

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

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

VIA ELECTRONIC MAIL AND U.S. MAIL, FIRST CLASS

January 30, 2006

Dear Mr. Albright:

On behalf of the New Mexico Environmental Law Center's clients, Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC"), please accept the following comments regarding Safe Drinking Water Act ("SDWA") jurisdiction over Section 8, Township 16N, Range 16W, in Church Rock, Navajo Nation, New Mexico ("Section 8"). As demonstrated below, Section 8 is within a dependent Indian community and is therefore Indian Country within the meaning of 18 U.S.C. § 1151(b). Therefore, jurisdiction to administer and enforce the SDWA lies with the U.S. Environmental Protection Agency ("EPA") or the Navajo Nation.

**I. Section 8 is Subject to Federal or Navajo Nation Jurisdiction for the Purposes of Administering and Enforcing the Safe Drinking Water Act Because the Church Rock Chapter is the Appropriate Community of Reference and is a Dependent Indian Community.**

**A. Legal Framework**

Areas that are "dependent Indian communities" are by definition Indian country and therefore fall under tribal or federal jurisdiction rather than state jurisdiction. 18 U.S.C. § 1151(b). The United States Court of Appeals for the 10<sup>th</sup> Circuit fashioned the test for whether a particular area is a dependent Indian community in Pittsburg & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531, 1545 (10<sup>th</sup> Cir. 1995). The Watchman analysis requires that in determining whether an area is a dependent Indian community, one must consider four factors: 1) whether the United States has retained title to the lands it permits Indians to occupy and has authority to enact laws and regulations

regarding the lands; 2) the nature of the area, the Indians' relationship to the area, and the Indians' relationship to the federal government in the area; 3) whether there is an element of cohesiveness in the community; and 4) whether the lands have been set apart for the use, occupancy, and protection of dependent Indian people. Id. As a precondition to applying the four factor test, however, the finder of fact must first establish a "community of reference" to which the four factor test would be applied. Id. at 1543-1544.

After the 10<sup>th</sup> Circuit decided Watchman, the United States Supreme Court decided Alaska v. Native Village of Venetie Tribal Gov't, which outlined a two part test for determining whether a community is a dependent Indian community. 522 U.S. 520, 527 (1998). The 10<sup>th</sup> Circuit has specifically declined to address the effect of Venetie on its dependent Indian community analysis and its community of reference requirement. HRI, Inc v. EPA, 198 F.3d 1224, 1254 (10<sup>th</sup> Cir. 2000). However, the facts of Venetie did not present the Supreme Court with the "community of reference" issue and was therefore never addressed. Indeed, the 10<sup>th</sup> Circuit noted that because the Alaska Native Claims Settlement Act had a categorical effect 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 under 18 U.S.C. § 1151(b). HRI, Inc. v. EPA, 198 F.3d at 1249. Thus, it is clear that the 10<sup>th</sup> Circuit's community of reference analysis remains intact and should be applied to determine the community to which the Venetie analysis is subsequently applied.

Thus, in its Federal Register notice, the EPA correctly notes that a community of reference analysis is required as a precondition to conducting the analysis to determine whether a community is a dependent Indian community set out by the Supreme Court in Venetie. However, while the 10<sup>th</sup> Circuit in Watchman declined to set forth a specific formula for determining the proper community of reference, it provided two organizing principles for determining the appropriate community of reference. Id.

First, the court declared that a community of reference must show an element of cohesiveness. Id. at 1544. This cohesiveness could be based on economic pursuits, common interests, or needs of the inhabitants as supplied by that locality. Id. However, the 10<sup>th</sup> Circuit later clarified that an important element of cohesiveness is the geographical definition of the area proposed as the community. United States v. Adair, 111 F.3d 770, 774 (10<sup>th</sup> Cir. 1997). In analyzing the geographical boundaries a court may consider boundary definition, a discernable identity on maps, reference as a mailing address, and a specific governing body. Id.

The second organizing principle of the community of reference analysis focuses on the community in question within the context of the surrounding area. Pittsburg & Midway Coal Mining Co. v. Watchman, 52 F.3d at 1544. Such an inquiry would focus, in part, on which government or governments provide the infrastructure and essential services for the community. Id. Additionally, when identifying government services to the community and community infrastructure, a community need not originate all or even most of the community's needs. U.S. v. Adair, 111 F.3d at 775. A small, poor community may exhibit the characteristics of a community while still receiving needed

services from outside the community. United States v. M.C., 311 F.Supp 2d 1281, 1292-1293 (D. N.M. 2004).

