Appeal No. 07-9506

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

HYDRO RESOURCES, INC.,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

NAVAJO NATION,

Intervenor.

On Petition for Rehearing *En Banc* of *Hydro Resources, Inc. v. United States Environmental Protection Agency,* 562 F.3d 1249 (10th Cir. 2009)
Review of a Final Order of the
United States Environmental Protection Agency
Land Status Determination
February 6, 2007

PETITIONER'S REPLY BRIEF RE REHEARING *EN BANC*

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INTRODUCTION

It is a doctrinal principle of Indian law that only Congress has the power to confer or divest "Indian country" status on land - neither an administrative agency, an Indian tribe, nor any court has that power.[1] The EPA, the Navajo Nation ("NN"), the American Indian Law Professors ("AILP") and the Pueblos of Santa Clara, Sandia, Isleta and Zia (together "*amici* Pueblos") each cite to cases that support this bedrock principle. Consistent with that principle, *Venetie* requires that land "***must*** have been set-aside" and "***must*** be under federal superintendence" for it to be found that Congress intended to confer Indian country status on that land under 18 U.S.C. § 1151(b) ("§1151(b)") – i.e., for it to be ensured that the land is occupied by a "dependent Indian community." *Venetie*, 522 U.S. at 527 (emphasis added).

Despite this foundational principle, the EPA, the Navajo Nation, the AILP and the *amici* Pueblos attempt to support, not under *Venetie*, but under a ***hybrid*** *Watchman*[2]*/Venetie* test, a determination that HRI's Section 8 land is Indian country. They do so based solely on the fact that almost half a century after Congress terminated

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[1] *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 531 n.6 (1998) ("*Venetie*") ("The federal set-aside requirement … reflects the fact that …some explicit action by Congress (or the Executive, acting under delegated authority) must be taken to create or to recognize Indian country."); *Hagen v. Utah*, 510 U.S. 399, 414 (1994); *Solem v. Bartlett,* 465 U.S. 463, 470 (1984) ("The first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries."); *see also HRI, Inc. v. EPA,* 198 F.3d 1224, 1242 (10th Cir. 2000) ("*HRI I*") ("EPA does not have the power to change the Indian country status of land – that is a status conferred by Congress."); *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1420 (10th Cir. 1990) ("This court is not going to 'remake history' and declare a *de facto* reservation in the face of clear congressional intent to the contrary."); *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073, 1077 (10th Cir. 1993) ("Nothing …indicates that the Supreme Court intended for Indian tribes to have such unilateral power to create Indian country.").

[2] *Pittsburgh & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531 (10th Cir. 1995).

the EO 709/744 area as a temporary reservation and returned unallotted lands to the public domain in 1911, the Navajo Nation, in 1955, encircled that land with the boundaries of the Church Rock Chapter, a Navajo Nation local governmental unit. *See HRI, Inc. v. EPA,* 562 F.3d 1249, 1255 (10th Cir. 2009) ("*HRI II*"). This position begs the question – what was the status of the Section 8 land before the Navajo Nation established the Church Rock Chapter in 1955? Clearly, it was ***not*** Indian country under the set-aside and superintendence tests of *Venetie*. That status did not change with the establishment of the Chapter.[3] Neither the establishment of the Church Rock Chapter nor any Chapter in the EO 709/744 area conferred Indian country status on fee, state or federal lands in that area. *See State v. Frank*, 52 P.3d 404, 405, 409 (N.M. 2002) (Federal BLM land within Nageezi Chapter in EO 709/744 area was not Indian country under *Venetie* tests).[4] The EPA and Navajo Nation cannot "remake history" by making fee lands in the EO 709/744 area Indian country. *See Yazzie,* 909 F.2d at 1420.

The EPA, Navajo Nation, and their *amici* do not point to any state or federal case that has held post-*Venetie* that fee land outside the congressionally drawn or recognized

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[3] The Navajo Nation attempts to make much of the fact that in **1928** the United States purchased the odd-numbered parcels from the railroad and took them into trust for the Navajo Nation. NN Supp. Br. at 5. Apart from having nothing to do with the status of HRI's Section 8 land, it points out the lack of any basis for the EPA's "determination" that "The Church Rock Chapter was first established in **1927** as a subdivision of the navajo nation government...." R 39 at 8. Notably, that "determination" was not adopted by the Panel in *HRI II*. Further, the Indian Land Consolidation Act, 25 U.S.C. §2203, relates to elimination of fractional interests in trust lands and consolidation of tribal landholdings and has nothing to do with the status of non-Indian fee lands.

