No. 07-9506

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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HYDRO RESOURCES, INC.,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Respondent, and

NAVAJO NATION,

Intervenor-Respondent.

_____

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

_____

NAVAJO NATION'S SUPPLEMENTAL BRIEF ON REHEARING *EN BANC*

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PRELIMINARY STATEMENT

The Navajo Nation is comprised of 110 "Chapters," which are roughly equivalent to counties or municipalities in the state governmental system. The 56,500-acre Church Rock Chapter was established by the United States of America. Its boundaries are set by specific metes and bounds. The United States recognizes the Chapter as a distinct community of Navajo Indians primarily dependent on federal and Navajo services and protection. Over 92% of the land within the Chapter is reserved and supervised by the United States for the exclusive use of Navajo Indians, and its population is over 97% Navajo.

There are only a handful of non-Indian inholdings within the Chapter. Hydro Resources, Inc. ("HRI") owns one of them, a quarter-section of land (the "Section 8 Land") where HRI seeks to mine uranium by pumping a chemical solution into the primary source of groundwater for the Chapter. HRI's activities will be governed by the Underground Injection Control ("UIC") provisions of the Safe Drinking Water Act ("SDWA"), which preserves federal authority over Indian country. HRI's quarter-section is not within reservation borders and is not an Indian allotment. Thus, EPA will administer the UIC requirements only if the Church Rock Chapter constitutes a "dependent Indian community"; if not, the State of New Mexico will administer those requirements. *See* 18 U.S.C. § 1151 (setting forth three categories of "Indian country"); 40 C.F.R. § 144.3 (2008) (adopting "Indian country" as UIC jurisdictional benchmark).

Following this Court's precedents and *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998), EPA and the panel considered as a threshold matter the proper

area for applying the federal set-aside and superintendence tests prescribed by *Venetie* and determined that only the Church Rock Chapter satisfies the standards for that "community of reference." EPA and the panel then applied the *Venetie* tests, and found that they are satisfied. HRI seeks *en banc* review, erroneously contending that the panel should have focused solely on its quarter-section, divorced from any community of which it is a part.

STATEMENT OF THE ISSUES

This Court ordered briefing on the issues raised in HRI's petition. Order (Aug. 24, 2009) at 2. They are stated at pages 2-3 of the petition and summarized as follows:

1. Whether *Venetie* prohibits this Court from determining that the Section 8 Land is part of a larger community of reference that meets *Venetie*'s set-aside and supervision tests;

2. Whether "bright lines" for determining Indian country should be set by land title rather than by recognized boundaries of the dependent Indian communities themselves; and

3. Whether this Court should treat this case as involving tribal jurisdiction when the issues actually presented and ripe for review concern the extent of federal jurisdiction only.

STATEMENT OF THE CASE

Two prior opinions of this Court set forth the procedural history of this case. *See Hydro Resources, Inc. v. E.P.A.*, 562 F.3d 1249, 1253-58 (10th Cir. 2009)*; HRI, Inc. v. E.P.A.*, 198 F.3d 1224, 1230-35 (10th Cir. 2000). In short, HRI seeks a permit to mine uranium in a manner that requires pumping a chemical solution into the aquifer serving the Chapter. The solution, called a lixiviant, unbinds uranium and various heavy metals and

other pollutants from the sandstone in and around the aquifer. Some of the newly polluted water is then pumped to the surface and stripped of the uranium, then returned to the aquifer. After extraction of uranium is completed, HRI hopes to restore the aquifer to acceptable purity by recirculating and treating so-called "pore volumes" of water from the aquifer (called "in-situ remediation," or "ISR"), but the industry has never succeeded in doing so.[1]

HRI proposes to conduct these operations on the Section 8 Land and adjacent land held in trust for the Navajo Nation by the United States (the "Section 17 Land"). EPA initially ruled that the Section 17 Land was Indian country subject to federal authority and that the jurisdictional status of the Section 8 Land was disputed and therefore subject to federal authority until EPA resolved the dispute. HRI sought review of both determinations.

This Court affirmed EPA's determinations, holding that the Section 17 Land was Indian country under 18 U.S.C. § 1151(a) and that, after *Venetie*, the status of the Section 8 Land was legitimately in dispute. *HRI*, 198 F.3d at 1254. This Court remanded the matter to EPA to resolve the dispute over the status of the Section 8 Land. *Id.*

EPA did so. It requested public input in two Federal Register notices. R41, R42. EPA also initiated consultations with the Solicitor of the Department of the Interior. R47.

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[1] "To date, no remediation of an ISR operation in the United States has successfully returned the aquifer to baseline conditions. Often at the end of monitoring, contaminants continue to increase by reoxidation and resolubilization of species reduced during remediation; slow contaminant movement from low to high permeability zones; and slow desorption of contaminants adsorbed to various mineral phases." J.T. Otton, S. Hall, U.S. Geological Survey, "In-Situ Recovery Uranium Mining in the United States: Overview of Production and Remediation Issues," IAEA-CN-175/87 at http://www-pub.iaea.org/MTCD /Meetings/PDFplus/2009/cn175/URAM2009/Session% 204/08_56_Otton_USA.pdf.

HRI urged that its quarter-section in Section 8 had to be addressed in isolation, and that it could not be a part of a dependent Indian community because that mine site was not specifically set apart or supervised by the United States for Indians. HRI proposed no other community of reference. *See* R15b at 1, 3. The State of New Mexico did not provide any substantial comments. *See* R14. The Navajo Nation argued that the Church Rock Chapter, including the Section 8 Land, is a dependent Indian community. R13a, R13b, R40.

The Interior Solicitor reviewed all of the public comments and "conclude[d] Section 8 is located within a dependent Indian community, namely the Church Rock Chapter of the Navajo Nation." R44 App. at 11. EPA considered the Solicitor's Opinion and the public comments and, "[c]onsistent with DOI's Opinion, EPA finds that the Church Rock Chapter, which necessarily includes Section 8, is a 'dependent Indian community.' Accordingly, EPA is the proper authority under the SDWA to regulate underground injections on HRI's Section 8 land . . .." R44 at 13. HRI petitioned for review of that decision; New Mexico did not. The panel agreed with EPA and denied HRI's petition. *Hydro*, 562 F.3d at 1254.

STATEMENT OF FACTS

I. FEDERAL ESTABLISHMENT AND RECOGNITION OF THE CHAPTER

None of the relevant facts are in dispute. The Church Rock Chapter is located within the aboriginal territory of the Navajo. *See* R13b App. 28, 198-99. Although the Santa Fe Railroad had been granted the odd-numbered sections in the area, *see, e.g.*, R13b App. 27-28, 42, President Theodore Roosevelt added the area to the Navajo Reservation by Executive Orders 709 and 744 in 1907 and 1908, *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909

F.2d 1387, 1391 & n.6 (10th Cir.), *cert. denied*, 498 U.S. 1012 (1990), *op. after remand*, *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531 (10th Cir. 1995). Later in 1908, Congress mandated that the Navajos living there be granted trust allotments (typically on the even-numbered sections not owned by the Railroad), and that the surplus lands be restored to the public domain, as they were by Executive Order 1284 in 1911. *See Yazzie*, 909 F.2d at 1397 (quoting 1908 Act). History does not end in 1911, though, as HRI suggests. HRI Br. 4-5, 16; *cf. HRI*, 198 F.3d at 1250; R18.

