.R. § 144.1(e) (requiring all 50 States to submit UIC programs). Once EPA approves a State UIC program, that State is granted "primary enforcement responsibility" ("primacy") for administering that UIC program. 42 U.S.C. §

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[2/] Because the Court set forth the relevant statutory and regulatory background of the SDWA UIC program in HRI v. EPA, and because this case does not involve the details of that program, we provide only a brief discussion of the program here.

300h-1(b)(3). The SDWA also directed EPA to promulgate a Federal UIC program that meets the minimum requirements of the Act, to cover those circumstances where EPA disapproves a State's UIC program or where a State fails to submit a UIC program for approval. 42 U.S.C. § 300h-1(c).

EPA exercises SDWA primacy over lands that meet the definition of "Indian lands" under 40 C.F.R. § 144.3. EPA has defined "Indian lands" under 40 C.F.R. § 144.3 to mean lands that are "Indian country" under 18 U.S.C. § 1151. "Indian country" is defined in 18 U.S.C. § 1151 as:

> (a) All land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;
>
> (b) All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State; and
>
> (c) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151. See also 40 C.F.R. § 144.3 (same); HRI v. EPA, 198 F.3d at 1248 (discussing 40 C.F.R. § 144.3 and 18 U.S.C. § 1151). If the Indian country status of land is in dispute, then EPA administers the UIC program with respect to that land in order to ensure there will be no disruption in the regulatory program.

See 53 Fed. Reg. 43096, 43097 (Oct. 25, 1988); HRI v. EPA, 198 F.3d at 1233.[3/]

No matter which entity exercises primacy under the SDWA, new underground injection is prohibited unless specifically authorized by a permit or by rule. See 40 C.F.R. §§ 141.11, 144.31. In addition, injection wells cannot be operated in a manner that would allow endangerment of an underground source of drinking water. 42 U.S.C. 300h(b)(1); 40 C.F.R. § 144.12(a) (prohibiting endangerment), 144.3 (defining "underground source of drinking water"). An aquifer may be excluded from the prohibition against endangerment if, among other things, it will never serve as a source of drinking water. 40 C.F.R. §§ 144.7, 146.4. See also HRI v. EPA, 198 F.3d at 1244 (discussing exemption process). A UIC permit is nonetheless required for an injection to an aquifer that has been exempted from the general prohibition against endangerment. 40 C.F.R. § 144.11.

EPA has approved New Mexico's UIC program with respect to the Class III wells that are used for in situ leach uranium mining for lands in New Mexico other

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[3/] The SDWA also allows EPA to treat Indian Tribes in the same manner as States ("TAS") if certain statutory criteria are satisfied. 42 U.S.C. § 300j-11. See 40 C.F.R. sbpt. E. While not at issue here, EPA has approved the Navajo Nation's TAS request under the SDWA to administer the public water system supervision program with respect to certain Indian lands in New Mexico. HRI v. EPA, 198 F.3d at 1232-33. This approval does not include the Section 8 land. Id. In approving the Navajo Nation's TAS application, EPA made no determination as to the Indian country status of the Section 8 land. See AR 13b (Appendix to Navajo Nation comments at 234, 237-38).

than Indian lands. HRI v. EPA, 198 F.3d at 1232. EPA administers the UIC program for Indian lands in New Mexico. Id. See also 40 C.F.R. sbpt. HHH (EPA's regulations for Indian lands in New Mexico).

### C. Factual and Procedural Background

#### 1. The Previous Litigation

In the previous case, NMED and HRI challenged EPA's determination that the Indian country status of the Section 8 land was in dispute and that, therefore, EPA was the appropriate UIC program permitting authority with respect to HRI's planned mining activities. HRI v. EPA, 198 F.3d at 1248. Among other things, NMED and HRI argued that no legitimate dispute could exist as to the jurisdictional status of the Section 8 land under Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520 (1998). HRI v. EPA, 198 F.3d at 1248.

The Court rejected those arguments, finding "there is a legitimate dispute, following Venetie, as to whether Section 8 falls within a 'dependent Indian community' under 18 U.S.C. § 1151(b)." Id. (emphasis added). In particular, the Court found that there were grounds for dispute over the proper "community of reference" for the Section 8 land under Pittsburg & Midway Coal Mining Co., v. Watchman, 52 F.3d 1531, 1542-45 (10th Cir. 1995). HRI v. EPA, 198 F.3d at 1248. The Court determined that Venetie did not address the propriety of

Watchman's requirement that a community of reference first be established when determining whether land falls within a dependent Indian community. Id. at 1248-49. The Court held that

> [b]ecause Venetie does not speak directly to the issue, barring en banc review by this court, Watchman . . . continues to require a "community of reference" analysis prior to determining whether land qualifies as a dependent Indian community under the set-aside and supervision requirements of 18 U.S.C. § 1151(b).

Id. at 1249. The Court specifically noted that the Section 8 land might qualify as a dependent Indian community if the entire Church Rock Chapter is determined to be the appropriate community of reference. Id. The Court therefore held that EPA had not abused its discretion in determining that a legitimate dispute existed as to the Indian country status of the Section 8 land. Id. It remanded the matter to EPA for a determination of whether the Section 8 land falls within a dependent Indian community. Id. at 1254.

### 2. EPA's Determination

After the previous case, EPA understood that HRI no longer intended to pursue a UIC permit for the Section 8 land. Land Status Determination ("Determination") at 1.[4] EPA therefore did not believe it was necessary to resolve

[4] A copy of the Determination is included in the Addendum.

the dispute as to the Indian country status of the Section 8 land. Id. NMED then requested that EPA resolve the dispute after HRI revived the issue with NMED. Id.

Thereafter, EPA published a "notice of prospective determination" in the Federal Register in which it sought public comment regarding the question of whether the Section 8 land is within a dependent Indian community under 18 U.S.C. § 1151(b). 70 Fed. Reg. 66,402 (Nov. 2, 2005). EPA noted the two-part test for determining whether a dependent Indian community exists under Venetie, which is as follows: first, whether land has been set aside by the Federal government for the use of Indians, and second, whether the land is subject to Federal supervision. Id. at 66,403. See Venetie, 533 U.S. at 530-31. EPA also noted this Court's holding in HRI v. EPA, 198 F.3d at 1249, that a community of reference analysis is required for the Section 8 land. 70 Fed. Reg. at 66,403. To ensure that it would have all possible relevant information before making its determination, EPA requested that interested parties submit information on a number of specific topics along with "any other relevant information that might assist EPA in making its determination." Id. EPA noted that it was soliciting the views of the Department of the Interior ("DOI") on the issue in recognition of DOI's expertise in Indian country matters. Id.

EPA provided the public comments it received to DOI and specifically sought DOI's opinion regarding the Indian country status of the Section 8 land. See Determination at 2. EPA officials, accompanied by an attorney from the DOI Solicitor's Office, visited the immediate vicinity of the Section 8 land and other areas within the Church Rock Chapter. See id.

DOI issued a formal, written opinion in which it determined that the Section 8 land is within a dependent Indian community under 18 U.S.C. § 1151(b). AR 39 ("DOI Opinion").[5/] In its written opinion, DOI discussed the relevant background, including this Court's decisions in HRI v. EPA and Watchman, among others, as well as the Supreme Court's decision in Venetie. DOI Opinion at 1-5. DOI then determined that the Church Rock Chapter was the appropriate community of reference under Watchman with respect to the Section 8 land. DOI Opinion at 5-9. DOI next determined that the Church Rock Chapter satisfied the Federal set-aside and superintendence tests under Venetie. Id. at 9-11. DOI concluded that the Section 8 land was located within a dependent Indian community, the Church Rock Chapter. Id. at 11.

When making its Determination, EPA considered the DOI opinion, along with the public comments it received and the relevant case law. Determination at

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[5/] The DOI opinion is attached as an Appendix to EPA's Determination.

2. EPA also consulted with the Navajo Nation consistent with the Federal government's trust relationship with the Tribe. Id. EPA conducted its own independent analysis with respect to the Section 8 land, in which it agreed with DOI's ultimate conclusions regarding the Indian country status of the Section 8 land. Id. at 3-13.

