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, and

NAVAJO NATION,

Intervenor-Respondent.

PETITION FOR REVIEW OF A DECISION OF THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

# BRIEF OF INTERVENOR-RESPONDENT NAVAJO NATION*

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Oral Argument is Requested

* With Attachments (Submitted as Photocopies and in Scanned PDF Format)

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HRI, Inc. v. EPA, 198 F.3d 1224 (10th Cir. 2000).

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## STATEMENT OF THE ISSUES

Petitioner Hydro Resources, Inc. ("HRI") seeks to mine uranium by injecting chemicals into an ore-bearing aquifer under a 160-acre tract of land (the "Section 8 Land") located within the Church Rock Chapter ("Chapter") of the Navajo Nation in New Mexico. HRI must obtain a permit under the Underground Injection Control ("UIC") provisions of the Safe Drinking Water Act ("SDWA") for this type of mining. The federal Environmental Protection Agency ("EPA") has the authority to issue the permit in Indian country as defined in 18 U.S.C. § 1151. The State of New Mexico has that authority in other parts of the State.

EPA determined in 1997 that the jurisdictional status of the Section 8 Land was in dispute and thus under temporary federal jurisdiction. R13b, App. 244.[1] In HRI, Inc. v. EPA, 198 F.3d 1224 (10th Cir. 2000), HRI challenged that determination, and urged that the Section 8 Land could not be considered Indian country under 18 U.S.C. § 1151(b) because the federal set-aside and superintendence requirements set forth in Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520 (1998), could not be satisfied for that land. This Court understood that the Section 8 Land is "owned in fee simple" by HRI, yet upheld EPA's determination that "there is a legitimate

[1] References to the record reflect the numbers assigned in the "Certified List of Documents Comprising Record [Corrected]" dated May 31, 2007. Thus, "R13b, App. 244" refers to page 244 of the Appendix to the Navajo Nation's comments of January 30, 2006, identified as document no. 13b in the Certified List.

dispute, following Venetie, as to whether Section 8 falls *within* a 'dependent Indian community,'" under 18 U.S.C. § 1151(b). HRI, 198 F.3d at 1231, 1248 (emphasis added). This Court observed that Venetie did not speak to the "community of reference" issue, as the Alaska Native Claims Settlement Act unequivocally terminated the Indian country status of all of Alaska (except the Annette Island Reserve) and obviated the need for such an inquiry. Id. at 1248-49; see Venetie, 522 U.S. at 524. This Court rejected HRI's argument, repeated in various formulations in HRI's opening brief here, that the Section 8 Land itself (the mine site) could be considered the community of reference, HRI, 198 F.3d at 1249 (citing Pittsburg & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531, 1542-43 (10th Cir. 1995)), and remanded the question of the jurisdictional status of the Section 8 Land to EPA because it "lack[ed] a decision below on the appropriate community of reference . . . and on the application of the set-aside and superintendence tests required by Venetie." HRI, 198 F.3d at 1248-49.

1. May this panel disregard the rulings in HRI and Watchman, that EPA must begin its jurisdictional inquiry by determining the proper community of reference and that a mine site itself cannot be the community of reference?

2. Did the EPA correctly determine that the Church Rock Chapter is the proper community of reference and that the entire Chapter is a dependent Indian

community subject to federal EPA regulatory authority where:

a. the Church Rock Chapter of the Navajo Nation was established by the United States;

b. its boundaries are established by precise metes and bounds, and over 90% of the land within those boundaries is held by the United States in trust for, or otherwise devoted by the United States to the exclusive use of, Navajo Indians;

c. 97.7% of the residents of the Chapter are Navajo Indians and most of the other residents, 65 in number, are married to Navajos.;

d. the vast majority of government services are provided to all residents there by the federal Government and the Navajo Nation, including water resource planning, development, and delivery critical to any community and centrally implicated by HRI's plans;

e. the Bureau of Indian Affairs considers the Church Rock Chapter to be a distinct community of Navajo Indians who depend primarily on federal and tribal governmental services and protection;

f. in a formal opinion, the Solicitor for the Department of the Interior concluded that the Chapter is the proper community of reference for determining the jurisdictional status of the Section 8 Land and that the Chapter satisfies the federal set-aside and superintendence requirements of a dependent Indian community under

Venetie; and

g. New Mexico does not challenge the EPA's decision that the State lacks regulatory authority over the Section 8 Land?

## STATEMENT OF THE CASE

### *Nature of the Case, Course of Proceedings, and Disposition Below*

HRI seeks to operate a uranium mine on adjacent sections 17 and 8, T. 16 N., R. 16 W., N.M.P.M., within the Church Rock Chapter of the Navajo Nation. HRI proposes to inject a chemical solution into an ore-bearing aquifer used as a source of drinking water[2] to loosen and recover the uranium. To do so it must obtain a permit under the UIC provisions of the SDWA. Under federal law, if the land is Indian country as defined in 18 U.S.C. § 1151, then EPA has permitting authority; if not, the State of New Mexico has that authority. See HRI, 198 F.3d at 1242; 40 C.F.R. § 144.3.

In 1983, EPA approved in part New Mexico's application to administer a UIC program for some types of injection wells, but excepted Indian lands, finding that New Mexico lacks authority over them. 48 Fed. Reg. 31,640 (1983); New Mexico Br. at 17. In 1988, EPA issued a final rule providing that "[t]he UIC program for all classes of wells on Indian lands in New Mexico is administered by EPA." 53 Fed.

[2] R13b, App. 250-53.

Reg. 43,084, 43,089 (1988). At the same time, EPA promulgated a final "tailored" federal UIC program for the Navajo Nation and other tribes in New Mexico. 53 Fed. Reg. 43,096 (1988) (codified at 40 C.F.R. Part 147, subpart HHH).

In 1994 EPA approved the Navajo Nation's "Treatment as a State" funding application under the SDWA, but did not either reject or grant that application in the context of off-Reservation fee lands. Rather, EPA emphasized that it would make such determinations on a fact-specific basis and that it was "not determining that the Navajo Nation *does not* have jurisdiction" over such lands. HRI, 198 F.3d at 1247 (quoting R13b, App. 234) (emphasis in original).

In 1997, EPA decided that land held in trust for the Navajo Nation by the United States and sought to be mined by HRI in the adjacent Section 17 is Indian country, and that, although it was "likely that Section 8 would be held to be within a dependent Indian community," R13b, App. 114, the jurisdictional status of the Section 8 Land was in dispute, and thus also under EPA authority pursuant to its "dispute rule," HRI, 198 F.3d at 1235. HRI challenged only the Section 8 determination,[3] while New Mexico challenged both. This Court affirmed both

[3] Even though HRI did not challenge EPA's Section 17 determination in the prior appeal and did not even mention Section 17 until its Reply Brief then, it now gratuitously expresses disagreement with this Court's holding on that issue. HRI Br. at 8 n.4. That holding is res judicata, and HRI's conclusory contention to the contrary in a footnote would not preserve the issue in any event. See Garrett v. Selby Connor

determinations, holding that Section 17 is Indian country under 18 U.S.C. § 1151(a), HRI, 198 F.3d at 1254, and that EPA did not abuse its discretion in concluding that the adjacent Section 8 Land was subject to a legitimate jurisdictional dispute, id. at 1249.

In HRI, EPA had not made a final determination as to the jurisdictional status of the Section 8 Land, so the merits of that dispute were not ripe for review. Id. After carefully considering the implications of the Venetie decision, this Court decided that "Watchman continues to require a 'community of reference' analysis prior to determining whether land qualifies as a dependent Indian community under the set-aside and supervision requirements of 18 U.S.C. § 1151(b). Under at least one theory – that the community of reference is the entire Churchrock Chapter, a theory neither adopted nor rejected in Watchman – Section 8 might qualify as a dependent Indian community." HRI, 198 F.3d at 1249 (citations omitted). This Court rejected HRI's contention that Venetie precludes any claim that HRI's Section 8 property is in Indian country,[4] and concluded instead "that there is a legitimate dispute, following Venetie, as to whether Section 8 falls *within* a 'dependent Indian community' under 18 U.S.C. § 1151(b)." Id. at 1248 (emphasis added). This Court remanded the matter to EPA

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Maddux & Janer, 425 F.3d 836, 841 (10th Cir. 2005).

[4] See, e.g., Reply Brief for Petitioner HRI, No. 97-9556 (May 1998) at 5.

to resolve the dispute. Id. at 1254.

EPA requested public input on the status of the Section 8 Land in two Federal Register notices. R41, R42. EPA also initiated consultations with the Solicitor of the Department of the Interior, seeking that Department's position on the Indian country status of the Section 8 Land. R47. The Solicitor reviewed all of the public comments and "conclude[d] Section 8 is located within a dependent Indian community, namely the Church Rock Chapter of the Navajo Nation." R44 App. at 11. The EPA considered that opinion and the comments of all parties, and concluded as follows:

> 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 . . . .

R44 at 13. HRI challenges that decision. The State of New Mexico does not.

