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 SUPPLEMENTAL BRIEF RE REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

Petitioner, Hydro Resources, Inc. ("HRI") is wholly owned by Uranium Resources, Inc., a publicly held corporation.

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PRELIMINARY STATEMENT

The Panel Decision in *Hydro Resources., Inc.* ["HRI"] *v. United States EPA*, 562 F.3d 1249 (10th Cir. 2009) ("*HRI II*" or "Panel Decision"), misapplies and conflicts with the Supreme Court's two-part test for determining whether land is Indian country under 18 U.S.C. § 1151(b) ("1151(b)") set forth in the Supreme Court's 1998 decision in *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998) ("*Venetie*"). The majority of the Panel, following *de novo* review, affirmed the United States Environmental Protection Agency's ("EPA") extraordinary conclusion in its Land Status Determination that fee land owned by HRI in McKinley County, New Mexico ("HRI's Section 8 land") outside the boundaries of the Navajo reservation is Indian country under 1151(b). R 44.

The Panel Decision results in uncertainty, unpredictability, disruption, and non-uniformity of Indian country jurisdictional issues that should be certain, predictable and uniform and determined by application of the bright-line test set forth in *Venetie*. The *en banc* Court should hold that a threshold "community of reference" analysis has no continuing validity after *Venetie* and that HRI's Section 8 land is not Indian country under 1151(b). *See HRI II,* 562 F.3d at 1271 (dissent) ("Thus, our community of reference test, as applied today, runs counter to congressional intent and may cause great jurisdictional uncertainty and disruption ....").

Petitioner sought this rehearing *en banc* to request the Tenth Circuit, *en banc*, to be consistent with the Supreme Court's decision in *Venetie* and every other federal and state Court to have applied the precedent of *Venetie.*

The Panel premised its decision on the perceived constraint of *stare decisis* to follow the dicta in *HRI, Inc. v. EPA*, 198 F.3d 1224 (10th Cir. 2000) ("*HRI I*") and applied the *Venetie* tests to a "community of reference" determined by consideration of subjective factors set forth in *Pittsburgh & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531 (10th Cir. 1995) ("*Watchman*"). One factor "evaluates 'the existence of an element of cohesiveness' in the community." *HRI II,* 562 F.3d at 1263 (quoting *Watchman*, 52 F.3d at 1544). As a result, the Panel applied *Venetie's* two part test of federal set-aside and federal superintendence, not to HRI's Section 8 land (which meets neither test), but to a "community of reference" determined to be the Church Rock Chapter, a local governmental unit established by and whose boundaries were drawn by the Navajo Nation.[1] *See* Facts § III, *infra*.

The Panel's so-called "hybrid *Watchman/Venetie* test" resulted in a determination that would not be reached by any other court through application of the bright-line two-part test dictated by *Venetie.* The correct result and the result that HRI urges this *en banc* Court to reach is that neither HRI's Section 8 land nor any fee land outside the

[1] The dicta in *HRI I* should not have been accorded *stare decisis* status. *See* Vol. 18 *Moore's Federal Practice* § 134.04[5] (Matthew Bender 3d ed.). Footnote 3 of *HRI I* made it clear that the Tenth Circuit did not fully analyze and rendered no decision on the ultimate effect of *Venetie* on the holding of *Watchman*, stating that "we need not address the precise impact of ... *Venetie* ... on the holding of *Watchman.*"198 F.3d at 1232 n.3, 1254; *see State v. Frank*, 52 P.3d 404, 408 (N.M. 2002) (concluding that the statements in *HRI I* regarding the continued application of the community of reference test were *dicta.*). However, whether or not the Panel was correct as to the nature of the statements in *HRI I*, the *en banc* Court should determine that the two-part bright-line test of *Venetie* is eviscerated by a threshold "community of reference" determination based on factors

boundaries of a reservation or Pueblo can ever be Indian country under 1151(b). *See HRI II,* 562 F.3d at 1270 (dissent) ("Never before has non-Indian fee land outside the exterior boundaries of a reservation or Pueblo been held to be a dependent Indian community.").[2]

HRI's Section 8 land is neither federally set-aside nor superintended. *See Id.* at 1269 (dissent) ("As noted in the majority opinion, the land in question in uninhabited and lies outside the Navajo reservation. It is not owned by the Navajo Nation. It is not set aside for Indian use. It is not federally superintended."). HRI requests that this Court *en banc* hold that HRI's Section 8 land is not Indian country under *Venetie's* two-part test and that the threshold "community of reference" determination set forth in *Watchman* no longer has any applicability to an 1151(b) analysis after *Venetie*.[3]

ISSUES PRESENTED FOR REVIEW[4]

1. Whether the United States Supreme Court's holding in *Venetie* renders invalid the Tenth Circuit's "community of reference" analysis first articulated in *Watchman* and the "hybrid *Watchman/Venetie* test" announced by the Panel Decision and precludes a determination of dependent Indian community status for non-Indian fee land

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(e.g. cohesiveness) "extremely far removed from the [set-aside and superintendence] requirements" of the dependent Indian community test. *Venetie*, 522 U.S. at 531 n.7.

[2] The Panel's rationale would result in state owned land adjacent to HRI's Section 8 land and within the boundaries of the Church Rock Chapter, also being Indian country. In its Amicus Brief, the State of New Mexico asserts that such a determination that results from a threshold "community of reference" determination is not supported by *Venetie* and that this Court, *en banc*, should reject the continued vitality of the "community of reference" test that employs "so many open questions and vague standards" and that this Court, *en banc*, should "provide bright line standards for jurisdictional determinations." State of New Mexico Amicus Curiae Brief In Support Of Petition For Rehearing *En Banc* at 7.

[3] Because of its *stare decisis* concerns, the Panel noted that only the Court *en banc* could remove the "community of reference" from Tenth Circuit jurisprudence. *HRI II,* 562 F.3d at 1262 (citing *United States v. Meyers*, 200 F.3d 715, 720 (10th Cir. 2000)).

[4] The Court's Order of August 24, 2009, directed HRI to "file a supplemental brief ... addressing, for en banc review, the issues raised in the petition for rehearing."

that is outside the exterior boundaries of the Navajo reservation, is not allotted land, and is neither land set-aside by the federal government for the benefit of the Navajo Nation nor land under federal superintendence?

2. Whether, *Watchman's* "community of reference" standard and the Tenth Circuit's dicta in *HRI I* that *Venetie* did not reject the "community of reference" test, should be rejected to bring the Tenth Circuit in line with all other courts in the application of *Venetie's* uniform bright-line test regarding the determination of what lands constitute a "dependent Indian community" under 18 U.S.C. § 1151(b)?

