
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.

Petition For Review Of A Decision Of The
United States Environmental Protection Agency

Land Status Determination
February 6, 2007

PETITIONER'S REPLY BRIEF

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ORAL ARGUMENT IS REQUESTED

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PRELIMINARY STATEMENT

In *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998), the Supreme Court held:

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 use of the Indians as Indian land; second, they **must** be under federal superintendence.

522 U.S. at 527 (emphasis added). EPA and the Navajo Nation urge the Tenth Circuit to ignore the undisputed facts that HRI’s Section 8 land is fee land owned by non-Indians that is fully alienable and free to be used for non-Indian purposes (similar to the tribal corporation owned land at issue in *Venetie*) and hold that the Section 8 land is among the “limited category of Indian lands” defined by 18 U.S.C. §1151(b) and *Venetie*. EPA and the Navajo Nation urge this Court to rule that non-Indian private fee land in the “checkerboard” area of northwestern New Mexico that is outside the boundaries of a Reservation and Pueblo and is indisputably not set-aside and superintended by the federal government is nonetheless Indian country under 18 U.S.C. §1151(b) because it lies within the boundaries of a local governmental unit of the Navajo Nation, the Church Rock Chapter. In support of their position, they apply the *Venetie* holding, not to the Section 8 land in question as required by *Venetie*, but to the majority of lands in a surrounding “community of reference” determined by vague and amorphous

factors enunciated in *Pittsburgh & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531 (10th Cir. 1995) – factors rejected in *Venetie* as being “**extremely far removed** from the [set-aside and superintendence] requirements themselves.” 522 U.S. at 531 n. 7 (emphasis added). EPA’s determination that HRI’s Section 8 land is Indian country must be reversed.

The State of New Mexico (“State”) purports to “file[its] brief in a neutral capacity.” State Brief at 1. However, the New Mexico Environment Department (“NMED”), the State agency responsible for administering the State’s UIC program, has maintained from the outset “that Section 8 is not [Indian country] under the test in *Venetie*.” R25. Further, a cursory reading of the State’s brief reveals that the State challenges the methodology employed by EPA to determine whether the Section 8 land is Indian country. The State expresses concerns that EPA’s methodology is contrary to law, will result in unpredictable and inconsistent results, and will deprive the State and its Counties of their historically exercised jurisdiction over state owned and non-Indian privately owned land in the “checkerboard” area merely because the lands lie within the boundaries of a Chapter. *See e.g.* State Brief at 4 (“There are many problems that arise from [the ‘community of reference’] that will create unintended confusion and complexity.”); 21-25 (“[T]he State believes that EPA’s determination relies upon

the “community of reference” test which is an unwieldy, vague, and amorphous legal standard that poses more questions than it answers.”)

The State’s and its Counties’ civil and criminal jurisdiction over private fee lands in the “checkerboard” area of the Eastern Navajo Agency and within Chapter boundaries has been recognized by the Tenth Circuit and the Navajo Nation itself. *See* HRI Brief at 17 citing R40 at C-15-16 (discussing the Springstead Subdivision); R4 (“McKinley County has established jurisdiction over private fee land in the County. This jurisdiction has been recognized by non-Indians and Indians, including the Navajo Tribal Government.”); *Blatchford v. Sullivan*, 904 F.2d 542 (10th Cir. 1990), *cert. denied*, 498 U.S. 1035 (1991) (Ya-Ta-Hey comprised of private land within the boundaries of the Rock Springs Chapter is not Indian country);¹ *Pittsburg & Midway Coal Co. v. Yazzie*, 909 F.2d 1387, 1420-22 (10th Cir. 1990) (“*Yazzie*”) (“...New Mexico has asserted [criminal jurisdiction] over lands owned by the state or held privately....It is well to remember that Congress has authorized checkerboard jurisdiction under its definition of Indian country in 18 U.S.C. §1151.... [S]ubsections 1151(b) and (c) allow checkerboard jurisdiction outside reservation boundaries.”)

¹ The Rock Springs Chapter shares the western border of the Church Rock Chapter. *See* HRI Brief at 55-56, n.17 (inadvertently referring to the Rock Springs Chapter as the Twin Lakes Chapter)

Placing undue weight on the “Federal government’s trust relationship with the Tribe” [EPA Brief at 10; R27-29], EPA completely reverses course from its initial determinations in the 1980-90’s that recognized New Mexico’s primacy in administering the UIC program on the Section 8 land and approved an aquifer exemption for Section 8. *See e.g.* R15c App. I-II and V. However, EPA is equivocal, inconsistent, and not wholly confident of its position that the Church Rock Chapter and all land within it is Indian country under 1151(b). This equivocation and inconsistency is evidenced by EPA’s assertion that this Court should not hold that the Church Rock Chapter is a “dependent Indian community” for all purposes and in all situations, and the Court should defer to EPA’s jurisdictional determination even if the Court would arrive at a different result. EPA Brief at 56. (“The Determination is not intended to define the Indian country status of other land within the Church Rock Chapter or elsewhere for other purposes.”)

