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 SUPPLEMENTAL BRIEF FOR THE *EN BANC COURT*

IGNACIA S. MORENO
Assistant Attorney General
Environment and Natural Resources Division

DAVID A. CARSON
United States Department of Justice
Environment and Natural Resources Division
1961 Stout Street – 8th Floor
Denver, CO 80294
(303) 844-1349

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INTRODUCTION

This Court has long recognized that privately held land within the Executive Order ("EO") 709/744 area may be Indian country under 18 U.S.C. § 1151(b), and it has consistently held that a community-of-reference analysis should be conducted under 18 U.S.C. § 1151(b) when it is unclear whether particular lands are within a dependent Indian community. The Court has also consistently held that the Supreme Court's decision in Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520 (1998) ("Venetie"), does not abrogate this Court's community-of-reference analysis.

As set forth below, Hydro Resources, Inc. ("HRI") provides no basis for this Court to reverse this well-established case law. See Payne v. Tennessee, 501 U.S. 808, 827 (1991) (*stare decisis* is the preferred course). This is especially so here because the Safe Drinking Water Act ("SDWA") does not even refer to "Indian country" or 18 U.S.C. § 1151(b). Rather, EPA incorporated 18 U.S.C. § 1151's definition of "Indian country" into its regulations for the sake of administrative convenience. HRI ignores this, advocating a parcel-by-parcel approach for determining the existence of a dependent Indian community that is not required by either the SDWA or Venetie, and that would read the term "community" out of 18 U.S.C. § 1151(b), and result in checkerboarded jurisdiction within dependent Indian communities. This Court should reject HRI's flawed reasoning, affirm its community-of-reference analysis and, consistent with its well-established case law and that of the Supreme Court of New Mexico, it should hold that HRI's section 8 fee land is located within a dependent Indian community and, thus, is Indian country under 18 U.S.C. § 1151(b) for purposes of the SDWA Underground Injection Control ("UIC")

Program. Therefore, the Court should not vacate or modify the Panel's opinion in this case, which did not determine the Navajo Nation's authority, and which 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/]

ISSUES PRESENTED

1. Whether Venetie, which concerned only 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 analysis as a first step in determining where to apply the federal set-aside and superintendence test 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.

3. Whether the *en banc* Court should modify the Panel's holding in this case, when the Panel majority correctly limited its holding to the facts of this case, which concerns only EPA's authority under the SDWA.

[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. 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 issue is not ripe for consideration as the Navajo Nation has not made such a request with respect to the Section 8 land, or for the regulation of any Class 3 wells under the SDWA.

ARGUMENT

I. This Court Has Long Recognized That Privately-Held Land Within The EO 709/744 Area May Be Indian Country Under 18 U.S.C. § 1151(b).

In Pittsburgh & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387 (10th Cir. 1990) ("Yazzie"), this Court thoroughly reviewed the historical background of the EO 709/744 area, which includes the Church Rock Chapter. EOs 709 and 744 withdrew 1.9 million acres of land in New Mexico from settlement and added it to the Navajo Reservation. Id. at 1390-91. After an unfavorable political response to EOs 709 and 744, Congress passed a resolution, section 25 of the Act of May 29, 1908, ch. 216, 35 Stat. 444, 457, calling for the return of unallotted lands in the EO 709/744 area to the public domain, and this was accomplished by EO 1000 in 1908, and EO 1284 in 1911. Id. at 1391-922.[2/]

In Yazzie, the Court held that section 25 of the Act of May 29, 1908, together with EOs 1000 and 1284, had the effect of diminishing or terminating the EO 709/744 area as part of the Navajo Reservation. Id. at 1419, 1422. However, the Court remanded the case to the district court to determine whether the mine site there in question was Indian country under 18 U.S.C. §§ 1151(b) or (c). Id. at 1422. Thus, the Court recognized that

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[2/] The Department of the Interior ("DOI") determined that the remaining allotted land was insufficient to protect the Navajo's lifestyle, which required large areas of land, along with sufficient watering holes, for grazing sheep. Id. at 1413 n.34. Therefore, DOI set aside and consolidated as much land as possible in the EO 709/744 area for the Navajos through the addition of trust lands and through leases to individual Navajos of land controlled by the Bureau of Land Management. Id. at 1419.

termination of the EO 709/744 area as part of the Navajo Reservation does not preclude any portion of the area from being Indian country under 18 U.S.C. § 1151(b). See id.