After the 1911 restoration, President Wilson ordered that 1080 acres in the area (in T. 16 N., R. 16 W., N.M.P.M.) be set aside for exclusive Navajo use by Executive Order 2513 (Jan. 15, 1917). R13b App. 188, 189. Under the Act of May 29, 1928, ch. 853, 45 Stat. 883, 899-900, the United States purchased the odd-numbered parcels from the railroad and took them into trust for the Navajo Nation. R39 (Solicitor's Opinion) at 9; *see HRI*, 198 F.3d at 1251; R13b, App. 26-83, 198-206. Tribal and allotted trust land thus comprises over 82% of the Chapter area. R13b App. 248 ¶ 6. Under an agreement among the Navajo Nation, the Bureau of Indian Affairs ("BIA") and the Bureau of Land Management ("BLM"), all of the other federal lands in the Chapter (another 10% of the total area) is dedicated for exclusive Navajo grazing use, as well. *See id.* ¶¶ 6-7; *see also id*. App. 126-30. The entire Chapter is within the area encompassed in the federally approved Navajo Land Consolidation Plan. R44 (EPA Decision) at 11; R13b App. 132 ¶ 5; *see* 25 U.S.C. § 2203.

The Navajo Chapters are unique in all of Indian country. R44 (EPA Decision) at 8.

"In 1927, the Federal Government organized the Church Rock Chapter as a subdivision of the Navajo Nation government. In doing so, the Government defined it geographically." R39 (Solicitor's Opinion) at 7; R13b App. 135; *see* R13b App. 123-25 (metes and bounds description of Chapter). Soon thereafter, the legendary Commissioner of Indian Affairs John Collier assured the Navajo Nation Council that the Chapters were "important and *official in every sense*." Robert Young, *A Political History of the Navajo Tribe* 67-68 (1978) (emphasis added).[2] The BIA Superintendent testified that "[t]he BIA considers the ... Church Rock Chapter[ ] to be [a] distinct communit[y] of Navajo Indians who depend primarily on federal and tribal governmental services and protection." R13b App. 132.[3]

The Navajo Nation Council formally certified the Church Rock Chapter as a local Navajo governmental unit by resolution in 1955, and the Secretary of the Interior approved that resolution. *See* R13b App. 135-36; Aubrey Williams, *Navajo Political Process* 40 (1970). In addition, the Navajo Nation Council recently delegated much of its authority over local matters to the Chapters under the Navajo Nation Local Governance Act, 26 N.N.C. § 1 *et seq*. (2005). *See Hydro*, 562 F.3d at 1263-64. The integration of such federal institutions into tribal governmental structures conforms with modern federal Indian policy. *See Tillett v. Lujan*, 931 F.2d 636, 640 (10th Cir. 1991) (concerning similar integration of

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[2] Young's work was cited in *Williams v. Lee*, 358 U.S. 217, 222 n.8 (1959), and *Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685, 690 n.17 (1965).

[3] HRI adopts, Br. 17, the erroneous statement in the dissent that the Chapter is a creation of the Navajo Nation. That statement is contrary to the record. *See* R39 (Solicitor's Opinion) at 7; R44 (EPA decision) at 8; R13b App. 131-34, 135, 204-06.

"CFR courts"). The federal government's establishment, recognition and consistent treatment of the Church Rock Chapter fully supports the position of the EPA and the Interior Solicitor that the Chapter is a dependent Indian community.

II. FEDERAL SET ASIDE AND SUPERVISION OF THE CHAPTER

A. THE UNITED STATES HAS SET ASIDE 92% OF THE CHAPTER TERRITORY FOR EXCLUSIVE NAVAJO USE.

As discussed above, the United States has set aside over 82% of the total land area in the Chapter in trust status for Navajos and holds and administers an additional 10% for exclusive Navajo use. By contrast, in the other federally recognized dependent Indian communities in New Mexico, the nineteen Pueblos, the United States typically did not set-aside *any* lands and does not hold Pueblo lands in trust, such lands having been granted in fee by the King of Spain. *See United States v. Sandoval*, 231 U.S. 28, 39, 48 (1913).

The half-dozen tracts of private non-Indian land in the Chapter comprise less than 3.7% of the Chapter area. R13b App. 248; see R16(H) (land status map, reproduced as an attachment hereto); *cf. United States v. Arrieta*, 436 F.3d 1246, 1249 (10th Cir.) (approximately 3,000 congressionally confirmed non-Indian inholdings in the 19 Pueblos), *cert. denied,* 547 U.S. 1185 (2006). HRI's quarter-section comprises less than three-tenths of one percent of the Chapter area, and it cannot be isolated from the larger community. As shown below, its planned activities on its quarter-section could impact the entire community in profound ways.

B. THE UNITED STATES ACTIVELY SUPERVISES 92% OF THE CHAPTER LAND FOR THE BENEFIT OF THE NAVAJO PEOPLE.

The panel summarized the extensive federal supervision over the Chapter succinctly. "Here, the government continues to retain title to 92% of the property in the Chapter, superintending that land for the benefit of the Navajo Nation, its members, and/or individual allottees." 562 F.3d at 1267; *accord* R 44 (EPA Decision) at 12. The extent and degree of such supervision is surely comprehensive, *see* R13b App. 131-34; 204-06; and no party disputes the dominant role of the United States in providing supervision over the Chapter lands, *see* 562 F.3d at 1267. Tribal services and infrastructure complement those of the federal government. R13b App. 135-38, 207-210, 261-64.

III. THE CHURCH ROCK CHAPTER AS A COMMUNITY

There is nothing arbitrary or subjective about EPA's determination that the Chapter is a community, nor does any party seriously dispute it. The panel summarized the most compelling indicia of its community status. 562 F.3d at 1262-64.

The Chapter has definite geographic boundaries, 562 F.3d at 1263, set by metes and bounds, R13b App. 123-25. Its cohesiveness as a community is demonstrated by the fact that 97% of its residents are Navajo Indians, most of whom speak Navajo, *see* 562 F.3d at 1263, R13b App. 246, 132-33, 155, and most of the rest are married into Navajo households, R13b App. 261, 135. As both EPA and the panel found, the Chapter community is cohesive in terms of economic pursuits, remaining centered on traditional means of earning a living. 562 F.3d at 1263; *see* R44 (EPA Decision) at 9; R13b App. 263; R40 at B-37-38.

Only 3% of the Chapter residents have household incomes of $30,000 or more, R40 at B-37, and the unemployment rate for the Chapter is much higher than in nearby non-Navajo communities, *id*. (35% Chapter unemployment); R15c App. III at 21 (7.8% unemployment in McKinley County; 5.7% for New Mexico as a whole). Accordingly, the BIA reports other common interests and needs of the Chapter community as housing, health care, and education, R13b App. 137, and the Chapter's Land Use Plan identified some of the most basic common needs as new or better roads, telephones, water, housing and home improvements, and electricity, R40 at B-32. "The residents look primarily to the Chapter (either with its own resources or through the Navajo Nation and BIA) to meet their various needs." R13b App. 263; 135-38; *see generally* 562 F.3d at 1263-64.

The panel also viewed the Chapter within the context of the surrounding area to ensure that it did not artificially fragment a larger community or fuse a series of smaller communities together. 562 F.3d at 1263-64. Like the Interior Solicitor, R39 at 9, and the EPA, R44 at 9, the panel found that the Chapter residents regularly turn to the Chapter to obtain services and to gather for political and social events, and that the Chapter provides governmental services and facilities, is a distinct entity under Navajo law, and is recognized by the New Mexico Supreme Court as "'perform[ing] similar functions with respect to the health and welfare of its residents as those performed by a county or municipality in the state governmental system,'" 562 F.3d at 1264 (quoting *Thriftway Mktg. Corp. v. State*, 810 P.2d 349, 352 (N.M. 1990)). These facts are amply supported in the record. *E.g.*, R44 (EPA

Decision) at 9 ("Church Rock has its own judicial district and is served by the Navajo police force. It has a Head Start Center, an elementary school, several churches, and a host of Chapter, tribal, and BIA services and facilities."); R13b App. 135-38, 261-64.

HRI's quarter-section clearly is part of the Chapter geographically. It is also an integral part of the Chapter functionally. HRI's 160 acres are hydro-geologically connected to the rest of the Chapter, R13b App. 268, and the aquifer into which HRI seeks to inject chemicals is used extensively for drinking water and livestock watering by the Chapter residents, *id*. App. 252. The quality of that water is now outstanding. *Id*.