[4] *State v. Frank,* 24 P.3d 338, 340-41 (N.M. Ct. App. 2001), *r'vd,* 52 P.3d 404 ("The accident occurred on land owned by the federal government and administered by the Bureau of Land Management .... [T]he situs of the accident is within a political subdivision of the Navajo Nation known as the Nageezi Chapter.").

boundaries of a reservation or Pueblo is Indian country under § 1151(b). *See HRI II*, 562 F.3d at 1270 (Frizzell, J., dissenting) ("Never before has non-Indian fee land outside the exterior boundaries of a reservation or Pueblo been held to be a dependent Indian community.").[5] Moreover, only the Navajo Nation [NN Supp. Br. at 20 n.5] even acknowledges this Circuit's pre-*Venetie* case that held that not all land within the boundaries of a Chapter is Indian country. *See Blatchford v. Sullivan*, 904 F.2d 542, 544, 549 (10th Cir. 1990) (The town of Yah-Ta-Hey within the Rock Springs Chapter was not Indian country.).

Also absent is any real discussion of the New Mexico Supreme Court's decision in *Frank*.[6] *Frank* was a criminal case arising from conduct on federal BLM land within the Nageezi Chapter in the checkerboard area. The New Mexico Supreme Court held that

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[5]Contrary to the Navajo Nation's assertion, HRI does not concede that all fee lands within Pueblos are Indian country. NN Supp. Br. at 18. At least one federal court in this Circuit has held post-*Venetie* that fee land within a Pueblo "no longer satisfies the federal set-aside requirement necessary for a finding of 'Indian Country.'" *United States v Gutierrez*, No. CR 00-M-375 LH (D.N.M. Dec. 1. 2000) (Hansen, Judge) (unpublished), attached as Exhibit 1. The Supreme Court held in *United States v Sandoval*, 231 U.S. 28, 45-49 (1913), decades before the enactment of 18 U.S.C. §1151(b), that the land within the boundaries of a Pueblo land grant was a dependent Indian community. However, federal and state case law appears to be aligned in holding that private fee land is not Indian country merely because the land is within the exterior boundaries of a Pueblo land grant. *See* Argument §IV, *infra* (discussing *Arrieta and Romero*). Rather, the cases hold that it must be determined whether Congress intended such private fee land to remain set-aside and thus remain Indian country. *Id.*

[6] The EPA relies almost exclusively on the lone dissent in *Frank* and offhandedly dismisses the decision of the *Frank* Court as "incorrect." EPA Supp. Br. at 15, 19, 26. Despite *Frank* addressing the status of land within a Navajo Chapter, the Navajo Nation summarily dismisses *Frank* in favor of Pueblo cases. NN Supp. Br. at 22. The *amici* Pueblos, while citing to six decisions of the New Mexico Supreme Court, do not cite to *Frank*. The AILP do not cite to a single state case or acknowledge that the New Mexico Supreme Court has reaffirmed on multiple occasions its rejection of the "community of reference" analysis.

the threshold "community of reference" analysis was abrogated by *Venetie*. *Frank*, 52 P.3d at 409. That Court then concluded that because the ***federal BLM land*** within the boundaries of the Nageezi Chapter was ***not*** set-aside or superintended for the use of Indians, it was ***not*** Indian country under § 1151(b). *Id.* ("[***N***]***o examination of the community of reference is required before applying the two-prong test established in Venetie***.") (emphasis added); *see also Frank,* 24 P.3d at 346-50 (Bosson, J., dissenting).

In view of the holding in *Frank* that Chapter boundaries have no bearing on the determination of Indian country, it is no surprise that the EPA and Navajo Nation briefs all but ignore *Frank* and urge this Court to follow the rationale of the New Mexico Supreme Court in its Pueblo case of *State v. Romero,* 142 P.3d 887 (N.M. 2006). EPA Supp. Br. at 26 ("[T]his Court should reject Frank and agree with Romero."); NN Supp. Br. at 22. However, as addressed below, *Romero* reaffirms New Mexico's rejection of the threshold community of reference test and actually supports the position advanced by HRI and supporting *amici* States and UNC that land extinguished as Indian country by Congress cannot be resurrected as Indian country in the absence of congressional action. Here, Congress has evidenced no intent to confer Indian country status on any of the private fee land in the EO 709/744 area. *See Yazzie*, 909 F.2d at 1420.

