Appeal No. 07-9506

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

HYDRO RESOURCES, INC.,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

NAVAJO NATION,

Intervenor.

Petition for Review of a Decision of
The United States Environmental Protection Agency

Land Status Determination
February 6, 2007

BRIEF OF PETITIONER

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ORAL ARGUMENT IS REQUESTED

CORPORATE DISCLOSURE STATEMENT

Petitioner Hydro Resources, Inc. ("HRI") is wholly owned by Uranium Resources, Inc., a publicly held corporation.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Statutes

TABLE OF AUTHORITIES
(continued)

Other Authorities

STATEMENT OF RELATED CASES

HRI, Inc. v. Envtl. Prot. Agency, 198 F.3d 1224, 1242 (10th Cir. 2000).

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STATEMENT OF JURISDICTION

I. EPA'S JURISDICTION

The United States Environmental Protection Agency ("EPA") has jurisdiction under the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300f - 300j-26 (1996), to administer the Underground Injection Control Program ("UIC"). EPA issued the Land Status Determination ("EPA Determination") which is contested in this proceeding pursuant to its purported authority under that Act. R44.[1] Although the SDWA confers jurisdiction on EPA for certain purposes, the "EPA does not have the power to change the Indian country status of land – that is a status conferred by Congress." *HRI, Inc. v. Envtl. Prot. Agency*, 198 F.3d 1224, 1242 (10th Cir. 2000) ("HRI Decision").

II. TENTH CIRCUIT'S JURISDICTION

The United States Court of Appeals for the Tenth Circuit continues to have jurisdiction of this matter under 42 U.S.C. §300j-7(a)(2).

III. TIMELINESS OF PETITION FOR REVIEW

A petition pursuant to 42 U.S.C. §300j-7(a)(2) must be filed within 45-days of the date the final action occurred. 42 U.S.C. §300j-7(a). The EPA Determination was issued and dated February 6, 2007. The Petition commencing this review was filed February 15, 2007.

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[1] References to the record will be to the numbers assigned in the Certified List of Documents Comprising Record [Corrected] dated May 31, 2007 ("Certified Record") [R__]

STATEMENT OF THE ISSUES

The overriding issue raised in this petition for review is whether EPA erred in determining that the Section 8 land in question, whose minerals and surface are both owned in fee by HRI, is Indian country as a "dependent Indian community" under 18 U.S.C. §1151(b) (1948).

Subissues include the following:

Whether the United States Supreme Court's holding in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998) ("*Venetie*") precludes a determination of dependent Indian community for land whose minerals and surface are owned in fee by non-Indians, is outside the exterior boundaries of the Navajo Nation reservation, and is neither land set-aside by the federal government for the benefit of the Navajo Nation nor land under federal superintendence.

Whether the precise and objective two-part *Venetie* test renders irrelevant and/or invalid the Tenth Circuit's threshold ad hoc, multifactor, fact-intensive, imprecise and unpredictable "community of reference" analysis first articulated in *Pittsburg & Midway Coal Mining Co. v Watchman*, 52 F.3d 1531 (10th Cir. 1995) ("*Watchman*").

Whether EPA complied with the Tenth Circuit's mandate on remand.

STATEMENT OF THE CASE

This case presents the issue whether fee land owned by HRI, a non-Indian corporation, located in the southeast quarter section of Section 8, Township 16N, Range 16W, N.M.P.M., in the "checkerboard area" of northwestern New Mexico and outside the boundaries of the Navajo reservation ("Section 8 land"), falls under the statutory definition of "Indian country" set forth in 18 U.S.C. §1151(b).

18 U.S.C. § 1151 defines Indian country as follows:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government ... (b) all dependent Indian communities within the borders of the United States 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 . . .

18 U.S.C. §1151. "Although this definition by its terms relates only to federal criminal jurisdiction, we have recognized that it also generally applies to questions of civil jurisdiction . . . ." *Venetie,* 522 U.S. at 527. That 1948 statute, which has its roots in prior Supreme Court cases defining "dependent Indian communities," was first interpreted by the Supreme Court in *Venetie.*

In *Venetie*, the Supreme Court narrowly tailored the statutory meaning of "dependent Indian communities:"

> We now hold that [the term "dependent Indian communities"] refers to a limited category of Indian lands that are neither reservations nor allottments, and that satisfy two requirements – first, they must have been set aside by the

> Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence.

Id. at 527.

Here, the Tenth Circuit remanded this case to EPA to determine a narrow issue – "whether that land [the Section 8 land] is a dependent Indian community under *18 U.S.C. §1151(b).*" *HRI,* 198 F.3d at 1254.

In the context of this case, "Indian country" is a jurisdictional, not a descriptive, concept. The decision ultimately rendered in this case will have jurisdictional and practical consequences far beyond the context in which this case arises.[2]

The Navajo Nation has intervened in this case to urge this Court to find that a "dependent Indian community" can be comprised not only of lands set-aside and superintended by the federal government for the benefit of Indians, but also of private land owned by non-Indians within the self-proclaimed boundaries of a "Chapter" that lies outside the reservation. However, the Tenth Circuit already has recognized that merely because land lies within a Chapter's boundaries does not make that land "Indian country." *See* Facts §III(C)(2), *infra.*

The Navajo Nation seeks to have all lands within a Chapter declared Indian country, not because EPA's standards for administering the UIC/SDWA are more stringent than New Mexico's standards – they are not. 42 U.S.C. §300g-2(a)

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[2] *See* Argument §IV, *infra.*

(State's regulations can be no less stringent than those promulgated by EPA). The Navajo Nation seeks an unprecedented expansive definition of Indian country to include private fee land, state-owned lands, and non-Indian federal lands within Chapter boundaries as a step in the Navajo Nation's attempt to assert sovereignty over and to prohibit the mining of uranium on lands outside the exterior boundaries of the reservation.[3] *See* Navajo Nation's Motion to Intervene at 4 ("[T]he Navajo Nation has governmental interests in the land HRI seeks to mine."); Navajo Nation's Reply in Support of Motion to Intervene at 4 ("The Navajo Nation's central participation as a party below is reflected in EPA's Determination, and its 'core sovereignty interests' at stake here are recognized in the HRI decision itself."); R27 ("Region 9's decision will have a significant impact on the Nation's ability as a self-governing sovereign to regulate activities and resources ....").

Yet, contrary to the Navajo Nation's assertions and contrary to the *dicta* in the HRI decision upon which the Navajo Nation relies, Section 1151(b) does **not** implicate "core sovereignty interests of Indian tribes and the federal government...." 198 F.3d at 1246. *Atkinson Trading Company, Inc. v. Shirley,* 532

[3] In April 2005, the Navajo Nation Tribal Council passed the Dinè Natural Resource Protection Act of 2005 which purports to ban uranium mining on "dependent Indian communities" as defined by 18 U.S.C. §1151(b). 18 N.N.C. § 1303. The Navajo Nation enacted the ban purportedly as a "fundamental exercise of Navajo tribal sovereignty." Resolution § 1301A. R1 at 1; R13b at App. 263-64 ¶¶17-18.

U.S. 645 (2001), a case decided after *HRI* and *Venetie*, makes it clear that §1151 does not extend tribal sovereignty beyond the borders of the reservation:

> Although § 1151 has been relied upon to demarcate state, federal, and tribal jurisdiction over criminal and civil matters [citation omitted], we do not here deal with a claim of statutorily conferred power. **Section 1151 simply does not address an Indian tribe's inherent or retained sovereignty over nonmembers on non-Indian fee land....**

532 U.S. at 653 n.5 (emphasis added).

An Indian tribe's sovereignty over land and non-Indians exists only within the reservation, and then only with respect to the activities of non-Indians on non-Indian fee land if one of two limited exceptions are met. *See, e.g., Montana v. United States,* 450 U.S. 544, 565 (1981) ("[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."). *See also UNC Resources, Inc. v. Benally*, 514 F.Supp. 358, 362 (D.N.M. 1981) ("[W]hen the issue is Indian tribal power over non-Indians, any civil authority of the tribe stops at the reservation boundary. The Navajos therefore cannot assert jurisdiction over UNC based on its off-reservation uranium milling operations."). Here, even if the Section 8 land is Indian country under 18 U.S.C. §1151(b), that statute does not provide the Navajo Nation a basis to assert sovereign power over that land under the holdings of *Montana* and its progeny, including *Atkinson*. *See also Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Nevada v. Hicks*, 533 U.S. 353 (2001); *United States v. Lara*, 541 U.S. 193 (2004).

Venetie, not the Tenth Circuit's HRI Decision, controls the determination whether the Section 8 land is Indian country. A plain reading of *Venetie* compels the inescapable conclusion that the Section 8 land is not a "dependent Indian community" and, therefore, is not Indian country.

STATEMENT OF FACTS

I. PROCEDURAL STATUS

This matter came before EPA on remand from the United States Court of Appeals for the Tenth Circuit for a determination whether the Section 8 land is a dependent Indian community under 18 U.S.C. §1151(b).

The history of EPA and New Mexico Environmental Department ("NMED") proceedings are detailed in the HRI Decision and the underlying record to that appeal. *HRI,* 198 F.3d at 1232-36. The HRI Decision also addressed the statutory and administrative framework under the SDWA and the state, federal and tribal roles in EPA's UIC program. *Id.* at 1230-36. Notably, EPA initially recognized New Mexico's jurisdiction and authority over HRI's planned injection and discharge activities on the Section 8 land when "EPA approved New Mexico's request for an aquifer exemption for HRI's Section 8 mine site." *Id.* at 1234.

Also of note is the fact that EPA's approval in 1994 of the Navajo Nation for treatment as a state ("TAS") under the SDWA excluded from TAS approval "private fee lands and state trust lands within the Eastern Navajo Agency, stating

that the Navajo Nation had 'not demonstrated the requisite jurisdiction.'" *Id.* at 1232-33.

No issues arose as to NMED's authority to issue UIC permits for the Section 8 land until 1992, after HRI requested that NMED extend the UIC permit to include the Church Rock Section 17 property ("Section 17"). On July 14, 1997, EPA stated that Section 17 was Indian country but that its status would be treated as "in dispute." *Id.* at 1235. EPA contemporaneously determined that the Section 8 land's status as Indian country was "in dispute" as well. *Id.*

In December 1997, HRI and NMED appealed those determinations to the United States Court of Appeals for the Tenth Circuit. On January 6, 2000, the Tenth Circuit held that the Section 17 land was part of an "informal reservation" and was Indian country pursuant to 18 U.S.C. §1151(a).[4] The Tenth Circuit held that the ultimate determination of the Indian country status of the Section 8 land was not ripe for judicial review and "**REMANDED** to EPA for a final determination as to whether **that land** is a dependent Indian community under 18 U.S.C. §1151(b)." *Id.* at 1254 (emphasis added).

II. EPA LAND STATUS DETERMINATION

In a March 3, 2005, letter to EPA, NMED asserted that the "Section 8 [land] is **not** a dependent Indian community under the test in *Venetie*" and requested that

[4] HRI respectfully submits that the determination regarding the Section 17 land is in error in light of subsequent cases.

EPA initiate a process to determine the land status of the Section 8 land. R25 (emphasis added). On November 2, 2005, almost six years after the Tenth Circuit's remand, EPA issued a notice inviting written comments from the public and interested parties on whether the Section 8 land constituted a "dependent Indian community" under §1151(b). R41; R43; http://www.epa.gov/region09/water/groundwater/permit-determination.html ("EPA website").

The Navajo Nation asserted that the matter did not merit a public hearing. R2 at 13. EPA did not hold public hearings. However, at the Navajo's request for consultations outside public comment [R27-29], EPA "consulted with the Navajo Nation." R44 at 2.

Twenty-five commenters responded. R1-24. Fifteen commenters from a broad cross-section of interests asserted, consistent with NMED [R25, R14], that the Section 8 land is not Indian country. R3-10, R12, R15a-c, R17, R19-22.[5]

Five commenters asserted that the Section 8 land is Indian country. R1, 11, 13a-b, 16a-q, 18. Certain commenters supported the Navajo Nation's efforts to extend its sovereignty to ban uranium mining outside the reservation. *See e.g.* R16a-q, R23-24, R46.

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[5] Commenters other than HRI also believe that the Navajo Nation is seeking to use the Indian country determination as a means to assert sovereignty over fee lands outside the reservation. R21 ("In these past few years, the Navajo Nation has made it very plain that they want to extend their sovereignty beyond the borders of the reservation.").

Five commenters submitted "comments" which EPA determined were not related to the Indian country determination. *See* R43.

On February 6, 2007, the EPA Determination was issued. R44; R45. The EPA Determination contained no original analysis or conclusions – it merely was a wholesale acceptance of the "Opinion" dated November 3, 2006 from the Department of Interior Solicitor ("DOI Opinion"). R39; R44. In requesting the DOI's input, EPA stated: "As framed by the Court, the precise issue for EPA in determining the status of HRI's land in Section 8, is whether the land is, **or is part of**, a dependent Indian community as defined under 18 U.S.C. §1151(b)." (emphasis added). R47. Unable to characterize the Section 8 land as Indian country under that framing of the issue, the issue was recast in the EPA Determination: "As framed by the *HRI* Court, the precise issue for EPA in determining the Indian country status of this Section 8 land is whether the land is, **or falls within**, a dependent Indian community under 18 U.S.C. §1151(b)." (emphasis added). R44 at 2.

The EPA Determination is fatally factually and legally flawed.