SUMMARY OF THE ARGUMENT

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). The *Venetie* opinion, the intent of Congress to avoid jurisdiction by tract book in such areas, this Court's consistent precedents, and decisions of the New Mexico courts support the Interior Solicitor's opinion, the EPA's decision, and the panel's holding.

HRI contends that there are only two relevant facts: (1) its quarter-section is held in fee status and (2) its land is not within formal reservation boundaries. HRI posits that each particular piece of land within the boundaries of a federally recognized dependent Indian community must be specially set aside and supervised by the federal government for Indians in order to be within Indian country. But HRI's position contravenes *Venetie*, § 1151 and the purposes motivating its passage, and all relevant Circuit and state court precedent.

Venetie fully supports the panel's decision. The question in *Venetie* was whether an

Alaska Native Village could impose taxes in the amount of $161,000 for the construction of one school. 522 U.S. at 525. Under HRI's theory, the Court would have first identified the particular land upon which the school was constructed as the "land in question." But it did not. The Court merely stated that the school was constructed "in Venetie," *id*., and then analyzed the history and status of the entire 1.8 million acre former Venetie Reservation, *id*. at 523, 532-34. Rather than rule that each tract of land must be set aside and supervised for Indians to be Indian country, the Court stated that the "more relevant factors" in making that determination are "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." *Id*. at 531 n.7 (internal quotation marks deleted; emphases added).

The panel's decision and other precedents of this Court are fully in accord with *Venetie*. Whether denominated the "land in question" or the "community of reference," the appropriate focus of the *Venetie* set-aside and superintendence tests is the entire community. Thus, in the case of the New Mexico Indian Pueblos, this Court has ruled 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. The New Mexico Supreme Court embraces this analysis, also. *State v. Romero*, 142 P.3d 887, 892 (N.M. 2006) (rejecting State's position that *Venetie* tests should be applied only to the fee lands involved, ruling "we look to the pueblo as a whole and determine if the pueblo is under federal government superintendence."). Surely, a small isolated mine site cannot

constitute the land in question or the community of reference in a dependent Indian community analysis. *HRI*, 198 F.3d at 1232; *Watchman*, 52 F.3d at 1542-43.

The panel's decision and other Circuit precedents fully accord with congressional intent and sound policy. Congress sought to reduce checkerboard jurisdiction when it enacted 18 U.S.C. § 1151. *E.g., Seymour v. Superintendent*, 368 U.S. 351, 358 (1962). Thus, contrary to HRI's contentions, true "bright lines" for civil and criminal jurisdictional purposes are provided not by tract books, but by the metes-and-bounds limits of the Chapter and the recognized boundaries of other recognized dependent Indian communities, such as the Indian Pueblos of New Mexico. That is good policy specifically in this case, as well. It is certain that one part of the proposed mine (the Section 17 Land) will be regulated by the federal EPA; the adjacent Section 8 Land, hydro-geologically connected to the Section 17 Land and the rest of the Indian community, should also be regulated by EPA.

Finally, EPA and the panel emphasized that this case concerns *federal* authority, not tribal authority. *See* 562 F.3d at 1265 n.17. HRI's request for an advisory opinion on tribal authority, an issue implicating a separate set of legal principles, should be rejected.

ARGUMENT

I. A DEFERENTIAL STANDARD OF REVIEW APPLIES.

The panel upheld EPA's determination that the Church Rock Chapter is a dependent Indian community, but did so without according EPA's decision any deference, reasoning that Congress has never delegated to EPA the authority to administer 18 U.S.C. § 1151. 562 F.3d at 1260. Since § 1151 is a criminal statute, that is certainly true, and the Navajo Nation

agrees that EPA's conclusion can be upheld without deference. However, because § 1151 is routinely used to delineate matters of civil and regulatory jurisdiction as well, and in light of EPA's mandate to resolve issues of Indian country jurisdiction under SDWA § 1451 (and several other environmental statutes), the Navajo Nation believes that deference is warranted, particularly if the jurisdictional question before the Court is considered a close one. *Cf. HRI*, 198 F.3d at 1241 n.10 (declining to rule on deference issue).

Deference is granted to an agency's determination of its own jurisdiction, as here. *See Quivira Mining Co. v. EPA*, 765 F.2d 126, 128 (10th Cir. 1985)*, cert. denied*, 474 U.S. 1055 (1986). While it is true that Congress has not delegated to EPA authority to administer § 1151 itself, that statute generally demarcates federal and tribal authority on the one hand, and state authority on the other, *Venetie*, 522 U.S. at 527 n.1, and Congress has repeatedly delegated to EPA authority to make such Indian-law jurisdictional determinations. For example, Congress delegated to EPA the authority to define areas under federal and tribal jurisdiction for "treatment as a state" or "TAS" purposes under the SDWA, the Clean Water Act, and the Clean Air Act. *See, e.g.*, 42 U.S.C. § 300j-11(b)(1) (EPA may grant tribe TAS status under the SDWA for "the area of the Tribal Government's jurisdiction"); 33 U.S.C. § 1377(e) (EPA may grant TAS status under Clean Water Act for water resources held by the tribe, held in trust for the tribe or its members, or "otherwise within the borders of an Indian reservation"); 42 U.S.C. § 7601(d) (EPA may grant TAS status under Clean Air Act for lands "within the exterior boundaries of the reservation or other areas within the tribe's

jurisdiction"). EPA has approved 46 TAS applications under the Clean Water Act, 30 under the Clean Air Act, and one under the SDWA;[4] has developed substantial expertise in determining what constitutes Indian country under express delegations from Congress; and has been consistently upheld in its jurisdictional determinations. *E.g., Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001) (upholding EPA's construction of the term "Indian reservation" in Clean Water Act to include off-reservation trust lands); *Arizona Public Serv. Co. v. EPA* , 211 F.3d 1280 (D.C. Cir. 2000) (upholding EPA's interpretation of the word "reservation" in Clean Air Act to include informal reservations, trust allotments and dependent Indian communities); *Administrator v. EPA*, 151 F.3d 1205, 1213 (9th Cir. 1998) (according deference to "[t]he EPA's determination that the Tribe's lands were reservation lands" under the Clean Air Act) (Ferguson, J., concurring in part and dissenting in part), *amended on denial of reh'g*, 170 F.3d 870 (9th Cir. 1999).

Here, in addition, EPA consulted closely with the Solicitor of the Department of the Interior, who has "special expertise on Indian country questions." R44 (EPA Decision) at 2; *see Administrator v. EPA*, 151 F.3d at 1213; *see also National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665-67 (2007) (deferring to EPA's interpretation of the Endangered Species Act, where EPA relied on Departments of Interior and Commerce). Congress has delegated primary responsibility over such matters to the Interior Department.

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[4] *See* http://www.epa.gov/waterscience/tribes/approvtable.htm; http://www.epa.gov/oar/tribal/backgrnd.htm1; http://www.epa.gov/safewater/tribal/history.html. (All visited on Nov. 2, 2009.)

See, e.g., Seymour, 368 U.S. at 357. Thus, the BIA's actual practice regarding the area, the Solicitor's interpretation and application of § 1151, and EPA's adoption of Interior's position should be accorded substantial deference, *see Seymour*; *Cheyenne-Arapaho Tribes v. State of Okla.*, 618 F.2d 665, 667-68 (10th Cir. 1980) (relying on Solicitor's opinion regarding Indian country status); *United States v. Martine*, 442 F.2d 1022, 1023-24 (10th Cir. 1971) (relying in part on established practice of government agencies and testimony of BIA officials in determining that Ramah Navajo Chapter is a dependent Indian community).

EPA's reliance on the Solicitor's interpretation and application of § 1151 and the BIA's established practices with respect to the Church Rock Chapter thus provide additional reasons for this Court to accord deference to EPA's determination that the *Venetie* set-aside and superintendence tests are satisfied and that the Chapter is a dependent Indian community.

