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

AMICUS CURIAE BRIEF OF THE STATE OF NEW MEXICO FILED IN SUPPORT OF NO PARTY

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INTEREST OF AMICUS CURIAE STATE OF NEW MEXICO

The State of New Mexico ("State") is authorized to file this amicus curiae brief without the consent of the parties or leave of the Court pursuant to F.R.App.P 29 (a). The State files this brief in a neutral capacity in accordance with F.R.App.P. 29 (e), meaning that the State is not offering this brief in support of the legal arguments of the Petitioner Hydro Resources, Inc. or the Respondent Environmental Protection Agency ("EPA") or the Navajo Nation, but rather to bring to this Court's attention the State's unique interests in this matter and how any final determination will impact the State.

The State has a vested interest in this Court's review of the EPA determination that the Section 8 land located within the checkerboard area[1] constitutes "Indian Country." First, the State has an interest in maintaining its strong government-to-government relationship with the Navajo Nation. While jurisdictional debates inevitably do arise, under the current Richardson administration the State strives to resolve such conflicts in an open and non-adversarial manner. The State also has a number of activities and programs occurring in the checkerboard area that are important and beneficial to the residents and entities located within those areas. It is important for the State that

1 Throughout this brief, the State will use the term "checkerboard area" to connote the area in northwestern New Mexico where there is a pattern of mixed Native and non-Native land title. *HRI, Inc. v. Environmental Protection Agency*, 198 F.3d 1224, 1231 (10th Cir. 2000).

this Court, should it uphold EPA's determination, limit its holding to the unique facts and law of the specific situation presented here. The State's position is that all other State programs and regulatory activities within the checkerboard area are not subject to, or regulated by, EPA's determination. Lastly, the State has an interest in understanding whether this Court believes the "community of reference test" from the case of *Pittsburgh & Midway Coal Mining Company v. Watchman*, 52 F.3d 1531 (10th Cir. 1995), still applies notwithstanding the Supreme Court's ruling in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998). If the "community of reference" test does survive, the State has concerns about that test.

SUMMARY

The State has previously taken the position before this Court that it has jurisdiction to administer its Safe Drinking Water Act ("SDWA") programs on Section 8 and that said land was not "Indian Country." *HRI, Inc. v. EPA*, 198 F 3d 1224 (10th Cir. 2002). The State is now under a different gubernatorial administration that has adopted policies to foster cooperative relationships with the tribes and pueblos in New Mexico. Under these new policies, the State must strive to strike a balance between undertaking its regulatory and governmental obligations in a thorough and comprehensive fashion while maintaining strong, positive relationships with its tribal neighbors. It is in this context that the State

files this brief to alert the Court to its concerns regarding EPA's decision, as well as its commitment to maintaining a positive, strong relationship with the Navajo Nation.

It is important for the Court to consider these intergovernmental relationships when rendering a ruling in this case to ensure that these positive practices and policies are not undermined or unduly disrupted by the Court's ruling. It also is important that any adoption of legal standards for determining "Indian Country" status does not increase the potential for future legal debates and controversy due to confusing or unclear criteria.

In this same vein, the State believes that if this Court upholds the EPA determination, it should be limited to the unique facts and law surrounding this particular case and EPA's decision should not have precedential effect in other situations. There are many vital and ongoing state programs occurring in the checkerboard area that are distinct from the situation at hand in law and fact and EPA's determination should have no legal effect on such activities. Likewise, the State has a strong interest in ensuring that the environment within the State's boundaries is protected – an interest shared with the Navajo Nation - and maintained at levels that the State has deemed to be suitable as a matter of law and policy. In fact, the State standards in many instances may be more protective than

the federal standards that would be applied if this Court upholds EPA's determination.

One final concern of the State is whether this Court will uphold the use of the "community of reference" test to determine "Indian Country" status. If this Court does so, there are many problems that arise from this test that will create unintended confusion and complexity.

Thus, the State asks this Court to consider the intergovernmental relationship that exists between the State and the Navajo Nation, the extensive state programs and regulatory activities occurring within the checkerboard area, and the need for a narrow application of the EPA determination, assuming this Court upholds that determination.