EPA first analyzed the Supreme Court's decision in Venetie, and this Court's decisions in HRI v. EPA and Watchman, with respect to the factors that must be considered in determining whether land falls within a dependent Indian community under 18 U.S.C. § 1151(b). Id. at 3-6. EPA rejected HRI's suggestion that its analysis must be limited to the Section 8 land because it determined that neither Section 8 nor the Section 8 land is an appropriate community of reference. Id. at 7-8. EPA then analyzed whether the Church Rock Chapter was the appropriate community of reference, as had been suggested by the Navajo Nation and several Indian law professors, and as had been determined by DOI. Id. at 8-10. After analyzing the Church Rock Chapter under Watchman and its progeny, EPA determined that the Church Rock Chapter was the appropriate community of reference. Id. EPA then examined the Venetie Federal set-aside and superintendence test, and applied the test to the Church Rock Chapter. Id. at 10-13. EPA determined that the Church Rock Chapter satisfied the two-part Venetie

test. Id. Consistent with the DOI Opinion, EPA determined that the Section 8 land is part of a dependent Indian community, the Church Rock Chapter, and that EPA is therefore the proper permitting authority under the SDWA UIC program for HRI's proposed uranium mine.

HRI has not sought a UIC permit from EPA with respect to its planned mining activities on the Section 8 land, and EPA has taken no action to issue or deny such a permit.

## STANDARD OF REVIEW

Because the SDWA does not articulate a standard or scope of review for final agency actions, the appropriate default for the standard and scope of review is that of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. See, e.g., HRI v. EPA, 198 F.3d at 1241. Under the APA, a reviewing court "shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

A reviewing court should apply the "arbitrary or capricious" standard to the agency decision based on the record the agency presents to the reviewing court. Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985). See also 5 U.S.C. § 706 (courts "shall review the whole record or those parts of it cited by a

party"). When there is a contemporaneous explanation of the agency decision, the validity of that action "must stand or fall on the propriety of that finding, judged of course, by the appropriate standard of review," and thus "[t]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." Camp v. Pitts, 411 U.S. 138, 142 (1973).

The arbitrary and capricious standard "is narrow and a court is not to substitute its judgment for that of the agency." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). An agency action is arbitrary and capricious only "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Id. Under this standard, the reviewing court may not set aside agency action merely because the court would have decided the issue differently, so long as the agency has considered the relevant factors and offered a rational explanation for its action. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

EPA's factual determinations are entitled to substantial deference. See

Arkansas v. Oklahoma, 503 U.S. 91, 112 (1991). EPA's factual determinations should be upheld as long as they are supported by the administrative record, even if there are alternative findings which could also be supported by the record. Id. Deference is particularly due to EPA's factual determinations underlying the Federal set-aside and Federal superintendence requirements here, because those factual determinations were informed by, and are supported by, the factual findings of the Department of the Interior, which administers the trust lands and Federal lands within the Church Rock Chapter, and which has been entrusted by Congress with "the management of Indian affairs and of all matters arising out of Indian relations." 25 U.S.C. § 2. See Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351, 357 (1962) (recognizing DOI's expertise with respect to Indian affairs); Cheyenne-Arapaho Tribes of Oklahoma v. Oklahoma, 618 F.2d 665, 667-68 (10th Cir. 1980) (determining that certain trust land was Indian country under 18 U.S.C. § 1151(a) partly because DOI had issued an opinion in which it determined that the land had reservation status).

## SUMMARY OF THE ARGUMENT

HRI's petition should be dismissed for lack of jurisdiction because HRI has not demonstrated its standing to bring the petition, and because HRI has suffered no injury from EPA's determination that is capable of redress by a decision in its favor.

HRI's true interest is in obtaining a UIC permit. It is entirely speculative that EPA will either deny a permit or issue a permit with conditions that may be more restrictive than one issued by NMED, which claims that its program is more stringent than the Federal program.

Even if the Court were to consider HRI's petition, HRI is collaterally estopped from asserting that a community of reference analysis is not allowed under Venetie, because this Court previously decided in HRI v. EPA that such an analysis continues to be required after Venetie. HRI incorrectly asserts that this Court's previous statements regarding the community of reference analysis were *dicta*. Rather, in HRI v. EPA, the Court specifically held that a community of reference analysis was required, and it remanded the matter to EPA precisely so that EPA could determine the appropriate community of reference for the Section 8 land prior to applying the Federal set-aside and superintendence tests of Venetie.

Moreover, EPA's determination that the Church Rock Chapter is the appropriate community of reference with respect to the Section 8 land is consistent with this Court's case law, consistent with 18 U.S.C. § 1151, and supported by the administrative record. The same is true with respect to EPA's determination that the Church Rock Chapter satisfies the Federal set-aside and superintendence requirements. EPA's Determination should therefore be upheld.

EPA's Determination was made for the purpose of determining the appropriate permitting authority for the Section 8 land under the SDWA UIC program. It does not implicate the policy concerns conjured up by HRI, and it does not provide occasion for this Court to reconsider the community of reference analysis. Furthermore, EPA's Determination should be upheld regardless of the community of reference analysis because the Section 8 land is plainly within the Church Rock Chapter. HRI's petition for review should therefore be dismissed or denied.

## ARGUMENT

### I. HRI LACKS STANDING TO CHALLENGE EPA'S DETERMINATION, WHICH DOES NOT GRANT OR DENY A UIC PERMIT TO HRI.

HRI bears the burden of proving that it has standing to challenge EPA's Determination in this case. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); Mount Evans Co. v. Madigan, 14 F.3d 1444, 1450 (10th Cir. 1994). In order to have standing, HRI must establish that it has suffered an injury in fact: "an invasion of a legally protected interest which is [both] concrete and particularized, . . . and . . . "actual or imminent, not 'conjectural' or 'hypothetical.'" Lujan, at 560-61. It must also show that it is "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." Id. Yet, HRI has made no

showing whatsoever that it has the requisite standing to bring its petition. See generally HRI's Br. Apparently, HRI believes that it need not prove its standing due to the existence of the previous case. See id. at 1 (suggesting that the Court "continues" to have jurisdiction). However, this is a new challenge to a new EPA decision and not a continuation of the previous case. Morever, even if it were a continuation of the previous case, HRI "must maintain standing at all times throughout the litigation for a court to retain jurisdiction." Phelps v. Hamilton, 122 F.3d 1309, 1315 (10th Cir. 1997). HRI's standing was not raised as an issue before because the State of New Mexico unquestionably had standing to challenge EPA's previous decision, which determined that EPA, as opposed to NMED, was the proper UIC permitting authority for the Section 8 land due to the existence of a jurisdictional dispute. See HRI v. EPA, 198 F.3d at 1235; Massachusetts v. EPA, 127 S.Ct. 1438, 1453 (2007) ("Only one of the petitioners needs to have standing to permit us to consider the petition for review"). HRI cannot continue to piggy-back off of New Mexico's standing, however, because New Mexico has not challenged EPA's Determination in this case. See Diamond v. Charles, 476 U.S. 54, 63-64 (1986) (intervenor, who lacked standing on its own, may not appeal a decision where the only party with standing has not appealed the decision); San Juan County v. United States, 420 F.3d 1197, 1206 (10th Cir. 2005) (intervening party need not

establish its own standing so long as another party with constitutional standing on the same side as the intervenor remains in the case). Accordingly, because HRI must demonstrate that it has standing to bring the current petition, and because it has not even attempted to meet this burden, its Petition should be dismissed for lack of jurisdiction.[6/]

It is also clear that HRI lacks standing because it can claim no cognizable injury from EPA's Determination, which determines only that EPA is the proper permitting authority for the SDWA UIC program on the Section 8 land. Determination at 1. ("The underlying issue in this Determination is whether EPA or NMED is the appropriate agency to consider a UIC permit application for the Section 8 land"). While New Mexico, which has not challenged EPA's Determination, may have a judicially cognizable interest in protecting any regulatory authority it could claim with respect to the UIC program regarding the Section 8 land, HRI may not stand in the State's shoes. Rather, HRI "must assert its own legal rights and interests and cannot rest [its] claim to relief on the legal rights or interests of third parties." Warth v. Seldin, 422 U.S. 490, 499 (1975).

Indeed, while HRI attempts to make public policy arguments in its brief, its

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[6/] Assuming HRI addresses the standing issue in its Reply Brief, EPA should be allowed to file a surreply brief responding to HRI's arguments, which will necessarily be new arguments.

challenge to EPA's Determination is ultimately fueled by business concerns, not public policy concerns. See HRI's Br. at 55-59 (discussing purported policy concerns). HRI's underlying interest is in obtaining a permit under the SDWA UIC program so that it can move forward with a planned uranium mine. See HRI's Br. at 11 (noting that HRI has an adjudicated Nuclear Regulatory Commission license to conduct uranium recovery operations on the Section 8 land); AR 15a at 1 (HRI's comments, explaining that resolution of the jurisdictional issue is necessary because HRI requires a UIC permit); HRI v. EPA, 198 F.3d at 1234 (discussing HRI's request for a permit under the UIC program); Wyoming v. Lujan, 969 F.2d 877, 881-82 (10th Cir. 1992) (in determining the State's standing, the Court focused on the State's true concerns, which were economic in nature, rather than on the State's asserted public policy concerns).

