LAND STATUS DETERMINATION

I. Summary

In consultation with the United States Department of the Interior, the United States Environmental Protection Agency (EPA or the Agency) has determined that the approximately 160 acres of land located in the southeast portion of Section 8, Township 16N, Range 16W, in the State of New Mexico (the Section 8 land), is part of a dependent Indian community under 18 U.S.C. section 1151(b) and, thus, "Indian country." EPA is therefore the appropriate agency to consider underground injection control permit applications under the Safe Drinking Water Act (SDWA) for that land.

II. Introduction and Background

This Land Status Determination arises from the remand to EPA in *HRI v. EPA*, 198 F.3d 1224 (10th Cir. 2000) (the *HRI* case).

In the late 1980s, Hydro Resources, Inc. (HRI) sought an underground injection control (UIC) permit for its property located within Section 8. This land is located in the "checkerboard" area of the Eastern Navajo Agency, within the borders of the State of New Mexico, approximately 18 miles to the eastern boundary of Gallup, NM.[1] The Navajo Nation has historically asserted that the Section 8 land in question is within a dependent Indian community. After considering materials submitted by the Navajo Nation and the New Mexico Environment Department (NMED), EPA determined that the Indian country status of the Section 8 land was in dispute and, thus, EPA would be the appropriate agency to issue the SDWA UIC permit. The State of New Mexico and HRI challenged EPA's determination with respect to the Indian country status of the land in question and petitioned for judicial review of EPA's decision.

In 2000, in the *HRI* case, the United States Court of Appeals for the Tenth Circuit upheld EPA's decision to implement the UIC program on HRI's Section 8 land because the Indian country status of that land was in dispute. At EPA's request, the *HRI* Court remanded the matter to EPA to make a final administrative decision on the status of the disputed Section 8 land in light of the United States Supreme Court's intervening decision in *Alaska v. Native Village of Venetie Tribal Government*[2] on dependent Indian communities under 18 U.S.C. section 1151(b).[3] Subsequent to the *HRI* Court's decision, it was EPA's understanding that HRI no longer planned to pursue a UIC permit for its property, and thus EPA did not take further action to resolve the Indian country issue. In 2005, NMED received a request from HRI for a UIC permit to operate a uranium in-situ leach mine in Section 8. As a result, NMED formally requested that EPA make a decision on the Indian country status of the Section 8 land.

The underlying issue in this Determination is whether EPA or NMED is the appropriate agency to consider a UIC permit application for the Section 8 land. The State of New Mexico has been authorized by EPA to administer the UIC program in the State, but EPA's authorization

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[1] *HRI*, 198 F.3d at 1248, 1231.

[2] 522 U.S. 520 (1998).

[3] *HRI*, 198 F.3d at 1248, 1254.

does not extend New Mexico's program to areas of Indian country.[4] EPA directly implements the federal UIC program on Indian lands in the absence of an EPA-approved state or tribal program, including on disputed lands where it is unclear whether or not they are "Indian lands."[5] Under EPA's SDWA regulations, "Indian lands" has the same meaning as "Indian country" defined by 18 U.S.C. section 1151.[6] Section 1151 defines "Indian country" as "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . [,] (b) all dependent Indian communities within the borders of the United States . . . [,] and (c) all Indian allotments, the Indian titles to which have not been extinguished . . . ."[7] Accordingly, if the Section 8 land is within a dependent Indian community, EPA is the appropriate regulatory entity.

As framed by the *HRI* Court, the precise issue for EPA in determining the Indian country status of this Section 8 land is whether the land is, or falls within, a "dependent Indian community" under 18 U.S.C. section 1151(b).[8] As discussed below, the *HRI* Court explained the need under the Tenth Circuit's case law for EPA to identify the appropriate community of reference to determine where to apply the Supreme Court's *Venetie* test.

In a Federal Register notice published November 2, 2005, EPA noted that HRI proposes to operate a uranium in-situ leach mine on an approximately 160-acre parcel of land located in the southeast portion of Section 8, Township 16N, Range 16W in the State of New Mexico.[9] Due to the State's lack of authorization to implement a UIC program in Indian country and as a result of the remand from the Tenth Circuit Court of Appeals to EPA, EPA noted that it must now determine whether or not the Section 8 land is part of a dependent Indian community under 18 U.S.C. section 1151(b) and, thus, considered to be "Indian country." The November Federal Register notice solicited public comments on and information relevant to the Indian country status of the Section 8 land. EPA received comments from 25 commenters, including HRI, the Navajo Nation, the State of New Mexico, and others.

The Agency reviewed the status of the land in light of the comments it received, the existing case law, and a November 3, 2006 opinion from the United States Department of the Interior (DOI) Solicitor, who has special expertise on Indian country questions. EPA consulted with the DOI Solicitor's Office, provided the Solicitor a copy of the submitted comments, and conducted a site visit to the HRI site and the surrounding area while accompanied by a Solicitor's Office staff attorney. EPA also consulted with the Navajo Nation pursuant to its federal trustee relationship.

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[4] 40 C.F.R. § 147.1600-1603.

[5] 53 Fed. Reg. 43096, 43097 (Oct. 25, 1988).

[6] 40 C.F.R. § 144.3.

[7] Although it is part of Title 18, the federal criminal code, the Supreme Court has recognized that section 1151 also defines Indian country for questions of civil jurisdiction. *DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 427 n.2 (1975).

[8] *HRI*, 198 F.3d at 1248 and 1254.

[9] *See* Safe Drinking Water Act Determination; Underground Injection Control Program, Determination of Indian Country Status for Purposes of Underground Injection Control Program Permitting, 70 Fed. Reg. 66402 (2005).

The DOI Solicitor's Opinion (DOI Opinion)[10] concluded that the Section 8 land is part of a dependent Indian community and, therefore, constitutes Indian country as defined by 18 U.S.C. section 1151. EPA agrees. As described further in the following discussion, because the Section 8 land is Indian country, EPA is the appropriate agency to consider any future UIC permit applications under the SDWA for that land.[11]

III. Determining Whether an Area is a Dependent Indian Community Under 18 U.S.C. § 1151(b)

A. *Venetie* and the community of reference analysis

In *Alaska v. Native Village of Venetie Tribal Government*, the Supreme Court outlined a two-part test for determining whether a community is a dependent Indian community.[12] In *Venetie*, the Supreme Court had to decide whether former reservation lands, conveyed to an Alaska Native corporation and then to the Alaska Native Village of Venetie in communal fee simple pursuant to the Alaska Native Claims Settlement Act (ANCSA), could be considered Indian country under 18 U.S.C. section 1151, thereby permitting the tribe to tax non-Indians doing business on the lands.[13] Because the lands were neither reservations nor allotments, the question was whether they constituted a dependent Indian community. The Court concluded "that in enacting § 1151(b), Congress indicated that a federal set-aside and a federal superintendence requirement must be satisfied for finding of a 'dependent Indian community[.]'"[14] According to the Supreme Court, the specific language of ANCSA clearly showed that Congress had no intention to set aside or superintend the lands at issue and, therefore, Venetie was not a dependent Indian community.[15]

Before *Venetie*, the Tenth Circuit used a four-prong test for determining whether a particular area is a dependent Indian community based upon its decision in *Pittsburg & Midway Coal Mining Co. v. Watchman*.[16] In *Watchman*, the Tenth Circuit considered as an issue of first impression "the threshold question of the appropriate community [or geographic area] to use" in determining whether an area constitutes a dependent Indian community under 18 U.S.C. section 1151(b).[17] It referred to this appropriate community or geographic area as the "community of

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[10] A copy of the DOI Opinion is attached to this Determination as the Appendix.