ARGUMENT

I. THE COOPERATIVE AND STRONG INTER-GOVERNMENTAL RELATIONSHIP BETWEEN THE STATE AND THE NAVAJO NATION SHOULD BE MAINTAINED AND NOT DESTABILIZED

In May of 2003, Governor Bill Richardson and the Navajo Nation entered into a "Statement of Policy and Process" that provided a framework for government-to-government consultation between the State and Navajo Nation on issues of mutual concern. [A.R. Comments of New Mexico Environment Department ("NMED"), pgs 5-7]. Governor Richardson has enacted a number of Executive Orders to promote positive intergovernmental relationships between the

State and New Mexico's tribes and pueblos, such as an Environmental Justice Executive Order applicable to the State's environmental decision making. [A.R. Comments of NMED, pgs.3-4] He has also issued an Order outlining commitments regarding the protection of sacred sites and an Order directing state agencies to adopt tribal consultation plans to explore models for working effectively with the tribes and pueblos on a government-to-government basis. Executive Orders No. 2005-003 and 2005-004.

Consistent with these policies, the State has been working cooperatively with the Navajo Nation on several sites within the checkerboard area. For instance, the State's Environment Department has offered its expertise and has advised the Navajo Nation on a mine cleanup at the Northeast Church Rock site located in Section 17 where EPA is conducting a removal action. *HRI, Inc. v. EPA*, 198 F.3d 1224, 1249 (10th Cir. 2000). The site is adjacent to the UNC Church Rock Superfund site where the State has been working with EPA and the Navajo Nation. Additionally, the State has been working cooperatively with EPA at the Homestake and Prewitt Superfund sites located in this same area. The State, at the request of the Navajo Nation, has begun to re-evaluate three other uranium mine sites for potential action under Superfund: Febco, Black Jack, and Silver Spur.

Further evidence of the State's strong intergovernmental relationship with the Navajo Nation and its federal trustee is found in a March 28, 1985, agreement between the State and the federal Indian Health Services to inspect and regulate restaurants that are located in the checkerboard area. Also, the State engaged in consultation with the Navajo Nation and the Pueblo of Zuni in negotiating a Resource Conservation Recovery Act ("RCRA") permit for the Fort Wingate site located approximately 15 miles east of Gallup, New Mexico.

Similar to the State's Environment Department, the Mining and Minerals Division ("MMD") of the New Mexico Energy, Minerals and Natural Resources Department cooperates with the Navajo Nation in a number of ways. There have been several recent efforts involving the reclamation of old uranium mines. For example, in one section close to the Nation's reservation boundary, MMD litigated with the operator in court for nearly ten years to uphold the State Mining Act's application to uranium mines. *New Mexico Mining Commission v. United Nuclear Corporation*, 2002-NMCA-108, 133 N.M. 8, 57 P.3d 862, *cert. den.*, 133 N.M. 7 (2002); New Mexico Mining Act, NMSA 1978, §§ 69-36-1 to -20 (1993). As plans were finally being made for the clean up of the site, the Navajo Nation expressed concerns about impacts off-site and on the reservation. The State, the Navajo Nation and the EPA decided to avoid a jurisdictional legal fight and agreed to work together to achieve the most protective cleanup possible, with EPA serving

as the lead. MMD has also shared training opportunities with the Navajo Abandoned Mine Land program and is working with the Navajo Nation in their plans to gain primacy from the federal government for the regulation of coal mines.

Another division of the Energy, Minerals and Natural Resources Department, the Oil and Conservation Division ("OCD"), has worked cooperatively with the Navajo Nation as well. The Navajo Nation and OCD have been partners in working with the Bureau of Land Management ("BLM") on remediation of leaks and spills resulting from oil and gas operations on or in the vicinity of Navajo lands. The Navajo Nation and OCD have also cooperated closely in addressing the problem of abandoned wells on Navajo lands. In this program, the Navajo Nation, BLM and OCD have jointly determined when wells needed to be plugged and each agency has used the resources available to it to identify responsible parties. OCD, through the State's Oil and Gas Reclamation Fund, has furnished funds to plug orphaned wells for which no agency could identify a responsible party. In addition, OCD's Environment Bureau cooperates closely with the Navajo Environmental Protection Agency with respect to permitting of oil and gas processing facilities on Navajo lands.