Once a community of reference has been established, the two pronged Venetie analysis can be applied. Under Venetie, in order to qualify as a dependent Indian community, Indian lands must 1) have been set aside by the Federal Government for the use of the Indians as Indian land; and 2) they must be under federal superintendence. 522 U.S. at 527.

## **B. Church Rock is the Proper Community of Reference**

Applying the 10<sup>th</sup> Circuit's community of reference analysis in this case shows that the Church Rock Chapter<sup>1</sup> is the logical community of reference. As demonstrated in sections B.1-7, below, the Church Rock Chapter shows cohesiveness of culture, language, infrastructure, land use, and aquifer use. Additionally, the Church Rock Chapter is defined by definite geographical boundaries in satisfaction of the Adair test. See, land status map, from Land Use Plan for the Church Rock Chapter, Final Report, Exhibit 18 at B-39 (Nov. 2002) ("Land Use Plan"), attached hereto as **Exhibit 1**.

Moreover, in similar situations, the 10<sup>th</sup> Circuit has concluded that the appropriate community of reference is the Chapter. In United States v. Martine, the 10<sup>th</sup> Circuit determined that an auto accident in the "checkerboard" area on neither reservation nor allotted land, occurred in "Indian Country" in light of the community of reference, which was the Navajo community of Ramah. Id., 442 F.2d 1022 (10<sup>th</sup> Cir. 1971). Similarly, in Watchman, the 10<sup>th</sup> Circuit specifically held that the district court had improperly focused on a single mine site<sup>2</sup> in determining the community of reference. Id., 52 F.3d at 1545. There, the court held:

[T]he district court erred by focusing too narrowly on the mine site. The South McKinley Mine does not exist in a vacuum. Its workers must eat, sleep, shop, worship, and otherwise engage in life's daily routines. The governmental or private entities that originally established, and continue to provide, the infrastructure required for the mine's ongoing operation are necessarily relevant to the dependent Indian community inquiry.

Id. Because in similar situations the 10<sup>th</sup> Circuit has held that the Chapter is the appropriate community of reference, in this case, Church Rock Chapter is likewise the proper community of reference.

Finally, the 10<sup>th</sup> Circuit has held that off-reservation fee land is Indian Country if it lies within a dependent Indian community. Pittsburg & Midway Coal Mining Co. v.

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<sup>1</sup> Somewhat analogous to a county or municipality, the Chapter is the basic unit of Navajo local government. As such, the Chapter has defined boundaries and specific powers. See, Navajo Nation Local Governance Act, 26 N.N.C. §§ 1 and 2.22.

<sup>2</sup> Significantly, the mine site in Watchman encompassed almost 16,000 acres, while Section 8 is a mere 160 acres. See, Watchman, 52 F.3d at 1534.

Watchman, 52 F.3d at 1534, 1546. Because HRI's fee land consists of a quarter section within the Church Rock Chapter boundaries, it lies within a dependent Indian community and is therefore Indian Country.

Notwithstanding the fact that the Church Rock Chapter has discernable geographical boundaries and a governing body comprised of elected chapter officials, it also has all the characteristics of a community, as demonstrated below.

### **1. Nature of the Area and Area Cohesiveness**

The demographics and history of the Church Rock Chapter support the conclusion that the Church Rock Chapter is the appropriate community of reference. The Church Rock Chapter is unified by common ethnic, cultural, and economic interests. According to 2000 census data, of the 2,802 Church Rock residents, 97% are American Indian, nearly all of them Navajo. Church Rock, Selected Characteristics from Census 2000, U.S. Census (2000), attached hereto as **Exhibit 2**. Additionally, the Navajo language or another Native language is spoken in 73.1% of households in Church Rock Id.

Many Church Rock families have been in the Church Rock area for generations. Comments of Larry J. King, Lucy R. Becenti, attached hereto in DVD format as **Exhibit 3** Many Church Rock residents have strong family ties to their neighbors. Id., Comments of Larry King, Marie Arviso Johnson; Declaration of Johnny Livingston at ¶ 5 (Jan. 27, 2006) ("Livingston Declaration"), attached hereto as **Exhibit 4**.

