IN THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF:

Safe Drinking Water Determination; Underground Injection Control Program, Determination of Indian Country Status for Purposes of Underground Injection Control Program Permitting

ON REMAND FROM:

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT COURT

Case Nos: 97-9556, 97-9557

HRI, Inc.

Petitioner

v.

United States Environmental Protection Agency

Respondent

WRITTEN COMMENTS OF HRI, INC. IN SUPPORT OF THE POSITION THAT THE SECTION 8 LAND IN QUESTION IS NOT INDIAN COUNTRY AS DEFINED IN 18 U.S.C. § 1151(B) AND *STATE OF ALASKA v. NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT*, 522 U.S. 520 (1998)

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I. INTRODUCTION

Hydro Resources, Inc. (HRI) hereby submits its comments in response to the United States Environmental Protection Agency's (EPA's) November 2, 2005, Federal Register Notice regarding a determination of the Indian country[1] status of the approximately 160 acres of land located in the southeast portion of Section 8, Township 16N, Range 16W in the State of New Mexico that comprises HRI's Church Rock, New Mexico Section 8 property ("Section 8 land in question"). Also submitted herewith is an Appendix containing documents referenced in these comments. Resolution of this matter is necessary to determine whether EPA or the State of New Mexico has jurisdiction to issue an underground injection control ("UIC") permit under the Safe Drinking Water Act ("SDWA") for the Section 8 land in question.

No part of the Section 8 land in question is reservation, tribal trust or allotted land. No part of the Section 8 land in question is now or has ever been set aside by the federal government for use of Indians as Indian land. No part of the Section 8 land in question is now or has ever been under federal superintendence for the benefit of Indians. Each and every acre of the Section 8 land in question is fee land, the surface and locatable mineral estates of which are owned by HRI as a result of a patent from the United States. There is no dispute on these matters.

The United States Court of Appeals for the Tenth Circuit has remanded this matter to the EPA to determine a narrow issue - whether the Section 8 land in question is a dependent Indian community under 18 U.S.C. §1151(b). The ***State of Alaska v. Native Village of Venetie Tribal Government***, 522 U.S. 520 (1998) (hereinafter referred to as ***Venetie***), controls the determination of this issue and compels the inescapable conclusion that the Section 8 land in question is not a dependent Indian community and, therefore, is not Indian country, because the Section 8 land in question is not and never has been (a) set aside by the federal government for use of Indians as Indian land and (b) under federal superintendence for the benefit of Indians. The state of New Mexico has jurisdiction over issuance of the UIC permit for the Section 8 land in question.

[INTENTIONALLY BLANK]

[1] The terms "Indian country" and "dependent Indian community" will appear herein without quotations; however, references to them are as defined terms within the meaning of 18 U.S.C. §1151.

II. PROCEDURAL STATUS

This matter comes before the EPA on remand from the United States Court of Appeals for the Tenth Circuit for a determination whether the Section 8 land in question is a dependent Indian community under 18 U.S.C. §1151(b). ***HRI, Inc. v. Environmental Protection Agency***, 198 F.3d 1224 (10th Cir. 2000) (hereinafter "***HRI v. EPA***").

On January 5, 1998, the United States Nuclear Regulatory Commission (NRC) issued HRI a source material license to operate an In Situ Leaching (ISL) uranium recovery facility at its Crownpoint Uranium Project ("Crownpoint Project") in New Mexico. The Crownpoint Project consists of the Section 8 land in question and three other properties in New Mexico (Church Rock Section 17, the Unit One properties and the Crownpoint properties).

Because HRI owns in fee both the surface and locatable mineral rights of the Section 8 land in question, HRI believed that the Section 8 land in question was not Indian country. Accordingly, on April 13, 1988, HRI submitted a permit application to the New Mexico Environmental Department (NMED) that would permit underground injection for ISL uranium recovery operations on the Section 8 land in question.[2]

In 1989, NMED applied to EPA for an aquifer exemption on the grounds that the portion of the aquifer to be used for ISL operations is not currently used as a drinking water source and cannot be used as a drinking water source in the future because it contains minerals that are expected to be commercially producible. *See* **Appendix I**. On June 21, 1989, EPA approved NMED's request for an aquifer exemption for the Section 8 land in question. On November 2, 1989 NMED granted approval for a UIC permit for the Section 8 land in question.

In April 1992, HRI requested that NMED extend the UIC permit to include the Church Rock Section 17 property ("Section 17"), and NMED applied to EPA for an aquifer exemption for that property. EPA declined the application, claiming that Section 17 was Indian country. NMED disagreed and, following a hearing, ruled that it had jurisdiction to issue the UIC permit for Section 17 because it was not Indian country.

On July 14, 1997, EPA stated that Section 17 was Indian country but that its status would be treated as "in dispute." EPA contemporaneously determined that the Section 8 land in question's status as Indian country was "in dispute" as well.

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[2] In addition to the NRC license, the underground injection of fluids utilized in ISL uranium recovery is regulated under the SDWA. Under SDWA, UIC programs regulate underground injection to protect current and future underground sources of drinking water (USDWs). For Indian country EPA has UIC jurisdiction. EPA also has jurisdiction in States unless the State has an accepted program and has been granted "primacy." New Mexico has been granted primacy. Some aquifers or portions of aquifers that meet the broad regulatory definition of a USDW may not reasonably be expected to serve as a current or future source of drinking water. As a result, the UIC program regulations allow EPA to *exempt* portions of an aquifer from delineation as a USDW and allow for injection into such aquifers or portions thereof for commercial mineral recovery.

In December 1997, HRI and NMED appealed those determinations to the United States Court of Appeals for the Tenth Circuit. On January 6, 2000, the Tenth Circuit held that the ultimate determination of the Indian country status of the Section 8 land in question was not ripe for judicial review and that "the **Section 8 lands** are subject to a jurisdictional dispute . . . . the Section 8 issue is hereby **REMANDED** to EPA for a final determination as to whether **that land** is a dependent Indian community under 18 U.S.C. §1151(b)." ***HRI, Inc. v. EPA***, 198 F.3d at 1254 (emphasis added).