A final example is the Navajo Nation Water Rights Settlement Agreement that was signed by Governor Bill Richardson and President Joe Shirley in 2005. In

this Agreement, which was the product of years of good faith negotiations, the two sovereigns agree that the State Engineer shall serve as the Water Master to administer diversions of water in the San Juan River stream system in New Mexico. Other parts of the Agreement recognize in the Navajo Nation the complementary authority to administer and distribute water after it has been diverted under the Nation's water rights. This Agreement represents a prime example of two sovereigns working together to avoid jurisdictional debates through pragmatic and cooperative agreement.

In sum, the State under the Richardson administration has strived to work cooperatively with the Navajo Nation on a government-to-government basis, including in the checkerboard area, in a manner that advances the shared, mutual goals of environmental safety and proper management of natural resources activity.

It is important for the Court to consider these relationships in this case. It is difficult when there is a disruption to the legal landscape in the midst of these cooperative efforts. If this Court upholds EPA's determination and does not limit it to the particular facts and law in question, that will trigger new disputes and litigation to the detriment of cooperative, intergovernmental relationships. While resolving an outstanding jurisdictional question may appear to be the laudable goal, this Court should also consider all perspectives and interests involved and any corollary impacts such a ruling may have to the detriment of tribal-state

cooperative efforts. It is critical that this Court's ruling minimizes the potential for future disputes and does not create or foster greater uncertainty and conflict that could disrupt these important intergovernmental relationships.

II. EPA'S DETERMINATION SHOULD HAVE NO PRECEDENTIAL EFFECT ON OTHER STATE ACTIVITIES IN THE CHECKERBOARD AREA THAT MAY RESULT IN LESS COMPREHENSIVE ENVIRONMENTAL PROTECTIONS.

The State is compelled to inform the Court of its position that the EPA determination, if upheld, should be narrowly construed and that it should have no legal effect on the State's other programs and regulatory activities in the area.

A. EPA'S DETERMINATION, IF UPHELD, SHOULD BE NARROWLY CONSTRUED TO HAVE NO LEGAL EFFECT ON THE STATE'S OTHER ACTIVITIES IN THE CHECKERBOARD AREA

If this Court upholds EPA's determination, it will be critical to the State that any such holding be limited to the unique facts and law of the particular case of Section 8. Within New Mexico, there are at least twenty-two Indian tribes, nations, and pueblos which each have their own unique land holdings, history, and governmental structure. There are a multitude of situations and fact patterns that will arise in the future within the checkerboard area, as well as elsewhere within the State involving jurisdictional questions. It would be misguided and legally unsound to apply the findings in this EPA determination in a "one size fits all"

fashion to all present and future situations involving jurisdictional complexities within the State.

First, the EPA determination arises from the unique language found in the regulations to the SDWA that uses the 18 U.S.C. 1151(b) language to define the term "Indian Country." Many other federal and state laws involving various state programs do not rely on the "Indian Country" definition and are distinguishable in this regard. For instance, under the State's oil and gas statutes there is no reference to the "Indian Country" definition. *See* Oil and Gas Act, NMSA 1978, § 70-2-1; New Mexico Water Quality Commission rules, 20.6.2.7 NMAC. Similarly, the New Mexico Mining Act includes no definition or reference to "Indian Country." NMSA 1978, §§ 69-36-1 to 69-36-20 (1993).