II. THE PANEL DECISION IS CONSISTENT WITH *VENETIE*.

A. THE PANEL ADHERED TO *VENETIE*'S REASONING.

The panel correctly observed that "the *Venetie* Court 'was not even presented with the question of defining the proper means of determining a community of reference for analysis under § 1151(b).'" 562 F.3d at 1261 (quoting *HRI*, 198 F.3d at 1249). Nonetheless, the panel's decision honored *Venetie*'s reasoning and guidance.

Venetie resolved the issue of whether the Native Village could tax construction of one school. If HRI were correct that the particular land on which the school was constructed was the "land in question," then the Court would have identified that particular quarter-section and discussed its status and history. But the Court did not. Rather, the Court observed that

the school was constructed "in Venetie," 522 U.S. at 525, and proceeded to analyze the history and status of the entire 1.8 million acre former reservation, *id.* at 523, 532-34.

Far from indicating that a particular parcel within the boundaries of the Indian community must be specifically set aside and superintended by the federal government for Indians in order to be Indian country under § 1151(b), *Venetie* ruled that the "more relevant factors" in deciding whether an area is a dependent Indian community are "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." *Id.* at 531 n.7 (internal quotation marks deleted; emphasis added). The Court invalidated a Ninth Circuit test that reduced those two critical factors to "mere considerations." *Id.*

The Court's reasoning in *Venetie* confirms that the proper focus of § 1151(b) is on the entire community, not any particular parcel of land within its boundaries. For example, the Court explained that "[t]he federal set-aside requirement ensures that the land in question is occupied by an '*Indian community*'; the federal superintendence requirement ensures that the *community* is sufficiently 'dependent' on the Federal Government that the Federal Government and the Indians involved, rather than the states, exercise *primary* jurisdiction over the land in question." 522 U.S. at 531 (emphases added); *accord Arrieta*, 436 F.3d at 1250. The panel's analysis of whether the Chapter constitutes an Indian community is supported not only by *Venetie* and Circuit precedent but also by the analysis of the Court in *United States v. Mazurie*, 419 U.S. 544 (1975), which decided that non-Indian fee land was

part of an Indian community for purposes of a related statute, 18 U.S.C. § 1154. There is no reason why HRI's quarter-section should not likewise be considered a part of the Church Rock community. *See Cohen's Handbook of Federal Indian Law* ("*Cohen*") at 194 n. 429 (2005).

The panel followed *Venetie*'s guidance. The panel first identified the proper area over which to apply the *Venetie* tests. Having determined that the Chapter constituted the "community of reference" (analogously termed the "land in question" in *Venetie*), the panel determined the extent to which the Chapter was set aside for Navajos and the degree of federal supervision over the Chapter, finding that the federal government owns and controls 92% of the land in the community, that 78% of the community is held in trust for the Navajo Nation and its members, and that the United States actively superintends 92% of the property in the Chapter for the benefit of the Navajo. 562 F.3d at 1266-67. These factors were not mere considerations for the panel; they were requirements that were satisfied.

HRI's sole focus on the title status of its quarter-section does not withstand scrutiny. The phrase "dependent Indian community" is taken almost *verbatim* from *Sandoval*, 231 U.S. at 46. *Sandoval* determined that the New Mexico Pueblos were Indian country, but the nature of the land titles was not dispositive. *Id.* at 48; *see Cohen* at 194 n.429. Indeed, none of the core lands of the Pueblos were ever "set aside" by the United States, nor does the United States retain title to them, such lands having been granted in fee status to the Pueblos by a prior sovereign. *Sandoval*, 231 U.S. at 48. As this Court reasoned in *Arrieta*, 436 F.3d

at 1250, and as the New Mexico appellate courts ruled in *Romero*, 142 P.3d at 892, and in *State v. Ortiz*, 731 P.2d 1352, 1356 (N.M. Ct. App. 1986), HRI appears to concede that fee land within the Pueblos is Indian country under § 1151(b). Br. at 12. But HRI offers no explanation why fee land within *other* dependent Indian communities should not also be Indian country under § 1151(b), which by its terms applies not just to Pueblos, but to "*all* dependent Indian communities." HRI's position is particularly weak given that the non-Indian fee titles in the Pueblos were congressionally confirmed under the Pueblo Lands Act, *see Arrieta*, 436 F.3d at 1249, yet they are nonetheless Indian country.

HRI's attack on the panel as being "result oriented" for its failure to adopt the town of Gallup as the community of reference, HRI Br. at 13, is baseless. The panel thoroughly examined each element of the community of reference test and concluded that EPA correctly determined that the Chapter was the appropriate community to which to apply the set-aside and superintendence tests. 562 F.3d at 1262-64. Moreover, EPA specifically solicited comments on the specific issue of the appropriate community of reference, and HRI commented only that its mine site was the appropriate community. R15(b) at 1, 3. HRI did not make any argument or any factual showing to the EPA that Gallup was the proper community of reference. (No commenter did.) HRI is therefore barred from advancing that argument now. *Osborne v. Babbitt*, 61 F.3d 810, 814 (10th Cir. 1995); *New Mexico Envtl. Impr. Div. v. Thomas*, 789 F.2d 825, 835-36 (10th Cir. 1986).

B. ADOPTION OF HRI'S POSITION WOULD NULLIFY § 1151(b).

HRI posits that if a piece of land within a dependent Indian community is not itself

affirmatively set aside and supervised for Indians, then it cannot be in Indian country. That position would render § 1151(b) superfluous, because land affirmatively set aside and supervised for Indian tribes is already Indian country under § 1151(a), and land set aside and supervised for individual Indians is already Indian country under § 1151(c). *See, e.g., Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991) (tribal trust land "qualifies as a reservation for tribal immunity purposes"); *United States v. John*, 437 U.S. 634, 648-49 (1978) (tribal trust land is a reservation for purposes of criminal jurisdiction); *HRI*, 198 F.3d at 1254 (tribal trust land is reservation land under § 1151(a); *United States v. Roberts*, 185 F.3d 1125, 1131 (10th Cir. 1999) (tribal trust land is Indian country under § 1151(a); official reservation status is not required), *cert. denied,* 529 U.S. 1108 (2000); *Cheyenne-Arapaho*, 618 F.2d at 668; *United States v. Sands*, 968 F.2d 1058, 1061-62 (10th Cir. 1992) (both trust and restricted fee allotments are Indian country under § 1151(c)). Thus, HRI's position would contravene both § 1151 and *Venetie* itself, since the Court in *Venetie* held that the term "dependent Indian community" "refers to a limited category of Indian lands that are *neither* reservations *nor* allotments. 522 U.S. at 527 (emphases added).

HRI's view that *Venetie* limits dependent Indian communities to particular parcels that individually meet the set-aside and superintendence tests also "reads the word 'communities' out of the statute," *Cohen* at 194, contrary to principles of statutory construction, *see Greater Yellowstone Coalition v. Tidwell*, 572 F.3d 1115, 1127 (10th Cir. 2009). Surely, an isolated

parcel of non-Indian land can be a part of an Indian community. *See Mazurie*. Adoption of HRI's position would allow the basic values and needs of federally recognized and distinctly Indian communities to be undermined from within, for example, by setting up a liquor store or pornography shop on such isolated parcels[5] or, in this case, by threatening the sole source of drinking water for the entire community. *See Montana v. EPA*, 137 F.3d 1135, 1141 (9th Cir.) ("A water system is a unitary resource. The actions of one user have an immediate and direct effect on other users.") (citation omitted), *cert. denied*, 525 U.S. 921 (1998).

C. THE PANEL'S DECISION IS CONSISTENT WITH ALL PRIOR DECISIONS OF THIS COURT; DECISIONS OF OTHER COURTS ARE LARGELY IN ACCORD WITH THE PANEL'S APPROACH.