The Supreme Court has held that Congress intended that 18 U.S.C. 1151(b) define Indian country for criminal and civil purposes. *Venetie*, 520 U.S. at 527. There can be only one correct answer to the question whether land is Indian country under 1151(b). The status of the Section 8 land and other non-Indian private fee land in the “checkerboard” area should be the same whether the issue is environmental regulation or criminal jurisdiction. However, EPA’s methodology,

by its own terms, would treat non-Indian private fee, state or federal land that is within the boundaries of the Church Rock Chapter differently based on the lands' proximity to other possible "communities of reference" (e.g. Gallup), the purpose for which the determination is made, or on policy considerations yet to be defined. Such an arbitrary and inconsistent determination of whether non-Indian private fee, state or federal land is Indian country is not what Congress intended when it enacted 18 U.S.C. §1151(b) or what the Supreme Court held when it interpreted that statute in *Venetie*.

The Navajo Nation's agenda is clear. The Navajo Nation sees the opportunity to have a court declare that the Church Rock Chapter is a "dependent Indian community" as a step in obtaining Indian country status for other Chapters and ultimately the entire Eastern Navajo Agency "checkerboard" land area. That area was terminated as a part of the Navajo reservation almost a century ago. *See HRI v. EPA*, 198 F.3d 1224, 1231 (10th Cir. 2000) ("*HRI*") *citing Yazzie*, 909 F.2d at 1389-92 (10th Cir. 1990); *see also Blatchford*, 904 F.2d at 543. If Indian country status is assigned, the Navajo Nation undoubtedly will seek to assert sovereignty over that area and attempt to implement its ban on uranium mining. *See HRI Opening Brief* at 4-5 n.3, 9 n.5.

In its effort to inject matters extraneous and irrelevant to the objective two-pronged analysis required under *Venetie*, the Navajo Nation speculates about

environmental and social (pornography and liquor) concerns that may result if “checkerboard” jurisdiction is preserved and this Court holds that non-Indian private fee land within the Chapter’s boundaries is not Indian country. Navajo Nation Brief at 38-39. The claimed social harms are wholly irrelevant to HRI’s planned activities and EPA’s regulation under the Safe Drinking Water Act, 42 U.S.C. §§300f-300j-26 (1996) (“SDWA”). The claimed environmental harms are unfounded and have been and will continue to be addressed through the regulatory and permitting process when HRI is allowed to proceed under the UIC permit from the State and related aquifer exemption.²

Lacking both legal and factual support, EPA’s determination that the Section 8 land is Indian country must be reversed.

² See e.g. R15a at 19 (“... HRI has demonstrated by detailed geological and hydrological analysis that ISL uranium recovery operations can be conducted in the exempted portion of the aquifer without posing any potential risk of adverse impacts to adjacent USDW’s.”); R15c App. I-II, V-X; R4 (attached McKinley County Water Board Study dated 11/15/05)(“We conclude that the mining operation as proposed by HRI and approved by the Nuclear Regulatory Commission is safe and effectively protects our groundwater sources.”)

ARGUMENT

I. HRI HAS STANDING TO CONTEST THE EPA'S LAND STATUS DETERMINATION

EPA's assertion that HRI lacks standing to seek review of EPA's determination that HRI's Section 8 land is Indian country is meritless at best. EPA's determination that HRI's Section 8 land is Indian country and that HRI must obtain a permit from EPA rather than the State prior to commencing underground injection on Section 8 "has a direct and immediate impact on petitioner HRI." *HRI*, 198 F.3d at 1224.

Where, as here, HRI's land is the "object of the [government's] action ... at issue, ... there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). Because EPA's decision subjects HRI to the Federal rather than the State regulatory and permitting scheme and the cost of compliance with Federal regulations, HRI has constitutional standing. *NCAA v. Califano*, 622 F.2d 1382, 1389 (10th Cir. 1980) ("Compulsion by unwanted and unlawful government edict is injury *per se*. Certainly, the cost of obeying the regulations constitutes injury.") Further, as a matter of prudential standing, HRI, as owner of the Section 8 land with plans to develop its resources, is unquestionably within the "zone of interests" implicated by EPA's land status determination. *Albuquerque v. Department of Interior*, 379

F.3d 901, 913-14 (10th Cir. 2004); *Stock West Corp. v. Lujan*, 982 F.2d 1389, 1395-97 (10th Cir. 1993).