[11] 53 Fed. Reg. 43096, 43097 (Oct. 25, 1988).

[12] *Venetie*, 522 U.S. at 527.

[13] See *id.* at 523-27.

[14] *Id.* at 530.

[15] *See id.* at 532-34.

[16] 52 F.3d 1531, 1545 (10th Cir. 1995) (specifying four-prong test: (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 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.)

[17] *Id.* At 1543.

reference." Prior to adopting its four-prong test, the *Watchman* Court identified "two organizing principles [or steps] useful for determining the community of reference": 1) "the status of the area in question as a community" and 2) "the community of reference within the context of the surrounding area."[18]

As the *HRI* Court noted, certain elements of the *Watchman* test appear to have been diminished by the *Venetie* decision:

> We note . . . that in *Venetie*, the Supreme Court reversed a decision of the Ninth Circuit applying a six-factor test--similar to our *Watchman* test--for dependent Indian community status to certain Alaskan Native lands . . . . The Court concluded that three of the factors relied on by the Ninth Circuit were extremely far removed from the [set-aside and superintendence] requirements of the dependent Indian community test. These three factors--nature of the area, relationship of area inhabitants to Indian tribes and the federal government, and the degree of cohesiveness of the area and its inhabitants--comprise parts of the second and third prongs of the test adopted in *Watchman* and presumably *Venetie* reduces substantially the weight to be afforded them.[19]

A key question following *Venetie* was whether the Tenth Circuit's community-of-reference threshold analysis survived *Venetie*. Several commenters have suggested that the community-of-reference analysis is no longer intact.[20] In reviewing the *Venetie* decision, however, the *HRI* Court reached a different conclusion. It concluded that, because the Supreme Court in *Venetie* was not presented with the question of the proper community of reference and did not speak directly to the propriety of a community-of-reference analysis, Tenth Circuit precedent continues to require a community-of-reference analysis. As the *HRI* Court stated:

> Although it appears that, in disapproving of the Ninth Circuit's multi-factor test for identifying a dependent Indian community, *Venetie* may require some modification of the emphases in the second step of our dependent Indian community test in *Watchman*, nothing in *Venetie* speaks to the propriety of the first element of that test-- determination of the proper community of reference . . . . Presumably because of the categorical effect of the Alaska Native Claims Settlement Act . . . on virtually all Alaskan native lands, the Supreme Court in *Venetie* was not even presented with the question of defining the proper means of determining a community of reference for analysis under § 1151(b).

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[18] *Id.* at 1543-44.

[19] *HRI,* 198 F.3d at 1232, n. 3 (citing *Venetie.* at 531 n. 7) (other citations and internal quotations omitted).

[20] In support of this view, a few commenters cited the decision in *Blunk v. Arizona Dep't of Transp.*, 177 F.3d 879 (9th Cir. 1999) (applying the two-part *Venetie* test to tribal fee land without a community-of-reference type of analysis). As a Ninth Circuit decision, *Blunk* 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. EPA's response to comments includes further discussion of *Blunk* and other cases cited by commenters.

> Because *Venetie* does not speak directly to the issue, barring en banc review by this court, [this court 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).[21]

As the DOI Opinion notes, "[i]n order to follow the terms of the court's remand, as well as the most recent law from the Tenth Circuit, . . . a community of reference analysis is necessary." [22] Under the Tenth Circuit's approach, the community-of-reference analysis identifies the geographic area over which to apply *Venetie*, which specifies a two-part test of federal set-aside and federal superintendence, but does not specify where to apply that test.[23]

B. Identifying the community of reference

As the DOI Opinion explains, the community-of-reference analysis is fact-intensive. Under the Tenth Circuit's analysis, the appropriate starting point is whether the proposed community has geographic definition.[24]

After examining the geographic boundaries of a community, DOI describes two principles for determining the appropriate community of reference in the Tenth Circuit: "the status of the area in question as a community" and "the community in the context of the surrounding area." [25]

In determining whether an area is a community, the Tenth Circuit first considers the importance of "the existence of an element of cohesiveness . . . [that] can be manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality." [26] The Tenth Circuit then inquires whether the community is more than an economic pursuit, and whether it qualifies as a "mini-society consisting of personal residences and an infrastructure potentially including religious and cultural institutions, schools, emergency services, public utilities, groceries, shops, restaurants, and the other needs, necessities, and wants of modern life." [27]

The second principle of the community-of-reference analysis focuses on the community in question within the context of the surrounding area.[28] This involves examining "the relationship of [the proposed community] to the surrounding area." [29] Such an inquiry focuses, in

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[21] *HRI* at 1248-49 (citing *Venetie,* 522 U.S. at 531, n. 7, and *Pittsburg & Midway Coal Min. Co. v. Watchman,* 52 F.3d 1531, 1542-3 (10th Cir. 1995)) (internal citations omitted from quote).
[22] DOI Opinion at 3.
[23] *HRI* at 1248-49.
[24] DOI Opinion at 3 (citing *United States v. Adair*, 111 F.3d 770, 774 (10th Cir. 1997)).
[25] *Id.*
[26] *Watchman*, 52 F.3d at 1544.
[27] DOI Opinion at 3.
[28] *Watchman*, 52 F.3d at 1544.
[29] *Id.*

part, on which government or governments provide the infrastructure and essential services for the community.[30] Additionally, when identifying government services to the community and community infrastructure, a community need not originate all or even most of that community's needs.[31] For example, a small, poor community may exhibit the characteristics of a community while still receiving needed services from outside the community.[32]

The DOI Opinion also examines more recent cases in the Tenth Circuit for consistency with this approach, including *United States v. Arrieta*.[33] *Arrieta* examined the appropriate community of reference within the context of the second part of the *Venetie* test—federal superintendence. Although the Tenth Circuit did not need to make an explicit community-of-reference determination in *Arrieta*, which included a mix of Indian and non-Indian lands in a pueblo, it is noteworthy that the *Arrieta* court did nonetheless explain that such an analysis must focus on "the entire Indian community, not merely a stretch of road."[34]

In *United States v. M.C.*,[35] the district court examined whether the Fort Wingate Indian School in McKinley County was a dependent Indian community. The court, citing *HRI*, *Watchman* and *Adair*, among other cases, conducted a detailed community-of-reference analysis consistent with the analysis undertaken in this Determination:

> In determining whether a specific area is a community of reference, the Court first must analyze "the status of the area in question as a community." In determining whether an area is a community, the *Watchman* Court first discussed the importance of "the existence of an element of cohesiveness . . . [which] can be manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality." *Watchman* went on to define a community as a "mini-society consisting of personal residences and an infrastructure potentially including religious and cultural institutions, schools, emergency services, public utilities, groceries, shops, restaurants, and the other needs, necessities, and wants of modern life." In *Adair*, the Tenth Circuit added to this analysis that the "appropriate starting point is the geographical definition of the area proposed as a community[.]"[36]

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[30] *Adair*, 111 F.3d at 775.
[31] *Id.*
[32] *United States v. M.C.*, 311 F.Supp 2d 1281, 1292-1293 (D. N.M. 2004).
[33] 436 F.3d 1246 (10th Cir. 2006).
[34] *Id.* at 1250.
[35] 311 F.Supp. 2d 1281 (D.N.M. 2004).
[36] *United States v. M.C.* at 1289 (citations omitted).

