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.

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

EPA'S OPPOSITION TO HRI'S PETITION FOR REHEARING *EN BANC*

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TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES

Page:

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

FEDERAL RULES

FEDERAL REGULATIONS

MISCELLANEOUS SOURCES

INTRODUCTION

Hydro Resources, Inc. ("HRI") has petitioned for rehearing *en banc* of the Panel's decision upholding EPA's determination that HRI's Section 8 land is Indian country under 18 U.S.C. § 1151(b), due to its location within a dependent Indian community, the Church Rock Chapter of the Navajo Nation. HRI asserts that the decision conflicts with Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520 (1998) ("Venetie"), with the decisions of other federal and state courts, and with the implicit reasoning of other panels of this Court, because the Panel applied this Court's community-of-reference analysis before applying the federal set-aside and superintendence test for determining the existence of a dependent Indian community. HRI argues that, under Venetie, its Section 8 land must be the *sole* focus of the federal set-aside and superintendence test. HRI also attempts to raise an issue not before the Court regarding the Navajo Nation's authority over HRI's activities on the Section 8 land.

As we show below, the Panel's decision does not conflict with Venetie, or with any decision of this Court or any authoritative decision of any other federal court of appeals, and *en banc* review is therefore unwarranted. In addition, the Panel did not determine the Navajo Nation's authority, and the Panel majority emphasized that its holding is narrowly restricted to the facts of this case. HRI v. EPA, 562 F.3d 1249, 1265-66 & n.17 (10th Cir. 2009) ("HRI II").[1/] Indeed, EPA's land status determination is

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[1/] HRI's third proposed issue for *en banc* review, whether the Panel decision rests on the premise that 18 U.S.C. § 1151 is an express delegation of civil regulatory authority over Indian country *to Indian Tribes* is not before the Court, and we therefore do not address it.

(continued...)

limited in scope and was made solely for the purpose of administering the underground injection control ("UIC") program of the Safe Drinking Water Act ("SDWA"), a federal environmental statute. The SDWA does not use the terms "Indian country" or "dependent Indian community," the statutory terms at issue in Venetie. In fact, Congress' sole reference to "Indian lands" in the SDWA was to make clear that the SDWA amendments did not alter or affect the status of those lands. 42 U.S.C. § 300j-6(d)(1). That EPA chose to use 18 U.S.C. § 1151 in its regulations to ensure comprehensive coverage of the UIC program need not be read to affect the statutory interpretation of Indian country for other purposes. Therefore, this case is both unique and limited, and it does not present a question of exceptional importance warranting *en banc* review.

ISSUES PRESENTED

1. Whether Venetie, which solely concerned the impact of the Alaska Native Claims Settlement Act on former Indian reservations in Alaska, requires that the federal set-aside and superintendence test for determining the existence of a dependent Indian community under 18 U.S.C. § 1151(b) be narrowly focused solely upon HRI's Section 8 land without regard to the larger dependent Indian community in which it is located.

2. Whether Venetie precludes application of this Court's community-of-reference

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[1/](...continued)
EPA made no determination with respect to the Navajo Nation's civil regulatory authority over the Section 8 land. Neither did the Panel, which refused to "wander down the *Plains Commerce Bank* path." HRI II, 562 F.3d at 1265 n.17 (citing Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S.Ct. 2709 (2008)). When applicable, EPA uses the "Montana test" in examining a Tribe's request for UIC program authority. See Montana v. United States, 450 U.S. 544 (1981). The Navajo Nation has not made such a request with respect to the Section 8 land.

analysis as a first step in determining where the federal set-aside and superintendence test should be focused when determining whether a dependent Indian community exists under 18 U.S.C. § 1151(b) when the Supreme Court did not address this issue in Venetie.

ARGUMENT

I. Venetie Does Not Require That The Federal Set-Aside And Superintendence Test Be Narrowly Focused Solely Upon A Parcel Of Fee Land Without Regard To The Larger Community In Which It Is Located.