The jurisdictional status of the mine site at issue in Yazzie again reached the Court in Pittsburg & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531 (10th Cir. 1995) ("Watchman"), where the Court recognized that State-owned and privately-owned land may be Indian country due to the land's location within a dependent Indian community under 18 U.S.C. § 1151(b). In Watchman, the Court determined that non-Indian private parties held title to 40 percent, and that the State of New Mexico held title to less than 0.5 percent, of the mine site in question. 52 F.3d at 1534. The trust allotments constituting 47 percent of the site were Indian country under 18 U.S.C. § 1151(c). Id. at 1541-42. The Court remanded the matter to the district court for a determination of whether the remainder of the site, including the privately-held and State-held lands, is Indian country due to its location within a dependent Indian community under 18 U.S.C. § 1151(b).[3/]

In HRI v. EPA, 198 F.3d 1224, 1231-32, 1254 (10th Cir. 2000) ("HRI I"), this Court explicitly recognized that HRI's Section 8 land is within the EO 709/744 area, and, consistent with Yazzie and Watchman, it remanded the matter to EPA for a determination of whether the Section 8 land is Indian country under 18 U.S.C. § 1151(b). Thus, the law in this Circuit firmly establishes that privately-held land within the EO 709/744 area may

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[3/] Because it was uncertain whether the mine site was within a dependent Indian community, the Court directed the district court to apply a community-of-reference analysis as a first step in determining the issue. Id. at 1543-45.

be Indian country due to its location within a dependent Indian community under 18 U.S.C. § 1151(b), notwithstanding the fact that the EO 709/744 area was diminished or terminated as part of the formal Navajo Reservation and that the unallotted land in the area was returned to the public domain. Id. at 1251 ("We decide that Yazzie and Watchman do not foreclose the existence of Indian country within the EO 709/744 area . . . ."). The panel majority in this case correctly applied this firmly-established law to uphold EPA's land status determination with respect to the Section 8 land.

HRI is therefore incorrect in its assertion that the Section 8 land may not be Indian country under 18 U.S.C. § 1151(b) because it is fee land within the EO 709/744 area, an argument it now makes for the first time. HRI's Supp. Br. at 4-5, 15-16. Congress has provided a "broad and flexible definition [of Indian country under 18 U.S.C. § 1151] to delineate federal jurisdiction." Tooisgah v. United States, 186 F.2d 93, 99 (10th Cir. 1951). See also United States v. Burnett, 777 F.2d 593, 596 (10th Cir. 1985) (same). The definition includes dependent Indian communities as a separate category from reservations and allotments. 18 U.S.C. § 1151; Venetie, 522 U.S. at 527 (Dependent Indian communities are a category of lands that are "neither reservations nor allotments."). Thus, the fact that the Section 8 land is located within the EO 709/744 area and not within a reservation under 18 U.S.C. § 1151(a), does not mean that it may not be Indian country due to its location within a dependent Indian community under 18 U.S.C. § 1151(b). Executive Orders 1000 and 1284 merely made some land available for possible ownership by non-Indians. That land is Indian country under 18 U.S.C. §

1151(b) if it is located within a dependent Indian community. See New Mexico v. Romero, 142 P.3d 887, 893 (N.M. 2006) ("Romero"), 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").

II. Venetie Resulted From The Overarching Effect Of ANCSA, And It Does Not Require A Parcel-By-Parcel Approach.

HRI and its amici argue that their so-called "bright line" parcel-by-parcel approach is required by Venetie. While Venetie clarified that the existence of dependent Indian communities is to be determined by the federal set-aside and superintendence test, it does not require that this Court reverse its well-established case law and apply that test on a parcel-by-parcel basis.

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.[4] 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

[4] In ANCSA, Congress extinguished all aboriginal claims to most Alaska land in 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.

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.[5/] Thus, the Court's ultimate holding that *none* of the Tribal Government's ANSCA lands were Indian country under 18 U.S.C. § 1151(b) was the result of congressional intent in ANCSA to "end the sort of federal supervision over Indian affairs that had previously

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[5/] Unlike this Court's community-of-reference analysis, which, as discussed below, merely determines *where to apply* the federal set-aside and superintendence tests, the Ninth Circuit subsumed the federal set-aside and superintendence test into a broad, textured, six factor balancing analysis under which "all six factors . . . [were] construed to fit within the two fundamental elements." Alaska v. Native Village of Venetie Tribal Gov't, 101 F.3d 1286, 1293-94 (9th Cir. 1996). The Supreme Court determined that the Ninth Circuit's balancing test was impermissible because it "reduced the federal set-aside and superintendence requirements to mere considerations." Venetie, 522 U.S. at 531 n.7.

marked federal Indian policy." Id. at 523-24.[6]