Because EPA has taken no action to issue or deny a UIC permit with respect to the Section 8 land, it is clear that HRI has suffered no injury sufficient to establish its standing in this case. "Injury in fact" to support standing means "concrete and certain harm." NCAA v. Califano, 622 F.2d 1382, 1386 (10th Cir. 1980). There is no evidence in the record to suggest that EPA intends to deny HRI a UIC permit with respect to its mining activities on the Section 8 land. In fact, because HRI has not even submitted a permit application to EPA, any claimed harm

is only "conjectural or hypothetical," not "actual or imminent." Lujan, 504 U.S. at 560. In addition, New Mexico posits that its program respecting UIC permits is more stringent in some respects than the Federal program. New Mexico's Amicus Br. at 16-21. Thus, it is entirely speculative that HRI would somehow be worse off if EPA regulates its activities under the UIC program, as opposed to New Mexico.[7] Therefore, HRI cannot establish the first element of the standing requirement.

While the Court previously determined that EPA's designation of the Section 8 land as in dispute would have an impact on HRI, the Court was discussing only the ripeness doctrine, rather than standing, which had not been raised. See HRI v. EPA, 198 F.3d at 1237. Because the ripeness doctrine is drawn from both "Article III limitations on judicial power and from prudential reasons," National Park Hospitality Ass'n v. DOI, 538 U.S. 803, 808 (2003), the Court's previous determination regarding the impact to HRI under the ripeness doctrine is not determinative of injury in fact for constitutional standing purposes here. The Court was previously guided by the prudential policy concerns respecting the timing of review, a key consideration for whether a claim is ripe. HRI v. EPA, 198 F.3d at

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[7] While HRI obtained a UIC permit for the Section 8 land from NMED in 1989, that permit was for, at most, a seven-year term. Even if NMED were the proper permitting authority, HRI would have to obtain a renewed permit from NMED, which could deny such a permit or impose more stringent conditions than those included in the previous permit.

1237 (stating that resolution of the issues would promote effective enforcement and administration by the agency and facilitate regulation by the appropriate authorities). This is different than the determination of whether a party has claimed an "injury in fact" for purposes of constitutional standing, which is guided solely by Article III case-or-controversy concerns, and not prudential ones. Lujan, 504 U.S. at 560.[8/] Moreover, given the overarching jurisdictional importance of the standing requirement, the Court should consider the injury in fact issue anew in any event. Because EPA has neither denied HRI a permit nor issued a permit with more onerous terms than NMED, HRI has suffered no injury in fact for standing purposes.

In addition, any claimed harm by HRI does not satisfy the requirement that the injury will likely be "redressed by a favorable decision." Lujan, 504 U.S. at 561. This is especially true here because, as discussed above, New Mexico, at least, asserts that its UIC program requirements are more stringent in some respects than the Federal requirements. Thus, even if the Court were to hear HRI's petition and rule in its favor, this does not necessarily mean that HRI will either obtain a

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[8/] Of course, where a party has met its heavier burden of demonstrating a sufficient injury in fact for purposes of standing, which should be addressed first as a jurisdictional requirement, it is more likely a court will find a sufficient impact on the complaining party for purposes of the ripeness doctrine. See, e.g., Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 81-81 (1978).

renewed UIC permit from NMED, or that it will obtain a permit from NMED that contains less stringent requirements than those that would be included in a permit issued by EPA. Therefore, it is entirely speculative that a decision in HRI's favor in this case will redress any harm HRI could suffer as a result of its need for a Federal UIC permit. Accordingly, its petition should be dismissed on standing grounds for this reason as well. See Lujan, 504 U.S. at 561.

## II. EPA CORRECTLY DETERMINED THAT THE SECTION 8 LAND IS PART OF A DEPENDENT INDIAN COMMUNITY UNDER 18 U.S.C. § 1151(b).

### A. EPA Correctly Applied a Community of Reference Analysis, and HRI Should be Precluded from Arguing that such an Analysis is not Allowed.

In HRI v. EPA, 198 F.3d at 1249, this Court specifically instructed that Watchman requires a community of reference analysis prior to determining whether land qualifies as a dependent Indian community under the two-part test enunciated by the Supreme Court in Venetie. HRI asserts that this Court's statement is *dicta*, and that this Court is wrong in any event because, in HRI's view, Venetie expressly precludes a community of reference analysis as part of a dependent Indian community determination.[9] HRI is wrong on both counts. Moreover, because this

[9] Proposed Amicus National Mining Association ("NMA") makes the same argument. In fact, all of its arguments are the same as those of HRI. If the Court (continued...)

Court previously decided that a community of reference analysis is required with respect to the Section 8 land after Venetie, HRI should be precluded from re-litigating the issue now.

### i. This Court previously held that a community of reference analysis is still required after Venetie.

The Court's direction in HRI v. EPA to apply a community of reference analysis was not *dicta*. The direction was given in the context of HRI and NMED's challenge to EPA's determination that there was a dispute as to the Indian country status of the Section 8 land. HRI and NMED argued that it was beyond dispute that the Section 8 land was not Indian country under Venetie. 198 F.3d at 1248. The Court rejected that argument because there were grounds for dispute as to the proper community of reference, which had not been determined by EPA below. Id. The Court specifically analyzed Venetie in relation to the test for determining the existence of a dependent Indian community and stated that "nothing in Venetie speaks to the propriety of the first element of that test – determination of the proper community of reference." Id. The Court went on to hold that

> [b]ecause Venetie does not speak directly to the issue, barring en banc review by this court, Watchman . . .

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[9/](...continued)
considers NMA's arguments, it should reject them for the same reasons it should reject HRI's arguments.

> continues to require a 'community of reference' analysis prior to determining whether land qualifies as a dependent Indian Community under the set-aside and supervision requirements of 18 U.S.C. § 1151(b).

Id. at 1250 (emphasis added). Therefore, HRI is incorrect that the Court's previous statements were *dicta*. In fact, the decision can only be read to require that EPA first undertake a community of reference analysis prior to applying the two-part Venetie test. Morever, because the Court clearly decided this issue, HRI should be precluded from re-litigating the issue here.[10/]

**ii. HRI should be collaterally estopped from asserting that a community of reference analysis is not allowed under Venetie.**

The doctrine of collateral estoppel is intended to prevent the re-litigation of issues already decided, along with the attendant waste of an opposing party's and the judiciary's resources. See Montana v. United States, 440 U.S. 147, 153-54

[10/] This Court also previously stated in a footnote that it need not address the precise impact of Venetie on the holding in Watchman. 198 F.3d at 1232 n.3. However, it is clear that the Court there was talking about the impact of Venetie on Watchman's four-part test for determining whether a given community of reference constitutes a dependent Indian community. That four-part test was the subject of the textual sentence that includes the footnote. Id. Indeed, the Court could not have been discussing whether a community of reference analysis is required prior to determining whether that community constitutes a dependent Indian community under Venetie. Otherwise, footnote 3 of the opinion would be inconsistent with the Court's later holding that Watchman continues to require a community of reference analysis after Venetie. Id. at 1249.

(1979). This Court has adopted a four-part test for collateral estoppel:

> (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party or in privity with a party in the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Murdock v. Ute Indian Tribe of Uintah and Ouray Reservation, 975 F.2d 683, 687 (10th Cir. 1992). See also Novitsky v. City of Aurora, 491 F.3d 1244 (10th Cir. 2007), 2007 WL 1935142, *13 n.2 (same). The test is met here.

While the Court did not previously reach the issue of whether the Section 8 land was within a dependent Indian community, it did reach the issue of whether it was arbitrary and capricious for EPA to have determined that the Indian country status of the Section 8 land was in dispute. In fact, the Court specifically decided that the issue was ripe for review, 198 F.3d at 1235-37, and it resolved the issue in favor of EPA. Id. at 1249. As discussed above, in resolving that issue in favor of EPA, the Court specifically concluded that Venetie does not preclude a community of reference analysis when determining whether the Section 8 land is within a dependent Indian community. Id. at 1249. Indeed, it held that Watchman continues to require a community of reference analysis after Venetie. Id. Thus, the Court previously decided the exact same issue that HRI attempts to re-litigate here.