HRI argues that the Supreme Court's Opinion in Venetie requires the federal set-aside and superintendence test to be focused *solely* on HRI's Section 8 land as "the land in question." HRI's Pet. at 1, 6, 11. Thus, HRI advocates a myopic approach to determining Indian country status, under which no fee land within a broader dependent Indian community could *ever* be Indian country under 18 U.S.C. § 1151(b), because the Indian country status of the larger community within which the land is located would be irrelevant to the fee "land in question," which, by definition, is not set aside or superintended by the federal government. As is shown below, Venetie does not demand the narrow focus advocated by HRI. Moreover, designating fee lands within a dependent Indian community as Indian country for purposes of federal regulatory jurisdiction is consistent with 18 U.S.C. § 1151(b), and the statute's anti-checkerboarding policy.

In Venetie, the Supreme Court considered the impact of the Alaska Native Claims Settlement Act ("ANCSA") on the Indian country status of former reservation land now owned in fee by the Native Village of Venetie Tribal Government. 522 U.S. at 523-24.[2/]

[2/] In ANCSA, Congress extinguished all aboriginal claims to most Alaska land in

(continued...)

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

The Supreme Court rejected the Ninth Circuit's six-factor balancing test for determining the existence of a dependent Indian community. The Court found that in 18 U.S.C. § 1151, Congress incorporated the definition of Indian country that had evolved through Supreme Court case law, including the Court's previous requirements of federal set-aside and federal superintendence for determining the existence of a dependent Indian community under 18 U.S.C. § 1151(b). Id. at 529-31. It held that neither factor was satisfied in that case, because in ANCSA Congress had expressed its intent to extinguish in toto the Indian country status of the Tribal Government's lands. Id. at 532-34. Thus, it was the overarching impact of ANCSA that resulted in the Court's ultimate holding that *none* of the Tribal Government's ANSCA lands, and not just the school land in question,

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[2/](...continued)
exchange for transfers of both Alaska land and monetary payments to Native corporations, the shareholders of which were required to be Alaska Natives. Id. at 524. The Native Corporation in Venetie elected to take title to former reservation land instead of the nonreservation land and the cash payment. Id. It then transferred the land to the Tribal Government.

were Indian country under 18 U.S.C. § 1151(b).[3/]

The Supreme Court did state in Venetie that "it is *the land in question*, and not merely the Indian tribe inhabiting it, that must be under the superintendence of the Federal Government." 522 U.S. 531 n.5 (emphasis in original). However, the Court did not use the term "land in question" to indicate that the two-part test for determining the existence of a dependent Indian community must be applied narrowly, focusing only on individual parcels of property as HRI suggests. Rather, as the Panel Majority explained, the Supreme Court used the term "land in question" to reject the notion that the federal superintendence test was satisfied with respect to the Tribally-owned land merely because all federally recognized Tribes are under the superintendence of the federal government. HRI II, 562 F.3d at 1265 (discussing Venetie, 522 U.S. at 531 n.5).

The term "land in question" is otherwise simply a convenient way of referencing the land claimed to be occupied by a dependent Indian community. See, e.g., Venetie, 522 U.S. at 531 ("The federal set-aside requirement ensures that the land in question is occupied by an 'Indian community.'"). While the dispute in Venetie was over the Indian country status of one school, the Supreme Court framed the issue as whether *any* of the

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[3/] The United Nuclear Corporation incorrectly asserts that Venetie explicitly holds that dependent Indian communities may only consist of "Indian lands." UNC's *Amicus Curiae* Br. at 5-6. Because Venetie did not concern non-Indian fee land within a dependent Indian community, the Supreme Court had no opportunity to address, and did not hold that such land may not be Indian country under 18 U.S.C. § 1151(b). The Court's reference to "Indian lands" indicates only that dependent Indian communities will largely consist of Indian lands due to the federal set-aside requirement. See Venetie, 522 U.S. at 527.

1.8 million acres of land owned by the Tribal Government were Indian country after ANCSA. Venetie, 522 U.S. at 523 ("[W]e must decide whether approximately 1.8 million acres of land . . . owned in fee simple by the . . . Venetie Tribal Government pursuant to [ANCSA], is 'Indian country.'"). Thus, there is nothing in Venetie to suggest that one must focus solely on a single parcel of land when making dependent Indian community determinations. Indeed, after Venetie, this Court specifically stated that it "examine[s] the *entire* Indian community, not merely a stretch of road, to ascertain whether the federal set-aside and federal superintendence requirements are satisfied." United States v. Arrieta, 436 F.3d 1246, 1250 (10th Cir. 2006) ("Arrieta") (emphasis added).