Thus the sole issue before EPA is whether the Section 8 land in question is a dependent Indian community under 18 U.S.C. §1151(b).

III. SUMMARY OF ARGUMENT

ISL uranium recovery operation requires three (3) regulatory regimes: (a) an NRC license to remove and process source material uranium; (b) a UIC permit for injection of oxidized groundwater into the uranium orebody and aquifer exemption for the aquifer or portion thereof where ISL uranium recovery will take place; and (c) a State water rights permit. An NRC license, State UIC permit and a State's water rights permit have been issued for the Section 8 land in question.

The underground injection of oxidized groundwater and the exemption of aquifers are regulated under the SDWA and EPA's implementing regulations under its UIC program. States are permitted to assume regulatory jurisdiction over issuance of such permits if they demonstrate that their UIC programs comply with SDWA and EPA requirements. For these purposes, Indian tribes may be treated as States.

The State of New Mexico currently operates an EPA-approved UIC program. The Navajo Nation has applied to EPA for primacy over wells other than wells (designated as Class III wells) used for ISL uranium recovery. Accordingly, the State of New Mexico has permitting jurisdiction over lands that are not classified as Indian country, and EPA has such jurisdiction over lands constituting Indian country.

Indian country is defined by federal statute. 18 U.S.C. §1151. That section defines Indian country as (a) reservation land, (b) dependent Indian community, and (c) allotted lands. As determined by the Tenth Circuit in ***HRI v. EPA***, the Section 8 land in question is not reservation or allotted lands. The only issue, therefore, is whether it is a dependent Indian community.

18 U. S. C. §1151(b) provides that Indian country means "all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state." As a result of the Supreme Court's decision in ***Venetie***, it is indisputable that no portion of the Section 8 land in question is a dependent Indian community. In ***Venetie***, the United States Supreme Court held that the term dependent Indian community "refers to a **limited category of Indian lands that are neither reservations nor allotments ...,**

and that satisfy two requirements—first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence." ***Venetie***, 522 U.S. at 527 (emphasis added). The ***Venetie*** court further explained:

> We therefore must conclude that in enacting § 1151(b), Congress indicated that a federal set-aside *and* a federal superintendence requirement **must be satisfied** for a finding of a "dependent Indian community" – just as those requirements had to be met for a finding of Indian country before 18 U.S.C. § 1151 was enacted. [footnote omitted] These **requirements** are reflected in the text of § 1151(b): The federal set-aside **requirement** ensures that **the land in question** is occupied by an "Indian community"; [footnote omitted] the federal superintendence **requirement** guarantees that the Indian community is sufficiently "dependent" on the Federal Government that the Federal Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the **land in question**. [footnote omitted]

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

The Section 8 land in question satisfies neither the required federal set-aside nor the federal superintendence tests. HRI owns the Section 8 land in question surface and locatable mineral estates, including uranium, in fee. The United States has never owned or held the Section 8 land in question for the benefit of an Indian tribe or individual allottees. The Section 8 land in question is not and has never been under the superintendence of the United States for the benefit of an Indian tribe or individual allottees.

In ***Venetie,*** the Supreme Court rejected the Ninth Circuit's "'textured' six-factor balancing test." 522 U.S. at 531 n.7. Lest there be any doubt that the Supreme Court rejected the Ninth Circuit's test that gave consideration to factors other than federal set-aside and federal superintendence, the Ninth Circuit has acknowledged that fact. ***Blunk v. Arizona Department of Transportation,*** 177 F.3d 879, 883 (9th Cir. 1999)("The [Supreme] Court rejected a 'textured' approach that defined Indian country through a multi-factor balancing test [citation omitted]. Instead, the Court adopted a narrow definition of 'dependent Indian communities'"). The Ninth Circuit explained in ***Blunk***:

> Native Village of Venetie controls our decision. The Navajo Fee Land is neither within the Navajo reservation nor is it an Indian allotment. The Navajo Fee Land is not a dependent Indian community because the land was purchased in fee by the Navajo Nation rather than set aside by the Federal Government. The Federal Government does not "actively control[] the land[] in question, effectively acting as a guardian for the Indians," nor does the Government exercise any lesser level of superintendence over

> the Navajo Fee Land. [citation omitted] The Navajo Fee Land does not become Indian country simply because of its tribal ownership or because of its proximity or importance to the Navajo Reservation. [citation omitted] In sum, the requirements for the Navajo Fee Land to be "Indian country" are not met in this case.

177 F.3d at 883-84.

Although there is dicta in ***HRI v. EPA*** that a community of reference analysis may have survived ***Venetie***, the holdings of ***Venetie***, ***Blunk, and United States v. Roberts,*** 185 F.3d 1125, 1133 n.5 (10th Cir. 1999)[3] make it clear that the federal set-aside and federal superintendence requirements must be satisfied for a finding of dependent Indian community with respect to the Section 8 land in question regardless of a separate finding of a community of reference. Even if the ***HRI v. EPA*** court is correct that there remains vitality to a community of reference analysis, the appropriate community of reference must be, by definition, only the Section 8 land in question. The court in ***HRI v. EPA*** expressly recognized this limitation in its remand to EPA. 198 F.3d at 1254 ("the Section 8 issue is hereby **REMANDED** to EPA for a final determination as to whether **that land** is a dependent Indian community under 18 U.S.C. §1151(b)." (emphasis added)). To apply a community of reference analysis to lands outside the boundaries of the Section 8 land in question would render meaningless the mandatory requirements of federal set-aside and federal superintendence dictated by ***Venetie***.

Finally, HRI respectfully submits that, in light of the Supreme Court's decision in ***Venetie***, it is not necessary for EPA to evaluate the factors as listed in its Federal Register Notice. Even if the narrow ***Venetie*** requirements of federal set-aside and federal superintendence are ignored, the answers to the community of reference questions presented in EPA's Notice do not support a finding of Indian country under a pre-***Venetie*** analysis. However, HRI will address these factors to ensure that the record that the EPA wishes to establish is complete. Further, information regarding certain of the factors will assist EPA in reaching the determination that the Section 8 land in question has never been set-aside by the federal government for use of the Indians and has never been under federal superintendence for the benefit of the Indians.

