NAVAJO NATION DEPARTMENT OF JUSTICE
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January 27, 2006

Mr. David Albright, Groundwater Office Manager
United States Environmental Protection Agency, Region 9
75 Hawthorne St., Mail Code WTR-9
San Francisco, CA 94105

Re: Notice Appearing in Federal Register, Nov. 2, 2005 Seeking Comments on EPA's Prospective Determination Concerning the Indian Country Status of Section 8 in the Church Rock Chapter

Dear Mr. Albright:

Enclosed with this letter you will find comments and supporting documents submitted on behalf of the Navajo Nation regarding the above-referenced matter. We believe that these comments and documents establish that the 160 acre parcel of land, the "Section 8 Land," is part of a dependent Indian community, the Church Rock Chapter of the Navajo Nation.

We also believe that the Notice appearing in the Federal Register for November 2, 2005 makes it clear that EPA has no choice but to determine whether or not the Section 8 Land is part of a larger dependent Indian community. The Court of Appeals rejected the argument that the Section 8 Land could be considered as the community of reference, and that is the mandate of the Court. *HRI v. EPA*, 198 F.3d 1224, 1249 (10th Cir. 2000), a decision rendered after the U.S. Supreme Court's decision in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998). Here are some of the facts that we consider determinative on the issue of whether the Section 8 Land is part of a dependent Indian community.

First, it is a fact that the Section 8 Land is located within the boundaries of the Church Rock Chapter. It's a fact that the Navajo Government recognizes the Church Rock Chapter as part of the Navajo Nation. It's a fact that no one is living on the Section 8 Land. It's a fact that the nearest residents to the ¼ parcel of Section 8, people

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living just across the road from it, are Navajos. It's a fact that the latest United States Census data shows that the population of the Church Rock Chapter is 2,802, 97.7% of whom are Native American. It's a fact that over 95% of the 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.

As evidenced by a recent workshop, held at the Church Rock Chapter House for community leaders and relating to issues involving former uranium mining in the Church Rock area, and by a planned public meeting regarding those same issues to be held at the Church Rock Chapter House, we believe it to be a fact that the United States Environmental Protection Agency has already recognized the Church Rock Chapter as the appropriate community of reference for public involvement purposes regarding matters of environmental concern in the Church Rock area.

This list of facts is meant to be illustrative, not exhaustive. There are other equally important facts, together with legal analysis, submitted as comments.

We thank you for the opportunity to offer these comments and look forward to receiving the Agency's decision regarding this matter of great importance to the Navajo Nation.

Sincerely,

NAVAJO NATION DEPARTMENT OF JUSTICE

Louis Denetsosie

Louis Denetsosie
Attorney General
Office of the Attorney General

LD/62

Enclosure

COMMENTS OF THE NAVAJO NATION

REGARDING THE "INDIAN COUNTRY" STATUS OF
LAND WITHIN THE CHURCH ROCK CHAPTER OF THE NAVAJO NATION
INCLUDING THE SOUTHEAST QUARTER OF SECTION 8, T. 16 N., R. 16 W.

AND IN RESPONSE TO

"NOTICE OF PROSPECTIVE DETERMINATION"
70 FED. REG. 66,402 (NOV. 2, 2005) AND 70 FED. REG. 74,318 (DEC. 15, 2005)

THE NAVAJO NATION
DEPARTMENT OF JUSTICE

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January 30, 2006

COMMENTS OF THE NAVAJO NATION REGARDING THE "INDIAN COUNTRY" STATUS OF A PORTION OF SECTION 8, T. 16 N., R. 16 W., N.M.P.M.

INTRODUCTION

The Navajo Nation respectfully submits these comments in response to the request of the Environmental Protection Agency ("EPA") that the public submit information on the factors to be used to determine whether the southeast portion of section 8, Township 16 North, Range 16 West, New Mexico Principal Meridian (the "Section 8 Lands" of approximately 160 acres[1]), is within a "dependent Indian community" and, thus, Indian country for jurisdictional purposes under the Underground Injection Control ("UIC") provisions of the Safe Drinking Water Act (SDWA"). See 70 Fed. Reg. 66,402 (Nov. 2, 2005) (requesting comments); 70 Fed. Reg. 74,318 (Dec. 15, 2005) (extending comment period through January 31, 2006). A company called HRI, Inc., seeks to establish a mine to obtain uranium from the Section 8 Lands and 200 contiguous acres of land in section 17 (the "Section 17 Lands") using a technique called in situ leaching, which requires the injection of lixiviants into an ore-bearing aquifer.

As the following comments and supporting documentation show, the Church Rock Chapter of the Navajo Nation, established by the United States government as a community of Navajo Indians dependent primarily on federal and Navajo governmental services and protection, is the appropriate "community of reference" under governing law. That area, which includes the Section 8 Lands, has been determined "Indian country" by the United States District Court for the District of New Mexico, UNC Resources, Inc. v. Benally, 514 F. Supp. 358, 360 (D.N.M. 1981), and all of the relevant factors support such a determination now.

