TRIBAL SOVEREIGNTY AND RESOURCE DESTINY: *HYDRO RESOURCES, INC. V. U.S. EPA*

INTRODUCTION

One of the schemes Congress enacted for settling the vast expanses of the western United States was to deed to railroad companies alternating one-square-mile parcels on each side of the planned railroad.[1] Subsequent sales of parcels helped fund railroad expansion, but also created a checkerboard of ownerships, sometimes including tribal sovereign ownership interspersed with private sections.[2] In these areas, Congress attempted to avoid checkerboard jurisdiction with respect to criminal enforcement[3] by adopting 18 U.S.C. § 1151, a criminal statute that extends U.S. federal jurisdiction over "Indian country."[4] Section 1151 defines "Indian country" to mean Indian reservations, dependent Indian communities, and Indian allotments.[5]

In *Hydro Resources, Inc. v. U.S. EPA* (*HRI III*),[6] the Tenth Circuit concluded that land adjacent to "parcels held in trust for the Navajo by the United States"[7] was not a "dependent Indian community" under § 1151(b).[8] As described below, interpretations of § 1151(b) that disregard the word "communities" in the statute result in the same checkerboard jurisdiction that Congress sought to avoid.[9] Such interpretations impact tribal sovereignty by taking from Indian[10] communities the power

1. *See* Hydro Res., Inc. v. U.S. EPA (*HRI II*), 562 F.3d 1249, 1255 n.3 (10th Cir. 2009).

2. *See* Hydro Res., Inc. v. U.S. EPA (*HRI III*), 608 F.3d 1131, 1136 (10th Cir. 2010) (en banc).

3. *See* Seymour v. Superintendant of Wash. State Penitentiary, 368 U.S. 351, 358 (1962); *see also* Hilderbrand v. Taylor, 327 F.2d 205, 206 (10th Cir. 1964).

4. 18 U.S.C. § 1151 (2006).

5. *Id.* The full text of § 1151 reads:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (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, including rights-of-way running through the same.

Id.

6. 608 F.3d 1131 (10th Cir. 2010) (en banc).

7. *Id.* at 1137.

8. *Id.* at 1166.

9. *See* Seymour v. Superintendant of Wash. State Penitentiary, 368 U.S. 351, 358 (1962); *HRI III*, 608 F.3d at 1174 (Ebel, J., dissenting) (citing KENNETH BOBROFF ET AL., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.04[2][c][iii], at 194 (Nell Jessup Newton et al. eds., 2005) [hereinafter COHEN'S]).

10. This Comment will use the term "Indian" not out of any disrespect for indigenous populations, but because of "its use in the relevant statutory language and precedents." *HRI III*, 608 F.3d at 1136 n.2.

to control the destiny of valuable natural resources on or under their land: for example, in the context of *HRI III*, uranium and drinking water.

Part I of this Comment briefly describes past impacts of uranium mining on Navajo land, broad principles of Indian sovereignty, the mining process that Hydro Resources, Inc. (Hydro) proposed, the Safe Drinking Water Act (SDWA), and then discusses the two primary interpretations of § 1151(b): the two-step, multi-factor *Watchman* balancing test and the two-part *Venetie* test. Part II summarizes the majority and dissenting opinions in *HRI III*, including the facts and procedural history. Part III explains how principles of stare decisis can lead to encroachments on Native American sovereignty and then discusses how a modified definition of "Indian lands" better aligns with congressional intent, while enabling the Navajo to control the destiny of its land, drinking water, and uranium. This Comment concludes that the *HRI III* holding contradicts Congress's intent in enacting § 1151, but that this and other problems may be avoided in the future.

I. BACKGROUND

Hydro has long intended to mine the disputed New Mexican land for uranium.[11] Past hazards impacting uranium miners, civilians, and the environment[12] led the Navajo to enact a ban on uranium mining in 2005.[13] Such perils suffered by the Navajo include an increase in cancer rates,[14] contamination of structures built with uranium mining waste,[15] and contamination of groundwater.[16] Notably, the largest nuclear tailing spill in U.S. history occurred in 1979 on Navajo land.[17]

Use of the *in situ* leach method that Hydro proposed using can mitigate many of the negative effects associated with conventional uranium mining.[18] It does not "disturb[] the natural surface, generat[e] dust, or

11. *Id.* at 1138.

12. *See id.* at 1184 (Henry, J., dissenting) (citing Rebecca Tsosie, *Climate Change, Sustainability, and Globalization: Charting the Future of Indigenous Environmental Self-Determination*, 4 ENVTL. & ENERGY L. & POL'Y J. 188, 220 (2009)); *see also* Ezra Rosser, *Ahistorical Indians and Reservation Resources*, 40 ENVTL. L. 437, 441–42 (2010) (detailing the pernicious effects of uranium mining on the Navajo and their land).