HRI's business plans to extract uranium from the Section 8 land are definite and certain. EPA undertook and rendered the land status determination because "HRI, Inc., which intends to operate a uranium in-situ leach mine on Section 8, has recently approached NMED concerning [a UIC] permit for its proposed operations." R25; *see also* R47 (same); EPA Brief at 8 (same). EPA's determination, if unchallenged, prohibits HRI from renewing its UIC permit previously obtained from the State and requires HRI to submit itself to the federal permitting process and regulatory jurisdiction. EPA's determination that HRI's Section 8 land is "Indian country" subjects HRI to significant jurisdictional consequences, including the assertion by the Navajo Nation that it has sovereignty over the Section 8 land and that it can prohibit HRI from mining uranium on that land. *See* HRI brief at 4-5; R27 ("Region 9's decision will have a significant impact on the Nation's ability as a self-governing sovereign to regulate activities and resources....").

The direct and immediate impact that EPA's determination has on HRI satisfies the injury-in-fact requirement for both ripeness and standing. *See e.g. Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1234 (10th Cir. 2004) ("although 'standing and ripeness are technically different doctrines, they

are closely related in that each focuses on whether the harm has matured sufficiently to warrant judicial intervention.’ [citations omitted]”); *Verizon Wireless v. City of Rio Rancho*, 476 F.Supp.2d 1325, 1330-31 (D. N.M. 2007) (“To determine whether there is an injury in fact [for ripeness], courts apply the same test used to determine whether there is an injury in fact for purposes of establishing standing.)

HRI asserted in its principal brief that 42 U.S.C. § 300j-7(a)(2) provided the jurisdictional basis for this petition for review. *See HRI*, 198 F.3d at 1230. EPA acknowledges that HRI’s business is directly affected by EPA’s determination. EPA Brief at 17-18 (“[HRI’s] challenge to EPA’s Determination is ultimately fueled by business concerns....”) 42 U.S.C. § 300j-7(a)(2) confers jurisdiction on this court and standing to any entity directly affected by the EPA’s determinations. If that were not the case, EPA could act with impunity knowing that its determinations were insulated from review. HRI risked being barred from seeking review if review was not sought within 45 days of EPA’s determination. *See e.g.* 42 U.S.C. § 300j-7(a). Since HRI contends that the Section 8 land is subject to the State’s UIC program and permit, it is nonsensical for EPA to suggest [EPA Brief at 18] that HRI must expend the monies to prepare and file a permit application with EPA (and thereby possibly waive the right to review) before it can seek review of EPA’s determination.

EPA's position on standing has no merit. EPA has asserted the standing issue as an afterthought in an effort to avoid substantive review. EPA's request for leave to file a surreply on the standing issue [EPA Brief at 17 n. 6] should be denied.

II. NEITHER EPA NOR DOI IS ENTITLED TO DEFERENCE – THE JURISDICTIONAL STATUS OF THE SECTION 8 LAND IS REVIEWED *DE NOVO*

“EPA does not have the power to change the Indian country status of land – that is a status conferred by Congress.” *HRI*, 198 F.3d at 1242. Having incorporated 18 U.S.C. §1151(b) into its regulations defining “Indian lands,” EPA is without authority to substitute its judgment for that of Congress in determining whether the Section 8 land is Indian country. *Id.*

Venetie makes clear that Congress did not provide for a flexible or subjective definition of Indian country depending upon the circumstances in which the issue arises. Under 18 U.S.C. §1151(b), land either is or is not Indian country. Thus, a determination that the Section 8 land is Indian country under 1151(b) because it is within a “dependent Indian community” defined by the boundaries of the Church Rock Chapter will have the effect of classifying as Indian country all non-Indian private fee, state and federal land within the boundaries of the Church Rock Chapter. Recognizing the adverse consequences of such a finding, EPA asserts that “[t]he Determination is not intended to define the Indian country status

of other land within the Church Rock Chapter or elsewhere for other purposes.” EPA Brief at 56. EPA also suggests that reasonable tribunals examining the same facts and applying the same law could arrive at differing but equally correct determinations as to the Indian country status of the Section 8 land. EPA Brief at 12 (“[T]he reviewing court may not set aside agency action merely because the court would have decided the issue differently.”) However, whether decided by an administrative agency or a court, or whether arising in a regulatory, civil or criminal context, there can be only one correct result under 1151(b). Here, that result is that HRI’s Section 8 land is not Indian country.

EPA’s determination whether land is Indian country under 18 U.S.C. §1151(b) is not entitled to deference. *Cf. Montana v. U.S. EPA*, 137 F.3d 1135, 1140 (9th Cir. 1998) (“EPA’s delineation of the scope of that standard [of inherent tribal authority], however, has nothing to do with its own expertise or with any need to fill interstitial gaps in the statute committed to its regulation. Therefore, EPA’s delineation of the scope of tribal inherent authority is not entitled to deference.”) Congress did not delegate to EPA under SDWA or any statute the authority to interpret 18 U.S.C. §1151(b). Further, since EPA was not delegated the authority to interpret 18 U.S.C. §1151(b), the EPA could not subdelegate authority to the Department of Interior (“DOI”). Thus, the DOI’s informal opinion which EPA adopts as its own is not entitled to deference.

