No. 07-9506

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

HYDRO RESOURCES, INC.,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent,

NAVAJO NATION,

Intervenor.

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

AMICUS CURIAE BRIEF OF THE STATE OF NEW MEXICO IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

GARY K. KING, Attorney General
Christopher D. Coppin
Special Assistant Attorney General
111 Lomas, NW Suite 300
Albuquerque, New Mexico 87102
(505) 222-9000
(505) 222-9183 (facsimile)

Justin Miller
Chief Counsel
Office of the Governor
490 Old Santa Fe Trail #400
Santa Fe, New Mexico 87501
(505) 476-2200
(505) 476-2207 (facsimile)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES:

NEW MEXICO CASES:

INTEREST OF AMICUS CURIAE STATE OF NEW MEXICO

The State of New Mexico ("State") is authorized to file this amicus curiae brief pursuant to this Court's order dated June 8, 2009. The State files this brief in support of Hydro Resources, Inc.'s ("HRI") Petition for Rehearing *En Banc* to bring to this Court's attention the State's unique interests in this matter and how any final determination will impact the State. The State's interest in this matter is limited solely to the jurisdictional question presented.

The State has a vested interest in the divided opinion of the panel in this case which affirmed the Environmental Protection Agency's ("EPA") determination that the private land in question, which is owned by HRI in fee simple and outside of the boundaries of the Navajo Reservation, constitutes "Indian country" and is thus not subject to the State's jurisdiction. This Court identified the Churchrock Chapter as the community of reference citing *HRI, Inc v. EPA*, 198 F.3d 1224, 1248 (10th Cir. 2000) as the precedent it was compelled to follow. *Hydro Resources, Inc. v. U.S. E.P.A.*, 562 F.3rd 1249, 1261 (10th Cir. 2009). The Court goes on to state that the previous "*HRI* court was bound to apply *Watchman's* community of reference test absent en banc review." *Id.*, 562 F.3rd at 1262, citing *HRI, Inc*, 198 F.3d at 1249 and *Pittsburg & Midway Coal Co. v. Watchman*, 52 F.3d 1531 (10th Cir. 1995); *see also Id.*, 562 F.3rd at 1268.

The State owns land in the area at issue. The State owns both trust lands granted to the State by Congress to support its public education system and lands owned for other public purposes. More importantly, the State has a number of activities and programs occurring throughout the State near Indian reservations that are important and beneficial to the residents and entities located within those areas. Who has jurisdiction to operate those programs is of vital interest to the State. The State has an interest in understanding whether this Court believes the "community of reference test" from the case of *Pittsburgh & Midway Coal Mining Company v. Watchman* still applies notwithstanding the United States Supreme Court's ruling in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998) because jurisdictional disputes will arise from such a vague test. The State is concerned that the use of such a test will lead to jurisdictional confusion; tension between the State and Indian tribes; and further litigation because of the ambiguity involved in such a test.

It is important for the Court to consider the intergovernmental relationships between the State and Indian tribes when rendering a ruling in this case to ensure that the positive practices and policies of the State are not undermined or unduly disrupted by the Court's ruling. It is critical that any legal standard for determining "Indian Country" status does not increase the potential for future legal debates and

controversy due to confusing or unclear criteria. The State believes the panel's decision increases the potential for conflict between the State and Indian tribes.

The State has a strong interest in ensuring that the environment within the State's boundaries is protected – an interest shared with the Navajo Nation – and maintained at levels that the State has deemed to be suitable as a matter of law and policy. In fact, the State standards in many instances may be more protective than the federal standards that would be applied if this Court upholds EPA's determination.

This Court's decision, if left to stand, will trigger new disputes and litigation, to the detriment of cooperative, intergovernmental relationships that the State has developed with Indian tribes, as explained in detail in the State's *amicus curiae* brief filed originally. While resolving an outstanding jurisdictional question may appear to be the laudable goal, this Court should also consider all perspectives and interests involved and any corollary impacts such a ruling may have to the detriment of tribal-state cooperative efforts. It is critical that this Court's ruling minimizes the potential for future disputes and does not create or foster greater uncertainty and conflict that could disrupt these important government-to-government relationships.

If this Court's decision is allowed to stand, there will be pressure for both sides to resort to a defensive posture and forego positive cooperative arrangements. In addition, there will be costly jurisdictional battles.

ARGUMENT

The State asserts that *Venetie* provides an objective two-part test for defining a dependent Indian community, thus, defining Indian country: (1) the federal government must have set aside the land in question for the use of Indians as Indian land; and (2) federal agencies must superintend the Indian land in question. *Id.*, 522 U.S. at 527. The Supreme Court's holding leaves no room for the subjective "community of reference" inquiry that the panel conducted before applying the *Venetie* test.

The Supreme Court was clear in establishing a bright- line test for determining what properties can be considered Indian Country – it did not contemplate a subjective "threshold test," and it rejected the factors that the panel used to establish the Church Rock Chapter as the community of reference.

I. THE PANEL'S DECISION IN THIS CASE IS NOT IN ACCORD WITH THE UNITED STATES SUPREME COURT DECISION IN *VENETIE* AND WILL LEAD TO CONFLICTS, CONFUSION AND LITIGATION

At the heart of the legal debate in this case are the disparate views over the validity of the "community of reference" test from the *Watchman* case in a post-*Venetie* world.

The EPA's administrative determination in this case was the first attempt at using the "community of reference" test to determine the land status of Section 8, the land in question. The State has serious concerns regarding the application of the "community of reference" test because such a test does not survive the United States Supreme Court decision in *Venetie* and the use of such a test will only result in jurisdictional confusion and further litigation. In EPA's discussion, it appears that the test itself requires the finding of the "status of the area in question as a community" and "the relationship of the area in question to the surrounding area." These two descriptions are vague and do not provide the kind of clear, bright line rules that will help the State in determining its jurisdiction.