The issue was adjudicated on the merits, which means that the "adjudication [was] necessary to the judgment." Murdock, 975 F.2d at 687. Again, while the Court remanded the question of whether the Section 8 land is within a dependent Indian community, it upheld on the merits EPA's determination that the status of the land was in dispute. 198 F.3d at 1249 ("[W]e cannot conclude that EPA abused its discretion in concluding that a dispute exists as to the Indian country jurisdictional status of Section 8"). This holding was necessary to the judgment because the issue was ripe for review and because HRI had argued that there was no question after Venetie that the Section 8 land was not a dependent Indian community. 198 F.3d at 1248. Had the Court agreed with HRI's argument, then the Court could not have upheld EPA's determination that a valid dispute existed. The Court disagreed with HRI, however, because it "lack[ed] a decision below on the appropriate community of reference," and because "[u]nder at least one theory – that the community of reference in the current action is the entire Churchrock Chapter . . . Section 8 might qualify as a dependent Indian community." Id. at 1249. Thus, the issue of whether a community of reference analysis is allowed under Venetie was finally adjudicated on the merits in the previous case.

HRI was a party in the previous case, and the Court's decision makes clear that HRI had a full and fair opportunity to litigate the issue of whether a community

of reference analysis is allowed after Venetie. See 198 F.3d at 1248-49. In fact, the issue arose because HRI argued that after Venetie, the Section 8 land could not be a dependent Indian community. Therefore, all four elements of the test for collateral estoppel are satisfied and HRI should be precluded from re-litigating the issue here.[11/] However, even if the Court were to re-consider the issue, the Court's previous holding is correct because Venetie does not preclude the community of reference analysis that Watchman requires.

### iii. Venetie does not preclude a community of reference analysis when making a dependent Indian community determination under 18 U.S.C. § 1151(b).

In Venetie, the Supreme Court considered the impact of the Alaska Native Claims Settlement Act ("ANCSA") on the Indian country status of former reservation land now owned in fee by the Native Village of Venetie Tribal

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[11/] As noted above, HRI may argue, incorrectly, that this case is merely a continuation of the previous case. However, if the Court were to conclude that this is a continuation of the previous case, then HRI should be precluded from asserting that a community of reference analysis is not allowed under Venetie under the law of the case doctrine. See Prairie Band of Potawatomi Nation v. Wagnon, 476 F.3d 818, 823 (10th Cir. 2007) ("[W]here a court decides upon a rule of law that decision should continue to govern the same issues in subsequent stages of the same case.") (internal quotation marks and citation omitted). While the doctrine is a flexible one that allows courts to depart from erroneous prior rulings, id., it would apply here because, as shown below, the Court's previous ruling respecting the community of reference issue is correct.

Government. 522 U.S. at 523-24.[12/] The Tribal Government attempted to impose a tax on a State-chartered public school located on the Tribal Government's land. Id. at 525. Because ANCSA revoked the Tribal Government's Reservation, and because the Tribal Government's land was not made up of Indian allotments, the land would have had to have been a dependent Indian community in order to qualify as Indian country under 18 U.S.C. § 1151. Id. at 527. The Ninth Circuit had held that the Tribal Government's land constituted a dependent Indian community under a six-factor balancing test. Id. at 525-26.

The Supreme Court rejected the Ninth Circuit's six-factor balancing test for determining the existence of a dependent Indian community. The Court determined that in enacting 18 U.S.C. § 1151, Congress had incorporated the definition of Indian country that had evolved through Supreme Court case law. Id. at 529-30. It found that Congress had incorporated the Court's previous requirements of Federal set-aside and Federal superintendence for determining the existence of a dependent Indian community under 18 U.S.C. § 1151(b). It held that neither of the factors

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[12/] In ANCSA, Congress extinguished all aboriginal claims to most Alaska land in exchange for transfers of both Alaska land and monetary payments to Native corporations, the shareholders of which were required to be Alaska Natives. Id. at 524. The Native Corporation in Venetie elected to take title to former reservation land instead of the nonreservation land and the cash payment. Id. It then transferred the land to the Tribal Government.

was satisfied with respect to the Tribal Government's lands because it was clear that Congress intended to extinguish the Indian country status of the land under ANCSA. Id. at 532-34.

HRI incorrectly asserts that Venetie abrogates the community of reference analysis required by Watchman. As this Court has already determined, because the Venetie Court examined the categorical effect of ANCSA on virtually all Alaskan Native lands, it was not even presented with the question of how one should determine the appropriate community of reference under 18 U.S.C. § 1151(b). HRI, 198 F.3d at 1249. Although the case concerned whether the Tribal Government could impose a tax upon one school, the Venetie Court framed the issue as whether all 1.8 million acres of land owned by the Tribal Government are Indian country. Venetie, 522 U.S. at 523. So framed, there was no need for the Court to conduct a community of reference analysis. Thus, the Court did not analyze the community of reference issue, and there is nothing in Venetie to suggest that one must focus only on the land upon which a school in that case, or a proposed mine in this case, is located when determining whether it is within a dependent Indian community.

Indeed, HRI makes much of the Venetie Court's, and a few other courts,' use of the term "land in question" as the purported focus of the test for determining a dependent Indian community. HRI Br. at 40-49. However, the Supreme Court in

Venetie did not use that term to indicate that the two-part test for determining the existence of a dependent Indian community must be applied narrowly, focusing only on small parcels of land as HRI suggests. Rather, the Court used the term to reject the Tribal Government's argument that the determination of a dependent Indian community should be based solely upon political dependence. 522 U.S. 531 n.5. If anything, the Venetie Court took an expansive, as opposed to a restrictive, view of the "land in question" because it focused not merely on the land upon which the school in question was located, which is what HRI's test argues for, but rather on all of the Tribe's ANCSA lands. See 522 U.S. at 523 ("[W]e must decide whether approximately 1.8 million acres of land . . . owned in fee simple by the . . . Venetie Tribal Government pursuant to [ANCSA], is 'Indian country'"). See also United States v. Arrieta, 436 F.3d 1246, 1250 (10th Cir. 2006) ("We examine the entire Indian community, not merely a stretch of road, to ascertain whether the federal set-aside and federal superintendence requirements are satisfied").

This Court's community of reference analysis is completely consistent with Venetie because it logically defines "the land in question" for application of the two-part test for determining the existence of a dependent Indian community. Thus, contrary to HRI's argument, HRI's Br. at 36-40, this Court's community of reference analysis does not apply a multi-factored test for determining whether a

dependent Indian community exists, like the Ninth Circuit test that was rejected in Venetie. Rather, it merely determines where the two-factor test specified by the Supreme Court in Venetie should be focused. See Watchman, 52 F.3d at 1546 (community of reference is threshold issue before determining whether the community is a dependent Indian community); HRI,198 F.3d at 1249 (explaining that Watchman requires a community of reference analysis prior to application of the set-aside and supervision requirements of 18 U.S.C. § 1151(b)).

In addition, contrary to HRI's argument, Venetie does not render this Court's post-Venetie application of the community of reference analysis invalid. See HRI's Br. at 38. Because Venetie did not address the community of reference analysis at all, it obviously did not determine how such an analysis should be conducted. Nor does the similarity of any particular factor for determining the community of reference, such as community cohesiveness, to any of the factors previously used by the Ninth Circuit for determining the existence of a dependent Indian community render the factor impermissible. See id. In Venetie, the Supreme Court found that the Ninth Circuit had impermissibly balanced the factors it used for determining the existence of a dependent Indian community against one another in such a way as to reduce the Federal set-aside and superintendence requirements to mere considerations. Venetie, 522 U.S. at 531 n.7. Such balancing does not occur under

this Court's post-Venetie approach, where the Federal set-aside and superintendence requirements must be independently satisfied after the appropriate community of reference is determined. See, e.g., United States v. M.C., 311 F. Supp.2d 1281, 1289-98 (D.N.M. 2004) (determining that Fort Wingate Indian School land was the appropriate community of reference under the relevant factors, but that it was not a dependent Indian community under two-part Venetie test).

Nor, as HRI contends, see HRI's Br. at 38-40, does application of the community of reference analysis necessarily predetermine the result of the two-part Venetie test, nor can it, because each of the two Venetie factors must be met in order for the community of reference to qualify as a dependent Indian community under 18 U.S.C. § 1151(b). See United States v. M.C., 311 F. Supp.2d at 1289-98 (finding community of reference did not satisfy set-aside requirement).

### B. EPA Reasonably Concluded that the Church Rock Chapter is the Appropriate Community of Reference.

In making its Determination, EPA examined the Section 8 land and the Church Rock Chapter and concluded that the Church Rock Chapter is the appropriate community of reference. Determination at 5-13. DOI reached the same conclusion. DOI Opinion at 5-9. EPA's determination is fully supported by the administrative record and is consistent with Watchman and its progeny. It should therefore be upheld.