13. *See* Diné Natural Resources Protection Act of 2005, NAVAJO NATION CODE ANN. tit. 18, §§ 1301–03 (2005).

14. Judy Pasternak, *Blighted Homeland: A Peril that Dwelt Among the Navajos*, L.A. TIMES, Nov. 19, 2006, at 2, http://articles.latimes.com/2006/nov/19/nation/na-navajo19.

15. U.S. ENVTL. PROT. AGENCY, HEALTH AND ENVIRONMENTAL IMPACTS OF URANIUM CONTAMINATION IN THE NAVAJO NATION: FIVE-YEAR PLAN 13 (2008), *available at* http://www.epa.gov/region09/superfund/navajo-nation/pdf/NN-5-Year-Plan-June-12.pdf.

16. U.S. ENVTL. PROT. AGENCY, *supra* note 15, at 17–18; Tsosie, *supra* note 12, at 220; Pasternak, *supra* note 14, at 11.

17. Tsosie, *supra* note 12, at 220.

18. *See In Situ Leach (ISL) Mining of Uranium*, WORLD NUCLEAR ASS'N, http://www.world-nuclear.org/info/inf27.html (last updated Mar. 2010).

produc[e] waste known as tailings."[19] However, *in situ* leaching involves the injection of chemicals into the groundwater to dissolve the uranium and the subsequent removal of uranium from the recovered solution,[20] creating a risk of groundwater contamination.[21] Despite the risks of uranium mining, regardless of method, uranium and other non carbon-based fuels are poised as the best solutions to the energy needs of the future.[22] Based partly on this potential, the price of uranium is currently more than six times higher than it was a decade ago.[23]

When mining companies seek to extract uranium on or near Indian areas, issues arise of jurisdiction and tribal sovereignty. Under U.S. law, Indian tribes are "domestic dependent nations"[24] that exercise "plenary and exclusive power over their members and their territory subject only to limitations imposed by federal law."[25] Further, "[t]ribal powers of self-government are recognized by the Constitution, legislation, treaties, judicial decisions, and administrative practice."[26] Accordingly, tribes retain authority over matters unless and until relinquished by federal legislation or treaty.[27]

The following section explains how the federal government determines whether it will grant permits for *in situ* leach wells, and then briefly summarizes the relevant law regarding which government has jurisdiction over particular areas of land.

A. Underground Injection Control Permitting Authority Under the Safe Drinking Water Act

The Safe Drinking Water Act (SDWA), enacted in 1974, conferred to the United States Environmental Protection Agency (EPA) the power either to (1) grant Underground Injection Control (UIC) permits, which

19. *In Situ Leach and Conventional Uranium-Recovery Methods*, TEX. COMM'N ON ENVTL. QUALITY, http://www.tceq.state.tx.us/permitting/radmat/uranium/process.html (last visited Mar. 28, 2011).

20. *See* WORLD NUCLEAR ASS'N, *supra* note 18.

21. *See* INT'L ATOMIC ENERGY AGENCY, GUIDEBOOK ON ENVIRONMENTAL IMPACT ASSESSMENT FOR IN SITU LEACH MINING PROJECTS 18 (2005), *available at* http://www-pub.iaea.org/MTCD/publications/PDF/te_1428_web.pdf.

22. *See* U.S. DEP'T OF ENERGY, *Nuclear*, ENERGY.GOV, http://www.energy.gov/energysources/nuclear.htm (last visited Mar. 30, 2011); s*ee also* Bruce Finley, *Uranium-Mill Plan Near Naturita Raises Concerns About Toxic Waste*, DENVERPOST.COM (Sept. 16, 2010, 1:00 AM), http://www.denverpost.com/news/ci_16087508 (stating that uranium will be used "for an anticipated nuclear-energy renaissance").

23. *See UxC Historical Ux Price Chart*, UX CONSULTING COMPANY, http://www.uxc.com/review/uxc_PriceChart.aspx?chart=spot-u3o8-full (last visited Mar. 30, 2011). The spot price of uranium was about $10 per pound in 2000. On March 28, 2011, the spot price was $62.50 per pound. *See id.*; UXC NUCLEAR FUEL PRICE INDICATORS, UX CONSULTING COMPANY, http://www.uxc.com/review/uxc_Prices.aspx (last visited Mar. 30, 2011).

24. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

25. COHEN'S, *supra* note 9, § 4.01[1][b], at 210. *See generally* Aaron Huey, *America's Native Prisoners of War*, TED (Nov. 2010), http://www.ted.com/talks/aaron_huey.html (detailing circumscriptions imposed on Native American sovereignty by federal law).