Grazing and agriculture is the primary economic pursuit in Church Rock. Land Use Plan at B-43 – B-46. In addition there are a small number of private businesses. Livingston Declaration at ¶ 15.1.

Church Rock's social and political center is the Chapter House. The Chapter provides many services to Chapter members. Livingston Declaration at ¶¶ 12-14; Land Use Plan, B-49 – B-50. See also, Declaration of Edward Carlisle, accompanying Navajo Nation Comments. According to a survey conducted by Architectural Research Consultants, Inc., 88% of survey respondents living in the Chapter visit the Chapter House. Land Use Plan at B-50. Of those visiting the Chapter House, 98 % visit at least once a month. Id.

In contrast, the quarter section of Section 8 upon which Hydro Resources, Inc. ("HRI") intends to mine uranium is not unified by economic activity or common interests. Rather, Section 8 is a single quarter section of land within the Church Rock Chapter boundaries and is currently unoccupied although livestock regularly graze there. Exhibit 3, Comments of Larry King and Johnny Livingston; photograph of cattle grazing at Section 8, attached hereto as **Exhibit 5**. As such, Section 8 is clearly not a self-contained community, but is instead a subdivision of the Church Rock community.

## 2. Indian and Non-Indian Land Uses

### a. Indian Land Uses

In 1999 ENDAUM and SRIC staff members conducted a land use survey, which was designed by Dr. Robert Bullard and conducted under his supervision, for the Church Rock area. A copy of that survey is attached hereto as **Exhibit 6**. The survey shows the land uses within a three mile radius of Section 8, including the proposed mine area. Exhibit 6, Affidavit of Mavis Smith at 3.<sup>3</sup> As demonstrated by the survey, the vast majority of respondents within the three mile radius of Section 8 use the land for subsistence farming and grazing. Of the 45 participants in the survey, 41 responded that they used their land for grazing livestock and/or subsistence farming. *Id.*, land use survey responses. Additionally, three-quarters of Section 8 not owned by HRI is used for grazing purposes, and as noted previously, even the one-quarter section of Section 8 owned by HRI is currently being used as grazing land. Exhibit 3, Comments of Larry King and Johnny Livingston; Exhibit 5. Moreover, the entirety of Section 8 is included in Grazing Permit No. 7, issued to Velma Nakai. B. Silago, Bureau of Indian Affairs, Crownpoint, N.M., personal communication, Jan. 27, 2006; Land Use Plan at B-44, Exhibit 21 at B-45 (map showing grazing permit numbers) attached hereto as **Exhibit 7**. Indeed, the canyon on Section 8 is known in Church Rock as “Cattle Canyon” because Church Rock residents used to conduct cattle drives through the canyon. Livingston Declaration at ¶ 18; Exhibit 3, Comments of Larry King and Johnny Livingston.

Within the Church Rock Chapter as a whole, land use patterns are similar. Much of the land is used for grazing. Exhibit 3, Comments of Larry King, Marie Arviso Johnson, Ned Yazzie; Exhibit 7; photograph of Larry King and cattle, attached hereto as **Exhibit 8**; photographs of sheep belonging to Mrs. Wilhelmina Yazzie, attached hereto as **Exhibit 9** and **Exhibit 10**. Much of the land is also used for subsistence farming. Land Use Plan at B-44; Livingston Declaration at ¶ 6.

In addition to agricultural uses, land in Church Rock is used for both centralized and dispersed housing developments. There are four major housing developments within Church Rock’s boundaries: Church Rock Estates, Sundance subdivision, the Coal Mine subdivision, and the NHA housing subdivision in Church Rock village. Residence in these housing developments is limited to enrolled members of Indian tribes. Livingston Declaration at 15e. Additionally, a substantial housing development is planned for the Springstead loop area in Section 30 of T16N, R16W. Exhibit 3, Comments of Chris Shuey. Outside of these centralized housing developments, the residents of Church Rock live in dispersed, traditional “camps” of one to a half dozen homes. Exhibit 3, Comments of Larry King. Traditionally, these camps were organized around extended families and livestock grazing, and remain a uniquely visible characteristic of Church Rock Chapter and virtually all rural Navajo communities.