III. THE CHECKERBOARD AREA – THE SECTION 8 LAND – McKINLEY COUNTY – GALLUP – THE CHURCH ROCK CHAPTER

A. The Section 8 Land

The Section 8 land is located in the "checkerboard" area of northwestern New Mexico. *HRI,* 198 F.3d at 1231. The Section 8 land is located outside the exterior boundaries of the Navajo reservation.[6]

The Section 8 land is owned in fee by HRI. R15c App.XI ¶2. HRI has an adjudicated Nuclear Regulatory Commission license to conduct uranium recovery operations on the Section 8 land.[7] R15c App.I at 2-3 and App. IX. HRI acquired the Section 8 land from United Nuclear Corporation ("UNC"). R15c App.XI ¶2. UNC acquired the Section 8 land from the United States in or about 1970. *Id.* The uranium mining claims on the Section 8 land were patented by the United States to UNC. R15c App.IV. The surface area of Section 8 not owned in fee by HRI is owned in fee by the United States. R15c App.XI ¶3. There are no inhabitants on the Section 8 land. *Id.* ¶4.

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[6] For a thorough history of legislative and executive action pertaining to this area and the evidence of Congressional intent to disestablish the area along the eastern and southeastern New Mexico borders of the Navajo Reservation, see generally *Pittsburg & Midway Coal Co. v. Yazzie*, 909 F.2d 1387, 1389-92, 1419-22 (10th Cir. 1990), noted by, *HRI*, 198 F.3d at 1231 n.2.

[7] Certain commenters to EPA in this proceeding have appealed the Nuclear Regulatory Commission's adjudication. *Eastern Navajo Dinè Against Uranium Mining v. United States Nuclear Regulatory Commission*, Case No. 07-9505 (10th Cir. Filed February 9, 2007.)

McKinley County assesses property taxes on the Section 8 land which are paid annually by HRI. *Id.* ¶5, R22.

The sole access road to the Section 8 land is State Highway 566, which the State of New Mexico is responsible for the maintaining. R15c App.XI ¶10; R4. McKinley County is responsible for the maintenance of other roads in the area. R4. McKinley County provides other essential services to the Section 8 land including fire, police and emergency medical services. R15c App.XI ¶9; R4. The Gallup/McKinley County public school system provides schools and transportation to schools. *Id.*

Upon commencement of operations on the Section 8 land, Public Service of New Mexico will provide electrical services. R15c App.XI ¶9.

The State of New Mexico has sole jurisdiction over water use on the Section 8 land. *Id.* ¶12. On October 22, 1999, the New Mexico State Engineer issued Findings and Order approving HRI's water rights to conduct operations on the Section 8 land. *Id.;* R15c App.VII.

B. McKinley County/Gallup

McKinley County "is a multi-cultural sustainable community ...." http://www.co.mckinley.nm.us (Vision Statement).

The boundaries of McKinley County are defined at NMSA 1978 § 4-17-1 (2006). McKinley County is comprised of 3,496,084 acres with title status as

follows: 498,393 acres of federal land; 168,887 acres of state land; 2,078,572 acres of trust (including reservation) land; and 750,232 acres of private land. R15c App.III p.38. Thus, more than 40% of the land in McKinley County is private, state-owned, or non-Indian federal land. The Section 8 land is part of the 1,172 square miles of private land in McKinley County. *Id.*; R4.

McKinley County exercises jurisdiction and provides infrastructure and services to private lands in McKinley County, both Indian and non-Indian owned alike. R4; R6; R15c at App.III p.40. "Neither the unincorporated Churchrock Chapter nor the Navajo tribal government provides any infrastructure or basic services to Section 8." R4. The McKinley County Attorney explained:

> Any attempt to expand Navajo jurisdiction in the Checkerboard Area of McKinley County is taken very seriously by the County. McKinley County has established jurisdiction over private fee land in the County. This jurisdiction has been recognized by non-Indians and Indians, including the Navajo Tribal Government. Size and location of a private tract have no bearing on the County's jurisdiction.

Id.; *see also* R21 ("Our fee lands have never been treated by any governmental entity as anything but private land. We obtain all services from McKinley County.")

As reiterated in the comments of the Eastern Navajo Allottees Association, infrastructure and services for the Section 8 land is exclusively provided by

McKinley County. R6 at 2 ("Neither the Churchrock Chapter nor the Navajo Tribe provides any area infrastructure or services to the fee portion of Section 8.")

The City of Gallup is west and northwest of the Church Rock Chapter. *See* R40 at B-1 (Land Use Plan for Church Rock Chapter ("Land Use Plan")). A significant number of persons residing in the Church Rock Chapter are employed in Gallup. R40 at B-24. Of Church Rock Chapter members surveyed for the Land Use Plan, only 2% indicated that they were employed in the Chapter compared to 47% employed in Gallup. *Id.*

The Church Rock Chapter House "is located about three miles east of the city limits of Gallup ...." R1 at 9. "Being located adjacent to Red Rock State Park and the City of Gallup enables the chapter to generate revenues through related activities and provides some access to employment for chapter members." R13b App.94.

The cities of Gallup and Ft. Wingate provide the locations for all high schools and middle schools, and all but one of the elementary schools in the area. R40 at B-53.

C. The Church Rock Chapter

1. Chapters are not "Creatures of the Federal Government"

EPA begins its discussion of the Church Rock Chapter with a notable disclaimer: "Nothing in this Determination should be read as recognizing Navajo

chapters as separate political entities by the United States." R44 at 8 n.45. Rather, "Chapters were local organizations, composed of, and directed by, people with common interests." Robert W. Young, A Political History of the Navajo Tribe 66-67 (Broderick H. Johnson ed., Navajo Community College Press 1978).

There is no evidence in the record (nor could there be) to support EPA's conclusion that the Church Rock Chapter (or any other Chapter) is a "creature of the federal government." R44 at 11; R39 at 10. There is no evidence or even suggestion that the federal government directed where Chapter Houses should be located, who the Chapter members should be, or how the boundaries of the Chapters should be drawn. In fact, the federal government had no input into these matters. Sam and Janet Bingham, Navajo Chapters 2-3 (Navajo Community College Press 1987) ("The B.I.A. men did not say exactly where the different chapters should be or who the members of the chapters would be."). Further, disputes as to the boundaries of Chapters and election districts are purely tribal matters resolved by the Navajo Tribal Courts with no involvement by or consequence to the state or federal government. *See Sweetwater Chapter v. Teec Nos Pos Chapter*, 2 Nav. R. 13 (Navajo 1979).

Chapters were established over time by the Navajo Nation to provide political organization and a mechanism for communication among local tribal members. Young, *supra.* ("The Headman long had held local meetings to deal

with local problems, and the Chapters represented a continuation of that traditional practice, differing largely in the formality attaching to their organization."). Chapter meetings are open only "to the Navajo residents of the community." 2 N.N.C. §4009.

Each Chapter is not its own Navajo Nation election district. Typically, two or more Chapters comprise an election district. 11 N.N.C. §10. For example, the Church Rock and Breadsprings (nka Baahaali) Chapter comprise election district 16. *Id.*

Grazing permits are based on districts, not Chapters. R15c App.III pp.48-49. The boundaries of each grazing district encompass many Chapters. *Id.*; *see also*, Bingham, *supra* at 7-11, 29-31 (Grazing District 16, which includes the Church Rock Chapter, has 15 Chapters).

2. The Existence of Chapters Does Not Affect the Jurisdictional Status of Land in the Checkerboard Area.

There is no uniformity of jurisdictional authority over the land that is within the Chapter boundaries. *Yazzie*, 909 F.2d at 1422 ("1151(b) and (c) allow checkerboard *jurisdiction* outside reservation boundaries."); *Benally*, 514 F.Supp. at 360 (the checkerboard area is an "area of mixed federal, state and tribal jurisdiction..."); *see also* R40 at B-18 (reference to "Checkerboard Area"; "Multiple jurisdictions"). The Section 8 land, like state or other non-Indian owned fee land, by definition, is **not** a **part** of the Chapter. *See Blatchford v. Sullivan*, 904

F.2d 542, 548-49 (10th Cir. 1990), *cert. denied,* 498 U.S. 1035 (1991) (holding that the community of Yah-Ta-Hey within the boundaries of the Rock Springs Chapter was not a dependent Indian community)[8]; http://rocksprings.nndes.org/ ("The community of Yatahey Junction (including Navajo Estates) is within the Chapter boundaries although it is not governed by the Chapter."). *See also United States v. M.C.*, 311 F.Supp. 2d 1281, 1285, 1295 (D.N.M. 2004) (finding that BIA school on federal land for use by BIA to educate Native Americans is "not land set-aside for the use of Indians as Indian land"; and stating "The [Navajo Department of Health] considers the school to be within the Iyabito [sic] Chapter boundaries.").

The fact that neither the Navajo Nation nor the United States' government has jurisdiction over state-owned land (*e.g.* Red Rock State Park) or private fee lands is recognized by the Navajo Nation and should have been recognized by EPA. R40 at C-15-16 (The Chapter's Land Use Plan, discussing the Springstead Subdivision consisting of 626 acres located 3 1/2 miles northeast of the Chapter House within the boundaries of the Chapter [closer to the Chapter House than the Section 8 land], recognized that "[t]he site is located on private land ... [I]t will be subject to the subdivision laws and regulations of the State of New Mexico.").

[8] The Rock Springs and Church Rock Chapters are adjacent to each other and are both in McKinley County in close proximity to the City of Gallup.

3. The Church Rock Chapter Was Not "Certified" by the Navajo Nation Until 1955.

Both the Department of Interior and EPA play fast and loose with "facts" relating to when, by whom, and for what purpose the Church Rock Chapter was established. Following EPA's opening disclaimer [R44 at 8 n.45], and without citation to any statute, executive order or congressional proclamation, EPA sets forth the keystone for its assertion that the Church Rock Chapter purportedly is set-aside by the federal government and is subject to federal superintendence:

> The Church Rock Chapter was organized by the federal government in 1927 "for the purposes of facilitating communication between Navajo communities and fostering self government. Although the Church Rock Chapter is now an integral part of the Navajo government, initially it was a creature of the Federal Government."

R44 at 11 (quoting DOI Opinion); *see also* R44 at 8 (same).

However, none of the sources cited by the DOI supports this assertion. R39 at 10. Under the Navajo Tribal Code the United States plays no role in the establishment and certification of Chapters. 2 N.N.C. §4001. The Navajo Tribal Council certifies the existence of Chapters. *Id.* The Church Rock Chapter was officially certified as a Chapter by the Navajo Nation on December 5, 1955. R40 at B-2.

While it appears that certain Chapter organizations within the Luepp Agency within the exterior boundaries of the Arizona portion of the reservation were

established in 1927, there is no reference in the source materials to the establishment of the Church Rock Chapter. Navajo Yearbook 191-92 (Robert Young ed., Navajo Agency 1958); Navajo Yearbook 374 (Robert Young ed., Navajo Agency 1961). Even as to the Arizona Chapters, the "source authorities" do not state whether any boundaries were established by the Navajo Nation in 1927 to delineate the geographic limits of membership in a Chapter or whether the Chapter concept was merely adopted by a group of Navajos living in an area.

Nowhere in the "source authority" cited by EPA is it asserted that the Chapters were intended to or had any effect on the title or jurisdictional status of land "within" a Chapter. Despite the lack of evidence that the United States government took any official action or played any official role in the drawing of the present (or any) boundaries of the Church Rock Chapter, EPA baldly asserts that "the federal government defined [the community] geographically." R44 at 8.

By the mid-1940's "[m]any chapters disintegrated and dissolved .... Under these circumstances many chapters lacked solid community support and the meetings stopped being held ...." Aubrey W. Williams, Jr., Navajo Political Process 40 (Smithsonian Institution Press 1970). From the mid-1940's until 1955 "the chapters lay dormant." *Id.* In 1955 the Chapters that existed "were reactivated by the Navajo Tribal Council." *Id.*

The first Chapter House for the Church Rock Chapter was built in 1946. R13b App.261 ¶6. However, there is no evidence in the record as to when, prior to or after 1955, the Church Rock Chapter boundaries or the boundaries of any other Chapter in the Eastern Navajo Agency were drawn or when a chapter actively participated in Navajo tribal government. HRI has been unable to locate any source outside the record that states when, by whom and how boundaries of the Church Rock Chapter were first established.

4. The Section 8 Land Is Neither Contiguous to Nor in Close Proximity to the Chapter House or the "Navajo Community" that Resides In and Around the Village of Church Rock

EPA grounds its assertion that the entirety of the Church Rock Chapter is an appropriate "community of reference" because it encompasses the Chapter House and the community which has been built around the Chapter House. R44 at 8-9. However, the maps submitted by the various commenters show quite clearly that the Chapter House and the community which has been built around the Chapter House is neither contiguous to nor in close proximity to the Section 8 land and is closer to the eastern boundaries of Gallup than to the Section 8 land. *See, e.g.*, R40 at B-39, B-51, B-58, B-59. The Chapter House is about three miles from Gallup's eastern city limits. R1 at 9. The non-Indian owned Springstead Site, which is subject to the subdivision laws of New Mexico and which is geographically

between the Chapter House and the Section 8 land, is 3½ miles from the Chapter House. R40 at C-15-16.

EPA's consideration of the population, gross census data, and infrastructure of the Church Rock Chapter is superficial and does not analyze whether the "community" indicated by that data includes the Section 8 land. Upon closer analysis, it is clear that it does not.

The Church Rock "community" has been built around and in close proximity to the Chapter House. *Id.* EPA notes that the Church Rock Chapter "has a Head Start center, an elementary school, several churches, and a host of Chapter, tribal, and BIA services and facilities." R44 at 9. Without exception, all of the referenced facilities are located either in the Village of Church Rock or in the portion of the chapter that is south of Interstate 40. *Id.* "The Chapter is divided into southern and northern portions by ... Interstate Highway 40." R40 at B-1. The northern portion is in the Gallup North subarea of McKinley County and the Southern Portion is in the Gallup South subarea of McKinley County. *See* McKinley County Comp Plan Phase II, Figure III-4-Map of McKinley County Subareas. http://www.co.mckinley.nm.us (follow "Comprehensive Plan" hyperlink; then follow "Comprehensive Plan II" hyperlink).

