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 AMICUS CURIAE NATIONAL MINING ASSOCIATION FILED IN SUPPORT OF HYDRO RESOURCES, INC.

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ORAL ARGUMENT IS REQUESTED

CORPORATE DISCLOUSRE STATEMENT

Amicus curiae National Mining Association (NMA) certifies that it is a non-profit corporation. NMA has no parent corporation and no publicly held company owns ten (10) percent or more of its stock.

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STATEMENT OF INTEREST: RULE 29(C)(3)

The National Mining Association (NMA) hereby appears as an *amicus curiae* in support of Hydro Resources, Inc.'s (HRI's) Petition for Review of a United States Environmental Protection Agency (EPA) Land Status Determination (LSD "R44") issued on February 6, 2007 determining that the Section 8 property, with surface land and subsurface mineral rights owned in fee by HRI, is within a "dependent Indian community" under 18 U.S.C. § 1151(b) and, thus, constitutes "Indian country."

NMA is the only national not-for-profit trade association that represents the interests of the mining industry before all branches of the United States government and the general public. Keeping with the tradition set by its predecessor organizations-the National Coal Association and the American Mining Congress-NMA advocates public policies designed to protect and expand domestic mining opportunities that are of vital importance to the United States' national security and economic prosperity. NMA's membership comprises more than 325 corporations that span the entire spectrum of the mining industry. Among its members, NMA counts the producers of most of the United States' coal, metals, industrial and agricultural minerals, manufacturers of mining and mine processing

machinery and supplies, consulting and engineering firms, and other businesses that provide goods and services to the mining industry.

NMA's member companies have a significant interest in the outcome of this proceeding. Many member companies have ongoing mining projects or plans to pursue potential projects, including specifically uranium recovery, in the United States, including the State of New Mexico. Regulatory certainty and predictability are critical for the domestic mining industry. Uncertainty about what constitutes "Indian country" under Section 1151(b), can adversely affect the permitting status of projects and, as a result, has broader policy implications. The ability to meet our nation's mineral needs from domestic sources depends upon a predictable legal and regulatory framework for mining. Legal uncertainty discourages capital investment in mining projects, investment necessary to bring such projects to fruition and less development of domestic resources leads to greater reliance on foreign sources. It is, therefore, critical to the domestic mining industry, as well as to our economy and national security that the process by which a court determines what constitutes a "dependent Indian community" be resolved in a clear, concise, and predictable manner to assure cost-effective licensing and permitting.

NMA has authority to file for leave of court to submit a brief as *amicus curiae* under Rule 29(b)(1&2), as described in the attached Motion for Leave to File. Further, NMA notes that Appellant Hydro Resources, Inc. (HRI) has consented to the filing of this *amicus* brief and Appellee the Environmental Protection Agency (EPA) has not objected to this filing.

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STATEMENT OF THE CASE

In 1948, Congress enacted 18 U.S.C. § 1151 to codify various decisions by the Supreme Court[1] as to what lands may be defined as "Indian country." Section 1151 defines Indian country to be:

> "(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 limit of a state, and
>
> (c) all Indian allotments, the Indian titles to which have not been extinguished…."

18 U.S.C. § 1151.

With respect to Section 1151(b), some fifty years later, the Supreme Court determined in *Venetie* that "dependent Indian communities" are defined using a simple, two-prong test:

> "first, they [lands in question] 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.

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[1] *See e.g., United States* v. *Sandoval*, 231 U.S. 28, 58 L. Ed. 107, 34 S. Ct. 1 (1913); *United States* v. *Pelican*, 232 U.S. 442, 58 L. Ed. 676, 34 S. Ct. 396 (1914); *United States* v. *McGowan*, 302 U.S. 535, 82 L. Ed. 410, 58 S. Ct. 286 (1938).

In *HRI, Inc. v. Envtl. Prot. Agency*, 198 F. 3d, 1224 (10th Cir. 2000), this court questioned the impact of the Supreme Court's legal test for "dependent Indian communities" stating:

> "Although it appears that, in disapproving of the Ninth Circuit's multi-factor test for identifying a dependent Indian community…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*."