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<sup>3</sup> Ms. Smith’s testimony and attached surveys were originally submitted as part of Eastern Navajo Diné Against Uranium Mining’s 1999 environmental justice presentation in the U.S. Nuclear Regulatory Commission administrative adjudication of Hydro Resources Inc.’s nuclear materials license, Docket No. 40-8968-ML.

Finally, many Church Rock residents and residents of surrounding Chapters use the land in the area to gather medicinal and ceremonial plants. Exhibit 3, Comments of Marie Arviso Johnson, Ned Yazzie. Certain areas are also used as family burial sites. Id., Comments of Marie Arviso Johnson.

### **b. Non-Indian Land Uses**

Currently, the only non-Indian uses within Church Rock's boundaries are the Mustang gas station and Transwestern Pipeline Company's rights-of-way through the Chapter.

### **3. Aquifer Uses**

Currently, the Westwater Canyon Aquifer is primarily used as a human drinking water source and for agricultural purposes such as livestock drinking water. Two wells completed in the Westwater Canyon Aquifer supply drinking water to Church Rock homes connected to the Navajo Tribal Utility Authority ("NTUA") water system. Declaration of Mitchell W. Capitan at ¶ 8 (January 25, 2006), attached hereto as **Exhibit 11**. As noted in the map and list of wells and developed springs in the Church Rock area, attached hereto as **Exhibit 12**, 13 unregulated wells and developed springs that were operating as of January 1, 2006 are used for both watering livestock and domestic purposes. See also, Declaration of Dr. John W. Leeper<sup>4</sup> at ¶ 23 (March 1, 2005) ("Leeper Declaration"), attached hereto as **Exhibit 13**. These wells are operated and maintained by the Navajo Nation Water Resources Division. Livingston Declaration at ¶ 8. The overlying Dakota aquifer and underlying Cow Springs aquifer are also current and potential sources of drinking water. Leeper Declaration at ¶ 27.

The Westwater is also a valuable resource for the Navajo Nation. In his Declaration, Dr. Leeper demonstrates that the Navajo Nation views the Westwater Canyon Aquifer as critical to support population and economic growth of the Church Rock Chapter. Leeper Declaration at ¶ 9. As such, groundwater is a valuable economic resource for the Navajo Nation. Id. at ¶¶ 32-38.

Further, groundwater represents a fundamental foundation for the maintenance of a Navajo homeland. Id. at ¶ 39. The Navajo Nation and the Federal government have extensive plans for water infrastructure improvement that are intended to insure a continuing viable homeland for the Navajo people by improving the standard of living and creating economic opportunities for tribal members. Id. at ¶ 40. Finally, water has deeply held cultural significance for the Navajo people and tribe. Id. at ¶ 39.

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<sup>4</sup> Dr. Leeper's testimony was originally submitted as part of Eastern Navajo Diné Against Uranium Mining's groundwater presentation in the U.S. Nuclear Regulatory Commission administrative adjudication of Hydro Resources Inc.'s nuclear materials license, Docket No. 40-8968-ML.

#### **4. Land Ownership Patterns**

According to the Church Rock Land Use Plan, 52 % of the land in Church Rock is Tribal trust land, 26 % consists of individual Indian allotments, 2 % is Tribal fee land, and 10 % is land administered by the U.S. Bureau of Land Management (“BLM”). See, Exhibit 1, Land Use Plan at B-38. An additional 6 % is private fee land and 4 % is land belonging to the state of New Mexico. Land Use Plan, B-38, B-40. Therefore, 80 % of the land within Church Rock’s boundaries is land set aside exclusively for the use of the Navajo Nation and its members. Additionally, much of the 10 % of land within Church Rock’s boundaries administered by the BLM is administered for the use and benefit of the Navajo Nation and its members.

Most of the lands immediately adjoining Section 8 are either tribal trust lands or federal lands administered for the benefit of the Navajo Nation. As indicated on the attached land status map, Sections 5, 7, 9, 17 and part of 18 are all Navajo trust lands. Exhibit 1; See also, HRI v. EPA, 198 F.3d at 1254 (Section 17 determined to be tribal trust land and therefore Indian country). The northwest quarter of Section 6 is Navajo fee land. Additionally, Section 4, part of Section 18, and three quarters of Section 8 is BLM land administered by the BLM and the Navajo Nation under a cooperative agreement for the purpose of grazing by members of the Navajo Nation. Only Section 16, which is state leased land, is neither Indian land nor federal land. However, the entirety of Section 16 is leased by the U.S. Bureau of Indian Affairs (“BIA”), which has in turn leased the land for Navajo grazing uses; indeed, Section 16 is covered by BIA grazing permits No. 7 and No. 10. Exhibit 7. In fact, out of the entire township and range in which Section 8 is located, roughly 90 per cent of the land is tribal land or federal land administered for the Navajo Nation. Exhibit 1.