Similar to the location of infrastructure and facilities, most of the persons who reside in the Chapter reside in and around the Chapter House area, including

in the outlying area of the Chapter that is south of the Chapter House and Interstate 40, and many of those persons work in Gallup. R40 at B-24.

5. The Section 8 Land is in Close Proximity to the More Than 40% of the Church Rock Chapter that is Not a Community or Capable of Sustaining a Community

More than 40% of the land within the boundaries of the Church Rock Chapter is not a "community" or capable of sustaining a "community." R40 at B-40 ("About 37 sections consist of rugged mountain ranges, canyons, and highlands.... They are not suitable for community or industrial development.").[9] R40 at B-38.

6. Services and Infrastructure

EPA relegates to a footnote the assertion that "limited services" are provided to residents of the chapter by the State of New Mexico and McKinley County. R44 at 10 n.60. However, the services provided by McKinley County, Gallup and the State of New Mexico to residents and land, including the Section 8 land and land owned by Indians, are significant and substantial. *See* Facts §§ III (A) and (B) *supra.*

SUMMARY OF ARGUMENT

Indian country is defined by 18 U.S.C. §1151. That federal statute defines Indian country as (a) reservation land, (b) dependent Indian community, and (c)

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[9] These 37 sections comprise approximately 40% (37 x 640 acres/section = 23,680 acres) of the "total Chapter area" of approximately 57,827 acres.

allotted lands. As determined by the Tenth Circuit in the HRI Decision, the Section 8 land is not reservation, tribal, trust, or allotted lands. As a result of the Supreme Court's decision in *Venetie*, it is indisputable that no portion of the Section 8 land is a "dependent Indian community."

Venetie requires that the Section 8 land be both federally set-aside and federally superintended to be Indian country under 1151(b). The Section 8 land satisfies neither test. HRI owns the Section 8 land in fee. The United States does not own or hold the Section 8 land for the benefit of Indians. The Section 8 land is not under the superintendence of the United States for the benefit of Indians.

The "community of reference" analysis does not survive *Venetie*. Although there is *dicta* in the HRI Decision that a "community of reference" analysis may have survived *Venetie*, the holdings of *Venetie*, *Blunk v. Arizona Department of Transportation*, 177 F.3d 879 (9th Cir. 1999) ("*Blunk*"), *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999), *cert. denied*, 529 U.S. 1108 (2000) ("*Roberts*"), and *United States v. Arrieta*, 436 F.3d 1246 (10th Cir. 2006), *cert. denied*, 126 S.Ct. 2368 (2006) ("*Arrieta*") make it clear that regardless of a threshold "community of reference" analysis, the federal set-aside and federal superintendence requirements must be applied and satisfied with respect to the Section 8 land. To apply the federal set-aside and superintendence tests to a "community of reference," but not

to the Section 8 land itself, would render superfluous *Venetie's* mandatory federal set-aside and federal superintendence requirements.

Even if a "community of reference" analysis beyond the boundaries of the Section 8 land is necessary, the Section 8 land is not a part of an Indian community. The Section 8 land, if part of any community, is part of the non-Indian communities defined by the town of Gallup or McKinley County. EPA's reliance on the entire Church Rock Chapter as the "community of reference" is thus misplaced.

The Section 8 land is not owned, occupied or controlled by Indians. Even if all persons residing and businesses operating within the boundaries of the Church Rock Chapter is an appropriate "community of reference," the existence of the Church Rock Chapter *qua* Chapter does not support either federal set-aside or federal superintendence of all of the land within the Chapter generally, and of the Section 8 land in particular.

EPA failed to follow the Tenth Circuit's remand to determine whether the Section 8 land is a "dependent Indian community." EPA improperly framed the issue to be decided as whether the Section 8 land is "within" a "dependent Indian community." Even under the misstated issue, the Section 8 land is not "within" Indian country because the Church Rock Chapter *qua* Chapter is neither federally set-aside nor federally superintended.

There are significant adverse practical and jurisdictional consequences if the Tenth Circuit continues to apply a threshold "community of reference" analysis and does not apply the two *Venetie* tests to the Section 8 land. One such consequence is that the multiple jurisdictional authorities in the Checkerboard area are ignored. Another consequence is that the "Indian country" of the Navajo Nation will be subject to varying criteria depending upon whether the land at issue is in Arizona or New Mexico, whether the "Indian country" determination is being made by New Mexico state courts or the Ninth Circuit on one hand or by the Tenth Circuit on the other, and how broadly or narrowly the "community of reference" is defined.

STANDARD OF REVIEW

"EPA does not have the power to change the Indian country status of land – that is a status conferred by Congress." *HRI,* 198 F.3d at 1242. The standard of review by this Court of the EPA Determination is *de novo*. *Arrieta,* 436 F.3d at 1248 ("we review the district court's conclusion [re Indian country] de novo.") (citing *Roberts,* 185 F.3d at 1129; *Watchman*, 52 F.3d at 1542); *see also Blatchford,* 904 F.2d at 544.

The Navajo Nation's asserted linkage between the Indian country status and the Navajo Nation's inherent tribal sovereignty (albeit incorrect) supports *de novo* review. *Montana v. EPA,* 137 F.3d 1135, 1140 (9th Cir. 1998) ("[T]he scope of

inherent tribal authority is a question of law for which EPA is entitled to no deference.").

ARGUMENT

I. *VENETIE* REQUIRES THAT THE SECTION 8 LAND BE BOTH FEDERALLY SET-ASIDE AND FEDERALLY SUPERINTENDED TO BE INDIAN COUNTRY UNDER 1151(b)

Prior to the Supreme Court's decision in *Venetie,* the First, Eighth, Ninth and Tenth Circuits adopted various multi-factor and fact-intensive tests to determine "whether a given area constitutes Indian country." *See Alaska v. Native Village of Venetie Tribal Government,* 101 F.3d 1286, 1291 (9th Cir. 1996) ("*Venetie I*") (citing *Watchman* and other cases); *Narragansett Indian Tribe v. Narragansett Elec. Co.,* 89 F.3d 908, 914-22 (1st Cir. 1999); *United States v. South Dakota,* 665 F.2d 837 (8th Cir. 1981). While the multi-factor tests applied in those cases incorporated federal set-aside and federal superintendence as "two central features of the inquiry into whether a given area constitutes Indian country," *Venetie I,* 101 F.3d at 1291, in the Ninth Circuit those two factors were "reduced ... to mere considerations." *Venetie,* 522 U.S. at 531 n.7.

In the First Circuit, the absence of federal ownership "or federal action sufficient to 'set aside' the land" was determinative that land was not a dependent Indian community. *Narragansett,* 89 F.3d at 921-22. In *Watchman,* at least as read by EPA, by requiring a threshold "community of reference" determination that

arguably could include private fee lands, the Tenth Circuit left open the possibility that the set-aside and superintendence factors were not determinative whether particular lands are Indian country. *But see Buzzard v. Oklahoma Tax Commission,* 992 F.2d 1073, 1076-77 (10th Cir. 1993) (land owned by Indian tribe in fee neither federally set-aside nor under federal superintendence and thus not Indian country.). Regardless of the tests applied, with rare exception involving land owned by tribes, "in most of the cases ... where land was privately held, even if by a tribe, the courts found there was not a dependent community." *Narragansett,* 89 F.3d at 920-21 (collecting cases).

The Ninth Circuit's *Venetie I* decision was one of those few cases where land owned in fee by a tribe was held to be Indian country. The Supreme Court reversed the Ninth Circuit's *Venetie I* decision that the land owned by a Native Alaskan corporation and occupied by the Venetie tribe met the statutory definition of a dependent Indian community because the land was neither federally set-aside nor superintended:

> We now hold that [the term "dependent Indian communities"] refers to a limited category of Indian lands that are neither reservations nor allottments, and that satisfy two requirements – first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence.

Venetie, 522 U.S. at 527. The Supreme Court's decision should have brought certainty, consistency and predictability to the determination whether lands outside

the exterior boundaries of federally established Indian reservations are properly classified as a dependent Indian community and thus Indian country under 18 U.S.C. § 1151(b).[10]

Despite the clarity of *Venetie,* EPA wrongly determined, based on *dicta* in the HRI Decision,[11] that the Tenth Circuit continues to embrace a threshold "community of reference" analysis which is "fact-intensive" and multi-factored. R44 at 5; R 39 at 3. EPA then compounded its error by wrongly and broadly applying the two *Venetie* tests of federal set-aside and federal superintendence to EPA's designated "community of reference" – the Church Rock Chapter – rather than **solely** to the Section 8 land. R44. EPA misstated the holding of *Venetie* by stating: "the Supreme Court outlined a two-part test for determining whether a community is a dependent Indian community." EPA Determination at 3. *Venetie* does not apply the tests to a "community." *Venetie* applies the tests to "the land in question." 522 U.S. at 531.

It is the Section 8 land, not the Church Rock Chapter, that is the land in question. EPA did not make any finding that the Section 8 land was set-aside and

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[10] A question presented for review in *Venetie* was "whether the Ninth Circuit correctly held ... that the determination whether land is Indian country within 1151(b) should depend upon an ad hoc, six-part balancing test incapable of producing predictable results." 1997 U.S. S. Ct. Briefs LEXIS 485 *1 (Petitioner's Brief).

[11] *See* Argument §I(C), *infra.*

superintended by the federal government for the benefit of the Navajo Nation. Rather, EPA determined that because the Section 8 land is **within** the boundaries of the Church Rock Chapter which EPA designated as the "community of reference" and a "dependent Indian community," *ipso facto*, the Section 8 land is Indian country. EPA's application of the *Venetie* tests to the designated "community of reference" without regard to the private fee status of the Section 8 land ignored the multiple jurisdictional authorities in the Checkerboard area and led EPA to the erroneous result that the Section 8 land is Indian country.

It is not disputed that the surface and mineral estates of the Section 8 land are owned in fee by HRI and that the uranium mining claims on the Section 8 land were patented by the United States to non-Indian parties. As a result, the Section 8 land itself fails to satisfy either of the two part federal set-aside and federal superintendence tests enunciated by the Supreme Court in *Venetie*. *Venetie* renders the threshold community of reference test irrelevant.

A. Congressional Enactment of 18 U.S.C. §1151; Codification of Federal Set-Aside and Federal Superintendence Requirements.

In 1948, after three decades of Supreme Court jurisprudence on the subject, Congress enacted 18 U.S.C. §1151 to codify the definition of Indian country for purposes of demarcating the boundaries of federal and state criminal jurisdiction for crimes committed on Indian country.

The Supreme Court in *Venetie* explained that the statutory definition of Indian country originated from the adoption by Congress of the rationale of the Supreme Court's cases of *United States v. Sandoval*, 231 U.S. 28 (1913); *Donnelly v. United States*, 228 U.S. 243 (1913); *United States v. Pelican*, 232 U.S. 442 (1914); and *United States v. McGowan*, 302 U.S. 535 (1938). *Venetie,* 522 U.S. at 528. The Supreme Court explained that the definition of Indian country under 1151(b) requires that the two tests of federal set-aside and superintendence be satisfied as to the land in question (here, the Section 8 land):

> In each of these cases, therefore, we relied upon a finding of both a federal set-aside and federal superintendence in concluding that the Indian lands in question constituted Indian country and that it was permissible for the Federal Government to exercise jurisdiction over them. Section 1151 does not purport to alter this definition of Indian country, but merely lists the three different categories of Indian country mentioned in our prior cases: [citations omitted]
>
> * * *
>
> We therefore must conclude that in enacting § 1151(b), Congress indicated that a federal set-aside *and* a federal superintendence requirement **must be satisfied** for a finding of a "dependent Indian community" – just as those requirements had to be met for a finding of Indian country before 18 U.S.C. § 1151 was enacted. These **requirements** are reflected in the text of § 1151(b): The federal **set-aside requirement** ensures that the **land in question** is occupied by an "Indian community"; the **federal superintendence requirement** guarantees 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.** [footnotes omitted]

522 U.S. at 530-31 (italics in original) (emphasis added).

EPA's purported application of the two *Venetie* tests, not to the Section 8 land, but to a "community of reference" determined through a vague, multi-factored analysis, transforms the heretofore discrete "dependent Indian community" category of Indian country into a form of Indian country that includes privately owned fee lands that lie outside the exterior boundaries of a reservation. By disregarding the intent of Congress as interpreted by the Supreme Court, that the Section 8 land must satisfy the federal set-aside and superintendence tests and by applying those tests to a broadly defined "community of reference," EPA's analysis improperly transfers from Congress to administrative agencies the power to allocate jurisdictional authority of the State of New Mexico, federal government, and Indian tribes outside the boundaries of the Navajo reservation.

EPA's approach makes the jurisdictional determination wholly dependent on how the "community of reference" is defined, and that definition is subjective, unpredictable, inconsistent, and result-oriented. For example, EPA states that it considered, but rejected, the "town of Gallup as the community of reference." R44 at 10 n. 64. The principal reason stated for such rejection was that "[Gallup's] eastern boundary is located approximately 18 miles, and its airport approximately 26 miles, from the Section 8 land." *Id.* However, there is private fee land in the southwest corner within the boundaries of the Church Rock Chapter that is

contiguous with non-Indian lands outside the boundaries of the Church Rock Chapter and within a mile or two of Gallup's city limits. *See* R16(b) (Land Status map). There also is private fee land along the eastern border of the southern portion of the Chapter that is contiguous to non-Indian land outside the chapter boundaries. *Id.* Whether private land within the boundaries of a Chapter is Indian country under 1151(b) should not be dependent on such matters as proximity to Indian, United States or non-Indian owned lands that are wholly unrelated to and disconnected from whether the land in question is federally set-aside and superintended.