For these reasons, as more fully set forth below, HRI urges the EPA to make the final determination that the Section 8 land in question is ***not*** Indian country under 18 U.S.C. §1151(b).

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[3] As discussed *infra* the ***Robert's*** decision was authored by the same judge that authored the Tenth Circuit's decision in ***Pittsburg & Midway Coal Mining Co. v. Watchman,*** 52 F.3d 1531 (10th Cir. 1995) (hereinafter referred to as ***Watchman***). In ***Roberts,*** the Tenth Circuit recognized that in ***Venetie***, "[t]he Court announced for the first time a two-part test for dependent Indian community" and that "the facts supporting 'set-aside' and 'superintendence' ... 'ensures that the land in question is occupied by an 'Indian community.'"" 185 F.3d at 1132 and n.5.

IV. ARGUMENT

A. Even Prior To the 1948 Enactment of 18 U.S.C. § 1151 and the 1998 Supreme Court's Decision in *Venetie*, Federal Set-Aside and Federal Superintendence Were Required For A Finding of Indian Country.

As demonstrated in ***HRI v. EPA*** and ***Roberts***, the Tenth Circuit clearly recognizes that the determination whether the Section 8 land in question is Indian country under 18 U.S.C. §1151(b) is to be made by application of the narrow two-part federal set-aside and federal superintendence tests set forth in ***Venetie.*** That being said, HRI believes that a brief review of the cases preceding the enactment of 18 U.S.C. § 1151 which resulted in the Supreme Court's decision in ***Venetie*** will illustrate how deeply rooted the factors of federal set-aside and federal superintendence are to the meaning of 18 U.S.C. §1151(b).

In ***Donnelly v. United States***, 228 U.S. 243 (1913), the Court determined that the definition of Indian country would include lands that were set-aside from the public domain pursuant to an executive order for use as an Indian reservation. The Court held that "nothing can more appropriately be deemed 'Indian country,'... than a tract of land that, being a part of the public domain, is lawfully set apart as an Indian reservation." 228 U.S. at 269.

Shortly thereafter, the Court established the dependent Indian community concept in ***U.S. v. Sandoval***, 231 U.S. 28 (1913), where the Court held that Pueblo communities required special protection as Indian country due to their reliance on the "fostering care and protection of the government, like reservation Indians in general." 231 U.S. at 41. The Court determined that Congress was responsible for "dependent Indian communities" that existed on lands that were under the superintendence of the federal government.

In 1914, the Court extended the concept of federal set-aside to allotted lands in ***U.S. v. Pelican***, 232 U.S. 442 (1914). The Court held that the trust allotments constituted "Indian country," because the land in question had been set-aside by an act of the federal government. 232 U.S. at 445. The Court concluded that, like a reservation, the lands in question were validly set-aside by the federal government and were under federal superintendence. As such, they were Indian country.

Finally, in ***U.S. v. McGowan***, 302 U.S. 535 (1938), the Supreme Court continued its adherence to the federal set-aside and federal superintendence requirements. ***McGowan*** involved lands owned by the United States government in trust for the tribe. The Supreme Court examined the history of the term Indian country and the previous cases. The Supreme Court reiterated its two-prong test for Indian country – the federal set-aside test and the federal superintendence test. Relying on the standard it articulated in ***Pelican***, the Supreme Court held that the lands were Indian country:

> The Reno Colony has been validly set apart for the use of the Indians. It is under the superintendence of the government. The government retains title to the lands which it permits the Indians to occupy.

302 U.S. at 539.

B. Congressional Enactment of 18 U.S.C. §1151; Codification of Federal Set-Aside and Federal Superintendence Requirements.

In 1948, after three decades of Supreme Court jurisprudence on the subject, Congress enacted 18 U.S.C. §1151 to codify the definition of Indian country. Section 1151 included three specific categories of lands that qualify as Indian country:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
>
> (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
>
> (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Although the Indian country definition is contained in a criminal statute, Congress has used the Section 1151 definition in civil statutes as well. *See, e.g.,* Indian Child Welfare Act of 1978, 25 U.S.C. § 1903(10) (2005). As stated in ***Venetie,*** "Although this definition by its terms relates only to federal criminal jurisdiction, we have recognized that it also generally applies to questions of civil jurisdiction such as the one at issue here." 522 U.S. at 527.

The legislative history of the statute demonstrates that Congress incorporated prior Supreme Court decisions into its statutory language. As stated by the United States Department of Interior's Office of the Solicitor, "[t]he reviser's note to 18 U.S.C. §1151 states that the 'definition is based on [the] latest construction of the term by the United States Supreme Court in U.S. v. McGowan..., following U.S. v. Sandoval....'" *See* United States Department of Interior, Office of the Solicitor, *Whether the Circle of Nations Wahpeton Indian School Campus Constitutes Indian country,"* (August 16, 1996). This reviser's note also states that Indian allotments were added in accordance with the Supreme Court's decision in ***U.S. v. Pelican***.

C. Post-Enactment Judicial Interpretations of 18 U.S.C. § 1151 Prior to the Supreme Court's Decision in *Venetie.*

Prior to the Supreme Court's 1998 decision in ***Venetie,*** various federal District and Circuit courts sought to interpret the meaning of the three classifications of Indian country set forth in 18 U.S.C. § 1151. While defining the categories of reservation land and allotted land set forth in subparagraphs (a) and (c) generally resulted in straightforward analysis, the same could not be said for the definition of dependent Indian community (subparagraph (b)) as a category of Indian country. Various multi-factored tests evolved in the First, Eighth, Ninth and Tenth Circuits and alternative tests existed for Eastern and Western lands. *See, e.g.,* ***Watchman***, 52 F.3d at 1545 n.15. As noted by the Tenth Circuit in ***Watchman***: "[t]wo tests exist [for Eastern and Western lands] because the Supreme Court has never adopted its own test for determining a dependent Indian community and has denied certiorari in cases applying both of the competing versions." ***Id.;*** *see also,* ***Thompson v. County of Franklin***, 127 F. Supp. 2d 145, 152 (N.D.N.Y. 2000) ("Due to this lack of guidance [from the Supreme Court], lower courts were employing different tests for determining how to define this limited category of Indian lands." (citing to ***Watchman***)).