In the administrative proceeding for this case, the Navajo Nation asserted that the Section 8 land was Indian country under 18 U.S.C. § 1151(b), due to its location within the Church Rock Chapter. Consistent with Arrieta, EPA and the Panel Majority applied the two-part Venetie test to the entire Indian community, which is the Church Rock Chapter. This broader focus is not only consistent with the case law, but also with the language of 18 U.S.C. § 1151(b).

The statute plainly provides that "*all* dependent Indian *communities*" are Indian country. 18 U.S.C. § 1151(b) (emphasis added). The term "community" denotes something broader than a single parcel of land. See Pittsburg & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531, 1544 (10th Cir. 1995) ("Watchman") (discussing broad meaning of "community"); New Mexico v. Romero, 142 P.3d 887, 893 (N.M. 2006), cert.

denied, 549 U.S. 1265 (2007) (holding that privately held fee lands within a pueblo are part of a dependent Indian community because "the terms of section 1151(b) refer to residential Indian communities under federal protection, not to types of land ownership or reservation boundaries"). Thus, Congress intended to assert federal jurisdiction over all land within a dependent Indian community no matter how or by whom held. See Cohen's Handbook of Federal Indian Law, 2005 Edition, § 304[2][c] (concluding that patented parcels may be Indian country if within a dependent Indian community). At the very least, the broad term "community" provides no indication that Congress intended to exclude from federal jurisdiction an individual parcel of fee land within a dependent Indian community.

In fact, when Congress has wanted to exclude fee land within Indian country from federal jurisdiction it has done so expressly. In 18 U.S.C. § 1154(c), Congress defined the term "Indian country" for purposes of the Indian alcohol control laws specifically to exclude "fee-patented lands in non-Indian communities." 18 U.S.C. § 1154(c); see United States v. Mazurie, 419 U.S. 544 (1975) (applying 18 U.S.C. § 1154(c)). In 1949, Congress amended 18 U.S.C. § 1151 to make clear that "Indian country" includes those lands listed in the section, "except as otherwise provided in sections 1154 and 1156" of title 18. See 18 U.S.C. § 1151 at Historical and Statutory Notes. Thus, application of the Indian alcohol control laws is the *only* circumstance for which Congress has expressly excepted some, though not all, fee lands otherwise within Indian country from the scope

of federal jurisdiction under 18 U.S.C. § 1151.[4]

Moreover, excluding a parcel of fee land located within a dependent Indian community from federal jurisdiction would create checkerboarded jurisdiction, which Congress sought to avoid under 18 U.S.C. § 1151. See Seymour v. Superintendent, 368 U.S. 351, 357-58 (1962); Hilderbrand v. Taylor, 327 F.2d 205, 207 (10th Cir. 1964). While both of those cases concerned non-Indian-owned fee land within a reservation under 18 U.S.C. § 1151(a), Congress likewise sought to avoid checkerboarding under 18 U.S.C. § 1151(b) through its use of the broad term "community." See Watchman, 52 F.3d at 1544 (discussing broad meaning of "community").[5]

If Congress desired checkerboarded jurisdiction under 18 U.S.C. § 1151(b), it would have expressly so provided, as it did in 18 U.S.C. § 1154, or chosen a word other than "community" that does not convey the same breadth of coverage. Therefore, even if the Court were to find that 18 U.S.C. § 1151(b) is ambiguous, it should interpret the term "community" to include fee lands in order to avoid checkerboarded jurisdiction. See

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[4] HRI and the dissent appear to suggest that fee land may be Indian country under 18 U.S.C. § 1151(b) only if located within a pueblo. HRI's Pet. at 14; HRI II, 562 F.3d at 1270 (Frizzell, J. dissenting). However, Congress broadly extended the statute's coverage to "*all* dependent Indian communities." 18 U.S.C. § 1151(b) (emphasis added).

[5] The dissent asserted that nothing in 18 U.S.C. § 1151 suggests that Congress intended to avoid checkerboard jurisdiction outside of a reservation. HRI II, 562 F.3d at 1271 (Frizzell, J. dissenting). However, the dissent failed to discuss Congress' intent in using the broad term "community" under 18 U.S.C. § 1151(b). Nor did the dissent explain *why* Congress would have intended to preclude checkerboarding on reservations but to allow it in dependent Indian communities. See id.