The courts have applied the "Indian Country" definition in other contexts. In a case involving RCRA, the Ninth Circuit in *Washington v. U.S. Envtl. Prot. Agency*, 752 F.2d 1465 (9th Cir. 1985), used §1151 to define Indian country and stated "[w]e accept this definition as a reasonable marker of the geographic boundary between state authority and federal authority." *Id*., 752 F.2d at 1467 n. 1. In another case involving the Historic Preservation Act, the Clean Water Act, the Safe Drinking Water Act and local laws, the First Circuit again turned to §1151(b) to determine whether the land in question was "Indian country". *Narragansett Indian Tribe of R.I. v. Narragansett Elec. Co.*, 89 F.3d 908, 911 (1st

Cir. 1996). Under the Clean Air Act, the D.C. Circuit has decided two cases using or favorably citing §1151 as the definition of Indian Country: *Arizona Public Service Co. v. Envtl. Prot. Agency*, 211 F.3d 1280 (D.C. Cir. 2000) and *Michigan v. Envtl. Prot. Agency*, 268 F.3d 1075 (D.C. Cir. 2001). However, these cases have no precedential value in the Tenth Circuit. Moreover, they involve unique fact patterns and legal authorities that are distinct from this case.

Another example where the definition of "Indian Country" may be relied upon is by the federal Office of Surface Mining ("OSM"), who may attempt to apply EPA's decision in determining the jurisdiction of MMD's primacy under the Surface Mining, Control and Reclamation Act ("SMCRA"). 30 U.S.C. Sec. 1273(c). The SMCRA uses the term "Indian Lands" and historically is considered to include mainly only reservation and tribal trust lands. 30 U.S.C. Sec. 1291(a). However, recently OSM has stopped rulemaking in this area and said determinations will be on a case-by-case basis. 72 Fed.Reg. 20672 (April 25, 2007). Two operating coal mines and one soon-to-be opened coal mine are all within Navajo chapter areas in relatively rural locations, much like Section 8. The State's position is that such areas would not be "Indian Country." However, if this Court upholds EPA's determination in an unlimited and broad fashion, it could create new legal debates regarding the scope of MMD's coal regulatory program.

The State's position is that if this Court deems Section 8 to be "Indian country," there is no legal basis to apply such a ruling to other factual scenarios involving other laws. Even when faced with a legal framework that utilizes the "Indian Country" definition at 18 U.S.C. §1151, the State's position is that each analysis must be separately conducted based on the unique facts and law at hand. There is no basis for applying EPA's determination in this case in a wholesale fashion to other situations in the State.

The reason this is so important to the State is because it has invested significant time, resources, expertise, and effort over many years in providing services to the checkerboard area, including the implementation of regulatory programs. Below are a few examples to provide the Court a sense of the magnitude of the State's presence in this area.

Under the New Mexico Air Quality Control Act, NMSA 1978, §§ 74-2-1 et seq. (2007), the State recently reviewed and regulated the Peabody Mustang Power Plant permit application for a proposed plant east of Gallup, New Mexico, until the applicant withdrew its application. Additionally, the State regulates six hundred thirty-five (635) producing oil or gas wells in the checkerboard area. New Mexico has been involved in over thirty (30) spills that have been remediated in that area under the State's Water Quality Act, NMSA 1978, §§ 74-6-1 et seq. (2005).

Much of what is known as the Grants uranium belt is in the checkerboard area.[2] MMD has already received five (5) applications for uranium exploration permits in the checkerboard area in the last seven (7) months. The MMD has been working cooperatively with the Nation regarding such exploratory permits instead of battling in the courts about jurisdiction.

MMD also regulates mines that are owned by Pueblos on fee lands. In both cases, the Pueblos obtained ownership of the mine and are pursuing reclamation pursuant to the State's Mining Act.[3] The State has worked cooperatively with these Pueblos at these mine sites.

Another example is the State's regulation of dozens of gas stations in the checkerboard area under the underground storage tank program, RCRA Subtitle I, for the past two decades. These facilities have been compliant with the New Mexico petroleum storage tank regulations, have paid the New Mexico petroleum products loading fee and have used the State's Corrective Action Fund, NMSA

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2 McLemore, V.T., and Chenoweth, W.L., 1992, Uranium mines and deposits in the Grants district, Cibola and McKinley counties, New Mexico: New Mexico Bureau of Geology and Mineral Resources, Open File Report 353, 22; McLemore, V.T., and Chenoweth, W.L., 2003, Uranium Resources in the San Juan Basin, New Mexico, New Mexico Geological Society Guidebook, p.165-177, and State of New Mexico Surface Management Responsibility Map 2004, U.S. Department of Interior, Bureau of Land Management. New Mexico has 341 million pounds of reserves of uranium and is second in the United States only to Wyoming. United States Department of Energy, Energy Information Administration, "U.S. Uranium Reserves Estimates" (June 2004) .
http://www.eia.doe.gov/cneaf/nuclear/page/reserves/ures.html

3 New Mexico Mining and Minerals Division 2006 Mining Act Reclamation Program Annual Report; www.emnrd.state.nm.us/MMD/MARP/AnalRprtMARP.