ARGUMENT

I. WHETHER LAND IS INDIAN COUNTRY SHOULD BE RESOLVED BY *VENETIE'S* TWO-PART BRIGHT-LINE OBJECTIVE TEST.

The AILP state that they are interested in the:

> orderly and coherent development of American Indian law doctrine in the federal courts, and in attempting to ensure that ... individual disputes do not drive the law towards inconsistent and entirely ad-hoc decision-making.

AILP Br. at 4. Those interests mirror the interests advanced by this Circuit in seeking a "uniform allocation of jurisdiction" in *Ute Indian Tribe v. Utah*, 114 F.3d 1513, 1527 (10th Cir. 1997) following the Supreme Court's decision in *Hagen v. Utah*, 510 U.S. 399 (1994). Those interests are best served if this Circuit rejects the "hybrid *Watchman/Venetie*" test, rejects the threshold "community of reference" analysis, and joins all other courts that have considered the issue in applying the bright-line, objective two-part *Venetie* test to the land in question - here, HRI's Section 8 land.

Jurisdictional consistency is not furthered by this Circuit standing alone among the federal courts with its "hybrid *Watchman/Venetie* test" and rendering an ad-hoc decision that the EPA urges should be "narrowly restricted to the facts of this case." EPA Supp. Br. at 29-30. Jurisdictional consistency and regulatory coherence with respect to lands outside the boundaries of the Navajo Nation reservation within Ninth and Tenth Circuit states is not furthered by a conflict between those Circuits.[7] *Compare HRI II with Blunk v. Arizona Dep't of Transportation*, 177 F.3d 879 (9th Cir. 1999). Jurisdictional consistency is also not furthered by the conflict with the Supreme Court of New Mexico.

The EPA argues that the prosecution of criminal conduct will be facilitated by application of a community of reference test if law enforcement officers do not have to "search tract books in order to determine whether criminal jurisdiction [exists] over each particular offense." EPA Supp. Br. at 14 (quoting *Seymour v. Superintendent of Washington State Penetentiary*, 368 U.S. 351, 358 (1962)). *Seymour* does not support this argument. *Seymour* is a reservation case where the Supreme Court concluded that

[7] Will the EPA's Region 9 office that rendered the decision in this case apply the Ninth or Tenth Circuit analysis to an SDWA issue that arises within a Ninth Circuit state?

"[w]e are unable to find where Congress has taken away from the Colville Indians any part of the land within the boundaries of the area which has been recognized as their reservation since 1892." 368 U.S. at 354, 359. Further, EPA all but concedes that jurisdictional questions in the criminal law enforcement context will actually be made more uncertain and difficult if a "community of reference" must be ascertained before jurisdiction can be established. EPA Supp. Br. at 15 ("[I]t 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)."); *see also* EPA Supp. Br. at 22. While EPA states that "the community-of-reference analysis ... only need be applied when it is unclear whether any particular area is within a dependent Indian community" [EPA Supp. Br. at 24], it is all but certain that any person charged with committing a crime defined in 18 U.S.C. § 1153 on fee land in the EO 709/744 area will challenge jurisdiction based on grounds that the Court did not determine the proper community of reference.[8]

The uncertainty and problems associated with continued application of the hybrid *Watchman/Venetie* test is no better evidenced than by the fact that this dispute has been ongoing for nearly a decade. The dissenting Court of Appeals Judge in *Frank*, whose conclusion that the community of reference test did not survive *Venetie* was adopted by the New Mexico Supreme Court, identified obvious problems created by the threshold community of reference analysis. 24 P.3d at 347 (Bosson, J., dissenting). ("Somehow, the judge is to define that community, not based on objective facts like ownership of

[8] How will the federal courts in New Mexico handle a *habeas corpus* petition from a defendant convicted in state court of a § 1153 crime on land that is not federally set-aside?

land, but by using ambiguous topics to interpret people's lives, their lifestyles, their 'cohesiveness,' their relationship to governments, and their sense of self.").