Even if this Court holds that the threshold “community of reference” analysis survives *Venetie* and EPA’s determination is reviewed under a deferential standard of review, EPA’s determination must be reversed. As addressed in HRI’s opening brief and herein, EPA’s determination is arbitrary and capricious. There is no support in the record for many of the foundational factual findings upon which EPA attempts to build its decision, including the unsupported keystone assertion that the Church Rock Chapter was the creation of and geographically defined by the federal government. *See* HRI Brief at 14-16.

Although the 1.9 million acres that comprise the area known as the Eastern Navajo Agency was designated a Reservation by the federal government before the area was terminated as a Reservation by Executive Orders [*see, Yazzie*], there is no evidence that the federal government drew the boundaries of any of the approximately thirty Chapters in that area. EPA’s sole “support” for the propositions that the Church Rock Chapter was created and geographically defined by the federal government are the bald and unsourced statements by the DOI that are materially incorrect on their face.³ Since there is no support in the record, the Land Status Determination based upon those false assertions cannot be sustained.

³ The DOI falsely states without support: “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.” R44 at 7.)

Further, even if the federal government had a hand in drawing chapter boundaries, those boundaries were drawn merely to define political boundaries for local governmental units of the Navajo Nation – the boundaries were not drawn with the purpose of changing or defining and had no effect upon the status of non-Indian private fee land. R13b at 131¶3 (“ [A] small portion of the land in Church Rock Chapter is not set apart and/or administered for the exclusive use, occupancy and protection of Indians.”) The status of the individual parcels of land in the “checkerboard” area were established long before the concept of chapters was conceived and boundaries were drawn.⁴

III. NEITHER COLLATERAL ESTOPPEL NOR LAW OF THE CASE PRECLUDES THIS COURT FROM DETERMINING THE ISSUES PRESENTED BY HRI’S PETITION FOR REVIEW

Venetie was decided while the *HRI* appeal was pending and after HRI and NMED filed their opening briefs. HRI and NMED addressed the then newly issued *Venetie* decision in their reply briefs. However, the status of the case in the context of EPA’s exercise of its “dispute rule” and whether EPA procedurally could withdraw its aquifer exemption and its prior determination that the Section 8 land was subject to the State’s “primacy” and NMED jurisdiction, neither

⁴ It is notable that in the extensive discussion in *Yazzie* of the status of lands and the history of the federal government’s involvement in the area known as the Eastern Navajo Agency, there is not a single reference to Navajo chapters.

warranted nor necessitated a full analysis of *Venetie* and its effect upon Tenth Circuit precedent, such as *Watchman*, as is now the issue.

Reflecting the view that *Venetie* was not directly relevant to the issues then before the Court, the panel in *HRI* made it clear that it did not fully consider the effect of *Venetie* on the Tenth Circuit's 1151(b) "community of reference" analysis. *HRI*, 198 F.3d at 1232 n. 3, 1254. The New Mexico Supreme Court characterized the Tenth Circuit's sparse analysis of the perceived substantive effect of *Venetie* on *Watchman* as *dicta*. *State v. Frank*, 52 P.3d 404, 408 (N.M. 2002).

A. Issues Presented By HRI's Petition Are Not Barred By Collateral Estoppel

Even if not *dicta*, the Tenth Circuit's limited analysis of the effect of *Venetie* on *Watchman* should not be a collateral estoppel bar to full consideration of the issue here. For collateral estoppel to apply:

- (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Murdock v. Ute Indian Tribe of Uintah and Ouray Reservation, 975 F.2d 683, 687 (10th Cir. 1992). While HRI was a party to the proceedings below, none of the remaining three requirements for collateral estoppel are satisfied.

The issues determined by EPA and being reviewed here are not identical to the issues relating to EPA's purported withdrawal of aquifer exemptions, state "primacy," and the application of EPA's procedural "dispute rule" that were the subject of EPA's prior actions and the prior appeal. *See HRI*, 198 F.3d at 1236-37 ("The question of the propriety of EPA's invocation of its dispute rule, however, is a distinct one from the underlying legal matter of the Indian country status of Section 8....") Further, in *HRI*, EPA had not developed an administrative record based on the requirements of *Venetie*. *Id.*

In *HRI*, there was no determination by EPA or review by this Court whether (a) the Section 8 land was Indian country; (b) whether the set-aside and superintendence tests of *Venetie* are applied only to the Section 8 land as the land in question or to a "community of reference;" (c) whether the facts that the Section 8 land is neither federally set-aside nor superintended properly are considered irrelevant in the context of a *Venetie* analysis; and (d) whether *Venetie's* rejection of the Ninth Circuit's textured multi-factor approach forecloses application of the set-aside and superintendence tests to a "community of reference" defined in substantial part by the "nature of the area" and "community cohesiveness." There was no occasion for EPA or the Court in the prior proceedings to determine whether *Venetie* allowed for the result EPA reached here.