3. Whether the Panel Decision rests on the flawed concept that 18 U.S.C. § 1151 represents an express Congressional delegation of civil authority over Indian country, a concept articulated in *Watchman* and expressly rejected by the Supreme Court in *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) ("*Atkinson*")?

FACTUAL CONTEXT

I. HISTORY AND STATUS OF HRI'S SECTION 8 LAND AS FEE LAND IN THE "CHECKERBOARD AREA" KNOWN AS THE "EO 709/744 AREA."

The history and status of land in the "checkerboard area" of northwestern New Mexico is well established and has been thoroughly analyzed by this Court in *Pittsburgh & Midway Coal Co. v. Yazzie,* 909 F.2d 1387, 1389, 1419-22 (10th Cir. 1990) ("*Yazzie*"). The *Yazzie* Court reviewed the history of congressional and executive action pertaining to the "checkerboard area" in which HRI's Section 8 land is found [the "EO 709/744 area"] and held that while the EO 709/744 area was designated as a temporary reservation by Congressional enactment and two Executive Orders bearing the numbers 709 and 744 issued in 1907 and 1908, respectively, the temporary reservation status of the EO 709/744 area was terminated by Congressional action and implementing Executive Orders, and all unallotted lands in the EO 709/744 area were restored to the public domain. Act of May 29, 1908, ch. 216, § 25, 35 Stat. 444, 457; Executive Order No. 1000 (1908); Executive Order No. 1284 (1911); *Yazzie,* 909 F.2d at 1422 ("We hold that

the district court erred in concluding that the 709/744 area in New Mexico retained reservation status."); *see also HRI II,* 562 F.3d at 1255 ("The latter executive orders thereby terminated the reservation status of the 'EO 709/744' tract. [citing *Yazzie*] In *Yazzie* this court concluded that the entire EO 709/744 area was not a de facto reservation and recognized the complicated jurisdictional status of the checkerboard lands."); *Navajo Tribe of Indians v. State of New Mexico*, 809 F.2d 1455, 1459 n.7 (10th Cir. 1987) ("[T]he Navajo Tribe apparently concedes in this case that the above-quoted phrase ["restored to the public domain"] in Executive Orders 1000 and 1284 was intended to disestablish the addition to the Navajo Reservation created by Executive Order 709, as amended by Executive Order 744.").

The EO 709/744 area that lost reservation status and that was restored to the public domain includes HRI's Section 8. *See HRI II,* 562 F.3d at 1255 ("The area surrounding Section 8 is 'often referred to as the "EO 709/744 area"....'"). Subsequent efforts by the Indian Office to re-expand the Navajo reservation into the New Mexico 709/744 area were "rejected each time by Congress." *Yazzie*, 909 F.2d at 1419. Because HRI's Section 8 land was restored to the public domain by Congress, only Congress, not the EPA or this Court, can reverse that action. *See HRI I,* 198 F.3d at 1242 ("EPA does not have the power to change the Indian country status of land – that is a status conferred by Congress."); *Yazzie*, 909 F.2d at 1420 ("This court is not going to 'remake history' and declare a *de facto* reservation in the face of clear congressional intent to the contrary.").

II. THE SDWA REGULATIONS REQUIRE THE DETERMINATION OF WHETHER LAND IS "INDIAN COUNTRY" UNDER 1151(B).

The issue of the jurisdictional status of HRI's Section 8 land in question arises in the context of the Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j-26 (1996) ("SDWA") and its regulations, 40 C.F.R. § 144.3. The SDWA establishes nationwide minimum drinking water protection standards. *HRI II,* 562 F.3d at 1256.

Pursuant to SDWA, the EPA approved New Mexico's underground injection control ("UIC") program and authorized the New Mexico Environmental Department ("NMED") to administer its UIC program with respect to the type of wells that HRI operates to mine uranium on lands over which New Mexico has jurisdiction – that is all lands in New Mexico except "Indian lands." *Id.* at 1257, (citing 48 Fed. Reg. 31640 (July 11, 1983) and 40 C.F.R. §§ 147.1600 – 147.1601). Pursuant to that authority NMED "approved HRI's request for a UIC permit for the Section 8 land in 1989." *HRI II,* 562 F.3d at 1257; *see also HRI I,* 198 F.3d at 1234.

EPA regulations under the SDWA "define 'Indian lands' as 'Indian country' as defined in 18 U.S.C. 1151." *HRI II,* 562 F.3d at 1260 (citing 40 C.F.R. § 144.3).

III. THE CHURCH ROCK CHAPTER IS A LOCAL GOVERNMENTAL UNIT OF THE NAVAJO NATION WHOSE BOUNDARIES ARE DRAWN BY THE NAVAJO NATION – NOT THE FEDERAL GOVERNMENT.

"The Chapter is merely a political subdivision of the Navajo government. The federal government has no input into its boundaries." *HRI II,* 562 F.3d at 1270 (dissent).

"The Chapter is a local government organization of the Navajo Nation, authorized by the Navajo Nation Local Governance Act...." *Id.* at 1255.[5]

Contrary to the majority's determination that HRI's Section 8 land is Indian country and not subject to the authority of NMED under the SDWA, even the Navajo Nation has recognized that the State of New Mexico has jurisdiction over state owned (*e.g.* Red Rock State Park) and fee lands within the boundaries of the Church Rock Chapter. R 40 at C-15-16.[6] Other facts derived from the record with respect to the Church Rock Chapter are set forth in HRI's Panel Brief of Petitioner.

STANDARD OF REVIEW

Although HRI submits that the majority of the Panel erred in their determination that HRI's Section 8 land in question is "Indian country," HRI agrees that the Panel applied the correct standard of review – no deference and *de novo* review of the EPA's determination. *HRI II,* 562 F.3d at 1259-60.

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[5] As noted by Judge Frizzell, "[o]ne might legitimately be concerned that our application of the community of reference test could be interpreted as permitting the boundaries of communities of reference to be drawn by Navajo legislation defining tribal political subdivisions." *HRI II,* 562 F.3d at 1270-71. Even pre-*Venetie,* the Tenth Circuit recognized that Indian tribes, through unilateral action, cannot create Indian country with respect to land not otherwise federally set-aside or superintended for the benefit of Indians. *See Buzzard v. Oklahoma Tax Commission,* 992 F.2d 1073, 1077 (10th Cir. 1993) ("Nothing in [*U.S. v. McGowan,* 302 U.S. 535 (1938)] or the cases concerning trust land indicates that the Supreme Court intended for Indian tribes to have such unilateral power to create Indian country.").