C. The appropriate community of reference in the present situation

1. The HRI property and Section 8

Several of the commenters, including HRI, stated that EPA's inquiry should be limited to either HRI's Section 8 land or all of Section 8. Section 8, however, (and by necessity the HRI Section 8 land) fails the community-of-reference analysis. EPA finds that neither HRI's Section 8 land nor all of Section 8 is the appropriate community of reference.

In analyzing Section 8 and the HRI Section 8 land, one must first determine whether either of these areas has geographic boundaries. While there are no particular geographic boundaries such as a river or bluff that delineate Section 8, its boundaries are clear. Additionally, HRI's Section 8 land also has clear boundaries designated by surveys and legal descriptions.

Despite the presence of boundaries, it is inappropriate to limit the analysis to the Section 8 land, which is only the site of a proposed mine. In *Watchman*, the Tenth Circuit specifically held that the district court had improperly focused on a single mine site in determining the community of reference. As the *HRI* Court observed, "*Watchman* explicitly declined to define with precision the proper community of reference for another mine site within the [Executive Order] 709/744 area."[37] *Watchman* noted that the mine site at issue in that case did not represent the "logical area of reference[.]"[38] Although it had a "use, purpose, and economic life distinct from the surrounding area[, t]he common and ordinary meaning of community . . . connotes something more than a purely economic concern."[39] As DOI's opinion states: the "Section 8 [land] is a mine site. No one lives on it. It has no population. At the most fundamental level, therefore, Section 8 fails to satisfy the definition of community because it lacks a population."[40]

Similarly, in *United States v. Arrieta*,[41] the Tenth Circuit found it improper to focus only on a non-Indian road when determining what area to analyze. The appellant argued that since the county road was not owned by the federal government, it was not superintended, and therefore not part of the appropriate community. The Tenth Circuit found, however, that this position "too narrowly conceives the concept of federal superintendence. We examine the entire Indian community, not merely a stretch of road, to ascertain whether the federal set-aside and federal superintendence requirements are satisfied." [42]

The DOI Opinion next analyzes whether the area qualifies as a "mini-society, containing an infrastructure, something more than a purely economic concern." [43] The record before EPA

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[37] *HRI* at 1249 (citation omitted).
[38] *Watchman*, 52 F.3d at 1545.
[39] *Id.*
[40] DOI Opinion at 6.
[41] 436 F.3d 1246.
[42] *Id.* at 1250.
[43] *Id.* (internal quotations omitted).

shows that the mine site currently lacks the necessary infrastructure to constitute a mini-society.[44] EPA has no evidence that workers will be provided housing at the site, nor is there evidence that it will not be dependent upon the larger community for basic services such as utilities, police, and fire protection. The governmental or private entities that originally established, and continue to provide the infrastructure required for the mine's operation, are necessarily relevant to the dependent Indian community inquiry. Similarly, the Section 8 land itself lacks the same characteristics of infrastructure to make it a mini-society.

2. The Church Rock Chapter[45]

The Church Rock Chapter was first established in 1927 by the United States as a subdivision of the Navajo Nation government, to facilitate local Navajo self-government and to foster improved communications between Navajos and federal agencies.[46] The Church Rock Chapter is located within McKinley County. Section 8 and HRI's Section 8 land are located within the Church Rock Chapter.

EPA agrees with the DOI opinion and several commenters that the Church Rock Chapter is the appropriate community of reference. The Section 8 land is located within the boundaries of the Church Rock Chapter, which is a clearly defined geographic area and community. The Church Rock Chapter shows cohesiveness of culture, language, land use, and aquifer use. As the DOI Opinion notes, "in doing so, the federal government defined [the community] geographically."[47] "Like the natural communities that lay at the core of the traditional social system, the Chapters [are] local organizations, composed of, and directed by, people with common interests."[48]

The Navajo Nation notes that Navajo Chapters are unique in all of Indian country.[49] The Navajo Chapters are the "foundation of the Navajo Nation Government."[50] Chapter Houses in the Navajo Nation perform a unique role. The Chapter "performs similar functioning with respect to the health and welfare of its residents as those performed by a county or municipality in the state government system."[51] The Chapter House "is the Navajo tribal political and social meeting point for the people of the community. Through the . . . Chapter House, the residents of

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[44] The public was provided an opportunity to submit comments on the Land Status Determination. No party submitted any comments indicating intent to develop the mine site in such a way that it might constitute such a mini-society.

[45] Nothing in this Determination should be read as recognizing Navajo chapters as separate political entities by the United States. The United States maintains a government-to-government relationship with the Navajo Nation and not the Church Rock or other Navajo Chapters.

[46] *See* ROBERT YOUNG, NAVAJO YEARBOOK (1958) at 191.

[47] DOI Opinion at 7.

[48] ROBERT YOUNG, A POLITICAL HISTORY OF THE NAVAJO TRIBE 66 (1978).

[49] Navajo Nation Comments at 10.

[50] *Id.* at 8 (citing to NAVAJO CODE tit. 2, § 4021(a) (1995)).

[51] *Thriftway Mktg. Corp. v. New Mexico*, 810 P.2d 349, 352 (N.M. Ct. App. 1990) (concerning off-reservation Nageezi Chapter).

the community can obtain services from the Navajo Nation and the federal government, and engage in political activities related to the Navajo Nation." [52]

With respect to ownership and use, "over 95% (54,030.85 out of 56,526.04 acres) of land in the Church Rock Chapter is held in trust for or in fee by the Navajo Nation, held in trust by the United States for Navajo citizens, or otherwise used exclusively by members of the Navajo Nation." [53] Seventy-eight percent of the land in the Church Rock Chapter is held in trust for the Navajo Nation or individual tribal members.[54]

The Church Rock Chapter also demonstrates cohesiveness in community and economic pursuits. Not only does the Navajo Nation government recognize the Church Rock Chapter as a part of the Navajo Nation, but EPA finds that the Navajo population helps to demonstrate the Indian character of the area: the 2000 census data shows that the population of Church Rock Chapter is 97.7% Native American with the majority of these residents speaking Navajo or other native languages.[55]

EPA notes that the Navajo Nation emphasizes the traditional nature of the Church Rock Chapter: "the Churchrock Chapter is a Navajo traditional rural community." [56] The economy of the Church Rock Chapter is centered on raising livestock. Additional earnings come from traditional self-employment: "jewelry making, silversmithing, sewing, stone carving, wood carving, and weaving." [57]

The Church Rock Chapter functions as a "mini-society" and provides the necessary infrastructure to support the residents who live there. EPA finds that the "residents look primarily to the Chapter (either with its own resources or through the Navajo Nation and BIA) to meet their various needs, [58] The infrastructure and services to Indian and non-Indian residents of the Church Rock Chapter are provided mainly by the Navajo Nation, the BIA, the Indian Health Services and the Chapter itself. These common needs are some of the most basic (water, electricity, telephones). Church Rock has its own judicial district and is served by the Navajo police force. It has a Head Start center, an elementary school, several churches, and a host of Chapter, tribal, and BIA services and facilities.[59] Water and utilities are provided by the Navajo

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[52] *United States v. Calladitto*, Cr. No. 91-356-SC, 19 Indian L. Rptr. 3057 (D.N.M. Dec. 5, 1991).

[53] This figure includes fee lands owned by the Navajo Nation and lands leased to tribal members or to the Navajo Nation. *See* Navajo Nation Comments at 7 and the Appendix to the Navajo Nation Comments at 248.