In ***Blatchford v. Sullivan,*** 904 F.2d 542 (10th Cir. 1990) and its companion civil case ***Pittsburg & Midway Coal Mining Co. v. Yazzi,*** 909 F.3d 1387 (10th Cir. 1990), the Tenth Circuit addressed the concept of a community of reference in the context of a determination of the existence of a dependent Indian community. ***Blatchford*** and ***Yazzi*** were the predecessor cases to ***Watchman***.[4] An appropriate community of reference was to be identified to establish the boundaries of the land to which the multi-factor analysis was to be applied.

The Tenth Circuit stated in ***Watchman*** that "[t]he issue of the proper community of reference for dependent Indian community analysis under 1151(b) is a question of first impression." 52 F.3d at 1543. When selecting a proper community of reference, the Tenth Circuit stated that there are two "organizing principles" that should be considered: (1) the status of the area in question as a "community" and (2) the relationship of the area within the context of the surrounding area. ***Id.*** at 1544. The Tenth Circuit indicated that *after* the appropriate community of reference has been identified, four factors must be considered to determine whether the land in question is a dependent Indian community:

> (1) whether the United States has retained 'title to the lands which it permits the Indians to occupy' and 'authority to enact regulations and protective laws respecting this territory';
>
> (2) 'the nature of the area in question, the relationship of the inhabitants in the area to Indian tribes and to the federal

[4] Tenth Circuit Judge Moore was on the panel that decided ***Blatchford*** and ***Yazzi.*** Judge Moore authored the opinion in ***Watchman***. In 1996, Judge Moore changed his name to Porfilio. Judge Moore, as Judge Porfilio, authored the post-***Venetie*** decision of ***Roberts***.

> government, and the established practice of government agencies toward the area';
>
> (3) whether there is 'an element of cohesiveness ... manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality'; and
>
> (4) 'whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples.' [internal quotes omitted]

52 F.3d at 1545.

The Tenth Circuit remanded the case to the district court for review and determination of the proper community of reference and application of the four-factor test. It is important to reiterate that the Tenth Circuit noted in ***Watchman*** that as of the date of the decision, "the Supreme Court has never adopted its own test for determining a dependent Indian community...." ***Id.*** at 1545 n.15.

Eighteen months after ***Watchman***, the Ninth Circuit addressed the issue of dependent Indian community in ***State of Alaska v. Native Village of Venetie Tribal Government***, 101 F.3d 1286 (9th Cir. 1996). At issue was the jurisdiction of an Alaska tribe to tax a contractor for doing business on lands that had once been part of the reservation but that had been conveyed to two Indian-chartered corporations and then to the tribe in fee simple, with no superintendence by the United States government. Alaska sued to enjoin the tribe from imposing the tax. The district court held the land was not Indian country.

After analyzing the multi-factor tests applied in other Circuits, including the Tenth Circuit, the Ninth Circuit reversed. The Ninth Circuit held that the determination that a dependent Indian community exists "requires a showing of federal set aside and federal superintendence." 101 F.3d at 1294. The Ninth Circuit further held that the requirements of federal set-aside and federal superintendence "are to be construed broadly and should be informed in the particular case by a consideration of the following [six] factors: (1) the nature of the area; (2) the relationship of the area inhabitants to Indian tribes and the federal government; (3) the established practice of government agencies toward that area; (4) the degree of federal ownership of and control over the area; (5) the degree of cohesiveness of the area inhabitants; and (6) the extent to which the area was set aside for the use, occupancy, and protection of dependent Indian peoples." ***Id.*** The Ninth Circuit concluded that "application of our six-factor inquiry indicates that Venetie meets the set-aside and superintendence requirements of the dependent Indian community test." ***Id.*** at 1302.

D. The Supreme Court's Decision Reversing the Ninth Circuit in *Venetie* Rejected The Multi-Factor Analysis and Mandates That For Land To Be a Dependent Indian Community it Must Be Both Set-Aside By The Federal Government and Subject to Federal Superintendence.

After previously denying certiorari review of cases addressing the meaning of a dependent Indian community as used in 18 U.S.C. §1151(b), the Supreme Court accepted review of the Ninth Circuit's ***Venetie*** decision. The Supreme Court rejected the Ninth Circuit's application of a multi-factor analysis and held that a dependent Indian community as set forth in §1151(b) "refers to a limited category of Indian lands that are neither reservations nor allotments ..., and that satisfy two requirements—first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence." ***Venetie,*** 522 U.S. at 527. The Supreme Court reversed the Ninth Circuit's determination that the land in question was a dependent Indian community.

The Supreme Court in ***Venetie*** explained:

> We therefore must conclude that in enacting § 1151(b), Congress indicated that a federal set-aside *and* a federal superintendence requirement **must be satisfied** for a finding of a "dependent Indian community" – just as those requirements had to be met for a finding of Indian country before 18 U.S.C. § 1151 was enacted. [footnote omitted] These **requirements** are reflected in the text of § 1151(b): The federal set-aside **requirement** ensures that **the land in question** is occupied by an "Indian community"; [footnote omitted] the federal superintendence **requirement** guarantees that the Indian community is sufficiently "dependent" on the Federal Government that the Federal Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the **land in question**. [footnote omitted]

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

The Supreme Court stated that for land to constitute Indian country the federal government must "take some action setting apart the land for the use of the Indians." ***Id.*** at 531 n.5. This requirement, the Court concluded, would ensure that "the land in question is occupied by an 'Indian community.'" ***Id.*** at 530. With respect to "federal superintendence," the Court expressly rejected an argument posed by the Tribe, stating that "it is *the land in question*, and not merely the Indian tribe inhabiting it, that must be under the superintendence of the Federal Government." ***Id.*** at 531 n.5 (emphasis in original). This requirement "guarantees that the Indian community is sufficiently 'dependent' on the Federal Government that the Federal Government and the Indians involved ... are to exercise primary jurisdiction over the land in question." ***Id.*** at 531.