EPA's analysis departs dramatically from the Supreme Court's decision in *Venetie*, which focused on Congressional intent to set-aside the land in question as Indian country – and required unambiguous evidence of that intent for lands that Congress has not designated a "reservation," or an "allotment." Yet, EPA rejected the teachings of *Venetie* and the necessary guidance of Congressional intent, and simply considered whether the land was within a Navajo chapter which is a creation of the Navajo Nation, not the federal government. *See* Facts §§III(C)(1)-(3). EPA found the superintendence criteria met by mere federal involvement in grazing permits on a district-wide basis and the provision of certain federal services generally available to Native Americans wherever they may reside. R44 at 12-13. Yet, *Venetie* held that "the mere provision of 'desperately needed' social

programs [do not] support a finding of Indian country." *Venetie,* 522 U.S. at 534; *see also, HRI,* 198 F.3d at 1253 ("The Venetie Court rejected the government's provision of social programs as merely general aid, not indicia of active federal control.")

Venetie's test for 1151(b) is circumscribed and precise. This is appropriate for a test serving the threshold function of delineating the respective parameters of federal, state, and tribal jurisdiction and requires courts to undertake a task to which they are both suited and accustomed: ascertaining Congress' intent. In contrast, the Tenth Circuit's pre-*Venetie* "community of reference" analysis is amorphous, ill-defined, fact-intensive, and multi-factored. The test is "hard to apply" and "jettison[s] relative predictability for the open-ended rough-and-tumble of factors," and "invit[es] complex argument in a trial court and a virtually inevitable appeal," all of which is especially unacceptable for threshold jurisdictional determinations. *Grubart v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995).

This Court should adhere to the Supreme Court's *Venetie* decision and hold that the threshold "community of reference" analysis has no applicability to the determination of the jurisdictional status of private fee land outside the exterior boundaries of a reservation. This Court should construe the "dependent Indian

community" category of 1151(b) according to its limited, congressionally intended scope and the narrowly tailored test enunciated in *Venetie*.

B. Elementary Principles Of Statutory Construction Do Not Support EPA's Conclusion That The Section 8 Land Is Indian Country Because It Lies Within The "Community of Reference."

The Tenth Circuit remanded this case to EPA to determine whether "that land [Section 8 land] is a dependent Indian community under 18 U.S.C. §1151(b)"; *HRI*, 198 F.3d at 1254. Despite this clear remand, EPA misstated this Court's mandate by stating the issue to be determined in the alternative: "As framed by the *HRI* Court, the precise issue for EPA in determining the Indian country status of this Section 8 land is whether the land is, **or falls within**, a 'dependent Indian community' under 18 U.S.C. section 1151(b)." (emphasis added) R44 at 2. Despite this erroneous characterization, the DOI Opinion clearly states that EPA understood that the remand was to determine "whether 160 acres owned in fee by [HRI] in Section 8 . . . are 'Indian country.'" R39 at 1. However, both the DOI Opinion and the EPA Determination carefully avoid the proper conclusion that the Section 8 land is not Indian country. Rather, the DOI Opinion "conclude[s] that Section 8 is **within** a dependent Indian community and is therefore part of Indian country as defined by Section 1151. *Id.* (Emphasis added).

EPA determined that the Section 8 land should be considered Indian country not because the land itself satisfied the set-aside and superintendence tests but

"because it is **within** the dependent Indian community of the Church Rock Chapter." R44 at 13 (emphasis added). EPA did not determine, as it could not, that the Section 8 land itself satisfied the definition of a "dependent Indian community" under 1151(b) and the tests enunciated in *Venetie*.

EPA's characterization of the remanded issue in the alternative and its holding violate elementary principles of statutory construction. Unlike 1151(a), which provides that Indian country means "all land **within the limits** of any Indian reservation" (emphasis added), 1151(b) does **not** provide that Indian country includes all lands, regardless of ownership status, within the boundaries of a "dependent Indian community." Had Congress intended that Indian country under 1151(b) include the latter category of private lands, Congress could have and would have included in 1151(b) the "within the limits" language of 1151(a) and *Venetie* would not have emphasized that the land in question must itself satisfy the set-aside and superintendence tests.[12]

EPA's construction of both 1151(b) and this Court's remand is error. Congress did not include "within the limits" language in 1151(b). *Bates v. United States*, 522 U.S. 23, 29-30 (1997) ("Where Congress includes particular language

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[12] Because 1151(b) does not contain the "within the limits" language, in 2005, Congress amended the Pueblo Lands Act to specifically provide for criminal jurisdiction over all lands (including private fee lands) within the exterior boundaries of any grant to a pueblo from a prior sovereign. 151 Cong. Rec. E 2386 109th Congress, 1st Session, Nov. 17, 2005; *see also* Pub. L. 109-133 § 20.

in a section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion."), *cited in, Universal Constr. Co., Inc. v. Occup. Safety and Heath Rev. Comm.*, 182 F.3d 726, 729 (10th Cir. 1999).

Had EPA followed this Court's mandate, adhered to elementary principles of statutory construction, and applied the two-part *Venetie* test to the Section 8 land, regardless of how it defined a "community of reference," it would have been compelled to conclude that the privately owned Section 8 land is **not** Indian country.

C. The Tenth Circuit's Decision In *HRI v. EPA* Did Not Fully Consider The Effect Of *Venetie* On The Tenth Circuit's 1151(b) "Community of Reference" Analysis

Contrary to the conclusion of EPA, the HRI Decision did not hold that the "community of reference" analysis – now unique in federal Indian jurisprudence – survives *Venetie*. Contrary to the conclusion of EPA, the HRI Decision did not hold that federal set-aside and superintendence tests are to be applied to the "community of reference" rather than to the land in question.

Although EPA quoted most of footnote 3 of the HRI Decision in discussing the effects of *Venetie* on the holding of *Watchman* [R44 at 4], EPA conspicuously omitted the first sentence of footnote 3. That sentence made it clear that the Tenth Circuit did not fully analyze and rendered no holding on the ultimate effect of

Venetie on the holding of *Watchman*: "For the reasons set forth in Section IV of this decision, we need not address the precise impact of ... *Venetie* ... on the holding of *Watchman*." *HRI,* 198 F.3d at 1232 n.3, 1254 (As relates to Section 17, "a dependent Indian community analysis would require us to delve into potentially difficult questions regarding the impact of Venetie on the Watchman analysis – questions that we are not required to reach today....").

In *dicta* in the HRI Decision, this Court stated that "[b]ecause Venetie does not speak directly to the issue . . . *Watchman*, 52 F.3d at 1542-45, 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." *HRI,* 198 F.3d at 1249. Because this Court had no reason to and did not fully consider the effect of *Venetie* on *Watchman*, the statements concerning the continued viability of the "community of reference" after V*enetie* were not necessary to the case. *See State v. Frank*, 52 P.3d 404, 408 (N.M. 2002) ("In dicta, the [HRI] Court stated that Venetie did not have the opportunity to address a proper community of reference...."); *see also Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1184 (10th Cir. 1995) (defining *dicta* as "statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to the case at hand.") (quoting, *Black's Law Dictionary*, 454 (6th ed. 1990)). Not only are the "community of reference"

comments *dicta,* but as a result of *Venetie,* those comments are an incorrect statement of the law.

In rejecting the Ninth Circuit's textured approach, the *Venetie* Court held that the element of community cohesiveness, in addition to other factors, "were extremely far removed from the [set-aside and superintendence] requirement" of the dependent Indian community test. *Venetie,* 522 U.S. at 531 n.7. The Supreme Court in *Venetie* thus rendered a holding that spoke directly to the holding of *Watchman* that a finding of a community of reference requires, in the first instance, "the existence of an element of cohesiveness ... [that] can be manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality." *Watchman,* 52 F.3d at 1544. By rejecting the subjective and ill-defined concept of cohesiveness of an "area" or "locality," the Supreme Court rejected any test for a dependent Indian community that incorporated that factor, particularly a test where the identification of the "community" then trumps any consideration of whether the land in question itself is federally set-aside and subject to federal superintendence.

The collision between the holding of *Venetie* and the threshold community of reference analysis is clearly demonstrated by the way EPA sought to identify the community of reference in this case. EPA accepted the DOI's consideration of the following factors in its "fact-intensive" analysis:

1. "the geographic boundaries of a community"

2. "the status of the area in question as a community"

    a. "the existence of an element of cohesiveness . . . [that] can be manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality."

    b. "whether [the community] qualifies as a 'mini-society consisting of personal residences and an infrastructure potentially including religious and cultural institutions, schools, emergency services, public utilities, groceries, shops, restaurants, and the other needs, necessities and wants of modern life.'"

3. "the community in question within the context of the surrounding area."

    a. "examining the 'relationship of [the proposed community] to the surrounding area.'"

        i. "which government or governments provide the infrastructure and essential services for the community."

R44 at 5-6.

The factors EPA considered in its *ad hoc* fact-intensive analysis are remarkably similar to and coextensive with the factors the Ninth Circuit applied before such factors were rejected (other than set-aside and superintendence) by the Supreme Court in *Venetie*:

> (1) the nature of the area; (2) the relationship of the area inhabitants to Indian tribes and the federal government; (3) the established practice of government agencies toward that area;

> (4) the degree of federal ownership of and control over the area; (5) the degree of cohesiveness of the area inhabitants; and (6) the extent to which the area was set aside for the use, occupancy, and protection of dependent Indian peoples.

522 U.S. at 525.

Now that the 1151(b) issue is ripe for review, this Court should fully consider the effect of *Venetie* on *Watchman* and hold that a threshold community of reference analysis has no place in the determination whether private fee land outside the exterior boundaries of a reservation is Indian country.

D. After *Venetie*, The Tenth Circuit And Other Courts Have Recognized That the Two Part Federal Set-Aside and Federal Superintendence Tests Must be Satisfied As to the Land In Question In Order for That Land to Be Indian Country

Judicial decisions in the Tenth Circuit and other Courts following the Supreme Court's decision in *Venetie* affirm that (i) the Supreme Court rejected fact-intensive multi-factor analyses for the determination whether land is Indian country under the definition set forth in 1151(b); (ii) the Supreme Court held that the federal set-aside and federal superintendence tests are the **only** tests to be applied; and (iii) that those two tests are to be applied **only** to the **land in question.**

Unlike 1151(a), which expressly includes non-Indian land within the exterior boundaries of a reservation as Indian country, 1151(b) does not provide that every parcel of non-Indian land contiguous to or within a dependent Indian community is Indian country. *See* Argument §I(B), *supra.* To hold otherwise

would ignore the recognition by the Tenth Circuit, the Navajo Nation, the State of New Mexico, and McKinley County that federal, state and Indian jurisdiction all coexist within the "checkerboard" area in northwestern New Mexico. *See* Facts §§ IIIB, C(2).

1. Tenth Circuit

a. *United States v. Roberts*

The Tenth Circuit first revisited the 1151(b) definition of Indian country after *Venetie* in *Roberts*. Although *Roberts* was decided prior to *HRI,* the *HRI* Court did not analyze *Roberts* in the context of the present issue.

The *Roberts* decision was authored by Judge Porfilio – formerly Judge Moore – the same Circuit Judge who authored *Watchman.* In *Roberts*, the Tenth Circuit addressed the jurisdiction of federal courts under the Major Crimes Act over a felony committed by a member of the tribe on land owned by the United States in trust for the tribe. The defendant challenged his conviction on the grounds that the land was not Indian country.

Apparently recalling his notation in *Watchman*, 52 F.3d at 1545 n.15, that "the Supreme Court has never adopted its own test for determining a dependent Indian community," Judge Porfilio noted in *Roberts* that:

> The [Supreme] Court announced for the first time a two-part test for dependent Indian community, stating, "[we] must . . . conclude that in enacting § 1151(b), Congress indicated that a federal set-aside and a federal superintendence requirement

> must be satisfied for a finding of a 'dependent Indian community.'"

185 F.3d at 1132 (quoting *Venetie*, 522 U.S. at 530).

The Tenth Circuit in *Roberts* recognized that the federal set-aside and federal superintendence tests enunciated in *Venetie* are to be applied only to the "land in question":

> Although the facts supporting "set-aside" and "superintendence" appear to be case sensitive, Justice Thomas further explained, "the federal set-aside requirement ensures that **the land in question** is occupied by an 'Indian community'; the federal superintendence requirement guarantees 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.**"

185 F.3d at 1133 n.5 (quoting *Venetie*, 522 U.S. at 531) (emphasis added).

As a result of this recognition, the Indian country analysis in *Roberts* was limited to the property on which the alleged crimes were committed - the Tribal Complex property. There is not a single reference in *Roberts* to the phrase "community of reference." As evidenced by its absence, there was no place in *Roberts* for a separate and threshold community of reference analysis. The federal set-aside and federal superintendence tests would be rendered meaningless if land neither federally set-aside nor federally superintended for the benefit of Indians could nonetheless be a dependent Indian community under 18 U.S.C. §1151(b).

b. *United States v. Arrieta*

More recently, in *Arrieta,* the Tenth Circuit has expressly recognized the significance of the title status of the land in question in determining whether the federal set-aside and federal superintendence requirements are satisfied.

In *Arrieta* the issue was whether there was state or federal jurisdiction to prosecute Arrieta for a crime committed against an Indian on Santa Fe County Road 105, aka Shady Lane, within the exterior boundaries of the Pojoaque Pueblo. 436 F.3d at 1248 ("Federal jurisdiction thus exists over crimes for which Mr. Arrieta was charged only if Shady Lane – the situs of the crime – was Indian country.").

Arrieta is significant because it applies the federal set-aside and federal superintendence tests to Pueblo land which the Supreme Court had determined almost 100 years earlier was in its totality a dependent Indian community, but within which Indian title to certain lands had been extinguished since that decision. 436 F.3d at 1249. Pueblo lands such as the Pojoaque Pueblo were the prototypical dependent Indian community that Congress had in mind when it enacted 18 U.S.C. §1151(b). *Venetie*, 522 U.S. at 528.