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

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[6] The United Nuclear Corporation incorrectly asserts that Venetie explicitly holds that dependent Indian communities may only consist of "Indian lands," and not fee lands held by non-Indians. UNC's *Amicus Curiae* Br. at 10-12. Because Venetie did not concern non-Indian fee land, the Supreme Court had no opportunity to address whether, and did not hold that such land may not be Indian country under 18 U.S.C. § 1151(b). The Court did not define the term "Indian lands" in the sentence quoted by UNC, and it likely there referred to the predominant character of the lands. See Venetie, 522 U.S. at 527. In that regard, "[n]o one is disputing the fact that the [EO 709/744] area has remained predominantly Navajo in character throughout the entire century." Yazzie, 909 F.2d at 1419.

country status of one school, the Supreme Court framed the issue as whether *any* of the 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, Venetie does not require a parcel-by-parcel approach. 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).

III. The Parcel-By-Parcel Approach Advocated By HRI And Its Amici Is Contrary To Both Congressional Intent In 18 U.S.C. § 1151(b) And Sound Anti-Checkerboarding Principles.

HRI and its amici's approach of applying the federal set-aside and superintendence test on a parcel-by-parcel basis would necessarily result in checkerboarded jurisdiction within dependent Indian communities containing fee land because, by definition, a single parcel of fee land could never meet the test when viewed in isolation. While this may be a "bright line," it is one that should not be drawn because it is contrary to congressional intent in 18 U.S.C. § 1151(b) and the sound anti-checkerboarding principles that gave rise to the provision. This Court's existing approach, which applies the federal set-aside and superintendence test to the entire Indian community, *is* consistent with both congressional intent and sound anti-checkerboarding principles and it should be retained. Arrieta, 436 F.3d at 1250.

Congress has broadly defined Indian country in 18 U.S.C. § 1151 to include both formal and informal reservations under 18 U.S.C. § 1151(a), all dependent Indian communities under 18 U.S.C. § 1151(b), and Indian allotments under 18 U.S.C. § 1151(c). 18 U.S.C. § 1151; HRI I, 198 F.3d at 1250-51.[7] Informal reservations consist of lands held in trust by the United States for an Indian tribe. Id. at 1249. Therefore, dependent Indian *communities* may consist of something *other* than just trust lands and allotments, as there would otherwise be no need for the dependent Indian community prong of section 1151. Simply stated, since trust lands fall within the section 1151(a) definition of "reservation" and allotments are covered by section 1151(c), under HRI's reading, section 1151(b) would be superfluous. The Supreme Court echoed this fact in Venetie, stating that dependent Indian communities are "neither reservations nor allotments." Venetie, 522 U.S. at 527.[8] Dependent Indian communities logically include

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[7] When it enacted 18 U.S.C. § 1151(b), Congress codified the requirements for federal set-aside and superintendence for determining the existence of a dependent Indian community that had evolved from the Supreme Court's decisions in United States v. Sandoval, 231 U.S. 28 (1931), in which the Court held that pueblos are dependent Indian communities, and United States v. McGowan, 302 U.S. 535 (1938), in which the Court held that the Reno Indian Colony is a dependent Indian community. Venetie, 522 U.S. at 528-31. Congress clearly intended to include more than just pueblos and Indian colonies under 18 U.S.C. § 1151(b), because Congress there included "*all* dependent Indian communities." 18 U.S.C. § 1151(b) (emphasis added).

[8] In United States v. Roberts, 185 F.3d 1125, 1133 (10th Cir. 1999) ("Roberts"), this Court found that the relationship between informal reservations and dependent Indian communities is not entirely clear, but that both dependent Indian communities and informal reservations continue to exist under 18 U.S.C. § 1151 after Venetie. Because trust lands and allotted lands meet the federal set-aside and superintendence test under

(continued...)

areas of land with distinct boundaries, the majority of which are trust lands and/or allotments, but which also may include federal lands, State lands and fee lands. Therefore, including fee lands within the boundaries of dependent Indian communities as Indian country under 18 U.S.C. § 1151(b) is consistent with the broad congressional definition of the term "Indian country" in 18 U.S.C. § 1151. It also gives meaning to the term "community" in 18 U.S.C. § 1151(b), which would otherwise be superfluous.

The term "community" denotes something broader than a single parcel of land. See Watchman, 52 F.3d at 1544 (discussing broad meaning of "community"); Romero, 142 P.3d at 893 (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, § 3.04[2][c][iii] ("Cohen") (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

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[8/](...continued)
Venetie, such lands may help to form a dependent Indian community. Thus, the Supreme Court's statement that dependent Indian communities are neither reservations nor allotments should be read to mean that dependent Indian communities are a separate category that may consist of *more* than just trust lands and allotments.

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 on the face of 18 U.S.C. § 1151.