1978, § 74-6B-7 (2004), as their federally required insurance. However, jurisdictional questions are now being raised for over a dozen gas stations operating in the checkerboard area in light of the EPA determination. An attempt to apply a discrete legal determination in a wholesale fashion to other situations is exactly what the State wants to avoid given its significant investment of resources and time in the area, as well as the establishment of a widely-understood and accepted regulatory framework.

Another area where the State has made positive strides to minimize jurisdictional debates is in the area of taxation. The State's existing practices with pueblos and tribes in this area demonstrate why any overly expansive ruling from this Court could foster new debates beyond the issue at hand and into other sensitive areas. In New Mexico, the State and the Indian tribes have adjusted the apportionment of taxes on mining operations located within jurisdictionally complex areas. State law provides for intergovernmental tax credits for the payment of oil and gas severance taxes, and related taxes, for severing products from "Indian tribal land" so that taxpayers will not be double taxed by both sovereigns. NMSA 1978, §7-29C-1. Similarly, state law provides for intergovernmental tax credits for the payment of severance tax on coal that is removed from "tribal land," which includes in its definition a reference to a "dependent Indian community." NMSA 1978, §7-29C-2. The State has also

worked effectively with a number of tribes and pueblos in cooperative working groups on sensitive issues of gasoline and cigarette taxes. Currently, State law exempts from state cigarette taxes any sales on a "reservation or pueblo grant," NMSA 1978, §7-12-4(A)(2), and allows for deduction from state gasoline taxes for any gasoline sold retail on an "Indian reservation, pueblo grant, or trust land" NMSA 1978, §§ 7-13-4 and 7-13-4.4. State law authorizes the State to enter into cooperative agreements with the pueblos and certain tribes for the collection of gross receipts tax revenue "of the party jurisdictions" and with the Navajo Nation for "tax revenues of the party jurisdictions." NMSA 1978, §§ 9-11-12.1 & 9-11-12.2; *see also* NMSA 1978, §§ 7-9-88.1 & 7-9-88.2 (gross receipt tax credits for sales on tribal land and coal sales on Navajo Nation lands). Thus, the taxation example demonstrates how the State has established carefully crafted systems for handling sensitive jurisdictional issues between sovereigns.

Finally, there are a number of other areas where the State is working within the Navajo checkerboard area to provide services and funding. The State provides capital outlay funds to the Navajo Nation for projects located at Navajo chapters within the checkerboard area**.** The State's Department of Transportation also provides services for road construction and improvements within the checkerboard area. There are state public schools located in the checkerboard area. There are state Medicaid/Medicare programs and Aging services and funding that are

provided to the area. The State also has entered into a number of Joint Powers Agreements with the Nation, as well as other tribes and pueblos, to share their authorities to implement programs instead of disputing jurisdictional issues. NMSA 1978, §§ 11-1-1 thru 11-1-7.

Under these circumstances, if a new legal precedent is introduced without care, this creates considerable pressure for both sides to resort to a defensive posture and forego positive cooperative arrangements reached between them. This Court should be wary of this potential to pit sovereigns into unnecessary and costly jurisdictional battles. Accordingly, if this Court upholds EPA's determination, the State requests that it do so in a narrow fashion and make clear that nothing in this particular determination has legal effect in other factually and legally distinct situations.

B. THE STATE'S UIC PROGRAM UNDER THE SDWA IS MORE DETAILED AND COMPREHENSIVE THAN THE FEDERAL PROGRAM.

If EPA's determination is upheld, the federal government will have jurisdiction over Section 8 under the SDWA instead of the State. The State has a more detailed and comprehensive regulatory program than the federal government. A discussion of the differences between these two governments' programs will highlight the importance of the State's role.