PRIOR PROCEEDINGS

The ultimate issue in this matter is whether the EPA or the State of New Mexico will administer the UIC program on the Section 8 Lands. In 1983, EPA approved in part New Mexico's application to administer a UIC program for some types of injection wells. 48 Fed. Reg. 31,640 (1983). That approval excepted Indian lands, finding that New Mexico lacked authority over Indian lands. Id. In 1988, the EPA issued a final rule which provided that "[t]he UIC program for all classes of wells on Indian lands in New Mexico is administered by EPA." 53 Fed. Reg. 43,084, 43,089 (1988). At the same time, EPA promulgated a final "tailored" federal UIC program for the Navajo Nation and other tribes in New Mexico. 53 Fed. Reg. 43,096 (1988), codified at 40 C.F.R. Part 147, subpart HHH. There, the EPA announced that it would implement that federal UIC program on an interim basis on lands where an Indian tribe and a state dispute the jurisdictional status of particular land. Id. at 43,097.

The Section 17 Lands are held in trust for the Navajo Nation by the United States. EPA decided that the Section 17 Lands constituted Indian country, and that determination was upheld by the Court of Appeals. HRI, Inc. v. EPA, 198 F.3d 1224, 1249-54 (10th Cir. 2000). Consistent with

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[1] See HRI, Inc. v. EPA, 198 F.3d 1224, 1231 n.1 (10th Cir. 2000).

Pittsburg & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531, 1542 (10th Cir. 1995), the Court of Appeals rejected the notion that the non-Indian ownership of the mineral estate of the Section 17 Lands should have any bearing on the jurisdictional status of that land, especially "considering the federal government's role in protecting Indian interests and the relationship of mining and underground injection to Indian communities and their public water supplies." HRI, 198 F.3d at 1254. The Court of Appeals also upheld the EPA's determination that "there is a legitimate dispute, following Venetie,[2] as to whether Section 8 falls within a 'dependent Indian community' under 18 U.S.C. § 1151(b)," even though it is not owned by or held in trust for the Navajo Nation. See id. at 1231, 1248. The court quoted with apparent approval the EPA's partial approval of the Navajo Nation's Treatment as a State ("TAS") application under the SDWA, where the EPA expressly did not determine that the Navajo Nation lacked jurisdiction over non-Indian fee lands in the off-reservation portion of the Eastern Navajo Agency, which includes the Church Rock Chapter and the Section 8 Lands. Id. at 1247. The court emphasized that all federal agencies have "a special trust obligation to protect the interests of Indian tribes, including protecting tribal property and jurisdiction." Id. at 1245.

The touchstone for the present jurisdictional determination is "Indian country." See 40 C.F.R. § 144.3. The regulatory definition of Indian country mirrors the generally applicable statutory definition which includes reservations, trust allotments, and dependent Indian communities. See 18 U.S.C. § 1151; HRI, 198 F.3d at 1248. The Court of Appeals has ruled that the Executive Order 709/744 Reservation that includes the Section 8 Lands was disestablished,[3] and no party contends that the Section 8 Lands are held in trust for an individual Indian as an allotment. Thus, the question is whether the Section 8 Lands are located within a dependent Indian community. The Court of Appeals did not resolve this question because it "lack[ed] a decision below on the appropriate community of reference, see Watchman, 52 F.3d at 1542-43 (remanding community of reference question for lower court determination), and on the application of the set-aside and superintendence tests required by Venetie," 522 U.S. at 531-32. HRI, 198 F.3d at 1248-49. The Court of Appeals observed that Venetie did not speak to the "community of reference" issue, presumably because the Alaska Native Claims Settlement Act, which terminated the Indian country status of the Venetie Reservation, obviated the need for such an inquiry. Id.

The Court of Appeals remanded the matter to the EPA for a determination of whether the Section 8 Lands are within a dependent Indian community. Recognizing that Venetie may require "some modification of the emphases" in the various factors employed in this analysis, id. at 1248, accord id. at 1232 n.3, the Court of Appeals directed that the analysis begin with the "community of reference" inquiry. Id. at 1249. Section 8 itself may not be considered the "community of reference." Id. That is the law of the case and is binding on EPA here. See Grigsby v. Barnhart, 294

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[2] Alaska v. Native Village of Venetie, 522 U.S. 520 (1998).

[3] See Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387 (10th Cir.), cert. denied, 498 U.S. 1012 (1990), opinion after remand, Pittsburg & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531 (10th Cir. 1995).

F.3d 1215, 1218 (10th Cir. 2002) (law of the case doctrine and mandate rule "require the administrative agency, on remand from a court, to conform its further proceedings in the case to the principles set forth in the judicial decision, unless there is a compelling reason to depart").

The Court of Appeals observed that "[u]nder at least one theory – that the community of reference in the current action is the entire Churchrock Chapter, a theory neither adopted nor rejected in Watchman – Section 8 might qualify as a dependent Indian community. See Watchman, 52 F.3d at 1545." Id. at 1249. That is the theory the Navajo Nation advances here for the EPA's consideration.