## ***Statement of Facts***

### I. NAVAJO CHAPTERS ARE UNIQUE CREATIONS OF THE UNITED STATES THAT NOW FORM THE BASIS OF NAVAJO SELF-GOVERNMENT.

The "Navajo Chapters are unique in all of Indian country." R44 (EPA Decision) at 8. They were established initially in the Western Navajo Agency in 1927 by the Bureau of Indian Affairs ("BIA"), and their establishment quickly spread over

all of Navajo Indian country. Robert Young, Navajo Yearbook (1958) 191.[5] The legendary Commissioner of Indian Affairs John Collier assured the Navajo Nation Council that the Chapters were "important and official in every sense." Robert Young, A Political History of the Navajo Tribe 67-68 (1978). Indeed, "for many years the Chapters were more important as aspects of Navajo political life than the artificially created Council." Robert Young, Navajo Yearbook (1961) at 374. Having declared the Chapters the "foundation of the Navajo Nation Government," 2 N.N.C. § 4021(a) (1995), the Navajo Nation Council recently delegated much of its authority over local matters to the Chapters under the Navajo Nation Local Governance Act, 26 N.N.C. §§ 1 et seq. (2005).

The Interior Solicitor observed that the "Federal Government organized the Church Rock Chapter as a subdivision of the Navajo Nation government." R44 App. at 7. The Chapter House was erected there in 1946, the Navajo Nation Council formally certified the Church Rock Chapter (among others) as a local Navajo governmental unit by resolution in 1955, and the Secretary of the Interior approved that resolution on August 12, 1955. See R13b, App. 135-36; Aubrey Williams, Navajo Political Process 40 (1970). The federal Government continues to recognize

[5] The Supreme Court cited the Navajo Yearbooks as authority in Williams v. Lee, 358 U.S. 217, 222 n.8 (1959), and Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685, 690 n.17 (1965).

the Church Rock Chapter as a distinct community of Navajo Indians who depend primarily on federal and tribal governmental services and protection, R13b, App. 132, and the "BIA relates to the residents of the . . . Church Rock Chapter[ ] not only on an individual basis, but through the Chapter[ ] as [a] communit[y]," id. This progression from a federally created entity to an agent of tribal self government is consistent with modern federal Indian policy. See Tillett v. Lujan, 931 F.2d 636, 640 (10th Cir. 1991) (concerning similar transition of former "CFR" courts).

## II. THE GEOGRAPHICALLY DEFINED CHURCH ROCK CHAPTER EXHIBITS THE CHARACTERISTICS OF A PROPER "COMMUNITY OF REFERENCE."

The Church Rock Chapter was found by both the Interior Solicitor and the EPA to constitute the appropriate community of reference under HRI, 198 F.3d at 1248 and Watchman, 52 F.3d at 1543-45. The record supports that determination.

The Church Rock Chapter was one of the first established by the Bureau of Indian Affairs in the BIA's Eastern Navajo Agency in the checkerboard area in New Mexico. R13b, App. 135. Its initial meetings were all-day affairs held under a cottonwood tree. R40 at B-4.[6] The Chapter House was erected in 1946 and the Navajo Nation certified the Chapter as an election precinct in the 1950s. R13b, App.

[6] The Church Rock Land Use Plan (R40 in EPA's index) was submitted by the Navajo Nation at the end of its Appendix (R13b), but appears separately in EPA's index. See R13b, Navajo Nation Comments, at 4 n.5.

135-36. The Chapter boundaries are defined by precise metes and bounds. Id., App. 123-25. "[T]he Government defined it geographically." R44 App. (Solicitor's Opinion) at 7.

"Like the natural communities that lay at the core of the traditional social system, the Chapters were local organizations, composed of, and directed by, people with common interests." Political History at 66. The Church Rock Chapter is a "Navajo traditional rural community." R13b, App. 263. Of the 2,802 residents, 97.7% (2,737) are Indian. R13b, App. 246. Most of the few (65) non-Indians are married to Navajos living there. Id., App. 261, 135. A recent survey reveals that 88% of Chapter residents visit the Chapter House, and 98% of those do so at least monthly. R40 at B-50. The community's cohesiveness is further shown by the fact that Navajo is the predominant language used at Chapter functions. R13b, App. 132-33, 155.

Economic interests and needs also bring the Chapter together. The raising of livestock and the Navajo government provide the economic base of the Church Rock community. Id., App. 263, 137. Its "economy is centered around livestock raising. The livestock and grazing programs are funded by the Navajo Nation Department of Agriculture." Id., 263. The unemployment rate is much higher there than in nearby non-Navajo communities. R40 at B-37 (35% unemployment); cf. R15c App. III at 21 (7.8% unemployment in McKinley County and 5.7% for New Mexico). Only 3%

of the Chapter residents have household incomes of $30,000 or more. R40 at B-37. Non-wage earnings come from traditional Navajo self-employment: "livestock grazing, jewelry making, silversmithing, sewing, stone carving, and weaving." Id. at B-38.

The BIA reports the common interests and needs of the Chapter as housing, health care and education. R13b, App. 137. The Chapter has adopted a Land Use Plan for the entire Chapter, and it similarly reflects the common interests, pursuits, and needs of the Chapter residents, drawn from surveys conducted in the community. These common needs are some of the most basic, and they distinguish this community from others. In order of priority, they include new or better roads, telephones, water, housing and home improvement, and electricity. R40 at B-32. "The residents look primarily to the Chapter (either with its own resources or through the Navajo Nation and BIA) to meet their various needs." R13b, App. 263; see id., App. 135-51.

Water resources are vital to any community, and certainly so in arid areas where the economy centers around raising livestock. HRI, 198 F.3d at 1254. The Navajo Nation has an active and capable Department of Water Resources and a respected Environmental Protection Agency. See R13b, App. 190-97, 207-43, 250-

53, 267-68; R16 Ex. E at 5.[7] "[T]he Navajo Nation, in part through the Indian Health Services, provides virtually all of the services and infrastructure for water resources planning, development and use within the Church Rock Chapter." R13b, App. 251, 259-60.

The island of Section 8 Land is hydro-geologically connected to the rest of the Chapter, id., App. 254, and the aquifer into which HRI seeks to inject chemicals is used extensively for drinking and for livestock watering by Chapter residents, id., App. 252. The quality of that water is now "outstanding." Id. The characteristics of the aquifer, the residents' reliance on it, and the centrality of the Chapter in planning and developing its use provide additional evidence of the cohesiveness and common interests of the Church Rock community. Id., App. 253.

The Chapter House anchors the Church Rock community. "Many people use the Chapter House for a variety of reasons, the most common of which are voting, attending Chapter meetings, for water, and to attend social events." R40 at B-50. Within its boundaries, the Chapter has personal residences, R40 at B-22, R13b, App. 266; churches (both Christian and Native American), R13b, App. 265; cultural

[7] See e.g., 2 N.N.C. §§ 1921-27 (establishment of the Navajo Nation Environmental Protection Agency); 4 N.N.C. §§ 101-327 (Solid Waste Act, Pesticide Act); 4 N.N.C. §§ 901-1575 (Environmental Policy Act, Air Pollution and Control Act, Clean Water Act, Underground Storage Tank Act); 22 N.N.C. §§ 2501-86 (Safe Drinking Water Act); 22 N.N.C. §§ 1101-2405 (Navajo Nation Water Code).

institutions, such as Red Rock State Park, Anasazi ruins, and ancient Kiva circles, id., App. 266; an elementary school and pre-school, id., App. 262, 265, R40 at B-17; a Navajo police substation and emergency services, R13b, App. 136, 265; public utilities, id., App. 263, R40 at C-4; a trading post and other stores, R13b, App. 265; and other infrastructure and amenities, e.g., id., App. 262.

## III. THE CHAPTER'S RELATIONSHIP TO THE SURROUNDING AREA AND ITS TREATMENT BY GOVERNMENTAL AGENCIES SUPPORT ITS SELECTION AS THE COMMUNITY OF REFERENCE.

EPA found that "[t]he 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 Service and the Chapter itself." R44 at 9. This finding is also supported by the record.

The Bureau of Indian Affairs ("BIA") representative averred that "[t]he BIA considers the . . . Church Rock Chapter[ ] to be [a] distinct communit[y] of Navajo Indians who depend primarily on federal and tribal governmental services and protection. The BIA relates to the residents of the . . . Church Rock Chapter[ ] not only on an individual basis, but through the Chapter[ ] as a communit[y]." R13b, App. 132. The United States provides the following services to the Chapter community as a whole and to its residents: windmills, housing, water assistance, road construction and maintenance, medical services, law enforcement services through

the BIA and the FBI, vital statistics, social services, employment assistance, adult education, adult vocational training, land operations, real estate services, and individual financial management. Id., App. 133. BIA representatives attend the Chapter meetings regularly. Id. The BIA has continuously had an Agency Office serving the Church Rock Chapter since 1907, and the people there "are entitled to all the benefits and services afforded by the BIA to which those residing on the reservation proper are entitled." Id., App. 132.

The Navajo Nation has consistently treated the Section 8 Land as within a dependent Navajo Indian community. See generally R13b, App. 1-25, 87-94, 117-210; 70 Fed. Reg. 66,402, 66,403 (2005) (R41). "The Navajo Nation provides the vast majority of law enforcement and dispute resolution services" in the Chapter, R13b, App. 263, 136, and State and county law enforcement officials appear there infrequently and only if requested by the Navajo police, id., App. 137. The Navajo Nation operates a food distribution program and a General Assistance program at the Chapter for needy residents, and administers a Women-Infants-and-Children program there. Id., App. 136-37. The Navajo Nation treats the Church Rock Chapter and its residents on an equal basis with on-Reservation Chapters and residents. See id., App. 156, 272-307.

