January 31, 2006

David Albright
Ground Water Office Manager
United States Environmental Protection Agency, Region 9
75 Hawthorne Street, Mail Code WTR-9
San Francisco, California 94105

RE: Comments on Safe Drinking Water Act Jurisdiction Over Church Rock Section 8 pursuant to Federal Register Notice, 70 Fed. Reg. 66402 (Nov. 2, 2005)

Dear Mr. Albright:

The writers of this comment are all professors of Federal Indian Law who have lived and worked on the Navajo Nation. We are all familiar with the Church Rock community and the checkerboard area of Navajo country. We are also all among the co-authors of the 2005 edition of Cohen's Handbook of Federal Indian Law, the leading treatise in Federal Indian Law. We write to support a finding that the Section 8 of the Church Rock community is Indian country as defined by 18 U.S.C. § 1151.[1]

Section 8 of the Church Rock community lies within either an informal reservation or a dependent Indian community and therefore is subject to the jurisdiction of the Environmental Protection Agency (EPA). As the EPA has requested comments only regarding whether Section 8 lies within a dependent Indian community, and as "the relationship between informal reservations and dependent Indian communities is not entirely clear under current case law," HRI, Inc. v. Environmental Protection Agency, 198 F.3d 1224, 1248 (10th Cir. 2000), this comment addresses solely dependent Indian community status. To determine whether Section 8 is a dependent Indian community, we must first define the appropriate community of reference for this inquiry, and then determine whether that community has been set aside for the use of a community of Indians under the superintendence of the federal government. *See* Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 (1998); HRI, Inc. v. Environmental Protection Agency, 198 F.3d 1224, 1248 (10th Cir. 2000). We believe that the appropriate community of reference is the Church Rock Chapter, and that the federal set aside and superintendence prongs are amply met.

A. Community of Reference

The appropriate community of reference for this analysis is the Church Rock Chapter as a whole. Any argument that the term "dependent Indian community" includes only specific parcels currently set aside for tribes in effect "reads the word 'community' out of the statute." Cohen's Handbook of Federal Indian Law 164 (2005) ("Cohen 2005"). Were Section 1151(b) read in this way, moreover, the section would be the

[1] "Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States." Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520, 527 n.1 (1998). In 18 U.S.C. § 1151, "Congress . . . defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States." Oklahoma Tax Commission v. Sac & Fox Nation, 508 U.S. 114, 123 (1993).

virtual equivalent of Section 1151(c), which includes only Indian allotments to which Indian title has not been extinguished. So as to give effect to the plain language of the statute and to avoid rendering either 1151(c) or 1151(b) either redundant or a mere surplusage, 1151(b) must be read to include lands that are not within federal or Indian ownership, but are nevertheless part of an Indian community.[2]

The relevant community of reference is determined in light of congressional intent in enacting the Indian country statute in 1948. Congress passed 18 U.S.C. § 1151 to resolve disputes regarding jurisdiction by establishing those areas in which primary jurisdiction should be with the federal government and the resident tribe. *See* Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 507 (1976); Cohen 2005 at 188 n.385. It was designed to the extent possible to do away with "checkerboard jurisdiction," or jurisdiction which "depends upon the ownership of particular parcels of land" by consolidating jurisdiction primarily in the hands of the government that would most logically police and control the area. *See* Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351, 357-358 (1962). Thus where land set aside for Indians consists only of isolated islands of Indian ownership within non-Indian communities, as in the case of scattered allotments, tribal and federal jurisdiction is limited to those specific allotments and state jurisdiction is predominant. 18 U.S.C. § 1151(c). But where the area is part of a unified territory, whether because it lies within official reservation boundaries, 18 U.S.C. § 1151(a), or because federal treatment and demographic characteristics make it part of a distinctly Indian community, 18 U.S.C. § 1151(b), primary jurisdiction lies with tribal and federal governments without regard to land ownership.[3]

The word "community" in Section 1151(b), therefore, should be interpreted to mean the area within which one would logically expect a single jurisdictional framework to apply. Here, that area is clearly the Church Rock Chapter as a whole. The area is all within the territory of this branch of municipal government, and its land is overwhelmingly occupied and used by the Navajo people that are subjects of that government. All the unoccupied land within chapter boundaries, including that part of HRI land not currently being used by HRI, is used by the Navajo residents for grazing purposes. Attorneys working in the area know it as part of the "checkerboard area," the area in which there is more non-Indian fee land than on most of the Navajo Nation, but which is otherwise fully part of the Navajo community. One would not expect primary jurisdiction of Section 8 to be in the hands of a different government than the rest of the Church Rock chapter, nor would such piecemeal jurisdiction serve effective

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[2] *See also* Cohen 2005 at 192: "Since § (a) of the Indian country definition covers reservations and § (c) covers trust and restricted fee allotments, this section appears to cover land outside of those categories."