STATEMENT OF FACTS; ANALYSIS

The Navajo Nation has consistently treated the Section 8 Lands as within a dependent Indian community. See, e.g., App. 1-25; 87-94; 117-210; 70 Fed. Reg. at 66,403. In determining that there was a legitimate dispute regarding the "Indian country" status of that land, the EPA's Regional Administrator observed that "after carefully reviewing the materials submitted by the Navajo Nation and NMED [the New Mexico Environment Department], EPA believes the Navajo Nation has presented substantial arguments to support its claim that Section 8 is within Indian country." App. 96; 103; 204; see also App. 84. Indeed, the EPA's exhaustive legal analysis concluded that "[i]t is likely that Section 8 would be held to be within a dependent Indian community." App. 114 (emphasis added). EPA's legal counsel based that conclusion on the following:

> Whatever community of reference is used, the existing evidence for each of the factors discussed in Pittsburg & Midway weighs towards finding that Section 8 is within a dependent Indian community: most of the land is held by the U.S. in trust for the benefit of the Navajo Nation or its members and was expressly set aside to provide homes and livelihoods for Navajo Indians; the community is overwhelmingly Navajo and as such is under the supervision of the federal (and tribal) government because the population is Indian; beyond the minimal commercial pursuits of non-Indians, the nature and purpose of the community relates solely to members of the Navajo Nation.

Id. The only bases that EPA's counsel found to support a legitimate dispute were the assertions by NMED that it has historically regulated Section 8 and that one non-binding decision of a state district court ruled without analysis that Section 8 was not in Indian country.[4] Id.

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[4] These assertions, if true, would not carry much weight in any determination of the Indian country status of Section 8. See, e.g., Solem v. Bartlett, 465 U.S. 463, 471 (1984); United States v. John, 437 U.S. 634, 652-53 (1978); HRI, 198 F.3d at 1246; Indian Country U.S.A., Inc., v. Oklahoma, 829 F.2d 967, 974 (10th Cir. 1987); United States v. South Dakota, 665 F.2d 837 (8th Cir. 1981), cert. denied, 459 U.S. 823 (1982); United States v. Washington, 641 F.2d 1368, 1373 (9th Cir. 1981), cert. denied, 454 U.S. 1143 (1982).

The facts at the present time regarding the Church Rock Chapter are at least as compelling as they were when the EPA first considered the status of the Chapter, and several of them are more so. The following summarizes those facts in the order set forth in EPA's Federal Register notice, 70 Fed. Reg. at 66,403, with reference to the factual record developed in the earlier proceedings and additional documentation developed in response to the EPA's request.

The Church Rock Chapter is the Appropriate Community of Reference

A. Nature of the Area of the Church Rock Chapter

The Church Rock Chapter is distinctly Indian in character. The nature of a community is determined primarily by its inhabitants. There are 2,802 people living within the boundaries of the Church Rock Chapter. App. 246-47. As James D. Williams, Ph.D., states, 97.7% of the population of the Church Rock Chapter is American Indian according to the 2000 census. App. 246. White people make up 1.4% of the population and other races the remaining 0.9%. Id. Most, if not all, of these few (65) non-Indians are married to Navajos living there. App. 261; 135. The overwhelming Navajo population demonstrates beyond a quibble the Indian character of the area. Cf. Solem v. Bartlett, 465 U.S. 463, 480 (1984) (where population of disputed area was "evenly divided between Indian and non-Indian residents . . . it is impossible to say that the opened areas of the Cheyenne River Sioux Reservation have lost their Indian character.").

"The Churchrock Chapter is a Navajo traditional rural community." App. 263; 132; 137. The Chapter is a community in every sense of the word. It includes police services, a head start center, an elementary school, several churches, and a host of Chapter, tribal and BIA services and facilities. App. 261-66; Land Use Plan for the Churchrock Chapter, Final Report (Nov. 2002) ("LUP") at B-50.[5]

A recent survey shows that 88% of Chapter residents visit the Chapter House, and 98% of those do so at least monthly. LUP at B-50. "Many people use the Chapter House for a variety of reasons, the most common of which are voting, attending Chapter meetings, for water, and to attend social events." Id. The Chapter "performs similar functions with respect to the health and welfare of its residents as those performed by a county or municipality in the state government system." Thriftway Mktg. Corp. v. New Mexico, 810 P.2d 349, 352 (N.M. Ct. App. 1990) (concerning off-reservation Nageezi Chapter). 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 the community can obtain services from the Navajo Nation and the federal government, and engage in political activities related to the Navajo Nation." United States v. Calladitto, Cr. No. 91-356-SC, 19 Indian L. Rptr. 3057 (D.N.M. Dec. 5, 1991).

[5] The Land Use Plan is reproduced at the end of the accompanying Appendix.

B. Indian and non-Indian Land Uses in the Church Rock Chapter

"The economy [of the Church Rock Chapter] is centered around livestock raising, and the Navajo government." App. 137; 132. Such Indian land use is the almost exclusive use of lands in the Chapter, except those few acres devoted to Indian housing, tourist areas featuring Indian culture, and Navajo Nation and Chapter governmental offices. See App. 132; 137. Other than providing home sites for the few non-Indians who are part of the Churchrock community by virtue of their marriages to Navajo residents of the Chapter, there are no significant non-Indian land uses in the Chapter. See App. 132. As discussed in more detail in Part D, below, over 95% of all the land in the Chapter is held in trust for, or otherwise devoted to the exclusive of, Navajo tribal members residing there. App. 248.

The Church Rock Chapter recently adopted the "Land Use Plan for the Churchrock Chapter, Final Report" (Nov. 2002). That land use plan covers the entire community, including state and private lands. See, e.g., LUP at B-57. No other government has prepared such a plan. That plan also provides detailed information regarding other factors to be considered in the "dependent Indian community" analysis, as discussed below.

