Response to Comments regarding Federal Register Notices 70 FR 66402 and 70 FR 74318
Determination of Indian Country Status for Purposes of UIC Program Permitting
(Section 8 Land)

Comment Overview

EPA received comments from 25 commenters

- 5 Commenters supported a determination that Section 8 is Indian country
- 15 Commenters opposed a determination that Section 8 is Indian country
- 5 Commenters submitted comments which were not related in any way to the Indian country status of the Section 8 land

States that the Section 8 Land:

Is in Indian Country	Is not in Indian Country
1. Eastern Navajo Dine Against Uranium Mining (ENDAUM/SRIC)	1. Arviso, Leonard
2. Federal Indian Law Professors	2. Eastern Navajo Allottees Association
3. Gould, Eliot	3. HRI
4. Navajo Nation Churchrock Chapter	4. Gramerco Associates, Ltd.
5. Navajo Nation DOJ	5. (County of) McKinley, Douglas W. Decker
	6. National Mining Association
	7. New Mexico Mining Association
	8. New Mexico Oil & Gas Association
	9. Northwest New Mexico Council of Governments
	10. NZ Uranium, submitted by Gallagher & Kennedy
	11. State of New Mexico, Office of the State Engineer
	12. State of Mexico, Representative Donald L. Whitaker
	13. State of New Mexico, Senator Lidio G. Rainaldi
	14. Strathmore Mineral Corporation
	15. Uranium Producers of America

Below are summaries that highlight the major comments submitted by the commenters, followed by EPA's responses. Full text of the comments can be obtained from EPA and its website.

COMMENT SUMMARIES AND RESPONSES

The Navajo Nation Department of Justice submitted a written comment requesting an extension of the comment period. EPA granted this request.

Comments Supporting Indian Country Status

Several commenters stated that the Church Rock Chapter is the proper focus of analysis and that the Church Rock Chapter, which includes the Section 8 land at issue, is a dependent Indian community within the meaning of 18 U.S.C. § 1151(b).

New Mexico Environmental Law Center, representing Eastern Navajo Dine Against Uranium Mining (ENDAUM) and Southwest Research and Information Center (SRIC): ENDAUM believes that applying the 10th Circuit's community of reference analysis in this case shows that the Church Rock Chapter is the logical community of reference. They believe that their comments demonstrate that the Church Rock Chapter shows cohesiveness of culture, language, infrastructure, land use, and aquifer use. Section 8 is clearly not a self-contained community, but is instead a subdivision of the Church Rock community. Because Church Rock satisfies both prongs of the *Venetie* test, Church Rock, and thus Section 8, is a dependent Indian community under 18 U.S.C. § 1151(b). ENDAUM/SRIC provided extensive documentation describing land uses, infrastructure and services, and federal agency involvement in the Church Rock Chapter.

Federal Indian Law professors (professors): Three federal Indian law professors submitted consolidated comments in support of a finding that Section 8 of the Church Rock community is Indian country as defined by 18 U.S.C. Section 1151(b). The professors write that they have lived and worked on the Navajo Nation, are all familiar with the Church Rock community, and are among the co-authors of Cohen's Handbook of Federal Indian Law, the leading treatise in Federal Indian Law. The professors argue that 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 a tribe in effect reads the word "community" out of the statute. They cite Cohen's Handbook of Federal Indian Law at p. 164 (2005). Additionally, the word "community" in Section 1151(b) 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. 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 administration of justice. Instead, congressional intent in encouraging uniform and efficient jurisdiction is best served by considering the logical jurisdictional community as a whole. 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. The professors also provided extensive comments regarding the history and law regarding set-aside of the Church Rock Chapter and historical and current federal superintendence of the area.

Eliot Gould: The United States continues to retain title to most of Section 8 and there is evidence to support that the property was "set-aside." There is also ongoing federal supervision of the property by BIA and EPA; federal agencies provide services to this area. He believes that a recommendation to the Administrator that the whole of Section 8 remains under Federal supervision is supported in several aspects.