1. The Panel Decision is Consistent with All Circuit Precedent.

HRI's contention that the panel's decision is inconsistent with the "implicit reasoning" of this Court's precedents in *Roberts* and *Arrieta*, HRI Br. 23-25, is without merit. *Roberts* held that land acquired by the United States and held in trust for a tribe for its governmental headquarters is Indian country under § 1151(a), consistent with longstanding Circuit precedent. *Roberts*, 185 F.3d at 1130-31; *see Cheyenne-Arapaho*, 618 F.2d at 668. *Roberts* considered whether, after *Venetie*, a showing of federal superintendence was required for tribal trust land to be considered Indian country under § 1151(a) and answered that question in the negative. There was therefore no occasion in *Roberts* for the court to undertake a

[5] *See* R32 for the establishment of such businesses near Yah-Ta-Hey, N.M., determined not to be a dependent Indian community in *Blatchford v. Sullivan*, 904 F.2d 542 (10th Cir. 1990), *cert. denied*, 498 U.S. 1035 (1991).

"community of reference" analysis under § 1151(b). 185 F.3d at 1133. This Court in *Arrieta* refused a party's invitation to look only at selected parcels of land in an Indian community, and ruled that "we examine the entire Indian community, not merely a stretch of road, to ascertain whether the federal set-aside and federal superintendence requirements are satisfied." 436 F.3d at 1250. The panel, by also applying the set-aside and superintendence tests to the larger community, was therefore consistent with *Arrieta*, which itself had at least implicitly relied on *HRI*. *See* 562 F.3d at 1265 (citing *Arrieta*, 436 F.3d at 1250 & n.2).

The panel's decision conforms with other holdings within the Circuit, also. In *Martine*, this Court held that the entire Navajo community of Ramah, New Mexico, was a dependent Indian community, *see Watchman*, 52 F.3d at 1535 n.3, even though the Ramah Chapter[6] includes some land not owned by the Navajo. James E. Lobsenz, *"Dependent Indian Communities": A Search for a Twentieth Century Definition*, 24 Ariz. L. Rev. 1, 21 (1982). Indeed, after *amicus curiae* United Nuclear Corporation released 94 million gallons of radioactive sludge into the Rio Puerco and through the Church Rock Chapter – the largest accidental release of radioactivity in United States history – the District Court in *UNC Resources, Inc. v. Benally*, 514 F.Supp. 358 (D.N.M. 1981), found that "all the land affected [by UNC's release] lies outside the boundaries of the Navajo reservation, but much of it is trust land and *all of it falls within 'Indian country,'* " *id.* at 360 (emphasis added).

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[6] *See* S. Rep. No. 174, 102d Cong., 1st Sess. 5 (1991) (Ramah community "is one of over 100 chapters, which are political subdivisions of the Navajo Nation"); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1456 (10th Cir. 1997).

2. New Mexico Courts Agree with this Circuit's Analytical Approach.

In *Romero*, the New Mexico Supreme Court echoed the *Arrieta* analysis of how to treat non-Indian lands within a dependent Indian community. Rejecting the position of the New Mexico Attorney General's office, the *Romero* court refused to consider "specific parcels of private fee land within the exterior boundaries of Taos and Pojoaque Pueblos that are the locations of the alleged crimes" that concededly did *not* meet "the requirements of federal set aside." 142 P.2d at 891-92. Rather, in *Arrieta*-like language, the court ruled: "[w]e look to the pueblo as a whole and determine if the pueblo is under federal government superintendence." And while that court in an earlier decision, *State v. Frank*, 52 P.3d 404 (N.M. 2002), had declined to undertake a community of reference analysis, *Romero* essentially limited that case to its particular facts, and stated that the "initial determination of whether the land in question is Indian country is easier in the present cases because, independent of the community of reference analysis, statutes and cases provide guidance," 142 P.3d at 892 (distinguishing *Frank*). This passage also equates the term "land in question" with the *entire* Indian community; in the case of the Pueblos, *all* land within the exterior boundaries constitutes the "land in question" and the "community of reference." The result should be no different for the federally created and recognized Church Rock Chapter.

3. There Is No Substantial Disagreement with Other Circuits.

The only recognized Indian Pueblos with a non-reservation, federally-recognized land base in the United States are in New Mexico. The only off-reservation Navajo Chapters are in New Mexico. So no other Circuit has had to confront the jurisdictional issues presented

here. Nonetheless, HRI contends that the panel's decision conflicts with *Blunk v. Arizona Dep't of Transp.*, 177 F.3d 879 (9th Cir. 1999), and *Yankton Sioux Tribe v. Podhradsky*, 577 F.3d 951 (8th Cir. 2009).

HRI's argument relies on language in *Blunk* that is *dictum* and so cannot create a conflict between the circuits. *See ACLU v. Schundler*, 168 F.3d 92, 98 n.6 (3d Cir. 1999). *Blunk* involved state regulation of a non-Indian on off-reservation fee land purchased by the Navajo Nation for economic development. The non-Indian contesting state jurisdiction in *Blunk* "concede[d] the land is not Indian country. We need not, therefore, undertake a dependent Indian communities analysis, the purpose of which is to determine whether the land is something Blunk already admits it is not." 177 F.3d at 884-85 (B. Fletcher, J., concurring). Ultimately, *Blunk* is the Ninth Circuit's version of *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073 (10th Cir.), *cert. denied*, 510 U.S. 994 (1993), where this Court held that a tribe's purchase of fee land, without any federal involvement, does not create Indian country – *Blunk* having the added feature of the Navajo Nation affirmatively *disclaiming* "Indian country status of the fee land," *Blunk*, 177 F.3d at 884.

Podhradsky held that the United States' set-aside and superintendence of 174.57 acres of miscellaneous trust lands was sufficient to qualify those lands as dependent Indian communities, 577 F.3d at 971, a question that the *HRI* court expressly left open regarding the Section 17 Land, *see HRI*, 198 F.3d at 1254. No party in *Podhradsky* raised or relied on a larger community of reference and the court did not, either. That matter was not at issue.

Finally, HRI's suggestion (Br. at 21) that *Narragansett Indian Tribe v. Narragansett Elec. Co.*, 89 F.3d 908 (1st Cir. 1996), is inconsistent with this Circuit's approach to dependent Indian communities could not be farther from the truth. *Narragansett* expressly *adopted* this Circuit's test to determine if there were an Indian community, 89 F.3d at 917-18 (adopting *Martine* factors), but found the federal government's role in financing a housing project did not make that community a "dependent" one, *id.* at 921-22.

The various district court cases cited by HRI do not create circuit conflicts, nor do any of them undercut the correctness of the panel's decision. The unreported decision in *City of New York v. Golden Feather Smoke Shop, Inc.*, 2009 WL 705815 (E.D.N.Y. Mar. 16, 2009), simply summarized the categories of Indian country, noted that "in each case the land has been designated as Indian country by the federal government," and determined that a state statute precluding civil actions against "Indians in Indian country (as defined in section 1151)" had no applicability because the tribe had "no relationship with the federal government." *Id*. at *11-*12. *United States v. Papakee*, 485 F.Supp. 2d 1032 (N.D. Iowa 2007), held that an Indian settlement was a *de facto* reservation for purposes of §1151(a) and that a particular tract was part of that settlement and therefore "reservation" land. *Id*. at 1040-41, 1044. The court ruled alternatively that the tract, even viewed in isolation, was either a reservation or a dependent Indian community, noting that *Venetie* abrogated a four-factor test for determining whether an area is a dependent Indian community. *Id*. at 1044-45 & n.13. This alternative ruling is not inconsistent with the panel's analysis. After

determining that the Chapter was the proper community for application of the *Venetie* factors, the panel in this case explained that it would apply the modified dependent Indian community analysis prescribed in the *HRI* decision so that only the two *Venetie* factors were applied to that community. 562 F.3d at 1261-1262 (citing *HRI*, 198 F.3d at 1248).

