IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 10-3330

LANCE GEORGE OWEN,

Petitioner and Appellant,

-vs-

DOUGLAS L. WEBER, Warden of the South Dakota State Penitentiary,

Respondent and Appellee,

AN APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA

HON. KAREN E. SCHREIER
CHIEF JUDGE

REPLY BRIEF OF THE APPELLANT

Ronald A. Parsons, Jr.
JOHNSON, HEIDEPRIEM& ABDALLAH LLP
431 N. Phillips Ave – Suite 400
Sioux Falls, SD 57104
(605) 338-4304

Counsel for Appellant

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REPLY ARGUMENT

1. In its brief, the State contends that this Court's prior precedent in *United States v. South Dakota*, 665 F.2d 837, 839 (8th Cir. 1981), concerning the test for ascertaining the existence of "dependent Indian communities" for federal jurisdictional purposes under 18 U.S.C. § 1151(b), has been *completely* superseded by the Supreme Court's decision in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998). Owen respectfully suggests that this may not be entirely so.

As explained by the principal dissent in *Hydro Resources, Inc. v. United States Environmental Protection Agency*, 608 F.3d 1131 (2010) (en banc), the *Venetie* decision does not preclude application of some of the factors identified in pre-*Venetie* decisions such as *South Dakota*, 665 F.2d at 843, in determining whether the land in question is a "community" under section 1151(b). As the dissent explained:

> Section 1151(b) uses three criteria to define Indian country: (1) it must be dependent; (2) it must be Indian; and (3) it must be a community. Venetie provides the criteria for determining whether an area of land satisfied (1) and (2): (1) the land is "dependent" if it is under federal superintendence, and (2) the land is "Indian" if it has "been set aside by the Federal Government for the use of the Indians as Indian land." Venetie, 522 U.S. at 527, 118 S.Ct. 948. Yet the Venetie Court did not address the third criteria: determining whether the land in question is a community. The set-aside and superintendence requirements address only the dependent and Indian character of the "land in question."

Id. at 1175-76 (Ebel, J., dissenting). As the Judge Ebel proceeded to explain:

> [t]he Court's decision in *Venetie* explicitly approved factors that appear to allow consideration of an entire community, so that fee lands might be considered part of a dependent Indian community: "[T]he 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 1176-77 (quoting *Cohen's Handbook of Federal Indian Law*, § 3.04[2][c][iii] at 194 (2005 ed.), *in turn quoting Venetie*, 522 U.S. at 531 n. 7).

2. In *South Dakota*, this Court noted that "the fact that the state has asserted jurisdiction over the project does not necessarily defeat a finding of a dependent Indian community." *South Dakota*, 665 F.2d at 842 (citing *United States v. John*, 437 U.S. 634, 653 (1978)). The factors that may be considered in determining the presence of such a community include: "the nature of the area in question, the relationship of the inhabitants of the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area," and whether there is "an element of cohesiveness … manifested either by economic pursuits in the area, common interests, or need of the inhabitants as supplied by that locality…" *South Dakota*, 665 F.2d at 839.

As acknowledged by the State, the district court also appeared to recognize the continued vitality of at least part of the test established by this Court in *South Dakota*, 665 F.2d at 839. (JA 296-98) (Appellee brief at 27-28). In addition, although this Court recently construed section 1151(b) in light of the Supreme

Court's holding in *Venetie*, it did not hold in that decision that its prior *South Dakota* decision had been abrogated or no longer had any force. *See Yankton Sioux Tribe v. Podhradsky*, 577 F.3d 951 (8th Cir. 2009).

3. Thus, the question in this case is whether the land in question here was part of a dependent Indian community under the dictates of *Venetie*, as well as this Court's relevant precedent in *South Dakota* and *Podhradsky*. *See Hydro Resources*, 608 F.3d at 1179 (Ebel., J., dissenting). This requires determining whether the broader community under consideration, as defined by the second and third factors identified in *South Dakota*, 665 F.2d at 839, is sufficiently dependent and Indian, as defined by the Supreme Court's requirements that the land "be set aside by the Federal Government for the use of the Indians as Indian land" and "be under federal superintendence." *Venetie*, 522 U.S. at 527; *see also Podhradsky*, 606 F.3d at 1014.

4. As detailed in Owen's opening brief, this Court should hold that these requirements have been satisfied in this case. The State has correctly acknowledged that the Housing Unit in question was part of a grouping of twenty-two other similar properties with four other properties that are not grouped with the others. (Appellee Brief at 8) (JA 48). This land has been leased at essentially no charge ($1.00) for long beyond the useful life of the

property (99 years) to the Sisseton-Wahpeton Housing Authority for housing that is subsidized by the federal government. (App. 47, 138). The lease is the a equivalent of transfer of the property to the Tribe under South Dakota case law. *See First Nat'l Bank of Madison v. Spear*, 80 N.W. 166, 168 (S.D. 1899).

The subsidization of the tribal housing authority and its housing projects by the federal government on land construed as transferred to the Tribe under the decision cited above should be deemed to qualify the land as having been set aside for use as Indian lands. To be sure, the "land in question" is part of the greater, Sisseton-Wahpeton "'Indian community[.]'" *Venetie*, 522 U.S. at 531. And here, just as in *South Dakota*, 665 F.2d at 840-41, the record demonstrates that the Indian residents of Peever have a strong connection to the Sisseton-Wahpeton Oyate Tribe and the governmental services, such as housing, schools, and health care, jointly provided by the Tribe and the United States government. (App. 48-49, 54-55). Thus, this Court should hold that the standard for establishing a dependent Indian community under 18 U.S.C. § 1151(b) was met, and the district court's contrary determination was an objectively unreasonable application of federal law. 28 U.S.C. § 2254(d).

CONCLUSION

WHEREFORE, Lance George Owen respectfully requests that the district court's order and judgment be reversed and vacated with instructions to grant his petition for writ of habeas corpus and release him from state custody.

Dated this 4th day of March, 2011.

JOHNSON, HEIDEPRIEM & ABDALLAH LLP

BY */S/ Ronald A. Parsons, Jr.*

Ronald A. Parsons, Jr.
431 N. Phillips Ave – Suite 400
Sioux Falls, SD 57104
(605) 338-4304

Counsel for Appellant Lance George Owen

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 4, 2011, a true and correct copy of the foregoing **Reply Brief of Appellant** was served by electronic notice following:

John P. Guhin
SOUTH DAKOTA OFFICE OF ATTORNEY GENERAL
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
(605) 773-3215

/s/ Ronald A. Parsons, Jr.
Ronald A. Parsons, Jr.

CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief of Appellant complies with the Type-Volume requirements of Fed. R. App. P. 32(a)(7)(B) in the following manner: The Brief was prepared using Microsoft Word, Version 2003. It is proportionately spaced in 14-point type, and contains 1,032 words.

/s/ Ronald A. Parsons, Jr.
Ronald A. Parsons, Jr.