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) ("Seymour"); 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"); Cohen at § 304[2][c][iii] (limiting dependent Indian communities to

particular parcels of land that individually meet the federal set-aside and superintendence test reads the word "communities" out of the statute and increases the possibility of checkerboard jurisdiction).[9]

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 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 for purposes of the SDWA UIC program because groundwater aquifers are not delineated by landownership boundaries. While, as explained *infra* at 29-30, the Panel's decision is correctly limited to the facts of this case, which concerns only EPA's authority under the SDWA, it is also very important to avoid checkerboarded jurisdiction for purposes of federal criminal

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[9] The dissent asserted that nothing in 18 U.S.C. § 1151 suggests that Congress intended to avoid checkerboarded 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 checkerboarded jurisdiction on reservations but to allow it in dependent Indian communities. See id.

jurisdiction as the Supreme Court long-ago recognized in Seymour. 368 U.S. at 358. See also Hilderbrand v. Taylor, 327 F.2d at 207. In addition to the problem of law enforcement officers having to "search tract books in order to determine whether criminal jurisdiction [exists] over each particular offense," Seymour, 368 U.S. at 358, checkerboarded jurisdiction also makes criminal offenses more difficult to prosecute. Violent crime often involves more than one act in more than one location and a crime could easily occur on both fee land and allotted lands within a dependent Indian community. It would be inherently more difficult to prosecute violent crime in the already checkerboarded EO 709/744 area if criminal jurisdiction is further checkerboarded within its dependent Indian communities. See Garcia v. Gutierrez, 2009 N.M. Lexis 550, *43 (Aug. 26, 2009) ("In the criminal context, Section 1151's 'Indian country' designation provides necessary homogenizing force, creating uniformity out of the sometimes chaotic jumble of land titles on, near, and within tribal boundaries."). Therefore, the Court should reject HRI and the amici's approach, which would result in unmanageable checkerboarded jurisdiction within dependent Indian communities.

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

HRI and its amici incorrectly assert that Venetie abrogates the Watchman community-of-reference analysis. As the Court discussed in HRI I, 198 F.3d at 1249, 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.

A community-of-reference analysis would serve no purpose with respect to the ANCSA lands at issue in Venetie because ANCSA *entirely* extinguished the Indian country status of *all* of the Native Village of Venetie's land. The jurisdictional issues in the EO 709/744 area are fundamentally more complicated than those at issue in Venetie. See New Mexico v. Frank, 52 P.3d 404, 410 (N.M. 2002)("Frank") (Minzner, J. dissenting) (contrasting Indian country in New Mexico with that of Alaska). The EO 709/744 area contains an interspersed mix of trust lands, allotments, Navajo fee lands, federal lands, private fee lands and State-owned lands. Thus, unlike the situation examined in Venetie, it may not be clear whether any particular lands within the EO 709/744 area are within a dependent Indian community under 18 U.S.C. § 1151(b). This Court's community-of-reference analysis makes sense in the EO 709/744 area because it provides an appropriate analytical method for determining whether a particular parcel of land is properly considered to be within an Indian community.[10/] If it is, then under

[10/] Other than their parcel-by-parcel approach, which is contrary to Congress's intent to (continued...)

Watchman, Arrieta, HRI I and HRI II, the Venetie test is applied to the entire Indian community. The Court should therefore reject HRI and its amici's request that the Court abandon its well-established community-of-reference analysis.[11/]

Moreover, 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* . . . ."). This Court's test is thus entirely *consistent* with Venetie, as the Supreme Court there did not invalidate all considerations other than set-aside and superintendence, but instead invalidated only a test that made those other factors *equal in importance to* the set-aside and superintendence factors. 522 U.S. at 531 & n.7. The community-of-reference factors are

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[10/](...continued)
include entire dependent Indian communities within 18 U.S.C. § 1151(b), HRI and its amici offer no alternative to the community-of-reference analysis.

[11/] In some cases, the appropriate community of reference will not be in question and will not require discussion. Such was the case in Arrieta, which concerned a State road within an indisputable dependent Indian community, the Pojoaque Pueblo. 436 F.3d at 1249.

properly used for the limited purpose of delineating the bounds of the community to be examined under the set-aside and superintendence test.

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. Unlike the Ninth Circuit's expansive balancing test, this Court's community of reference analysis is applied as a *prerequisite* for delineating the bounds of the community to be examined under the set-aside and superintendence test. See United States v. Adair, 111 F.3d 770, 774-75 (10th Cir. 1997) (finding area in question is not a community and therefore not the community of reference). Thus, this Court does not balance any factors against one another in such a way as to reduce the federal set-aside and superintendence requirements to mere considerations. See Venetie, 522 U.S. at 531 n.7. Rather, under this Court's post-Venetie approach, 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.