C. Relevant Aquifer Uses

The Court of Appeals recognized the special "relationship of mining and underground injection to Indian communities and their public water supplies." HRI, 198 F.3d at 1254. As the EPA knows, the Navajo Nation has a well developed Environmental Protection Agency and an active and capable Department of Water Resources. See App. 211-43 (approval of Navajo Nation Treatment as a State application under SDWA); App. 190-97; 207-10; 250-53; 267-68. The EPA recently approved the Navajo Nation's TAS application to administer its Surface Water Quality Standards program. Gallup Independent (Jan. 24, 2006) at 2. Those agencies have studied the relationship of uranium mining, including the proposed HRI mine on the Section 8 Lands, to underground and surface water resources. As one would expect, the effects of past mining activities have not been confined to mine sites, see App. 267-71, and the environmental impacts of the proposed HRI mine would similarly be felt by the entire community.

The Navajo Nation's chief hydrologist, John Leeper, Ph.D., P.E., examined the water resources of the Church Rock Chapter generally, the Section 8 Lands in particular, and the relationship of these precious water resources to the locality. Dr. Leeper has "observed the cohesiveness and the common needs and interests of [Chapter] residents relating to the provision of water for drinking and stock watering . . ." and finds that the residents "rely almost exclusively on the Navajo Nation and the federal government as trustee" with respect to water resources planning and development. App. 253. Dr. Leeper reports that the Navajo Nation and Indian Health Service "provide[ ] virtually all of the services and infrastructure for water resources planning, development and use within the Church Rock Chapter, which includes the section 8 parcel." App. 251; accord, App. 263. Dr. Leeper finds that the focus of the residents' activities with respect to water needs "is the Church Rock Chapter government." App. 253; accord App. 263.

Dr. Leeper further reports that the quality of water in the Westwater Canyon Aquifer is "outstanding" and it "meets primary Safe Drinking Water Act standards." App. 252. He states that the Church Rock Chapter residents extensively use the Westwater Canyon, Entrada (or Cow Creek), and Dakota Sandstone aquifers for in-house domestic and livestock water purposes. Id. He finds that "the in situ uranium mining proposed for the section 8 parcel (as well as a larger neighboring parcel of land held in trust for the Navajo Nation in section 17) may pollute and significantly jeopardize the viability of the Westwater Canyon, Dakota Sandstone and Cow Creek Aquifers as underground sources of drinking water for the inhabitants of the Church Rock Chapter and surrounding areas which are also within the Navajo Nation and inhabited predominantly by Navajo citizens." App. 253.

Dr. Leeper's professional opinions are that the three principal aquifers underlying the Section 8 Lands are "underground sources of drinking water" under federal law, 40 C.F.R. § 144.3; that "from a hydrological and water resources perspective, the Church Rock Chapter forms the most appropriate "community of reference"; and that

> the proposed uranium mining operations in the section 8 parcel in the Church Rock Chapter may substantially jeopardize important underground sources of drinking water as defined in 40 C.F.R. § 144.3 . . . .

App. 253. Dr. Leeper's Supplemental Declaration shows the proximity of the wells serving the area to the Section 8 Lands. App. 259-60.

Similarly, the Executive Director of the Navajo Nation Environmental Protection Agency states that the old uranium mines (including a Superfund site near section 8), the Section 8 Lands and other lands within the Chapter "are connected hydro-geologically" and opines that the Federal EPA and NNEPA have chosen to conduct consultations relating to the remediation of environmental damage caused by past uranium mining at the Church Rock Chapter House because "the Church Rock Community is the most appropriate community of reference, for public involvement purposes, regarding matters of environmental concern in the Church Rock area." App. 253.

Incidentally, the Navajo Nation has reviewed the comments of the State Engineer dated December 15, 2006. The State Engineer is concerned that any decision regarding UIC permitting authority may weaken a negotiated water rights settlement that confirms the authority of the "State Engineer as Water Master over all waters of the San Juan Basin, including both surface and groundwater." State Engineer's Comments at 2. However, the Section 8 Lands are located in the Rio Puerco and Little Colorado basin, not the San Juan Basin. App. 253, 254 (map showing elevations within and around Church Rock Chapter). The question of UIC permitting authority and the statutory responsibilities and authorities of the State Engineer are distinct, in any event. See State Engineer's Comments at 1-2 (delineating authorities of State Engineer).

Finally, we understand that the State of New Mexico, through NMED, has reasserted its position that the Section 8 Lands are under State jurisdiction. However, the State also suggests that

its position may be modified by New Mexico Executive Order 2005-056, signed by Governor Richardson on November 18, 2005. App. 308-09. Clearly, the Church Rock Chapter is a community of "color" and a low income community under that Executive Order. See App. 246; LUP at B-38. The Navajo Nation requests that the EPA take administrative notice of the fact that there are already two major uranium-contaminated sited located within a few miles of the Section 8 Lands, the United Nuclear NPL site and the Northeast Church Rock mine site. See App. 271 (reproducing EPA's own map of these contaminated sites). Given that there are already two major contaminated sites affecting the Church Rock community, that it is a low income community of color, and that the State itself now demands environmental justice-related scrutiny when addressing siting issues in such communities, the State's policies appear to cut against its assertion of jurisdiction for purposes of the proposed facility on the Section 8 Lands.