[54] DOI Opinion at 11.

[55] Comments for the Navajo Nation, *supra*, at 4 (*citing* App. 246-47).

[56] *Id.* at 4 (citing Appendix to the Navajo Nation Comments at 246, 247). *See also* Appendix to the Navajo Nation Comments at 263. Note that the Navajo Nation Comments refer to "Churchrock" and "Church Rock" interchangeably.

[57] Navajo Nation Comments at 10.

[58] *Id.* at 8 (citing Appendix to the Navajo Nation Comments at 263); see also Appendix to the Navajo Nation Comments at 137-51.

[59] Navajo Comments at 4, *citing* App. 261-66; Land use Plan for the Churchrock Chapter, Final Report ("LUP") (Nov. 2002) at B-50.

Nation through its utility authority, and the United States through its Indian Health Service.[60] A recent survey showed that 88% of Chapter residents visit the Chapter House, and 98% of those do so at least monthly.[61] The State maintains State Route 566, which runs through the Chapter,[62] but the United States and the Navajo Nation maintain other roads in the Chapter.[63]

Thus, the Church Rock Chapter is the appropriate community of reference to which the two-part *Venetie* test should be applied.[64]

D. Applying *Venetie* to the appropriate community of reference

1. Federal set-aside generally

Under *Venetie,* the area being analyzed "must have been set aside by the Federal Government for the use of the Indians as Indian land . . . ." [65] In pronouncing its decision, the Supreme Court specifically cited *United States v. McGowan,*[66] where it had held that the Reno Indian Colony was a dependent Indian community. The Supreme Court explained: "The fundamental consideration of both Congress and the Department of the Interior in establishing this colony has been the protection of a dependent people. Indians in this colony have been afforded the same protection by the government as that given Indians in other settlements known as 'reservations.'"[67] Therefore, land is "validly set apart for the use of Indians as such" only if the federal government takes some action indicating that the land is designated for use by Indians.[68] "The underlying purpose of the federal set-aside requirement is two-fold: (1) it 'ensures that the land in question is occupied by an 'Indian community'' . . . and (2) 'it reflects the fact that because Congress has plenary power over Indian affairs, . . . some explicit action by Congress (or the Executive, acting under delegated authority) must be taken to create or to recognize Indian country.'" [69]

In previous cases, trust land has been considered set aside for purposes of satisfying the *Venetie* test. As an example, the Tenth Circuit has found that land accepted into trust under the

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[60] *Id.* at 7. Note that the State of New Mexico and McKinley County provide limited services, namely, most schools, some roads, and fire and EMS services. DOI Opinion at 8.

[61] *Id., citing* LUP at B-50.

[62] HRI Comments at 16 and HRI Comments Appendix III.

[63] Appendix to Navajo Nation Comments at 131, 132.

[64] *Id.* Although no commenters proposed the town of Gallup as the community of reference, EPA considered it. The town of Gallup, N.M. is located southwest of the mine site. Gallup contains schools, emergency services, groceries, shops, and restaurants. Although Gallup may be a defined community, its eastern boundary is located approximately 18 miles, and its airport approximately 26 miles, from the Section 8 land. Based upon its disconnection from the mine site, among other factors, it is not the appropriate community of reference.

[65] Venetie, supra, at 527.

[66] 302 U.S. 535, 58 S.Ct. 286, 82 L.Ed. 410 (1938).

[67] *Id.* at 538.

[68] *Buzzard v. Oklahoma Tax Com'n*, 992 F.2d 1073, 1076 (10th Cir. 1993).

[69] *Thompson v. Franklin*, 127 F. Supp. 2d 145, 153 (N.D.N.Y.) (quoting *Alaska v. Native Village of Venetie Tribal Government*, supra, at 531 n.6).

Indian Reorganization Act, where the United States acts as trustee, does fulfill the set-aside requirement.[70] A set-aside was also recognized when Congress took into trust land that was purchased with funds designated for the acquisition of unspecified land for the use and benefit of a particular tribe.[71] Similarly, trust land was found to be set aside by the federal government when the land had been purchased with funds appropriated by Congress to establish a permanent settlement for tribes scattered across the state of Nevada.[72]

2. The Church Rock Chapter is federally set-aside

Section 8 lands are a part of the Church Rock Chapter and are examined together with the Chapter. As the DOI Opinion notes, *Venetie* first requires consideration of whether the federal government set aside the land for Indian use.[73] In the Church Rock Chapter, the United States purchased the odd numbered parcels from the railroad and put them into trust for the Nation, and then bought some of the even-numbered parcels and placed them into trust for allotments for individual Indians.[74] Seventy-eight percent of the land within Church Rock's boundaries is set aside for the occupation and use of the Navajo tribal members. As for the remaining land within the Chapter's boundaries, the Secretary of the Interior has designated the Chapter within the federally approved Navajo land consolidation area under the Indian Land Consolidation Act (ILCA).[75] Under the ILCA, it is the policy of the United States: "(1) to prevent the further fractionation of trust allotments made to Indians; (2) to consolidate fractional interests and ownership of those interests into usable parcels; (3) to consolidate fractional interests in a manner that enhances tribal sovereignty; (4) to promote tribal self-sufficiency and self-determination; and (5) to reverse the effects of the allotment policy on Indian tribes."[76]

The Church Rock Chapter also has a unique history that supports its status as a community set aside by the federal government.[77] The Church Rock Chapter was organized by the federal government in 1927 "for the purposes of facilitating communication between Navajo communities and fostering self-government. Although the Church Rock Chapter is now an integral part of the Navajo government, initially it was a creature of the Federal Government."[78] In earlier cases addressing the unique circumstances of the Chapters in the Eastern Navajo Agency, where the Section 8 land is located, both state and federal courts recognized Navajo and federal authority over non-trust lands within Chapter boundaries.[79] The court found in *UNC*

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[70] *See United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999).

[71] See *HRI, Inc. v. EPA*, supra, at 1251-53.

[72] See *United States v. McGowan*, 302 U.S. 535 (1938).

[73] *Venetie*, 522 U.S. at 527.

[74] DOI Opinion at 9.

[75] Codified at 25 U.S.C. § 2201 *et. seq.*

[76] 25 U.S.C.A. § 2201 note (Declaration of Policy).

[77] DOI Opinion at 10.

[78] *Id.*

[79] *See, e.g., United States v. Martine*, 442 F.2d 1022 (10th Cir. 1971) (concerning Ramah Chapter); *United States v. Calladitto*, Cr. No. 91-356, 19 Indian L. Rptr. 3057 (D. N.M. Dec. 5, 1991) (concerning Baca Chapter); *United*

Resources, Inc. v. Benally that "[a]ll the land affected [by UNC's spill of radioactive sludge in the Church Rock Chapter area] lies outside the boundaries of the [formal] Navajo reservation, but much of it is trust land and *all of it falls within 'Indian country'* [—] that checkerboard area of mixed federal, state, and tribal jurisdiction adjoining the reservation proper." [80]

The EPA agrees with DOI that the Church Rock Chapter has been validly set aside.