Second, EPA's land status determination and this review are a continuation of the prior proceedings relating to the Section 8 land. There was no "prior action" or a final adjudication of the merits with respect to the Indian country status of the Section 8 land. *See HRI*, 198 F.3d at 1248 ("[T]he ultimate merits of the dispute are not ripe for resolution.")

Finally, no party to the prior proceedings, including HRI, had a full and fair opportunity to litigate the substantive issues presented here. The substantive issue whether the Section 8 land is Indian country under 1151(b) post-*Venetie* was not ripe for review. *Id.*

B. Issues Presented By HRI's Petition Are Not Barred By The Law Of The Case Doctrine

"The law of the case doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Integra v. Fidelity Capital Appreciation Fund*, 354 F.3d 1246, 1258-59 (10th Cir. 2004). The law of the case doctrine does not apply to *dicta*. *Octagon Resources, Inc. v. Bonnett Resources, Corp.*, 87 F.3d 406, 410 (10th Cir. 1996).

In *HRI*, this Court did not decide the substantive issue here – that is, whether non-Indian private fee land that is neither federally set-aside nor superintended for the benefit of Indians and lies outside the boundaries of a Reservation or Pueblo is Indian country. Neither EPA nor the Navajo Nation cites to any state or federal

court post-*Venetie* that has ever issued such a holding. *See United States v. M.C.*, 311 F.Supp.2d 1281, 1295 (D.N.M. 2004) (“[T]here has never been a finding of a dependent Indian community unless the community at issue was located on tribal lands or land held in trust for native Americans.”). Courts that have considered the substantive issue post-*Venetie* have uniformly held that such non-Indian private fee land is **not** Indian country. *See* HRI Opening Brief at 45-48 (collecting cases); *see also Retasket v. Dept. of Revenue*, 2007 Ore. Tax LEXIS 110 (July 12, 2007).

Even if this Court determines that the law of the case doctrine may apply to certain limited issues, this Court should exercise its discretion and consider all issues anew. *Homans v. Albuquerque*, 366 F.3d 900, 904 (10th Cir. 2004) (“[T]he doctrine is discretionary rather than mandatory.”). The ultimate issue whether the Section 8 land is Indian country was not ripe for review in *HRI*. The determination of that issue has significant implications for the status of all non-Indian private fee, state and federal lands in the “checkerboard” area. All related issues, whether or not discussed in *HRI*, should be decided here.

The exceptions to the law of the case recognized by the Tenth Circuit are:

- (1) when the evidence in a subsequent trial is substantially different;
- (2) when controlling authority has subsequently made a contrary decision of the law applicable to such issues;
- (3) when the decision was clearly erroneous and would work a manifest injustice.

Integra, 354 F.3d at 1259. Each of these exceptions has applicability here.

First, the HRI decision was issued in a relative factual vacuum as to whether the Section 8 land is Indian country. Here, the record is more fully developed and reveals that (a) the Section 8 land is non-Indian private fee land that is not set-aside or superintended for the benefit of Indians; (b) the Church Rock Chapter is a local governmental unit of the Navajo Nation with boundaries drawn and administered by the Navajo Nation decades after the “checkerboard” title and status of individual parcels of land was established and long after the Eastern Navajo Agency was terminated as a reservation; (c) the Church Rock Chapter is not akin to a Pueblo that had its boundaries and nature as Indian land created by a prior foreign sovereign and recognized by Congressional and Executive enactments and the Supreme Court; and (d) the Navajo Nation recognizes “checkerboard” jurisdiction within the Church Rock Chapter boundaries, including the regulatory jurisdiction of New Mexico and McKinley County over non-Indian private fee land. *See generally*, HRI Opening Brief; *see also* R4.

Second, since the *HRI* decision, the Tenth Circuit in *United States v. Arrieta*, 436 F.3d 1246 (10th Cir. 2006) has made it clear that the title to the specific land at issue (there Shady Lane) is dispositive of whether land is set-aside under *Venetie’s* interpretation of 1151(b). 436 F.3d at 1250-51 (“Although the PLA 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.”); *see* HRI Brief at 43-45. This Tenth Circuit precedent, more recent than *HRI*, should control here.

Third, if it is determined that the *HRI* court indicated that non-Indian private fee land which is not federally set-aside and superintended for the benefit of Indians and lies outside the boundaries of a Reservation or Pueblo nonetheless can be Indian country, that is clearly erroneous under the analysis required by *Venetie*. It would be manifestly unjust, with all the jurisdictional consequences attendant to such a ruling, for this Court to adhere to that erroneous ruling.