#### **5. Area Infrastructure and Services**

With respect to the second principle guiding the determination whether Church Rock is the proper community of reference, i.e., the community’s relationship to the surrounding area, the majority of Church Rock’s infrastructure and essential services are provided by the Navajo Nation or the federal government.

##### **a. Water**

The majority of Church Rock’s drinking water is provided by the NTUA. Livingston Declaration at ¶ 15.a.; Declaration of Mitchell W. Capitan at ¶ 7 (Jan. 26, 2006) (“Capitan Declaration”), attached hereto as **Exhibit 13**. NTUA is the Navajo Nation owned utility company. Capitan Declaration at ¶ 3.

Church Rock’s basic drinking water infrastructure was constructed by the federal government and turned over to the Navajo Nation for operation and maintenance. Drinking water wells are drilled by the United States Indian Health Service (“IHS”), a federal agency, for individual Indians and for communities. Livingston Declaration at ¶

15.a. Water distribution lines are likewise constructed by IHS and then turned over to NTUA for operation and maintenance. Id.

Some Church Rock residents also haul water for domestic uses and livestock watering from wells and developed springs within Church Rock's boundaries. Capitan Declaration at ¶ 9; Livingston Declaration at ¶ 15.b; See also, Exhibit 12. These unregulated water sources are primarily owned and maintained by the Navajo Nation Department of Water Resources. Capitan Declaration at ¶ 9.

#### **b. Wastewater Treatment**

NTUA likewise provides the majority of wastewater treatment for Church Rock residents. Capitan Declaration at ¶ 10. Wastewater treatment infrastructure is constructed by the federal government for the Chapter and operated and maintained by NTUA.<sup>5</sup> Livingston Declaration at ¶ 15.d.

#### **c. Electricity**

Most of Church Rock's electrical service is provided by Continental Divide Electric Co-op under a contract with the Navajo Nation and Gallup Joint Utilities under a joint service agreement with the Navajo Nation. Livingston Declaration at ¶ 15.c; Land Use Plan at C-4. However, NTUA also provides electrical service to some Church Rock residents. Capitan Declaration at ¶ 12.

#### **d. Public Safety and Legal**

Police service is provided primarily by the Navajo Nation through its substation located in Church Rock. Livingston Declaration at ¶ 15.i. The Navajo Nation police force is funded through the BIA. Id. Officers from the McKinley County Sheriff's Department and the New Mexico State Police are cross-deputized and provide secondary police protection to Church Rock. Id.

Fire protection is provided by the McKinley County White Cliffs Fire Department. Id. at ¶ 15.h. However, Church Rock Chapter is currently working to obtain its own fire department. Id.

Judicial services are provided by the Navajo Nation Judicial Branch, Crownpoint Judicial District in Crownpoint, New Mexico. Id. at ¶ 15.j. Appeals from this court are heard by the Navajo Nation Supreme Court in Window Rock, Arizona. Id. Pursuant to federal law, non-Indian criminal cases occurring in Church Rock are tried in state court unless the case falls under federal jurisdiction. Id.

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<sup>5</sup> The wastewater lagoons filmed by Mr. Shuey in his comments are not the Church Rock Chapter wastewater lagoons. See, Exhibit 3, Comments of Chris Shuey. The Church Rock wastewater lagoons are located further to the east. However, the Church Rock lagoons are similarly constructed.



**e. Health Care**

For healthcare, most Church Rock residents go to the Gallup Indian Medical Center in Gallup, New Mexico, which is operated by the federal government. Id. at ¶ 15.g. Dental care is primarily provided by the U.S. Public Health Service dental clinic in Ft. Wingate New Mexico. Id. Chapter members with private insurance obtain health care from private physicians or at Rehoboth Christian – McKinley Health Care Services. Id.