Seymour v. Superintendent, 368 U.S. at 358 (discussing the unworkable system for the administration of criminal jurisdiction that would exist in checkerboarded areas); Hilderbrand v. Taylor, 327 F.2d at 207 (quoting Seymour); State v. Romero, 140 N.M. at 304-05 (concerning a pueblo). See also Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985) ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit"). Avoiding checkerboarded jurisdiction is especially important under an environmental statute such as the SDWA because groundwater aquifers are not delineated by landownership boundaries.

II. Venetie Did Not Abrogate This Court's Community-Of-Reference Analysis.

HRI incorrectly asserts that Venetie abrogates the community-of-reference analysis required by Watchman. As the Court discussed in HRI, Inc. v. EPA, 198 F.3d 1224, 1249 (10th Cir. 2000) ("HRI I"), because the Venetie Court examined only the categorical effect of ANCSA on virtually all Alaskan Native lands, it was not even presented with the question of how one should determine the appropriate community of reference under 18 U.S.C. § 1151(b) in circumstances where the majority of land clearly retains its Indian country status. As discussed above, although Venetie concerned whether the Tribal Government could impose a tax upon one school, the Supreme Court framed the issue as whether *any* of the 1.8 million acres of land owned by the Tribal Government are Indian country after ANCSA. Venetie, 522 U.S. at 523. So framed, there was no need for the Court to conduct a community-of-reference analysis, and it did not consider the issue.

This Court's community-of-reference analysis does *not* apply a multi-factored test for determining whether a dependent Indian community exists, and thus differs significantly from the Ninth Circuit test that was rejected in Venetie. Rather, it merely determines *where* the two-factor test specified by the Supreme Court in Venetie should be focused. See Watchman, 52 F.3d at 1546 (identifying the community of reference as a threshold issue before determining whether that community is a dependent Indian community); HRI II, 562 F.3d at 1262) ("[W]e first determine the community of reference, and we then apply to that community of reference the set-aside and superintendence requirements established in *Venetie*. . . .").

Nor does the similarity of any particular factor for determining the community of reference, such as community cohesiveness, to any of the factors previously used by the Ninth Circuit for determining the existence of a dependent Indian community necessarily render the factor impermissible. See id. In Venetie, the Supreme Court found that the Ninth Circuit had impermissibly balanced the factors it used for determining the existence of a dependent Indian community against one another in such a way as to reduce the federal set-aside and superintendence requirements to mere considerations. Venetie, 522 U.S. at 531 n.7. Such balancing does not occur under this Court's post-Venetie approach, where the federal set-aside and superintendence requirements must be *independently* satisfied *after* the community of reference is identified. HRI II, 562 F.3d at 1262.

III. None of HRI's Other Cases Warrants *En Banc* Review In This Case.

HRI argues that the Panel's decision conflicts with the case law of other courts and

with the "implicit reasoning" of other panels of this Court, thereby warranting *en banc* review. While *en banc* review may be warranted when a panel's decision conflicts with the decision of another panel of the same court, or with the authoritative decisions of other United States courts of appeals that have addressed the issue, Fed. R. App. P. 35(b)(1)(B), that is not the case here. Rather, the Panel's decision is in accord with the other decisions of this Court, and the only other federal court of appeals decision relied upon by HRI contains nothing more than *dicta* with respect to the issue raised here.

HRI incorrectly asserts that the Panel's decision here conflicts with "the implicit reasoning" of this Court's decisions in United States v. Roberts, 185 F.3d 1125 (10th Cir. 1999), and Arrieta. Even if a conflict with another panel's "implicit reasoning" would warrant *en banc* review, no such conflict exists.