In some cases in rural New Mexico, the "nearest" community may be miles away from the land in question, or there may be multiple communities equidistant from the site of the activity. *Watchman*, 52 F.3d at 1543-44.

Other puzzling aspects of this test are the required examination of the infrastructure provided to the surrounding area of the "community." In many cases, there is often a blending of local, tribal, county, and State services. How does the State determine that despite this blending of services, that the Federal government, instead of the State, has "primary jurisdiction?" *Venetie*, 522 U.S. at 527, n.1. How does the State determine which government services should be

given ample weight in the analysis, whereas other services are given negligible weight, such as general federal social programs? *Venetie*, 522 U.S. at 534.

There also is the question of whether the fact the land is within the exterior boundaries of a reservation or a pueblo is a determining factor. Certainly it appeared to be a determining factor in this Court's most recent ruling applying the *Venetie* decision. *United States v. Arrieta*, 436 F.3d 1246, 1250 (10th Cir. 2006), *cert. denied* 547 U.S. 1185 (2006) (holding that county road was a "dependent Indian community" since the Pueblo held title to the land under the road and it was located within the exterior boundaries of the Pueblo).

II. THE PANEL'S DECISION CONFLICTS WITH NEW MEXICO CASE LAW

As pointed out by HRI and by the State in its original *amicus curiae* brief, the use of a community of reference test conflicts with the decisions of the New Mexico appellate courts. *State v. Frank*, 52 P.3d 404, 409 (2002) (noting that "the six-factor test that was rejected by the Supreme Court in *Venetie* used essentially the same factors as those in *Watchman*" and "[t]he *Venetie* two-prong test redirects 'our attention to land and its title and away from the more nebulous issue of community cohesiveness" and holding that in "light of the clear guidelines of the *Venetie* opinion, we decline to incorporate a community of reference inquiry into our case law."); *State v. Romero*, 142 P.3d 887, 891 (N.M. 2006), *cert. denied* 549 U.S. 1265 (2007) ("We adopted the *Venetie* analysis in *Frank*."); *State v.*

Quintana, 178 P.3d 823, 825 (N.M. Ct. App. 2006), *aff'd* 178 P.3d 820 (N.M. 2008) ("To determine whether there is a set-aside, we first look to the title of the land in question because the link between title and status as Indian country has been previously recognized by this Court"); (accident in question occurred on a state highway on land owned by the BLM in the checkerboard area, and therefore, not Indian Country); *State v. Romero*, 142 P.2d 887, 892 (2006) (applying the *Venetie* test without a community of reference standard given that incident on private fee land occurred within Pueblo boundaries and Pueblo lands were always set aside by Congress as Indian Country).

CONCLUSION

It is difficult for the State to operate and administer its programs in a consistent and complementary way when there are so many open questions and vague standards employed in the "community of reference" test employed by the panel in this case. The more specific, bright line, and concise the standards are, the greater the likelihood for fewer legal disputes and costly litigation. New Mexico requests this Court to rehear this matter, *en banc*, and provide the bright line standards for jurisdictional determinations.

CERTIFICATE OF COMPLIANCE

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

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,302 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospaced typeface using Microsoft Word 2003 in 14 pitch font, Times New Roman style.

3. The digital submission of this brief has been scanned for viruses with the most recent version of a commercial virus scanning program, E-Trust Management Suite r3, most recently updated August 10, 2009, and according to the program, is free from viruses.

Respectfully submitted,

Gary K. King, Attorney General

/s/ Christopher D. Coppin
Christopher D. Coppin
Special Assistant Attorney General
111 Lomas, NW Suite 300
Albuquerque, New Mexico 87102
505-222-9175
505-222-9183 (fax)

Justin Miller, Chief Counsel
Governor Bill Richardson
State Capitol, Suite 400
Santa Fe, New Mexico 87501
(505) 476-2236
(505) 476-2207 (fax)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, I caused and true and correct copy of the foregoing AMICUS CURIAE BRIEF OF THE STATE OF NEW MEXICO IN SUPPORT OF PETITION FOR REHEARING *EN BANC* to be served 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:

Marc D. Flink
Casie D. Collignon
Baker and Hostetler, LLP
303 East 17th Street, St. 1100
Denver, CO 80203

Jon J. Indall
Comeau, Maldegan, Templeman &
Indall, LLP
141 East Palace Avenue
Santa Fe, NM 87605

David A. Taylor
The Navajo Nation Department of Justice
P. O. drawer 2010
Window Rock, AZ 86515

Paul E. Frye
Frye Law Firm, P.C.
10400 Academy N.E., Suite 310
Albuquerque, NM 87111

Jill E. Grant
1401 K Street N.W., Suite 801
Washington, D.C. 20005

Anthony J. Thompson
Christopher S. Pugsley
Thompson & Simmons, PLLC
1225 – 19th St. NW, Suite 300
Washington, D.C. 20036

Robert W. Lawrence
Jonathan W. Rauchway
Constance L. Rogers
Davis Graham & Stubbs LLP
1550 – 17th Street, Suite 500
Denver, CO 80202

John C. Cruden
David A. Carson
Environment & Natural Resources Division
United States Department of Justice
1961 Stout St. – 8th Floor
Denver, CO 80294

Dated: August 10, 2009

/s/ Christopher D. Coppin
Christopher D. Coppin
Special Asst. Attorney General