3. Federal superintendence generally

The *Venetie* Court wrote, "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." [81] It is the land in question, not merely the Indian tribe inhabiting it, that must be under the superintendence of the federal government.[82] In prior cases, superintendence was found where the federal government actively controlled the lands in question, effectively acting as a guardian for the Indians.[83]

4. The Church Rock Chapter is under federal superintendence

The second part of the *Venetie* test requires that the land in question be under federal superintendence.[84] Federal supervision of the Church Rock Chapter includes the federal government's supervision, as trustee, of 46,648.64 acres within the Chapter and the federal government's further supervision of an additional 5,712.70 acres over which grazing leases and permits have been issued to Navajo residents within the Chapter. In the Church Rock Chapter, the federal government supervises over 92.5 percent of the total area.

The Department of the Interior supervises natural resources in the Chapter, requiring approval of mineral leases and issuing grazing permits. The BIA also supervises land use in the Chapter by issuing homesites and residential and business leases for Indian allotments. Moreover, the BIA is responsible for protecting Navajo Nation trust lands, natural resources, and water rights, and administering various trust benefits on behalf of the Church Rock members. As the DOI Opinion observes, Church Rock primarily receives services from the Navajo Nation and

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States v. Yazzie, No. Cr. 93-470 (D.N.M. Jan. 28, 1994) (concerning Tsayatoh Chapter); *Thriftway Mktg. Corp. v. New Mexico*, 810 P.2d 349 (N.M. Ct. App. 1990) (concerning Nageezi Chapter).

[80] *UNC Resources, Inc. v. Benally,* 514 F. Supp. 358, 360 (D.N.M. 1981) (emphasis added).

[81] 522 U.S. at 531.

[82] *Id.* at 531 n.5.

[83] *See United States v. McGowan, supra*, at 537-39 (emphasizing that the federal government had retained title to the land to protect the Indians living there); *United States v. Pelican, supra*, at 447 (stating that the allotments were "under the jurisdiction and control of Congress for all governmental purposes, relating to the guardianship and protection of the Indians"); *United States v. Sandoval*, 231 U.S. at 37, n.1 (citing a federal statute placing the Pueblos' land under the absolute jurisdiction and control of the Congress of the United States").

[84] *Venetie* at 527.

the federal government, not the state or county.[85] Therefore, EPA agrees with DOI that the second part of the *Venetie* test is satisfied.

IV. Conclusion

Consistent with DOI's Opinion, EPA finds that the Church Rock Chapter, which necessarily includes Section 8, is a "dependent Indian community." Accordingly, EPA is the proper authority under the SDWA to regulate underground injections on HRI's Section 8 land because it is within the dependent Indian community of the Church Rock Chapter and, thus, is Indian country.[86]

Dated this 6TH day of February, 2007.

Wayne Nastri
Administrator, EPA Region 9

[85] DOI Opinion at 10.

[86] EPA is not determining at this time whether or not the issuance of a UIC permit is an appropriate action, simply that it is the appropriate entity to decide whether or not to issue any such permit.

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO

NOV - 3 2006

Mr. Roger Martella
Acting General Counsel
U.S. Environmental Protection Agency
Ariel Rios Building, Room 4010A
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Mr. Martella:

By letter of June 20, 2005, former General Counsel Ann Klee solicited the Department of the Interior's views on whether 160 acres owned in fee by Hydro Resources, Inc. (HRI) in Section 8, T. 16N, R 16W (Section 8), within the checkerboard area of the Eastern Navajo Agency are "Indian country." More particularly, she asked if this land is considered a "dependent Indian community" within the meaning of 18 U.S.C. § 1151,[1] which defines "Indian country" for purposes of Federal law. Since making that request, your agency has solicited through a *Federal Register* notice public comments on the particular factors that go into the dependent Indian community analysis. I have reviewed those comments as well as the relevant case law and conclude that Section 8 is within a dependent Indian community and is therefore part of Indian country as defined by section 1151.

I. Background

In *H.R.I. v. Envirtl. Prot. Ag.*, 198 F.3d 1224 (10th Cir. 2000) (*HRI*), the Tenth Circuit Court of Appeals remanded to your agency the question of whether Section 8 was within a dependent Indian community. Section 8 is owned in fee by HRI. HRI intends to mine uranium on it. It is located within the Church Rock Chapter of the Navajo Nation.

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[1] Section 1151 defines Indian country as follows:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government . . . (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 . . .

18 U.S.C. § 1151. This dispute concerns section 1151(b), dependent Indian communities only. Unlike the other types of Indian country, which are self-defining, the term dependent Indian communities is defined by case law and its meaning is not readily apparent. Supreme Court precedent established "that Indian country includes those tribal Indian communities under federal protection that did not originate in either a federal or tribal act of 'reserving,' or were not specifically designated a reservation." FELIX COHEN, HANDBOOK OF AMERICAN INDIAN LAW 38 (1982).

The Church Rock Chapter is a division of the Navajo Nation's government organized in 1927.[2] The Federal Government holds 78 percent of the land within the Church Rock Chapter in trust either for the benefit of the Navajo Nation (52 percent) or individual allottees (26 percent).[3] The United States purchased the odd numbered parcels of land and took them in trust for the Navajo Nation and purchased some of the even numbered parcels of land and took them into trust as allotments. Ninety-seven percent of the population within the Church Rock Chapter is Navajo. Seventy-three percent of the households speak Navajo or some other native language. Grazing and agriculture are the main economic pursuits within Church Rock. The major employers within the Chapter are the Mustang Gas Station, Red Rock State Park, Church Rock Academy (the elementary school), and the Navajo Nation and Church Rock Chapter governments. Most private employment is provided outside the Chapter. The Chapter, the Navajo Nation, and the Bureau of Indian Affairs (BIA) provide the majority of the infrastructure within the Chapter, except main roads, most schools, and fire and EMS services, which are provided by the State of New Mexico and the county.

II. Dependent Indian Community

In *HRI*, the court laid out a three-part analysis to apply in determining whether Section 8 was part of a dependent Indian community. First, determine the appropriate "community of reference," *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1543 (10th Cir. 1995), then determine whether the land has been set-aside for the use of Indians as Indian land and whether the land is under Federal superintendence, *Alaska v. Native Village of Venetie*, 522 U.S. 520, 527 (1998).[4] *HRI*, 198 F.3d at 1249. In *Venetie*, which was decided after *Watchman*, the Supreme Court established Federal set-aside and Federal superintendence for the test of dependent Indian communities. *Venetie*, 522 U.S. at 527. Some of the commenters in response to your *Federal Register* solicitation argued that *Watchman*'s community of reference analysis did not survive *Venetie*. But the *HRI* court specifically held that *Venetie* did not address the community of reference issue. 198 F.3d at 1248 ("Nothing in *Venetie* speaks to the propriety of the . . . determination of the proper community of reference.") Moreover, this approach that focuses on the entire community was recently reinforced by the Tenth Circuit in *United States v. Arrieta* when the court held that in areas of Indian and non-Indian lands, the *Venetie* test applies to the entire community, not a single parcel of land. *Arrieta*, 436 F.3d 1246, 1250 (10th Cir. 2006), *cert. denied*, 126 S. Ct. 2368 (2006), *citing HRI*, 198

[2] Comments of the Navajo Nation; THE NAVAJO YEARBOOK, Report No. viii (1961) 374.

[3] Of the remaining land, two percent is tribal fee land, ten percent is Bureau of Land Management land, six percent is private fee land, and four percent is state land.