Navajo Nation Churchrock Chapter: The Chapter is on record as supporting Indian country designation for the subject parcel. The southwest quarter of Section 8 is surrounded by Navajo lands or lands occupied and used by the Dine people, who are the only people who have continuously inhabited this community for most of the last 200 years. The land that is identified as Section 8 is located within the exterior boundaries of the Churchrock Chapter within the lands set aside for the Navajo people by the Treaty of 1868, subsequent federal

legislation, executive orders, individual Indian allotments, other agreements, land exchanges involving the United States, the Bureau of Indian Affairs (BIA), the Bureau of Land Management, the states and the Navajo Nation or by courts' orders. For federal purposes, the Churchrock Chapter is under the administrative jurisdiction of the Superintendent, Eastern Navajo Agency, BIA at Crownpoint, New Mexico. In its comments the Churchrock Chapter also provided information on demographics, land uses/status, and details regarding services providing by federal agencies in this area.

Navajo Nation Department of Justice (Navajo Nation): The Navajo Nation believes that the comments and documents establish that the 160-acre parcel of land, the Section 8 Land is part of a dependent Indian Community, the Church Rock Chapter of the Navajo Nation. The Navajo Nation has consistently treated the Section 8 Lands as within a dependent Indian community. The Church Rock Chapter is distinctly Indian in character. The nature of a community is determined primarily by its inhabitants: 97.7% of the population of the Church Rock Chapter is American Indian according to the 2000 census. Most, of not all, of the few (65) non-Indians are married to Navajos living there. The Churchrock Chapter is a Navajo traditional rural community. The Chapter is a community in every sense of the word. It includes police services, a head start center, an elementary school, several churches, and a host of Chapter, tribal, and BIA services and facilities.

The Navajo Nation chief hydrogeologist, Dr. John Leeper: Dr Leeper has observed the cohesiveness and the common needs and interests of Chapter residents relating to the provision of water for drinking and stock watering. Dr Leeper reports that Navajo Nation and Indian Health Service provide virtually all of the services and infrastructure for water resources planning, development, and use within the Church Rock Chapter, which includes the Section 8 parcel. That area, which includes Section 8 Lands, has been determined "Indian country" by the US District Court for the District of NM. The Church Rock Chapter is distinctly Indian in character. The Chapter House is the Navajo tribal political and social meeting point for the people of the community. Both the Indian and non-Indian residents in the Church Rock Chapter use the same infrastructure and services. Those are provided in the main by the Navajo Nation, the BIA, the Indian Health Service and the Chapter itself. The Indian Health Service and Environmental Health provide funding for domestic and livestock water systems and the Chapter Health Representative Program. The domestic and livestock water systems, windmills, wells and distribution lines are maintained by the Navajo Tribal Utility Program. Many of the initiatives of the BIA in that area are projects designed to serve the community as a whole; for example, the need for windmills, housing, and water assistance. The Navajo Nation has provided for electric service in the Chapter. The Chapter's Community Service Coordinator lists numerous programs, services or offices located at the Chapter, including property management, records management, housing assistance, elections, scholarships, public employment, youth employment, emergency relief, uranium monitoring, senior lunch program, meals on wheels, transportation assistance for dental and eye care, in-home assistance, Head Start (three regular programs and one home-based program for the handicapped, Community Health Representative Program, Navajo police substation, and the Land Board. The Navajo Nation provides funding for the Chapter's administration, and the BIA assists with funding for housing assistance, police, and scholarship programs. Aside from busing students to Gallup and maintaining two roads, no other services of any significance are provided by the State or County governments. Navajo Chapters are unique entities in all of Indian country. The Chapters were established initially by the United States in 1927 to foster improved communications between Navajo communities dependent on federal services and protection

and to facilitate local self-government for those Navajo communities. The Chapter areas were set aside without regard to scattered islands of fee land within their boundaries, and those isolated enclaves should not be treated as non-Indian communities. Indeed, in the unique circumstance of the Chapters in the Eastern Navajo Agency, both State and Federal courts recognize Navajo and Federal authority over non-trust lands within Chapter boundaries. As the court found in *UNC Resource v. Benally*, 514 F.Supp. 358 (D.N.M 1981), "[a]ll of the land affected [by UNC's spill of radioactive sludge in the Church Rock Chapter area] lies outside the boundaries of the Navajo reservation, but much of it is trust land and all of it falls within 'Indian country'". The Navajo Nation provided documentation and commented that over 92% (52,361.34 acres) has been set aside by the United States for the excusive use of the Navajo people in the Church Rock community. Finally, the Navajo Nation provided comments regarding the federal supervision shown by the continuous presence since 1907 throughout the Chapter of the Bureau of Indian Affairs, which the Navajo Nation contrasted to the "minimal supervision" exercised by the United States in Alaska in *Venetie*. The Navajo Nation also provided documentation describing historical land use in the area, correspondence from the 1930s regarding this area in question, and relevant correspondence and affidavits.