Watchman established two organizing principles for determining the appropriate community of reference. 52 F.3d at 1543. The first is the status of the area in question as a community. Id. Basic to the definition of community is an element of cohesiveness, which can be shown by economic pursuits, common interests, or needs of the inhabitants as supplied by the locality. Id. at 1544. The second principle focuses on the community of reference within the context of the surrounding area. Id. This principle concerns the degree of essential services that are provided by the defined area. See id. EPA correctly applied these principles to both the Section 8 land and the Church Rock Chapter.

EPA first examined whether the Section 8 land itself, or all of Section 8, qualified as the appropriate community of reference. EPA determined that while both areas had geographic boundaries, neither qualified as a community because neither Section 8 nor the Section 8 land has a population of individuals living on it, or any other attribute that could remotely qualify it as a mini-society. Determination at 7-8. See also DOI Opinion at 5-7. This is completely consistent with Watchman, in which the Court explained that a community is more than just a purely economic concern but rather a "mini-society consisting of personal residences and an infrastructure . . . ." Watchman, 52 F.3d at 1544. Indeed, in Watchman, the Court determined that the mine site in question there was not the

appropriate community of reference because it did not provide any of the necessary infrastructure to support a community. Id. Because the same is true of the Section 8 land here (as well as Section 8 itself), EPA correctly determined that the Section 8 land is not the appropriate community of reference. See also United States v. Arrieta, 436 F.3d at 1250 (applying set-aside and superintendency requirements to the "entire Indian community," not merely to the stretch of road in question).

EPA next considered whether the Church Rock Chapter, within which the Section 8 land is located, is the appropriate community of reference, as had been suggested by the Navajo Nation and several other commenters. EPA first determined that the Church Rock Chapter is a clearly defined geographic area. Determination at 8. This finding is clearly supported by the administrative record and should be upheld. See AR 16b (map showing boundaries of the Church Rock Chapter).

EPA then determined that the Church Rock Chapter is a community that shows cohesiveness of culture, language, land use, and aquifer use. Determination at 8. As the Navajo Nation pointed out in its comments, Navajo Chapters are unique in all of Indian country and form the foundation of the Navajo Nation Government. Determination at 8 (citing Navajo Nation comments); AR at 13a (Navajo Nation comments at 10). EPA noted that the New Mexico state courts

have found that specific Navajo Chapters "perform[] similar functions with respect to the health and welfare of its residents as those performed by a county or municipality in the state government system." Determination at 8 (quoting Thriftway Marketing Corp. v. New Mexico, 810 P.2d 349, 352 (N.M. Ct. App. 1990)). EPA also noted that over 78 percent of the land within the Church Rock Chapter is held in trust for the Navajo Nation or individual tribal members, and that over 95 percent of the land within the Church Rock Chapter is either trust land, tribal fee lands, or otherwise used exclusively by members of the Navajo Nation. Determination at 9; AR 13b (Appendix to Navajo Nation comments at 248); AR 39 (DOI Opinion at 11). In addition, EPA found that 97.7 percent of the population in the Church Rock Chapter is Native American, with the majority of these residents speaking Navajo or other native languages. Determination at 9; AR 13a (Navajo Nation comments at 4); AR 13b (Appendix to Navajo Nation comments at 246-47). EPA also found that the economy of the Church Rock Chapter is centered on raising livestock and that the Chapter is a Navajo traditional rural community. Determination at 9; AR 13a (Navajo Nation comments at 4-5); AR 13b (Appendix to Navajo Nation comments at 121, 263). This all shows that the Church Rock Chapter has a sufficient level of cohesiveness to qualify as a community under Watchman.

EPA also considered the Church Rock Chapter in relation to the surrounding area and found that the Chapter functions as a mini-society that provides necessary infrastructure to Chapter residents. EPA found that Chapter residents look primarily to the Chapter to meet the residents' various infrastructure needs, either through the Chapter itself or through the larger Navajo Nation, supported, in some circumstances, by the Bureau of Indian Affairs ("BIA") and the Indian Health Service. Determination at 9; AR 13a (Navajo Nation Comments at 8); AR 13b (Appendix to Navajo Nation Comments at 135-51, 261-64). This infrastructure includes police and judicial services, educational services, worship services, water and utilities, and the maintenance of some roads. Determination at 9-10; AR 13a (Navajo Nation comments at 4, 8); AR 13b (Appendix to Navajo Nation comments at 131-33, 207-10, 261-66). See also AR 39 (DOI Opinion at 8) (detailing infrastructure and noting that the Chapter provides home repair and purchase assistance, scholarships and meals for seniors and undertakes economic development projects). In light of all of these services, EPA reasonably concluded that the Church Rock Chapter is the appropriate community of reference under the second guiding principle of Watchman. Accordingly, EPA's determination that the Church Rock Chapter is the appropriate community of reference is consistent with Watchman, supported by the administrative record, and should therefore be upheld.

HRI offers no valid reason for not considering the Church Rock Chapter as the appropriate community of reference here. In fact, HRI primarily contends that one must determine the Indian country status of the Section 8 land with blinders on, focusing solely on the Section 8 land itself. As shown above and below, that contention is invalid under Watchman and inconsistent with this Court's direction in HRI that a community of reference analysis must be undertaken with respect to the Section 8 land.

HRI notes that some services are provided to the Church Rock Chapter by McKinley County, that the State of New Mexico maintains State Highway 566, and that HRI eventually intends to contract with a private company for electrical services to the Section 8 land. HRI Br. at 12. EPA likewise noted that the State of New Mexico and McKinley County provide some services to Chapter residents including schools, roads, and fire and emergency management services. Determination at 10 & n.60. None of this undercuts EPA's determination that the Church Rock Chapter provides sufficient services to be considered the appropriate community of reference with respect to the Section 8 land, however, because a given "community cannot be expected to originate all or even most of the 'needs, necessities, and wants of modern life.'" United States v. Adair, 111 F.3d 770, 775 (10th Cir. 1997) (quoting Watchman, 52 F.3d. at 1544). Indeed, this Court recently

found that a public road maintained by Santa Fe County, New Mexico, was part of a dependent Indian community and therefore Indian country under 18 U.S.C. § 1151(b). United States v. Arrieta, 463 F.3d at 1247-48, 1250. Accordingly, the fact that other governments or private parties may provide some services to an Indian community does not disqualify the community from being the appropriate community of reference under Watchman, as long as the Indian community itself provides sufficient necessary infrastructure. As shown above, EPA reasonably concluded that the Church Rock Chapter provides such infrastructure, and its determination should therefore be upheld.

HRI's contention that the Section 8 land is not close to the Chapter House, but rather is closer to Chapter lands that are unlikely to be developed, is likewise of no moment. The Section 8 land falls within the boundaries of the Chapter, which consists of more than just the Chapter House and the area immediately surrounding it. Thus, the Chapter is clearly the nearest community with respect to the Section 8 land and is the appropriate community of reference. See Watchman, 52 F.3d at 1545 (indicating that the appropriate community of reference could be the entire Tsayatoh Chapter within which the mine site at issue there was located or another "clearly identifiable community that includes the mine site but is smaller than the

entire Tsaytoh Chapter").[13/] The Section 8 land is surrounded by tribal lands and clearly within the Church Rock community. See AR 16b (map showing Chapter boundary and land status). At bottom, HRI has not shown that EPA's conclusions regarding the appropriate community of reference are arbitrary and capricious. Rather, the administrative record clearly supports EPA's determination that the Church Rock Chapter is the appropriate community of reference, and EPA's determination should therefore be upheld.

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[13/] While no commenter suggested the town of Gallup as the appropriate community of reference with respect to the Section 8 land, EPA considered and rejected Gallup as the appropriate community of reference, largely due to its distance from the Section 8 land. Determination at 10 n.64. The Section 8 land is clearly not within, or close to, the boundaries of the community of Gallup. Therefore, HRI's suggestion that the Section 8 land is part of the community of Gallup is incorrect. See HRI Br. at 24. Moreover, the Court should not consider that suggestion, along with HRI's related suggestion that the Section 8 land is within the community of McKinley County, because HRI did not raise these contentions to EPA during the comment period preceding EPA's Determination. See Osborne v. Babbitt, 61 F.3d 810, 814 (10th Cir. 1995) ("this [C]ourt will not consider contentions not raised in the appropriate administrative proceedings."). Even if the Court were to consider HRI's contention with respect to McKinley County, it should reject the contention because, as shown above, the record supports EPA's conclusion that the Church Rock Chapter provides sufficient infrastructure within the Chapter's boundaries to qualify as the appropriate community of reference under Watchman.