Rather than take a pre-*Venetie* approach and define a community of reference by the Pueblo's boundaries, the Tenth Circuit first properly examined the status of "the situs of the crime" – the land in question – Shady Lane. *Arrieta,* 436

F.3d at 1248. Further, although the Court stated that it should look to the "entire Indian community ... to ascertain whether federal set-aside and federal superintendence requirements are satisfied," it limited the "Indian community" only to land "to which the Pueblo hold title." *Id.* at 1250-51. The *Arrieta* court, by implication, if not expressly, correctly excluded private fee land from the area that was "Indian community." *Id.* at 1246.

The Tenth Circuit did not look to the "community" to define the area to which the federal set-aside and federal superintendence tests were applied – those tests were applied only to Shady Lane. *Id.* The Tenth Circuit merely indicated, similar to other post-*Venetie* courts, that it may be useful to define the "community," not to supplant the analysis of the two federal requirements enunciated in *Venetie* as to the land in question, but to help "inform the analysis of the two federal requirements." *Thompson v. County of Franklin*, 127 F.Supp. 2d 145, 155 (N.D.N.Y. 2000).

In summary, the Tenth Circuit held in *Arrieta* that **Shady Lane** met the statutory definition of "dependent Indian community" because it was land owned by the Pueblo Indians within the exterior boundaries of the Pueblo. 436 F.3d at 1250 ("Because the Pojoaque Pueblo possess title to Shady Lane and Shady Lane is within the exterior boundaries of the Pojoaque Pueblo, it is part of the Pojoaque community."). The analysis of *Arrieta*, which first analyzed whether "the situs of

the crime" (i.e. the land in question) was land set-aside for the benefit of Indians, teaches that, had the crime occurred on one of the privately owned parcels adjacent to Shady Lane, land on which Pueblo title had been extinguished by Congress, "the situs of the crime" would not have been part of the Pojoaque community and, thus, would not have been Indian country.[13] Similarly, if the rationale and analysis of *Arrieta* are applied to the Section 8 land here, it must be concluded that the Section 8 land is **not** part of a "dependent Indian community" and thus is **not** Indian country. The analysis is even more straight forward here than in *Arrieta* because, unlike Pueblos, Chapters do not have their origins in a congressional land grant.[14]

2. Ninth Circuit

Lest there be any doubt that the Supreme Court rejected the Ninth Circuit's test that considered factors other than federal set-aside and federal superintendence with respect to the land in question, the Ninth Circuit acknowledged that fact: "The [Supreme] Court [in *Venetie*] rejected a 'textured' approach that defined Indian country through a multi-factor balancing test [citation omitted]. Instead, the Court adopted a narrow definition of 'dependent Indian communities.'" *Blunk*, 177 F.3d at 883.

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[13] The result may now be different under the 2005 amendment to the Pueblo Lands Act. *See Id.* at 1251. *See also* footnote 12, *supra.*

[14] "The lands belonging to the several pueblos ... usually embrace about 17,000 acres, held in communal, fee simple ownership under grants from the King of Spain made during the Spanish sovereignty and confirmed by Congress since the acquisition of that territory by the United States." *Sandoval*, 231 U.S. at 39.

Applying *Venetie* to Navajo fee land in Arizona, the Ninth Circuit held in *Blunk*:

> Native Village of Venetie controls our decision. The Navajo Fee Land is neither within the Navajo reservation nor is it an Indian allotment. The Navajo Fee Land is not a dependent Indian community because the land was purchased in fee by the Navajo Nation rather than set aside by the Federal Government. The Federal Government does not "actively control[] the land[] in question, effectively acting as a guardian for the Indians," nor does the Government exercise any lesser level of superintendence over the Navajo Fee Land. [citation omitted] The Navajo Fee Land does not become Indian country simply because of its tribal ownership or because of its proximity or importance to the Navajo Reservation. [citation omitted] In sum, the requirements for the Navajo Fee Land to be "Indian country" are not met in this case.

177 F.3d at 883-84. Likewise, HRI's fee land in New Mexico does not become Indian country because of its proximity to the Navajo Reservation or tribal trust or allotted lands.

3. Federal Courts in the Eighth Circuit

Most recently, in *United States v. Papakee,* No. 06-CR-162-LRR, 2007 U.S. Dist. LEXIS 32475, at *34 (N. D. Iowa, May 2, 2007), a court within the Eighth Circuit, citing *Venetie*, held that "[l]and is part of a 'dependent Indian community' if it is (1) validly set-aside for use of Indians as such and (2) under the superintendence of the government." In determining that a parcel of land identified as 315 Red Earth Drive satisfied the definition of Indian country under 1151(b), the court noted: "*Venetie* implicitly abrogated [the] four-factor test [set

forth in *United States v. Azure,* 801 F.2d 336 (8th Cir. 1986)] for determining whether a particular area is a 'dependent Indian community.'" *Id.* at *34 n.13.

4. New Mexico State Courts

Following *Venetie*, the courts of the State of New Mexico rejected the "community of reference" analysis. *Frank,* 52 P.3d at 409 ("In light of the clear guidelines of the Venetie opinion, we decline to incorporate a community of reference inquiry into our case law."); *see also*, *State v. Romero*, 142 P.3d 887, 891 (N.M. 2006) ("We adopted the Venetie analysis in *Frank.*")[15]

In *Frank*, the New Mexico Supreme Court compared the *Venetie* standard with the community of reference test and concluded that "the six-factor test that was rejected by the Supreme Court in *Venetie* used essentially the same factors as those in *Watchman*" and that "[t]he *Venetie* two-prong test redirects 'our attention to land and its title and away from the more nebulous issue of community cohesiveness." 52 P.3d at 549; *see also, State v. Frank,* 24 P.3d 338, 346-350 (N.M. Ct. App. 2001) (Bosson, Chief Judge dissenting); *State v. Quintana*, No. 25,107, 2006 N.M.App. LEXIS 76, at *6 (N.M. Ct. App. June 15, 2006), writ granted 2006 N.M. LEXIS 420 (N.M. Aug. 25, 2006) ("To determine whether

[15] *Romero* held that private fee land within the Pojoaque Pueblo was Indian country for the reason that "Congress and the United States Supreme Court have established that pueblo lands are Indian country." 142 P.3d at 892. The *Romero* court rendered its decision without reference to *Arrieta* (also dealing with Pojoaque Pueblo) or the congressional acts referenced in *Arrieta* that extinguished Indian title to certain lands.

is a set-aside, we first look to the title of the land in question because the link between title and status as Indian country has been previously recognized by this Court.").

5. Other State and Federal Courts

Other State courts also have recognized that the Supreme Court's two-part test set forth in *Venetie* is the only test to be applied to the land in question. *See, e.g., State v. Owen,* 729 N.W.2d 356, 368-69 (S.D. 2007) ("There is no evidence on the record that the Housing development [where the crime occurred] is under federal superintendence or a federal set-aside."); *Dark-Eyes v. Commissioner of Revenue Services*, 887 A.2d 848, 864-65 (Conn. 2006) (holding that because the land in question was not set-aside for Indians by the federal government, "[w]e begin and end with the issue of whether the plaintiff has met her burden of proof with respect to the first requirement, the set aside.").

The significance of *Venetie* is explained in *Thompson v. County of Franklin:*

> So, instead of six, or even three, there are now only two determinative factors- federal set-aside and superintendence. What is more, after *Venetie* . . ., factors other than federal set-aside and superintendence are so diminished in importance as to be practically meaningless, except perhaps to the extent that those other "extremely far removed" factors can be used to inform the analysis of the two federal requirements.

127 F. Supp. 2d at 155.

E. The Section 8 land Does Not Satisfy The Federal Set-Aside And Federal Superintendence Tests

Neither the federal set-aside nor the federal superintendence tests are satisfied with respect to the Section 8 land. *See* Facts §III(A). As a result, the Section 8 land is not Indian country.

II. AS A MATTER OF LAW, THE CHURCH ROCK CHAPTER, *QUA* CHAPTER IS NEITHER FEDERALLY SET-ASIDE NOR SUPERINTENDED AND THE SECTION 8 LAND IS NOT PART OF THAT "COMMUNITY" OR PART OF INDIAN COUNTRY

The issue before EPA was whether the Section 8 land was a "dependent Indian community" under 1151(b). Because EPA rejected the Section 8 land as a "community of reference" - assuming *arguendo* that the threshold community of reference analysis survives *Venetie* - the Section 8 land cannot be Indian country. *United States v. Adair*, 111 F.3d 770, 774 (10th Cir. 1997) ("The first step [in the *Watchman* analysis] requires an analysis of whether the area proposed as a dependent Indian community is appropriate as a community of reference . . . . If an area . . . does not emerge from this threshold evaluation as a community of reference, it necessarily cannot constitute a dependent Indian community."). By designating as the "community of reference" a land area (Church Rock Chapter) that included within its boundaries the Section 8 land, rather than designating solely the Section 8 land, EPA manipulated and attempted to preordain the outcome of this matter.

However, even assuming that a "community of reference" needs first to be determined and the *Venetie* tests of set-aside and superintendence applied to the "community of reference," rather than to the Section 8 land, the Church Rock Chapter, as a whole, satisfies neither test. The Section 8 land, while within the boundaries of the Church Rock Chapter, is not a part of that community. *See* Facts §III(C)(2), *supra, Arrieta,* and *Papakee.* Further, the Church Rock Chapter is not the proper "community of reference." If the Section 8 land is not the appropriate "community of reference," the "community of reference" should be the "community" that benefits from the taxes paid and provides the infrastructure and services to the Section 8 land and other fee lands. That "community" is McKinley County and/or the town of Gallup. *See* Facts §III(B).

A. The Church Rock Chapter Is Not Federally Set-Aside

As set forth in Facts §III(C)(1), *supra*, the Church Rock Chapter *qua* Chapter is not land set-aside by the federal government for the benefit of Indians. The Church Rock Chapter, its certification, its boundaries, and its membership criteria, are the creation of the Navajo Nation. Facts §III(C), *supra.* No land grants were made to create the Chapters. *Id.* Boundary lines merely were drawn by the Navajo Nation around a land area whose title, status and jurisdictional interests already were established. *Id.* While it may be argued that certain tracts of land within the Chapter boundaries have been set-aside by the federal government

for the benefit of Indians (e.g., trust lands), those tracts, by definition, do not include the private fee land that comprises the Section 8 land. *See* Facts §III(C)(2), *supra, Arrieta,* and *Papakee.*

B. The Church Rock Chapter Is Not Under Federal Superintendence

EPA states that "[i]n prior cases, superintendence was found where the federal government actively controlled the **lands in question**, effectively acting as a guardian for the Indians." R44 at 12 (emphasis added).

As set forth in Facts §III(C), *supra*, the Church Rock Chapter is not wholly comprised of lands subject to the active control and guardianship of the federal government. Further, as recognized by EPA, "[i]t is the land in question, not merely the Indian tribe inhabiting it, that must be under the superintendence of the federal government." R44 at 12, citing, *Venetie* 522 U.S. at 531 n.5. While it may be argued that certain tracts of land within the Chapter boundaries are under active federal superintendence for the benefit of Indians, those tracts do not include the Section 8 land, other private lands such as the Springstead Site, lands owned in fee by Indians, state lands, and federal lands not owned in trust for Indians. Moreover, the provision of social services and programs does not support a finding of active federal superintendence. *See* Argument §I(A), *supra.* As a result, the entire Chapter, *qua* Chapter, is **not** under federal superintendence.

C. Neither EPA Nor Any Commenter Cites To A Single Case Where Non-Indian Fee Land Outside The Exterior Boundaries Of A Reservation Or Pueblo Has Been Held To Be Indian Country

EPA asserts that "both state and federal courts recognized Navajo and federal authority over non-trust lands within Chapter boundaries." R44 at 11 n.79. However, case law does not support this assertion. *See, e.g., U.S. v. M.C.*, 311 F.Supp. 2d at 1295 ("[a]s a review of the case law makes clear, there has **never** been a finding of a dependent Indian community unless the community at issue was located on tribal lands or land held in trust for Native Americans.") (emphasis added).

The cases cited by EPA are all pre-*Venetie* decisions. Even then, none of the four cases cited by EPA in footnote 79, and no cases cited by any commenter, hold that non-Indian fee land outside the exterior boundaries of a reservation or Pueblo is Indian country under 1151(b). *See United States v. Martine*, 442 F.2d 1022 (10th Cir. 1971) (although set-aside was not addressed in the Tenth Circuit's opinion, in the United States' appeal brief, it was stated: "Ramah is not on allotted land but on land bought with Navajo tribal funds, with title in the United States, (Tr. 89) and on United States land the Indians are permitted to use." U.S. Brief at 9-10;[16]

[16] The District Court in *Martine* tied the finding of Indian country to the specific section of land where the accident/crime occurred: "The trial court instructed the jury (Tr. 242): The Court instructs you that Section 4, Township 7 North, Range 16 West of the New Mexico Principal Meridian is Indian country within New Mexico." U.S. Brief at 8.

United States v. Calladitto, Cr. No. 91-356, 19 Indian L. Rptr. 3057 (D.N.M. Dec. 5, 1991) (The community of reference was the Northern Half of Section 13, land owned by the Navajo Nation, and the part of the section where the Chapter House was located); *United States v. Yazzie*, No. Cr. 93-470 (D.N.M. Jan. 28, 1994) (Automobile accident occurred in a section of land owned by Navajo Tribe; *see* U.S. Brief ¶2 filed January 7, 1994); *Thriftway Mktg. Corp. v. State*, 810 P.2d 349 (N.M. Ct. App. 1990) (Indian country issue not presented).