The Chapter itself provides a broad array of services. The Chapter employees

assist in "planning, organizing and implementing local government, community and economic development initiatives [and] are responsible for identifying community needs." Id., App. 261. The following programs, services, or offices are located at the Chapter, among others: Chapter administration and finance, personnel and procurement services, property and records management, housing assistance, election administration, scholarship assistance, public and youth employment services, emergency relief, a Senior Citizens Center (including a senior lunch program, meals on wheels, transportation, dental and eye care assistance, and in-home assistance), a Head Start Program (with three regular classroom programs, one home-based program for the handicapped, bus transportation, and breakfast and lunch programs), a Community Health Representative Program, a Veterans Program, a Navajo Police Substation, and a Land Board. Id., App. 262. Domestic and livestock water systems, windmills, wells and distribution lines are maintained by the Navajo Nation's Utility Authority, and the Chapter relies on that Utility Authority to provide potable water for Chapter residents. Id., App. 263; R16 Ex. E at 5. The Church Rock Chapter relies primarily on the Navajo Nation for environmental protection related services. R13b, App. 263.

Finally, New Mexico recognizes the standing of off-Reservation Navajo Chapters to protect the health and welfare of all residents within Chapter boundaries

even when a dispute with a company arises on non-Indian fee land. Thriftway Mktg. Corp. v. New Mexico, 810 P.2d 349, 352 (N.M. Ct. App. 1990). Navajo court decisions are in accord. Sandoval v. Tinian, Inc., 5 Nav. Rptr. 215 (Crownpoint Dist. Ct. 1986).

## IV. THE UNITED STATES SET ASIDE THE CHAPTER FOR NAVAJO USE AND BENEFIT.

Congress and the Executive Branch have purchased and/or set aside the vast majority of the land in the Church Rock Chapter for the exclusive use and benefit of the Navajo. The Solicitor's Opinion observes that "[w]ithin the Chapter, the United States purchased the odd numbered parcels from the railroad and took them into trust for the Navajo Nation.[8] The United States bought a number of the even numbered parcels and took them into trust for allotments for individual Indians. In total, this land comprises 78 percent of the Church Rock Chapter that the United States purchased and set-aside as Indian land for Indian use." R 44 App. at 9. Executive Order No. 2513 (Jan. 15, 1917) also set aside land within the Chapter for Navajo use and occupancy, R13b, App. 188-89 (1080 acres in T. 16 N., R. 16 W.), and trust land now comprises 82% of the Chapter area, id., App. 248 ¶ 6. The BIA, the Bureau of Land Management and the Navajo Nation have entered into an agreement for the

[8] See R13b, App. 26-83, 198-206; HRI, 198 F.3d at 1251 (referring to the Act of May 29, 1928, ch. 853, 45 Stat. 883, 899-900).

administration of additional federal lands within the Chapter, and they are now devoted exclusively for Navajo use and benefit, also. See R13b, App. 248, ¶ 7. In sum, approximately 92% of the land in the Church Rock Chapter is held in trust by the United States for the Navajo Nation or for Navajo allottees, or otherwise dedicated by the United States to the exclusive use by members of the Navajo Nation. See id. ¶ 6 (considering only the trust and BLM lands); R44 (EPA decision) at 12.

As the Solicitor's Opinion notes, the Chapter itself is a "creature of the Federal Government." R44 App. at 10. As for the relatively small percentage of land in the Chapter that is *not* held in trust for the Navajo people, the Secretary of the Interior has designated the Chapter within a federally approved Navajo land consolidation area, pursuant to his delegated authority under the Indian Land Consolidation Act, 25 U.S.C. § 2203. R44 (EPA decision) at 11; R13b, App. 132. An ongoing Navajo/federal land exchange program is consolidating additional lands there in tribal trust status. See R13b, App. 121-22; 126-28.

## V. THE CHAPTER IS SUPERINTENDED BY THE UNITED STATES.

"[T]he federal government supervises over 92.5% of the total area" of the Church Rock Chapter. R44 (EPA decision) at 12. This includes 46,348.64 acres of land held in trust by the United States for the Navajo people (30,699.14 for the Navajo Nation itself and 15,659.50 for individual owners of trust allotments) and

5,712.70 acres of other federal land leased exclusively to Navajo individuals. R13b, App. 248.

The BIA superintends the trust lands in the same manner as it does Reservation land. Id., App. 204-06. "It is not possible to obtain any interest in trust land or resources except in compliance with the procedures provided in the federal laws and regulations." Id., App. 205. Those procedures govern, inter alia, rights-of-way, id.; 25 U.S.C. §§ 323-328; 25 C.F.R. Part 169; homesite, agricultural, residential, and business site leases, 25 U.S.C. § 415; 25 C.F.R. Part 162; mineral leases, 25 U.S.C. §§ 396, 396a-396g; 25 C.F.R. Parts 211, 212; grazing permits, R13b, App. 204; 25 U.S.C. § 403; 25 C.F.R. Parts 166, 167; and "protecting Navajo Nation trust lands, natural resources, and water rights, and administering various trust benefits on behalf of the Church Rock members." R44 (EPA decision) at 12; R13b, App. 131-33, 204-06.

"Church Rock receives very few services from the state[9] and the county. Its

[9] This is not to denigrate the services that the general area does receive from State agencies, including notably those of its Environmental Department, Oil and Conservation Division, and Mining and Minerals Division. See New Mexico Brief at 5-8, 12-15. In cooperation with the State, the Navajo Nation is striving to ensure that regulatory efforts in the BIA's Eastern Navajo Agency among the State, the Navajo Nation, and the federal Government are seamless and complementary. The State and the Navajo Nation may (and we believe should) continue to cooperate and coordinate with regard to the services provided in the Church Rock Chapter and elsewhere in the Eastern Navajo Agency, as discussed in New Mexico's brief at 12-

services come from the Navajo Nation and the Federal Government." R44 App. (Solicitor's Opinion) at 10. Federal superintendence is historic and ongoing. The BIA has had an Agency office serving the Chapter continuously since 1907, and it still considers the Chapter a "distinct communit[y] of Navajo Indians who depend primarily on federal and tribal government services and protection." R13b, App. 132 (Declaration of BIA Eastern Navajo Agency Superintendent).

## SUMMARY OF THE ARGUMENT

In HRI, HRI made the very same arguments as it does this time around. It contended unsuccessfully that Venetie's set-aside and superintendence tests should be applied to its island of fee land without reference to any community. This Court disagreed, requiring the EPA to first make a determination as to the proper community of reference and then to apply the Venetie set-aside and superintendence tests to that community. HRI may not properly urge that this panel ignore the law of the case and several binding precedents of this Circuit.

This Court's precedents in Watchman, HRI, United States v. Arietta, 436 F.3d 1246 (10th Cir. 2006), and United States v. Adair, 111 F.3d 770 (10th Cir. 1997), require that the analysis of whether land is properly considered a dependent Indian community begin by determining the appropriate community of reference. After the

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15, regardless of the EPA's determination here.

community of reference is defined, Venetie's federal set-aside and superintendence tests must be satisfied for the community, requiring an examination of the "*degree* of federal ownership of and control over the area, and the *extent* to which the area was set aside for the use, occupancy, and protection of dependent Indian peoples." 522 U.S. at 531 n.7 (emphases added). HRI's reading of Venetie is inconsistent with that language, and its view that only land held by the United States for Indians qualifies as dependent Indian communities would read subsection (b) out of 18 U.S.C. § 1151 and create jurisdictional confusion.

The EPA's determination that the Church Rock Chapter is the proper community of reference is amply supported by the record and is entitled to deference. No one advanced any other viable community of reference before the EPA, and HRI does not in its brief. The Chapter is geographically defined; its cohesiveness is demonstrated by its demographics and the common interests, needs, and pursuits of its residents; and it is properly characterized as a mini-society consisting of personal residences and an infrastructure, including churches, cultural institutions, schools, police and emergency services, utilities, stores, and the like.

Similarly, the record fully supports the EPA's determination that the set-aside and superintendence tests are satisfied for this community and that determination is also entitled to deference. The Chapter was created by the federal Government. Over

92% of the Chapter area is supervised by the United States for the exclusive benefit of the Navajo. Over 80% of the area has been purchased by the United States and is held in trust for the Navajos' sole use and benefit, additional federal land is devoted to exclusive Navajo use, and the rest (about 7.5% of the total area) is in the Navajo land consolidation area approved by the Secretary of the Interior under 25 U.S.C. § 2203. The United States supervises these trust lands in the same comprehensive manner as it does lands of the Navajo Reservation proper. It considers the Chapter to be a distinct community of Navajo Indians who depend primarily on federal and tribal government services and protection, and the heavy reliance of the Chapter on federal services is unrebutted in the record. Therefore, the Section 8 Land is within a dependent Indian community under Venetie and subject to federal UIC regulation.

## ARGUMENT

### I. STANDARD OF REVIEW: EPA'S FACTUAL FINDINGS SHOULD BE HONORED UNLESS CLEARLY ERRONEOUS, AND THE AGENCY'S APPLICATION OF THOSE FACTS TO THE LAW IS ENTITLED TO DEFERENCE.