In 1983, the State of New Mexico received approval from EPA under Section 1422 of the SDWA to "issue UIC permits for Classes I, II, III, IV and V wells under a federally approved UIC program." 48 Fed. Reg. 31,640 (July 11, 1983). However, New Mexico's UIC [underground injection control] program does not extend to "Indian lands." *Id.* UIC wells located upon "Indian lands" are regulated by EPA pursuant to a federally-administered "direct implementation" program as established by rule. 49 Fed. Reg. 20,138 (May 11, 1984). The regulations under the SDWA define "Indian lands" to mean: "Indian Country" as defined at 18 U.S.C. §1151; 40 C.F.R. § 144.3 (1999). Thus, the State cannot implement its UIC program in Section 8 if this Court concludes that Section 8 is "Indian Country." The Court should be aware that there are significant differences between the federal UIC program and the State's UIC program.

Under the federal program, prior to conducting underground injection or in situ mining, an operator must obtain an aquifer exemption. 40 C.F.R. § 146.4 (1983). The federal regulations provide that an aquifer or any portion thereof may be exempted under certain circumstances as set forth under 40 C.F.R. § 146.4 (1983).[4] Similar to the federal aquifer exemption, under New Mexico state law

4 Previously, on June 21, 1989, EPA approved an aquifer exemption for Section 8 submitted by the State of New Mexico under its UIC primacy program which would suggest that EPA concluded the land in question was not Indian Country; however, this Court later determined that such a prior action by the EPA was not determinative of the land status of Section 8. *HRI, Inc*., 198 F.3d at 1247.

and its UIC primacy program, a person may seek an aquifer exemption to allow the injection of water contaminants into groundwater for the extraction of minerals such as uranium. 20.6.2.5101 NMAC (2001).[5] However, unlike the federal program, State law requires that an aquifer designation be temporary in nature. 20.6.2.5101.C(2) NMAC. This effectively means that any exemption that allows for potential damage to the aquifer cannot remain indefinitely and will have to eventually be cleaned up to the State's water quality standards.[6]

In addition, under the State's permit application process, the permittee must designate specific methods or techniques it will use to restore groundwater so that upon final termination of operations, including restoration efforts, the groundwater at "any place of withdrawal for the present or reasonably foreseeable future use" will not contain either concentrations in excess of state water quality standards or any toxic pollutant. 20.6.2.5101.C(2) NMAC. Moreover, the New Mexico Water Quality Control Commission has designated the "place of withdrawal for present or reasonably foreseeable future use" as the facility or operation site itself. *Phelps Dodge Tyrone, Inc. v. New Mexico Water Quality Control Commission*, 2006-

5 A well for the injection of fluids for extraction of minerals or other natural resources, including sulfur, uranium, metals, salts or potash by in situ extraction is known as a Class III well. 20.6.2.5002.B(3) NMAC (2001). As stated above, the State has received primacy from USEPA over Class III UIC wells.

6 There is no equivalent under federal law to the State's Water Quality Act for protecting groundwater. NMSA 1978, §§ 74-6-1 through 17 (2006). The New Mexico Water Quality Act is a preventive statute that prescribes measures to prevent pollution of the State's groundwater. It requires treatment prior to discharge, groundwater monitoring, and closure of a site.

NMCA-115, 140 N.M.464, 463; 143 P.3d 502, 511 (2006). This approach contrasts from the federal approach where the protection is only for future drinking water and not present use. Also, unlike New Mexico, EPA does not have a specified place of withdrawal in the form of the facility or operation site for purposes of measuring its protection of future drinking water.