D. Land Ownership Patterns

The metes and bounds description of the Church Rock Chapter is found at App. 123-35. The declaration of Raymond Kee, Title Examiner with the Navajo Land Department, provides the information regarding land titles and land ownership patterns. App. 248. 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." Id.

The land ownership patterns are shown graphically in the map attached to the Kee Declaration. That land status map shows the trust lands and federal lands devoted to exclusive Navajo use in brown, reddish and yellow coloring. See App. 249. What is left are a very few areas of State lands, most of which are leased by the Navajo Nation for grazing purposes, and just four discrete areas of fee land, 244.82 acres of which is owned by the Navajo Nation itself. See id.; App. 248.

Like the percentage of the Indian population of the Chapter, the percentage of land in the Chapter devoted to exclusive Indian use is greater than that of most Indian reservations. See Bartlett, supra; cf. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 604 (1977) (diminished reservation area was "90% non-Indian both in population and in land use").

E. Use of Area Infrastructure and Services by Indians and Non-Indians

Both the Indian and non-Indian residents in the Church Rock Chapter use the same infrastructure and services. Those are provided in the main by the Navajo Nation, the BIA, the Indian Health Service and the Chapter itself. "The Indian Health Service and Environmental Health provide funding for domestic and livestock water systems and the Chapter Health Representative Program. The domestic and livestock water systems, windmills, wells and distribution lines are maintained by the Navajo Tribal Utility Program." App. 263 "Many of the initiatives of the BIA in that area are projects designed to serve the community as a whole; for example, the need for windmills, housing, and water assistance." App. 133. The Navajo Nation has provided for electric

service in the Chapter, through a contract with a local cooperative. LUP at C-4. There is no natural gas service. Id.

The only government offices in the Church Rock Chapter are tribal offices. These include a tribal police substation, App. 137, health clinic, veterans office, senior citizen center, Head Start, and offices for other social service and governmental functions. App. 262, 265. Responsibility for road construction and maintenance is shared. The BIA built and now maintains several roads, including one that the State refused to build, see App. 133, and the State maintains old highway 66 and Route 566 that run through the Chapter. App. 137. Most roads are dirt or gravel roads periodically graded by the Chapter, the BIA, the Navajo Nation or the County. See LUP, map at C-1.

The other significant infrastructure improvements concern housing. The housing initiatives of the Chapter, often implemented with the Navajo Housing Authority, a tribal entity, are described in the Land Use Plan. LUP at B-40.

F. Relationship of the Inhabitants to the Navajo Nation and Federal Government

The inhabitants of the Church Rock Chapter, almost all of whom are Navajo Indians or those married to Navajos, "look primarily to the Chapter (either with its own resources or through the Navajo Nation and BIA) to meet their various needs." App. 263. The community is a traditional rural Navajo community, id., and the residents' close ties with the Chapter and Chapter House activities demonstrate their fundamental identification with the Navajo Nation. See LUP at B-29. The residents are entitled to all of the services that the BIA provides to Navajo Indians on the reservation proper. App. 132.

Water and utilities are provided by the Navajo Nation, through its Utility Authority, and the United States, through its Indian Health Service and Environmental Health unit. App. 263. "The Navajo Nation provides the vast majority of all law enforcement and dispute resolution services for the Chapter." Id. The Navajo Nation Council treats the Chapter and its residents equally to on-reservation Chapters and citizens. See App. 272-307; App. 156 ("The people of the Church Rock Chapter enjoy the same rights, responsibilities, and privileges as Navajo Indians who reside within formal reservation boundaries. These rights include the most fundamental rights of Navajo Indians under the Navajo Bill of Rights, the Indian Civil Rights Act, voting rights under Navajo law, the right to sit on juries, and the right to avail themselves of benefits and programs administered by the Navajo Nation and its divisions and enterprises."). Examples of Navajo Nation Council resolutions dealing specifically with the needs of the Church Rock Chapter are reproduced at App. 155-87 and 273-307.

G. Activities of Government Agencies toward the Area

Clearly, the Navajo Nation considers the Church Rock Chapter to be an integral part of the Navajo Nation itself. The Church Rock Chapter is a recognized Chapter of the Navajo Nation, and the Chapters form the "foundation of the Navajo Nation Government." 2 N.N.C. § 4021(a) (1995).

The Chapter's Community Service Coordinator lists numerous programs, services or offices located at the Chapter, including property management, records management, housing assistance, elections, scholarships, public employment, youth employment, emergency relief, uranium monitoring, senior lunch program, meals on wheels, transportation assistance for dental and eye care, in-home assistance, Head Start (three regular programs and one home-based program for the handicapped), Community Health Representative program, Navajo police substation, and the Land Board. App. 262. The Navajo Nation provides funding for the Chapter's administration, and the BIA assists with funding for housing assistance, police, and scholarship programs. Id. Other federal agencies fund programs run from the Chapter, including those of the Department of Agriculture and the Indian Health Service, which "provide[s] funding for domestic and livestock water systems and the Chapter Health Representative Program." App. 262-63 The domestic and livestock water systems, windmills, wells and distribution lines are maintained by the Navajo Tribal Utility Program," an authority of the Navajo Nation. App. 263.

