

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

**AMICUS CURIAE REPLY BRIEF OF THE STATE OF NEW
MEXICO FILED IN SUPPORT OF NO PARTY**

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INTRODUCTION

The State of New Mexico (“State”) filed an amicus brief in this matter pursuant to F.R.App.P. 29(a) to stress the importance of limiting the ruling in this matter to the specific facts applicable to the land in question and to not issue a broad ruling regarding all lands within the boundaries of the Church Rock Chapter. The State argued that, if the “community of reference” test is to be applied, it must be limited because the State is actively involved in exercising its regulatory authority throughout the area in question.

The briefs submitted by the Navajo Nation and the United States Environmental Protection Agency (“EPA”) argue that a broad ruling should be issued that would find that all lands within the Church Rock Chapter be found to be “Indian country.” A broad ruling would lead to confusion and a disruption of State programs currently being administered in the area that do not deal with uranium mining.

The Navajo Nation also argues that the State of New Mexico agrees with the agency determination that the land in question, specifically Section 8, is “Indian country.” That is a misstatement of the State’s position. The State has taken the position before the EPA that the land in question is not Indian country and the State has never deviated from that position. The State

complained in its amicus brief that the “community of reference” test used by EPA is vague and confusing and that the Court should instead use a test that is clear and has bright lines so the governmental entities with interests in the area would know which entity had jurisdiction, thus reducing the possibility of arguments and litigation. The State stressed that its interests were in a ruling that would allow cooperation between the State, federal government and Tribal governments, not a ruling that used vague guidelines that create disputes.

**ANY RULING BY THIS COURT SHOULD BE NARROW
AND BASED UPON THE SPECIFIC FACTS OF THIS
CASE AS THEY APPLY ONLY TO SECTION 8**

Throughout its amicus brief, the State of New Mexico stated that this Court, if it were to uphold the EPA’s determination, should limit any holding that the land in question is “Indian country” because of the State’s heavy involvement in regulating matters throughout the checkerboard area in Northwest New Mexico. The State went into some detail regarding those programs and expressed the belief that a broad ruling would lead to a disruption of those programs. Despite EPA’s statement that its determination “[i]s not intended to define the Indian country status of other land within the Church Rock Chapter or elsewhere for other purposes” (EPA’s Merits Brief at 56), EPA and the Navajo Nation contradict that statement in their briefs.

EPA argues that “[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’s Merits Brief at 57. “[T]he Section 8 land is Indian country . . . because the land is clearly within the boundaries of the Church Rock Chapter.” EPA’s Merits Brief at 55, fn 19. The Navajo Nation argues that “[i]ndeed, regulatory consistency and efficiency are aided by a Chapter-wide determination in areas where only a handful of parcels of non-Indian land are interspersed with federal lands set aside for the exclusive use and benefit of Indians.” Brief of Navajo Nation at 36.

EPA’s and the Navajo Nation’s arguments that all lands within the Church Rock Chapter should be considered “Indian country” simply because it is located within the boundaries of the Chapter should be rejected and any decision should be limited to Section 8 and the facts of this case.

If the community of reference test in *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531 (10th Cir. 1995) is still valid law after the decision in *Alaska v. Native Village of Venetie Tribal Gov’t*, 522 U.S. 520 (1998), as both EPA and the Navajo Nation allege, *Watchman* requires a fact specific inquiry as to whether or not that test applies to a certain tract of land. “[T]he resolution of this issue involves substantial factual determinations, making the district court the appropriate forum for its

initial consideration.” *See Watchman* at 1545. A sweeping declaration that lands within the boundaries of the Church Rock Chapter are “Indian country” simply because of the lands’ location within the Chapter’s boundaries would place other parcels of non-Indian owned lands within “Indian country” without the requisite factual inquiry required by *Watchman*.

NEW MEXICO DOES NOT ACCEPT FEDERAL JURISDICTION UNDER THE EPA’S DETERMINATION

The Navajo Nation states that “[N]otably, New Mexico does *not* contest the EPA’s determination that the Section 8 Land is Indian country under federal UIC regulatory authority.” Navajo Nation Brief at 45. The Nation also states that “New Mexico’s acceptance of federal jurisdiction under EPA’s determination, after it previously opposed federal jurisdiction over the Section 8 Land, has real legal significance.” *Id.* These declarative statements by the Navajo Nation are not accurate. Indeed, the State in its amicus brief informed this Court that it had taken the position in *HRI, Inc. v. EPA*, 198 F.3d 1224 (10th Cir. 2002) that there was state jurisdiction to administer the Safe Drinking Water Act program on Section 8. New Mexico Amicus brief at 2.

While the State further noted to this Court that under a new governor there is more of an emphasis on government-to-government cooperation, the

State also stressed that it still must maintain a balance with this policy and its existing regulatory obligations. *Id.* Apparently, the Navajo Nation assumes that New Mexico's statements in its brief regarding cooperative efforts between the two governments in the checkerboard area amount to an acceptance of federal jurisdiction. That assumption is incorrect.

In fact, the State of New Mexico, through its Environment Department, stated to EPA in its March 3, 2005, letter asking EPA to make a ruling on the status of Section 8 that “[W]e maintain the position that Section 8 is not a dependent Indian community.” That position has never changed. The State has determined to express its views to this Court through an amicus brief pursuant to F.R.App.P. No. 29, which provide the State with automatic amicus status. In its amicus brief, the State of New Mexico stated that if the EPA decision is upheld, it would be contrary to the State's interests. *Id.* at 21. The State said that the “community of reference” test creates uncertainty and confusion. *Id.* The State complained that the “community of reference” test was too vague and that the State preferred a test with clear, bright lines. *Id.* at 22, 24-25. The State argued that “[L]astly, the State believes that EPA's determination relies upon the ‘community of reference’ test which is unwieldy, vague, and amorphous legal standard that poses more questions than it answers.” *Id.* at 25.

CONCLUSION

The State of New Mexico asks this Court to ensure that any test it approves to determine if certain lands are within “Indian country” be a test that is clear and provides a bright line to avoid disruption, confusion and further litigation. The State also requests that the Court limit any holding to Section 8 and to specifically state that it does not apply to any other lands located within the boundaries of the Church Rock Chapter.

CERTIFICATE OF COMPLIANCE

In compliance with Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I do hereby certify that this brief complies with the type-volume limitations of Rule 32(a)(7)(B)(ii). The brief contains 1,842 words, excluding the portions of the brief exempted by Rule 32(a)(7)(B)(iii) from said limitations. This brief is prepared in Microsoft Word 2003, Times New Roman 14-point font.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 5th day of October, 2007, copies of the foregoing were mailed, via first-class mail, to the following counsel, properly addressed and prepaid:

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