V. Interests Of Uniformity Do Not Warrant This Court Reversing Its Well-Established Case Law.

Contrary to HRI's argument, the doctrine of "uniformity" does not counsel in favor of this Court abandoning its well-established community-of-reference analysis. HRI's Supp. Br. at 8-10. The doctrine of uniformity has been applied to modify final judgments in order to avoid different results in currently pending cases due to an

intervening ruling by a higher court that is contrary to the ruling in the otherwise final case. See American Iron and Steel Inst. v. EPA, 560 F.2d 589, 598 (3rd Cir. 1977) (reasoning that interests of uniformity support recalling the mandate where the prior ruling was in conflict with a subsequent Supreme Court case and also with those of other courts of appeals). In Ute Indian Tribe v. Utah, 114 F.3d 1513, 1525-26 (10th Cir. 1997), cited by HRI, the doctrines of finality and uniformity were at tension because a final decision of this Court was in conflict with a subsequent decision of the Supreme Court -- resulting from a conflicting state-court decision below -- with respect to whether the Uintah Valley Reservation had been diminished. This Court had held that no part of the Reservation had been diminished, while the Supreme Court held that a portion of the Reservation had been diminished. Id. at 1518-19 This Court applied the doctrine of uniformity in a limited fashion to modify its previous ruling to the extent it expressly conflicted with the Supreme Court's subsequent holding. Id. 1525-28. In doing so, the Court discussed the practical problems of having a non-uniform system of jurisdiction on the Uintah Valley Reservation due to the conflicting rulings. Id. at 1526.

As explained above, the Supreme Court has not addressed the community-of-reference issue, let alone held that a community-of-reference analysis may not be applied as a first step in determining the existence of a dependent Indian community under 18 U.S.C. § 1151(b). Nor are there any conflicting rulings with respect to the status of the Church Rock Chapter or the Section 8 land as Indian country. Thus, this case is far removed from the situation existing in Ute Indian Tribe v. Utah. Moreover, uniformity

already exists in this Circuit with respect to the community-of-reference analysis because the district courts within this Circuit are bound to apply the analysis when it is necessary to do so in accordance with this Court's precedents, and this Court stands as a check on any misapplication of the analysis in any particular case.[12/]

While the New Mexico Supreme Court has determined not to follow the community-of-reference analysis, this was due to that Court's apparent, and incorrect, determination that Venetie precludes application of the analysis. See Frank, 52 P.3d at 409. As the dissent in Frank points out, the court unwisely decided to reject this Court's determination in HRI I, which the majority in Frank incorrectly described as *dicta*, that Venetie does not preclude a community-of-reference analysis as a first step in determining the existence of a dependent Indian community. Id. at 410 (Minzner, J. dissenting).[13/] The interests of uniformity hardly counsel in favor of changing the well-established law in this Circuit simply because the New Mexico Supreme Court incorrectly read Venetie to preclude application of this Court's community-of-reference analysis and incorrectly read this Court's contrary holding in HRI I as *dicta*.

[12/] The doctrine of uniformity does *not* apply with respect to conflicts in the varying circuits, where conflicts "'are generally accepted and in some ways even welcomed.'" Ute Indian Tribe v. Utah, 114 F.3d at 1525 (quoting United States v. Stauffer Chem. Co., 464 U.S. 165, 177 (1984) (White, J. concurring).

[13/] The Court's statement in HRI I to the effect that Venetie does not preclude a community-of-reference analysis was made in rejecting HRI's argument that the Section 8 land is conclusively not Indian country under Venetie, and it is therefore not *dicta*. HRI I, 198 F.3d at 1250. See also HRI II, 562 F.3d at 1262 (determining that the law in this Circuit is settled that the community-of-reference analysis survives Venetie).

VI. Interests Of Uniformity Counsel Against The Parcel-By-Parcel Approach Advocated By HRI And Its Amici.

To the extent the interests of uniformity apply in this case, those interests counsel *against* HRI and its amici's parcel-by-parcel approach because that approach is directly contrary to the New Mexico Supreme Court's holding in Romero that fee lands within a pueblo are Indian country. Romero, 142 P.3d at 893; HRI's Supp. Br. at 20 (arguing that fee land within a pueblo is not Indian country if title is controlling). While dependent Indian communities are not reservations or allotments under Venetie, 522 U.S. at 527, as the Romero court explained, dependent Indian communities are sufficiently similar to reservations to merit identical treatment with respect to federal jurisdiction over fee lands within dependent Indian communities. "18 U.S.C. §§ 1151(a) and (b) employ a functional definition focusing on the federal purpose in recognizing or establishing a reasonably distinct location for the residence of tribal Indians under federal protection." Romero, 142 P.3d at 893.[14/] Therefore, the best way to harmonize this Court's existing case law with that of the New Mexico Supreme Court is to hold that fee land may be