[6] The Chapter's Land Use Plan, discussing the Springstead Subdivision consisting of 626 acres located 3 ½ miles northeast of the Chapter House within the boundaries of the Church Rock Chapter, recognized that "the site is located on private land ... [I]t will be subject to the subdivision laws and regulations of the State of New Mexico."

ARGUMENT

I. THE TENTH CIRCUIT HAS RECOGNIZED THE IMPORTANCE OF UNIFORMITY AND CONSISTENCY BETWEEN COURTS WHEN IT COMES TO INDIAN COUNTRY JURISDICTIONAL ISSUES.

In *Ute Indian Tribe v. Utah,* 114 F.3d 1513, 1527 (10th Cir. 1997), *cert. denied,* 533 U.S. 1107 (1998), a Panel of this Court took the extraordinary action of modifying a previous *en banc* decision of this Court that conflicted with the Supreme Court's decision in *Hagen v. Utah,* 510 U.S. 399 (1994).[7] The Court did so based not merely on the inconsistency between its prior decision and *Hagen,* but also on the importance of uniformity in our system of judicial decision making:

> Uniformity is an important value in our system of judicial decision making....The related doctrines of collateral estoppel and stare decisis are exactly the sort of tools that have been designed to ensure uniformity and compliance with binding precedent.... Unfortunately, these doctrines have so far failed to prevent the inconsistency between *Ute Indian Tribe III* and *Hagen.* Given the important values that underlie these doctrines, we cannot allow such an inconsistency to persist.
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> More importantly, the lack of uniformity between *Ute Indian Tribe III* and *Hagen* presents a practical dilemma of daily importance.... In this situation, the interest of uniformity clearly supports modification of the *Ute Indian Tribe III* and creation of a uniform allocation of jurisdiction.
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[7] The Supreme Court's decision in *Hagen* is relevant to the issues in this case relating to congressional intent to terminate the temporary reservation status of the EO 709/744 area addressed above. *Hagen,* 510 U.S. at 414 ("[W]e hold that the restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with the continuation of reservation status.... Indeed, we have found only one case in which a Federal Court of Appeals decided that statutory restoration language did not terminate a reservation, *Ute Indian Tribe, 773 F.2d at 1092,* a conclusion the Tenth Circuit has since disavowed as 'unexamined and unsupported.' [citing *Yazzie*]").

> ...Where a prior erroneous judgment necessarily affects continuing conduct, the interests of uniformity may demand departure from the prior judgment to bring a court's view of the law into line with the prevailing view....

Ute Indian Tribe, 114 F.3d at 1525-26.

It is readily apparent that there is likelihood for confusion, inconsistency, lack of uniformity and litigation with respect to the jurisdictional status of fee and state lands within a Chapter resulting from the application of a threshold "community of reference" test. If the Panel Decision is allowed to stand, HRI's Section 8 land (and possibly other fee and state owned land within the boundaries of a Navajo Chapter) may be Indian country if determined by a court within the Tenth Circuit, but decidedly will not be Indian country if determined by a New Mexico state court where it has been determined that the "community of reference" test did not survive and was abrogated by *Venetie*. *See* Argument § V(B), *infra*. If the Panel Decision is allowed to stand, certain fee or state owned land within a Navajo Chapter may be Indian country while other fee or state owned land within the same Chapter may not be Indian country, based solely on the land's location within the boundaries of the Chapter, the land's proximity to "communities of reference" outside the boundaries of the Chapter (e.g. City of Gallup), or whether the fee land is determined to be its own "community of reference" within the Chapter. *See, e.g., Blatchford v. Sullivan,* 904 F.2d 542, 548-49 (10th Cir. 1990) (holding that Yah-Ta-Hey within boundaries of the Rock Springs Chapter was not Indian country under 1151(b)). If the Panel Decision is allowed to stand, fee lands within different Chapters outside the boundaries of the reservation may be treated differently from Chapter to Chapter depending upon the percentage of Indian, state, private fee and

federal lands within the Chapter. *See HRI II,* 562 F.3d at 1267 n.18 ("At oral argument, we pressed EPA on 'how much' of the community of reference must be set aside. We need not establish a particular percentage....").

II. THE JURISDICTIONAL QUESTION WHETHER LAND IS INDIAN COUNTRY SHOULD BE GOVERNED BY A UNIFORMLY APPLIED BRIGHT-LINE TEST THAT PROVIDES CONSISTENT AND PREDICTABLE RESULTS – *VENETIE* ESTABLISHES THAT TEST.

Jurisdictional determinations based on the Indian country status of land should be governed by a uniform, logical and consistently applied test. *Cf. Ute Indian Tribe,* 114 F.3d at 1527 ("The task of allocating jurisdiction necessarily involves line-drawing, and in an area where there is a compelling need for uniformity, there must be a single bright line."). The State of New Mexico concurs. *See* Amicus Curiae Brief of the State of New Mexico in Support of Petition for Rehearing *En Banc* at 7 ("New Mexico requests this Court to rehear this matter, *en banc*, and provide the bright line standards for jurisdictional determinations.").

The Supreme Court's decision in *Venetie* established such a bright-line test for "Indian country" determinations under 18 U.S.C. § 1151(b):

> We now hold that [the term "dependent Indian communities"] refers to a **limited category of Indian lands** that are neither reservations nor allotments, and **that satisfy two requirements** – first, they **must** have been set aside by the Federal Government for the use of the Indians as Indian land; second, they **must** be under federal superintendence.

Venetie, 522 U.S. at 527 (emphasis added). Uniformity, consistency and certainty can be brought to the determination of the jurisdictional status of fee and state lands outside the

boundaries of a reservation or Pueblo simply by applying *Venetie's* bright-line set-aside and superintendence tests to the land in question – here HRI's Section 8 land.

In 1948, after three decades of Supreme Court jurisprudence on the subject, Congress enacted 18 U.S.C. §1151 to codify the definition of Indian country for purposes of demarcating the boundaries of federal and state criminal jurisdiction for crimes committed on Indian country. The Supreme Court in *Venetie* explained that the statutory definition of Indian country originated from the adoption by Congress of the rationale of the Supreme Court's cases of *United States v. Sandoval*, 231 U.S. 28 (1913); *Donnelly v. United States*, 228 U.S. 243 (1913); *United States v. Pelican*, 232 U.S. 442 (1914); and *United States v. McGowan*, 302 U.S. 535 (1938). *Venetie,* 522 U.S. at 528. The Supreme Court explained that the definition of Indian country under 1151(b) requires that the two tests of federal set-aside and superintendence be satisfied as to the land in question (here, HRI's Section 8 land):

> In each of these cases, therefore, we relied upon a finding of both a federal set-aside and federal superintendence in concluding that the Indian lands in question constituted Indian country and that it was permissible for the Federal Government to exercise jurisdiction over them. 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: [citations omitted]
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> We therefore must conclude that in enacting § 1151(b), Congress indicated that a federal set-aside *and* a federal superintendence 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. These **requirements** are reflected in the text of § 1151(b): The federal **set-aside requirement** ensures that the **land in question** is occupied by an "Indian community"; the **federal superintendence requirement** guarantees that the Indian community is

> sufficiently "dependent" on the Federal Government that the Federal Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the **land in question**. [footnotes omitted]

Venetie, 522 U.S. at 530-31 (italics in original) (emphasis added).