Similarly, the BIA considers the Church Rock Chapter to be a distinct community of Navajo Indians who depend primarily on federal and tribal governmental services and protection. App. 132. The BIA provides extensive services and funding for programs run from the Chapter. E. g., App. 132-33; App. 262-63. "The Navajos living within the . . . Church Rock Chapter[ ] are entitled to all the benefits and services afforded by the BIA to which those residing on the reservation proper are entitled." App. 132. "Many of the initiatives of the BIA in [the Church Rock] area are projects designed to serve the community as a whole; for example, the need for windmills, housing and water assistance." App. 133. The BIA provides a wide array of services to the Chapter, including "tribal operations (vital statistics), law enforcement, social services, employment assistance, adult education, adult vocational training, road construction and maintenance, land operations, real estate services, and maintenance of Individual Indian Monies ('IIM') accounts." Id. "The BIA relates to the residents of the [neighboring] Pinedale and Church Rock Chapters not only on an individual basis but through the Chapters as communities." App. 132.

Indians living on reservations are theoretically entitled to all state and county services, as well. See Shepherd v. Platt, 865 P.2d 107, 110 (Az. Ct. App. 1994). However, state and county agencies virtually ignore the Chapter area. App. 263 ("The Navajo Nation and the Bureau of Indian Affairs provide almost all of the government services to the Churchrock community."); App. 137 (aside from busing students to Gallup and maintaining two roads, "no other services of any significance are provided by the State or County governments"). Unfortunately, such neglect is also emblematic of Indian country status in New Mexico. See Ramah Navajo School Bd. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 834 n.1 (1982) (referring to the children of the Ramah Chapter as the "tribal children abandoned by the State"); Yazzie, 909 F.2d at 1436-37 (reproducing District Court findings regarding the lack of state and county services in the former Executive Order 709/744 reservation that includes the Church Rock Chapter); Natonabah v. Board of Educ. of Gallup-McKinley School Dist., 355 F. Supp. 716, 719 (D.N.M. 1973).

H. Elements of Cohesiveness (Economic Pursuits; Common Interests or Needs Supplied by the Chapter)

The economy of the Church Rock Chapter is centered around livestock raising and the Navajo government. App. 263; 137. The unemployment rate is much higher than the national average or the nearby non-Indian areas. See LUP at B-37 (estimating a 35% unemployment rate in the Chapter. Except for jobs at the Chapter House, Head Start, and the elementary school, people in the community typically obtain wage-paying jobs by commuting to places of business outside the Chapter. See id. (listing the "major employers" in the Churchrock area).[6] Only 3% of Chapter residents report a household income of $30,000 or more. Id. Non-wage earnings come from traditional self-employment: "livestock grazing, jewelry making, silversmithing, sewing, stone carving, wood carving, and weaving." LUP at B-38.

Common interests and needs were reported by the BIA in 1995 as housing, health care and education. App. 137. The Land Use Plan has a more detailed listing of the common interests and needs of the community, drawn from surveys conducted in the community. These common needs are some of the most basic, and distinguish this community from nearby non-Indian areas. They include, in order of priority, (1) new or better roads (52%), telephones (41%), water (37%), housing and home improvements (29% and 26%, respectively), and electricity (22%). LUP at B-32. "The residents look primarily to the Chapter (either with its own resources or through the Navajo Nation and BIA) to meet their various needs." App. 263; see App. 137-51.

The Set-Aside and Supervision Requirements are Satisfied Here.

A. Federal Set-Aside of Lands for the Use, Occupancy and Protection of the Navajo People

The prototypical "dependent Indian communities" are the Pueblos of New Mexico. See United States v. Sandoval, 231 U.S. 28 (1913). In those cases, there was no federal set aside of lands for the Indians. Those lands are held in fee by the Pueblos under grants from the King of Spain. Nonetheless, the Pueblo lands are unquestionably "Indian country" under Sandoval, and Congress codified both Sandoval and United States v. McGowan, 302 U.S. 535 (1938), when it included "dependent Indian communities" in the "Indian country" definition of 18 U.S.C. § 1151(b). See Venetie, 522 U.S. at 530. In this case, virtually all of the Chapter has been set aside by the United States for the use and protection of Navajo Indians. In such a case, as the "leading treatise" in the field states, "patented parcels of land and rights-of-way within dependent Indian communities should also be within Indian country." Felix S. Cohen's Handbook of Federal Indian Law 39 (R. Strickland ed. 1982) (citing Martine); see United States v. Felter, 752 F.2d 1505, 1511 (10th Cir. 1985) (describing the 1982 Handbook as the "leading treatise in this area"); Felix S. Cohen's Handbook Federal Indian Law 195 (Nell J. Newton ed.2005).

Navajo Chapters are unique entities in all of Indian country. The Chapters were established

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[6] The Churchrock Mine, listed there, is actually in the neighboring Pinedale Chapter.