198 F.3d at 1248-1249, *citing Venetie*, 118 S. Ct. at 955 & n.7 (emphasis added).

This court then remanded the case to EPA and directed the agency to determine whether the Section 8 parcel of land properly constitutes "Indian country" as a "dependent Indian community."

On November 2, 2005, EPA issued a Federal Register notice[2] that invited members of the public, organizations, and other entities to submit comments on whether the Section 8 property constitutes a "dependent Indian community" under Section 1151(b). The United States Department of the Interior (DOI) submitted a Solicitor's Opinion to EPA on November 3, 2006 in response to the Federal Register notice. Several parties, including HRI, NMA, the Navajo Nation, McKinley County, and other organizations and members of the public submitted comments with various different legal and

[2] *See* 70 Fed. Reg. 66402 (November 2, 2005).

policy perspectives on the issue to be decided in that proceeding. EPA also consulted privately with DOI and the Navajo Nation prior to issuing its decision.

On February 6, 2007, EPA issued its Land Status Determination (LSD "R44") in which DOI's Opinion was adopted virtually *in toto* and, by using a "community of reference" test, determined that the Section 8 property, as a part of the Church Rock Chapter of the Navajo Nation, is specifically set-aside and superintended by the federal government and, thus, part of a "dependent Indian community" under Section 1151(b). On appeal, HRI argues that EPA erred in classifying the Section 8 property as part of a "dependent Indian community." NMA agrees with the substance of HRI appeal.

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SUMMARY OF THE ARGUMENT

NMA respectfully requests that this court reverse the holding of EPA'a Land Status Determination (LSD "R44") below for the following reasons: (1) EPA's application of this court's "community of reference" test for determining what lands constitute a "dependent Indian community" under 18 U.S.C. § 1151(b) is in error because it directly conflicts with the mandatory two-prong legal test articulated by the Supreme Court in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998); (2) even if this court's "community of reference" test is not in conflict with the *Venetie* test, EPA's application of the test to the Section 8 lands in its LSD is in error.

Initially, NMA argues that this court's suggestion in *HRI v. EPA* that the *Venetie* decision did not expressly overrule the use of a "community of reference" test is in error. This suggestion, however, ignores the fact that the rejected Ninth Circuit *Venetie* I multi-factor balancing test was essentially identical to the Tenth Circuit's "community of reference" multi-factor balancing test. Although the Ninth Circuit multi-factor balancing test did not explicitly incorporate a component described as a "community of reference" test in its "dependent Indian community" analysis, it focused on nearly identical factors in its analysis of various nebulous community

cohesiveness issues. Both multi-factor balancing tests effectively were set aside in favor of *Venetie*'s concise two-prong test for determining "dependent Indian communities" under Section 1151(b): (1) the land must be set-aside by the federal government for use by the Indians as Indian land and (2) the land must be under federal superintendence. *See Venetie*, 522 U.S. at 530-531. Indeed, the *Venetie* Court specifically stated that "[t]he federal set-aside requirement ensures that the land in question is occupied by an "Indian community" and that "*it is the land in question, and not merely the Indian tribe inhabiting it,*" (much less an Indian tribe inhabiting lands contiguous to or in proximity to the "land in question," as is the case with the Section 8 property), that must satisfy this test. *See id.* at 531 (emphasis added). Thus, the first issue to be addressed is the legal status of the *title* to the "land in question" and the second issue is whether the federal government is actively managing the land for the benefit of Indian residents on it.

As a result, NMA asserts that EPA should have relied solely on the two-prong *Venetie* test of federal set-aside and superintendence when evaluating the land status of the Section 8 property. As a matter of law, the Supreme Court's *Venetie* test for determining "dependent Indian communities" effectively overruled any and all multi-factor test(s), the

results of which cannot satisfy federal set-aside and superintendence for the "land in question." Indeed, post-*Venetie*, the Ninth Circuit and other federal and state courts have relied solely on the Supreme Court's "dependent Indian community" tests in accord with *Venetie* and eliminated consideration of "community of reference" and/or multi-factor balancing tests in direct conflict with EPA's LSD below. *See e.g., Blunk v. Arizona Department of Transportation*, 177 F.3d 879 (9th Cir. 1999); *United States v. Papakee*, No. 06-CR-162-LRR, 2007 U.S. Dist. LEXIS 32475, at *34 (N. D. Iowa, May 2, 2007); *State v. Frank*, 52 P.3d 404 (N.M. 2002). Thus, the reliance by EPA/DOI on a "community of reference" test to "inform" the determination of federal set-aside and superintendence is a fundamental flaw that invalidates their analyses and conclusions.