[4] Some of the commenters argued that the court's reference to *Watchman* was *dicta* and that the proper analysis would apply the *Venetie* factors only. In fact, the *Watchman* factor was integral to the court's decision. The EPA had exercised jurisdiction over Section 8 premised on there being a dispute as to whether Section 8 was Indian country. The court held, "Specifically there are grounds for dispute as to the first *Watchman* test for 18 U.S.C. § 1151(b): What constitutes the proper 'community of reference' in determining the Indian country status of Section 8?" *HRI*, 198 F.3d at 1248. Holding that *Watchman* required a community of reference analysis, therefore, was crucial to the court's upholding of EPA's exercise of jurisdiction on the grounds that there was a dispute as to the status of Section 8. The court's reference to *Watchman* was not *dicta*.

F.3d at 1249. In order to follow the terms of the court's remand, as well as the most recent law from the Tenth Circuit, therefore, a community of reference analysis is necessary.

A. Community of Reference

The community of reference analysis is fact intensive. The starting point is whether the proposed community has geographical definition. *United States v. Adair*, 111 F.3d 770, 774 (10th Cir. 1997). Without boundaries, it is impossible to determine where the community starts and stops and, therefore, where Indian country starts and stops. *Id.* If a community has geographical definition, *Watchman* dictates applying two "organizing principles." *Watchman*, 52 F.3d at 1543. The first is the "status of the area in question as a community." *Id.* The second is the community in the context of the surrounding area. *Id.* at 1544. Specifically, this second principle looks at which jurisdiction provides essential services for the community. *Id.*

Watchman elaborates on the principle of "community" extensively. First, it offers a definition of "community" as "a unified body of individuals . . . with common interests living in a particular area; . . . an interacting population of various kinds of individuals in a common location." *Id.* Second, it demands cohesiveness. This cohesion can be demonstrated in any of three ways: "economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality." *Id.* Finally, *Watchman* instructs that the community must be more than an economic pursuit. *Id.*

> A community is a mini-society consisting of personal residences and an infrastructure potentially including religious and cultural institutions, schools, emergency services, public utilities, groceries, shops, restaurants, and other needs, necessities, and wants of modern life.

Id.

The community of reference analysis, therefore, is a multi-factored, fact intensive analysis that examines the purported community for geographic definition and cohesion, its status as a "mini-society," including the degree to which it has an infrastructure, and finally, the status of the community in the context of surrounding area.

B. *Venetie* Factors

Venetie laid out two factors to consider in determining whether an area is a dependent Indian community. The first is whether the area is set aside as Indian land for Indian use. *Venetie,* 522 U.S. at 527. This requirement ensures that "the land in question is occupied by an 'Indian community.'" *Id.* at 531. The second factor is that the lands must be under Federal superintendence. *Venetie*, 522 U.S. at 527. This 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." *Id.* at 531.

In *Venetie*, the Court considered the effect of the Alaska Native Claims Settlement Act (ANCSA) on the Indian country status of former reservation land held in fee by an Alaska Native corporation.[5] The village of Venetie had sought to impose a tax on a contractor for doing business on tribal land within a dependent Indian community. The State of Alaska sued to enjoin the Village from collecting the tax.

The Court found that the Village failed to satisfy both the set-aside and the superintendence requirements. It failed to satisfy the set-aside requirement because ANCSA unambiguously revoked all Indian reservations "*set aside* by legislation or by Executive or Secretarial Order *for Native use*," excepting one. *Id.* at 532 (quoting ANCSA; emphasis in original). ANCSA, therefore, stripped land set aside for Native use of that status. Significant to the Court's finding was the fact that the land was unrestricted and therefore could be sold to non-Native owners at any time and be put to non-Indian use by the Village. *Id.* at 533 ("Because Congress contemplated that non-Natives could own the former Venetie Reservation, and because the Tribe is free to use it for non-Indian purposes, we must conclude that the Federal set-aside requirement is not met."). Similarly, the Court found that the Village failed to satisfy the Federal superintendence requirement. Noting that Federal protection of the Village's land was limited to protecting it from adverse possession claims, real property taxes, and certain judgments, the Court held such involvement was inadequate to satisfy the superintendence factor.

> These protections, if they can be called that, simply do not approach the level of superintendence over the Indians' land that existed in our prior cases. In each of those cases, the Federal Government actively controlled the lands in question, effectively acting as a guardian for the Indians.

Id. at 533. The Court then cited *United States v. McGowan*, 302 U.S. 535, 537-539 (1938), for the proposition that the United States had retained title to the land to protect the Indians living there, *United States v. Pelican*, 232 U.S. 442, 447 (1914), for the proposition that the allotments in that case were "under the jurisdiction and control of Congress for all governmental purposes, relating to the guardianship and protection of the Indians," and *United States v. Sandoval*, 231 U.S. 28, 37 n.1 (1913), for the proposition that the United States had placed the Pueblos' land under "the absolute jurisdiction and control of the Congress of the United States." *Venetie*, 522 U.S. at 533-534. Federal set aside is satisfied, therefore, when the Federal Government retains title to the land and the Federal superintendence is satisfied when the Federal Government exercises jurisdiction and control for the purposes of fulfilling its trust responsibility.

[5] ANCSA terminated all but one reservation in Alaska and created state incorporated Native corporations to hold the land. Village corporations hold the surface rights and Regional corporations hold the subsurface rights. These rights are freely alienable, subject to no restriction by the Federal Government.

Under *Venetie,* an area may be a dependent Indian community if the land has been set aside as Indian land for Indian use; specifically, the land must be committed to Indian use by some sort of restriction. If the land satisfies the set-aside requirement, it must still be under Federal superintendence, meaning 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." *Venetie*, 522 U.S. at 531.

C. Summary

Following the *HRI* court's order and Tenth Circuit precedent, the correct analysis is to first determine the correct community of reference and then determine whether the area has been set aside by the Federal Government as Indian land for Indian use and whether it is under Federal superintendence. The community of reference analysis first determines whether the area has a geographical definition. Then it applies *Watchman*'s definition of community, looks at whether the area has "cohesiveness," and then examines the area's infrastructure. Finally, the *Watchman* analysis looks at the area in the context of the surrounding area to determine which jurisdiction provides its essential services. If the area is found to be an appropriate community of reference, one applies the *Venetie* factors to it. First, the area must be set aside by the Federal Government. This requirement is essentially that the community be committed to Indians and Indian uses. Second, the community must be under Federal superintendence. Either the Federal Government holds title to the community's land or it controls the land as trustee. If an area can satisfy all these requirements, it is a dependent Indian community.

III. Analysis

The major dispute between the commenters responding to your solicitation was whether Section 8 or the Church Rock Chapter should be the community of reference. I conclude that the Church Rock Chapter is the appropriate community of reference. I conclude further that Church Rock has been set aside by the Federal Government as Indian land for Indian use and that it is under Federal superintendence. Church Rock, therefore, is a dependent Indian community.

A. Section 8 as the Community of Reference

HRI submitted that if the community of reference analysis is relevant, Section 8 alone should be the community of reference. Under Tenth Circuit precedent as well as the community of reference analysis, Section 8 does not qualify as an appropriate community of reference.

Under *Arrieta*, Section 8 does not qualify as a community of reference. In *Arrieta*, a member of a pueblo had been convicted of committing a crime on a county road located on pueblo land within the exterior boundaries of the pueblo but surrounded by non-Indian land. Federal jurisdiction was premised on the crime having been

committed within a dependent Indian community. He challenged his conviction on the ground that he did not commit the criminal act within Indian country because he committed it on a county road. The court held that in conducting the dependent Indian community analysis, courts must "examine the entire Indian community, not merely a stretch of road." *Arrieta*, 436 F.3d at 1250. Under this holding, therefore, we must look beyond Section 8, a single parcel of land, to the entire Indian community to determine whether Section 8 is within a dependent Indian community.