**f. Roads**

The major highways running through Church Rock were built by and are maintained by the state of New Mexico. Id. at ¶ 15.f. The majority of other roads in Church Rock are maintained by the BIA and McKinley County, although the Navajo Nation contributes financial resources to road maintenance through its gasoline excise tax. Id.

**g. Schools**

Children go to pre-school at the Church Rock Headstart. Land Use Plan at B-53. Local children go to elementary school at Church Rock Academy or in Ft. Wingate and Gallup. Id. High-school aged youth go to Gallup schools or the BIA school in Ft. Wingate. Id.

**h. Employment**

According to the Church Rock Chapter website, the major employers in Church Rock include the Mustang gas station, Red Rock state park, the Church Rock Academy, and Navajo and Church Rock government. <http://churchrock.ndes.org>, link to chapter data, chapter profile (last visited Jan. 30, 2006). However, most private employment is provided outside the Chapter boundaries. Land Use Plan, Exhibit 5 at B-24.

**i. Miscellaneous Services**

Other miscellaneous services, such as general assistance are provided by the Navajo Nation. Livingston Declaration at ¶ 15.k. Additionally, a number of service programs are located in the Chapter and the Chapter also provides a number of services funded by its annual budget, which is provided by the Navajo Nation. Id. at ¶ 11. Services provided by the Chapter include: scholarships for Chapter members, home repair and purchase assistance for Chapter members through the Housing Discretionary Fund, and economic development projects. Id.

**j. Housing**

The Navajo Housing Authority (“NHA”) is the Chapter’s principal housing agency. Id. at ¶ 15.e. NHA principally receives funding from the U.S. Department of

Housing and Urban Development and the U.S. Department of Agriculture. Id. NHA uses these funds to build low cost housing for Navajo Nation members and members of other tribes. Id. There are four NHA funded housing developments within Church Rock's boundaries: Church Rock Estates, the NHA subdivision in Church Rock Village, and the Sundance and Coal Mine subdivisions. Id.

## **6. Relationship of Church Rock Residents to Indian Tribes and the Federal Government**

As demonstrated in Part B.5, above, Church Rock residents rely heavily on infrastructure and services from the Navajo Nation and federal governments. Additionally, the Bureau of Indian Affairs maintains a strong presence in the community. The BIA is responsible for issuing homesite and residential leases on allotted land, which affects individual Navajo allottees. Livingston Declaration at ¶ 16. The BIA is also responsible for issuing grazing permits. Id.; See also, Grazing Permit of Larry King, attached hereto as **Exhibit 14**. Because so many Navajos engage livestock, this function affects a majority of Church Rock residents.

## **7. Activities of Government Agencies Toward the Area**

As demonstrated in Parts B.5 and B.6, above, the Navajo Nation and United States governments provide substantial infrastructure and services to Church Rock. In contrast, the State of New Mexico has a very limited presence in the community. New Mexico provides few direct services to Church Rock Chapter residents. Further, the services that New Mexico provides, such as road maintenance and police protection, are provided in conjunction with tribal or federal authorities. Indeed, when Church Rock resident Larry King resided on state land within Church Rock's boundaries, his family was denied all basic services. Exhibit 3, Comments of Larry King. Not until his family moved to its current homesite on trust land was it able to receive water, electric and other basic services. Id.

## **C. Church Rock Satisfies the Venetie Test**

### **1. Federal Set Aside of Lands**

The Federal government's intent to set aside the lands of Church Rock Chapter is demonstrated by the vast majority of land within the Chapter boundaries being tribal trust or allotted land.<sup>6</sup> As noted in Section B.4, above, 80 % of the land within the Church Rock Chapter boundaries is Tribal trust land, allotted land, or Tribal fee land. These

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<sup>6</sup> The history of the "checkerboard" or "Executive Order 709/744" area of the Eastern Navajo Agency is discussed in detail in Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387, 1388-1392 (10<sup>th</sup> Cir. 1990). Church Rock lies within the E.O. 709/744 area, which was later returned to the public domain pursuant to Executive Orders 1000 and 1284. See, Correll, J.Lee & Dehiya, Alfred, Anatomy of the Navajo Indian Reservation: How It Grew at 24-26 (Navajo Times Publishing Co., 1978), attached hereto as **Exhibit 15**. However, because most of the land within Church Rock is either trust or allotted land, which is *per se* Indian country, the E.O. 709/744 history has little bearing on the factual inquiry as to whether Church Rock is Indian country.