HRI argues that the Panel's decision is in conflict with Roberts because the Roberts Court used the term "land in question," and never uttered the term "community of reference" when determining that the tribal complex in question, which was held in trust by the United States for the Choctaw Nation of Oklahoma, was Indian country under 18 U.S.C. § 1151. The Court never mentioned the term "community of reference" in Roberts, however, because the Court appears to have determined that the tribal complex was Indian country primarily due to its status as an informal reservation under 18 U.S.C. § 1151(a). See Roberts, 185 F.3d at 1130-33 (discussing the many cases in which trust lands have been held to constitute informal reservations under 18 U.S.C. § 1151(a)). While the Court discussed Venetie, it specifically found that Venetie did not repudiate the

Supreme Court's prior cases in which trust lands were determined to be Indian country under 18 U.S.C. § 1151(a). The Court ultimately found that the trust land in question was Indian country regardless of what label one attached to it. Id. at 1133. To the extent that the Court also found the tribal complex itself to be a dependent Indian community, there appears to be no dispute that the complex itself was the appropriate community of reference. See id. Accordingly, Roberts hardly supports HRI's contention that there is now an intra-Circuit conflict.

HRI also contends that this Court narrowly focused solely on a tract of land without reference to the broader Indian community when it determined that Shady Lane was part of a dependent Indian community in Arrieta, 463 F.3d 1246. As the Panel in this case pointed out, HRI's contention is contrary to the actual *holding* in Arrieta, that "'all lands within the exterior boundaries of a Pueblo land grant, to which the Pueblo hold title, are Indian country . . . .'" HRI II, 562 F.3d at 1262 n.14 (quoting Arrieta, 436 F.3d at 1250-51.). Indeed, the Court rejected Arrieta's argument that Shady Lane, the situs of the crime, could not meet the federal superintendence test because it is a county road, specifically stating 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." Arrieta, 436 F.3d at 1250 (emphasis added). In addition, there was no question that the Pojoaque Pueblo was the appropriate community of reference, so an extended analysis was not required. See id. See also HRI II, 562 F.3d at 1262 n.14. Moreover, because the Pueblo held title to the land upon which Shady Lane

was built, the Court did not have occasion to consider the Indian country status of the privately-held land surrounding Shady Lane. See Arrieta, 436 F.3d at 1250 (noting parties' agreement that the Pueblo held title to the land underlying Shady Lane). Therefore, HRI incorrectly asserts that the Court "implicitly" held that the private land is not Indian country. The Panel's decision in this case does not conflict with Arrieta.

The only other federal court of appeals case relied upon by HRI, Blunk v. Arizona Dep't of Transportation, 177 F.3d 879 (9th Cir. 1999), concerned a solitary tract of fee land owned by the Navajo Nation outside of the Navajo Reservation near Winslow, Arizona, that no one even contended was within a dependent Indian community. Rather, Blunk argued that Arizona's authority to regulate the billboards he erected on the property was pre-empted because the land was owned by the Navajo Nation and in close proximity to the Navajo Reservation. 177 F.3d at 883. The Navajo Nation itself had taken the position that State law applied to the land, and it declined to intervene in the case. Id. at 881 & n.4. Indeed, Judge Fletcher specifically concurred in the result but criticized the majority for suggesting that the case required a nuanced parsing of Venetie that was not presented by the facts or advocated by the parties. Id. at 844 (Judge Fletcher concurring) (comparing the majority's analysis to Alice in Wonderland, where "'off with his head' is the 'only . . . way of settling all difficulties, great and small'") (citation omitted). Thus, the Ninth Circuit's discussion of Venetie in Blunk is nothing more than *dicta*. Simply put, Blunk does not provide a sufficient basis for *en banc* review of the Panel's decision here because Blunk is not an authoritative decision of the Ninth Circuit

with respect to the issue raised here. See Fed. R. App. P. 35(b)(1)(B).[6/]

IV. EPA's Determination Is Limited In Scope And The Panel Correctly Limited Its Decision To The Facts Of This Case.

As is relevant here, EPA has the authority to determine the jurisdictional status of lands claimed to be Indian country for purposes of administering the SDWA UIC