Generally, the EPA's informal agency decisions under statutes it administers, such as the decision here under the SDWA, must be affirmed unless arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. HRI, 198 F.3d at 1241; accord W.R. Grace & Co. v. EPA, 261 F.3d 330, 338 (3d Cir.

2001); see generally ARCO Oil and Gas Co. v. EPA, 14 F.3d 1431, 1433 (10th Cir. 1993) (deference due is the same for agency interpretations of statutes performed through rulemaking or informal adjudication). The EPA's interpretation of its own regulations, such as 40 C.F.R. § 144.3, is given controlling weight unless it is plainly erroneous or inconsistent with the regulation. National Ass'n of Home Builders v. Defenders of Wildlife, 127 S.Ct. 2518, 2529-30, 2537-38 (2007); HRI, 198 F.3d at 1241. A presumption of validity attaches to the EPA's action, see Colorado Health Care Ass'n v. Colorado Dep't of Social Svcs., 842 F.2d 1158, 1164 (10th Cir. 1988), and the EPA and the Interior Solicitor are presumed to have institutional competence meriting deference in the interpretation of the statutes that they administer, see Toomer v. City Cab, 443 F.3d 1191, 1196 (10th Cir. 2006). Deference is granted to an agency's determination of its own jurisdiction, as here. See Quivira Mining. Co. v. EPA, 765 F.2d 126, 128 (10th Cir. 1985).

The EPA made detailed factual findings on such matters as the demographics and land status of the Church Rock Chapter, the common interests and needs of its residents, and the establishment, active support, and current recognition of the Chapter by the federal Government as a community of dependent Indians. Review of such factual determinations is quite narrow and based on the record developed by the agency. The Administrative Procedure Act adopts a "substantial evidence"

standard, and evidence is substantial if it would justify refusal to direct a verdict on a factual conclusion if trial were to a jury. Hoyl v. Babbitt, 129 F.3d 1377, 1383 (10th Cir. 1997). This highly deferential standard frees reviewing courts from the onerous task of weighing evidence. Slingluff v. Occupational Safety & Health Rev. Comm'n, 425 F.3d 861, 868 (10th Cir. 2005). An agency may also make reasonable inferences from the evidence which comport with common sense and may take official notice of commonly acknowledged facts within the agency's area of expertise. Kapcia v. INS, 944 F.2d 702, 705 (10th Cir. 1991).

An agency's interpretation of a statute entrusted to its administration will be upheld if reasonable. Walker Operating Corp. v. FERC, 874 F.2d 1320, 1332 (10th Cir. 1989). In HRI, the company argued that the EPA's interpretation of 18 U.S.C. § 1151 (and by extension 40 C.F.R. § 144.3) was not entitled to deference because Congress had allegedly not delegated interpretive power to the EPA with respect to that statute. A decision on that issue was not needed because the court could reach the same conclusion without according EPA any deference. HRI, 198 F.3d at 1241 n.10.

Nevertheless, Congress has in fact delegated to the EPA wide authority to make such jurisdictional determinations, entrusting to the EPA the authority to define areas under tribal jurisdiction for "treatment as a state" purposes under the SDWA, the

Clean Air Act, and the Clean Water Act, and, conversely, by giving the EPA the duty to ensure that state authority does not intrude onto lands subject to federal and tribal environmental administration. See, e.g., 42 U.S.C. § 300j-11(b)(1) (EPA may grant tribe treatment as a state over "the area of the Tribal Government's jurisdiction" under SDWA); 42 U.S.C. § 7601(d) (EPA may grant tribe treatment as a state under the Clean Air Act "within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction"); 33 U.S.C. § 1377(e) (EPA may grant tribe treatment as a state under the Clean Water Act over water resources held by the tribe, held in trust for the tribe or tribal members, or "otherwise within the borders of an Indian reservation"); Wisconsin v. EPA, 266 F.3d 741 (7th Cir. 2001) (upholding EPA's determination that a tribe could regulate all water within a reservation under the Clean Water Act, regardless of ownership, and upholding EPA's construction of the term "Indian reservation" to include off-reservation trust lands), cert. denied, 535 U.S. 1121 (2002); Arizona Public Serv. Co. v. EPA, 211 F.3d 1280 (D.C. Cir. 2000) (upholding EPA's interpretation of the word "reservation" in the Clean Air Act to include informal reservations, trust allotments, and dependent Indian communities); Administrator v. EPA, 151 F.3d 1205, 1213 (9th Cir. 1998) (according Chevron deference to EPA's construction of term "reservation" in the Clean Air Act and to "[t]he EPA's determination that the Tribe's lands were reservation lands") (Ferguson,

J., concurring in part and dissenting in part), amended on denial of reh'g, 170 F.3d 870 (9th Cir. 1999); State of Washington, Dep't of Ecology v. EPA, 752 F.2d 1465 (9th Cir. 1985) (upholding EPA's refusal to approve Washington's RCRA program in "Indian country"); see generally, Cohen's Handbook of Federal Indian Law 783-95 (2005). As of the filing of this brief, the EPA had approved 41 "treatment as a state" applications to administer water quality standards under the Clean Water Act, 20 such applications under the Clean Air Act, and one under the SDWA (the Navajo Nation's Public Water Systems Supervision Program).[10] Thus, the EPA has indeed developed expertise in determining what constitutes Indian country under express delegations from Congress and its decision here should be accorded substantial deference.

Here, in addition, the EPA consulted closely with the Solicitor for the Department of the Interior, who has "special expertise on Indian country questions." R44 (EPA determination) at 2 and App. (Solicitor's Opinion); see Administrator v. EPA, 151 F.3d at 1213; see also National Ass'n of Home Builders (deferring to EPA's interpretation of the Endangered Species Act, where EPA relied on the interpretation of the Departments of Commerce and Interior, the agencies with special expertise in implementing that Act). Congress has delegated primary jurisdiction to

[10] See http://www.epa.gov/waterscience/tribes/approvtable.htm; http://www.epa.gov/oar/tribal/backgrnd.html; http://www.epa.gov/safewater/tribal/history.html.

the Interior Department over such matters, see, e.g., Seymour v. Superintendent, 368 U.S. 351, 357 (1962), so that the BIA's actual practice regarding the area, the Solicitor's interpretation and application of 18 U.S.C. § 1151, and EPA's adoption of Interior's position are entitled to substantial deference, see Seymour; Cheyenne-Arapaho Tribes v. State of Okla., 618 F.2d 665, 667-68 (10th Cir. 1980) (relying on Solicitor's opinion regarding Indian country land status); United States v. Martine, 442 F.2d 1022, 1023-24 (10th Cir. 1971) (relying in part on the established practice of government agencies and the testimony of BIA officials in determining that the Ramah Chapter is a dependent Indian community). For all these reasons, the EPA's and the Solicitor's careful and studied conclusions that the Church Rock Chapter is the appropriate community of reference and that the federal set-aside and superintendence requirements are met as to that community should be affirmed if they are "reasonable." Walker, 874 F.2d at 1332.

## II. HRI'S REQUEST THAT THIS PANEL OVERRULE WATCHMAN, HRI, AND ARIETTA MUST BE REJECTED.

### A. Watchman, HRI, and Arietta Control.

HRI asserts that "Venetie, not the Tenth Circuit's HRI decision, controls the determination whether the Section 8 land is Indian country." HRI Br. at 7. HRI contends further that the "'community of reference' analysis does not survive

Venetie," id. at 23, and urges this panel to "hold that the threshold 'community of reference' analysis has no applicability," id. at 33, even though the HRI Court, after full consideration of the Venetie decision, ordered that a community of reference analysis be performed as a threshold matter. 198 F.3d at 1249. The Solicitor examined and properly rejected HRI's characterization of HRI's requirement of the threshold community of reference inquiry as "dicta." As the Solicitor noted,

> the EPA had exercised jurisdiction over Section 8 premised on there being a dispute as to whether it was Indian country. The [HRI] court held, "[s]pecifically there are grounds for dispute as to the first Watchman test for 18 U.S.C. § 1151(b): What constitutes the proper 'community of reference' in determining the Indian country status of Section 8?" HRI, 198 F.3d at 1248. Holding that Watchman required a community of reference analysis, therefore, was crucial to the court's upholding of EPA's exercise of jurisdiction on the grounds that there was a dispute as to the status of Section 8. The court's reference to Watchman was not dicta.

R44 App. 2 n.4. See Rohrbaugh v. Celotex Corp., 53 F.3d 1181, 1184 (10th Cir. 1995).

Ignoring again this Court's prior rulings, HRI also focuses on the status of the Section 8 Land – the mine site – in isolation from its surroundings. Watchman's holding that a mine site cannot be examined in isolation under 18 U.S.C. § 1151(b) is unambiguous. 52 F.3d at 1542-43 ("We conclude that the [district] court erred by examining the mine site in isolation from the surrounding area."). HRI adopted that

reasoning. 198 F.3d at 1248-49. So did this Court in Arietta, 436 F.3d at 1250. HRI's request that this panel overrule these precedents should fall on deaf ears. United States v. Hargus, 128 F.3d 1358, 1364 (10th Cir. 1997).