The Supreme Court concluded that the land in question did not satisfy either of the two prongs of its dependent Indian community test and, therefore, were not Indian country under Section 1151(b). The Court summarized its conclusion by stating that "[o]ur holding is based on our conclusion that in enacting § 1151, Congress codified these two requirements, which previously we had held **necessary** for a finding of 'Indian country' generally" ***Id.*** at 527 (emphasis added).

E. Judicial Decisions Following the Supreme Court's Decision in *Venetie* Make It Clear that the Supreme Court Rejected Multi-Factor Analysis and Held that Federal Set-Aside and Federal Superintendence Tests Are the Only Tests to be Applied to the Land In Question.

Judicial decisions following the Supreme Court's decision in ***Venetie*** affirm that the Supreme Court rejected multi-factor analyses for the determination of a dependent Indian community, that the federal set aside and federal superintendence tests are the only tests to be applied, and that those tests are to be applied only to the land in question. If the dictates of ***Venetie*** are ignored, however, the Tenth Circuit's decision in ***HRI v. EPA*** and its progeny should and can be read consistently with these other well reasoned opinions by recognizing that after ***Venetie***, any community of reference analysis must be limited to the specific land in question and must not stray outside the objective boundaries of that land.

Lest there be any doubt that the Supreme Court rejected the Ninth Circuit's test that gave consideration to factors other than federal set-aside and federal superintendence, the Ninth Circuit has acknowledged that fact. In ***Blunk v. Arizona Department of Transportation,*** 177 F.3d 879, 883 (9th Cir. 1999), the Ninth Circuit clearly stated: "The [Supreme] Court [in ***Venetie***] rejected a 'textured' approach that defined Indian country through a multi-factor balancing test [citation omitted]. Instead, the Court adopted a narrow definition of 'dependent Indian communities.'" The Ninth Circuit explained in ***Blunk***:

> Native Village of Venetie controls our decision. The Navajo Fee Land is neither within the Navajo reservation nor is it an Indian allotment. The Navajo Fee Land is not a dependent Indian community because the land was purchased in fee by the Navajo Nation rather than set aside by the Federal Government. The Federal Government does not "actively control[] the land[] in question, effectively acting as a guardian for the Indians," nor does the Government exercise any lesser level of superintendence over the Navajo Fee Land. [citation omitted] The Navajo Fee Land does not become Indian country simply because of its tribal ownership or because of its proximity or importance to the Navajo Reservation. [citation omitted] In sum, the requirements for the Navajo Fee Land to be "Indian country" are not met in this case.

177 F.3d at 883-84.

The Tenth Circuit first revisited the definition of Indian country and dependent Indian community after ***Venetie*** in ***United States v. Roberts***, 185 F.3d 1125 (10th Cir. 1999). The ***Roberts*** decision was authored by Judge Porfilio - formerly Judge Moore – the same Circuit Judge who authored ***Watchman***. In ***Roberts***, the Tenth Circuit addressed the jurisdiction of federal courts under the Major Crimes Act over a felony committed by a member of the tribe on land owned by the United States in trust for the tribe. The defendant challenged his conviction on the grounds that the land was not Indian country.

Apparently recalling his notation in ***Watchman*** that "the Supreme Court has never adopted its own test for determining a dependent Indian community," Judge Porfilio noted in ***Roberts*** that:

> The [Supreme] Court announced for the first time a two-part test for dependent Indian community, stating, "[we] must . . . conclude that in enacting § 1151(b), Congress indicated that a federal set-aside and a federal superintendence requirement must be satisfied for a finding of a 'dependent Indian community.'"

185 F.3d at 1132.

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

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

185 F.3d at 1133 n.5 (emphasis added) .

As a result of this recognition, the Indian country analysis in ***Roberts*** was limited to the Tribal Complex property, the property on which the alleged crimes were committed. As evidenced by its absence from the decision, there was no place or need in ***Roberts*** for a separate and threshold community of reference analysis. To the extent that a separate community of reference test survives the Supreme Court decision in ***Venetie,*** it is subsumed within the federal set-aside and federal superintendence tests. Those requirements would be rendered meaningless if land neither federally set aside nor federally superintended for the benefit of Indians could nonetheless be a dependent Indian community under 18 U.S.C. §1151(b).

There should be no doubt that the Supreme Court in ***Venetie*** considered and rejected the principles of a community of reference analysis. To assert otherwise ignores the lucid explanation of the significance of ***Venetie*** in ***Thompson v. County of Franklin***, 127 F. Supp. 2d 145, 155 (N.D.N.Y. 2000) in which the Federal District Court for the Southern District of New York stated:

> So, instead of six, or even three, there are now only two determinative factors- federal set-aside and superintendence. What is more, after *Venetie* . . ., factors other than federal set-aside and superintendence are so diminished in importance as to be practically meaningless, except perhaps to the extent that those other "extremely far removed" factors can be used to inform the analysis of the two federal requirements.

127 F. Supp. 2d at 155.

Any assertion that ***Venetie*** does not reject community of reference also ignores the presentation by the Venetie Tribal Government in its brief to the Supreme Court. The Tribal Government argued that the lands in question should be considered Indian country as a dependent Indian community because they constitute a "distinctly Indian community." ***Venetie*** Respondents' Brief, 1996 U.S. Briefs at *64. It argued that

> The multi-factor analysis employed in these cases 'provide meaning to the general notions of set aside and superintendence,'...two *broad concepts* whose application in various settings necessarily is facilitated by the guidance these cases provide. The First, Eight, Ninth and Tenth Circuits employ *a virtually identical approach for determining the presence of a 'dependent Indian community.'*

Id. (emphasis in original).