Also, EPA misplaces reliance on *Benally*, 514 F.Supp. 358, for the proposition that all the land in the checkerboard area is "Indian country." The court, while making that statement, conducted no jurisdictional analysis and recognized that the checkerboard area is an "area of mixed federal, state and tribal jurisdiction." *Id.* The court used the term "Indian country" in a general and descriptive manner, not as a jurisdictional finding. Finally, contrary to EPA's assertion, courts within the Tenth Circuit, on a case by case basis, have held, that certain lands in the checkerboard area and within the boundaries of a Chapter are **not** Indian country. *See* Facts §III(C)(2), *supra*.

III. EPA DEVIATED FROM THE TENTH CIRCUIT'S MANDATE AND REMAND

By framing the issue to be decided in the alternative and stating the obvious – the Section 8 land is "within" the boundaries of the Church Rock Chapter – EPA deviated from this Court's mandate to determine whether the Section 8 land itself

is Indian country under 1151(b). The "mandate rule" provides that an inferior tribunal "must comply strictly with the mandate rendered by the reviewing court." *See Huffman v. Saul Holdings Ltd. Partnership*, 262 F.3d 1128, 1132 (10th Cir. 2001). The "[mandate] rule is equally applicable to the duty of an administrative agency . . . to comply with the mandate issued by a reviewing court." *In re Wella A.G.*, 858 F.2d 725, 728 (Fed. Cir. 1988) citing, *Federal Power Comm'n v. Pacific Co.*, 307 U.S. 156 (1939).

The "mandate rule" is an "important corollary" to the law of the case doctrine. *Huffman*, 262 F.2d at 1132. As addressed in Argument §I(C), *supra*, the Tenth Circuit's discussion of "community of reference" is *dicta*. As *dicta*, it is not law of the case. *Meridian Reserve, Inc. v. Bonnett Resources Corporation*, 87 F.3d 406, 410 (10th Cir. 1996) ("[T]his court has also recently joined 'the majority of our sister circuits in holding that dicta is not subject to the law of the case doctrine.'"). Even if not *dicta*, it is not law of the case. *Venetie* is "controlling authority ... applicable to such issues" and application of a threshold community of reference analysis "is clearly erroneous and would work a manifest injustice." *See Watchman*, 52 F.3d at 1536 n.4.

Although deviation from the mandate may often require a remand back to the inferior tribunal to correctly address the issue on remand, that is not necessary here. The record is sufficiently clear and the facts relating to the Section 8 land

undisputed for this Court to render a decision that the Section 8 land owned by HRI is not Indian country.

IV. THERE ARE ADVERSE JURISDICTIONAL AND PRACTICAL CONSEQUENCES TO APPLYING THE "COMMUNITY OF REFERENCE" ANALYSIS AND DESIGNATING PRIVATE FEE LAND OUTSIDE THE EXTERIOR BOUNDARIES OF A RESERVATION AS "INDIAN COUNTRY"

The jurisdictional and practical consequences of the Tenth Circuit imposing a threshold "community of reference" analysis on the determination of whether private fee land outside the exterior boundaries of an Indian reservation is a "dependent Indian community" require rejection of that analysis and adherence to the holding of *Venetie*.

One consequence that will result is that the "Indian country" of the Navajo Nation will not be determined by application of uniform criteria. Rather, the determination of whether private fee land outside the exterior boundaries of the Navajo reservation is Indian country will depend on the vagaries of whether the land is located in New Mexico or Arizona, whether the determination is being made in the New Mexico state or federal courts, whether the determination is being made within the jurisdiction of the Ninth or Tenth Circuits, how broadly the "community of reference" is defined,[17] or which community is designated as the

[17] In *Blatchford*, 904 F.2d 542, the "community of reference" was defined as the Ya Ta Hey community. It was determined that Ya Ta Hey was neither set-aside nor superintended by the federal government. *Id.* 548-49. Ya Ta Hey is within the

"community of reference."[18] For example, if the Section 8 land was located in Arizona (Ninth Circuit), EPA would apply the Ninth Circuit test set forth in *Blunk* and find that the Section 8 land was **not** "Indian country." R44 at 4 n. 20. Whether a parcel of land is "Indian country" of the Navajo Nation under 1151(b) should be determined by a uniform and consistently applied test. "The task of allocating jurisdiction necessarily involves line-drawing, and in an area where there is a compelling need for uniformity, there must be a single bright line." *Ute Indian Tribe v. Utah*, 114 F.3d 1513, 1527 (10th Cir. 1997), *cert. denied*, 522 U.S. 1107 (1998). *Venetie's* two-part test applied to the land in question provides that "single bright line."

Private fee land exists within the checkerboard area of most if not all of the twenty-eight Navajo Chapters that the Navajo Nation considers a part of the Eastern Navajo Agency. R15c App.III p.49. The "community of reference" determination will require the courts to be called upon to resolve these claims in the innumerable instances in which they may arise, subjecting the boundaries and extent of county, state and federal jurisdiction to exercise fundamental government powers to many case-by-case determinations. Sorting all this out will be a time-

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Twin Lakes Chapter. Would the result have been different if the Twin Lakes Chapter was the "community of reference"? If not, are some Chapters outside the reservation wholly federally set-aside and superintended and other Chapters not?

[18] Under EPA's analysis which applies the *Venetie* tests to the "community of reference" and not solely to the land in question, the status of private fee land likely will vary depending on how the "community of reference" is defined.

consuming, expensive, and divisive endeavor -- especially if an indeterminate, "fact-intensive," multi-factor analysis for defining the "community of reference" is applied rather than applying the two narrowly tailored *Venetie* tests to the land in question.

The resulting confusion and uncertainty over basic questions of governmental authority and operations itself provides a compelling reason for this Court to recognize that a "community of reference" should not be a determinative part of the Indian country analysis. *See Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 425, 462 n.8 (1989) (White, J.) (rejecting holding that would create "uncertainty" due to "the necessarily case-by-case determination of which regulatory body (or bodies) has ... jurisdiction over [certain] land, not to mention the uncertainty as to when a tribe will attempt to assert such jurisdiction"). On the other hand, if lands outside the exterior boundaries of a reservation neither set-aside by the federal government for Indians nor superintended by the federal government for the benefit of Indians can never be Indian country under 1151(b) (perhaps with the exception of private fee-land within Pueblos pursuant to Congressional mandate), then consistent jurisdictional principles and settled understandings – based on the Supreme Court's decision in *Venetie* – will exist.

The consequences of a judicial finding that private fee land outside the exterior boundaries of a reservation can be Indian country are profound. Indian tribes, such as the Navajo Nation has attempted to do, will seek to assert their sovereignty over such lands, thus seeking to expand *de facto* their reservation boundaries.[19] Absent an act of Congress, states and counties with presently recognized jurisdiction over private lands should not lose such jurisdiction and thus regulatory control, and citizens who own such lands should not be subject to what will amount to an adverse taking.

A threshold "community of reference" test, as applied by EPA, renders the federal set-aside and federal superintendence tests of *Venetie* superfluous and not even a consideration as to private fee land. Decisions by the Supreme Court should not be subject to such disregard. *See Hutto v. Davis*, 454 U.S. 370, 375 (1982) ("unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.").

There are no adverse consequences if the Tenth Circuit joins the other courts which have addressed the issue post-*Venetie* and applies the *Venetie* set-aside and

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[19] *But see, Yazzie*, 909 F.2d at 1420 ("Just because the area has remained predominantly Navajo has apparently not been a sufficient reason for Congress to establish a permanent reservation on the 709/744 lands in New Mexico. This court is not going to 'remake history' and declare a *de facto* reservation in the face of clear congressional intent to the contrary.").

superintendence tests straight up to the Section 8 land. Under the *Venetie* set-aside and superintendence tests, no land that meets both tests would be excluded from the 1151(b) definition of Indian country – and no land that does not meet both tests, such as private fee land, would be included.

CONCLUSION

For the reasons set forth above, EPA erred in making the determination that the Section 8 land is "Indian country" under 18 U.S.C. §1151(b). Under *Venetie,* the Section 8 land is not "Indian country." NMED thus has SDWA primacy to administer and issue UIC permits with respect to the Section 8 land.

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STATEMENT WITH RESPECT TO ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a), Petitioner HRI, requests that there be oral argument. Petitioner believes that oral argument will assist the Court in addressing these important jurisdictional issues regarding the statutory definition of "Indian country," under 18 U.S.C. § 1151(b).

DATED: This 11th day of June, 2007.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 13,978 words, excluding the parts of the brief exempted by Fed. R. App. P. Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) this brief has been prepared in a proportionally spaced typeface using Word XP Service Pack 3 in 14 font size and Times New Roman style.

DATED: This 11th day of June, 2007.

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LAND STATUS DETERMINATION

I. Summary

In consultation with the United States Department of the Interior, the United States Environmental Protection Agency (EPA or the Agency) has determined that the approximately 160 acres of land located in the southeast portion of Section 8, Township 16N, Range 16W, in the State of New Mexico (the Section 8 land), is part of a dependent Indian community under 18 U.S.C. section 1151(b) and, thus, "Indian country." EPA is therefore the appropriate agency to consider underground injection control permit applications under the Safe Drinking Water Act (SDWA) for that land.

II. Introduction and Background

This Land Status Determination arises from the remand to EPA in *HRI v. EPA*, 198 F.3d 1224 (10th Cir. 2000) (the *HRI* case).

In the late 1980s, Hydro Resources, Inc. (HRI) sought an underground injection control (UIC) permit for its property located within Section 8. This land is located in the "checkerboard" area of the Eastern Navajo Agency, within the borders of the State of New Mexico, approximately 18 miles to the eastern boundary of Gallup, NM.[1] The Navajo Nation has historically asserted that the Section 8 land in question is within a dependent Indian community. After considering materials submitted by the Navajo Nation and the New Mexico Environment Department (NMED), EPA determined that the Indian country status of the Section 8 land was in dispute and, thus, EPA would be the appropriate agency to issue the SDWA UIC permit. The State of New Mexico and HRI challenged EPA's determination with respect to the Indian country status of the land in question and petitioned for judicial review of EPA's decision.

In 2000, in the *HRI* case, the United States Court of Appeals for the Tenth Circuit upheld EPA's decision to implement the UIC program on HRI's Section 8 land because the Indian country status of that land was in dispute. At EPA's request, the *HRI* Court remanded the matter to EPA to make a final administrative decision on the status of the disputed Section 8 land in light of the United States Supreme Court's intervening decision in *Alaska v. Native Village of Venetie Tribal Government*[2] on dependent Indian communities under 18 U.S.C. section 1151(b).[3] Subsequent to the *HRI* Court's decision, it was EPA's understanding that HRI no longer planned to pursue a UIC permit for its property, and thus EPA did not take further action to resolve the Indian country issue. In 2005, NMED received a request from HRI for a UIC permit to operate a uranium in-situ leach mine in Section 8. As a result, NMED formally requested that EPA make a decision on the Indian country status of the Section 8 land.

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. The State of New Mexico has been authorized by EPA to administer the UIC program in the State, but EPA's authorization

[1] *HRI*, 198 F.3d at 1248, 1231.
[2] 522 U.S. 520 (1998).
[3] *HRI*, 198 F.3d at 1248, 1254.

does not extend New Mexico's program to areas of Indian country.[4] EPA directly implements the federal UIC program on Indian lands in the absence of an EPA-approved state or tribal program, including on disputed lands where it is unclear whether or not they are "Indian lands."[5] Under EPA's SDWA regulations, "Indian lands" has the same meaning as "Indian country" defined by 18 U.S.C. section 1151.[6] Section 1151 defines "Indian country" as "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . [,] (b) all dependent Indian communities within the borders of the United States . . . [,] and (c) all Indian allotments, the Indian titles to which have not been extinguished . . . ."[7] Accordingly, if the Section 8 land is within a dependent Indian community, EPA is the appropriate regulatory entity.

As framed by the *HRI* Court, the precise issue for EPA in determining the Indian country status of this Section 8 land is whether the land is, or falls within, a "dependent Indian community" under 18 U.S.C. section 1151(b).[8] As discussed below, the *HRI* Court explained the need under the Tenth Circuit's case law for EPA to identify the appropriate community of reference to determine where to apply the Supreme Court's *Venetie* test.

In a Federal Register notice published November 2, 2005, EPA noted that HRI proposes to operate a uranium in-situ leach mine on an approximately 160-acre parcel of land located in the southeast portion of Section 8, Township 16N, Range 16W in the State of New Mexico.[9] Due to the State's lack of authorization to implement a UIC program in Indian country and as a result of the remand from the Tenth Circuit Court of Appeals to EPA, EPA noted that it must now determine whether or not the Section 8 land is part of a dependent Indian community under 18 U.S.C. section 1151(b) and, thus, considered to be "Indian country." The November Federal Register notice solicited public comments on and information relevant to the Indian country status of the Section 8 land. EPA received comments from 25 commenters, including HRI, the Navajo Nation, the State of New Mexico, and others.

The Agency reviewed the status of the land in light of the comments it received, the existing case law, and a November 3, 2006 opinion from the United States Department of the Interior (DOI) Solicitor, who has special expertise on Indian country questions. EPA consulted with the DOI Solicitor's Office, provided the Solicitor a copy of the submitted comments, and conducted a site visit to the HRI site and the surrounding area while accompanied by a Solicitor's Office staff attorney. EPA also consulted with the Navajo Nation pursuant to its federal trustee relationship.

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[4] 40 C.F.R. § 147.1600-1603.

[5] 53 Fed. Reg. 43096, 43097 (Oct. 25, 1988).

[6] 40 C.F.R. § 144.3.

[7] Although it is part of Title 18, the federal criminal code, the Supreme Court has recognized that section 1151 also defines Indian country for questions of civil jurisdiction. *DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 427 n.2 (1975).