In this instance, application of the mandatory *Venetie* two-prong test to the Section 8 property leads to the conclusion that such property *is not* a "dependent Indian community" under Section 1151(b). The Section 8 property's surface and subsurface minerals rights are owned in fee by HRI, a private company, and the United States does not hold such land in trust or in any other form of custodianship for Indians. Further, the Section 8 property is not under federal superintendence as the land does not have any inhabitants, Indian or otherwise, and receives no "active" federal services for

the benefit of Indians. Indeed, the Section 8 property is under the active jurisdiction of McKinley County, New Mexico and the State of New Mexico for taxes and a variety of services such as roads, schools, and other social services. Thus, the land in question is neither a "dependent Indian community" nor part of a "dependent Indian community."

Further, even if a "community of reference" test survives *Venetie*, the concepts of "community of reference" and "dependent Indian community" are not automatically co-extensive. As a result, EPA's selection of the Church Rock Chapter as the appropriate "community" and its "textured" application of the *Venetie* requirements to the entire Chapter, including the Section 8 property and other private, State or federal property, is incorrect. EPA improperly determined that the presence of the Section 8 property in the selected "community of reference" renders it, and all other properties therein, automatically a part of a "dependent Indian community" regardless of the legal title status of such properties. Additionally, EPA's unsupported assertion that the Church Rock Chapter was federally created as the basis for finding federal set-aside and superintendence is without merit and cannot support a finding that the *Venetie* requirements have been satisfied.

ARGUMENT

I. THE SUPREME COURT'S DECISION IN *VENETIE* OVERRULES ANY AND ALL "COMMUNITY OF REFERENCE" OR MULTI-FACTOR BALANCING TESTS FOR DETERMINING WHETHER THE LAND IN QUESTION IS A DEPENDENT INDIAN COMMUNITY

The standard for determining whether a parcel of land constitutes "Indian country" as a "dependent Indian community" under 18 U.S.C. § 1151(b) has been articulated by the Supreme Court in *Venetie*. This court, however, stated in *HRI* that, while the Supreme Court has determined that the requirements of federal set-aside and federal superintendence must be satisfied, nevertheless, a "community of reference" test must be conducted prior to determining whether the "land in question" is part of a "dependent Indian community." *See generally HRI v. Envtl. Prot. Agency*, 198 F.3d 1224 (10th Cir. 2000). This *dicta* is the basis for the fundamental assumption underlying Department of the Interior's (DOI's) Opinion and, thus, the Environmental Protection Agency's (EPA's) Land Status Determination (LSD "R44")—namely that a "community of reference" test can "inform" the application of *Venetie*'s two mandatory findings to determine that HRI's Section 8 property is part of (or within) a "dependent Indian community" and, therefore, is "Indian country." *See generally* R44. NMA argues that EPA's "community of reference" test is legally contrary to the Supreme

Court's opinion in *Venetie,* is factually flawed, and, therefore, must be reversed.

The legal standard articulated by the Supreme Court in *Venetie* controls the outcome of this proceeding, as it has in all other post-*Venetie* proceedings in other federal and state courts. Prior to 1996, various federal Circuit Courts offered different amorphous, multi-factor balancing tests to determine what constitutes "Indian country" under Section 1151(b). While these multi-factor balancing tests generally incorporated federal set-aside and superintendence factors, such requirements were not treated as mandatory prerequisites to determining what constitutes a "dependent Indian community," as they are in *Venetie. 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). In *Alaska v. Native Village of Venetie Tribal Government*, the Supreme Court specifically rejected the multi-factor balancing test utilized by the Ninth Circuit in *Venetie* I because it reduced these two requirements to "mere considerations." *Venetie*, 522 U.S. 520, 531 (1998).