26. COHEN'S, *supra* note 9, § 4.01[1][a], at 205.

27. *See id.* § 2.03, at 128, 131, § 3.04[2][a], at 183, § 4.01[1][a], at 206.

are required for *in situ* wells to "mitigat[e] the risk of contamination to potential drinking water sources"[28] or (2) delegate such authority to the states[29] or Indian tribes.[30] Additionally, the EPA may exempt aquifers from SDWA standards that do not now or will not in the future "serve as a source of drinking water."[31]

In 1982, the EPA delegated primary UIC permitting authority in New Mexico to the State of New Mexico,[32] except for wells "on Indian lands."[33] The EPA has not delegated UIC permitting power to the Navajo Nation for the type of injection wells in this case,[34] so the EPA retains UIC permitting authority over these types of wells. Therefore, the classification as "Indian land" of the land on which the wells will be drilled will determine whether NM or EPA will exercise UIC permitting authority. To define "Indian lands" under the SDWA, the EPA adopted the definition of "Indian country" under 18 U.S.C. § 1151.[35]

B. Section 1151(b)[36]

Section 1151, adopted in 1948, codified language from two Supreme Court decisions to extend federal criminal jurisdiction over "Indian country."[37] In *United States v. Sandoval*,[38] the defendant was criminally prosecuted for "introducing intoxicating liquor into the Indian country," the Santa Clara pueblo.[39] The defendant challenged the validity of the statute upon which the indictment was based, and the Court, therefore, considered whether Congress could criminalize the introduction of liquor onto the Santa Clara pueblo.[40] The Court concluded that Congress could criminalize such conduct and reasoned that the Commerce Clause[41] and "an unbroken current of judicial decisions have attributed to the

28. *HRI III*, 608 F.3d 1131, 1138 (10th Cir. 2010) (en banc); *see* Safe Drinking Water Act, 42 U.S.C. § 300h(d)(1)–(2) (2006).
29. § 300h-1(b)(3).
30. § 300h-1(e).
31. 40 C.F.R. § 146.4(a) (2011).
32. 40 C.F.R. § 147.1600.
33. 40 C.F.R. § 147.1601.
34. *See* Hydro Res., Inc. v. U.S. EPA (*HRI I*), 198 F.3d 1224, 1232–33 (10th Cir. 2000). The type of injection well here is Class III. *Id.* at 1232. Class III wells pertain to the *in situ* mining of uranium. 40 C.F.R. § 144.6(c)(2) (2011).
35. 40 C.F.R § 144.3 (2011). In adopting the § 1151 definition, the EPA stated that it "believe[d] this definition [was] most consistent with the concept of Indian lands as the Agency ha[d] used it in regulations and UIC program approvals to date." Underground Injection Control Program: Federally-Administered Programs, 49 Fed. Reg. 45292, 45294 (Nov. 15, 1984) (to be codified at 40 C.F.R. pt. 144.3).
36. 18 U.S.C. § 1151(b) (2006).
37. *See* § 1151 hist. n.
38. 231 U.S. 28 (1913).
39. *Id.* at 36.
40. *Id.* at 38.
41. U.S. CONST. art I, § 8, cl. 3.

United States . . . the power and the duty of exercising a fostering care and protection over all dependent Indian communities."[42]

The Court addressed a similar question in *United States v. McGowan*.[43] There, the defendant was criminally charged with introducing alcohol into the Reno Indian Colony.[44] Noting that the Colony was "validly set apart for the use of the Indians" and "under the superintendence of the government,"[45] the Court determined that the Colony was established for the "protection of a dependent people."[46]

The text of § 1151(b), a federal criminal statute enacted in 1948, codified the "dependent Indian communities" language from *Sandoval* as interpreted in *McGowan*.[47]

C. Pittsburg & Midway Coal Mining Co. v. Watchman[48]

In 1995, the Tenth Circuit first declared how to determine whether an area constituted a "dependent Indian community" under § 1151(b).[49] Relying on basic definitions of "community,"[50] the court in *Watchman* employed a two-step test.[51] First, a court must determine the appropriate "community of reference" by weighing "the status of the area in question as a community"[52] and "the community of reference within the context of the surrounding area."[53] Second, the court must weigh several factors to determine if the community qualified as a "dependent" Indian community: such factors include whether the United States has retained "title to the lands which it permits the Indians to occupy" and "whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples."[54]