[14/] The amendments to the Pueblo Lands Act make clear that federal criminal jurisdiction within pueblos exists when the crime is described in chapter 53 of title 18 U.S.C., and is "by or against an Indian . . . or any Indian-owned entity, or that involves any Indian property or interest." Pub. L. No. 109-133, 119 Stat. 2573 (Dec. 20, 2005). The amendments did not apply in Romero, 142 P.3d at 888 n.1. Nor did they apply in Arrieta, 436 F.3d at 1251. If this Court were to adopt HRI's parcel-by-parcel approach, then the potential for conflict would continue to exist between state law and federal law in New Mexico with respect to questions of civil jurisdiction within Pueblos under 18 U.S.C. § 1151(b), and with respect to all jurisdictional issues respecting other dependent Indian communities in New Mexico.

Indian country if located within a dependent Indian community, and that a community-of-reference analysis should be used where it is unclear whether a particular parcel of land is within a dependent Indian community.[15/]

VII. This Court And The Lower Courts Within This Circuit Are Quite Capable Of Applying This Court's Community-Of-Reference Analysis.

HRI asserts that this Court's community-of-reference analysis is "subjective, unpredictable, inconsistent, and result-oriented." HRI's Supp. Br. at 13.[16/] However, while determination of the community-of-reference for purposes of 18 U.S.C. § 1151(b) does not appear to have arisen very frequently in this Circuit, this Court and the district courts within this Circuit have capably applied the community-of-reference analysis when it has been necessary to do so. See United States v. Adair, 111 F.3d at 774-75 (finding area in question is not a community and therefore not the community of reference); United States v. M.C., 311 F. Supp.2d 1281, 1289-98 (D.N.M. 2004) (determining that Fort Wingate Indian School land was the appropriate community of reference). The Panel majority faithfully reviewed EPA's application of the community-of-reference

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[15/] HRI's argument that Navajo chapters are not the same as pueblos is beside the point. HRI's Supp. Br. at 16-20. Neither EPA nor the Panel majority determined that Navajo chapters have the same historical underpinnings as pueblos. Indian colonies are also not pueblos, and were not established by land grant, but they *are* dependent Indian communities under 18 U.S.C. § 1151(b). United States v. McGowan, 302 U.S. at 538-39; Venetie, 522 U.S. at 529-30.

[16/] Nothing could be more result-oriented than HRI and its amici's approach, under which no fee land within a dependent Indian community could ever be Indian country under 18 U.S.C. § 1151(b).

analysis here. HRI II, 562 F.3d at 1262-65.

The community-of-reference analysis is no different than many analyses the courts are required to apply to particular factual situations, and the Court should not abandon the analysis in favor of HRI's legally incorrect parcel-by-parcel approach merely because that approach might be easier to apply. Rather, the Court must give meaning to the term "community" in 18 U.S.C. § 1151(b), and the community-of-reference analysis does so, while HRI's parcel-by-parcel approach does not. See Holder v. Hall, 512 U.S. 874, 966 (1994) ("Our work would certainly be much easier if every case could be resolved by consulting a dictionary, but when Congress has legislated in general terms, judges may not invoke judicial modesty to avoid difficult questions.") (Stevens, J. writing separately).

VIII. No Conflicts Exist Which Should Compel This Court To Reverse Its Well-Established Case Law.

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. As discussed below, none of HRI's cases warrants this Court reversing its well-established case law.

HRI incorrectly asserts that the Panel's decision here conflicts with "the implicit reasoning" of this Court's decisions in Roberts, 185 F.3d 1125, because the Court there 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 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. HRI asserts that the case was decided *solely* on the basis that the Pojoaque Pueblo held title to the land underlying Shady Lane. This is not so. In rejecting Arrieta's contention that Shady Lane could not meet the federal superintendence test because it is a county road, the Court specifically stated 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). Therefore, HRI

is incorrect that title was the sole criterion in Arrieta and that the case is consistent only with the parcel-by-parcel approach it espouses. There also 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. Indeed, this Court's case law is best harmonized by holding that the community-of-reference analysis survives Venetie (as do informal reservations under Roberts), but that it only need be applied when it is unclear whether any particular area is within a dependent Indian community.

HRI relies on two decisions from other courts of appeals, including Blunk v. Arizona Dep't of Transportation, 177 F.3d 879 (9th Cir. 1999). That case 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 this Court to reverse the established law in this Circuit providing for a community-of-reference analysis in appropriate cases under 18 U.S.C. § 1151(b).