[3] Although the Supreme Court has not had the opportunity to determine standards for the community of reference for the dependent Indian community analysis, *see* HRI, Inc. v. Environmental Protection Agency, 198 F.3d 1224, 1248 (10th Cir. 2000), some guidance may be found in its decision in *United States v. Mazurie*, 419 U.S. 544 (1973). That case construed 18 U.S.C. § 1154(c), which provides that tribal liquor standards do not apply on fee lands that, although within reservation boundaries, are located in "non-Indian communities." *Mazurie* held that the Blue Bull Bar was not located within a non-Indian community, because it was on the outskirts of an unincorporated village with undefined boundaries, and only 212 families scattered over a 20 mile area 80% of which were Indian. 419 U.S. at 551. As is urged here, the Supreme Court appears to have considered the logical governmental area rather than isolated land in dispute in determining the relevant community.

administration of law. Instead, congressional intent in encouraging uniform and efficient jurisdiction is best served by considering the logical jurisdictional community as a whole. That community is clearly the Church Rock chapter.

B. Federal Set Aside

The Church Rock chapter has been validly set aside for the use of the Navajo community. The Church Rock chapter lies within the area designated as part of the Navajo Reservation by executive order in 1907. Exec. Order No. 709 ("EO 709"). Although Executive Order No. 1284 (1911), as interpreted by the Tenth Circuit in *Pittsburg & Midway Coal Mining Company v. Yazzie*, 909 F.2d 1387 (10th Cir. 1990), prohibits finding that the EO 709 area in its entirety is a formal reservation, it does not undermine the effect of EO 709 and subsequent orders in setting aside the land for the Navajo people. The 1907 Order was promulgated to ensure that the land would be allotted to the Navajos people and not to the white and Mexican-American stockmen trying to claim it. *Yazzie*, 909 F.2d at 1390-1391, 1408. The government did not intend for this land eventually to fall into the hands of non-Indians and become a non-Indian community. Instead, federal officials hoped that Navajos would obtain all the limited waterholes in the area, thus discouraging non-Indians from encroaching there. *Id.* at 1390, 1408. As stated by the Tenth Circuit, "[r]ather than opening reservation lands to integration and assimilation, as contemplated by the General Allotment Act, EO 709 was meant to protect Navajos from competing settlement." 909 F.2d at 1406-1407.

It was only after President Taft was assured that this allotment was all completed that unclaimed lands were "restored to the public domain." Executive Order No. 1284 (1911); *Yazzie* at 1393. While this "restoration" resulted in significant non-Navajo land ownership in some parts of the EO 709 area, within the Church Rock Chapter the intended set aside was successful. Eighty percent of the land is owned by or held in trust for the Navajo Nation and its members, and an additional ten percent is administered by the Bureau of Land Management for the tribe and its members. Church Rock Land Use Plan; *see also Yazzie* at 1419 (stating regarding entire 709 area that "[n]o one is disputing the fact that the area has remained predominantly Navajo in character throughout the entire century").

Even after Executive Order 1284, the federal government continued to work to ensure that the land within the 709 area remained set aside for the Navajo people. Several times, the President and Congress enacted measures to consolidate Navajo land ownership within the 709 area by permitting exchanges of Navajo land outside the area for lands owned by the railroads within the area. *See* Executive Order No. 1483 (1912); Executive Order No. 2513 (1917); Act of March 3, 1921, 41 Stat. 1225, 1239; *see also Yazzie* at 1409-1411 n. 30 (discussing exchanges). Other unallotted lands within the EO 709 area were "reserved from entry, sale or other disposition, for Indian purposes." Exec. Order No. 1359 (1911). These lands were to be used in connection with Navajo Indian schools, *Yazzie* at 1412, demonstrating federal intent that the set aside area remain a distinctly Navajo community whose welfare was the responsibility of the federal government. These efforts to preserve and enhance set aside for the Navajos of the EO 709 area included the Church Rock community. In particular, in 1929 the Secretary of the Interior used part of the funds appropriated "[f]or purchase of additional land and water rights for the use and benefit of Indians of the Navajo Tribe" to purchase Section 17 on which part of the Church Rock mine is located. HRI, Inc. v. Environmental

Protection Agency, 198 F.3d 1224, 1251 (10th Cir. 2000); *see also Yazzie*, 909 F.2d at 1419 ("Over the years the Interior Department and the Tribe have tried to consolidate as much land as possible in Navajo ownership . . . .").