initially by the United States in 1927 to foster improved communications between Navajo communities dependent on federal services and protection and to facilitate local self-government for those Navajo communities. Robert Young, Navajo Yearbook (1958) 191.[7] The Chapter areas were set aside without regard to scattered islands of fee land within their boundaries, and those isolated enclaves should not be treated as non-Indian communities. See United States v.Mazurie, 419 U.S. 544 (1975). Indeed, in the unique circumstance of the Chapters in the Eastern Navajo Agency, both State and Federal courts recognize Navajo and Federal authority over non-trust lands within Chapter boundaries. See, e.g., United States v. Martine, 442 F.2d 1022 (10th Cir. 1971) (concerning Ramah Chapter)[8]; United States v. Calladitto, Cr. No. 91-356, 19 Indian L. Rptr. 3057 (D.N.M. Dec. 5, 1991) (concerning Baca Chapter); United States v. Yazzie, No. Cr. 93-470 (D.N.M. Jan. 28, 1994) (Tsayatoh Chapter); Thriftway Mktg. Corp. v. New Mexico, 810 P.2d 349 (N.M. Ct. App. 1990) (concerning Nageezi Chapter). As the court found in UNC Resources, Inc. v. Benally, 514 F. Supp. 358 (D.N.M. 1981), "[a]ll of the land affected [by UNC's spill of radioactive sludge in the Church Rock Chapter area] lies outside the boundaries of the Navajo reservation, but much of it is trust land and all of it falls within 'Indian country' – that checkerboard area of mixed federal, state and tribal jurisdiction adjoining the reservation proper." Id. at 360 (emphasis added).

"Like the natural communities that lay at the core of the traditional social system, the Chapters were local organizations, composed of, and directed by, people with common interests." Robert Young, A Political History of the Navajo Tribe 66 (1978). The Church Rock Chapter was one of the first ones established in the Eastern Part of Navajo Indian country. App. 135. It was established as "'important and official in every sense.'" Id. at 67-68 (quoting Commissioner of Indian Affairs John Collier). Indeed, "for many years the Chapters were more important as aspects of Navajo political life than the artificially created Council." Robert Young, Navajo Yearbook (1961) at 374.

In addition to that general federal set-aside of the Chapter as a whole, the United States has over time set aside almost all of the individual parcels within the Chapter boundaries for the exclusive use of Navajo Indians. The United States purchased the odd-numbered sections of land within the Chapter (including the Section 17 Lands) from the Santa Fe Pacific Railroad and took those lands into trust for the Navajo Nation under a 1928 Act of Congress, expressly for the exclusive use and protection of the Navajo. See HRI, 198 F.3d at 1251-53; App. 26-83; 198-206.

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[7] The United States Supreme Court has cited the Yearbooks as persuasive authority in Williams v. Lee, 358 U.S. 217, 272 n.8 (1959), and Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685, 690 n.17 (1965).

[8] The Ramah community "is one of over 100 chapters, which are political subdivisions of the Navajo Nation." S. Rep. No. 174, 102d Cong., 1st Sess. 5 (1991). It is in the "'checkerboard' area of western New Mexico . . . [where] some of the land was owned by the Navajo Tribe and some was not." James E. Lobsenz, "Dependent Indian Communities": A Search for a Twentieth Century Definition, 24 Ariz. L. Rev. 1, 21 (1982); see also Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1456 (10th Cir. 1997).

Much of the even-numbered sections (about 15,650 acres) had been set aside in trust status for Navajo Indians as allotted land under the General Allotment Act and the Act of May 29, 1908, ch. 216, 35 Stat. 444, 457, again for the exclusive use and protection of Navajo people. See Navajo Tribe of Indians v. State of New Mexico, 809 F.2d 1455, 1459 n. 9 (10th Cir. 1987); 25 U.S.C. § 348. The remaining federal land is devoted to exclusive Navajo use under agreements, permits and leases with the Navajo Nation and its members, and the Navajo Nation also leases the scattered sections of State land there for grazing purposes.

The Chapter is within the federally approved Navajo land consolidation area under the Indian Land Consolidation Act, App. 132, and additional cooperative federal/Navajo Nation land acquisition and consolidation efforts are ongoing under other Acts of Congress. See Yazzie, 909 F.2d at 1419 (in the Eastern Navajo Agency of which the Church Rock Chapter is a part, the United States has "tried to consolidate as much land as possible in Navajo ownership"); App. 126-30; 188-189 (Executive Order 2513 setting aside lands within T. 16 N. R. 16 W. in Church Rock Chapter).[9] As noted above, the 160-piece of section 8 is not owned by or held in trust for the Navajos, but "every case dealing with the concept [of a "community"] . . . has looked to the surrounding territory." United States v. Mission Golf Course, Inc., 548 F. Supp. 1177, 1183 (D.S.D. 1982), aff'd, 716 F.2d 907 (8th Cir. 1983), cert. denied, 464 U.S. 1041 (1984); accord HRI, 198 F.3d at 1249 (rejecting focus on Section 8 Lands for dependent Indian community analysis); Watchman, 52 F.3d at 1542-43 (requiring examination of area outside of coal mine to determine "dependent Indian community" status of mine site); Blatchford v. Sullivan, 904 F.2d 542, 548 (10th Cir. 1990) (examining highway intersection and the surrounding area within a three to five mile radius), cert. denied, 498 U.S. 1035 (1991). Here, the area surrounding the Section 8 Lands is almost all held in trust by the United States for the use and protection of Navajo Indians under federal statutes designed to secure Navajo authority over the area.

In sum, of the approximately 56,526.04 acres of land within the Church Rock Chapter, over 92% (52,361.34 acres) has been set aside by the United States for the exclusive use of the Navajo people in the Church Rock community. App. 248 (considering only trust land and BLM lands leased for exclusive Navajo use). Again, this is a greater percentage of exclusive Indian land ownership and use than in most reservations in the United States.