The EPA's and the Panel's erroneous application of the two *Venetie* tests, not to HRI's Section 8 land, but to a "community of reference" determined through a vague, multi-factored analysis, expands the heretofore discrete "dependent Indian community" category of Indian country into an unprecedented, broad universe of Indian country that includes fee lands that lie outside the exterior boundaries of a reservation or Pueblo. *See HRI II,* 562 F.3d at 1270 (dissent) ("Never before has non-Indian fee land outside the exterior boundaries of a reservation or Pueblo been held to be a dependent Indian community.").

The Panel's application of the federal set-aside and superintendence tests to a broadly defined "community of reference" rather than HRI's Section 8 land, disregards the intent of Congress as interpreted by the Supreme Court and improperly transfers from Congress to administrative agencies and the courts the power to allocate jurisdictional authority of the State of New Mexico, federal government, and Indian tribes outside the boundaries of the Navajo reservation. *See HRI I,* 198 F.3d at 1242 ("EPA does not have the power to change the Indian country status of land – that is a status conferred by Congress."). Just as the *Yazzie* court declined " to 'remake history' and declare a *de facto* reservation in the face of clear congressional intent to the contrary" [909 F.2d at 1420], *Venetie's* bright-line two-part test does not permit an administrative agency or a court to "remake history" by declaring as Indian country fee land in the 709/744 area that

Congress expressly removed from Indian country status when it terminated the temporary reservation and restored such lands to the public domain. *Cf. DeCoteau v. District County Court*, 420 U.S. 425, 449 (1975) ("In the 1889 Agreement and the 1891 Act ratifying it, Congress and the tribe spoke clearly. Some might wish they had spoken differently, but we cannot remake history.").

EPA's approach makes the jurisdictional determination wholly dependent on how the "community of reference" is defined, and that definition is subjective, unpredictable, inconsistent, and result-oriented. For example, EPA and the Panel rejected the town of Gallup as "another potential community of reference." *See HRI II,* 562 F.3d at 1265 n.15; R 44 at 10 n.64. The principal reason stated for the EPA's rejection was that "[Gallup's] eastern boundary is located approximately 18 miles, and its airport approximately 26 miles, from the Section 8 land." R 44 at 10 n.64. Similarly, the Panel rejected Gallup with the statement "[a] glance at the map dispels this contention." *HRI II,* 562 F.3d at 1265 n.15. How much closer to Gallup would land have to be to be a part of the Gallup "community of reference" and would the fee land in the southwest corner of the Church Rock Chapter be close enough? *See* R 16(b) (Land Status map). The fundamental question is, however, what relevance does proximity to reservation lands or non-reservation lands have to a determination whether the land in question is federally set-aside and superintended? HRI submits that there is no relevance and that *Venetie* makes abundantly clear that such proximity is wholly unrelated and disconnected from a determination of federal set-aside and superintendence. *See Blunk v. Arizona Dept. of Trans.*, 177 F.3d 883, 883-84 (9th Cir. 1999) ("*Blunk*") ("Native Village of Venetie

controls our decision. . . . The Navajo Fee Land does not become Indian country simply because of its tribal ownership or because of its proximity or importance to the Navajo Reservation. [citation omitted]. . . .").

Similarly, after *Venetie*, the Indian country status of land cannot be dependent on subjective factors such as "cohesiveness" – factors rejected by *Venetie* as "**extremely far removed** from the [set-aside and superintendence] requirements" of the dependent Indian community test. *Venetie*, 522 U.S. at 531 n.7 (emphasis added).

The Panel's and EPA's analysis departs dramatically from the Supreme Court's decision in *Venetie*, which focused on congressional intent to set-aside the land in question as Indian country – and required unambiguous evidence of that intent for lands that Congress has not designated a "reservation" or an "allotment." *Venetie*, 522 U.S. at 531 n.6 ("The federal set-aside requirement also reflects the fact that ... some explicit action by Congress (or the Executive...) must be taken to create or to recognize Indian country."). *Venetie's* test for 1151(b) is circumscribed and precise. This is appropriate for a test serving the function of delineating the respective parameters of federal, state, and tribal jurisdiction and requires courts to undertake a task to which they are both suited and accustomed: ascertaining Congress' intent. In contrast, the Tenth Circuit's pre-*Venetie* "community of reference" analysis is amorphous, subjective, incapable of precise definition, fact-intensive, and multi-factored, all of which is especially unacceptable for jurisdictional determinations. *See, e.g., Grubart v. Great Lakes Dredge & Dock Co.,* 513 U.S. 527, 547 (1995) (rejecting jurisdictional test that is "hard to apply"

and "jettison[s] relative predictability for the open-ended rough-and-tumble of factors," and "invit[es] complex argument in a trial court and a virtually inevitable appeal.").

This *en banc* Court should adhere to the Supreme Court's *Venetie* decision and hold that the threshold "community of reference" analysis has no applicability to the determination of the jurisdictional status of fee land outside the exterior boundaries of a reservation. This *en banc* Court should construe the "dependent Indian community" category of 1151(b) according to its limited, Congressionally intended scope and the narrowly tailored two-part test enunciated in *Venetie*.

III. THE PANEL'S "HYBRID *WATCHMAN/VENETIE*" TEST IS FATALLY FLAWED AND MUST BE REJECTED.

There can be no clearer indication of the flaws in the Panel's "hybrid *Watchman/Venetie*" test than (1) application of the test results in private fee land that was expressly restored to the public domain by Congressional and Executive action being held to be "Indian country" under 1151(b); and (2) the Panel felt compelled to state that the threshold "community of reference" determination is not determinative of the status of all fee lands in the Church Rock Chapter in other contexts and may lead to a different result for private fee land in another Chapter or in another context. *HRI II,* 562 F.3d at 1266 ("[W]e emphasize that our holding is narrow and restricted to the facts of this case. We do *not* hold that any land within the geographical boundaries of a political subdivision of a tribe necessarily has Indian country status....").