II. THIS COURT SHOULD NOT REINTERPRET "DEPENDENT INDIAN COMMUNITY" ALREADY INTERPRETED BY THE *VENETIE* COURT.

Where the Supreme Court has interpreted a statute, the circuit courts are constrained to follow that interpretation. *See United States v. Richards*, 87 F.3d 1152, 1155 (10th Cir. 1996) (*en banc*) ("We need not perform our own interpretive analysis, however. The Supreme Court has authoritatively construed the terms in *Chapman*.").

The EPA, Navajo Nation and their *amici* would like to parse the words used in § 1151(b) and redefine them by resort to a dictionary without regard to the historical context of the statute. However, that is not the course the Supreme Court followed in *Venetie*. It looked to the historical origins of the statutory provision and interpreted § 1151(b) in that context. *Venetie*, 522 U.S. at 530 ("Section 1151 does not purport to alter this definition of Indian country, but merely lists the three different categories of Indian country mentioned in our prior cases...."). If meaning is to be given to *Venetie's* interpretation that the "term 'dependent Indian communities' ... refers to a limited category of Indian lands that are neither reservations or allotments," a tribe should not be able to create a "dependent Indian community" that they liken to a Pueblo by establishing a local governmental unit that encompasses trust lands and allotments that were Indian country prior to the establishment of the unit. *Cf. Buzzard*, 992 F.2d at 1077.

The Supreme Court also made it clear that a "dependent Indian community" under § 1151(b) was to be the same as before § 1151(b) was enacted. *Venetie*, 520 U.S. at 530 ("[I]n enacting §1151(b), Congress indicated that a federal set-aside...requirement must

be satisfied for a finding of a 'dependent Indian community'- just as those requirements had to be met for a finding of Indian country before 18 U.S.C. § 1151 was enacted."). Before § 1151 was enacted, Indian country did not even include private fee lands within the boundaries of a reservation. Although Congress altered the status of fee lands within a reservation through the enactment of § 1151(a), Congress made no such change with respect to "dependent Indian community." *See, e.g., Yankton Sioux Tribe v. Podhradsky*, 577 F.3d 951, 964 (8th Cir. 2009) ("*Section 1151(a)* abrogated this understanding of Indian country [that once Indians departed with title, the land ceased to be Indian country] and, with respect to reservation lands, preserves federal and tribal jurisdiction even if such lands pass out of Indian ownership."). While Congress uncoupled reservation status from Indian ownership when it enacted § 1151(a), it did not do so when it enacted § 1151(b). *See Solem*, 465 U.S. at 468. Had Congress intended that Indian country under § 1151(b) include private fee lands, Congress could have and would have included in § 1151(b) the "within the limits" language of § 1151(a).

Because the Supreme Court has interpreted § 1151(b), the application and interpretation of the phrase "non-Indian communities" in 18 U.S.C. § 1154(c) is of no relevance here. Moreover, § 1154(c)'s use of the language of § 1151(a) relating to "fee-patented lands ... or rights-of-way through Indian reservations" makes it clear that this provision does not relate to §. *Venetie* makes clear that Indian country under § 1151(b) does not include fee-patented lands. *See* fn. 4, *supra;* Argument §IV, *infra* (discussing "diminishment test" and Pueblos).

EPA argues that the community of reference "merely determines *where to apply* the federal set-aside and superintendence tests." EPA Supp. Br. at 7 n.3. Nothing could be less accurate. The community of reference analysis identifies the lands where the tests are ***not*** applied – i.e. lands that are of a nature that do not predominate in the community of reference. The Panel did not find that the Chapter *qua* Chapter was set-aside – it merely concluded that "78% of the Chapter land was set aside...." *HRI II*, 562 F.3d at 1266. The lands "set-aside" through the purchase of trust lands in 1928 was unrelated to the establishment of the Chapter in 1955.

III. CHECKERBOARD JURISDICTION REMAINS IN THE 709/744 AREA.

The EPA, Navajo Nation and their supporting *amici* all ground their arguments on the false premise that Congress intended to eliminate checkerboard jurisdiction with § 1151(b). This Circuit has held otherwise. *Yazzie,* 909 F.2d at 1421-22. With its requirements that only land that is federally set-aside and superintended can be § 1151(b) Indian country, the Supreme Court in *Venetie* reinforced this Court's pre-*Venetie* determination in *Yazzie* that "subsection[] 1151(b)... allow[s] checkerboard *jurisdiction* outside reservation boundaries." *Id.* at 1422.