The Tribe argued that "the simple ownership of lands by a federally-recognized, dependent Indian tribe is sufficient to bring the lands so held within the ambit of the phrase 'Indian country.'" ***Id.*** at *74. Thus, the Tribe argued that "the key to §1151(b) Indian country is *political* dependency, not federal land title." ***Id.*** at *50. The Tribe argued that because the Indians that occupied the land were a federally recognized tribe, they were under the *political* superintendence of the federal government. *See* ***Venetie***, 1966 U.S. Briefs at *57-58. The Tribe concluded that the State of Alaska was incorrect when it stated that "the requisite federal superintendence must be over lands." ***Id.*** at *59.

The Supreme Court's opinion directly rejects this argument stating, "[t]his argument ignores our Indian country precedents, which indicate...that the Federal Government must take some action setting apart the land for the use of the Indians 'as such'...." ***Venetie***, 522 U.S. at 531 n.5. This conclusion is supported by Article I,

Section 8, Clause 3 of the United States Constitution that states that Congress' plenary power over Indians implies that "some explicit action by Congress (or the Executive, acting under delegated authority) must be taken to create or to recognize Indian country." ***Id.*** at 531 n.6.

The Supreme Court concluded, "that it is *the land in question*, and not merely the Indian tribe inhabiting it, that must be under the superintendence of the Federal Government." *See* ***id.*** at 531 n.5, *citing* ***McGowan***, 302 U.S. at 539 (emphasis in original). Community without federal set-aside and federal superintendence of the land was considered and rejected by ***Venetie***.

State courts also have recognized that the Supreme Court's two part test set forth in ***Venetie*** is the only test to be applied to the land in question. *See, e.g.,* ***Dark-Eyes v. Commissioner of Revenue Services***, 276 Conn. 559, 2006 WL 5064 (Conn., Jan. 03, 2006); ***State v. Frank***, 52 P.3d 404, 406 (N.M. 2002). Indeed, in ***Frank***, the New Mexico Supreme Court held that the community of reference test is subsumed within the Supreme Court's ***Venetie*** two-prong test, particularly the federal set-aside requirement. The New Mexico Supreme Court compared the ***Venetie*** standard with the community of reference test and concluded that the ***Venetie*** standard replaced a nebulous approach with a clear, objective standard. The New Mexico Supreme Court noted that "the six-factor test that was rejected by the Supreme Court in ***Venetie*** used essentially the same factors as those in ***Watchman***" and that "[t]he ***Venetie*** two-prong test redirects 'our attention to land and its title and away from the more nebulous issue of community cohesiveness.'" 52 P.3d at 409.

F. Even If *HRI v. EPA's* Dicta that A "Community of Reference" Analysis Survives *Venetie* is Correct, *Venetie* Requires That the Section 8 Land in Question is the Community of Reference.

Although there is dicta in ***HRI v. EPA*** that it may be necessary to utilize a community of reference analysis, the holdings of ***Venetie***, ***Blunk***, and ***Roberts,*** make it clear that the **federal set-aside and federal superintendence** requirements must be satisfied with respect to the Section 8 land in question for a finding of dependent Indian community regardless of the determination of an appropriate community of reference.[5] Even if the ***HRI v. EPA*** court is correct that there remains vitality to a community of reference determination, the community of reference is by definition only the Section 8 land in question. The court in ***HRI v. EPA*** recognized this limitation in its remand. 198 F.3d at 1254 ("the Section 8 issue is hereby **REMANDED** to EPA for a final determination as to whether **that land** is a dependent Indian community under 18 U.S.C. §1151(b)." (emphasis added)).

[5] This dicta relating to the Section 8 land is inconsistent with the Court's analysis of the Section 17 land. In evaluating the Indian country status of the Section 17 property, the Tenth Circuit in ***HRI v. EPA*** did not address the "community of reference" test while expressly addressing the federal set-aside and federal superintendence two-part test enunciated in ***Venetie***.

As stated, even if a community of reference is to be determined, the community of reference should be defined by the Section 8 land in question. In ***United States v. M.C.***, 311 F. Supp. 2d 1281 (D.N.M. 2002), in determining a proper "community," the Federal District Court of New Mexico found that the school in question, and not the surrounding areas, constituted the proper community of reference. 311 F. Supp. 2d at 1297.

After determining the proper community of reference, the ***M.C.*** court applied the federal set-aside and federal superintendence requirements to the School and its land. In holding that the land in question did not satisfy the federal set-aside requirement, the court determined that, "[a]s a review of the case law makes clear, there 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." ***Id.*** at 1295 (emphasis added). Further, the court noted that, "in each case where a dependent Indian community has been found to exist, that community was created by Native Americans themselves or the federal government to provide for the use, occupancy and protection of the community." ***Id.*** Since the school community in question did not satisfy this requirement, the court determined that it was not a dependent Indian community under 18 U.S.C. §1151(b).

G. The Section 8 Land in Question Does Not Satisfy the Mandatory Requirements of Federal Set-Aside and Federal Superintendence.

1. Federal Set-Aside Requirement

As noted above, §1151(b), as interpreted in ***Venetie***, requires an express Congressional or Executive act to "set-aside" the Section 8 land in question to satisfy the first prong of the §1151(b) test. The Section 8 land in question is not now, nor has it ever been, the subject of an express Congressional or Executive act setting-aside that land for Indian use either as a "reservation" or as land held in trust by the federal government. Further, as stated by the *amici* States in ***Venetie***, land is not "validly" set aside by the federal government for the use of Indians if there is no "Indian occupancy" on the land:

> First, an 'Indian community' *must exist* -- a requirement indicating that more than just a discrete piece of property is involved. The notion of an 'Indian community' reflects what was present in Sandoval: a geographical area set aside for the *exclusive occupancy* of a culturally and politically distinct group of Indians.