In *Yazzie,* as addressed above, the Tenth Circuit held that the land of the Eastern Navajo Agency [709/744 area] that encompasses HRI's Section 8 land was expressly

restored to the public domain. Even if HRI's Section 8 land, a century ago, may have been within the boundaries of a temporary reservation, the Congressional action in 1908 and the Executive Orders in 1908 and 1911 expressly terminated that status. *See Venetie,* 522 U.S. at 532 ("With respect to the federal set-aside requirement, it is significant that ANSCA, far from designating Alaskan lands for Indian use, revoked the existing Venetie Reservation.... In no clearer fashion could Congress have departed from its traditional practice of setting aside Indian lands. Cf. *Hagen v. Utah,* 510 U.S. 399, 401 [](1994) (holding that by diminishing a reservation and opening the diminished lands to settlement by non-Indians, Congress had extinguished Indian country on the diminished lands.")). Where, as here, Congress terminated the temporary reservation status of the 709/744 area and restored all unallotted fee lands (including HRI's Section 8 land) to the public domain, any test that classifies HRI's Section 8 fee land as Indian country is fatally flawed and must be abandoned. The two-part *Venetie* test applied to HRI's Section 8 land in question achieves a proper result consistent with prior Congressional action. HRI's Section 8 land is not "Indian country."

IV. NAVAJO CHAPTERS DO NOT HAVE THE SAME STATUS AS PUEBLOS, BUT RECENT CASES ON THE STATUS OF LAND WITHIN THE BOUNDARIES OF PUEBLOS SUPPORT THE CONCLUSION THAT HRI'S SECTION 8 LAND IS NOT INDIAN COUNTRY.

Navajo Chapters are not Pueblos and there is no kinship between a Chapter and a Pueblo. The boundaries of Pueblos and the status of pueblo lands were established by a foreign sovereign (Spain) and recognized by Congress. *See United States v Sandoval,* 231 U.S. 28, 36-39 (1913); *United States v Arrieta* ("*Arrieta*"), 436 F.3d 1246, 1249-50

(10th Cir.), *cert. denied*, 126 S. Ct. 2368 (2006); *State v. Romero* ("*Romero*"), 142 P.3d 887, 889-90 (N.M. 2006), *cert. denied*, 127 S. Ct. 1494 (2007).

In contrast to the Congressional action that recognized Pueblos, Congressional action did not create the Navajo local governmental units known as Chapters that now exist within the area referred to as the Eastern Navajo Agency [709/744 area] (including the Church Rock Chapter established in 1955). "The Navajo Nation Council determines the number of certified chapters and the boundaries thereof." *HRI II*, 562 F.3d at 1269 (dissent). "Boundary disputes between chapters appear to be tribal matters resolved by Navajo Tribal Courts with no involvement by the federal government." *Id.* Moreover, as addressed above, the unallotted parcels of fee land that the Navajo have now brought within the boundaries of the Chapters in the 709/744 area were expressly extinguished as Indian country and restored to the public domain by Congressional and Executive action. *See Yazzie,* 909 F.2d at 1420*; see also* Facts § I, *supra.* The Navajo Nation, through its establishment of Chapters and their boundaries cannot convert the status of non-Indian fee or state owned lands within those boundaries to "Indian country." *Buzzard*, 992 F.2d at 1077 (10th Cir. 1993) ("Nothing in [*U.S. v. McGowan,* 302 U.S. 535 (1938)] or the cases concerning trust land indicates that the Supreme Court intended for Indian tribes to have such unilateral power to create Indian country.").

The logic of federal and state post-*Venetie* cases determining the status of lands within the exterior boundaries of a Pueblo is instructive. In *Romero*, the New Mexico Supreme Court considered whether non-Indian fee land within the boundaries of the Taos and Pojoaque Pueblos was Indian country in the context of the "unique circumstances of

New Mexico's pueblos." *Romero*, 142 P.3d at 891. In equating pueblos with reservations[8] and finding that "Congress and the United States Supreme Court have established that pueblo lands are Indian country," the Court held that "Congress has not shown clear intent to extinguish Indian country status, so Indian country status for the privately-held parcels within Taos or Pojoaque Pueblos' exterior boundaries has not been extinguished." *Id.* at 892, 895.[9] The Court went on to hold that "[a]bsent a clear congressional statement to change the status, the fact that the land is encompassed by the pueblo controls the jurisdictional issue." *Romero*, 142 P.3d at 896. The requirement that "[u]nder *Venetie*, there must be some explicit action taken by Congress or the Executive to create Indian country," recently was reiterated by the New Mexico Supreme Court. *State v. Quintana*, 178 P.3d 820, 822 (N.M. 2008) ("Unlike *Romero*, there is no evidence of any explicit congressional or executive action recognizing State Road 16 as Indian country..."); *see also, Garcia v. Gutierrez*, 2009 N.M. LEXIS 550 *42 (N.M. S. Ct., Aug. 26, 2009) ("We merely concluded [in *Romero*] that the [Pueblo Lands Act] did not provide 'substantial and compelling evidence of congressional intent to change Indian country status.'").

[8] "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.... Since then, Congress has consistently used the word 'reservation' broadly to encompass pueblo land.... The State does not provide any example of Congress treating a pueblo distinctly from a reservation, especially not for the purposes of criminal jurisdiction in Indian country." *Romero*, 142 P.3d at 894.

[9] Although *Arrieta* was decided prior to *Romero*, the *Romero* court did not cite to *Arrieta*.

Neither Congress nor any court (including the Panel here) has ever equated Chapters with reservations or Pueblos. Even if it were proper to do so, however, the clear Congressional intent to restore the fee lands in the 709/744 area to the public domain is a determinative event and has extinguished any former Indian country status of HRI's Section 8 land.[10] HRI's Section 8 land, under a *Romero/Quintana* analysis, is not Indian country.[11]

Arrieta presented no issue of Indian country status of non-Indian fee land within a Pueblo. In *Arrieta,* the Tenth Circuit considered whether a stretch of road within the Pueblo boundaries was Indian country under § 1151(b). Title to the road was owned by the Pojoaque Pueblo and the road was located between two parcels of non-Indian fee land. All were within the Pueblo boundaries. *Arrieta*, 436 F.3d at 1250. Applying the *Venetie* set-aside test, the Tenth Circuit held that "[a]lthough the [Pueblo Lands Act of 1924, ch. 331, 43 Stat. 636] extinguished the Pueblo's title over some of the land that was originally set aside for them, any land where title was not extinguished by the Board remained set aside for use by the Pueblo. Thus, the federal set-aside requirement is satisfied." *Id.* After finding that the superintendence requirement of *Venetie* was satisfied through pueblo ownership of the land in question within the exterior boundaries

[10] Not only did the Panel majority not equate Chapters with reservations or pueblos, they expressly stated that they "do not hold that any land within the geographical boundaries of a political subdivision of a tribe necessarily has Indian country status." *HRI II*, 562 F.3d at 1266.