IV. WHETHER *VENETIE'S, ARRIETA'S* AND *FRANK'S* SET-ASIDE TEST OR *ROMERO'S* DIMINISHMENT TEST IS APPLIED, HRI'S SECTION 8 LAND IS NOT INDIAN COUNTRY.

Pueblos have a "distinctive and unusual history of their relationship with the federal government." *Amici* Pueblos Br. at 2. In 1913, the Supreme Court in *Sandoval* described Pueblos as dependent Indian communities and held that all lands within the Pueblo land grants were Indian country. 231 U.S. at 46-7. As noted by the *amici*

Pueblos, they submitted an *amicus* brief to the New Mexico Supreme Court in *Romero*. [9] They argued that because lands within the boundaries of a Pueblo were historically recognized as Indian country the *Venetie* tests should not be applied and the issue should be framed as whether Indian country status had been diminished by congressional action:

> But where, as here, the status of the land as Indian country has already been established, and the only change is the patenting of scattered tracts to non-Indians, **the question is whether Congress intended the patenting of those tracts to change their Indian country status, and thus checkerboard the pueblo grants.** In other words, the question is **not** "Are the grants Indian country?" That threshold question was previously answered in *Sandoval*. The question in this case is "Do the patented lands *remain* Indian country?" **That question does not call for application of the "set aside" and "superintendence" test, but instead, the Supreme Court's "diminishment" test.**

Brief of *Amici Curiae* In Support of Petitioner Seeking Reversal filed July 26, 2004 in *Romero*, Case No. 28,410 at 10-11 (emphasis added) (italics in original) (attached as Exhibit 2). In contrast, the *amici* Pueblos here ignore diminishment and argue that private fee lands within a "dependent Indian community" are Indian country regardless of set-aside. Despite also participating as *amici* in *United States v. Arrieta*, 436 F.3d 1246 (10th Cir. 2006), the *amici* Pueblos fail even to acknowledge *Arrieta*. This is telling because in *Arrieta*, a Panel of this Court applied *Venetie's* set-aside test to Shady Lane and implicitly recognized that had Congress extinguished Pueblo title to the stretch of road at issue, as it had to the parcels on either side of the stretch of road, the land would **not** have been Indian country under § 1151(b). 436 F.3d at 1250-51 ("[W]e hold that all lands within the exterior boundaries of a Pueblo land grant, **to which the Pueblo hold**

[9] The *amici* Pueblos invite scrutiny of the position they asserted in the *Romero* case by referencing their participation in that case. *See amici* Pueblos' Br. at 2.

title, are Indian country....") (emphasis added). Contrary to the position the United States EPA takes here, in *Arrieta* the United States acknowledged that "Federal jurisdiction is absent over crimes which occur on land [within a Pueblo] which has been transferred from Indian ownership to non-Indian ownership." *See* United States' Answer Brief at 7 filed in *Arrieta* attached as Exhibit 3.

In contrast to *Arrieta*, the *Romero* Court, after reviewing the unique history of the Pueblos beginning with the settlement of the Taos Pueblo in 1000 A.D. and the Pueblos relationship with the federal government (a history and relationship bearing no resemblance to the EO 709/744 area), applied the "diminishment test" urged by the Pueblos. The Court determined "that Congress has not shown clear intent to extinguish Indian country status, so Indian country status for the privately-held parcels within Taos and Pojoaque Pueblos' exterior boundaries has not been extinguished." 142 P.3d at 307; *see also Garcia v. Gutierrez,* 217 P.3d 591, 601 (N.M. 2009) (same). Here, Congress' intent to terminate the temporary reservation in the EO 709/744 area was clear. *Yazzie*, 909 F.2d at 1420-22.