Brief of *Amici* States, 1996 U.S. Briefs at 20.[6]

A "dependent Indian community," therefore, requires that the land host an actual *Indian community* for which the land was "validly" set-aside, pursuant to an express

[6] Further, ownership of the land in fee by Indians or an Indian tribe also is not determinative of the set-aside issue. As the Ninth Circuit has recognized in its post-***Venetie*** decision in ***Blunk***, "[t]he Navajo Fee Land does not become Indian country simply because of its tribal ownership or because of its proximity or importance to the Navajo Reservation." 177 F.3d at 884.

Congressional or Executive act. There are no inhabitants on the Section 8 land in question.

2. *Federal Superintendence Requirement.*

The Section 8 land in question is not now and never has been under the superintendence of the federal government for the benefit of Indians. It is well-settled in the State of New Mexico that McKinley County, in which Section 8 is located, has jurisdiction over private fee land in the County. Both Indians (including the Navajo Nation) and non-Indians have recognized the County's jurisdiction and that the location of a private tract of land within the "checkerboard" area does not withdraw the lands from the County's jurisdiction. *See e.g.* Comments of Leonard Arviso dated December 18, 2005 and Comments of Members of Eastern Navajo Allottees Association dated January 23, 2006. As stated above, HRI holds title to the Section 8 land in question in fee, thereby subjecting it to the jurisdiction of McKinley County.

The Navajo Tribal government and/or members of the tribe may own private land within McKinley County. These landowners are required to pay property taxes to the County unless otherwise exempted by factors other than ownership. In return for the tax payments, Indian and non-Indian owners receive essential services from the County government such as road maintenance, fire and police protection, emergency medical services and public schools, including transportation thereto.

Access to the Section 8 land in question is by State Highway 566, which is maintained by the State of New Mexico. Areas surrounding the Section 8 land in question are accessed using roads maintained by McKinley County. This evidence demonstrates that the Section 8 land in question is not under any, let alone active and pervasive "federal superintendence," because taxes are paid to State and local authorities with essential services being provided by such authorities in return. Even if Indians owned private lands in Section 8, they would be required to pay taxes to such authorities. These facts demonstrate that the Section 8 land in question does not satisfy the standard for active and pervasive "federal superintendence" envisioned by Congress in 18 U.S.C. §1151(b), as interpreted by the Supreme Court.

Factual statements are based on the McKinley County Comprehensive Plan Phase 2 August 22, 2005 Draft White Paper Regarding Socioeconomics and Growth Analysis, Conditions, Issues and Policy Directions ("White Paper"). The White Paper is submitted as **Appendix III**.[7]

H. The Section 8 Land in Question is Not Indian Country Under a Community of Reference Analysis.

As demonstrated above, the community of reference analysis, to the extent that it retains any vitality after ***Venetie***, should be confined to the Section 8 land in question (the

[7] It is anticipated that McKinley County will issue in the near future a final version of the White Paper. Once issued, HRI will supplement the record with the final version of the White Paper.

approximately 160 acres referenced by the Tenth Circuit in ***HRI v. EPA*** and by EPA in its November 2, 2005 Federal Register Notice) and should not include any surrounding lands.

As stated in the ***M.C.*** case, "the geographical definition of an area is the starting point for the community of reference analysis...[and] objective boundaries are crucial to determining the appropriate community of reference." ***United States v. M.C.***, 311 F. Supp. 2d 1281, 1291 (D.N.M. 2002). In ***M.C.*** the court determined that the community of reference inquiry must focus on the specific land at issue and not on any lands outside the boundaries of that specific land. The boundaries of the Section 8 land in question are clearly defined by the patent from the United States conveying title to the lands to HRI's predecessors in interest. *See* **Patent at Appendix IV.**

Expansion of the appropriate community of reference beyond the "objective" boundary of the Section 8 land in question is fundamentally inconsistent with the "checkerboard" nature of land ownership in the State of New Mexico and effectively renders the mandatory federal set-aside and federal superintendence requirements meaningless. Given that individual parcels of land in this region are owned by multiple different entities, inclusion of lands owned by entities other than HRI outside the Section 8 land in question disregards the ***M.C.*** court's statement that "objective" boundaries are "crucial to determining the appropriate community of reference" against which the federal set-aside and federal superintendence requirements are to be applied.

Given that the Section 8 land in question should be the appropriate community of reference, EPA has requested comments on 10 points that it suggests have relevance to "making its determination on the Section 8 land status": (1) the nature of the area in question; (2) Indian and non-Indian land uses; (3) relevant aquifer uses; (4) land ownership patterns; (5) use of area infrastructure by Indians and non-Indians; (6) the relationship of the inhabitants in the area to Indian tribes and to the federal government; (7) activities of the government agencies toward to the area; (8) elements of cohesiveness manifested either by economic pursuits in the area, common interests or needs of inhabitants supplied by the locality; (9) is the land set apart for the use, occupancy and protection of dependent Indian peoples; and (10) is the land subject to federal supervision.

As has been previously demonstrated with respect to EPA's points 9 and 10, the Section 8 land in question does not meet the federal set-aside or federal superintendence requirements that are mandatory under ***Venetie***. *See* Subsection G above. As a result, no multi-factor analysis is necessary. Nevertheless, an evaluation of the other eight factors specified by EPA still demonstrates that the Section 8 land in question is not Indian country.

1. The Area, Ownership Patterns and Land Uses (Points 1,2 and 4)[8]

As stated by the Tenth Circuit in ***HRI v. EPA,*** this area of New Mexico is located in the "checkerboard" area, composed of various parcels of land owned by multiple parties (e.g., private citizens, private companies, State of New Mexico, Bureau of Land Management, the Navajo Nation and individual members of the Navajo Tribe).

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[8] *See also,* Comments of McKinley County Attorney, Douglas W. Decker, dated December 15, 2005.

HRI owns the locatable minerals, including uranium, and the surface of the Section 8 land in question in fee under a mining claim patent from the United States. *See* **Patent at Appendix IV.** The surface of the remainder of Section 8 is owned by the BLM and the locatable minerals, including uranium, are held by HRI under valid mining claims.