[8] *HRI*, 198 F.3d at 1248 and 1254.

[9] *See* Safe Drinking Water Act Determination; Underground Injection Control Program, Determination of Indian Country Status for Purposes of Underground Injection Control Program Permitting, 70 Fed. Reg. 66402 (2005).

The DOI Solicitor's Opinion (DOI Opinion)[10] concluded that the Section 8 land is part of a dependent Indian community and, therefore, constitutes Indian country as defined by 18 U.S.C. section 1151. EPA agrees. As described further in the following discussion, because the Section 8 land is Indian country, EPA is the appropriate agency to consider any future UIC permit applications under the SDWA for that land.[11]

III. Determining Whether an Area is a Dependent Indian Community Under 18 U.S.C. § 1151(b)

A. *Venetie* and the community of reference analysis

In *Alaska v. Native Village of Venetie Tribal Government*, the Supreme Court outlined a two-part test for determining whether a community is a dependent Indian community.[12] In *Venetie*, the Supreme Court had to decide whether former reservation lands, conveyed to an Alaska Native corporation and then to the Alaska Native Village of Venetie in communal fee simple pursuant to the Alaska Native Claims Settlement Act (ANCSA), could be considered Indian country under 18 U.S.C. section 1151, thereby permitting the tribe to tax non-Indians doing business on the lands.[13] Because the lands were neither reservations nor allotments, the question was whether they constituted a dependent Indian community. The Court concluded "that in enacting § 1151(b), Congress indicated that a federal set-aside and a federal superintendence requirement must be satisfied for finding of a 'dependent Indian community[.]'"[14] According to the Supreme Court, the specific language of ANCSA clearly showed that Congress had no intention to set aside or superintend the lands at issue and, therefore, Venetie was not a dependent Indian community.[15]

Before *Venetie*, the Tenth Circuit used a four-prong test for determining whether a particular area is a dependent Indian community based upon its decision in *Pittsburg & Midway Coal Mining Co. v. Watchman.*[16] In *Watchman*, the Tenth Circuit considered as an issue of first impression "the threshold question of the appropriate community [or geographic area] to use" in determining whether an area constitutes a dependent Indian community under 18 U.S.C. section 1151(b).[17] It referred to this appropriate community or geographic area as the "community of

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[10] A copy of the DOI Opinion is attached to this Determination as the Appendix.

[11] 53 Fed. Reg. 43096, 43097 (Oct. 25, 1988).

[12] *Venetie*, 522 U.S. at 527.

[13] See *id.* at 523-27.

[14] *Id.* at 530.

[15] *See id.* at 532-34.

[16] 52 F.3d 1531, 1545 (10th Cir. 1995) (specifying four-prong test: (1) whether the United States has retained title to the lands which it permits the Indians to occupy and authority to enact regulations and protective laws respecting this territory; (2) the nature of the area in question, the relationship of the inhabitants in the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area; (3) whether there is an element of cohesiveness . . . manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality; and (4) whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples.)

[17] *Id.* At 1543.

reference." Prior to adopting its four-prong test, the *Watchman* Court identified "two organizing principles [or steps] useful for determining the community of reference": 1) "the status of the area in question as a community" and 2) "the community of reference within the context of the surrounding area."[18]

As the *HRI* Court noted, certain elements of the *Watchman* test appear to have been diminished by the *Venetie* decision:

> We note . . . that in *Venetie*, the Supreme Court reversed a decision of the Ninth Circuit applying a six-factor test--similar to our *Watchman* test--for dependent Indian community status to certain Alaskan Native lands . . . . The Court concluded that three of the factors relied on by the Ninth Circuit were extremely far removed from the [set-aside and superintendence] requirements of the dependent Indian community test. These three factors--nature of the area, relationship of area inhabitants to Indian tribes and the federal government, and the degree of cohesiveness of the area and its inhabitants--comprise parts of the second and third prongs of the test adopted in *Watchman* and presumably *Venetie* reduces substantially the weight to be afforded them.[19]

A key question following *Venetie* was whether the Tenth Circuit's community-of-reference threshold analysis survived *Venetie*. Several commenters have suggested that the community-of-reference analysis is no longer intact.[20] In reviewing the *Venetie* decision, however, the *HRI* Court reached a different conclusion. It concluded that, because the Supreme Court in *Venetie* was not presented with the question of the proper community of reference and did not speak directly to the propriety of a community-of-reference analysis, Tenth Circuit precedent continues to require a community-of-reference analysis. As the *HRI* Court stated:

> Although it appears that, in disapproving of the Ninth Circuit's multi-factor test for identifying a dependent Indian community, *Venetie* may require some modification of the emphases in the second step of our dependent Indian community test in *Watchman*, nothing in *Venetie* speaks to the propriety of the first element of that test-- determination of the proper community of reference . . . . Presumably because of the categorical effect of the Alaska Native Claims Settlement Act . . . on virtually all Alaskan native lands, the Supreme Court in *Venetie* was not even presented with the question of defining the proper means of determining a community of reference for analysis under § 1151(b).

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[18] *Id.* at 1543-44.

[19] *HRI*, 198 F.3d at 1232, n. 3 (citing *Venetie*. at 531 n. 7) (other citations and internal quotations omitted).

[20] In support of this view, a few commenters cited the decision in *Blunk v. Arizona Dep't of Transp.*, 177 F.3d 879 (9th Cir. 1999) (applying the two-part *Venetie* test to tribal fee land without a community-of-reference type of analysis). As a Ninth Circuit decision, *Blunk* is not controlling in the Tenth Circuit. Like DOI, EPA in its Determination properly followed pertinent Tenth Circuit case law—specifically the *HRI* Court's direction—regarding the community-of-reference analysis. EPA's response to comments includes further discussion of *Blunk* and other cases cited by commenters.

> Because *Venetie* does not speak directly to the issue, barring en banc review by this court, [this court 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).[21]

As the DOI Opinion notes, "[i]n order to follow the terms of the court's remand, as well as the most recent law from the Tenth Circuit, . . . a community of reference analysis is necessary." [22] Under the Tenth Circuit's approach, the community-of-reference analysis identifies the geographic area over which to apply *Venetie*, which specifies a two-part test of federal set-aside and federal superintendence, but does not specify where to apply that test.[23]

B. Identifying the community of reference

As the DOI Opinion explains, the community-of-reference analysis is fact-intensive. Under the Tenth Circuit's analysis, the appropriate starting point is whether the proposed community has geographic definition.[24]

After examining the geographic boundaries of a community, DOI describes two principles for determining the appropriate community of reference in the Tenth Circuit: "the status of the area in question as a community" and "the community in the context of the surrounding area." [25]

In determining whether an area is a community, the Tenth Circuit first considers the importance of "the existence of an element of cohesiveness . . . [that] can be manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality." [26] The Tenth Circuit then inquires whether the community is more than an economic pursuit, and whether it qualifies as a "mini-society consisting of personal residences and an infrastructure potentially including religious and cultural institutions, schools, emergency services, public utilities, groceries, shops, restaurants, and the other needs, necessities, and wants of modern life." [27]

The second principle of the community-of-reference analysis focuses on the community in question within the context of the surrounding area.[28] This involves examining "the relationship of [the proposed community] to the surrounding area." [29] Such an inquiry focuses, in

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[21] *HRI* at 1248-49 (citing *Venetie*, 522 U.S. at 531, n. 7, and *Pittsburg & Midway Coal Min. Co. v. Watchman*, 52 F.3d 1531, 1542-3 (10th Cir. 1995)) (internal citations omitted from quote).
[22] DOI Opinion at 3.
[23] *HRI* at 1248-49.
[24] DOI Opinion at 3 (citing *United States v. Adair*, 111 F.3d 770, 774 (10th Cir. 1997)).
[25] *Id.*
[26] *Watchman*, 52 F.3d at 1544.
[27] DOI Opinion at 3.
[28] *Watchman*, 52 F.3d at 1544.
[29] *Id.*

part, on which government or governments provide the infrastructure and essential services for the community.[30] Additionally, when identifying government services to the community and community infrastructure, a community need not originate all or even most of that community's needs.[31] For example, a small, poor community may exhibit the characteristics of a community while still receiving needed services from outside the community.[32]

The DOI Opinion also examines more recent cases in the Tenth Circuit for consistency with this approach, including *United States v. Arrieta*.[33] *Arrieta* examined the appropriate community of reference within the context of the second part of the *Venetie* test—federal superintendence. Although the Tenth Circuit did not need to make an explicit community-of-reference determination in *Arrieta*, which included a mix of Indian and non-Indian lands in a pueblo, it is noteworthy that the *Arrieta* court did nonetheless explain that such an analysis must focus on "the entire Indian community, not merely a stretch of road."[34]

In *United States v. M.C.*,[35] the district court examined whether the Fort Wingate Indian School in McKinley County was a dependent Indian community. The court, citing *HRI*, *Watchman* and *Adair*, among other cases, conducted a detailed community-of-reference analysis consistent with the analysis undertaken in this Determination:

> In determining whether a specific area is a community of reference, the Court first must analyze "the status of the area in question as a community." In determining whether an area is a community, the *Watchman* Court first discussed the importance of "the existence of an element of cohesiveness . . . [which] can be manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality." *Watchman* went on to define a community as a "mini-society consisting of personal residences and an infrastructure potentially including religious and cultural institutions, schools, emergency services, public utilities, groceries, shops, restaurants, and the other needs, necessities, and wants of modern life." In *Adair*, the Tenth Circuit added to this analysis that the "appropriate starting point is the geographical definition of the area proposed as a community[.]"[36]

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[30] *Adair*, 111 F.3d at 775.
[31] *Id.*
[32] *United States v. M.C.*, 311 F.Supp 2d 1281, 1292-1293 (D. N.M. 2004).
[33] 436 F.3d 1246 (10th Cir. 2006).
[34] *Id.* at 1250.
[35] 311 F.Supp. 2d 1281 (D.N.M. 2004).
[36] *United States v. M.C.* at 1289 (citations omitted).

C. The appropriate community of reference in the present situation

1. The HRI property and Section 8

Several of the commenters, including HRI, stated that EPA's inquiry should be limited to either HRI's Section 8 land or all of Section 8. Section 8, however, (and by necessity the HRI Section 8 land) fails the community-of-reference analysis. EPA finds that neither HRI's Section 8 land nor all of Section 8 is the appropriate community of reference.

In analyzing Section 8 and the HRI Section 8 land, one must first determine whether either of these areas has geographic boundaries. While there are no particular geographic boundaries such as a river or bluff that delineate Section 8, its boundaries are clear. Additionally, HRI's Section 8 land also has clear boundaries designated by surveys and legal descriptions.

Despite the presence of boundaries, it is inappropriate to limit the analysis to the Section 8 land, which is only the site of a proposed mine. In *Watchman*, the Tenth Circuit specifically held that the district court had improperly focused on a single mine site in determining the community of reference. As the *HRI* Court observed, "*Watchman* explicitly declined to define with precision the proper community of reference for another mine site within the [Executive Order] 709/744 area."[37] *Watchman* noted that the mine site at issue in that case did not represent the "logical area of reference[.]"[38] Although it had a "use, purpose, and economic life distinct from the surrounding area[, t]he common and ordinary meaning of community . . . connotes something more than a purely economic concern."[39] As DOI's opinion states: the "Section 8 [land] is a mine site. No one lives on it. It has no population. At the most fundamental level, therefore, Section 8 fails to satisfy the definition of community because it lacks a population."[40]

Similarly, in *United States v. Arrieta*,[41] the Tenth Circuit found it improper to focus only on a non-Indian road when determining what area to analyze. The appellant argued that since the county road was not owned by the federal government, it was not superintended, and therefore not part of the appropriate community. The Tenth Circuit found, however, that this position "too narrowly conceives the concept of federal superintendence. 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." [42]

The DOI Opinion next analyzes whether the area qualifies as a "mini-society, containing an infrastructure, something more than a purely economic concern." [43] The record before EPA

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[37] *HRI* at 1249 (citation omitted).
[38] *Watchman*, 52 F.3d at 1545.
[39] *Id.*
[40] DOI Opinion at 6.
[41] 436 F.3d 1246.
[42] *Id.* at 1250.
[43] *Id.* (internal quotations omitted).

shows that the mine site currently lacks the necessary infrastructure to constitute a mini-society.[44] EPA has no evidence that workers will be provided housing at the site, nor is there evidence that it will not be dependent upon the larger community for basic services such as utilities, police, and fire protection. The governmental or private entities that originally established, and continue to provide the infrastructure required for the mine's operation, are necessarily relevant to the dependent Indian community inquiry. Similarly, the Section 8 land itself lacks the same characteristics of infrastructure to make it a mini-society.

2. The Church Rock Chapter[45]

The Church Rock Chapter was first established in 1927 by the United States as a subdivision of the Navajo Nation government, to facilitate local Navajo self-government and to foster improved communications between Navajos and federal agencies. [46] The Church Rock Chapter is located within McKinley County. Section 8 and HRI's Section 8 land are located within the Church Rock Chapter.

EPA agrees with the DOI opinion and several commenters that the Church Rock Chapter is the appropriate community of reference. The Section 8 land is located within the boundaries of the Church Rock Chapter, which is a clearly defined geographic area and community. The Church Rock Chapter shows cohesiveness of culture, language, land use, and aquifer use. As the DOI Opinion notes, "in doing so, the federal government defined [the community] geographically." [47] "Like the natural communities that lay at the core of the traditional social system, the Chapters [are] local organizations, composed of, and directed by, people with common interests." [48]

The Navajo Nation notes that Navajo Chapters are unique in all of Indian country.[49] The Navajo Chapters are the "foundation of the Navajo Nation Government." [50] Chapter Houses in the Navajo Nation perform a unique role. The Chapter "performs similar functioning with respect to the health and welfare of its residents as those performed by a county or municipality in the state government system." [51] The Chapter House "is the Navajo tribal political and social meeting point for the people of the community. Through the . . . Chapter House, the residents of

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[44] The public was provided an opportunity to submit comments on the Land Status Determination. No party submitted any comments indicating intent to develop the mine site in such a way that it might constitute such a mini-society.