[6/] The lower federal court and state court decisions cited by HRI are by definition not the authoritative decisions of another United States court of appeals for which *en banc* review might be warranted even if in conflict with the Panel's decision in this case. Fed. R. App. 35(b)(1)(A), (B). The federal district court decisions do not establish precedent. Garcia v. Tyson Foods, Inc., 534 F.3d 1320, 1329 (10th Cir. 2008). Nor do they establish a conflict. United States v. Papakee, 485 F. Supp.2d 1032, 1045 n.13 (N.D. Iowa 2000), and Thompson v. County of Franklin, 127 F. Supp.2d 145, 155 (N.D.N.Y. 2000), at most stand for the unremarkable proposition that multi-factor tests for determining the existence of a dependent Indian community were implicitly abrogated by Venetie. City of New York v. Golden Feather Smoke Shop, Inc., 2009 U.S. Dist. Lexis 20953 *36-37 (E.D. N.Y. Mar. 16, 2009), was a cigarette tax case involving businesses on the reservation of a Tribe that was not even federally recognized. Tunica-Biloxi Indians of Louisiana v. Pecot, 351 F.Supp.2d. 519, 524-25 (W.D. La. 2004), held that a parcel of land purchased by an Indian Tribe was not Indian country prior to its placement into trust by the Department of the Interior. Most of HRI's state court cases were decided on their own unique facts. See South Dakota v. Owen, 729 N.W.2d 356, 368-69 (S.D. 2007) (home within the City of Peever, South Dakota, on land that was owned by City and leased to Sisseton-Wahpeton Housing Authority was not within a dependent Indian community); New Mexico v. Quintana, 2006 N.M. App. Lexis 76 (N.M. App. 2006) (State road built on Forest Service land that was not within the boundary of any pueblo was not within a dependent Indian community); Dark-Eyes v. Comm'r of Revenue Services, 887 A.2d 848, 867-71 (Conn. 2006) (concerning unique circumstances under Mashantucket Pequot Indian Claims Settlement Act). In New Mexico v. Frank, 52 P.3d 404, 409 (N.M. 2002), the Supreme Court of New Mexico concluded that a community-of-reference analysis was not required after Venetie. However, after Frank was decided, the court specifically held that private fee lands within a dependent Indian community are Indian country under 18 U.S.C. § 1151(b), and that the Venetie test applies to the entire community and not just the specific fee lands in question. New Mexico v. Romero, 142 P.3d at 896. Thus, the more recent precedent of the New Mexico Supreme Court supports the Panel's ultimate decision here.

program. 42 U.S.C. §§ 300h-1(e), 300j-11. The SDWA does not require that EPA use 18 U.S.C. § 1151 to define the scope of federal regulatory authority for the UIC program, and EPA incorporated 18 U.S.C. § 1151's definition of "Indian country" for the sake of administrative convenience and to ensure comprehensive coverage of the program. See 49 Fed. Reg. 45,292, 45,294 (Nov. 15, 1984) (Explaining that EPA intends to use the "generic definition" of "Indian country" in 18 U.S.C. § 1151 in its administration of the UIC program in order to ensure comprehensive coverage of the UIC program). EPA's land status determination was made solely for the purpose of determining whether EPA or the State of New Mexico is the appropriate permitting authority for purposes of the SDWA UIC program under EPA's regulations, and the Panel majority correctly emphasized that its holding is narrowly restricted to the facts of this case. HRI II, 562 F.3d at 1265-66 & n.17; id. at 1266 ("We do *not* hold that any land within the geographical boundaries of a political subdivision of a tribe necessarily has Indian country status . . . ."). Therefore, this case is both limited and unique, and it does not present a question of exceptional importance warranting *en banc* review.[7]

CONCLUSION

For all these reasons, the Court should deny the petition for rehearing *en banc.*

[7] While the Panel determined that HRI has standing in this case, if the full Court determines to hear the case, it should reject HRI's petition on standing grounds. See EPA's Merits Brief at 15-20.

Respectfully submitted,

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CERTIFICATION OF DIGITAL SUBMISSION

In accordance with the Court's Emergency General Order Regarding the Electronic Submission of Selected Documents, it is hereby certified that: (1) no privacy redactions were required for this document, (2) the electronic version of this document is an exact copy of the written document that is filed with the Clerk, and (3) the digital copy

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s/David A. Carson
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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. 32(a)(7)(C), the undersigned certifies that this response is proportionally spaced, uses 13-point type and is in Times New Roman font.

s/David A. Carson
David A. Carson

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date I served a copy of the foregoing EPA's Opposition to HRI's Petition for Rehearing *En Banc* by filing it with the Court's electronic filing system, where it is automatically provided to those counsel registered with the system, and also by first class United States mail upon the following counsel:

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