lands are by definition set aside for the exclusive use and benefit of the Navajo tribe and its members. 18 U.S.C. § 1151; Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 634, 648-649 (1993) (intent of Congress was to designate as Indian country all lands set aside, by whatever means, for the residence of tribal Indians under federal protection); Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 511 (1991) (tribal trust land, irrespective of its location, qualifies as reservation). Moreover, a 1929 contract between the United States and the Santa Fe Pacific Railroad Company shows that the United States purchased certain lands within the Church Rock Chapter boundaries, including the odd numbered sections in Township 16 North, Range 16 West, specifically to be placed in trust for the Navajo Nation. Contract between United States and the Santa Fe Pacific Railroad Company at 1, 2 (June 14, 1929), attached hereto as **Exhibit 16**.

Furthermore, the 10 % of lands within the Church Rock Chapter that are within the public domain are administered for the benefit of Navajo Nation members. As discussed above, for example, the  $\frac{3}{4}$  of Section 8 not owned by HRI is public domain that is administered by the BLM, BIA and the Navajo Nation for use as grazing land by Navajo tribal members. Additionally, Mr. Johnny Livingston resides on BLM land. Livingston Declaration at ¶ 4. Finally, as shown in Exhibit 7, grazing permits are issued to tribal members by the BIA irrespective of land status. See also, Exhibit 3, Comments of Chris Shuey (character of land uses are unchanged by legal land status).

Given that 90% of the land within Church Rock's boundaries is set aside for the occupation and use of Navajo tribal members, the remaining 10% of the land within the Chapters' boundaries must also be considered Indian country. Pittsburg & Midway Coal Mining Co. v. Watchman, 52 F.3d at 1534, 1546 (Navajo Nation satisfied its initial burden of demonstrating that the South McKinley Mine, including fee lands therein, was a dependent Indian community); UNC Resources, Inc. v. Benally, 514 F.Supp. 358, 360 (D. N.M. 1981) (checkerboard area of Church Rock adjoining reservation is Indian country); Seymore v. Superintendent, 368 U.S. 351, 358 (1962) (the Congressional intent in enacting 18 U.S.C. § 1151 was to avoid checkerboard jurisdiction). The lands within the Church Rock Chapter are therefore clearly set aside for the use, occupancy, and protection of Navajo Nation members, satisfying Venetie's federal set aside requirement.

## **2. Federal Superintendence of Lands**

Venetie requires federal superintendence of land as a condition of a dependent Indian community. 522 U.S. at 527. Federal superintendence requires that the federal government actively control the land in question, acting as a guardian for the Indians. Id. at 533-534.

In this case, the federal superintendence of land within Church Rock is clear. The United States Indian Health Service drills drinking water wells and installs drinking water distribution lines for use by Church Rock Community members. Livingston Declaration at ¶ 15a; Capitan Declaration at ¶ 6. Likewise, IHS's Office of Environmental Health and Engineering constructed sewage lagoons and sewer infrastructure for Church Rock

which has been turned over to NTUA for ongoing operation and maintenance. Livingston Declaration at ¶ 15d.

Further, the BIA supervises natural resources, requiring approval of mineral leases and issuing grazing and gravel permits. Livingston Declaration at ¶ 16. With respect to grazing permits, the BIA issues such permits for non-Indian land within the Church Rock Chapter boundaries. Exhibit 7; Livingston Declaration at ¶ 17. The BIA also supervises land use by issuing homesite, residential and business leases for Indian allotments. Livingston Declaration at ¶ 16. Moreover, the BIA is responsible for protecting Navajo Nation trust lands, natural resources, and water rights, and administering various trust funds on behalf of Church Rock members. *Id.* The federal government clearly maintains superintendence of the Church Rock community.