Nor does the Eight Circuit's recent decision in Yankton Sioux Tribe v. Podhradsky, 577 F.3d 951, 971 (8th Cir. 2009), provide that a community-of-reference analysis may not be used as a first step in determining the existence of a dependent Indian community under 18 U.S.C. § 1151(b). The court there held that 174.57 acres of miscellaneous land held in trust by the United States for the Yankton Sioux Tribe were Indian country under 18 U.S.C. § 1151(b). The court did not even discuss a community-of-reference analysis, let alone hold that such an analysis is not permitted under 18 U.S.C. § 1151(b). Moreover, the trust lands at issue there constitute an informal reservation under 18 U.S.C. § 1151(a). See HRI I, 198 F.3d at 1254 ("[L]ands held in trust by the United States for the Tribes are Indian Country within the meaning of § 1151(a).") (internal quotation marks omitted). Thus, the case is not especially relevant here.[17/]

[17/] The lower federal court decisions HRI relies upon do not establish precedent and are therefore not a sufficient basis for this Court to overturn its well-established case law. 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 land

(continued...)

The New Mexico Supreme Court's decisions in Frank and Romero, are discussed above. In Frank, 52 P.3d at 409, the Supreme Court of New Mexico incorrectly determined not to apply a community-of-reference analysis after Venetie. In Romero, 142 P.3d at 896, the court correctly held that private fee lands within a pueblo 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. As discussed above, this Court should reject Frank and agree with Romero.

New Mexico v. Quintana, 178 P.3d 820, 821 (N.M. 2008), concerned a State road built on Forest Service land that was not within the boundary of any pueblo, but rather formed the border between two pueblos. The court decided not to apply a community-of-reference analysis consistent with its previous decision in Frank. Id. As shown above, Frank was wrongly decided with respect to the community-of-reference analysis. Quintana adds nothing new to the discussion. Moreover, a community-of-reference analysis was arguably not necessary in Quintana because the road was clearly not within

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[17/](...continued)
purchased by an Indian Tribe was not Indian country prior to being placed into trust by DOI.

HRI's state court cases outside of New Mexico were decided on their own unique facts and are outside of this Circuit. 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); 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).

the borders of either pueblo.

Garcia v. Gutierrez, 2009 NM Lexis 550, * 22, * 33 (Aug. 26, 2009), affirmed Romero's holding that fee lands within pueblos are Indian country under 18 U.S.C. § 1151(b). The court held that the fee lands at issue are not part of the Pojoaque Pueblo for purposes of being the "home state" within the meaning of Uniform Child-Custody Jurisdiction and Enforcement Act, N.M. Stat. Ann. §§ 40-10A-101 - 403 (2001), which concerned whether the Pueblo courts would have exclusive jurisdiction over child custody disputes involving non-members on fee lands. Id. HRI cites Garcia v. Gutierrez, for the court's reference to its decision in Romero as concluding that the Pueblo Lands Act did not provide compelling evidence of congressional intent to change the Indian country status of lands within pueblos that became fee lands under the Act. HRI's Supp. Br. at 18. However, the court specifically noted that title carries very little weight under 18 U.S.C. § 1151(b), especially for purposes of criminal jurisdiction where checkerboarded jurisdiction is an overarching concern. 2009 N.M. Lexis 550 at * 43. Thus, Gutierrez supports federal jurisdiction over HRI's Section 8 land under 18 U.S.C. § 1151(b), which seeks to avoid checkerboarded jurisdiction by defining Indian country to include entire dependent Indian communities.

IX. HRI's Fact-Specific Arguments Are Not Before The *En Banc* Court And Are Nonetheless Incorrect.

HRI attempts to place before the *en banc* Court fact-specific arguments regarding the application of the community-of-reference analysis and the federal set-aside and

superintendence test in this case. HRI's Supp. Br. at 6-7, 28-30. However, in its August 24, 2009, Order granting *en banc* review, the Court specifically limited the briefing before the *en banc* Court to only those "issues raised in the petition for rehearing." (Doc. 01018260221 at 2). HRI did not raise these fact-specific issues in its petition for rehearing and the issues are therefore not properly before the full Court. See Petitioner's Petition for Rehearing *En Banc*. Nor would such fact-specific issues be a sufficient basis for *en banc* review in the first place. See Fed. R. App. P. 35. The *en banc* Court should therefore not reach HRI's fact-specific issues.