The HRI decision is the law of the case. See Rohrbaugh, 53 F.3d at 1184. It requires a community of reference analysis, followed by application of Venetie's set-aside and superintendence tests. 198 F.3d at 1248-49. The law of the case governs subsequent appeals to this Court. McIlravy v. Kerr-McGee Coal Co., 204 F.3d 1031, 1034 (10th Cir. 2000). The law of the case doctrine applies to all issues previously decided, either explicitly or by necessary implication, such as where resolution of an issue was a necessary step in resolving the earlier appeal. Id. at 1036; Integra Realty Resources, Inc. v. Fidelity Capital Appreciation Fund, 354 F.3d 1246, 1259 (10th Cir. 2004). The circumstances justifying a departure from the law of the case are "exceptionally narrow . . . (1) when the evidence on a subsequent trial is substantially different; (2) when controlling authority has subsequently made a contrary decision of the law applicable to such issues; or (3) when the decision was clearly erroneous and would work a manifest injustice." Integra, 354 F.3d at 1259 (citation omitted). Here, the evidence is not materially different (the Section 8 Land was known to be held in fee by HRI in the previous decision, 198 F.3d at 1231), HRI makes no showing that the prior panel's decision was clearly erroneous and would work a

manifest injustice (notwithstanding its conclusory assertion to the contrary at page 54 of its brief), and there has been no subsequent controlling decision to the contrary. Any concern that HRI (or New Mexico) may have regarding any future exercise of authority by the Navajo Nation is both speculative and unripe. See Arizona Public Serv. Co., 211 F.3d at 1296-98; Wisconsin v. EPA, 266 F.3d at 749-50; Montana v. EPA, 137 F.3d 1135, 1141-42 (9th Cir.), cert. denied, 525 U.S. 921 (1998).[11]

And subsequent controlling authority is fully in accord with the HRI decision. As to the requirement to first define the community of reference before applying the federal set-aside and superintendence tests, this Court in Arietta rejected the argument

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[11] HRI occasionally states concerns that it may be subject to Navajo jurisdiction, e.g., HRI Br. at 5 & n.3, while recognizing that tribal jurisdiction over non-Indians is governed by additional tests, id. at 6. It implies that it will be excluded from Navajo governmental decision making, stating quite falsely that only Navajos can participate in Chapter meetings. Id. at 16. HRI knows better; it has made numerous presentations at various Chapter meetings, including at Church Rock. Indeed, one principal purpose of the Government's establishment of the Chapters was to facilitate communications between local Navajos and non-Indians. See Aubrey Williams, Navajo Political Process 45 (1970) (describing translation from Navajo to English for "Anglo" attendees at chapter). HRI professes a concern that the Navajo Nation may commit an "adverse taking" of its property, HRI Brief at 58, failing to recognize that the Navajo Bill of Rights provides protection against takings. 1 N.N.C. § 8 (2005). The Navajo Bill of Rights and the federal Indian Civil Rights Act protect the rights of non-Indians in Navajo courts. E.g., George v. Navajo Tribe, 2 Navajo Rptr. 1, 5-6 (Navajo Ct. App. 1979) (holding that the exclusion of non-Indians from Navajo jury panels violates the Indian Civil Rights Act). A recent article exhaustively reviewed Navajo court decisions and concludes that nonmembers are treated fairly there. Bethany R. Berger, Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems, 37 Ariz. St. L. J. 1047 (2005).

that only a county road, and not the surrounding area, should be scrutinized in determining if the road were part of a dependent Indian community. Citing HRI and Watchman, this Court ruled that "[w]e examine the entire Indian community, not merely a stretch of road, to ascertain whether the federal set-aside and federal superintendence requirements are satisfied." Id. at 1250. The Arietta Court found that the county road was indeed within the dependent Indian community of the Pojoaque Pueblo, even though the lands in the Pueblo were *not* set aside by the United States for the Indians,[12] "pockets of privately owned, non-Indian land lie amidst Pueblo lands," and the lands immediately surrounding the road were patented to non-Indians. Id. at 1249-50.

Similarly, in State v. Romero, 142 P.3d 887 (N.M. 2006), the court held that Indian Pueblos qualify as dependent Indian communities under Venetie, and rejected the position that "we should look only to the parcels of private fee land, rather than the whole pueblo" in applying the federal superintendence test. Id., 142 P.3d at 892-93. The leading treatise is in accord. Cohen's Handbook of Federal Indian Law 194-95 (2005) ("patented parcels of land and rights-of-way may also be within Indian

[12] Typically, Pueblo lands were "set aside" as a matter of land title by the King of Spain, who granted fee title to the Pueblos. United States v. Sandoval, 231 U.S. 28, 39, 48 (1913). The political branches later recognized the status of the Pueblos as Indian country and often added land to the core Spanish grant area. See id. at 39.

country if they are within a dependent Indian community") (footnote omitted). Thus, under both Arietta and Romero, a dependent Indian community may contain areas of privately owned, non-Indian land. And HRI's contention that the prior panel "did not fully consider the effect" of its decision (HRI Br. at 36) (heading), would not vitiate the law of the case doctrine in any event. See Integra, 354 F.3d at 1259 (rejecting argument that law of the case should not govern because prior panel erred by "failing to appreciate the seriousness of the issue and treating it only narrowly").

The cases on which HRI relies are neither subsequent to the HRI decision in 2000 nor controlling. United States v. Roberts, 185 F.3d 1125 (10th Cir. 1999), "was decided prior to HRI." HRI Br. at 41. Roberts did not need to address the question of the status of fee land within a dependent Indian community or the boundaries of any such community. The conduct of the defendant in that case "occurred at the Choctaw Nation Tribal Complex, a property which is owned by the United States in trust for the Choctaw Nation." Roberts, 185 F.3d at 1129. That is Indian country under 18 U.S.C. § 1151(a). See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 511 (1991); United States v. John, 437 U.S. 634, 648-49 (1978); HRI, 198 F.3d at 1254.

Next, HRI cites Blunk v. Arizona Dep't of Transp., 177 F.3d 879 (9th Cir. 1999). HRI Brief at 45. Blunk involved Arizona's authority to regulate signs erected

by a non-Indian on land purchased in fee by the Navajo Nation for economic development. Blunk, too, was decided before HRI. In that case, the Navajo Nation, by letter, informed the court that it did not consider itself to be an indispensable party and "disavow[ed] any interest in the outcome" of the case, Blunk, 177 F.3d at 881 n.4, 884, and the record did not reveal any federal superintendence over the land, id., at 885 (Fletcher, J. concurring); accord Buzzard v. Oklahoma Tax Comm'n, 992 F.2d 1073, 1076 (10th Cir. 1993). That is a far cry from this case, where the Navajo Nation has consistently urged that the Section 8 Land is within Indian country and where both the Department of the Interior and the United States Environmental Protection Agency assert supervisory authority over the land as Indian country.

Finally, HRI's characterization of New Mexico decisions is imprecise at best. It relegates the holding in Romero to a footnote and its selective quotation from Romero would suggest that the New Mexico Supreme Court was again rejecting a community of reference analysis. HRI Br. at 47 & n.15. In fact, the Romero Court held that the State lacked jurisdiction to prosecute crimes committed on non-Indian fee land within the Taos Pueblo, a dependent Indian community. It *rejected* the State's position that it should focus only on the private fee lands where the crime occurred and not the Pueblo as a whole in applying both the set-aside and superintendence tests. 142 P.3d at 891-93. Romero recognized the potential conflict

with a prior case that did not employ a threshold community of reference analysis,[13] but found that it could distinguish that case (which involved highway land owned by the federal Government), essentially limiting it to its facts. Id. at 892. The snippets from unreported cases of lower courts cited by HRI clearly do not constitute subsequent controlling authority.

This Court's decisions in Watchman, HRI, and Arietta control on the issues of whether a community of reference analysis is required 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) and whether a mine site, taken in isolation, can constitute a proper community of reference. HRI's contention that the mine site may be examined in isolation and that a community of reference analysis need not be undertaken contravenes these controlling precedents and cannot be upheld.

### B. Tribal Authority Is Not At Issue, But Tribal Authority Would Not Stop at Reservation Boundaries Even If It Were.

HRI's larger contention that *tribal* authority stops at formal reservation boundaries, HRI Br. at 6, is irrelevant because this case concerns *federal* authority. There is no issue here of the Navajo Nation's authority to issue a Class III UIC permit (the type that HRI requires), since the Navajo Nation does not have an approved Class

[13] State v. Frank, 52 P.3d 404 (N.M. 2002).

III UIC program. Development of such a program and EPA's "treatment as a state" approval take years to accomplish.[14]

In any event, HRI's position contravenes all controlling authority, including Venetie itself. See Venetie, 522 U.S. at 527 & n.1; Solem v. Bartlett, 465 U.S. 463, 467 n.8 (1984) (tribal and federal courts have exclusive jurisdiction over allotments, regardless of whether reservation was disestablished); Mustang Prod. Co. v. Harrison, 94 F.3d 1382, 1385-86 (10th Cir. 1996) (Cheyenne-Arapaho Tribes authorized to impose oil and gas severance tax occurring on off-reservation trust allotments); Watchman, 52 F.3d at 1542 n.11 (Navajo Nation may impose Business Activities Tax on non-Indian source gains from off-reservation allotments); Indian Country, U.S.A., Inc. v. Oklahoma Tax Comm'n, 829 F.2d 967, 973 (10th Cir. 1987); accord Tempest Recovery Services, Inc. v. Belone, 74 P.3d 67, 70-71 (N.M. 2003) (overruling contrary precedent and "conclud[ing] that the civil jurisdiction of the [Navajo] tribal court extends to [off-reservation] Indian allotments"); Wisconsin v. EPA, 266 F.3d at 749 (a tribe's "inherent authority over activities having a serious effect on the health of the tribe . . . is not defeated even if it exerts some regulatory force on off-reservation activities").