Response: In consultation with the U.S. Department of the Interior, EPA has determined that the Section 8 land is part of the Church Rock Chapter, a dependent Indian community that meets the federal set-aside and superintendence requirements of *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998). The Church Rock Chapter has been set aside by the federal government for the use of the Navajo Nation, and the Church Rock Chapter is under federal superintendence. In applying the *Venetie* test, EPA followed the direction of *HRI, Inc. v. Environmental Protection Agency*, 198 F.3d 1224 (10th Cir. 2000), on the need to identify the appropriate community of reference in determining the Indian country status of the land at issue. The appropriate community of reference was determined to be the Church Rock Chapter, which includes the Section 8 land at issue. EPA agrees with the commenters that the Church Rock Chapter is the appropriate community of reference.

Comments Opposed to a Determination that the Section 8 Land is in Indian Country

VENETIE

Several commenters asserted that the *Venetie* decision precludes a finding that the Section 8 land is a dependent Indian community.

Eastern Navajo Allottees Association: Section 8 has not been set aside by the federal government for the use of Indians. The fee 160-acre portion of Section 8 owned by HRI is not subject to federal supervision.

HRI: Although there is dicta in *HRI v. EPA* that a community of reference analysis may have survived *Venetie*, the holding of *Venetie, Blunk*, and *United States v. Roberts* 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. HRI also argued a dependent Indian community requires that the land host an actual *Indian community* for which

the land was 'validly' set-aside, pursuant to a Congressional or Executive act. It noted that there are no inhabitants on the Section 8 land in question.

County of McKinley: Private land such as the Section 8 land has not been set aside by the federal government, nor is the land in question under federal superintendence. Since the federal set-aside and federal superintendence requirements are not satisfied on Section 8, the property is not 'Indian country'.

National Mining Association: Since Section 8 does not meet either prong of the *Venetie* requirements, EPA must determine that Section 8 cannot constitute a dependent Indian community and therefore cannot constitute Indian country. NMA also argued that use of the *Watchman* community of reference test directly conflicts with the *Venetie* two-prong test by relegating the mandatory federal set-aside and superintendence requirements to mere considerations.

New Mexico Mining Association: Because the Section 8 land is fee land, NMMA asserted that there can be no question that the land was never set aside by the federal government for the exclusive use of Indians. Further, the land in question is administered by its owner, HRI, not the federal government. Thus, according to the *Venetie* factors of federal set aside and federal superintendence, HRI's Section 8 property is not Indian country. The New Mexico Supreme Court, following *Venetie*, explicitly rejected the dicta of *HRI, Inc. v. Envtl. Prot Agency*, 198 F.3d 1224 (10th Cir. 2000) by declining to incorporate a community of reference test into New Mexico case law.

New Mexico Oil & Gas Association: Under New Mexico law, it is error to require a community of reference threshold inquiry. Given that the 160-acre tract in Section 8 is owned in fee (surface and mineral rights) by Hydro Resources, Inc, the *Venetie* two-prong test redirects the focus to land and its title and removes the more nebulous issue of community cohesiveness. NNOMGA believes the non-Indian country status of HRI's fee land is the only sound and legal decision for EPA to make.

Northwest New Mexico Council of Governments: The land in question, comprising fee lands lying north-northeast of Churchrock, New Mexico, is surrounded by a variety of land types inhabited predominantly by citizens of the Navajo Nation. However, in the particular case of Section 8, which is on McKinley County's tax rolls, it appears inescapable that this property does not satisfy the criteria established by the Supreme Court in the *Venetie* case, i.e. that: (a) it must be set aside by the federal government for the use of Indian tribes; and (b) the land must be under the superintendence of the federal government.