The federal UIC program is less stringent than the State's in other areas as well. For example, the federal program does not require permitting of all Class V wells. 40 C.F.R. 144.24. Instead, Class V wells are "authorized by rule" under the federal regulation at 40 C.F.R. 144.24, which means that a permit is not required if the well does not endanger underground sources of drinking water during operation or after closure. EPA may require a permit for a Class V well, but historically has not done so. 40 C.F.R. 144.25. EPA has issued only one Class V permit for all Class V wells within New Mexico. When EPA does not issue a permit, there is no monitoring of groundwater to determine whether the injection well is in fact contaminating groundwater. 40 C.F.R. 144.84. In contrast, the State requires permits for all Class V wells, which includes groundwater remediation injection wells, mining injection wells, domestic waste injection wells, and groundwater management injection wells. 20.6.2.3000 NMAC. Each of these State permits contains requirements for the operation, monitoring and closure of the well, and contingency plans to address failures of the system, including groundwater

contamination. Monitoring of groundwater in the vicinity of each Class V injection well is a crucial and essential element for protecting groundwater quality under the State's legal framework.

The Oil Conservation Division's (OCD) of the New Mexico Energy, Minerals and Natural Resources Department has authority to administer a UIC program for Class II wells pursuant to the SDWA. 40 C.F.R. 147.1600. Currently, OCD is administering approximately thirty-six (36) UIC permits in the checkerboard area. The OCD's UIC program uses a one-half mile Area of Review for injection well applications (OCD form C-108) rather than the one-quarter mile area used in federal regulations, 40 C.F.R. 146.6(b). The Area of Review is the area surrounding a proposed injection well within which the applicant must satisfy the permitting authority that it has identified and, if necessary, repaired or plugged, any existing wells that could provide conduits to allow movement of injected fluids into a fresh water aquifer. By using a larger Area of Review, the OCD program is more stringent in protecting drinking water sources than is the federal program.

OCD's UIC program also protects oil and gas resources pursuant to the New Mexico Oil and Gas Act, NMSA 1978, §§ 70-2-1 to 70-2-38, as amended. In order to obtain an OCD injection permit, an applicant must demonstrate not only that the proposed injection will not adversely affect any underground source of drinking water (the exclusive focus of the federal UIC program), but also that it will not

adversely affect any present or future commercial source of oil or gas. 19.15.9.6 NMAC.

Thus, there are significant consequences if this Court were to uphold the EPA's determination. The State would lose jurisdiction to implement its UIC program at Section 8 which is a more comprehensive, detailed regulatory framework than the federal program. This not only would be contrary to the State's interest, but also poses the question as to whether the federal program or the State program would be more commensurate with the Navajo Nation's policy goals in the area of environmental protection. Given the highly protective and comprehensive nature of the State's UIC program, the State's standards and policy objectives should be considered, if not applied, in any regulatory program implemented in this case.

III. THERE ARE CONSIDERABLE PROBLEMS WITH THE "COMMUNITY OF REFERENCE" TEST THAT NEED TO BE RESOLVED SHOULD THIS COURT APPLY IT IN THIS CASE.

Should this Court apply the "community of reference" test in this case, the State must inform this Court of various difficulties and unanswered questions that arise from this test, including the uncertainty and confusion it creates for regulatory agencies. The State hopes that this Court may clarify or modify its findings to address these concerns.

At the heart of the legal debate in this case is the disparate views of HRI, Inc. and EPA regarding the validity of the "community of reference" test from the *Watchman* case in a post-*Venetie* world. This Court in the prior case never ruled on the merits of whether Section 8 was a "dependent Indian community" under either standard, and instead, referred the matter to EPA for a decision. *HRI, Inc.*, 198 F.3d at 1248. In fact, this Court noted that *Watchman* never opined on whether an entire Navajo chapter would constitute the appropriate "community of reference." *Id.* at 1249; *Watchman*, 52 F.3d. at 1545. Thus, EPA's determination was a first attempt at using the "community of reference" test to determine the land status of Section 8.

Upon careful review of EPA's determination, the State has some serious concerns regarding the application of the "community of reference" test. In EPA's discussion, it appears that the test itself requires the finding of the "status of the area in question as a community" and "the relationship of the area in question to the surrounding area." These two descriptions are vague and do not provide the kind of clear, bright line rules that will help the State in determining the scope of its jurisdiction. In some cases in rural New Mexico, the "nearest" community may be miles away from the land in question, or there may be multiple communities equidistant from the site of the activity. *Watchman*, 52 F.3d at 1543-44. This raises difficult questions when faced with a situation akin to the current case where

the land in question is private fee land with no inhabitants - how far must one go to find a community, in what direction, and does the specific plot of land at issue or the community at issue, or both, become the focus of not only the "community of reference" test, but also the *Venetie* two-pronged test?