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[14] The Navajo Nation used the grant it received under the SDWA in 1994, see supra at 5, to develop a Class II UIC program, which pertains to oil and gas development, and which is still awaiting EPA approval.

HRI also appears to be concerned with the Navajo Nation's authority over non-Indians generally. Contrary to HRI's position, an Indian tribe's right of self-government is not restricted to governing or regulating its own members. Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195, 201 (1985) ("The [Navajo Nation's] power to tax members *and non-members alike* is surely an essential attribute of [tribal] *self*-government.") (emphases added).

HRI makes some general assertions regarding Montana v. United States, 450 U.S. 544 (1981), and its progeny, HRI Br. at 6, but fails to appreciate that those cases concern tribal, not federal, authority; do not involve specific federal statutes that allocate regulatory jurisdiction; and do not involve the special situation where environmental protection of water resources is at stake. See Wisconsin v. EPA, 266 F.3d at 746-47. But even if the Montana test applied to this case, its second prong (where a non-Indian's activities "threatens or has some direct effect on the political integrity, economic security, or the health or welfare of the tribe," 450 U.S. at 556) would be satisfied. See City of Albuquerque v. Browner, 97 F.3d 415, 418 & n.2 (10th Cir. 1996) (upholding EPA's approval of tribal water quality standards despite off-Reservation implications for nonmembers), cert. denied, 522 U.S. 965 (1997); Montana v. EPA, 137 F.3d at 1141 (relying on Browner and holding that conduct by nonmembers that threatens a tribe's water resources satisfies second Montana test, in

part because of the mobile nature of pollutants and the fact that a water system is a unitary resource); Wisconsin v. EPA, 266 F.3d at 748-49 (relying on Browner and rejecting Montana-based challenge to EPA's granting of "treatment as a state" to tribe despite off-reservation implications for nonmembers).

### C. HRI's Proposed "Bright-Line" Test Would Create a Jurisdictional Mess and Would Read Subsection (b) Out of 18 U.S.C. § 1151.

HRI expresses concerns that affirmance of the EPA decision will cause jurisdictional confusion and uncertainty. E.g., HRI Br. at 57. To the contrary, the most efficient regulatory regime would favor the Section 8 Land also being under federal UIC authority, given that the adjoining section 17 tribal trust property is part of the same mine plan and has previously been determined to be Indian country under federal UIC regulatory authority. HRI, 198 F.3d at 1254. Indeed, regulatory consistency and efficiency are aided by a Chapter-wide determination in areas where only a handful of parcels of non-Indian land are interspersed with federal lands set aside for the exclusive use and benefit of Indians. See R16 Ex. B; Montana v. EPA, 137 F.3d at 1141. As the Supreme Court noted in Seymour, 368 U.S. at 358, permitting checkerboard jurisdiction by reliance on land titles would "recreate confusion Congress specifically sought to avoid" by enacting § 1151. Accord Romero, 142 P.3d at 892-93; Cohen's Handbook of Federal Indian Law 191 (2005).

This Court and the New Mexico Supreme Court have honored that intent in dependent Indian community jurisprudence, in Arietta and Romero. That congressional policy underlying 18 U.S.C. § 1151 should be honored here, as well.

Moreover, by looking only at the isolated Section 8 Land in applying the Venetie tests, HRI would in essence require that the United States hold title to a specific piece of land for it to be Indian country under 18 U.S.C. § 1151(b) as a "dependent Indian community." E.g., HRI Br. at 23 (Section 8 Land must "be both federally set-aside and federally superintended to be Indian country under 1151(b)"). But if a dependent Indian community must be held by the Government either for a tribe or for individual Indians, then § 1151(b) would be rendered wholly superfluous, because land set aside by the United States for a tribe is Indian country under § 1151(a) as a formal or informal reservation, see John, 437 U.S. at 648-49; Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 511 (1991) (Rehnquist, C.J.); Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 123 (1993), and land set aside for individual tribal members is Indian country under § 1151(c), see Watchman, 52 F.3d at 1541-42. HRI's proposed requirement would also negate almost a century of Supreme Court cases and related congressional legislation regarding the Pueblos in New Mexico, whose land has been found to be dependent Indian communities yet is held by the Indians in fee simple.

Venetie itself demonstrates the fallacy of HRI's absolutist position. Venetie characterized as the "more relevant" factors those that necessarily require consideration of an entire community: "the *degree* of federal ownership of and control over the area, and the *extent* to which the area was set aside for the use, occupancy, and protection of dependent Indian peoples." Venetie, 522 U.S. at 531 n.7 (emphases added).

In addition, HRI's notion that the mine site itself, where no one lives, should be examined by itself to see if it is Indian country under 18 U.S.C. § 1151(b) would read the word "community" out of the phrase "dependent Indian community." See Watchman, 52 F.3d at 1544; Cohen's Handbook of Federal Indian Law 194 (2005). HRI seeks to inject chemicals into the principal source of drinking water for the entire Chapter. The aquifer knows no section lines. "A water system is a unitary resource. The actions of one user have an immediate and direct effect on other users." Montana v. EPA, 137 F.3d at 1141 (internal quotation marks and citation omitted). Allowing HRI to declare itself an island with no ties to the people directly impacted by its operations would negate the concept of a community. See HRI Brief at 50 ("The Section 8 land, while within the boundaries of the Church Rock Chapter is not a part of that community.").

To illustrate further, women in the Navajo culture are most highly esteemed.

see e.g., Kluckhohn and Leighton, The Navajo 102 (Harv. U. Pr. 1974); Estate of Boyd Apache, 3 Navajo Rptr. 250, 251-52 (Window Rock Dist. Ct. 1982) (Navajo society is matrilocal and matrilineal), and the Navajo Nation has succeeded in keeping even so-called soft pornography off the reservation. See R32 Att. col. 4. The problems of alcohol abuse are well known. But, as the Navajo Nation urged in its Supplemental Authority to EPA, if an isolated tract of fee land within a Navajo community is separated as a jurisdictional matter, then the community and its core values can be destroyed from within, by the operation of liquor stores, pornography outlets, and, as here, mineral extraction operations that may not conform to community land use plans or water needs. R32 at 2 (noting opening of pornography outlet on fee land just west of Sagebrush Liquors a few miles from the Navajo reservation boundary in the checkerboard area).

HRI would manufacture a conflict with Venetie (where Congress had eliminated any possible community of reference) by claiming that this Court's method of determining the area over which the Venetie set-aside and superintendence tests are applied resurrects tests rejected in that case. That reading of Venetie is inconsistent with its very language. Unless Congress has eliminated Indian country entirely, as it did in the Alaska Native Claims Settlement Act in Venetie, the courts will need to determine the boundaries of a community within which to ascertain the

"degree" of federal land ownership and control, and the "extent" to which the entire area was set aside for the use, occupancy and protection of the Indians. See Venetie, 522 U.S. at 531 n.7.

In areas where tribal Indians primarily dependent on federal and tribal services live and function as a society, a delineation of the area over which to apply the two-part Venetie test must be made as a threshold matter. The Venetie test can then be applied rigorously without diminishing its clarity or importance, as the EPA did here.

## III. THE RECORD FULLY SUPPORTS EPA'S DETERMINATION THAT THE CHURCH ROCK CHAPTER IS THE PROPER COMMUNITY OF REFERENCE.

### A. EPA's Decision Embraces a Theory Approved by this Court.

In HRI this Court observed that "[u]nder at least one theory – that the community of reference in the current action is the entire Churchrock Chapter . . . – Section 8 might qualify as a dependent Indian community." 198 F.3d at 1249. This is the theory that the Navajo Nation advanced, R13b, Navajo Nation Comments at 3, and the theory upon which both the Interior Solicitor and the EPA based their determinations, R44.

This Court has ample experience with Navajo Chapters. The first reported decision construing the phrase "dependent Indian community" in 18 U.S.C. § 1151(b) is Martine v. United States, 442 F.2d 1022 (10th Cir. 1971). Martine concerned the

status of the Ramah Chapter which, like Church Rock, is in the "'checkerboard' area of western New Mexico . . . [where] some of the land was owned by the Navajo Tribe and some was not." James E. Lobsenz, "Dependent Indian Communities": A Search for a Twentieth Century Definition, 24 Ariz. L. Rev. 1, 21 (1982).[15] In Martine, this Court determined that the off-Reservation Ramah Navajo community is a dependent Indian community, setting out the factors to be considered in determining the community of reference. Id. at 1023-24. Since Martine, Ramah has been recognized as Indian country, and federal and Navajo authority is not questioned there.