The result of analyzing Section 8 according to the community of reference factors is consistent with the conclusion in *Arrieta*. The first factor in considering Section 8 as the appropriate community of reference is whether Section 8 has geographical boundaries. *Adair*, 111 F.3d at 774. Section 8 is well defined geographically and satisfies this factor.

The next factor to consider is whether Section 8 is a community. There are several sub-factors within this factor. The first sub-factor is *Watchman*'s definition of a "community" as "a unified body of individuals . . . with common interests living in a particular area; . . . an interacting population of various kinds of individuals in a common location." *Watchman*, 52 F.3d at 1544 (internal quotation and citation omitted). Section 8 fails to satisfy this sub-factor. Section 8 is a mine site. No one lives on it. It has no population. At the most fundamental level, therefore, Section 8 fails to satisfy the definition of community because it lacks a population.

The next sub-factor is cohesiveness among the inhabitants. *Id.* Section 8 cannot satisfy this sub-factor because it will have no inhabitants. As noted above, no one lives on Section 8. It is simply a mine site, a business enterprise. Because Section 8 will have no inhabitants, it cannot possibly satisfy this factor.

The final sub-factor is that the area must be a "mini society," containing an infrastructure, "something more than a purely economic concern." *Id.* Section 8 fails this sub-factor because it is nothing more than an economic concern and contains no infrastructure whatsoever. Moreover, when viewed in the context of the surrounding area, it is clear that Section 8 is entirely dependent on the surrounding area for its essential services. It generates none of its own services, such as public utilities and fire and police protection. It has no housing for its workers. It is nothing but a mine site. Analyzing Section 8 under the *Watchman* factors, therefore, I conclude Section 8 cannot qualify as the appropriate community of reference.

My conclusion that Section 8 does not qualify as the appropriate community of reference is consistent with the court's conclusion in *Watchman* that the mine site in that case was not an appropriate community of reference. In that case, the Navajo Nation sought to impose a business activity tax levied on business activities within its jurisdiction on a mine that was located outside the reservation in a checkboard area. The mine site consisted of approximately 20 to 25 square miles. *Watchman*, 52 F.3d at 1534. Five parties held ownership interests in the surface estate: the United States held 47 percent in trust for Navajo allottees; non-Indian private parties held 40 percent; the

Navajo Nation held title to seven percent; the United States held five percent as public lands managed by the Bureau of Land Management; and the State of New Mexico held title to less than 0.5 percent. *Id.* Three parties held title to the coal estate, all of which had leased their interests to the mining company. *Id.* at 1534-1535. In a prior appeal, the Tenth Circuit had remanded to the district court the question whether some or all of the mine site was within Indian country as a dependent Indian community under section 1151(b) or as allotments under section 1151(c). The district court concluded the mine site could be Indian country only under section 1151(b) as part of a dependent Indian community. The court used the mine site as the community of reference and concluded it was not a dependent Indian community.

On appeal, the Tenth Circuit held that the district court "erred by examining the mine site in isolation from the surrounding area." *Id.* at 1543. Critical to the court's rejecting the mine site as the community of reference was the fact that it lacked any infrastructure and it depended on the surrounding area for its essential services. *Id.* at 1544-1545. The court remanded the case back to the district court to find a more appropriate community of reference, possibly the Chapter, for the dependent Indian community analysis.

B. Church Rock Chapter as the Community of Reference

Several commenters argued that the Church Rock Chapter is the appropriate community of reference.[6] Under the *Watchman* factors, Church Rock qualifies as the appropriate community of reference. Church Rock satisfies *Adair*'s requirement that the proposed community be defined geographically. In 1927, the Federal Government organized the Church Rock Chapter as a subdivision of the Navajo Nation government. In doing so, the Government defined it geographically. The Church Rock Chapter is geographically defined.

Next, the Church Rock Chapter constitutes a community. First, Church Rock satisfies *Watchman*'s definition of a community as "a unified body of individuals . . . with common interests living in a particular area; an interacting population of various kinds of individuals in a common location." *Watchman*, 52 F.3d at 1544 (internal quotation and citation omitted). The population in Church Rock is unified by and shares interests in their tribal membership and their Native culture. Ninety-seven percent of the residents of Church Rock are members of the Navajo Nation and seventy-three percent of the households speak Navajo or some other Native language.

Second, the Church Rock Chapter satisfies *Watchman*'s requirement of cohesiveness. *Watchman* provides that an area can satisfy this requirement in any one of three ways: economic pursuits; common interests; and needs of the inhabitants as supplied by that locality. *Id.* The Church Rock Chapter satisfies the second and third criteria. It satisfies the second criterion because 97 percent of the residents of the Chapter are members of the Navajo Nation and 73 percent of the residences speak Navajo or

[6] The Navajo Nation, the New Mexico Environmental Law Center, and a group of Indian law professors advocated this position.

some other Native language. *Adair*, 111 F.3d at 775 (holding that fifty percent Cherokee population constitutes cohesiveness). Church Rock satisfies the third criterion in that the majority of the needs of the inhabitants of the Chapter are supplied within the Chapter. The Navajo Nation, the Chapter, the BIA, and the Indian Health Service provide the majority of the services to the Chapter residents. These services are provided within the Chapter itself, many times at the Chapter House. These services are discussed in greater detail in the next factor, "infrastructure." The State of New Mexico and the county provide very limited services, namely, most schools, some roads, and fire and EMS services.

Third, Church Rock satisfies *Watchman*'s requirement that it exist as a "mini society" and provide its own infrastructure. Church Rock has a collection of residences, as *Watchman* requires. The residences either are organized into traditional family-based "camps" of one to six homes or into low cost tribal housing developments built by the Navajo Nation. The Nation has four such projects within the Chapter. Church Rock has an infrastructure provided by the Chapter, the Navajo Nation, and the Federal Government. Church Rock is served by the Navajo police force and has its own judicial district. It has a Head Start program and an elementary school. It has churches. The Navajo Nation provides housing, electricity, drinking water, wastewater treatment, sewer services, and utilities. The Indian Health Service drills drinking water wells and constructs water distribution lines. The Church Rock Chapter provides scholarships, home repair and purchase assistance, and meals for seniors, and undertakes economic development projects. There are several sources of employment within the Chapter, though most private employment is outside the Chapter. The BIA issues home site and residential leases on allotted land and grazing permits on non-trust land and maintains many of the roads within the Chapter. As is typical of a rural community, Church Rock does not have a hospital, restaurants, a grocery, or other shops. The fact that Church Rock does not provide all of its own infrastructure is not determinative. "[A] community cannot be expected to originate all or even most of the needs, necessities, and wants of modern life." *Adair*, 111 F.3d at 775 (internal quotation and citation omitted); *see also United States v. M.C.*, 311 F. Supp. 2d 1281, 1292 (D.N.M. 2004). I conclude that Church Rock provides enough of its own infrastructure to satisfy this factor.