### C. EPA Reasonably Concluded that the Section 8 Land Within the Church Rock Chapter Is Part of a Dependent Indian Community.

#### i. EPA reasonably concluded that the Church Rock Chapter meets the Federal set-aside requirement.

"The federal set-aside requirement ensures that the land in question is occupied by an 'Indian community.'" Venetie, 522 U.S. at 531. The requirement can be satisfied by "some explicit action by Congress (or the Executive acting under delegated authority) . . . to create or to recognize Indian country." Id. at 531 n.6.

EPA determined this requirement was satisfied with respect to the Church Rock Chapter for several reasons. First, the overwhelming majority of land within the Church Rock Chapter, 78 percent, was either purchased by the Federal government and placed in trust for the Navajo Nation, or purchased by the Federal government and placed in trust as allotments for individual Indians. Determination at 11. AR 39 (DOI Opinion at 9); AR 1 (Church Rock Chapter comments at 9). Thus, the United States took explicit action to set aside the majority of lands that are occupied by the Chapter, thereby ensuring that the area in which the Chapter resides is occupied by an Indian community.

Second, EPA noted that the Secretary of the Interior has designated the Chapter within the federally approved Navajo land consolidation area under the Indian Land Consolidation Act ("ILCA"), 25 U.S.C. § 2201. Determination at 11.

AR 13b (Appendix to Navajo Nation comments at 131, Affidavit of Wilfred Bowmen, Superintendent of Eastern Navajo Agency, BIA). As EPA noted, the policies underlying ILCA promote the continuity of Indian communities by preventing the fractionation of trust allotments and by consolidating fractional interests in a manner that enhances tribal sovereignty. 25 U.S.C. § 2201 note (Declaration of Policy). Thus, the federal government has taken explicit action under ILCA to recognize the Church Rock Chapter as an Indian community. Furthermore, consistent with ILCA, this recognition is intended to help ensure that the tribal lands within the Church Rock Chapter continue to be occupied by an Indian community by preventing the fractionation of those lands.

EPA also recognized that the United States played a role in the formation of the various Navajo Chapters. Determination at 11. See also DOI Opinion at 10. Relying on the extra-record materials in its proposed Appendix, HRI argues that the Chapters are not creatures of the Federal government and that the Navajo Nation did not officially certify the Church Rock Chapter until 1955. HRI Br. at 14-20, 50-51. Because this argument is based on materials outside the administrative record, the Court should not consider the argument or the materials for the reasons stated in EPA's Opposition to HRI's Motion to File Appendix. However, even if the Court were to consider the argument and the materials, they do not support HRI's ultimate

contention that the Church Rock Chapter fails the Federal set-aside test. Indeed, the materials show that in 1927, John Hunter of the BIA began the development of Navajo Chapters as "local community organizations." HRI's Proposed App. at 39 (Navajo Yearbook (1958) at 191). This was done in order to better facilitate communications between the federal government and the Indians living within those communities. Id. The materials likewise show that the 1955 Navajo Tribal Resolution that certified the various Navajo Chapters was explicitly approved by the Secretary of the Interior on August 12, 1955. HRI's Proposed App. at 77 (Navajo Political Process (1970) at 40). Thus, HRI's own materials show that the Federal government played a key role in the development and certification of the Navajo Chapters.

Moreover, the question is not whether the Federal government took some kind of action to create the Navajo Chapters as political entities. Rather, the question is whether the Federal government has taken any action to create or recognize, as an Indian community, the area of lands on which the Church Rock Chapter resides. As shown above, the Federal government did so by purchasing the majority of the lands within the Chapter for the Navajo. It also did so by designating the Chapter lands as falling under the ILCA. Thus, the set-aside requirement is met regardless of whether the United States played any role in the

creation of the Church Rock Chapter as a political organization.

HRI's assertion that the Section 8 land itself was not set aside by the Federal government is likewise not material. This Court has made clear that it "examine[s] the entire Indian community . . . to ascertain whether the federal set-aside and superintendence requirements are satisfied." Arrieta, 436 F.3d at 1250. Watchman also provides that privately held lands can be part of a larger dependent Indian community. The Court there remanded the case to the district court for a determination of whether the entire mine site, including the privately held portions, were part of a dependent Indian community under 18 U.S.C. § 1151(b), after it determined that the 47 percent portion of the site that constituted trust lands was Indian country under 18 U.S.C. § 1151(c). Watchman, 52 F.3d at 1541. There would have been no need for a remand if the privately held portions of the site could not also be part of a larger dependent Indian community. In addition, as discussed above, the Watchman Court held that the mine site itself was not the community of reference, making clear that the Indian country status of the privately held lands within the mine site would be determined based upon a larger community of reference. See id. at 1543 ("'[T]he [district] court erred by examining the mine site in isolation from the surrounding area"). Therefore, under Arrieta and Watchman, EPA properly applied the Federal set-aside test to the

Church Rock Chapter as the community of reference, as opposed to only the Section 8 land, as advocated by HRI.

### ii. EPA reasonably concluded that the Church Rock Chapter meets the Federal superintendence requirement.

The Federal superintendence requirement ensures that "the Indian community is sufficiently 'dependent' on the Federal Government that the Federal Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the land in question." Venetie, 522 U.S. at 531. The test focuses on the land, and not merely the Indian tribe inhabiting it. Id. at 531 n.5. The test is satisfied when the Federal government holds title to or otherwise actively controls the land within the Indian community. See Venetie, 522 U.S. at 533 (noting Court's precedents in which Federal superintendence was found where the United States either retained title to land within the community or otherwise retained jurisdiction and control over such land).

EPA reasonably found the Federal superintendence test satisfied with respect to the Church Rock community because the Federal government exercises control over 92.5 percent of the land within the community. Determination at 12. This includes 46,648.64 acres for which the United States holds title in trust for the Navajo Nation or individual Indians, and 5,712.70 acres of Federal land over which

the Bureau of Land Management supervises grazing leases and permits issued to Navajo Indians within the community. Id. AR 13b (Appendix to Navajo Nation comments at 248, Declaration of Raymond Klee, Title Examiner). See also DOI Opinion at 10 (noting that the Federal government exercises control as trustee for the Indians on 78 percent of the land within the Church Rock Chapter). In addition to exercising control over the trust lands by the retention of title, EPA found that the Federal government actively controls such land through, for example, the BIA's protection of the natural resources and water rights associated with the land. Determination at 12. AR 16e (Declaration of Johnny Livingston at ¶¶ 16-17). Thus, the Federal government pervasively controls the vast majority of lands within the Chapter in a manner sufficient to make the Chapter Indians dependent upon the Federal government under the Federal supervision requirement.

HRI argues that some land located within the Church Rock community, including the Section 8 land, is not subject to Federal supervision. HRI Br. at 51. However, as shown above, the overwhelming majority of land within the community is subject to Federal superintendence. Under Arrieta, one must examine the entire Indian community to determine whether the Federal superintendence requirement is satisfied. Arrieta, 436 F.3d at 1250. Thus, the fact that limited parcels of land within the Church Rock chapter are not subject to Federal

superintendence does not call EPA's Determination into question. Rather, EPA reasonably determined that the Church Rock Chapter, when viewed as a whole, meets the Federal superintendence requirement.

HRI's additional contention, that no court has ever held that privately held lands within a Navajo Chapter are within "Indian country," is likewise of no moment. As discussed above, this Court's remand in Watchman clearly contemplated that the private lands that would be occupied by a portion of the mine in that case could fall within a dependent Indian community under 18 U.S.C. § 1151(b). The same is true with respect to the Court's remand in HRI v. EPA. There would have been no need for this Court to remand the matter to EPA for a determination of whether the Section 8 land could constitute Indian country under 18 U.S.C. § 1151(b) if there was no room in the statute for a determination that the land could be part of a dependent Indian community in light of its private nature. Accordingly, this Court's precedents clearly contemplate that privately-held land within a Navajo Chapter can be part of a dependent Indian community under 18 U.S.C. § 1151(b).