NZ Uranium L.L.C.: Any community of reference factors can only establish the relevant community; they cannot work to replace-or even impact-the two *Venetie* requirements. It is the position of NZ Uranium, that regardless of EPA's conclusion with respect to relevant aquifer used, the nature of the land, elements of cohesiveness, or any other factors stemming from the community of reference analysis, the HRI property has not been set aide by the federal government for the use of Indians, is not subject to federal superintendence, and thus is not dependent Indian community.

Strathmore Minerals Corp.: HRI's Section 8 and Strathmore's properties do not meet either *Venetie* test. As is the case with Section 8, the Strathmore properties have long been associated

with uranium mining. The *Venetie* federal set-aside and superintendence test has been the practice in the Checkerboard area for determining Indian country status even before the *Venetie* case was decided.

Uranium Producers of America: Following *Venetie, Blunk,* and *United States v. Roberts*, it is clear that the federal set-aside and federal superintendence review must be confined to HRI's Section 8 property and not expanded to some larger area of land. HRI's Section 8 property is the land in question, and it is not occupied by Indians. Given the clear direction of *Venetie* and its progeny, UPA urged EPA to declare that HRI's Section 8 property is not Indian country.

New Mexico: We maintain the position that Section 8 is not a dependent Indian community. The Supreme Court's intervening decision in *Alaska v. Native Village of Venetie Tribal Government,* interpreted the terms 'Indian country' and 'dependent Indian community'. To be a dependent Indian community, Section 8 (1) must have been set aside by the Federal Government for the use of Indians as Indian land and (2) must be under federal superintendence. NMED asserted that Section 8 is not a dependent Indian community under the test in *Venetie*.

Response: As explained more fully in the U.S. Department of the Interior (DOI) opinion and in EPA's Land Status Determination, the Section 8 land is part of the Church Rock Chapter, which is a dependent Indian community that meets the federal set-aside and federal superintendence requirements. As explained in the DOI opinion and EPA's Determination, in applying the *Venetie* test, EPA followed the direction of the Tenth Circuit's *HRI* decision on the need to identify the appropriate community of reference in determining the Indian country status of the land at issue. The appropriate community of reference was determined to be the Church Rock Chapter, which includes the Section 8 land, and the Church Rock Chapter does have an "actual Indian Community."

EPA considered the cases cited by those opposed to the Indian country status of the land, and in particular the cases of *Blunk v. Arizona Department of Transportation,* 177 F.3d 879 (9th Cir. 1999), and *United States v. Roberts,* 185 F.3d 1125 (10th Cir. 1999). As *Blunk* is a Ninth Circuit decision, it is not controlling in the Tenth Circuit. Like DOI, EPA in its Determination properly followed pertinent Tenth Circuit case law—specifically the *HRI* Court's direction—regarding the community-of-reference analysis. *Blunk* involved the regulation of commercial activity and a question of federal preemption on a parcel of fee land purchased by the Navajo Nation in an area of Arizona disconnected from the formal Navajo Reservation. In contrast, the ultimate issue before EPA was whether EPA or the State of New Mexico is the proper authority to issue a permit under the federal Safe Drinking Water Act. The Tenth Circuit's decision in *Roberts* is also distinguishable. *Roberts* is a criminal case in which the court upheld federal jurisdiction under the Major Crimes Act because the crimes of a tribal member on tribal trust land were committed in Indian country. In reaching its decision, the court made clear that the area qualified as Indian country either as a reservation under section 1151(a) or a dependent Indian community under section 1151(b). As a result, the court saw no need to address the precise relationship between informal reservations and dependent Indian communities post-*Venetie*. In reaching its decision, the court stated: "we believe both dependent Indian communities and reservations, whether formal or informal, continue to exist under 18 U.S.C. § 1151 and Supreme Court jurisprudence." *Roberts*, 185 F.3d at 1133.

Finally, one of the commenters asserts that the *HRI* decision's language regarding the Community of Reference is dicta. Although the Tenth Circuit did not address the "precise impact of *Alaska v. Native Village of Venetie Tribal Government* on the holding of *Watchman*," it gave clear direction to EPA that "barring en banc review by this court, *Watchman* continues to require a 'community of reference' analysis prior to determining whether land qualifies as a dependent Indian community under the set-aside and supervision requirements of 18 U.S.C. § 1151(b)." *HRI* at 1232 and 1249 (internal citations omitted). Applying that community of reference analysis yields the Church Rock Chapter as the appropriate community of reference to which the *Venetie* factors of federal superintendence and federal set-aside were applied.