The Ninth Circuit's decision in *Venetie* I held that land owned in fee by an Indian tribe constituted "Indian country." *See generally Venetie* I, 101 F.3d 1286. While the court recognized the requirements of federal set-aside and superintendence were required, it indicated that those factors *should be informed* in the particular case by a consideration" of six factors, many of which are identical to this court's "community of reference" test. *See id.* at 1294 (emphasis added). After applying this six-factor test, including specific application of "the nature of the area" and the "degree of cohesiveness of the area inhabitants," the Ninth Circuit determined that the lands satisfied its test for "dependent Indian communities." *Id.* at 1292.

However, on appeal, the Supreme Court reversed the Ninth Circuit's holding and the use of its multi-factor balancing test by stating that:

> "We now hold that [the term "dependent Indian communities"] refers to a limited category of *Indian lands* that are neither reservations nor allotments, 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 (emphasis added).

The Court specifically rejected the Ninth Circuit's pronouncement that a multi-factor balancing test, such as its six-factor test, can be used to "inform" the evaluation of federal set-aside and superintendence. In fact, the Court specifically stated that:

> "Although the Court of Appeals majority also reached the conclusion that § 1151(b) imposes federal set-aside and federal superintendence requirements, *it defined those requirements far differently, by resort to its "textured" six-factor balancing test*."

Id. at 531, fn. 7.

This decision set forth a clear and concise standard for the determination of what lands constitute "dependent Indian communities" under Section 1151(b). This new mandatory two-prong test requires a demonstration that the "land in question" must be: (1) set-aside by the federal government for the use of the Indians and (2) under federal superintendence.

Thus, by reversing the Ninth Circuit's holding in *Venetie* I, the Supreme Court specifically overruled the use of multi-factor balancing tests *to define* whether the federal set-aside and superintendence requirements have been satisfied.

But, in 2000, despite the Supreme Court's express elimination of the Ninth Circuit's multi-factor test in *Venetie*, this court stated in *HRI*:

> "Although it appears that, in disapproving of the Ninth Circuit's multi-factor test for identifying a dependent Indian community…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*."

HRI, 198 F.3d at 1248-1249 *citing Venetie*, 118 S. Ct. at 955 & n.7 (emphasis added).

This *dicta* is a truism, because the Ninth Circuit's test did not, in fact, contain a factor specifically identified as a "community of reference" test for the Supreme Court to address. However, as shown in Table 1 below, a comparison of the multi-factor balancing test in *Venetie* I with this court's "community of reference" test demonstrates that the two tests are so similar that the Supreme Court must have negated the need for "community of reference" tests in "dependent Indian community" analyses:

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TABLE 1

Tenth Circuit "Community of Reference" Test (*Watchman*)	Ninth Circuit Multi-Factor Balancing Test (*Venetie* I)
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"	1. The degree of federal ownership of and control over the area;
2. The nature of the area in question; the relationship of the inhabitants in the area to Indian tribes and the federal government; the established practice of government agencies toward the area	2. The nature of the area; the relationship of the area inhabitants to Indian tribes and the federal government; the established practice of government agencies toward that 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"	3. The degree of cohesiveness of the area inhabitants;
4. "Whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples."	4. The extent to which the area was set aside for the use, occupancy, and protection of dependent Indian peoples;

As noted above, based on this court's statement in *HRI*, EPA/DOI employed a "community of reference" test to "inform" the determination of the two mandatory *Venetie* requirements. *See generally* R44 at 3-10. Use of this "community of reference" test led EPA to improperly define the scope of the lands to be evaluated under the mandatory federal set-aside and superintendence requirements. As a result, EPA looked at a *much larger "community"* than just the Section 8 property. EPA's application of this court's "community of reference" test in this manner directly contradicts the Supreme Court's holding in *Venetie* as it inevitably incorporates an evaluation of part or all previously overruled multi-factor balancing tests (e.g., "the nature of the area" and "the degree of cohesiveness of the area inhabitants") and, as such, it is in error and should be set aside.