[11] The New Mexico Supreme Court has held that the "community of reference" test was abrogated by *Venetie*. It thus played no role in *Romero*. *See* Argument §V(B), *infra*.

of the Pojoaque Pueblo, the Court further held that "all lands within the exterior boundaries of a Pueblo land grant, **to which the Pueblo hold title**, are Indian country within the meaning of 18 U.S.C. § 1151." *Id.* at 1250 (emphasis added). The Tenth Circuit did not distinguish between extinguishing title and extinguishing Indian country status as did *Romero*. Instead the Court based its decision on title to the road. Applying the *Arrieta* analysis to non-Indian fee parcels within the boundaries of the Pueblo would have resulted in the determination that the non-Indian fee parcels were no longer set-aside and thus were not Indian country.[12]

V. THE PANEL DECISION CONFLICTS WITH THE NEW MEXICO SUPREME COURT AND OTHER COURTS APPLYING *VENETIE.*

Following the Supreme Court's decision in *Venetie,* the New Mexico Supreme Court, the Eighth and Ninth Circuits, federal district courts, and other state courts, have all concluded that (1) the Supreme Court rejected the multi-factor analyses for the determination of dependent Indian community under § 1151(b); (2) the Supreme Court held that the federal set-aside and federal superintendence tests are the only tests to be applied; and (3) those two tests are to be applied only to the land in question. The Panel Decision is in direct conflict with the *Venetie* test applied in these other jurisdictions.

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[12] The unique jurisdictional issues presented by Pueblos is further evidenced by the passage of the 2005 amendments Congress made to the Pueblo Lands Act "to clarify federal, state, and Pueblo criminal jurisdiction" within the boundaries of a Pueblo. *Arrieta*, 436 F.3d at 1251, citing Pub. L. No. 109-133, 119 Stat. 2573 (Dec. 20, 2005). Because the crimes at issue in *Arrieta* and *Romero* occurred prior to 2005, the amendments did not apply retroactively to the jurisdictional issues on appeal before each court. *Arrieta*, 436 F.3d at 1251; *Romero*, 142 P.3d at 888 n.1.

A. The Panel Decision Conflicts With Decisions In Other Circuits.

In *Blunk*, the Ninth Circuit held that under the *Venetie* test of set-aside and superintendence, even land owned by the Navajo Nation in fee is not dependent Indian community under § 1151(b). The Ninth Circuit recognized and acknowledged that the Supreme Court rejected the use of any multi-factored tests other than federal set-aside and superintendence: "The Court [in *Venetie*] rejected a 'textured' approach that defined Indian country through a multi-factor balancing test [citation omitted]. Instead, the Court adopted a narrow definition of 'dependent Indian communities.'" *Blunk,* 177 F.3d at 883-84 ("Native Village of Venetie controls our decision. . . . The Navajo Fee Land does not become Indian country simply because of its tribal ownership or because of its proximity or importance to the Navajo Reservation. [citation omitted]. . . ."). If Navajo-owned land is not Indian country under the Ninth Circuit's analysis, HRI's fee land outside reservation boundaries cannot be Indian country under the test mandated by *Venetie*. The Panel Decision is directly contrary to the position of the Ninth Circuit.

The Eighth Circuit also has adopted *Venetie's* two-part test to the exclusion of the multi-factor balancing test. *Yankton Sioux Tribe v. Podhrasky,* 2009 U.S. App. LEXIS 19096 *52-54 (8th Cir. Aug. 25, 2009). The First Circuit, *pre-Venetie,* foreshadowed *Venetie* by indicating that cohesiveness could not trump federal set-aside. *See Narragansett Indian Tribe v. Narragansett Elec. Co.,* 89 F.3d 908, 914-22 (1st Cir. 1996).

B. The Panel Decision Conflicts With The New Mexico Supreme Court.

Following *Venetie* the New Mexico Supreme Court rejected the "community of reference" test as a part of the jurisdictional analysis. *Frank,* 52 P.3d at 409 (N.M. 2002)

("In light of the clear guidelines of the *Venetie* opinion, we decline to incorporate a community of reference inquiry into our case law.... We adopt the two-prong test adopted in *Venetie* to resolve questions of Indian jurisdiction in civil and criminal cases; therefore, no examination of the community of reference is required before applying the two-prong test established in *Venetie*."); *Quintana*, 178 P.3d at 826 (N.M. 2008 (citing *Frank* for the proposition that New Mexico "decline[ed] to incorporate the community of reference inquiry into the *Venetie* analysis" and holding that a federally-owned road between two Pueblos is not Indian country.); *Romero*, 142 P.3d at 891 ("We adopted the *Venetie* analysis in *Frank*.").

C. The Panel Decision Conflicts With Federal District And State Courts.

The Panel Decision also conflicts with other federal and state courts that have applied *Venetie* and abandoned the multi-factored textured approach akin to the "community of reference" analysis. *See City of New York v. Golden Feather Smoke Shop,* 2009 U.S. Dist LEXIS 20953 *36-37 (Case No. 08-CV-3966 (CBA), E.D.N.Y. March 16, 2009) ("To be a 'dependent Indian community,' lands must satisfy 'two requirements – first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second they must be under federal superintendence.'"); *United States v. Papakee,* 485 F. Supp. 2d 1032, 1045 n.13 (N.D. Iowa 2007) ("*Venetie* implicitly abrogated [the] four-factor test [set forth in *United States v. Azure,* 801 F.2d 336 (8th Cir. 1986)] for determining whether a particular area is a 'dependent Indian community'" and holding that "[l]and is part of a 'dependent Indian community' if it is (1) validly set aside for the use of Indians as such and (2) under the superintendence of

the government."); *Tunica-Biloxi Indians v. Pecot,* 351 F. Supp. 2d 519, 525 (W.D. La. 2004) ("Even the Ninth Circuit recognized that 'fee land does not become Indian country simply because of its tribal ownership or because of its proximity or importance to the ... reservation,'" citing *Blunk*); *Thompson v. County of Franklin*, 127 F. Supp. 2d 145, 155 (N.D.N.Y. 2000) ("instead of six, or even three, there are now only two determinative factors- federal set-aside and superintendence. What is more, after *Venetie* . . ., factors other than federal set-aside and superintendence are so diminished in importance as to be practically meaningless"); *State v. Owen,* 729 N.W.2d 356, 369 (S.D. 2007) ("There is no evidence on the record that the Housing development [where the crime occurred] is under federal superintendence or a federal set-aside."); *Dark-Eyes v. Comm'r of Revenue Servs.*, 887 A.2d 848, 865 (Conn. 2006) (holding that because the land in question was not set-aside for Indians by the federal government, "[w]e begin and end with the issue of whether the plaintiff has met her burden of proof with respect to the first requirement, the set-aside.").