Not only by EO 709, but by numerous subsequent allotments, executive orders, congressional enactments, and actions by the Secretary of Interior, the federal government has set aside the Church Rock community for the use and benefit of the Navajo people. For almost a century, the federal government has worked to ensure that the area as a whole would remain predominantly in the hands of the Navajo people, and that it would be administered to serve their needs. The area therefore meets the set aside prong of the dependent Indian community test.

C. Federal Superintendence

Even before EO 709 and continuing to this day, the federal government has treated the area within which Church Rock is located as a dependent Indian community entitled to federal supervision and assistance. This is far more than the mere provision of federal aid and services found insufficient in *Venetie*; rather the Navajo communities of the EO 709 area "have been regarded and treated by the United States as requiring special consideration and protection, like other Indian communities." *See* United States. v. Sandoval, 231 U.S. 29, 40 (1913) (discussing federal superintendence of Pueblo communities). As discussed above, the original decision to set aside the EO 709 area was because of a sense of the dependence of the Navajo community there and the need to protect it from encroaching non-Indians. Even after the 1911 executive order, the sense of federal responsibility and Navajo need was so great that until 1935 the Department of the Interior made repeated attempts to have the reservation boundaries officially extended to include it. *Yazzie*, 909 F.2d at 1412-1415. Although the non-Indian New Mexico delegation thwarted success of these measures, the federal government has continued to treat the predominantly Navajo portions of the EO 709 area essentially as it would a community within the official boundaries of the Navajo Nation.

Because of the vast size of the Navajo Nation, federal services are administered by not one but five different agencies of the Bureau of Indian Affairs. The BIA created the Pueblo Bonito Agency (today called the Eastern Agency) for the administration and provision of federal services to the EO 709 area. As discussed above, the federal government continued to purchase lands and build schools for the communities within the Eastern Agency just as it would on the Navajo Nation. From the beginning, moreover, the Superintendent of the Eastern Agency had jurisdiction not merely over Navajos living on allotments, but over "all of the Navajos allotted *or living on public lands*" in the 709 area. *Yazzie*, 909 F.2d at 1418 n.42 (quoting Interior Department reports and letters). Because residence in Indian country was required for federal jurisdiction, this is powerful evidence that the area as a whole was considered Indian country for federal superintendence purposes. Indeed, the equivalence of the area to reservation lands was so complete that federal superintendents repeatedly referred the area as the "reservation" over which they had jurisdiction. *See Yazzie*, 909 F.2d at 1416 n.36.

This pattern of federal superintendence and responsibility continues today. Navajos living in the Church Rock community receive essentially the same package of governmental services as do Navajos living within the official boundaries of the Navajo reservation. Consistent with federal policies of self-determination, many of these services, although federally funded, are administered by the Navajo Nation. Consistent

with the constitutional obligation not to discriminate against Navajo people in the provision of state services, some services are provided by the state government. But as is the case throughout the Navajo Nation, these services are all provided under the supervision and with the assistance of the federal government, as required by the federal trust responsibility to Indian people. *See generally* Cohen 2005, Ch.22 (discussing governmental services for Indian people).

Church Rock residents receive medical care through the federally funded Indian Health Service. They attend pre-school at the Church Rock Head Start, a Navajo Nation program using federal Johnson-O'Malley funds for Indian children. Their police services are provided by the Navajo Nation through a public safety branch located in Church Rock, which benefits from both tribal funds and federal funds for Indian people. The chapter lies within the judicial jurisdiction of the Crownpoint District of the Navajo Nation Courts. Water is provided through the Navajo Tribal Utility Authority, which is owned by the Navajo Nation. Church Rock residents vote in Navajo Nation elections, and elect two Church Rock representatives to serve on the Navajo Nation Council. The Church Rock Chapter provides other municipal services, including services for the elderly and for other community needs. This is a community that primarily turns to the federal and tribal governments for its needs, and over which the federal government maintains superintendence and responsibility. The Church Rock Chapter satisfies the federal superintendence prong.

D. Conclusion

The Church Rock community, although not part of a formal reservation, is more like a reservation in Indian character, land ownership, and federal and tribal responsibility for services than many official reservations. A finding that either the chapter or individual parcels of land within the chapter do not constitute Indian country would contravene the intent of Congress, undermine effective and just administration of law, and thwart the health and welfare of the Navajo people residing there. We urge you to find that Section 8 and the Church Rock Chapter as a whole constitute Indian country as defined by 18 U.S.C. § 1151(b).

Very truly yours,

Bethany Berger
Wayne State University Law School
471 W. Palmer Street
Detroit MI 48202
(313) 577-9774
bberger@wayne.edu

Kenneth Bobroff
University of New Mexico School of Law

Sarah Krakoff
University of Colorado School of Law