TAXES AND SERVICES

Leonard Arviso: Mr. Arviso owns fee land in the Baca Chapter (Cibola County) and allotted lands located three miles the Section 8 land. His position is that fee land is not Indian country by any definition. He argues that he pays taxes to Cibola County on the fee land that he owns and receives services from Cibola and McKinley Counties. He does not believe that the Navajo Nation provides any services to owners of fee lands. He also argues that Navajo allottees should have the right to full alienation of their property and that finding that fee land such as the Section 8 land is Indian country would establish bad precedent for other Indian or non-Indian fee owners in the checkerboard region.

Eastern Navajo Allottees Association: The fee portion of Section 8 is subject to taxation by McKinley County, which in exchange provides services to this area including police, fire, emergency, schools and road maintenance. They also believe that uranium mining is the "highest and best use" of the property. Navajo allottees aspire to own their lands with full rights of alienation.

Gamerco Associates, Ltd.: Gamerco owns fee lands in the checkerboard area north of Gallup, New Mexico, and is concerned that this determination could have unintended consequences for other land owners in the Checkerboard Area. They assert that Gamerco's fee land has never been treated by any governmental entity as anything but private land. They maintain that Gamerco obtains all services from McKinley County.

County of McKinley: McKinley County has established jurisdiction over private fee land in the County. This jurisdiction has been recognized by non-Indians, Indians, and the Navajo Tribal Government. Private land owners pay McKinley County taxes and are provided services through the McKinley County such as road maintenance, fire and police protection, emergency medical services and public schools and school transportation. The tract of land subject to this determination is accessed by State Highway 566.

State of New Mexico, Representative Donald L. Whitaker: Checkerboard land ownership already complicates land use and other issues, such as taxation. A determination identifying the private land under consideration as 'Indian country' would further and unavoidably cause further confusion for all entities involved.

State of New Mexico, Senator Lidio G. Rainaldi: Checkerboard land ownership tends to hinder development in this area due to already existing jurisdictional issues and other related complex procedural requirements. More importantly, we rely on county taxes to build our local

economy and provide fundamental services and resources in this area. The property in question is private land that has always been taxed by McKinley County in the same manner that all private land is taxed in the County. This land has never been treated as Indian country by McKinley County. A determination of this fee land as Indian country would be completely disruptive to combined efforts to build our communities.

Northwest New Mexico Council of Governments: Section 8 is on McKinley County's tax rolls and public services are provided by the County.

Response: EPA is not considering whether fee lands located in counties other than McKinley might be Indian country, simply whether the Section 8 land, which is part of the Church Rock Chapter located in McKinley County, is part of a dependent Indian community. As discussed herein, EPA has concluded, based on applicable case law, that this area is Indian country. Additionally, the U.S. Department of the Interior found that essential community services are provided by the Navajo Nation and the federal government. EPA acknowledges that fee owners may pay county and/or state taxes and may receive some services from those jurisdictions. However, the government to which taxes are paid is a separate issue from this Indian country determination and was not addressed by EPA. Finally, EPA acknowledges the comments that checkerboard ownership patterns may raise complex issues that are beyond the scope of this determination.

WATER RIGHTS CONCERNS

State of New Mexico, Office of the State Engineer: All groundwater located under the proposed site falls within the sole and exclusive administrative jurisdiction of the New Mexico State Engineer. The Navajo Nation Water Rights Settlement Agreement, adopted by both the State of New Mexico and the Navajo Nation after years of negotiation, confirms jurisdiction in the New Mexico State Engineer as Water Master over all water of the San Juan Basin, including both surface and groundwater. The State Engineer is very concerned that a finding of 'Indian country' for the private land under consideration by the EPA will be used to abrogate or weaken this Water Rights Settlement Agreement, and create confusion and uncertainty, much as existed before the negotiated agreement."

New Mexico Mining Association: The Navajo Nation has taken the position that the 160-acre property is somehow part of the Church Rock Chapter. This position has been overruled by the New Mexico State Engineer and the McKinley County District Court in water rights adjudication involving this tract of land. Any analysis of the status of HRI's Section 8 property must be confined to this tract alone."

McKinley County: The McKinley County Water Board conducted a review of the proposed mining operation, and discovered no evidence that would suggest that the mining operation will impair our water supply.