A. The Supreme Court's Decision in *Venetie* Overruled the Use of "Community of Reference" and Multi-Factor Balancing Tests for "Dependent Indian Community" Evaluations

The Supreme Court's decision in *Venetie* overruled the use of multi-factor balancing tests, including "community of reference" tests, when determining whether a given parcel of land is a "dependent Indian community."

As stated above, the Supreme Court refused to adopt the Ninth Circuit's multi-factor balancing test, as a mechanism to "inform" the analysis of federal set-aside and superintendence. Specifically, the Court evaluated three of the individual factors in the Ninth Circuit six-factor balancing test, the factors most similar to this court's "community of reference" test, and found that they were unnecessary for an analysis of federal set-aside and superintendence:

> "Three of those factors, however, were extremely far removed from the requirements themselves: "*the nature of the area"; "the relationship of the area inhabitants to Indian tribes and the federal government"; and "the degree of cohesiveness of the area inhabitants*."

Venetie, 522 U.S. at 531 (emphasis added).

As a result, the Court, noting that all previous Court precedent prior to the enactment of Section 1151 required a finding of federal set-aside and superintendence,[3] concluded that the "balancing" of these additional factors with the federal set-aside and superintendence requirements to "define" or "inform" the "dependent Indian community" analysis would reduce the federal set-aside and superintendence requirements to "mere considerations." *Id.* at 531 (By *balancing* these "factors" against one

[3] *See e.g., United States* v. *Sandoval*, 231 U.S. 28, 58 L. Ed. 107, 34 S. Ct. 1 (1913); *United States* v. *Pelican*, 232 U.S. 442, 58 L. Ed. 676, 34 S. Ct. 396 (1914); *United States* v. *McGowan*, 302 U.S. 535, 82 L. Ed. 410, 58 S. Ct. 286 (1938).

another, the Court of Appeals reduced the federal set-aside and superintendence requirements to mere considerations").

The Court then determined that the two-prong test of federal set-aside and superintendence sufficiently defines "dependent Indian communities" in accord with Congress' intent in Section 1151(b):

> "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."[4]

Id. at 530 (emphasis in original in part and added in part).

Based on the analysis above, it is reasonable to conclude that, faced with this court's multi-factor balancing test, the Supreme Court's decision would have been essentially identical to its decision in *Venetie*.

Moreover, recent case law suggests that this court has refined its views on the proper test for "dependent Indian community" determinations

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[4] The Supreme Court specifically noted that the requirements of federal set-aside and superintendence were not court-imposed, but rather a creature of Congress:

> "Our holding is based on our conclusion that in enacting § 1151, Congress *codified* these two requirements [federal set-aside and superintendence], which previously we had held necessary for a finding of "Indian country" generally."

Venetie, 522 U.S. at 527 (emphasis added).

in light of *Venetie*. Prior to this court's ruling in *HRI,* in *United States v. Roberts,* this court did not conduct a "community of reference" test nor did it even mention that such a test was performed by the lower court or that its determination regarding the land in question was conducted in accordance with any such test. *See generally* 52 F.3d 1125 (10th Cir. 1999), *cert. denied* 529 U.S. 1108 (2000). In other words, it appears that the court has recognized that a "community of reference" analysis is unnecessary since *Venetie*'s requirements control. *See Roberts,* 185 F.3d at 1133, fn. 5, *quoting Venetie,* 522 U.S. at 531 (emphasis added).

Additionally, in *United States v. Arrieta*, although this court indicated that it would be useful to define the "community" in a "dependent Indian community" analysis, it properly focused its opinion on the "situs of the crime" (the "land in question") rather than on the entire "community." 436 F.3d 1246, 1248 (10th Cir. 2006), *cert. denied* 126 S.Ct. 2368 (2006). In *Arrieta*, this court conducted its "dependent Indian community" analysis in accord with the pronouncement in *Venetie* that it is the "land" and not the "people" inhabiting such land that must be the focus of the analysis. *Compare Venetie*, 520 U.S. 522. Accordingly this court applied the *Venetie* requirements of federal set-aside and superintendence only to the Shady

Lane *lands* instead of the outer boundaries of the Pueblo and the inhabitants of the lands.