Tunica-Biloxi Indians v. Pecot, 351 F.Supp. 2d 519 (W.D. La. 2004), merely recites the two *Venetie* factors and holds, echoing *Buzzard*, that a tribe's purchase of fee land, without more, does not create Indian country. *Thompson v. County of Franklin*, 127 F.Supp. 2d 145 (N.D.N.Y. 2000), *aff'd,* 314 F.3d 79 (2d Cir. 2002), cites with approval this Court's opinion in *HRI* regarding *Venetie*'s clarification of the applicable standards (as well as *Watchman* on another point), *id*. at 154-56 & n.4, and, like the panel, recognizes that *Venetie* prescribes a two-part test to be applied to the land assertedly constituting the Indian community, *id*. at 156.

In *State v.Owen*, 729 N.W.2d 356 (S.D. 2007), none of the land where the housing project at issue was located was set aside for or even owned by an Indian tribe; all of the land was owned by the City of Peever. *Id.* at 368-69. The other state court case listed by HRI, *Dark-Eyes v. Comm'r of Rev. Svcs.*, 887 A.2d 848 (Conn.), *cert. denied,* 549 U.S. 815 (2006), concerns unique circumstances under the Mashantucket Pequot Indian Claims Settlement Act, but it, too, cites *HRI* with approval. *See id.* at 866. None of the allegedly conflicting decisions listed by HRI takes issue with the post-*Venetie* approach adopted by this Court in *HRI* and applied by the panel.

III. "BRIGHT LINES" ARE PROVIDED BY BOUNDARIES OF DEPENDENT INDIAN COMMUNITIES, AS CONGRESS INTENDED.

Congress sought to end checkerboard jurisdiction when it enacted 18 U.S.C. § 1151. *Seymour*, 368 U.S. at 358. For Indian country under 18 U.S.C. § 1151(b), the jurisdictional "bright lines" desired by HRI are provided not by tract books but by the established exterior boundaries of the federally recognized dependent Indian communities. We note that New Mexico's *amicus curiae* brief does not challenge the panel's ultimate conclusion that the Chapter, which includes the Section 8 Land, is a dependent Indian community, just as it did not seek review of EPA's decision. Since New Mexico sought review of EPA's *initial* determination that the Indian country status of Section 8 Land was legitimately in dispute following *Venetie*, New Mexico's decision not to seek review of EPA's *final* decision that the Section 8 Land *is* Indian country is significant. *See Penobscot Nation v. Fellencer*, 164 F.3d 706, 710-11 (1st Cir.), *cert. denied*, 527 U.S. 1022 (1999).

New Mexico's own courts have ruled in favor of defining Indian country by reference to the exterior boundaries of dependent Indian communities and have rejected the unworkable "bright lines" determined by reference to tract books and favored by HRI. In *Romero,* the New Mexico Supreme Court rejected the position that HRI and the State Attorney General urge here, stating: "Considering the pueblo as a whole is also consistent with congressional intent in enacting § 1151 because it discourages checkerboarding." 142 P.3d at 892. The *Romero* court cited *Hilderbrand v. Taylor*, 327 F.2d 205, 207 (10th Cir. 1964), *Seymour*, and the 1982 edition of *Cohen* in support of its ruling that "fee land within

a §1151(b) dependent Indian community is Indian country just like the fee land within a §1151(a) reservation." *Id.* at 895; *see also id.* at 892-93; *Cohen* at 194-95 & n.429.

The New Mexico Court of Appeals similarly rejected the State Attorney General's position in *State v. Ortiz*, 731 P.2d 1352 (N.M. Ct. App. 1986). That position, the court observed, would exacerbate "jurisdictional confusion and competition" among the State, tribes, and the federal government, and "would encourage a more extensive pattern of 'checkerboard jurisdiction.' This result is inconsistent with Congressional intent." *Id*. at 1356. Oddly, the States' *amicus* brief, at 3, posits just the opposite.

The panel disposed of HRI's (and the dissent's) concern that identifying the appropriate community before applying the *Venetie* tests introduces jurisdictional uncertainty. First, the decision is expressly narrow and restricted to the facts of this case. 562 F.3d at 1266. Second, Congress has plenary power over Indian affairs, so that any attempt by a tribe to overextend its boundaries would be subject to correction. *Id*.

In addition, the panel reaffirmed this Circuit's requirement that any dependent Indian community have definite geographic boundaries. 562 F.3d at 1262-63; *United States v. Adair*, 111 F.3d 770, 774 (10th Cir. 1997). Finally, and, just as fundamentally, the concern of a jurisdictional "black hole" forming around Indian country erroneously suggests that the Navajo Nation will act irresponsibly, snapping up as Navajo Indian country any stray lands that happen to be near its reservation. That is belied by two cases on which HRI has relied. In *Blunk* the Navajo Nation was asked for its position on the tribal fee land at issue, and it

formally disavowed any interest in the outcome of the matter. 177 F.3d at 884. In *United States v. M.C.*, 311 F.Supp. 2d 1281 (D.N.M. 2004), the current Speaker of the Navajo Nation Council testified that the Navajo Nation did "not exercise any real authority" over the area at issue, and it was determined to be outside of Indian country. *Id.* at 1286. In short, HRI assumes without any basis that both the Navajo Nation and the United States will act in bad faith.

IV. HRI'S REQUEST FOR AN ADVISORY OPINION ON THE EXTENT OF TRIBAL JURISDICTION SHOULD BE REFUSED.

This case concerns only the division of state and federal authority under the SDWA. That is how EPA framed the issue, R44 at 1, 13, and the panel made that clear, 562 F.3d at 1253, 1265 n.17. Thus, HRI's third issue, the extent of *tribal* authority, is not implicated in either the EPA's determination or the panel's decision affirming it, nor was it the focus of anyone's comments to the EPA. Any dissertation on the extent of tribal authority over HRI would require analysis of an entirely different body of law, starting with the Navajo treaties and proceeding through the analysis prescribed by *Montana v. United States*, 450 U.S. 544 (1981), and its progeny. HRI seeks an advisory opinion but this Court does not issue them. *United States v. Burlington N. R. Co.*, 200 F.3d 679, 699 (10th Cir. 1999).[7]

[7] HRI's assertion, Br. 26, that "[t]he 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" confuses different SDWA authorities, misconstrues the showings required for primacy, and misunderstands federal Indian law generally. First, the Navajo Nation received primacy to implement Class II UIC provisions for oil and gas development, not for Class III provisions applicable to in-situ uranium

HRI also expresses concern about the treatment of State lands within Indian country. Br. at 3 n.2. Treatment of those lands would be impacted by yet another body of law not at issue here. *See, e.g.*, *Lassen v. Arizona ex. rel. Highway Dep't*, 385 U.S. 458 (1967). In any event, the Navajo Nation has always acknowledged the special status of state lands. Indeed, HRI makes much of the Navajo Nation's recognition of limited state jurisdiction within the Chapter, Br. at 7, but overlooks the fact that states have some jurisdiction within *all* of Indian country. *See, e.g.*, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (New Mexico may tax mineral developers within Jicarilla Apache Reservation). The question under *Venetie* is which government exercises "primary" jurisdiction over the area, 522 U.S. at 530, not whether a state may exercise some authority there.