D. The Panel Decision Conflicts With The Implicit Reasoning Of Other Panels Of The Tenth Circuit.

In *United States v. Roberts,* 185 F.3d 1125 (10th Cir. 1999) ("*Roberts*"), the Tenth Circuit revisited the 1151(b) definition of Indian country and held that land held in trust by the United States for the Choctaw tribe and superintended by the United States for the benefit of the Choctaw tribe was Indian country under § 1151(b). The *Roberts* decision was authored by Judge Porfilio, the same Circuit Judge who authored *Watchman.* In

Roberts Judge Porfilio recognized that the federal set-aside and federal superintendence tests enunciated in *Venetie* are to be applied only to the "land in question":

> . . . Justice Thomas further explained, "the federal set-aside requirement ensures that **the land in question** is occupied by an 'Indian community'; the federal superintendence requirement guarantees that the Indian community is sufficiently 'dependent' on the Federal Government that the Federal Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the **land in question.**"

185 F.3d at 1133 n.5 (quoting *Venetie*, 522 U.S. at 531) (emphasis added). The Indian country analysis in *Roberts* was limited to the property on which the alleged crimes were committed – there was not a single reference to "community of reference." This opinion is consistent with the holdings in *Venetie* and inconsistent with the Panel Decision.

More recently, in *Arrieta,* addressed above, the title status of the **land in question** was determinative of whether *Venetie's* federal set-aside and superintendence requirements were satisfied. Rather than take a pre-*Venetie* approach and define a community of reference by the Pueblo's boundaries, the Tenth Circuit first examined the title of "the situs of the crime" which was the land in question. 436 F.3d at 1248. The Tenth Circuit held that because title to the land underlying the road was still owned by the Pueblo it was still part of the dependent Indian community defined by the Supreme Court in *Sandoval* and was superintended by the United States. Without that title being in the Pueblo, it would not be Indian country. *Id.* at 1248-49. Although the opinion cites *Watchman* and *HRI I*, the rationale is only consistent with *Venetie*. "Community of reference" as an analytical tool only functions to embrace, in violation of *Venetie*, land that has not been previously determined to be dependent Indian community and that is

not owned by the United States for the benefit of an Indian tribe and superintended by the United States for their benefit. Implicit in the Tenth Circuit's decision in *Arrieta* is the conclusion that the land on either side of the road is not Indian country because it is not owned by the Pueblo. This opinion is consistent with *Venetie* and inconsistent with the Panel Decision.

VI. THESE PROCEEDINGS INVOLVE QUESTIONS OF EXCEPTIONAL IMPORTANCE THAT THE NAVAJO NATION ASSERTS IMPLICATES ITS LEGISLATIVE AND ADJUDICATORY JURISDICTION – AN ASSERTION BASED IN PART ON *WATCHMAN'S* FLAWED JURISDICTIONAL ANALYSIS.

As stated by Justice Thomas in *Venetie*, the federal set-aside requirement "guarantees that the Indian community is sufficiently 'dependent' on the Federal Government that the Federal Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the land in question." *Venetie*, 522 U.S. at 531. Thus, the determination that HRI's Section 8 land is Indian country has the potential to implicate the legislative and adjudicatory jurisdiction asserted by the Navajo Nation and is inconsistent with the United States Supreme Court's decisions in *Montana v. United States*, 450 U.S. 544 (1981) and *Atkinson*.[13] Those decisions establish the principle that an Indian tribe is presumed to have no inherent authority to regulate the activities of non-

[13] In April 2005, the Navajo Nation Tribal Council passed the Dinè Natural Resource Protection Act of 2005 which purports to ban uranium mining on "dependent Indian communities" as defined by 18 U.S.C. § 1151(b). 18 N.N.C. § 1303. The Act provides that it is a "fundamental exercise of Navajo tribal sovereignty." Resolution § 1301A. The Navajo Nation made it clear in its motion to intervene that it seeks to assert sovereignty over HRI's Section 8 fee land if it is determined to be Indian country. *See* HRI Opening Brief at 4-6.

Indians on non-Indian fee land whether located within or outside reservation boundaries and that 15 U.S.C. § 1151 is not a delegation by Congress of any legislative or adjudicatory jurisdiction to Indian tribes. The result of the Panel Decision is that EPA's grant of primacy to the Navajo Nation for purposes of regulation under the SDWA, sanctions the exercise of jurisdiction by the Navajo Nation to regulate activities of non-Indians on non-Indian fee land outside reservation boundaries. *See* Navajo Nation; Underground Injection Control (UIC) Program; Primacy Approval, 73 Fed. Reg. 65,556, 65,559 (Nov. 4, 2008) (to be codified at 40 C.F.R. pt. 147 ("EPA has previously construed the language in SDWA 1451 as covering the full extent of Indian country. . . . In EPA's approval of the Navajo Nation's SDWA PWSS primacy program, EPA found that Indian country was the relevant standard: 'EPA agrees that "Indian country" is the appropriate standard for determining the territorial extent of jurisdiction of the Navajo Nation for the purposes of section 1451 of the SDWA.'").

The Panel states that it does not wish to wander down the path of the *Montana* doctrine. *HRI II*, 562 F.3d at 1265 n.17. However, HRI respectfully submits that addressing the *Montana* doctrine in this context is essential to reaching a correct result consistent with the Supreme Court's controlling precedents.

The Panel Decision rests on the *Watchman* precedent. *Watchman* is based in part on the flawed conclusion that 18 U.S.C. § 1151 is a grant of civil jurisdiction to Indian tribes. The opinion in *Watchman* states:

> § 1151 represents an express Congressional delegation of civil authority over Indian country to the tribes. As a result, the Navajo Nation has

> authority to tax any mining activities taking place in Indian country without violating any express jurisdictional prohibitions.

Watchman, 52 F.3d at 1541. The Supreme Court rejected that conclusion six years later in *Atkinson*. Chief Justice Rehnquist stated that § 1151 is not a Congressional delegation to the tribe of authority over non-Indian fee lands within reservation boundaries:

> We find misplaced the Court of Appeals' reliance upon 18 U.S.C. § 1151 . . . Although § 1151 has been relied upon to demarcate state, federal, and tribal jurisdiction over criminal and civil matters [citation omitted], we do not here deal with a claim of statutorily conferred power. Section 1151 simply does not address an Indian tribe's inherent or retained sovereignty over nonmembers on non-Indian fee land.