Most other federal and state courts addressing similar questions have held that the concise two-prong test in *Venetie* controls. Since *Venetie* and prior to *HRI*, the Ninth Circuit revisited the issue of a "dependent Indian community" in *Blunk v. Arizona Department of Transportation*, 177 F.3d 879 (9th Cir. 1999) and discarded the extraneous factors in its "textured" multi-factor balancing test used in *Venetie* I noting that the Supreme Court:

> "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."'

177 F.3d at 883.

As a result, the Ninth Circuit stated:

> "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]."

Id. at 883-884.

Thus, the Ninth Circuit's test for determining a "dependent Indian community" rests squarely on the mandatory two-prong *Venetie* test, which

is in direct conflict with this court's apparent insistence that its "community of reference" test survived *Venetie*.

B. The *Venetie* Requirements of Federal Set-Aside and Superintendence Only Apply to the Section 8 Property as the "Land in Question" and Not to the Church Rock Chapter

Second, EPA's designation of the Church Rock Chapter as the appropriate "community of reference," rather than the Section 8 property itself when evaluating its "dependent Indian community" status under Section 1151(b) is inconsistent with the Supreme Court's decision in *Venetie*. The *Venetie* decision mandates that a "dependent Indian community" analysis must first focus on the legal title status of the "land in question" and not upon a "community of reference," including land surrounding or in proximity to the "land in question" inhabited by Indians. As a result, EPA's designation of the Church Rock Chapter as the proper situs for a "dependent Indian community" analysis is incorrect and must be reversed and remanded for a proper determination in accordance with the mandatory two-prong test in *Venetie*.

In *Venetie* I, the Ninth Circuit sustained the United States District Court for the District of Alaska's interpretation of Section 1151(b), agreeing that it "is not *land* but *Indians* which must be under

the superintendence of the federal government." *Venetie* I, 101 F.3d at 1291. On appeal, the Supreme Court explicitly noted that the Ninth Circuit's endorsement of the District Court's statement on this issue was incorrect: "it is *the land in question*, and not merely the Indian tribe inhabiting it, that must be under the superintendence of the Federal Government." *Venetie*, 522 U.S. at 531 (emphasis in original). Justice Thomas specifically highlighted the term "land in question" to delineate the physical boundaries of the lands to be evaluated prior to determining whether they are part of a "dependent Indian community."

Indeed, as stated above, this court in *Roberts* expressly recognized that the "dependent Indian community" analysis must be limited 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*."

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

This court then proceeded to evaluate the "land in question" issue and limited its analysis to the property on which the alleged crimes were committed and not to land in surrounding areas. Further, in *Arrieta*, this court also confined the scope of its review to the "land in question" (i.e., lands to which *title* was held by the Pueblo) and did not extend its inquiry to other private fee lands in the area. *See* 436 F.3d at 1250-1251.

In addition, as a policy matter, a broad application of the "community of reference" test that ignores the *title* status of the "land in question" is incompatible with the nature of the region in which the Section 8 property is located. The Section 8 property is located within the "checkerboard" region of the State of New Mexico, which received this moniker due to the varying land ownership and jurisdictional status of the intermingled parcels of land in that part of the State. EPA/DOI's broad application of "community of reference" to this region runs the risk of incorporating various types of land ownership into a single classification of "Indian country". Congress could not have intended for the entire checkerboard region of New Mexico, with its wide variety of land ownership, including private fee, state-owned, and federally-owned or controlled lands to be included in

"Indian country." Application of EPA/DOI's decision to make any Navajo, (or potentially any other Native American), Chapter or equivalent the "community of reference" (and therefore a "dependent Indian community") would result in the entire New Mexico checkerboard or other similar land areas becoming "Indian country," regardless of the title status of individual parcels. As a result, EPA's application of the "community of reference" test is in conflict with the Supreme Court's holding in *Venetie* regarding the title status of the "land in question" and must be set aside.