Other puzzling aspects of this test are the required examination of the infrastructure provided to the surrounding area of the "community." In many cases, there is often a blending of local, tribal, county, and state services. How does one determine that despite this blending of services, that the federal government, instead of the State, has "primary jurisdiction?" *Venetie*, 522 U.S. at 527, n.1. How does one determine which government services should be given ample weight in the analysis, whereas other services are given negligible weight, such as general federal social programs? *Venetie*, 522 U.S. at 534.

There also is the question of whether the fact the land is within the exterior boundaries of a reservation or a pueblo is a determining factor. Certainly it appeared to be a determining factor in this Court's most recent ruling applying the *Venetie* decision. *United States v. Arrieta*, 436 F.3d 1246, 1250 (10th Cir. 2006) (holding that county road was a "dependent Indian community" since the Pueblo held title to the land under the road and it was located within the exterior boundaries of the Pueblo). Presumably, the title to the land would also be a determinative factor in not only the "community of reference" test, but also in the

federal set-aside and superintendence prongs from the *Venetie* case. *Id*.; *see also State of New Mexico v. Frank*, 52 P.3d 404, (2002) (accident in question occurred on a state highway on land owned by the BLM in the checkerboard area, and therefore, not Indian Country); *State of New Mexico v. Romero*, 142 P.2d 887, 892 (2006) (applying the *Venetie* test without a community of reference standard given that the incident on private fee land occurred within Pueblo boundaries and Pueblo lands were always set aside by Congress as Indian Country).

Another important inquiry is whether there are certain fact situations that would preclude the application of a "community of reference" test altogether, as noted by this Court in the *HRI, Inc.* decision: "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)." *HRI, Inc.*, 198 F.3d at 1249 (citations omitted). This begs the question as to whether there are other "categorical" instances where the "community of reference" test will not apply, or other instances where the test will always apply.

In sum, it is difficult for the State, as well as our neighboring governments, to operate and administer our programs in a consistent and complementary way when there are so many open questions and vague standards in a legal test. The

more specific, bright line, and concise any such standards are, the greater likelihood for less legal disputes and costly litigation.

Thus, the State respectfully requests that this Court consider these questions in adopting a legal standard to address these important matters.

CONCLUSION

In sum, the State submits this brief to inform the Court of the State's important interests in this case. This case forces all interested parties, including the State and the Navajo Nation, to protect their respective authority and interests. The State has an interest in regulating the environment in a manner consistent with its established policies and regulatory standards, which in this case are more comprehensive than the federal program. The State also has a strong and active presence in the checkerboard area that it wishes to maintain to ensure that citizens and communities continue to benefit from the State's services and programs. To minimize any adverse impacts to these interests, should this Court uphold EPA's determination, it must be limited to the unique facts and law at issue in this particular case. Lastly, the State believes that EPA's determination relies upon the "community of reference" test which is an unwieldy, vague, and amorphous legal standard that poses more questions than it answers. For these reasons, the State asks this Court to render a decision that does not disrupt the delicate balances and intergovernmental relationships that the Navajo Nation and State have developed

over the years and that it consider the State's substantive presence and significant investment it has made in the checkerboard area.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) the amici makes the following certifications:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,829 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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) because this brief has been prepared in a monospaced typeface using Microsoft Word 2003 in 14 pitch font, Times New Roman style.

3. The digital submission of this brief has been scanned for viruses with the most recent version of a commercial virus scanning program, E-Trust Management Suite r3, most recently updated June 15, 2007, and according to the program, is free from viruses.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of June, 2007, a true and correct copy of the foregoing **AMICUS CURIAE BRIEF OF THE STATE OF NEW MEXICO FILED IN SUPPORT OF NO PARTY** was served via United States Mail, first-class postage prepaid, addressed as follows:

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Pursuant to Emergency General Order of October 20, 2004 (c) I further certify as follows:

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