In contrast, in *Adair*, the Tenth Circuit found that the purported community of Rocky Mountain failed as a community of reference because it failed as a community. First, Rocky Mountain was not geographically defined. *Adair*, 111 F.3d at 773. Second, Rocky Mountain was missing most aspects of infrastructure. Although Rocky Mountain contained cemeteries, an Indian stomp ground, an elementary school, three churches, a convenience store, and some farms, the court held that "Rocky mountain lacks the quality and quantity of activity and institutions which create infrastructure and, in turn, community." *Id.* at 775. The court cited Rocky Mountain's lack of a hospital, a doctor, a grocery store, a public utility office, a bank and a restaurant. *Id.* However, earlier in the opinion, the court had cited other factors, specifically, Rocky Mountain's lack of any tribal or local government, communal activities, or businesses and the fact that Rocky Mountain received electricity from a public utility and water from the county, that all the roads, except one, were maintained by the state and the county, and that the county

provided police protection, though it would call the tribe if it believed a crime had occurred within Indian country. Church Rock has a much more developed infrastructure than Rocky Mountain and is easily distinguished.

Finally, when viewed in the context of the surrounding area, Church Rock is a distinct community in that it provides most of its own essential services. In *Watchman*, the court cited *Blatchford v. Sullivan*, 904 F.2d 542 (10th Cir. 1990), as the source for this factor. *Watchman*, 52 F.3d at 1544. In *Blatchford*, the court considered whether an Indian community at a commercial crossroads constituted a dependent Indian community. The court concluded that it did not. The court found it significant that the Navajo living in the disputed community had to travel outside the community to obtain BIA and tribal services and that the city, the county, and the state provided services to the community, "including water, roads, landfills, public schools and law enforcement." Moreover, community businesses "paid state and county taxes and were subject to state and county health and building codes," and other regulations and laws. *Blatchford*, 904 F.2d at 548. Church Rock, in contrast, is very different. First, the residents of Church Rock do not travel outside the Chapter to get Chapter, tribal, and BIA services. Second, with the exception of some roads, most schools, and fire and EMS services, Church Rock receives no services from the state or county. Third, trust land, which comprises 78 percent of the Chapter, is outside the state's jurisdiction. Unlike the community in *Blatchford*, the vast majority of the land in Church Rock is not subject to state or county regulation or taxation. In the context of the surrounding area, therefore, Church Rock emerges as a distinct community.

I conclude Church Rock is the appropriate community of reference because Church Rock is geographically defined, it satisfies *Watchman*'s definition of community, it has an element of cohesiveness, it provides much of its own infrastructure, and it is a distinct community within the context of the surrounding area. The next step in the dependent Indian community analysis is to apply the *Venetie* factors: Federal set-aside and Federal superintendence.

C. Federal Set-Aside

Venetie's first factor is that the Federal Government set-aside Indian land for Indian use. *Venetie*, 522 U.S. at 527. The purpose of this factor is to ensure that an Indian community occupies the land. *Id.* at 531. Church Rock satisfies this factor and purpose. Within the Chapter, the United States purchased the odd numbered parcels from the railroad and took them into trust for the Navajo Nation. The United States bought a number of the even numbered parcels and took them into trust for allotments for individual Indians. In total, this land comprises 78 percent of the Church Rock Chapter that the United States purchased and set-aside as Indian land for Indian use. The Court concluded in *Venetie* that the land at issue there was not set-aside as Indian land for Indian use because the land could be sold to non-Indians or be put to non-Indian use by the tribe itself. *Venetie*, 522 U.S. at 533. In contrast, this trust land in Church Rock cannot be sold to non-Indians or committed to non-Indian use. The Federal Government holds it in trust for the benefit of the Nation or individual Indians to put to Indian uses.

Given these restrictions, the Nation's trust land and the allotted lands satisfy the *Venetie* set-aside factor. Moreover, the community of reference analysis establishes that an Indian community occupies this land. Church Rock satisfies both the letter and the spirit of this factor.

In addition, Church Rock has a unique history that makes its status as a community set-aside by the Federal Government more compelling. The Federal Government organized the Chapter in 1927 for the purposes of facilitating communication between Navajo communities and fostering self-government. Although the Chapter is now an integral part of the Navajo government, initially it was a creature of the Federal Government. While this fact is not determinative, it adds weight to the conclusion above that the Chapter as a whole was set aside by the Federal Government as Indian land for Indian purposes.

D. Federal Superintendence

Venetie's second factor is that the land in question is under Federal superintendence. *Id.* at 527. The purpose of this factor is to ensure that the Indian community is sufficiently dependent on the Federal Government, as opposed to the state such that it is subject to Federal and tribal jurisdiction. *Id.* at 531. I conclude Church Rock satisfies this factor as well.

In *Venetie*, the Court pointed to *McGowan*, *Pelican,* and *Sandoval* as examples of communities under Federal superintendence. *Venetie*, 522 U.S. at 533. In *McGowan* the Federal Government held title to the Indian colony land. In *Pelican* the Federal Government exercised control as trustee over allotments out of a diminished reservation. In *Sandoval* the Federal Government exercised "absolute" jurisdiction and control over land held in fee by the pueblo but subject to restrictions on alienation. The principle that emerges from these cases is that Federal superintendence is satisfied if the Government holds title or otherwise controls the land.

In this case, the Federal Government owns title to 78 percent of the land over which it exercises control as trustee. Seventy-eight percent of the land in the Church Rock Chapter, therefore, is under Federal superintendence for the Indians. Because the United States holds title to such a large percentage of land within Church Rock, Church Rock as a community can be said to be under Federal superintendence. Moreover, the facts demonstrate that Church Rock fulfills the purpose of the factor in that it is dependent on the Federal Government and subject to Federal and tribal jurisdiction. Church Rock receives very few services from the state and the county. Its services come from the Navajo Nation and the Federal Government. The majority of the land in Church Rock, the 78 percent that is trust land, is beyond state jurisdiction and is subject to Federal and tribal jurisdiction. Thus, not only is the vast majority of land within Church Rock subject to Federal superintendence but the Church Rock Chapter as a community is dependent on the Federal Government such that it is subject to Federal and tribal jurisdiction. The Church Rock Chapter satisfies the Federal superintendence factor.

E. Conclusion

I conclude Section 8 is located within a dependent Indian community, namely the Church Rock Chapter of the Navajo Nation. Church Rock satisfies the three-part test laid down by the court in *HRI*, 198 F.3d at 1249. First, Church Rock is the appropriate community of reference. It is geographically defined. *Adair*, 111 F.3d at 774. It constitutes a community in that it satisfies the definition of community, it is cohesive in its interests and its needs as supplied by the community, and it constitutes a "mini society" in that it has residences and its own infrastructure. *Watchman*, 52 F.3d at 1543-1544. Finally, it qualifies as a community of reference because when considered in the context of the surrounding area, Church Rock provides most of its essential services. *Id.* at 1544. Second, Church Rock was set aside as Indian land for Indian use. *Venetie* 522 U.S. at 527. The United States purchased the odd numbered parcels of land and took them into trust for the Navajo Nation and purchased some of the even numbered parcels of land and took them into trust as allotments. In all, this land amounted to 78 percent of the land in Church Rock. This trust land, therefore, was set aside as Indian land for Indian use. Finally, Church Rock is under Federal superintendence. *Id.* This factor is satisfied when the Federal Government holds title to or otherwise controls the land in question. The Federal Government holds title to 78 percent of the land in Church Rock for the benefit of the Navajo Nation or individual tribal members. As trustee, it exercises control over the land. As the above analysis demonstrates, the Church Rock Chapter is a dependent Indian community.

If you have any questions or would care to discuss this analysis, please feel free to contact me, or Jane Smith (208-5808), the member of my staff assigned to work on this matter.

Sincerely,

David L. Bernhardt
Solicitor