### D. EPA's Determination is Consistent with 18 U.S.C. § 1151(b).

HRI's statutory argument, that 18 U.S.C. § 1151(b) does not include the term "within" and therefore necessarily restricts the focus to only the specific parcel of

land in question, is inconsistent with this Court's binding precedents in Watchman and Arrieta, as well as this Court's remand in HRI. As discussed above, Watchman contemplates that privately-held land can be Indian country under 18 U.S.C. § 1151(b) if the land is part of a dependent Indian community, and the Court's remand in HRI would not have been necessary if the statutory language precluded such a finding. As also discussed above, under Arrieta, this Court focuses upon the entire community of reference, and not just the specific parcel of land involved, when determining whether the parcel is within Indian country under 18 U.S.C. § 1151(b). HRI's argument is inconsistent with this Court's precedents because under HRI's reading of 18 U.S.C. § 1151(b), one must focus only upon the specific fee "lands in question," without reference to the larger dependent Indian community.

In addition, HRI's reading does not flow logically from the statute itself. 18 U.S.C. § 1151(a) provides that Indian country includes "all land within the limits of any Indian reservation," while 18 U.S.C. § 1151(b) provides that Indian country includes "all dependent Indian communities." By not including the phrase "within the limits" in 18 U.S.C. § 1151(b), Congress merely recognized that dependent Indian communities were by definition not reservations that will always have

precisely defined geographic boundaries or "limits."[14] Thus, the plain language of 18 U.S.C. § 1151(b) shows that Congress did not intend to exclude land otherwise "within" a dependent Indian community based on the notion that the land itself is not an Indian "community." As this Court has clearly found, the term "community" denotes something larger than a specific parcel of land. Watchman, 52 F.3d at 1544 (finding that "community" means a "mini-society"). The term "dependent Indian community" under 18 U.S.C. § 1151(b) therefore includes specific parcels of land that fall "within" the broader "community." See New Mexico v. Romero, 142 P.3d 887, 893 (N.M. 2006) (holding that privately held fee lands within a pueblo are part of a dependent Indian community because "the terms of section 1151(b) refer to residential Indian communities under federal protection, not to types of land ownership or reservation boundaries"). Accordingly, HRI's statutory argument does not withstand scrutiny.[15]

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[14] In Adair, 111 F.3d at 774, this Court determined that the lack of any discernable boundaries makes it difficult to determine that a community exists under the Court's community of reference analysis. However, the Court also stated that an "area need not be an established municipality, an incorporated political subdivision, or authoritatively and precisely defined by metes and bounds in order to be an appropriate community of reference." Id. This analysis is consistent with the congressional recognition in 18 U.S.C. § 1151(b) that a dependent Indian community will not necessarily have precisely defined "limits."

[15] Under HRI's approach, non-Indian-owned fee land within a dependent Indian

(continued...)

In addition, HRI's argument should be rejected because it is contrary to the canon of construction that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985). Thus, to the extent the Court finds 18 U.S.C. § 1151(b) ambiguous, it should construe it liberally in favor of a positive finding of Indian country status. It should not take the wooden approach espoused by HRI.

### E. EPA's Determination is Consistent With this Court's Case Law.

HRI argues that this Court does not actually follow Watchman's requirement for a community of reference analysis under 18 U.S.C. § 1151(b). According to HRI, this Court's post-Venetie cases show that it focuses only on the "the land in question" without reference to any larger community when determining whether a dependent Indian community exists. This is completely wrong.

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[15/](...continued)
community would never be considered Indian country because it would not meet the Federal set-aside and superintendence requirements. Thus, HRI's approach would create the very kind of checkerboarding that Congress sought to avoid in enacting 18 U.S.C. § 1151. See Hilderbrand v. Taylor, 327 F.2d 205, 207 (10th Cir. 1964). While Hilderbrand concerned non-Indian-owned fee land within a reservation under 18 U.S.C. § 1151(a), Congress likewise sought to avoid checkerboarding under 18 U.S.C. § 1151(b) through its use of the broad term "community." See Watchman, 52 F.3d at 1544 (discussing broad meaning of "community").

HRI ignores HRI v. EPA, in which the Court specifically directed that a community of reference analysis must first be conducted before applying the two-part Venetie test to the Section 8 land. It would be nonsensical for the Court to direct that the community of reference first be ascertained if the jurisdictional status of the Section 8 land was to be determined without reference to that community.[16/]

HRI asserts that this Court's decision in United States v. Roberts, 185 F.3d 1125 (10th Cir. 1999), is somehow dispositive of the issue because the Court never used the term "community of reference" when determining that the Tribal Complex in question, which was held in trust by the United States for the Choctaw Nation of Oklahoma, was Indian country under 18 U.S.C. § 1151. It is not surprising that the Court never mentioned the term "community of reference" in Roberts, however, because the Court appears to have determined that the Tribal complex was Indian country primarily due to its status as an informal reservation under 18 U.S.C. § 1151(a). See Roberts, 185 F.3d at 1130-32 (discussing the many cases in which

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[16/] Therefore, EPA did not deviate from this Court's mandate in HRI v. EPA as HRI asserts. HRI Br. at 53-54. As shown above, the Court clearly indicated that EPA must conduct a community of reference analysis prior to applying the two-part Venetie test. HRI, 198 F.3d at 1249. Indeed, the Court previously indicated that "there is a legitimate dispute, following Venetie, as to whether Section 8 falls within a 'dependent Indian community' under 18 U.S.C. § 1151(b)." Id. at 1248 (emphasis added). EPA properly resolved this dispute, as framed by the Court, on remand.

trust lands have been held to constitute an informal reservation under 18 U.S.C. § 1151(a)). While the Court discussed Venetie, it specifically found that Venetie did not repudiate the Supreme Court's prior cases in which trust lands were determined to be Indian country under 18 U.S.C. § 1151(a). The Court ultimately found that the trust land in question was Indian country regardless of what label one attached to it. Id. at 1133. To the extent that the Court also found the Tribal Complex itself to be a dependent Indian community, there appears to be no dispute that the Complex itself was the appropriate community of reference. See id. Accordingly, Roberts hardly supports HRI's contention that this Court has abandoned the community of reference analysis.

Oddly, HRI also contends that this Court focused solely on the "land in question," without reference to the broader Indian community when it determined that Shady Lane was part of a dependent Indian community in Arrieta, 463 F.3d 1246. HRI Br. at 43-45. HRI incorrectly asserts that the Court applied the set-aside and superintendence test only to Shady Lane. HRI Br. at 44. This argument overlooks the fact that Arrieta specifically argued that the Federal superintendence test could not be met with respect to Shady Lane because it was a county road. Arrieta, 436 F.3d at 1250. In rejecting this contention, the Court held that the federal superintendence requirement is not to be applied so narrowly and that the

Court "examine[s] the entire Indian community, not merely a stretch of road, to ascertain whether the federal set-aside and federal superintendence requirements are satisfied." Id. Therefore, Arrieta stands for the exact opposite of what HRI contends. Moreover, contrary to HRI's contention, HRI Br. at 45, because the Pueblo held title to the land upon which Shady Lane was built, the Court did not have occasion to consider the Indian country status of the privately held land surrounding Shady Lane. See Arrieta, 436 F.3d at 1250 (noting parties' agreement that the Pueblo held title to the land underlying Shady Lane). Thus, HRI is wrong to suggest that Arrieta stands for the proposition that privately-owned lands cannot be part of a dependent Indian community because the Court nowhere addressed that question.[17/]

In fact, in the only one of HRI's cases in which a court specifically

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[17/] We note that Santa Fe County must have had an easement or right-of-way over the Pueblo land for Shady Lane. See Arrieta, 436 F.3d at 1247 (describing Shady Lane, which was also known as Santa Fe County Road 105, as a public road maintained by the county). Thus, if anything, Arrieta stands for the proposition that a non-Indian property right does not somehow extinguish the Indian country status of land within a dependent Indian community. It also indicates that 18 U.S.C. § 1151 should not be narrowly construed as HRI contends. HRI Br. at 34-35. 18 U.S.C. § 1151(a) expressly includes rights-of-way running through a reservation, while 18 U.S.C. § 1151(b) makes no mention of rights-of-way. However, the Court had no problem in finding that Shady Lane, the right-of-way upon which the crime occurred, was within a dependent Indian community under 18 U.S.C. § 1151(b).

considered the issue, the Supreme Court of New Mexico held that private fee lands within a dependent Indian community are Indian country under 18 U.S.C. § 1151(b). In New Mexico v. Romero, 142 P.3d at 896, the court held that privately held fee lands within two pueblos are Indian country under 18 U.S.C. § 1151(b), and that the State of New Mexico therefore lacked jurisdiction over alleged crimes committed on those fee lands. The court applied the two-prong Venetie test and rejected the State's argument that the test should be applied only with reference to the fee lands in question. Id. at 891. Like this Court in Arrieta, the court determined that the test should be applied to the pueblos in question as a whole. Id. at 892. The court reasoned that considering the community as a whole is consistent with congressional intent in enacting 18 U.S.C. § 1151 because it discourages checkerboarding. Id. (citing Hilderbrand, 327 F.2d. at 207). The court also determined that treating the fee lands as part of the dependent Indian community is consistent with the language of 18 U.S.C. § 1151(b), which speaks to the existence of land within an Indian community, and not to ownership. Id. at 894. While New Mexico v. Romero obviously is not controlling here, the Court should follow its sound reasoning, which is consistent with this Court's decision in Arrieta, and hold that the Section 8 land is part of a dependent Indian community under 18 U.S.C. § 1151(b).