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

Despite finding that HRI’s Section 8 land is Indian country because it is within the boundaries of the Church Rock Chapter, EPA equivocates on the effects of that finding and asserts that that the jurisdictional test should be flexible to meet the exigencies of the moment: “[t]he Determination is not intended to define the Indian country status of other land within the Church Rock Chapter or elsewhere for other purposes.” EPA Brief at 56. EPA thus asserts that while it has determined that the privately owned Section 8 land within the boundaries of the Church Rock Chapter is Indian country, that should not mean that all non-Indian private fee, state and federal lands in the Church Rock Chapter also are Indian country. The Navajo Nation concurs with EPA in asserting that there should be no

bright-line test when it comes to determining whether non-Indian private fee land outside Reservations and Pueblos are Indian country. Navajo Brief at 36.

Despite its equivocation as to the effect of its determination on other non-Indian lands within the boundaries of the Chapter and the inconsistencies that would result, EPA goes on to equate Chapters with Pueblos and argue that “even if no community of reference analysis were applied [,] [t]he section 8 land is plainly within the boundaries of the Church Rock Chapter and therefore within a dependent Indian community under Venetie.” EPA Brief at 56-57. This begs questions which EPA does not even attempt to answer: What is the basis for equating Chapters with Pueblos? What factors distinguish the Section 8 land from the other non-Indian private fee lands within a Chapter’s boundaries that EPA contends would not be Indian country?

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 v. Utah*, 114 F.3d 1513, 1527 (10th Cir. 1997), *cert. denied*, 533 U.S. 1107 (1998) (“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 concurs that “clear, bright line rules ... will help the State in determining the scope of its jurisdiction.” State Brief at 22.

In order for there to be uniformity and consistency in the determination whether land is Indian country under 1151(b), the *Venetie* tests of federal set-aside and superintendence must be applied to the land in question – here, the Section 8 land – and not to a “community of reference” that is defined using the vague and amorphous factors that the Supreme Court rejected in *Venetie*. *Id.*

V. VENETIE DOES NOT SUPPORT DEFINING THE “LAND IN QUESTION” BY A THRESHOLD “COMMUNITY OF REFERENCE” DETERMINATION

Venetie clearly holds that the federal set-aside and superintendence tests **must** be applied to the “land in question” in order to determine whether that land is Indian country. 522 U.S. at 527, 530-31. *Venetie* leaves no room for doubt that the “land in question” is the land that is the subject of the dispute. The issue as framed in *Venetie* was whether approximately 1.8 million acres of land in northern Alaska uniformly titled in a tribal corporation is “Indian country.” 522 U.S. at 523. Here, the issue is whether HRI’s Section 8 land is “Indian country.” With the exception of *New Mexico v. Romero*, 142 P.3d 887 (N.M. 2006) (discussed *infra*), each and every state and federal court since *Venetie* that has made the substantive determination whether certain land outside the boundaries of a Reservation is Indian country, including the Tenth Circuit in *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999) and *Arrieta*, has based their determination on whether the land in dispute is federally set-aside and federally superintended for the benefit of

Indians. *See* HRI Opening Brief at 40-48 (collecting cases); *see also Retasket, supra.*

While the Tenth Circuit in *Arrieta* indicated that it was appropriate to “examine the entire Indian community to ascertain whether the federal set-aside and federal superintendence requirements are satisfied,” the actual analysis in *Arrieta* makes it clear that to be Indian country the land in question itself – there Shady Lane – must satisfy the two requirements. To the extent that a broader “community” is examined, it is only to help inform the set-aside and superintendence analysis with respect to the land in question. *Arrieta*, 436 F.3d at 1250; *Thompson v. County of Franklin*, 127 F.Supp.2d 145, 155 (N.D.N.Y 2000).

Non-Indian owned private fee land outside Reservation or Pueblo boundaries has never been held to be Indian country under 1151(b) post-*Venetie*. Regardless of how a “community of reference” is defined, fee lands titled in non-Indians outside a reservation cannot be a part of an Indian community. *Cf. Arrieta*, 436 F.3d at 1250 (“Because the Pojoaque Pueblo possesses title to Shady Lane and Shady Lane is within the exterior boundaries of the Pojoaque Pueblo, it is part of the Pojoaque Pueblo community.”) The Section 8 land, if part of any community, is part of the non-Indian communities defined by the town of Gallup and surrounding areas or McKinley County. *See generally*, HRI Brief.