Because Church Rock Chapter satisfies both prongs of the *Venette* test, Church Rock, and thus Section 8, is a dependent Indian community under 18 U.S.C. § 1151(b). The State of New Mexico therefore does not have primacy over Section 8 under the Safe Drinking Water Act.<sup>7</sup>

## **II. State Authority to Administer Water Rights is Irrelevant to Determination of Safe Drinking Water Act Jurisdiction Over Section 8**

The New Mexico Office of the State Engineer (“OSE”) submitted comments in this matter in December of 2005. State of New Mexico’s State Engineer Comments to the Environmental Protection Agency for Safe Drinking Water Act Determination; Underground Injection Control Program, Determination of Indian Country Status for Purposes of Underground Injection Control Permitting (Dec. 15, 2005) (“OSE Comments”). In its Comments, the OSE expressed concern that a determination that Section 8 is Indian Country for the purpose of enforcing the Safe Drinking Water Act would be used by the Navajo Nation to “abrogate or weaken” a water rights agreement between the Navajo Nation and New Mexico and create “confusion and uncertainty”<sup>8</sup>. *Id.* at 2. The OSE apparently believes a determination that Section 8 is Indian Country will affect the OSE’s proclaimed “sole and exclusive administrative jurisdiction” over the groundwater in the Gallup Underground Water Basin (“Gallup Basin”). *Id.* The OSE asserts that it has this jurisdiction pursuant to its declaration of the Gallup Basin and a water rights settlement agreement with the Navajo Nation. *Id.*

However, the OSE’s concern is misplaced and unfounded. Even assuming that the OSE has jurisdiction over the Gallup Basin, by law, this jurisdiction extends only to the administration of water *rights*, i.e., the designation of consumptive rights or water quantity. NMSA 1978, § 72-2-1 (2005). However, the SDWA’s purpose is to protect the

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<sup>7</sup> From a practical standpoint, it makes little sense to subject Section 8 to state SDWA jurisdiction when Section 17 is already subject to federal or tribal jurisdiction. See, *HRI v. EPA*, 198 F.3d at 1254. Such a determination would lead to a scenario where two contiguous sections of land overlying a contiguous aquifer would be subject to two separate and potentially conflicting regulatory regimes.

<sup>8</sup> The OSE fails to explain exactly how the water rights agreement with the Navajo Nation might be abrogated or weakened by a determination that Section 8 is Indian Country.

water *quality* of public drinking water supplies and underground sources of drinking water. See, e.g., 42 U.S.C. § 300h(b)(1) (state underground injection program regulations “shall contain minimum requirements for effective programs to prevent underground injection which endangers drinking water sources”).

While water quality and water quantity are related, the United States Supreme Court has made clear that with similar provisions of the Clean Water Act, a state’s jurisdiction is limited. In PUD No. 1 of Jefferson Co. and City of Tacoma v. Washing Dept. of Ecology, et. al, the Court determined that the Clean Water Act preserved the authority of states to allocate water quantity as between users, but did not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation. 511 U.S. 700, 720 (1994).

Just as the Clean Water Act sets water quality standards and imposes controls for discharges into surface waters, the SDWA sets water quality standards for public drinking water supplies and imposes controls on underground injection to protect current and future underground sources of drinking water. Thus, the rationale used by the Court in PUD No. 1 is equally applicable in this case. The OSE’s asserted jurisdiction over groundwater in the Gallup Basin cannot, therefore, limit the scope of groundwater protection provided by the SDWA.

Moreover, irrespective of whether New Mexico, the Navajo Nation or EPA has primacy over Section 8 for the purposes of enforcing the SDWA, any person who has been allocated water by the OSE will still be required to meet that statute’s requirements, as applicable. The SDWA imposes minimum requirements for public water supplies and underground injection projects that must be incorporated in state or tribal regulations. Thus, whether New Mexico, the Navajo Nation, or the EPA enforces the SDWA should be irrelevant from the perspective of the OSE, because whichever sovereign enforces the SDWA will be enforcing the same minimum requirements.

### **III. CONCLUSION**

Based on the foregoing facts, Church Rock Chapter is clearly the proper community of reference for an inquiry into whether Section 8 lies within Indian country. Church Rock Chapter also clearly satisfies the Venetie requirements of federal set aside and superintendence. Therefore, the inescapable conclusion is that because Section 8 lies within Indian country, it must be subject to either federal or Navajo Nation jurisdiction for the purposes of enforcing the requirements of the Safe Drinking Water Act. Thank you for your consideration of this matter and please do not hesitate to contact me if you have questions or need any additional information to assist you in your decision.

Sincerely,

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Eric D. Jantz  
Staff Attorney  
New Mexico Environmental Law Center  
1405 Luisa Street, Suite 5  
Santa Fe, New Mexico 87505  
(505) 989-9022

Attorneys for ENDAUM and SRIC