Apparently believing that HRI's Section 8 land will be Indian country if Chapters are considered akin to Pueblos, the Navajo Nation states: "This case boils down to one question: whether all land within the boundaries of a federally recognized dependent Indian community is Indian country under 18 U.S.C. § 1151(b)." NN Supp. Br. at 10. [10]

[10] Based on historical context alone, equating Chapters with Pueblos is unsupported. *See* EPA Supp. Br. at 21 n.15 ("Neither EPA nor the Panel majority determined that Navajo chapters have the same historical underpinnings as pueblos."). The EPA misstates *Romero* when it states that "as the Romero court explained, dependent Indian communities are sufficiently similar to reservations to merit identical treatment with

Disregarding the misstatement of the issue and the mischaracterization of Chapters as dependent Indian communities akin to Pueblos, the answer to the Navajo Nation's question is No. If the set-aside test of *Venetie, Arrieta* and *Frank* or the "diminishment test" of *Romero* is applied to fee lands within the EO 709/744 area, those fee lands, including HRI's Section 8 land, are ***not*** Indian country under § 1151(b). The establishment of Chapters did nothing to reverse the termination in 1908 and 1911 of the temporary reservation and did not confer Indian country status on fee lands in the EO 709/744 area. *Cf. Frank*, 52 P.3d 404.

V. THE "HYBRID *WATCHMAN/VENETIE*" TEST APPLIED TO FEE LANDS RESULTS IN THE SET-ASIDE REQUIREMENT BEING TRUMPED BY FACTORS REJECTED BY *VENETIE*.

Through the "hybrid *Watchman/Venetie*" test, the EPA, the Navajo Nation and their *amici* seek to reintroduce into the § 1151(b) determination factors expressly rejected in *Venetie*. The Navajo Nation misreads and misstates the holding of *Venetie*. At the core of the Navajo Nation's argument is the assertion that *Venetie* requires an examination of the "*degree* of federal ownership of and control over the area, and the *extent* to which the area was set-aside for the use, occupancy, and protection of dependent Indian peoples." NN Supp. Brief at 16; *Amici* Pueblos Br. at 27 (both quoting *Venetie*, 522 U.S. at 531 n.7 and adding emphasis). While the *Venetie* Court stated that the **Ninth Circuit's factors** of the "degree of federal ownership" and the "extent to which the area was set-aside" may be "more relevant" than the other four factors, the Supreme Court

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respect to federal jurisdiction over fee lands within dependent Indian communities." EPA Supp. Br. at 20. What the *Romero* court said was: "We determine that a **pueblo** satisfying § 1151(b) is sufficiently similar to a reservation in § 1151(a) to merit identical treatment for the purposes of criminal jurisdiction." *Romero*, 142 P.3d at 306.

rejected the Ninth Circuit's formulation of those two factors. The Supreme Court instead held that for land to be Indian country under § 1151(b) it "***must*** have been set aside" and "***must*** be under federal superintendence." *Venetie*, 522 U.S. at 527 (emphasis added). *Venetie* leaves no room for evaluating "degrees" of set-aside or the "extent" of superintendence. *See* HRI Panel Br. at 40-48 and Supp. Br. at 20-25 (collecting cases).

The community of reference is determined in large measure by evaluating the nature of the area and the degree of cohesiveness of the area inhabitants. *Watchman*, 52 F.3d at 1544. The EPA, Navajo Nation and their *amici* wholly fail to explain how an analysis that purports to apply the set-aside and superintendence tests to the majority of the land in a "community of reference" determined based on factors "***extremely far removed*** from the [set-aside and superintendence] requirements themselves" [522 U.S. at 531 n.7 (emphasis added)], can coexist with the holding of *Venetie*. It cannot.

The EPA's, Navajo Nation's and their *amici's* argument that HRI's reading of the holding of *Venetie* renders § 1151(b) "wholly superfluous" is without merit. One need only look to *Arrieta* which held, solely under a § 1151(b) analysis, that the pueblo owned land at issue within a Pueblo was Indian country. Further, as noted in *Venetie*, § 1151(b) is derived from *Sandoval* and *United States v. McGowan, 302 U.S. 535 (1938)* which addressed the Indian country status of land that was neither reservation nor allotted lands. 522 U.S. at 529-30.