Neither EPA nor the Navajo Nation question the holding of *Venetie* that the federal set-aside and federal superintendence tests must be applied to the “land in question” in order to determine whether the “land in question” is Indian country. Rather, EPA and the Navajo Nation assert that if the “land in question” is non-Indian private fee land that is not itself a “community,” a “community of reference” that encompasses the land in question is to be determined and the two-part *Venetie* test is to be applied to that “community of reference.” Thus, according to EPA and the Navajo Nation, it is irrelevant to the Indian country determination that the land in dispute is non-Indian private fee land neither federally set-aside nor superintended for the benefit of Indians. EPA’s and the Navajo Nation’s position does not survive *Venetie*.

In asserting its position, the Navajo Nation misreads and repeatedly misstates the holding of *Venetie*. At the core of the Navajo Nation’s argument is the assertion that *Venetie* requires “an examination of the ‘*degree*’ of federal ownership of and control over the area, and the *extent* to which the area was set-aside for the use, occupancy, and protection of dependent Indian peoples.” Navajo Brief at 20, 38 and 40, citing to *Venetie*, 522 U.S. at 531 n. 7 and adding emphasis. The Navajo Nation ignores the fact that the quoted language and the words “degree” and “extent” (which the Navajo Nation emphasizes) were **not** the words of Justice Thomas. They were the **Ninth Circuit’s language** for two of the

six factors rejected by the Supreme Court. 522 U.S. at 531 n. 7 (“Although the Court of Appeals majority also reached the conclusion that §1151(b) imposes federal set-aside and federal superintendence requirements, it defined those requirements far differently, by resort to its ‘textured’ six-factor balancing test. [citation omitted]”).

While the Supreme Court stated that the Ninth Circuit’s factors of the “degree of federal ownership” and “the extent to which the area was set-aside” may be “more relevant” than the other four factors, the Supreme Court did not adopt the Ninth Circuit’s formulation of those two factors. The Supreme Court held that for land to be Indian country under 1151(b) it “**must** have been set-aside” and “**must** be under federal superintendence.” 522 U.S. at 527 (emphasis added).

Venetie leaves no room for evaluating “degrees” of federal set-aside or the “extent” of federal superintendence based on nearby or surrounding lands. If the land in question is not federally set-aside and superintended for the benefit of Indians, it cannot be Indian country under 1151(b). See HRI Brief at 40-48 (collecting cases); see also *Retasket*.

The Navajo Nation’s argument that HRI’s reading of the holding of *Venetie* renders 1151(b) “wholly superfluous” is without merit. Navajo Brief at 37. One need only look to *Arrieta* which held, solely under an 1151(b) analysis, that the tribal owned land at issue was Indian country. Further, as noted in *Venetie*, the

dependent Indian community category of Indian country set forth in 1151(b) is derived from *United States v. McGowan*, 302 U.S. 535 (1938), which addressed the Indian country status of land purchased with funds appropriated by Congress and held in trust for the benefit of Indians residing on the land. 522 U.S. at 529-30.

In accepting the Navajo Nation's assertion that the Church Rock Chapter is a proper "community of reference," EPA relies on "community cohesiveness" as a primary factor in defining the "community of reference." Navajo Nation Brief at 42-43. The *Venetie* Court described the Ninth Circuit's factors of "the nature of the area" and "the degree of cohesiveness of the area inhabitants" as "**extremely far removed** from the [set-aside and superintendence] requirements themselves." 522 U.S. at 531 n. 7 (emphasis added). Neither EPA nor the Navajo Nation explain how an analysis that purports to apply the set-aside and superintendence tests to the majority of the land in a "community of reference" determined based on "community cohesiveness" can coexist with the holding of *Venetie*. It cannot.

EPA and the Navajo Nation place substantial reliance on *Romero*. That reliance is misplaced. Navajo chapters are not Pueblos or akin to Pueblos. *Romero* involved private lands within the exterior boundaries of a Pueblo. The Court found that in the "unique circumstances of New Mexico pueblos," **all** land within the Pueblos, "even the now privately-held parcels[,] have been previously recognized as set-aside by the federal government for the use of the Indians as

Indian land” and “[t]he federal government has historically superintended all land, whether pueblo-owned or private claim, that is located within the exterior boundaries of the Pueblo of Pojoaque.”⁵ 142 P.2d 892-93. The *Romero* Court further found that “[t]he initial determination of whether the land in question is Indian country is easier in the [case of Pueblos] because ... Congress and the United States Supreme Court have established that pueblo lands are Indian country.”⁶ 142 P.2d at 892. Finally, *Romero* acknowledges that the New Mexico Supreme Court rejected the threshold “community of reference” analysis relating to land in the “checkerboard” area. 142 P.2d at 892 *citing New Mexico v. Frank*, 52 P.3d 404 (N.M. 2002).

⁵ Although *Romero* was decided four months after *Arrieta*, it makes no reference to *Arrieta*. Based on the analysis in *Arrieta*, had the Tenth Circuit been faced with the facts of *Romero*, HRI suggests that the private fee land would **not** have been held to be Indian country.