[45] Nothing in this Determination should be read as recognizing Navajo chapters as separate political entities by the United States. The United States maintains a government-to-government relationship with the Navajo Nation and not the Church Rock or other Navajo Chapters.

[46] *See* ROBERT YOUNG, NAVAJO YEARBOOK (1958) at 191.

[47] DOI Opinion at 7.

[48] ROBERT YOUNG, A POLITICAL HISTORY OF THE NAVAJO TRIBE 66 (1978).

[49] Navajo Nation Comments at 10.

[50] *Id.* at 8 (citing to NAVAJO CODE tit. 2, § 4021(a) (1995)).

[51] *Thriftway Mktg. Corp. v. New Mexico*, 810 P.2d 349, 352 (N.M. Ct. App. 1990) (concerning off-reservation Nageezi Chapter).

the community can obtain services from the Navajo Nation and the federal government, and engage in political activities related to the Navajo Nation." [52]

With respect to ownership and use, "over 95% (54,030.85 out of 56,526.04 acres) of land in the Church Rock Chapter is held in trust for or in fee by the Navajo Nation, held in trust by the United States for Navajo citizens, or otherwise used exclusively by members of the Navajo Nation." [53] Seventy-eight percent of the land in the Church Rock Chapter is held in trust for the Navajo Nation or individual tribal members.[54]

The Church Rock Chapter also demonstrates cohesiveness in community and economic pursuits. Not only does the Navajo Nation government recognize the Church Rock Chapter as a part of the Navajo Nation, but EPA finds that the Navajo population helps to demonstrate the Indian character of the area: the 2000 census data shows that the population of Church Rock Chapter is 97.7% Native American with the majority of these residents speaking Navajo or other native languages.[55]

EPA notes that the Navajo Nation emphasizes the traditional nature of the Church Rock Chapter: "the Churchrock Chapter is a Navajo traditional rural community." [56] The economy of the Church Rock Chapter is centered on raising livestock. Additional earnings come from traditional self-employment: "jewelry making, silversmithing, sewing, stone carving, wood carving, and weaving." [57]

The Church Rock Chapter functions as a "mini-society" and provides the necessary infrastructure to support the residents who live there. EPA finds that the "residents look primarily to the Chapter (either with its own resources or through the Navajo Nation and BIA) to meet their various needs, [58] The infrastructure and services to Indian and non-Indian residents of the Church Rock Chapter are provided mainly by the Navajo Nation, the BIA, the Indian Health Services and the Chapter itself. These common needs are some of the most basic (water, electricity, telephones). Church Rock has its own judicial district and is served by the Navajo police force. It has a Head Start center, an elementary school, several churches, and a host of Chapter, tribal, and BIA services and facilities.[59] Water and utilities are provided by the Navajo

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[52] *United States v. Calladitto*, Cr. No. 91-356-SC, 19 Indian L. Rptr. 3057 (D.N.M. Dec. 5, 1991).

[53] This figure includes fee lands owned by the Navajo Nation and lands leased to tribal members or to the Navajo Nation. *See* Navajo Nation Comments at 7 and the Appendix to the Navajo Nation Comments at 248.

[54] DOI Opinion at 11.

[55] Comments for the Navajo Nation, *supra*, at 4 (*citing* App. 246-47).

[56] *Id.* at 4 (citing Appendix to the Navajo Nation Comments at 246, 247). *See also* Appendix to the Navajo Nation Comments at 263. Note that the Navajo Nation Comments refer to "Churchrock" and "Church Rock" interchangeably.

[57] Navajo Nation Comments at 10.

[58] *Id.* at 8 (citing Appendix to the Navajo Nation Comments at 263); see also Appendix to the Navajo Nation Comments at 137-51.

[59] Navajo Comments at 4, *citing* App. 261-66; Land use Plan for the Churchrock Chapter, Final Report ("LUP") (Nov. 2002) at B-50.

Nation through its utility authority, and the United States through its Indian Health Service.[60] A recent survey showed that 88% of Chapter residents visit the Chapter House, and 98% of those do so at least monthly.[61] The State maintains State Route 566, which runs through the Chapter,[62] but the United States and the Navajo Nation maintain other roads in the Chapter.[63]

Thus, the Church Rock Chapter is the appropriate community of reference to which the two-part *Venetie* test should be applied.[64]

D. Applying *Venetie* to the appropriate community of reference

1. Federal set-aside generally

Under *Venetie,* the area being analyzed "must have been set aside by the Federal Government for the use of the Indians as Indian land . . . ." [65] In pronouncing its decision, the Supreme Court specifically cited *United States v. McGowan,*[66] where it had held that the Reno Indian Colony was a dependent Indian community. The Supreme Court explained: "The fundamental consideration of both Congress and the Department of the Interior in establishing this colony has been the protection of a dependent people. Indians in this colony have been afforded the same protection by the government as that given Indians in other settlements known as 'reservations.'"[67] Therefore, land is "validly set apart for the use of Indians as such" only if the federal government takes some action indicating that the land is designated for use by Indians.[68] "The underlying purpose of the federal set-aside requirement is two-fold: (1) it 'ensures that the land in question is occupied by an 'Indian community'' . . . and (2) 'it reflects the fact that because Congress has plenary power over Indian affairs, . . . some explicit action by Congress (or the Executive, acting under delegated authority) must be taken to create or to recognize Indian country.'" [69]

In previous cases, trust land has been considered set aside for purposes of satisfying the *Venetie* test. As an example, the Tenth Circuit has found that land accepted into trust under the

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[60] *Id.* at 7. Note that the State of New Mexico and McKinley County provide limited services, namely, most schools, some roads, and fire and EMS services. DOI Opinion at 8.

[61] *Id., citing* LUP at B-50.

[62] HRI Comments at 16 and HRI Comments Appendix III.

[63] Appendix to Navajo Nation Comments at 131, 132.

[64] *Id.* Although no commenters proposed the town of Gallup as the community of reference, EPA considered it. The town of Gallup, N.M. is located southwest of the mine site. Gallup contains schools, emergency services, groceries, shops, and restaurants. Although Gallup may be a defined community, its eastern boundary is located approximately 18 miles, and its airport approximately 26 miles, from the Section 8 land. Based upon its disconnection from the mine site, among other factors, it is not the appropriate community of reference.

[65] Venetie, supra, at 527.

[66] 302 U.S. 535, 58 S.Ct. 286, 82 L.Ed. 410 (1938).

[67] *Id.* at 538.

[68] *Buzzard v. Oklahoma Tax Com'n*, 992 F.2d 1073, 1076 (10th Cir. 1993).

[69] *Thompson v. Franklin*, 127 F. Supp. 2d 145, 153 (N.D.N.Y.) (quoting *Alaska v. Native Village of Venetie Tribal Government*, supra, at 531 n.6).

Indian Reorganization Act, where the United States acts as trustee, does fulfill the set-aside requirement.[70] A set-aside was also recognized when Congress took into trust land that was purchased with funds designated for the acquisition of unspecified land for the use and benefit of a particular tribe.[71] Similarly, trust land was found to be set aside by the federal government when the land had been purchased with funds appropriated by Congress to establish a permanent settlement for tribes scattered across the state of Nevada.[72]

2. The Church Rock Chapter is federally set-aside

Section 8 lands are a part of the Church Rock Chapter and are examined together with the Chapter. As the DOI Opinion notes, *Venetie* first requires consideration of whether the federal government set aside the land for Indian use.[73] In the Church Rock Chapter, the United States purchased the odd numbered parcels from the railroad and put them into trust for the Nation, and then bought some of the even-numbered parcels and placed them into trust for allotments for individual Indians.[74] Seventy-eight percent of the land within Church Rock's boundaries is set aside for the occupation and use of the Navajo tribal members. As for the remaining land within the Chapter's boundaries, the Secretary of the Interior has designated the Chapter within the federally approved Navajo land consolidation area under the Indian Land Consolidation Act (ILCA).[75] Under the ILCA, it is the policy of the United States: "(1) to prevent the further fractionation of trust allotments made to Indians; (2) to consolidate fractional interests and ownership of those interests into usable parcels; (3) to consolidate fractional interests in a manner that enhances tribal sovereignty; (4) to promote tribal self-sufficiency and self-determination; and (5) to reverse the effects of the allotment policy on Indian tribes."[76]

The Church Rock Chapter also has a unique history that supports its status as a community set aside by the federal government.[77] The Church Rock Chapter was organized by the federal government in 1927 "for the purposes of facilitating communication between Navajo communities and fostering self-government. Although the Church Rock Chapter is now an integral part of the Navajo government, initially it was a creature of the Federal Government."[78] In earlier cases addressing the unique circumstances of the Chapters in the Eastern Navajo Agency, where the Section 8 land is located, both state and federal courts recognized Navajo and federal authority over non-trust lands within Chapter boundaries.[79] The court found in *UNC*

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[70] *See United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999).

[71] See *HRI, Inc. v. EPA*, supra, at 1251-53.

[72] See *United States v. McGowan*, 302 U.S. 535 (1938).

[73] *Venetie*, 522 U.S. at 527.

[74] DOI Opinion at 9.

[75] Codified at 25 U.S.C. § 2201 *et. seq.*

[76] 25 U.S.C.A. § 2201 note (Declaration of Policy).

[77] DOI Opinion at 10.

[78] *Id.*

[79] *See, e.g., United States v. Martine*, 442 F.2d 1022 (10th Cir. 1971) (concerning Ramah Chapter); *United States v. Calladitto*, Cr. No. 91-356, 19 Indian L. Rptr. 3057 (D. N.M. Dec. 5, 1991) (concerning Baca Chapter); *United*

Resources, Inc. v. Benally that "[a]ll the land affected [by UNC's spill of radioactive sludge in the Church Rock Chapter area] lies outside the boundaries of the [formal] Navajo reservation, but much of it is trust land and *all of it falls within 'Indian country'* [—] that checkerboard area of mixed federal, state, and tribal jurisdiction adjoining the reservation proper." [80]

The EPA agrees with DOI that the Church Rock Chapter has been validly set aside.

3. Federal superintendence generally

The *Venetie* Court wrote, "the federal superintendence requirement guarantees 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." [81] It is the land in question, not merely the Indian tribe inhabiting it, that must be under the superintendence of the federal government.[82] In prior cases, superintendence was found where the federal government actively controlled the lands in question, effectively acting as a guardian for the Indians.[83]

4. The Church Rock Chapter is under federal superintendence

The second part of the *Venetie* test requires that the land in question be under federal superintendence.[84] Federal supervision of the Church Rock Chapter includes the federal government's supervision, as trustee, of 46,648.64 acres within the Chapter and the federal government's further supervision of an additional 5,712.70 acres over which grazing leases and permits have been issued to Navajo residents within the Chapter. In the Church Rock Chapter, the federal government supervises over 92.5 percent of the total area.

The Department of the Interior supervises natural resources in the Chapter, requiring approval of mineral leases and issuing grazing permits. The BIA also supervises land use in the Chapter by issuing homesites and residential and business leases for Indian allotments. Moreover, the BIA is responsible for protecting Navajo Nation trust lands, natural resources, and water rights, and administering various trust benefits on behalf of the Church Rock members. As the DOI Opinion observes, Church Rock primarily receives services from the Navajo Nation and

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States v. Yazzie, No. Cr. 93-470 (D.N.M. Jan. 28, 1994) (concerning Tsayatoh Chapter); *Thriftway Mktg. Corp. v. New Mexico*, 810 P.2d 349 (N.M. Ct. App. 1990) (concerning Nageezi Chapter).

[80] *UNC Resources, Inc. v. Benally*, 514 F. Supp. 358, 360 (D.N.M. 1981) (emphasis added).

[81] 522 U.S. at 531.

[82] *Id.* at 531 n.5.

[83] *See United States v. McGowan, supra*, at 537-39 (emphasizing that the federal government had retained title to the land to protect the Indians living there); *United States v. Pelican, supra*, at 447 (stating that the allotments were "under the jurisdiction and control of Congress for all governmental purposes, relating to the guardianship and protection of the Indians"); *United States v. Sandoval*, 231 U.S. at 37, n.1 (citing a federal statute placing the Pueblos' land under the absolute jurisdiction and control of the Congress of the United States").

[84] *Venetie* at 527.

the federal government, not the state or county.[85] Therefore, EPA agrees with DOI that the second part of the *Venetie* test is satisfied.

IV. Conclusion

Consistent with DOI's Opinion, EPA finds that the Church Rock Chapter, which necessarily includes Section 8, is a "dependent Indian community." Accordingly, EPA is the proper authority under the SDWA to regulate underground injections on HRI's Section 8 land because it is within the dependent Indian community of the Church Rock Chapter and, thus, is Indian country.[86]

Dated this 6TH day of February, 2007.

Wayne Nastri
Administrator, EPA Region 9

[85] DOI Opinion at 10.

[86] EPA is not determining at this time whether or not the issuance of a UIC permit is an appropriate action, simply that it is the appropriate entity to decide whether or not to issue any such permit.

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of June, 2007, a true and correct copy of the foregoing **BRIEF OF PETITIONER HYDRO RESOURCES, INC.** was served via US Mail, postage prepaid, addressed to the following:

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I further certify that all required privacy redactions have been made, and with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the clerk and the digital submissions have been scanned for viruses with the most recent version of the commercial virus scanning program, Trend Micro OfficeScan, version 7.3, engine version 8.320.1003, pattern file 4.527.00, last update was 6/11/07 and according to the program, are free of viruses.

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