Similarly, in an off-Reservation tax dispute, this Court observed in Watchman that the off-Reservation Tsayatoh Chapter is a local governmental subunit of the Navajo Nation, 52 F.3d at 1535 n.3; noted that "we have previously held the *entire* Navajo community of Ramah, New Mexico, was a dependent Indian community," id. at 1543 (citing Martine) (emphasis added); and ruled that "[t]he Tsayatoh Chapter may prove to be the appropriate community of reference" for determining if a mine on non-Indian fee land is within a dependent Indian community, id. at 1545. As shown below, the Church Rock Chapter is the proper community of reference under

[15] See also Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1456 (10th Cir. 1997) (Ramah Chapter is "a sanctioned tribal organization of the Navajo Nation"); S. Rep. No. 174, 102d Cong., 1st Sess. 5 (1991) (Ramah community "is one of over 100 chapters, which are political subdivisions of the Navajo Nation.").

this Court's precedents.

### B. The Chapter is a Clearly Defined Geographic Area Which Functions as a Mini-Society.

The first step in determining if an area constitutes a dependent Indian community is defining the community of reference. Watchman, 52 F.3d at 1543 (describing this issue as "the threshold question"); HRI, 198 F.3d at 1249 (community of reference analysis is to be undertaken "prior to" determining if federal set-aside and superintendence tests are met). The starting point is whether the proposed community has geographical definition. Adair, 111 F.3d at 774; R44 App. (Solicitor's Opinion) at 3. Although a metes and bounds description is not necessary under Adair, 111 F.3d at 774, the Church Rock Chapter *is* precisely defined by metes and bounds, R13b, App. 123-25.

To determine if such a defined geographical area constitutes a community, Watchman requires an inquiry into whether there is a "unified body of individuals . . . with common interests living in a particular area; . . . an interacting population of various kinds of individuals in a common location." Watchman, 52 F.3d at 1544. In this case, the Church Rock Chapter was established by the Government as a "local organization[ ], composed of, and directed by, people with common interests." Political History at 66; United States v. Begay, 42 F.3d 486, 491 n.5 (9th Cir. 1994),

and the people of the Church Rock Chapter continue to be unified, interacting people with common interests.

Community cohesiveness can be demonstrated by "economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality." Watchman, 52 F.3d at 1544. The Chapter is a traditional Navajo rural community, e.g., R13b, App. 263, and the record is unrebutted that its residents share common economic interests, see, e.g., id.; R40 at B-37-38, and some of the most basic needs, id. at B-32.

The demographics reflect community cohesiveness. About 98% of the residents are Native American, R13b, App. 246, and most of the rest are married to Navajos living there, id., App. 261, 135; cf. Bartlett, 465 U.S. at 480 (50% Indian population supported Indian country determination under 18 U.S.C. § 1151(a)). The Chapter House itself provides cohesiveness, where Navajo is the predominant language used. R13b, App. 132-33. Federal and State judicial decisions find likewise. See Begay, 42 F.3d at 491 n.5 (Chapters serve as town halls); Thriftway, 810 P.2d at 352 (off-Reservation Nageezi Chapter protects the health and welfare of its residents as a municipality might); United States v. Calladitto, Cr. No. 91-356-SC, 19 Indian L. Rptr. 3057 (D.N.M. Dec. 5, 1991) (off-Reservation Baca Chapter House "is the Navajo tribal political and social meeting point for the people of the

community"). Virtually all residents visit the Chapter House regularly. R40 at B-50.

Next, Watchman instructs that the community must be more than an economic pursuit: "A community is 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." 52 F.3d at 1544. As the EPA and the Solicitor determined, the Church Rock Chapter meets this definition. R44 at 8-10 and App. at 3, 7-9; see R13b, App. 136, 262-66; R40 at B-17, B-22, C-4.

Finally, Watchman looks to the relationship of the community to its surroundings, its treatment by other government agencies, and provision of essential services. See 52 F.3d at 1544. The federal Government considers the Chapter to be a distinct Indian community primarily dependent on federal and tribal protection and services. R13b, App. 132. The federal Government provides a wide array of services to the Chapter and its residents, id., App. 133, and the people there are entitled to all the benefits and services afforded by the BIA to which residents of the reservation proper are entitled, id.

The Navajo Nation, often through the Chapter, complements these federal services and protections. It provides the vast majority of law enforcement and dispute resolution services, comprehensive welfare offices and services, and the water

pumping and delivery infrastructure and service needed for the community. R13b, App. 263, 136-37; R16 Ex. E at 5. The Chapter hosts offices serving the political, educational, employment, and social needs and interests of the community. R13b, App. 261-63. The Navajo Nation treats the Chapter and its residents equally with on-Reservation Chapters and citizens, id., App. 156, and New Mexico recognizes the standing of off-Reservation chapters to protect the health and safety of its residents, see Thriftway, 810 P.2d at 352.

Notably, New Mexico does *not* contest the EPA's determination that the Section 8 Land is Indian country under federal UIC regulatory authority. N.M. Br. at 1-2. New Mexico's acceptance of federal jurisdiction under the EPA's determination, after it previously opposed federal jurisdiction over the Section 8 Land, has real legal significance. See Penobscot Nation v. Fellencer, 164 F.3d 706, 710-11 (1st Cir. 1999). The Navajo Nation will continue to work with New Mexico to ensure that proper standards are employed and that the natural environment is protected for all citizens of the State, including those in Indian country. If applicable[16] State UIC regulations are indeed more protective of the environment than EPA's, see New Mexico Brief at 17-19, the Navajo Nation will likely urge EPA to

[16] This case concerns Class III injection wells, so the Nation will not address the State's discussion of Class II and V wells. See New Mexico Br. at 17-20.

incorporate the more stringent requirements in any decision-making.

Indians in Indian country are entitled to the same State and county services as other citizens of a State, Shepard v. Platt, 865 P.2d 107, 110 (Ariz. Ct. App. 1994), and vacillating federal Indian policy has made some degree of assimilation inevitable. Therefore, the provision of some services by state entities is not inconsistent with distinctly Indian communities under federal supervision. Adair, 111 F.3d at 775; see John, 437 U.S. at 652 n.23; United States v. Washington, 641 F.2d 1368, 1373 (9th Cir. 1981), cert. denied, 454 U.S. 1143 (1982). Regardless, in the Church Rock Chapter, as in other parts of the Eastern Navajo Agency, "[t]he Navajo Nation and the Bureau of Indian Affairs provide almost all of the government services." R13b, App. 263, 136-37. The record evidence conforms to the facts found by a federal District Court after a two-week evidentiary hearing and reproduced in Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387, 1436-37 (10th Cir.), cert. denied, 498 U.S. 1012 (1990), that, in providing services and infrastructure in that area, "[t]he contribution of the State of New Mexico is small."

**C. The Mine Site Itself Cannot Constitute a Community of Reference.**

Watchman and HRI foreclose HRI's contention that the Section 8 Land taken in isolation may constitute a proper community of reference. Watchman expressly reversed the district court in that case for "examining the mine site in isolation from

the surrounding area." 52 F.3d at 1543. Watchman noted that a mine "does not exist in a vacuum. Its workers must eat, sleep, shop, worship, and otherwise engage in life's daily routines," id. at 1545, and it is the availability of facilities to accommodate these life routines, as well as the interactions of residents in engaging in them, that characterizes a community. HRI reaffirmed that approach. 198 F.3d at 1248-49. HRI concedes that not one soul lives on the Section 8 Land. HRI Br. at 11. The EPA correctly rejected HRI's position that its mine site is the appropriate community of reference. R44 at 7-8; accord R44 App. (Solicitor's Opinion) at 5-7.

HRI claims that EPA deviated from this Court's mandate by not focusing solely on the Section 8 Land as the "land in question." HRI Brief at 53-54. That contention would nullify Watchman's holding and HRI's adoption of it. HRI's position overlooks the actual language of the HRI decision. HRI affirmed the EPA's ruling that the jurisdictional status of the Section 8 Land was subject to a legitimate dispute, as follows: "we conclude that there is a legitimate dispute, following Venetie, as to whether Section 8 falls *within* a 'dependent Indian community' . . ." 198 F.3d at 1248 (emphasis added). If that were not clear enough, the court provided ample clarification that Section 8 itself would be Indian country if the community of which it is a part qualifies under Venetie as a dependent Indian community. "Under at least one theory – that the community of reference in the current action is the entire

Churchrock Chapter, a theory neither adopted nor rejected in Watchman – Section 8 might qualify as a dependent Indian community." Id. at 1249. These statements are the basis for the court's holding that EPA did not abuse its discretion in concluding that the status of Section 8 was legitimately in dispute. Id. HRI's myopic reading of the mandate, Br. at 24, 34, 54, ignores this Court's explanation of how "Section 8 might qualify as a dependent Indian community," and HRI's contentions based on that erroneous reading must fail. See Estate of Whitlock v. CIR, 547 F.2d 506, 510 (10th Cir.) (opinion of court is to be considered in determining intent of mandate), cert. denied, 430 U.S. 916 (1977); In re Sanford Fork and Tool Co., 160 U.S. 247, 256 (1895) (same).

### D. The Record Lacks Any Support for Designating "McKinley County and/or the Town of Gallup" as the Community of Reference.