At bottom, HRI fears that, as a result of the panel's decision, the Navajo Nation will impose a "ban" on HRI's planned uranium mining. As a legal matter, the ability of the Navajo Nation to do so would be decided on a fact-driven basis under *Montana*, not solely based on whether HRI seeks to mine uranium in Indian country. As a practical matter, the Navajo Nation will seriously question new uranium mining on economic and other grounds until the existing radioactive contamination from prior mining is properly cleaned up, such as the vestiges of *amicus* United Nuclear's release of 94 million gallons of radioactive sludge

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mining. Second, EPA did not grant primacy to implement even those Class II UIC provisions over non-Indians based on a finding of Indian country alone, but rather after undertaking a thorough analysis of the Navajo Nation's authority under *Montana* and related cases. The panel decision finding the Section 8 Land to be within a dependent Indian community expressly does *not* address the additional *Montana* issues and therefore cannot have the result that HRI contends.

into the Chapter and United Nuclear's nearby Superfund site that is leaching contaminants into the Chapter's groundwater from its unlined cells.[8] *See* Bradford D. Cooley, *The Navajo Uranium Ban: Tribal Sovereignty v. National Energy Demands*, 26 J. Land Resources & Envtl. L. 393, 422 (2006) ("The [Navajo] Nation has legitimate fears, substantiated by past experience, that uranium mining may have disastrous impacts on the sole drinking water source for over 12,000 people."). The Navajo Nation certainly has the right to comment on and consult with EPA on the proper cleanup of UNC's Superfund site under EPA's longstanding Indian policy, regardless of the Indian country status of that land. *See* Attachment 2 (EPA Policy and 2009 affirmation of it) at 3 ¶¶ 5, 6.

CONCLUSION

The panel's decision should be affirmed.

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[8] By comparison, even garden-variety municipal landfills are required to be lined. *See* 40 C.F.R. § 258.40(a)(2) (2008).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Navajo Nation's Supplemental Brief on Rehearing *En Banc* was filed with the Court's electronic filing system, where it is automatically provided to those counsel registered with the system, and also served on counsel of record by placing same in the United States mail, first-class postage prepaid and addressed and addressed as follows, this 19th day of November, 2009:

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I certify that all required privacy redactions have been made, and with the exception of those redactions, every document submitted in Digital Form or scanned PDF 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 virus scanning program, AVG Anti-virus Free Edition, last update was November 17, 2009 and according to the program, is free of viruses.

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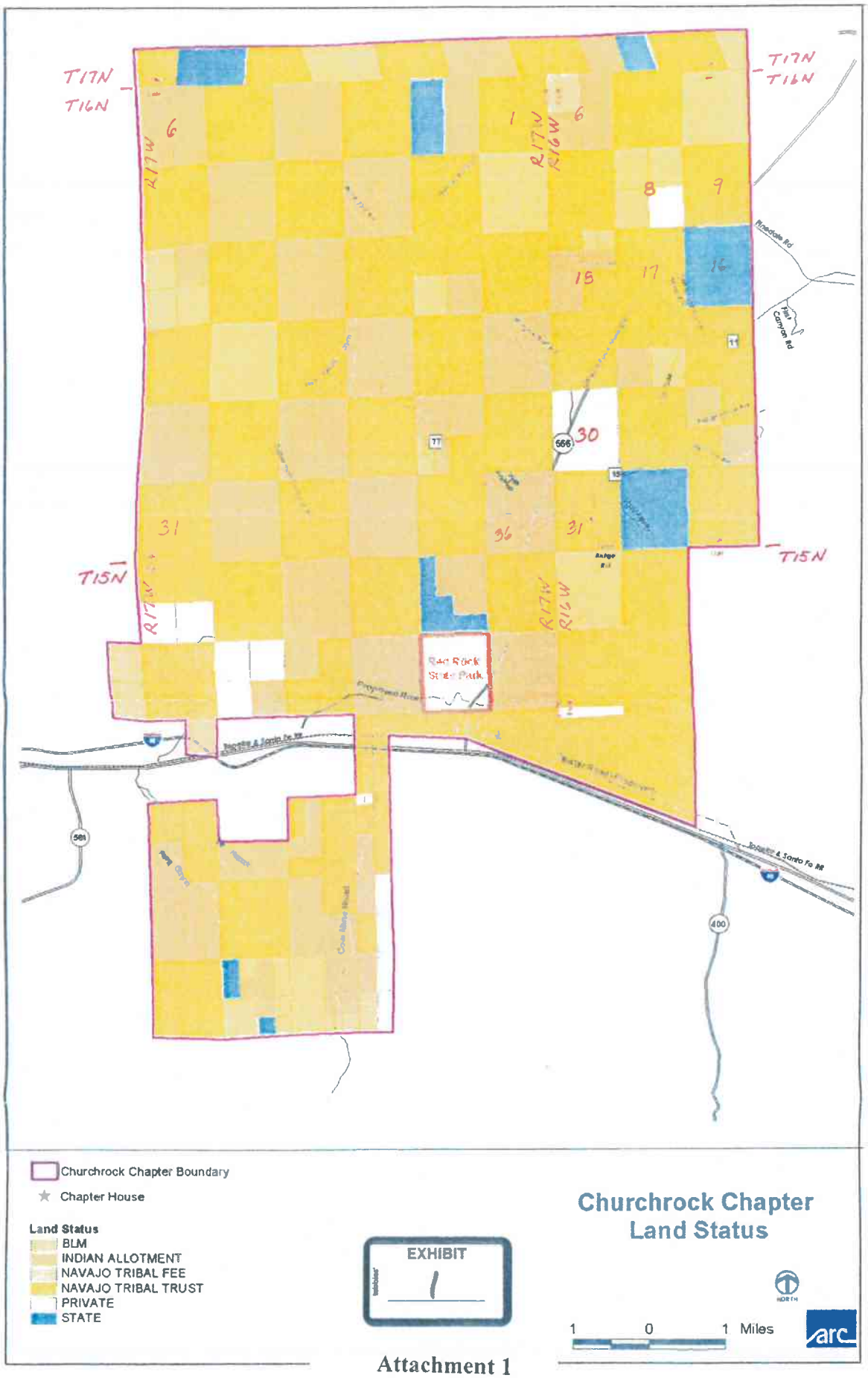
Exhibit 18: Land Status



Attachment 1

Map labels added by SRIC, Jan. '06

11/8/84

EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS

INTRODUCTION

The President published a Federal Indian Policy on January 24, 1983, supporting the primary role of Tribal Governments in matters affecting American Indian reservations. That policy stressed two related themes: (1) that the Federal Government will pursue the principle of Indian "self-government" and (2) that it will work directly with Tribal Governments on a "government-to-government" basis.

The Environmental Protection Agency (EPA) has previously issued general statements of policy which recognize the importance of Tribal Governments in regulatory activities that impact reservation environments. It is the purpose of this statement to consolidate and expand on existing EPA Indian Policy statements in a manner consistent with the overall Federal position in support of Tribal "self-government" and "government-to-government" relations between Federal and Tribal Governments. This statement sets forth the principles that will guide the Agency in dealing with Tribal Governments and in responding to the problems of environmental management on American Indian reservations in order to protect human health and the environment. The Policy is intended to provide guidance for EPA program managers in the conduct of the Agency's congressionally mandated responsibilities. As such, it applies to EPA only and does not articulate policy for other Agencies in the conduct of their respective responsibilities.

It is important to emphasize that the implementation of regulatory programs which will realize these principles on Indian Reservations cannot be accomplished immediately. Effective implementation will take careful and conscientious work by EPA, the Tribes and many others. In many cases, it will require changes in applicable statutory authorities and regulations. It will be necessary to proceed in a carefully phased way, to learn from successes and failures, and to gain experience. Nonetheless, by beginning work on the priority problems that exist now and continuing in the direction established under these principles, over time we can significantly enhance environmental quality on reservation lands.

POLICY

In carrying out our responsibilities on Indian reservations, the fundamental objective of the Environmental Protection Agency is to protect human health and the environment. The keynote of this effort will be to give special consideration to Tribal interests in making Agency policy, and to insure the close involvement of Tribal Governments in making decisions and managing environmental programs affecting reservation lands. To meet this objective, the Agency will pursue the following principles:

1. THE AGENCY STANDS READY TO WORK DIRECTLY WITH INDIAN TRIBAL GOVERNMENTS ON A ONE-TO-ONE BASIS (THE "GOVERNMENT-TO-GOVERNMENT" RELATIONSHIP), RATHER THAN AS SUBDIVISIONS OF OTHER GOVERNMENTS.