VI. *WATCHMAN* AND *HRI I* ARE BASED IN PART ON A FLAWED JURISDICTIONAL ANALYSIS.

The Navajo Nation intervened in an effort to establish a basis to assert, with respect to HRI's Section 8 land, "core sovereignty interests" that it states "are recognized

in the [*HRI I*] decision itself." NN's Reply in Support of Motion to Intervene at 4. Contrary to the Navajo Nation's assertions and the *dicta* in *HRI I* upon which the Navajo Nation relies, § 1151(b) does not implicate core sovereignty issues of Indian tribes. *Atkinson Trading Company, Inc. v. Shirley*, 532 U.S. 645 (2001). This *en banc* Court should reject the Navajo Nation's efforts to dissuade this Court from considering issues presented by *Montana v. United States*, 450 U.S. 544 (1981) and its progeny, including *Atkinson*, in its analysis of Indian country issues. *Watchman* and *HRI I* adopted a threshold community of reference analysis based in part on the flawed conclusion that §1151 "represents an express Congressional delegation of civil authority over Indian country." *Watchman*, 52 F.3d at 1541. In its decision here, this *en banc* Court should correct this error.

VII. CONCERNS ABOUT *IN SITU* MINING OPERATIONS ARE UNFOUNDED AND IRRELEVANT TO THE INDIAN COUNTRY ISSUE.

The Safe Drinking Water Act, 42 U.S.C §§ 300f–300j-26 ("SDWA") provides that the EPA has nationwide authority to administer the SDWA, but also provides that states can take primary responsibility ("primacy") for enforcing an underground injection control ("UIC") program upon a showing that the state's program meets the requirements of the SDWA. *HRI I*, 198 F.3d at 1232-35. In 1983, the EPA approved New Mexico's program for "Class III" wells used for *in situ* leach uranium mining. *Id.*

After New Mexico Environmental Department ("NMED") approved HRI's discharge plan for underground injection on Section 8, "EPA approved New Mexico's

request for an aquifer exemption for HRI's Section 8 mine site."[11] *Id.* at 1234. The EPA, NMED, and the McKinley County Water Board all concluded that HRI's proposed operations in Section 8 would not impact USDWs. *See, e.g.,* R 15b at 18-19 and 15c App. I and II (HRI's comments to EPA); R 4 (McKinley County comments to EPA). Any concerns regarding HRI's proposed operations should be addressed in the regulatory and permitting process, not in the context of the determination whether EPA or NMED has jurisdiction over operations in Section 8.[12]

CONCLUSION

The Tenth Circuit *en banc* should hold that the "hybrid *Watchman/Venetie*" test and its threshold "community of reference" analysis no longer have a place in a § 1151(b) Indian country determination after *Venetie*, and that under *Venetie*, the EPA and the Panel erred in concluding that HRI's Section 8 land is Indian country. [13]

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[11] EPA has a process for exempting aquifers that will never be used as underground sources of drinking water ("USDW"). *HRI I*, 198 F.3d at 1223. The EPA's standards for administering the UIC/SDWA are not more stringent than New Mexico's standards. *See* 42 U.S.C. § 300g-2(a).

[12] The Navajo Nation's stated concern that a "chemical solution" called a "lixiviant" will be pumped into the "aquifer serving the Chapter" [NN Supp. Br. at 2-3] is misleading at best. The exempted portion of the aquifer is not a USDW. The "chemical solution" is "a natural groundwater solution containing non-toxic chemicals (e.g. oxygen and carbon dioxide)." R 15c App. II §3.0 ISL Technology.

[13] The EPA and the Navajo Nation ask this Court, in addition to the issues presented by HRI, to rehear issues relating to HRI's standing and the standard of review. The *en banc* Court did not grant rehearing as to these issues. However, to the extent theses issues are considered, HRI's positions are set forth in its Panel briefs. The Panel decision on these issues should be affirmed.

Dated: December 11, 2009.

Respectfully submitted,

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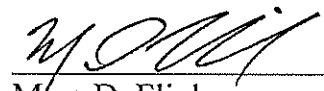
CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the type-volume limitation set forth in the Court's August 24, 2009 Order because this motion has been prepared in proportionately spaced typeface using Microsoft Word in 13 point Times Roman font.

I further certify that all required privacy redactions have been made, and with exception of those redactions, every document submitted in Digital form or scanned PDR format is an exact copy of the written document filed with the clerk and the digital submissions have been scanned for viruses with the most recent version of the commercial virus scanning program, Trend Micro OfficeScan, version 8.0, engine 9.100.1001, pattern file 6.685.00, last update was 12/11/09 and according to the program, are free of viruses.



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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of December, 2009, a true and correct copy of the foregoing **PETITIONER'S REPLY BRIEF RE REHEARING *EN BANC*** was served via e-mail electronic transmission in PDF format addressed to the following:

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