Response: Water supply rights raise different issues than land status determinations involving authority to administer federal environmental laws. Therefore, water supply rights are beyond the scope of this determination. Similarly, environmental impacts related to mining operations are also beyond the scope of this determination.

DEVELOPMENT/PROPERTY ISSUES

Eastern Navajo Allottees Association: They also believe that uranium mining is the "highest and best use" of the property. Navajo allottees aspire to own their lands with full rights of alienation.

State of New Mexico, Senator Lidio G. Rainaldi: Checkerboard land ownership tends to hinder development in this area due to already existing jurisdictional issues and other related complex procedural requirements.

County of McKinley: Economic growth and the need to expand its limited tax base are very vital issues for McKinley County.

Gamerco Associates, Ltd.: If Section 8 is determined to be Indian country, then the Navajo Nation has annexed private land.

Strathmore Minerals Corp.: Any Indian country designation in the vicinity of Strathmore's uranium holding based on a nebulous community of reference test would establish an adverse precedent against Strathmore. An Indian country designation could be taken by the Navajo Tribe as an opportunity to institute its ban on uranium mining in this area. An Indian country determination by EPA would effectively constitute a taking without just compensation of Strathmore's valuable property interests, contrary to the Fifth Amendment of the United States Constitution. Strathmore also discusses the 2005 Energy Bill and supporting the Bush Administration's nuclear initiatives.

Response: The sole purpose of this Determination is to determine the Indian country land status for underground injection control permit purposes. EPA made no determination regarding whether uranium mining should or should not be allowed in this area.

Comments Outside Scope of Proposed Action

EPA received several comments that were outside the scope of the proposed action. These include the following comments:

Ms. Zakiya Leggett: No uranium mining on Native lands.

Rikki S. Padilla: We are opposed to any uranium mining in Church Rock, N.M. area or any uranium mining on the Navajo Reservation.

Wilfred Nabahe: I am against any/all permitting for uranium in-situ leach mining. This appears to be an environmental justice issue. The Federal Trust Responsibility of the EPA should supersede any application to destroy the health/environment of indigenous people residing within Federal Trust Land. Mr. Nabahe also stated that there should definitely be an allowance for a public hearing.

Uranium Producers of America: UPA believes that the Administration's Nuclear Power Initiative coupled with the clear signal from Congress in the recently enacted Energy Bill that

nuclear power is a favored source of energy for the country requires the reestablishment of a vital domestic uranium producing industry.

Response: These comments are outside the scope of the Determination as EPA is not now considering any permit application for mining activity. EPA therefore does not address them here. Furthermore, EPA did consider whether to hold a public hearing. EPA received only one comment that mentioned a public hearing. EPA also determined, however, that it had sufficient information for the Determination without holding a public hearing.

State of New Mexico, Environmental Department: NMED stated that it has previously outlined its position on this issue in letters to EPA and in filings to the Tenth Circuit Court of Appeals. NMED provides comments in the form of Executive Order 2005-056 recently signed by New Mexico Governor Bill Richardson. This Executive Order is a new initiative by New Mexico regarding Environmental Justice. New Mexico is dedicated to bringing environmental justice issues into its decision-making processes. NMED also provided copies of a Statement of Policy and Process with the Navajo Nation, providing that the Governor desires to have an open-door policy with the Navajo Nation to voice concerns and discuss issues and to have the Nation's views seriously considered with respect to the formulation and execution of State policy.

We maintain the position that Section 8 is not a dependent Indian community. The Supreme Court's intervening decision in *Alaska v. Native Village of Venetie Tribal Government* interpreted the terms 'Indian country' and 'dependent Indian community'. To be a dependent Indian community Section 8 (1) must have been set aside by the Federal Government for the use of Indians as Indian land and (2) must be under federal superintendence. NMED asserts that Section 8 is not a dependent Indian community under the test in *Venetie.*

Response: EPA acknowledges the position previously outlined by the State in this matter and referenced in its comment document. Consistent with the *HRI* Court's decision and other applicable Tenth Circuit case law, EPA has made a determination regarding the status of this Section 8 land, as explained fully in its Land Status Determination. Additionally, EPA acknowledges the State of New Mexico's comment with respect to Environmental Justice issues.