McKinley County assesses real property taxes on the Section 8 land in question and all private land inside the checkerboard area, whether owned by Indians or non-Indians. *See* **White Paper at Appendix III.** The boundaries of the Navajo Nation's Church Rock Chapter are amorphous, while the boundaries of McKinley County are objective and defined. *See* **White Paper at Appendix III.** The Section 8 land in question falls within the McKinley County political boundary which is defined at NMSA 1978 § 4-17-1 (2006).

The Section 8 land in question is not inhabited by anyone and it and surrounding lands have been the subject of mineral development activities for over fifty years. Private companies patented fee title to the surface and minerals of the Section 8 land in question in 1970. *See* **Patent at Appendix IV.** The Section 8 land in question has not now nor has it ever been set-aside or held in trust by the federal government for the use and occupancy of Indians. Further, the land is not located within the boundaries of the Navajo Reservation and is not allotted land. There is also no evidence that the Section 8 land in question is now or has ever been the subject of a legislative or executive act or conveyance setting such land aside for Indian use. *See* **Bartels Affidavit at Appendix XI.**

2. *Aquifer Uses; Water Rights (Point 3)*[9]

Because it is capable of mineral production in commercial quantities, the only relevant use of the portion of the Westwater aquifer located at the Section 8 land in question is for ISL uranium recovery operations as delineated in HRI's NRC license. ISL uranium recovery operations are conducted in qualified exempted aquifers under NRC and EPA regulations that assure that USDW are not impacted outside of the UIC permit and exempted area. These regulations assure that USDWs are not impacted, in part by requiring that a Permittee extract a surplus of water during ISL recovery operations so as to create an inflow of groundwater into the exempted area and hence a cone of depression. Detailed monitoring of ISL recovery operations is required to verify the effectiveness of the cone of depression. There is further groundwater extraction use after mining is completed when restoration, consistent with pre-mining conditions or federal or state concentration limits is required. This extraction results in *consumptive* use of groundwater, an impact to water levels and quantity impacts within the aquifer at distances from the permit or exempted area. Quantity impacts that result from groundwater *consumptive* use are not subject to regulation under the provisions of the SDWA but rather are subject to water rights permitted by the State that is administered by the New Mexico State Engineer.

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[9] *See also,* Comments of McKinley County Attorney, Douglas W. Decker, dated December 15, 2005.

For Section 8, HRI, Inc. filed an Application G-11-A to Change the Place or Purpose of Use and Points of Diversion of Underground Waters which would provide the necessary water rights to conduct the Section 8 ISL operation in accordance with the AEC and SDWA regulations, licenses and permits. A hearing was held on March 24, 1998 on HRI's Application before the New Mexico State Engineer. The Navajo Nation participated in the hearing and claimed that the Navajo Nation, not the New Mexico State Engineer, had jurisdiction over the matter.

Subsequent to this hearing, in his Finding and Order, the New Mexico State Engineer ruled that he had personal and subject matter jurisdiction to administer the water rights and the diversion and consumptive use of 650 acre feet per annum for the purposes stated in the Application which would not impair valid existing water rights and would not be contrary to the conservation of water or detrimental to the public welfare of the State. Finally, the New Mexico State Engineer Ordered that Application G-11-A be approved. *See* **Appendix VII**. With the subsequent expiration of the time period for appeal, the New Mexico State Engineer's order became final.

Submitted as **Appendix I** and **Appendix II** are detailed discussions of the EPA's regulatory authority over USDWs, including grants of aquifer exemptions for mineral recovery and an explanation of why HRI's ISL uranium recovery activities cannot adversely affect the non-exempted portions of the regional aquifer and their use as USDW.

As set forth in the Appendices, HRI has demonstrated by detailed geological and hydrological analyses 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 USDWs. NRC accepted this analysis after rigorous review. (NUREG – 1508 at 4.3.1: LBP-99-30); *See* **Appendix IX.** Any portions of the regional aquifer currently available for use as an USDW may continue to be used in that manner prior to, during and after completion of ISL uranium recovery operations.

3. *Area Infrastructure; Services and Inhabitants (Points 5, 6, 7 and 8)*[10]

There are no inhabitants on the Section 8 land in question. As a result, there is no "community" on the Section 8 land in question and the element of cohesiveness is not applicable to these lands. The surface and locatable minerals, including uranium, of the Section 8 land in question are owned in fee by HRI. The remainder of Section 8 is owned by BLM. *See* **Bartels Affidavit at Appendix XI.** McKinley County assesses property taxes on HRI's Section 8 land in question and historically has provided essential services, including road maintenance, fire and police protection, schools and transportation. *See* **White Paper at Appendix III.** The State is responsible for maintenance of State Highway 566, the sole access road for Section 8, while the County is responsible for maintenance of other roads in the area. *See* **Bartels Affidavit at**

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[10] *See also,* Comments of McKinley County Attorney, Douglas W. Decker, dated December 15, 2005.

Appendix XI. The Navajo Nation has no jurisdiction over state and county roads. ***Strate v. A-1 Contractors***, 520 U.S. 438 (1997).

Electrical services for Section 8 where ISL uranium recovery will occur will be provided by Public Service of New Mexico. As noted above, the State also retains sole jurisdiction over water use in the area. *See* **Bartels Affidavit at Appendix XI.** The use of area infrastructure and essential services by both Indian and non-Indian landowners is governed by McKinley County and the State of New Mexico and not the federal government or Navajo Nation. *See* **White Paper at Appendix III.**

V. CONCLUSION

For the reasons set forth above, the EPA should make a final determination that the Section 8 land in question is **not** Indian country under 18 U.S.C. §1151(b).

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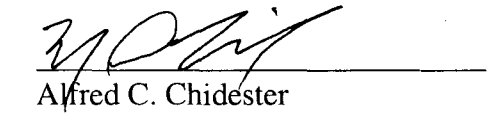
DATED: This 30th day of January, 2006.

Respectfully submitted,



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