EPA recognizes Tribal Governments as sovereign entities with primary authority and responsibility for the reservation populace. Accordingly, EPA will work directly with Tribal Governments as the independent authority for reservation affairs, and not as political subdivisions of States or other governmental units.

2. THE AGENCY WILL RECOGNIZE TRIBAL GOVERNMENTS AS THE PRIMARY PARTIES FOR SETTING STANDARDS, MAKING ENVIRONMENTAL POLICY DECISIONS AND MANAGING PROGRAMS FOR RESERVATIONS, CONSISTENT WITH AGENCY STANDARDS AND REGULATIONS.

In keeping with the principle of Indian self-government, the Agency will view Tribal Governments as the appropriate non-Federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace. Just as EPA's deliberations and activities have traditionally involved the interests and/or participation of State Governments, EPA will look directly to Tribal Governments to play this lead role for matters affecting reservation environments.

3. THE AGENCY WILL TAKE AFFIRMATIVE STEPS TO ENCOURAGE AND ASSIST TRIBES IN ASSUMING REGULATORY AND PROGRAM MANAGEMENT RESPONSIBILITIES FOR RESERVATION LANDS.

The Agency will assist interested Tribal Governments in developing programs and in preparing to assume regulatory and program management responsibilities for reservation lands. Within the constraints of EPA's authority and resources, this aid will include providing grants and other assistance to Tribes similar to that we provide State Governments. The Agency will encourage Tribes to assume delegable responsibilities, (i.e. responsibilities which the Agency has traditionally delegated to State Governments for non-reservation lands) under terms similar to those governing delegations to States.

Until Tribal Governments are willing and able to assume full responsibility for delegable programs, the Agency will retain responsibility for managing programs for reservations (unless the State has an express grant of jurisdiction from Congress sufficient to support delegation to the State Government). Where EPA retains such responsibility, the Agency will encourage the Tribe to participate in policy-making and to assume appropriate lesser or partial roles in the management of reservation programs.

4. THE AGENCY WILL TAKE APPROPRIATE STEPS TO REMOVE EXISTING LEGAL AND PROCEDURAL IMPEDIMENTS TO WORKING DIRECTLY AND EFFECTIVELY WITH TRIBAL GOVERNMENTS ON RESERVATION PROGRAMS.

A number of serious constraints and uncertainties in the language of our statutes and regulations have limited our ability to work directly and effectively with Tribal Governments on reservation problems. As impediments in our procedures, regulations or statutes are identified which limit our ability to work effectively with Tribes consistent with this Policy, we will seek to remove those impediments.

5. THE AGENCY, IN KEEPING WITH THE FEDERAL TRUST RESPONSIBILITY, WILL ASSURE THAT TRIBAL CONCERNS AND INTERESTS ARE CONSIDERED WHENEVER EPA'S ACTIONS AND/OR DECISIONS MAY AFFECT RESERVATION ENVIRONMENTS.

EPA recognizes that a trust responsibility derives from the historical relationship between the Federal Government and Indian Tribes as expressed in certain treaties and Federal Indian Law. In keeping with that trust responsibility, the Agency will endeavor to protect the environmental interests of Indian Tribes when carrying out its responsibilities that may affect the reservations.

6. THE AGENCY WILL ENCOURAGE COOPERATION BETWEEN TRIBAL, STATE AND LOCAL GOVERNMENTS TO RESOLVE ENVIRONMENTAL PROBLEMS OF MUTUAL CONCERN.

Sound environmental planning and management require the cooperation and mutual consideration of neighboring governments, whether those governments be neighboring States, Tribes, or local units of government. Accordingly, EPA will encourage early communication and cooperation among Tribes, States and local governments. This is not intended to lend Federal support to any one party to the jeopardy of the interests of the other. Rather, it recognizes that in the field of environmental regulation, problems are often shared and the principle of comity between equals and neighbors often serves the best interests of both.

7. THE AGENCY WILL WORK WITH OTHER FEDERAL AGENCIES WHICH HAVE RELATED RESPONSIBILITIES ON INDIAN RESERVATIONS TO ENLIST THEIR INTEREST AND SUPPORT IN COOPERATIVE EFFORTS TO HELP TRIBES ASSUME ENVIRONMENTAL PROGRAM RESPONSIBILITIES FOR RESERVATIONS.

EPA will seek and promote cooperation between Federal agencies to protect human health and the environment on reservations. We will work with other agencies to clearly identify and delineate the roles, responsibilities and relationships of our respective organizations and to assist Tribes in developing and managing environmental programs for reservation lands.

8. THE AGENCY WILL STRIVE TO ASSURE COMPLIANCE WITH ENVIRONMENTAL STATUTES AND REGULATIONS ON INDIAN RESERVATIONS.

In those cases where facilities owned or managed by Tribal Governments are not in compliance with Federal environmental statutes, EPA will work cooperatively with Tribal leadership to develop means to achieve compliance, providing technical support and consultation as necessary to enable Tribal facilities to comply. Because of the distinct status of Indian Tribes and the complex legal issues involved, direct EPA action through the judicial or administrative process will be considered where the Agency determines, in its judgment, that: (1) a significant threat to human health or the environment exists, (2) such action would reasonably be expected to achieve effective results in a timely manner, and (3) the Federal Government cannot utilize other alternatives to correct the problem in a timely fashion.

In those cases where reservation facilities are clearly owned or managed by private parties and there is no substantial Tribal interest or control involved, the Agency will endeavor to act in cooperation with the affected Tribal Government, but will otherwise respond to noncompliance by private parties on Indian reservations as the Agency would to noncompliance by the private sector elsewhere in the country. Where the Tribe has a substantial proprietary interest in, or control over, the privately owned or managed facility, EPA will respond as described in the first paragraph above.

9. THE AGENCY WILL INCORPORATE THESE INDIAN POLICY GOALS INTO ITS PLANNING AND MANAGEMENT ACTIVITIES, INCLUDING ITS BUDGET, OPERATING GUIDANCE, LEGISLATIVE INITIATIVES, MANAGEMENT ACCOUNTABILITY SYSTEM AND ONGOING POLICY AND REGULATION DEVELOPMENT PROCESSES.

It is a central purpose of this effort to ensure that the principles of this Policy are effectively institutionalized by incorporating them into the Agency's ongoing and long-term planning and management processes. Agency managers will include specific programmatic actions designed to resolve problems on Indian reservations in the Agency's existing fiscal year and long-term planning and management processes.

William D. Ruckelshaus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 22 2009

THE ADMINISTRATOR

MEMORANDUM

SUBJECT: EPA Indian Policy

TO: All EPA Employees

In 1984, the U.S. Environmental Protection Agency became the first federal agency to adopt a formal Indian Policy. Today, 25 years later, I am proud to formally reaffirm that policy. By my action, EPA reiterates its recognition that the United States has a unique legal relationship with tribal governments based on the Constitution, treaties, statutes, Executive Orders, and court decisions. EPA recognizes the right of tribes as sovereign governments to self-determination and acknowledges the federal government's trust responsibility to tribes. EPA works with tribes on a government-to-government basis to protect the land, air, and water in Indian country.

EPA's tribal program has evolved since the Indian Policy was first adopted. Many significant milestones and successes in the EPA-tribal environmental partnership during these years can be directly traced to the EPA Indian Policy and the EPA-staff commitment to the EPA Indian Policy.

Today, EPA faces unique challenges that both the President and I believe require a full commitment to our nation's environmental and energy future: leading the world in reversing our collective greenhouse gas emissions' growth, decreasing our dependency on foreign oil, creating millions of new jobs in emerging clean-energy technologies, and reducing the pollution that can endanger our children. A clean energy environment is to this decade and the next what the Space Race was to the 1950s and 1960s, and, as America moves forward, tribes are essential partners in this future.

It is an important day in our partnership with tribes as EPA builds on past successes and strives to meet current and future environmental challenges in Indian country. Please join me in continuing to build a strong partnership with tribal governments to protect human health and the environment in Indian country.

Lisa P. Jackson

Attachment