II. EPA'S APPLICATION OF THE *VENETIE* REQUIREMENTS TO THE "LAND IN QUESTION" IS ERRONEOUS

A. EPA's Failure to Apply the *Venetie* Test to the Section 8 Property as the "Land in Question" Constitutes Reversible Error

As noted above, a "community of reference" test can only survive the Supreme Court's decision in *Venetie* to the extent that its application does not conflict with or frustrate the application of the mandatory two-prong *Venetie* test. EPA improperly failed to evaluate the Section 8 property as the "land in question" as required by *Venetie*. When discussing its application of the *Venetie* requirements of federal set-aside and superintendence, EPA stated that "Section 8 lands are a part of the Church Rock Chapter and are examined together with the Chapter." EPA R44 at 11. The selection of the

entire Church Rock Chapter as the "land in question" improperly treats the "community of reference" as automatically co-extensive with the boundaries of a "dependent Indian community." Thus, EPA's selection of the Church Rock Chapter as the appropriate "community of reference" and its "textured" application of the *Venetie* requirements to the entire Chapter, including the Section 8 property and other private, State or federal property, is incorrect. Therefore, EPA's decision below must be reversed.

B. The Section 8 Property Has Not Been Set-Aside by the Federal Government for Use by the Indians

With respect to federal set-aside requirement, the Supreme Court stated that the requirement's purpose was to "ensure[] that the land in question is occupied by an 'Indian community.'" *Id.* Currently, the Section 8 property is not occupied by any Indian or other private residents and does not serve any purpose for the landowner other than to be the situs for a uranium recovery project. Even DOI and EPA acknowledge that the Section 8 property has no population and that no one lives on it. EPA R44 at 7. Thus, the Section 8 property is not "occupied" by any Indian community, or any other "community," because it is not occupied by anyone.

Further, there have been no actions, express or implied, by the federal government to, as the *Venetie* Court stated, to "set[] apart the land for the

use of the Indians 'as such,'" *Id.* at 531. EPA/DOI attempts to address this first prong of the *Venetie* test by stating that:

> "[a]lthough the Church Rock Chapter is now an integral part of the Navajo government, initially it was a creature of the Federal Government."[5]

EPA R44 at 11.

Whether or not EPA/DOI's statement is accurate is irrelevant as title to the Section 8 property (i.e., the "land in question"), does not satisfy the mandatory federal set-aside requirement. The Section 8 property has followed a clear chain of title passing from entity to entity until finally it was transferred in fee to HRI, a private company.

Moreover, all of the legal precedent cited by EPA is its Determination preceded the Supreme Court's ruling in *Venetie*. *See e.g., United States v. Martine*, 442 F.2d 1022 (10th Circ. 1971); *United States v. Calladito*, Cr. No. 91-356, 19 Indian L. Rptr. 3057 (D. N.M. Dec. 5, 1991); *United States v. Yazzie*, No. Cr. 93-470 (D. N.M. Jan. 28, 1994). EPA relies on these cases to demonstrate that "both state and federal courts recognized Navajo and federal authority over non-trust lands within Chapter boundaries." *Id.* However, as noted by HRI in its comments to EPA, the Section 8 property is

[5] NMA asserts that there is no evidence in the record to prove that EPA's statement is correct. For example, disputes over Chapter boundaries and election districts are resolved by the Navajo Tribal Courts and with no involvement by the federal or state government.

under the jurisdiction of McKinley County and the State of New Mexico. Neither the Navajo Nation nor the federal government have jurisdiction over the Section 8 property. Therefore, EPA's reliance on these previous cases to support a finding that the Section 8 property satisfies the federal set-aside requirements is incorrect.

EPA also bases its conclusion that the Section 8 property is federally set-aside on the fact that "[s]eventy-eight percent of the land within Church Rock's boundaries is set-aside for the occupation and use of the Navajo tribal members." EPA R44 at 11. However, given that the Section 8 property is private fee land, it is not and cannot be part of the seventy-eight percent that has been set-aside for the use of the Navajo tribal members.