Even if the Court considers the issues, however, it should not modify the Panel majority's decision. The Panel majority correctly applied the community-of-reference analysis and the federal set-aside and superintendence test in this case. HRI II, 562 F.3d 1262-68. See also EPA's Merits Br. at 21-43[18/] The fact that the dissent disagreed that the Church Rock Chapter is the appropriate community of reference only underscores the need for a community-of-reference analysis when it is not clear if a particular parcel of

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[18/] In the background section of its supplemental brief, HRI's argues that Navajo Chapter boundaries are determined solely by the Navajo Nation. HRI's Supp. Br. at 6-7. However, in 1927, the Bureau of Indian Affairs began the development of Navajo Chapters as "local community organizations." HRI's App. at 39 (Navajo Yearbook (1958) at 191). This was done in order to better facilitate communications between the federal government and the Indians living within those communities. Id. On August 12, 1995, the Secretary of the Interior explicitly approved the 1955 Navajo Tribal Resolution that certified the various Navajo Chapters. HRI's App. at 77 (Navajo Political Process (1970) at 40). As the Panel majority correctly determined, the federal government set aside the overwhelming majority of lands within the Church Rock Chapter for the Navajos. HRI II, 562 F.3d at 1266-67 & n.18. The Church Rock Chapter clearly meets the federal set-aside requirement.

land is within a dependent Indian community.[19/]

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

EPA has the authority to determine the jurisdictional status of lands claimed to be Indian country for purposes of administering the SDWA UIC program. 42 U.S.C. §§ 300h-1(e), 300j-11. The SDWA does not even use the terms "Indian country" or "dependent Indian community," let alone require that EPA use 18 U.S.C. § 1151 to define the scope of federal regulatory authority for the UIC program. Rather, 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 &

[19/] The dissent would artificially limit the community of reference to the immediate area surrounding the Church Rock Chapter House in disregard of the Navajo in the surrounding area who engage in traditional Navajo grazing practices. See HRI II, 562 F.3d at 1269-70 (Frizzell, J. dissenting). 18 U.S.C. § 1151(b) includes *all* dependent *Indian* communities, and the Navajo people's traditional way of life should be taken into account when delineating the community of reference.

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 . . . ."). Because EPA purports only to be interpreting its jurisdiction under the SDWA, which does not even refer to 18 U.S.C. § 1151, this case is both limited and unique, and the full Court should not vacate or modify the Panel's opinion.[20/]

CONCLUSION

For all these reasons, the *en banc* Court should affirm its community-of-reference analysis and it should neither vacate nor otherwise modify the Panel's opinion.

[20/] If it were to vacate the Panel's decision, then the full Court should deny HRI's petition on standing grounds. See EPA's Merits Brief at 15-20.

Respectfully submitted,

IGNACIA S. MORENO
Assistant Attorney General
Environment and Natural Resources Division

s/David A. Carson
DAVID A. CARSON
United States Department of Justice
Environment and Natural Resources Division
1961 Stout Street, 8th Floor
Denver, Colorado 80294
(303) 844-1349

OF COUNSEL:

Joseph Edgell
Anthony F. Guadagno
Office of General Counsel
U.S. EPA
Washington, DC

Vali Frank
Office of Regional Counsel
U.S. EPA Region 9
San Francisco, CA

Date: November 19, 2009.

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
David A. Carson

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 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 Supplemental Brief For The *En Banc* Court 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
Benjamin D. Pergament
Baker and Hostetler, LLP
303 East 17th Avenue, Suite 1100
Denver, Colorado 80203

Jon J. Indall
Comeau, Maldegen, Templeman &
Indall, LLP
141 East Palace Avenue
Santa Fe, New Mexico 87504

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

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

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

Gary K. King
Christopher D. Coppin
Office of the Attorney General
111 Lomas, NW Suite 300
Albuquerque, New Mexico 87102

Justin Miller, Chief Counsel
Office of the Governor
State Capitol, Suite 490
Santa Fe, New Mexico 87501

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

Robert W. Lawrence
Jonathan W. Rauchway
Constance L. Rogers
Davis Graham & Stubbs LLP
1550 Seventeenth Street, Suite 500
Denver Colorado 80202

Mark L. Shurtleff
Utah Attorney General
Utah State Capitol - Suite 230
P.O. Box 14230
Salt Lake City, Utah 84114-2320

John W. Suthers
Attorney General of Colorado
1525 Sherman St., 7th Floor
Denver, Colorado 80203

Steve Six
Attorney General of Kansas
120 SW 10th Ave., 2nd Floor
Topeka, Kansas 66612

Bruce A. Salzburg
Attorney General of Wyoming
123 Capitol Building
200 W. 24th Street
Cheyenne, Wyoming 82002

Date: November 19, 2009

s/David A. Carson
David A. Carson