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[9] See, e.g., Act of March 3, 1921, ch. 119, 41 Stat. 1225, 1239; Act of Oct. 17, 1975, Publ. L. 94-114, 89 Stat. 577; Act of Oct. 6, 1982, Pub. L. 97-287, 96 Stat. 1225; 25 Fed. Reg. 8546 (1960) (241,807 acres); 42 Fed. Reg. 55,275 (1977) (69,627 acres); 47 Fed. Reg. 56,409 (1982) (57,200 acres); 51 Fed. Reg. 21,424 (1986) (about 15,000 acres); 51 Fed. Reg. 27,467 (1986) (34,593 acres); 57 Fed. Reg. 33,733 (1992) (29,905 acres); 57 Fed. Reg. 43,015 (1992) (79,726 acres); see generally, 25 U.S.C. §§ 463, 465(a), 467, 2201 et seq.

B. Federal Supervision

There is no significant difference in the way the United States interacts with the Church Rock Chapter than the way it interacts with Chapters located in the Navajo Reservation proper. See App. 131-33. Its supervision of the area includes its supervision as trustee of 46,648.64 acres and its further supervision of grazing leases and permits issued only to Navajo residents there of an additional 5,712.70 acres – over 92% of the total land area. See App. 248.

In addition, federal supervision is shown by the continuous presence since 1907 throughout the Chapter of the Bureau of Indian Affairs ("BIA"). See App. 132. In contrast to the "minimal supervision" exercised by the United States in Alaska in Venetie, see HRI, 198 F.3d at 1253,

> [t]he BIA considers the [neighboring] Pinedale and Church Rock Chapters to be distinct communities of Navajo Indians who depend primarily on federal and tribal governmental services and protection. The BIA relates to the residents of the Pinedale and Church Rock Chapters not only on an individual basis, but through the Chapters as communities. BIA officials regularly attend meetings of the Pinedale and Church Rock Chapters to disseminate information about Government programs to, and receive community input from, the Pinedale and Church Rock Chapters. At these Chapter meetings, the primary language spoken is Navajo. Many of the initiatives of the BIA in that area are projects designed to serve the community as a whole; for example, the need for windmills, housing and water assistance. The BIA, along with the Navajo Tribe, also funds the services of a local livestock control officer at Pinedale. After the Navajo Tribe unsuccessfully petitioned the State to pave the dirt road that ran through Pinedale in 1961, the BIA paved it and now maintains it as Highway 11 of the BIA road system. In addition, the Indian Health Service of the Federal Government provides medical services to the Pinedale and Church Rock Communities at the Gallup Indian Medical Center or the Crownpoint Hospital. The United States also provides law enforcement services to the Pinedale and Church Rock Chapters through both the BIA and the Federal Bureau of Investigation.

App. 133.

NEED FOR A HEARING

The EPA's Notice states that "[i]f there is sufficient public interest and a request is made, EPA may consider holding a public hearing to elicit further input from the public on this matter." 70 Fed. Reg. at 66,403. The Navajo Nation does not believe that the facts are subject to any significant dispute meriting a public hearing. The Navajo Nation therefore does not request a public hearing on this matter.

CONCLUSION

All of the relevant factors support a determination that the Church Rock Chapter, including the 160-acre Section 8 Lands, is a "dependent Indian community." The Church Rock Chapter is the appropriate community of reference. The nature of that area is distinctly Navajo in character. Almost 98% of the Chapter residents are Navajos, and most of the rest are there because they married Navajos. The Chapter is a traditional rural Navajo community, where over 95% of the land is held in trust for or otherwise devoted to the exclusive use and benefit of the Navajo people. The Chapter has adopted a land use plan that includes all of the land in the Chapter, and no other government has attempted any such unified plan.

The relevant aquifer uses support treatment of the Section 8 Lands as Indian country, also. The aquifers that HRI seeks to mine are underground sources of drinking water under the SDWA, are relied on for the very existence of all of the Church Rock Chapter residents, and are hydro-geologically connected to the wells that the Navajo Nation and federal government have constructed to serve the community.

Because there are virtually no non-Indians in the Chapter, it receives no substantial services from state or county agencies. The governmental services are provided by the United States, the Navajo Nation and the Chapter itself. The residents therefore look to the United States and the Navajo Nation for infrastructure, services and protection. The Chapter is a cohesive community, bound by economic pursuits, common interests and needs supplied by or through the Chapter.

If the Chapter is found by the EPA to constitute the community of reference, the federal set-aside and superintendence requirements of Venetie are satisfied. Almost all of the land there has been set aside by the United States under acts of Congress for the use and protection of Navajo Indians. Federal superintendence over the land and people is extensive and ongoing on a daily basis. The unique Navajo Chapter system was established by the United States eighty years ago, and Congress, the Executive Branch, and the Federal and State courts recognize the Chapters' authority over all lands within their boundaries.

Congress has defined Indian country "broadly." Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114, 123 (1993). The term has a "'broad and flexible definition.'" United States v. Burnett, 777 F.2d 593, 596 (10th Cir.) (citation omitted), cert. denied, 476 U.S. 1106 (1986). That definition includes the unique chapters of the Navajo Nation, established by the United States and overwhelmingly Navajo in character. The Navajo Nation therefore respectfully urges that the EPA find that it has the authority under the SDWA to regulate underground injections throughout all of the Church Rock Chapter, including the isolated Section 8 Lands.

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