Atkinson, 532 U.S. at 653 n.5.[14]

As noted by the dissent to the Panel Decision: "With today's application of our community of reference test, we take an unprecedented step. Never before has non-Indian fee land outside the exterior boundaries of a reservation or Pueblo been held to be a dependent Indian community." *HRI II,* 562 F.3d at 1270; *see also Plains Com. Bank v. Long Family Land & Cattle Co., Inc.*, 128 S. Ct. 2709, 2720 (2008) ("efforts by a tribe to regulate nonmembers, especially on non-Indian fee land are 'presumptively invalid.'"). This "unprecedented step" leaves the door open for Indian tribes, such as the Navajo Nation, to seek to assert their sovereignty over other private non-Indian fee lands in the checkerboard land area, even though that specific area was terminated after the temporary

[14] A court within the Tenth Circuit and the New Mexico Supreme Court recently cited to and recognized the import of footnote 5 from *Atkinson*. *See Osage Nation v. Oklahoma,* 597 F. Supp. 2d 1250, 1265 (N.D. Okla. 2009) (following *Atkinson* and holding that § 1151 "creates no rights [relating to taxation] that may be asserted by [tribal] members or

expansion of the Navajo reservation and the unallotted parcels restored to the public domain almost a century ago. *See HRI I,* 198 F.3d at 1231 (citing *Yazzie,* 909 F.2d at 1389-92); *see also Blatchford*, 904 F.2d at 543.

Absent an act of Congress setting aside fee lands outside the boundaries of a reservation or pueblo for the benefit of Indians, states and counties should not lose jurisdiction and thus regulatory control over those fee lands. *See* Amicus Curiae Brief of the State of New Mexico in Support of Petition for Rehearing *En Banc.*

VII. EVEN IF A THRESHOLD "COMMUNITY OF REFERENCE" DETERMINATION IS PROPER, THE DISSENT REACHED THE CORRECT RESULT THAT HRI'S SECTION 8 LAND IS NOT INDIAN COUNTRY WHEN THE TWO-PART *VENETIE* TEST IS APPLIED.

Even if a threshold "community of reference" determination is proper, the dissent reached the correct result that (1) the entire Church Rock Chapter is not the correct "community of reference," and (2) HRI's Section 8 land is not Indian country when the *Venetie* tests of set-aside and superintendence are applied.

A. HRI's Section 8 Land Is Not A Part Of The Church Rock Chapter "Community."

For the same reasons that the *Arrieta* court reasoned that "[l]and owned by an Indian tribe within the exterior boundaries of land granted to the tribe is necessarily part of the Indian community" [436 F.3d at 1250], HRI's fee land is not a part of the Church Rock Chapter "community." HRI's Section 8 land shares no "cohesiveness" with the Navajo living in proximity to the Chapter House. Judge Frizzell correctly determined

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by the Nation in this action."); *Garcia,* 2009 N.M. LEXIS 550 at *25-34 (discussing the

that if there is a "community" that revolves around the Chapter House, that "community" does not encompass HRI's section 8 land:

> Because our precedents do not go so far as to hold that uninhabited, non-Indian land holdings outside a reservation or Pueblo can be a part of a small Indian community surrounding a Chapter House located over six miles away, the EPA's conclusion that the entire Church Rock Chapter is the appropriate community of reference does not have an adequate basis in law.
>
> * * *
>
> In this case, the evidence may support a conclusion that the community surrounding the Church Rock Chapter House is **an** appropriate community of reference, but not the entire Church Rock Chapter. The record does not support a conclusion that the Navajo community extends so far from the Chapter House, nor that the political boundaries of the entire Chapter should have any meaningful bearing on the community of reference determination.

HRI II, 562 F.3d at 1268-70 (emphasis added). The fact that the judges of a reviewing court can differ on the description of the appropriate "community of reference" is further evidence of the inconsistency, unpredictability, lack of uniformity and confusion that can result from applying a "hybrid *Watchman/Venetie* test" rather than the bright-line set-aside and superintendence tests to HRI's Section 8 land as required by *Venetie*.

B. Neither the Church Rock Chapter *Qua* Chapter Nor HRI's Section 8 Land Is Federally Set-aside Or Superintended.

In its discussion of the "set-aside requirement," the Panel Decision fails to explain how the Church Rock Chapter *qua* Chapter or HRI's Section 8 land is set-aside by the federal government for the benefit of Indians. *HRI II*, 562 F.3d at 1266-67. Rather, the majority of the Panel concluded that "78% of the Chapter land was set aside for the

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Montana doctrine, *Atkinson*, fn.5 and 1151).

Navajo Nation ... by the federal government." *Id.* That set-aside through allotments or trust lands, however, was done decades before the Church Rock Chapter was certified by the Navajo Nation Council in 1955, and the land that was set-aside does not include HRI's Section 8 land. *Id.* at 1269 (dissent). HRI's Section 8 land was restored to the public domain a century ago.

Drawing an unwarranted and unsupportable parallel between Congressionally established reservations and Navajo Nation established Chapters, the majority of the Panel states that because "[w]e would be hard-pressed to argue that the government does not superintend the reservations [,] [i]t follows, then, that the government superintends the Chapter [*qua* Chapter]." *Id.* at 1267. As pointed out in the dissent, while "[c]ertain properties within the political boundaries of [sic] Chapter are federally superintended, ... the Chapter itself is not." *HRI II*, 562 F.3d at 1270. Moreover, there is no dispute that the federal government does not superintend HRI's Section 8 land. *Id.*

CONCLUSION

For the reasons set forth herein, in HRI's opening and reply Panel briefs, in HRI's Petition For Rehearing *En Banc*, and in the *amici* briefs filed by the State of New Mexico and other parties in support of HRI's position, the Tenth Circuit *en banc* should hold that the *Watchman* "community of reference" test no longer has a place in an 1151(b) Indian country determination after *Venetie*, and that the EPA erred in concluding that HRI's section 8 land is "Indian country."

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in the Court's August 24, 2009 Order because this brief 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 8.950.1094, pattern file 6.517.00, last update was 10/7/09 and according to the program, are free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of October, 2009, a true and correct copy of the foregoing **PETITIONER'S SUPPLEMENTAL BRIEF RE REHEARING *EN BANC*** was served via e-mail transmission in PDF format and U.S. Mail, postage prepaid, addressed to the following:

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