Contrary to HRI's assertion, the Ninth Circuit's decision in Blunk v. Arizona Dep't of Transportation, 177 F.3d 879 (9th Cir. 1999), provides no footing for analysis of the issues in this case. See HRI's Br. at 45-46. Blunk concerned a solitary tract of fee land owned by the Navajo Nation that was outside of the Navajo Reservation and close to Winslow, Arizona. It is not surprising that the Court determined the land was not within a dependent Indian community because no one contended that it was. Rather, Blunk argued that the State of Arizona's authority to regulate the billboards he erected on the property was pre-empted because the land is owned by the Navajo Nation and is in close proximity to the Navajo Reservation. 177 F.3d at 883. The Navajo Nation itself had taken the position that State law applied to the land, and it declined to intervene in the case. Id. at 881 & n.4. Indeed, Judge Fletcher specifically concurred in the result but criticized the majority for suggesting that the case required a nuanced parsing of Venetie that was not presented by the facts or advocated by the parties. Id. at 844 (Judge Fletcher concurring) (comparing the majority's analysis to Alice in Wonderland, where "'off with his head' is the 'only . . . way of settling all difficulties, great and small'") (citation omitted). Moreover, because the land was not within a Navajo Chapter, it is not clear how the Ninth Circuit would view fee lands that are within a Navajo

Chapter.[18/]

The only other federal court decisions cited by HRI, United States v. Papakee, 485 F. Supp.2d 1032, 1045 n.13 (N.D. Iowa 2000), and Thompson v. County of Franklin, 127 F. Supp.2d 145, 155 (N.D.N.Y. 2000), at most stand for the unremarkable proposition that multi-factor tests for determining the existence of a dependent Indian community were implicitly abrogated by Venetie. See HRI's Br. at 46-48. As discussed above, EPA did not use such a multi-factor test in this case. Rather, it properly applied the two-factor test of Venetie after determining the appropriate community of reference under Watchman.

In New Mexico v. Frank, 52 P.3d 404, 409 (N.M. 2002), the Supreme Court of New Mexico concluded that a community of reference analysis was not required after Venetie. The court made clear that it was not required to adopt the reasoning of this Court. Id. However, it incorrectly stated that this Court's statement in HRI

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[18/] Because it is not known how the Ninth Circuit would rule on a factual situation like the one presented here, HRI is wrong to suggest that the result would necessarily be different if this case were in the Ninth Circuit. HRI's Br. at 55-56. However, the results would vary between the New Mexico state courts and the Federal courts within this Circuit if the Court were to adopt HRI's approach. Under HRI's approach, fee lands within a dependent Indian community would not be within Indian country. Because such lands are within Indian country under Romero, 142 P.3d at 896, HRI's approach would lead to varying results (and possibly forum shopping) depending upon whether a claim is brought in State court or Federal court in New Mexico.

v. EPA regarding the continuing requirement for a community of reference analysis under Watchman, was *dicta*. Id. at 408. The dissent took the majority to task for that statement, because it is clear under HRI v. EPA that Federal courts in this Circuit must continue to apply a community of reference analysis after Venetie. Id. at 410. Thus, the majority incorrectly construed this Court's precedent, and its incorrect analysis of the community of reference requirement should have no bearing here. Moreover, as discussed above, after Frank was decided, the Supreme Court of New Mexico specifically held that private fee lands within a dependent Indian community are Indian country under 18 U.S.C. § 1151(b), and that the Venetie test applies to the entire community and not just the specific fee lands in question. New Mexico v. Romero, 142 P.3d at 896. Thus, the New Mexico Supreme Court's case law ultimately supports EPA's Determination in this case.[19/]

The other State court cases cited by HRI were decided on their facts, are outside of this Circuit, and have no bearing here. See South Dakota v. Owen, 729 N.W.2d 356, 368 (S.D. 2007) (home within the City of Peever, South Dakota, on land that was owned by City and leased to Sisseton-Wahpeton Housing Authority was not within a dependent Indian community); New Mexico v. Quintana, 2006

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[19/] As discussed below, the Section 8 land is Indian country under 18 U.S.C. § 1151(b) regardless of whether a community of reference analysis is first applied because the land is clearly within the boundaries of the Church Rock Chapter.

N.M. App. Lexis 76 (N.M. App. 2006) (State road built on Forest Service land that was not within the boundary of any pueblo was not within a dependent Indian community); Dark-Eyes v. Comm'r of Revenue Services, 887 A.2d 848, 867-71 (Conn. 2006) (concerning unique circumstances under Mashantucket Pequot Indian Claims Settlement Act).

## III. EPA'S DETERMINATION IS LIMITED IN NATURE AND IT DOES NOT PROVIDE OCCASION FOR THE COURT TO REVISIT THE WATCHMAN COMMUNITY OF REFERENCE REQUIREMENT.

EPA has the authority to determine the Indian country status of land for purposes of certain Federal environmental statutes it administers. EPA made its Determination with respect to the Section 8 land for the purpose of determining whether EPA or the State of New Mexico is the appropriate permitting authority for the SDWA UIC program. The Determination is not intended to define the Indian country status of other land within the Church Rock Chapter or elsewhere for other purposes. Therefore, contrary to HRI's argument, EPA's site-specific and limited determination should not result in the far-reaching consequences conjured up by HRI. HRI's Br. at 55-59.

Furthermore, EPA's Determination provides no occasion for the Court to revisit the community of reference requirement of Watchman because the result would be the same here even if no community of reference analysis were applied.

The Section 8 land is plainly within the boundaries of the Church Rock Chapter and therefore within a dependent Indian community under Venetie. See Arrieta, 436 F.3d at 1250 (applying set-aside and superintendence test to dependent Indian community as a whole); New Mexico v. Romero, 142 P.3d at 896 (holding that privately held fee lands within two pueblos are Indian country under 18 U.S.C. § 1151(b)). Accordingly, this case provides no reason for the Court to reconsider the community of reference requirement even if the Court were otherwise inclined to do so.

In addition, the Court should not reconsider the requirement for a community of reference analysis, because such analysis makes sense in checkerboard areas, such as those that exist in the States within the Tenth Circuit. Congress made clear in 18 U.S.C. § 1151(b) that dependent Indian communities are Indian country for purposes of Federal jurisdiction. While the Section 8 land is plainly within the Church Rock Chapter, it may not always be clear whether a given parcel of land is within an Indian community. In those circumstances, the community of reference analysis provides an appropriate analytical method for determining whether a particular parcel of land is properly considered to be within an Indian community. If it is, then under Watchman, HRI and Arrieta, the Venetie test is applied to the entire Indian community of which the property is a part. The Court should

therefore decline HRI's invitation to reconsider Watchman with respect to the community of reference requirement.

## CONCLUSION

For all these reasons, the Court should dismiss or deny the petition for review.

Respectfully submitted,

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Date: August 24, 2007.

## STATEMENT REGARDING ORAL ARGUMENT

EPA believes that the issues in this case are sufficiently complex that oral argument would be beneficial to the Court in its consideration of those issues. EPA therefore respectfully requests that the Court schedule oral argument.

## STATEMENT OF COMPLIANCE

In accordance with Fed. R. App. 32(a)(7)(C), the undersigned certifies that this brief is proportionally spaced, uses 14-point type, and contains 13,933 words.

s/David A. Carson
David A. Carson

## CERTIFICATION OF DIGITAL SUBMISSION

In accordance with the Court's Emergency General Order Regarding the Electronic Submission of Selected Documents, it is hereby certified that: (1) no privacy redactions were required for this Brief, (2) the electronic version of this

Brief is an exact copy of the written Brief that is filed with the Clerk, and (3) the digital copy of this Brief has been scanned for viruses with the most recent version of E-Trust Antivirus 7.1.192 virus scanning program, which was last updated on 23 August 2007, and, according to the program, is free of viruses.

s/David A. Carson
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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date I served two true and correct copies of the foregoing EPA's Merits Brief, along with two copies of a compact disc containing a copy of EPA's Merits Brief in digital format, upon the following counsel by first class United States mail:

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