HRI now argues for the first time that, if the Section 8 Land is not the appropriate community of reference, then the proper community of reference is "McKinley County and/or the town of Gallup." HRI Br. at 50. HRI did not make this argument to the EPA, however, and it is barred from advancing it here. Osborne v. Babbitt, 61 F.3d 810, 814 (10th Cir. 1995) (court will not consider contentions not raised in the appropriate administrative proceedings); New Mexico Envtl. Improvement Div. v. Thomas, 789 F.2d 825, 835-36 (10th Cir. 1986) (when EPA

solicited comments on the very issue that petitioner challenges on appeal and petitioner failed to make a record on the issue before the EPA, issue was waived). These are rules of administrative law rooted in simple fairness to administrative agencies. Nuclear Energy Inst., Inc. v. EPA, 373 F.3d 1251, 1297 (D.C. Cir. 2004). Even if HRI had made some claim to the EPA that "McKinley County and/or the town of Gallup" were the proper community of reference, its one sentence assertion to that effect in its brief-in-chief, unsupported by any argument or authorities, would not suffice. See Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 (10th Cir. 2005); Phillips v. Calhoun, 956 F.2d 949, 954 (10th Cir. 1992).

Even though no commenter, HRI included, urged that Gallup was the appropriate community of reference, the EPA considered and rejected that possibility. R44 at 10 n.64. The EPA found it to be disconnected from the mine site and not an appropriate community of reference. Id. HRI did not argue below that Gallup was the appropriate community of reference and presents no argument or authority now to refute the EPA's conclusion that it is not. Its modest effort to challenge EPA's rejection of Gallup as the community of reference must therefore fail. See Osborne, 61 F.3d at 814; Garrett, 425 F.3d at 841; Calhoun, 956 F.2d at 954.

## IV. THE EPA AND THE SOLICITOR CORRECTLY DETERMINED THAT THE CHAPTER SATISFIES THE FEDERAL SET-ASIDE AND SUPERINTENDENCE TESTS.

### A. The Chapter Was Established by the United States, and Almost All of the Chapter is Set Aside for the Exclusive Use of Navajo Indians.

Congress' inclusion of dependent Indian communities as Indian country in 18 U.S.C. § 1151 codified the holdings of United States v. McGowan, 302 U.S. 535 (1938), and United States v. Sandoval, 231 U.S. 28 (1913). See Venetie, 522 U.S. at 530. In McGowan, an Act of Congress expressly authorized a purchase and set-aside of 20 or so acres of land for the Reno Indian Colony. See HRI, 198 F.3d at 1253. Sandoval concerned the territory of Pueblo Indians, land held by the Pueblo in fee simple under grants from the King of Spain. Sandoval, 231 U.S. at 39, 48; Cohen's Handbook of Federal Indian Law 192 (2005). The Pueblo territory in Sandoval was not dedicated or set aside initially by the United States. Rather, the Government subsequently recognized and treated those lands as Indian country, with the concomitant provision of federal services. 231 U.S. at 39-40. Thus, "[d]ependent Indian communities include those tribal Indian communities under federal protection that did not originate in either a federal or tribal act of 'reserving,' or were not specifically designated a reservation." Arizona Public Serv. Co. v. EPA, 211 F.3d 1280, 1286 (D.C. Cir. 2000) (citation and internal quotation marks omitted).

While the Chapter is not a reservation, the United States created it and has purchased and placed in trust status 82% of the land included within the Chapter's boundaries. It has dedicated an additional 10.5% of the land there for exclusive Navajo use. Thus, the United States has set aside for exclusive Navajo use and benefit over 92% of the land within the Chapter. *All* of the land is within the Navajo land consolidation area, approved by the Secretary of the Interior under 25 U.S.C. § 2203. The federal Government recognizes and treats the Chapter as Indian country, and provides substantial services to the community and its residents accordingly.

The overwhelming Navajo land status in the Chapter supports the EPA's Indian country determination. Cf. Bartlett, 465 U.S. at 480 n.26 (continued reservation status supported by fact that "only half" of the lands passed out of Indian ownership). As the EPA points out, R44 at 11-12, the District Court in UNC Resources, Inc. v. Benally, 514 F. Supp. 358 (D.N.M. 1981), found that "all the land affected [by UNC's release of 94 million gallons 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." Id. at 360 (emphasis added). HRI believes that such concurrent jurisdiction negates a finding that the Chapter is a dependent Indian community, HRI Br. at 16, 41, but concurrent

jurisdiction prevails throughout *all* of Indian country, see, e.g., Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) (State may impose moderate severance tax on non-Indian oil company operating on Indian reservation); Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 415 (1989) (tribe may enforce zoning ordinance in "closed" portion of reservation where 3.4% of land was held in fee by non-Indians, but not in remainder of reservation where county zoning of fee lands would prevail).

Contrary to HRI's claim that no case has ruled that an area that includes non-Indian land is a dependent Indian community, HRI Br. at 52, this Court in Martine did just that, and the entire Ramah community has been treated as Indian country ever since, see Watchman, 52 F.3d at 1543. So has this Court ruled in Arietta, and the New Mexico Supreme Court in Romero. See also Watchman, 52 F.3d at 1543 (entire Tsayatoh Chapter may be a dependent Indian community notwithstanding non-Indian fee lands within its boundaries); Thriftway, 810 P.2d at 352 (recognizing Chapter standing in dispute arising on non-Indian land within Chapter boundaries).

The EPA's factual determinations regarding the set-aside requirement are amply supported in the record, and its application of those facts to the law is entitled to deference. See R13b App. 248; R44 at 9, 10-12 and App. (Solicitor's Opinion) at 4-5, 9-10; Walker, 874 F.2d at 1332. The Church Rock Chapter satisfies the set-aside

test of § 1151(b) and Venetie.

### B. The Federal Government Superintends the Chapter as It Does the Reservation Proper.

"[T]he 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 of the land in question." Venetie, 522 U.S. at 531. In this case, the BIA has had an Agency Office serving the Chapter area since 1907, and continues to exercise its guardianship function over the Chapter just as it does over the people and lands of the Reservation proper. See generally R13b, App. 131-33, 204-06. The BIA relates to the residents both on an individual basis and through the Chapter as a community. R13b, App. 133. The BIA regularly attends the Chapter meetings, and its initiatives include a wide variety of projects and programs designed to serve the community as a whole. Id.

The BIA accords all the same benefits and services to Navajos living within the Chapter as to Navajos residing on the reservation proper, and the BIA provides additional services to Navajos who own interests in allotments relating to the management of the allotments. Id., App. 132. The Eastern Navajo Agency of the Bureau of Indian Affairs provides law enforcement services, social services,

employment assistance, adult education and vocational training, road construction and maintenance, land operations and real estate services, and personal financial services related to the trust lands. Id., App. 133. In short, the United States and the Navajo Nation provide almost all of the government services for the Chapter and its residents. Id., App. 263, 136-37.

Regarding the land in question, the record shows and the EPA found that "[i]n the Church Rock Chapter, the federal government supervises over 92.5% of the total area." R44 at 12. Its supervision of the area includes 46,648.64 acres of tribal and allotted trust land and an additional 5,712.70 acres of federal land devoted to grazing leases and permits issued only to Navajo residents. The BIA supervises and administers tribal trust land just as it does land within the Reservation proper. R13b, App. 204-06. The allotted trust land is closely regulated by the federal Government. See, e.g., 25 C.F.R. Parts 169 (rights-of-way), 162 (homesite, agricultural, residential, and business site leases), 212 (mineral leases) and 166 (grazing leases). "It is not possible to obtain any interest in trust land or resources except in compliance with the procedures provided in the federal laws and regulations." R13b, App. 205.

After noting that 78% of the land in the Chapter is beyond state jurisdiction, see 25 C.F.R. § 1.4, the Solicitor opined that "not only is the vast majority of the land within Church Rock subject to Federal superintendence but the Church Rock Chapter

as a community is dependent on the Federal Government such that it is subject to Federal and tribal jurisdiction. The Church Rock Chapter satisfies the Federal superintendence factor." R44 App. at 10; accord Venetie, 522 U.S. at 531 (federal superintendence requirement is satisfied if the United States and the tribe, rather than the State, are to exercise "primary jurisdiction over the land"). The EPA's adoption of that conclusion is fully supported by the factual record, and the Solicitor's and the EPA's considered legal analyses are reasonable and must be honored. R44 at 12-13 and App. at 3-5, 10; Walker, 874 F.2d at 1332.

## CONCLUSION

For the above reasons, the land status determination of the Environmental Protection Agency should be affirmed.

## STATEMENT ON ORAL ARGUMENT

The Navajo Nation requests oral argument. Regulation of the potential injections of chemicals into a pristine Navajo drinking water aquifer is a matter of grave concern to the Navajo Nation, and the Navajo Nation believes that regulation of HRI's mine – both the Section 17 lands previously held to be Indian country in HRI and the adjacent Section 8 Land at issue here – should be administered by a single agency, the federal Environmental Protection Agency.

Respectfully submitted,

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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 13,358 words, excluding the parts of the brief exempted by Fed. R. App. P. 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 Perfect 10 in 14 font size and Times New Roman style.

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## CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Brief of Intervenor-Respondent Navajo Nation were served on counsel of record by electronic mail and by Federal Express, priority overnight delivery, and addressed as follows, the 24th day of August, 2007:

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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 virus scanning program, Symantec Norton Antivirus 2006, last update was August 22, 2007 and according to the program, is free of viruses.

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