⁶ As an example of where the Tenth Circuit and the New Mexico Supreme Court diverge, *Arrieta* held that “the PLA extinguished the Pueblo’s title over some of the land that was originally set-aside for them” (436 F.3d at 1250) whereas *Romero* stated: “[w]e decide that Congress has not shown clear intent to extinguish Indian country, so Indian country status for the privately held parcels within Taos and Pojoaque Pueblos’ exterior boundaries has not been extinguished.” 142 P.2d at 895. Here, there is no dispute that the area known as the Eastern Navajo Agency was terminated as a Reservation. *See, Yazzie*.

VI. THE CHURCH ROCK CHAPTER *QUA* CHAPTER IS NEITHER SET-ASIDE NOR SUPERINTENDED BY THE FEDERAL GOVERNMENT.

Even if this Court determines that (a) *Venetie* leaves room for the threshold determination of a “community of reference” to delineate the “land in question”; (b) the Church Rock Chapter, rather than the Section 8 land, Gallup and its surrounding area, or McKinley County, is the proper “community of reference”; and (c) the two *Venetie* tests are applied to the “community of reference” and not to the Section 8 land, the Church Rock Chapter *qua* Chapter does not satisfy the federal set-aside and superintendence tests.

A. The Church Rock Chapter Is Not Set-Aside

In order for EPA or the Navajo Nation to establish that the Church Rock Chapter and all land within its boundaries is set-aside by the federal government for the benefit of Indians, they would have to show that the land status of **all** lands was established by Congress or the Executive and that Congress or the Executive established the boundaries of the Church Rock Chapter for the express purpose of setting the land aside and superintending the land for the benefit of Indians. *See* 522 U.S. at 531 n.6. The Supreme Court in *Venetie* made this requirement of set-aside quite clear in its recitation of the facts in *United States v. Sandoval*, 231 U.S. 28 (1913) relating to the creation of the Pueblos and in *McGowan* relating to the creation of the Reno Colony with **all** lands held in trust. 522 U.S. 527-30.

EPA and the Navajo Nation ground their set-aside argument on the oft-repeated but unsupported assertion that the United States created the Church Rock Chapter. Merely repeating that assertion does not make it so. Unlike the circumstances present in *Sandoval* and *McGowan*, no Act of Congress or Executive Order created the Church Rock Chapter or any chapter in the Eastern Navajo Agency. Rather than being a creation of the federal government, the Church Rock Chapter merely is a political sub-unit of the Navajo Nation created by the Navajo Nation. HRI Brief at 14-20; *Blatchford*, 904 F.2d at 549 (chapters are a “local governmental unit” of the Tribe); *see also M.C.*, 311 F. Supp. 2d. at 1285-86 (“The Iyanbito chapter is recognized by the Navajo Nation as a governmental sub-unit of the Navajo Nation.”)

EPA and the Navajo Nation misplace reliance upon the Indian Land Consolidation Act, 25 U.S.C. §2203 (“ILCA”). That statute was enacted to allow Indian tribes to eliminate fractional interests in Indian trust or restricted lands and to consolidate tribal landholdings. The ILCA has nothing to do with non-Indian private fee lands or whether those lands have been set-aside by the government for the benefit of Indians.

B. The Church Rock Chapter *Qua* Chapter Is Not Federally Superintended

EPA and the Navajo Nation assert that the federal government “supervises” and “exercises control” over 92.5% of the total area of the Church Rock Chapter.

While that may mean that the parcels that comprise that 92.5% of the land may be superintended by the federal government, it does not mean that all land within the Chapter or that the Chapter *qua* chapter is actively superintended by the federal government for the benefit of Indians. In an effort to overcome this deficiency, EPA and the Navajo Nation recite the various services that they contend the Navajo Nation and the federal government provide to the inhabitants of the Chapter. In doing so, they ignore the substantial critical services (e.g. schools) provided by New Mexico. State Brief at 15-16. Regardless whether it is the State, Navajo Nation or federal government which provides the services to the inhabitants of the Chapter, *Venetie* made clear that “the mere provision of ‘desperately needed’ social programs [do not] support a finding of Indian country.” 522 U.S. at 534; *see also HRI*, 198 F.3d at 1253 (“The *Venetie* Court rejected the government’s provision of social programs as merely general aid, not indicia of active federal control.”).

CONCLUSION

For the reasons set forth in HRI’s Brief and herein, EPA erred in making the determination that the Section 8 land is “Indian country” under 18 U.S.C. §1151(b). Under that statute and *Venetie*, the Section 8 land is not “Indian country.”

DATED: October 9, 2007.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. R. 32(a)(7)(B)(ii) because the brief contains 6,995 words, excluding the parts of the brief exempted by Fed. R. App. P. Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Word XP Service Pack 3 in 14 font size and Times New Roman Style.

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CERTIFICATE OF SERVICE

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