C. The Section 8 Property Is Not Under Active Federal Superintendence

With respect to the federal superintendence requirement, the *Venetie* Court cited the cases of *United States v. McGowan* and *United States v. Pelican* to provide examples of what types of land are under the superintendence of the federal government. In *McGowan*, the Court noted that lands where "[t]he Government retains title to the lands which it permits the Indians to occupy" are under federal superintendence. 302 U.S. 535, 539. In *Pelican*, the Court determined that lands were under federal superintendence because "the Federal Government retained "ultimate

control" over the allotments in question." 232 U.S. 442, 449 (1914). In *Venetie*, the Supreme Court evaluated the "land in question" and stated that the mere fact that the federal government provided some services to its residents is "not indicia of *active federal control* over the Tribe's land sufficient to support a finding of federal superintendence." *Venetie*, 522 U.S. at 534.

The Section 8 property does not fit within the parameters of traditional federal superintendence. The United States does not retain title to the Section 8 property, as the surface and subsurface minerals rights are owned in fee by HRI. The United States also does not have "ultimate control" over the Section 8 property as HRI's fee ownership of the surface and subsurface permits it to determine the use of the property. The United States does not engage in *active* control of the Section 8 property, as it does not provide any services to the property. Therefore, the Section 8 property does not satisfy the mandatory *Venetie* requirement of federal superintendence.

EPA/DOI's analysis of federal superintendence, as tailored to the Church Rock Chapter as a whole, is erroneous, because it relies on assertions that are inapplicable to the Section 8 property or other properties within the Chapter (e.g., private, State, federal, BLM, United States Forest

Service, etc.). For example, EPA states that, "superintendence was found where the federal government actively controlled the lands in question, effectively acting as a guardian for the Indians." EPA R44 at 12, *citing e.g.*, *United States v. McGowan*, 302 U.S. 535, 537-539 (1938). But, in the instant case, the Section 8 property, as well as other land parcels within the Chapter controlled by private entities, Indians as private landowners, and the State is not under the active control of the federal government.

EPA also states that "[t]he Department of the Interior supervises natural resources in the Chapter, requiring approval of mineral leases and issuing grazing permits." *Id.* at 12. But, the Section 8 property, surface and subsurface mineral rights, are owned in fee by HRI and not controlled by the federal government. Moreover, HRI has significant water rights on this parcel that were obtained from the State of New Mexico, not the federal government.

Finally, EPA contends that "the [Bureau of Indian Affairs] BIA is responsible for protecting Navajo Nation *trust lands, natural resources, and water rights, and administering various trust benefits on behalf of Church Rock members.*" *Id.* (emphasis added). However, the Section 8 property, as well as other lands within the Church Rock Chapter, is not trust or allotted

land and is not under the active oversight of the BIA. These statements further demonstrate that EPA's analysis is legally and factually flawed.

III. CONCLUSION

Since the Section 8 property's is not federally set-aside for the use of the Indians and is not under federal superintendence, NMA respectfully requests that this court reverse EPA's determination that the Section 8 property is "Indian country" as a "dependent Indian community" under 18 U.S.C. § 1151(b).

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STATEMENT WITH RESPECT TO ORAL ARGUMENT

Pursuant to Fed. R. App. P. 29(g), in the event that this court grants oral argument to the principal parties, it is hereby requested that the court allow NMA to participate in oral argument.

DATED: This 20th day of June, 2007

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CERTIFICATE OF COMPLIANCE

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

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) & 29(d), because this brief contains under 7,000 words (6,094 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.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

HYDRO RESOURCES, INC.	)	
	)	
Petitioner,	)	
	)	
	)	**MOTION FOR LEAVE TO**
	)	**FILE AN AMICUS BRIEF**
v.	)	
	)	**APPEAL NO. 07-9506**
UNITED STATES	)	
ENVIRONMENTAL	)	
PROTECTION AGENCY	)	
	)	
Respondents	)	
	)	
NAVAJO NATION	)	
	)	
Intervenor	)	
_____	)	

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of National Mining Association's Motion for Leave to File an Amicus Brief and Brief of *Amicus Curiae* National Mining Association Filed in Support of Hydro Resources, Inc. in the above-captioned proceeding have been served on the following parties by U.S. Mail, first class, this 20th day of June, 2007:

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