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42. *Sandoval*, 231 U.S. at 46.
43. 302 U.S. 535 (1938).
44. *Id.* at 536.
45. *Id.* at 539 (quoting United States v. Pelican, 232 U.S. 442, 449 (1914)).
46. *McGowan*, 302 U.S. at 538.
47. 18 U.S.C. § 1151 hist. n. (2006) ("Definition is based on latest construction of the term by the United States Supreme Court in *U.S. v. McGowan*, 302 U.S. 535, following *U.S. v. Sandoval*, 231 U.S. 28, 46.").
48. 52 F.3d 1531 (10th Cir. 1995).
49. *Id.* at 1543–45.
50. *Id.* at 1544.
51. *Id.* at 1543–45.
52. *Id.* at 1543.
53. *Id.* at 1544.
54. *Id.* at 1545 (quoting United States v. South Dakota, 665 F.2d 837, 839 (8th Cir. 1981)). The other two factors were: "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" and 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." *South Dakota*, 665 F.2d at 839 (alteration in original).

If the disputed area passed both the "community of reference" prong and the "dependency" prong of the test, then a court would determine that the area constituted a "dependent Indian community."[55]

D. Alaska v. Native Village of Venetie Tribal Government[56]

Subsequent to *Watchman*, the United States Supreme Court created a test to find a "dependent Indian community" under § 1151(b). In *Venetie*, the land in dispute was a reservation until Congress passed legislation revoking reservation status.[57] After the State of Alaska refused to pay a tax that the Venetie Tribe tried to impose, the district court held that the Tribe did not have the power to impose such a tax.[58] The Ninth Circuit reversed, holding that a six-factor balancing test should be used to determine whether the land constituted a "dependent Indian community."[59] The Ninth Circuit noted that there was only one "significant difference between" its test and the Tenth Circuit's *Watchman* test: the Ninth Circuit "asses[es] the 'degree of federal ownership and control' over the area in question while the [Tenth Circuit] ask[s] whether the United States retains 'title' to the land in question."[60]

A unanimous Supreme Court, in 1998, abrogated the Ninth Circuit's "degree of federal ownership and control" test, holding that the term "dependent Indian communities" describes lands that "satisfy two requirements—first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence."[61] Satisfaction of the set-aside prong would show that an "Indian community" occupied the disputed land.[62] Fulfillment of the superintendence prong would ensure that the "Indian community" was "sufficiently 'dependent' on the Federal Government that the Government and the Indians involved, rather than the States, are to exercise primary jurisdiction."[63] While rejecting the Ninth Circuit's

55. *See Watchman*, 52 F.3d at 1546.

56. (*Venetie II*), 522 U.S. 520 (1998).

57. *See id.* at 524. Reservations were designed to "restrict the limits of all the Indian tribes upon [American] frontiers, and cause [the Indian tribes] to be settled in fixed and permanent localities, thereafter not to be disturbed." COHEN'S, *supra* note 9, § 1.03[6][a], at 64. Tribal members on Indian reservations are immune to many state taxes. *See* COHEN'S, *supra* note 9, § 8.03[1][b], at 693. Tribes may tax nontribal members in Indian country. COHEN'S, *supra* note 9, § 8.04[2][b], at 715.

58. *Venetie II*, 522 U.S. at 525.

59. *Id.* at 525–26 (citing Alaska v. Native Vill. of Venetie Tribal Gov't (*Venetie I*), 101 F.3d 1286, 1292–93 (9th Cir. 1996)). The Ninth Circuit employed the following factors:

> (1) the nature of the area; (2) the relationship of the area inhabitants to Indian tribes and the federal government; (3) the established practice of government agencies toward that area; . . . (4) the degree of federal ownership of and control over the area; (5) the degree of cohesiveness of the area inhabitants; and (6) the extent to which the area was set aside for the use, occupancy, and protection of dependent Indian peoples.

Venetie I, 101 F.3d at 1294 (alteration in original).

60. *Venetie I*, 101 F.3d at 1292.

61. *Venetie II*, 522 U.S. at 527.

62. *Id.* at 531.

63. *Id.*

multi-factor approach, the Court stated that two factors were "relevant": the "degree of federal ownership" over the area and "the extent to which the area was set aside for the use, occupancy, and protection of dependent Indian peoples."[64] To summarize, the Ninth Circuit's test differed from the Court's two-step test in that the Ninth Circuit analyzed the level of federal ownership and the degree to which the land could be to be considered a "dependent Indian community" as factors in a multi-factor test. The Supreme Court used these factors as elements, allowing for a finding of a "dependent Indian community" only if the federal government had set aside the disputed land and also superintended it.[65]

II. *HYDRO RESOURCES, INC. V. U.S. EPA*

Petitioner Hydro owns the surface and mineral rights[66] to land in northwestern New Mexico, 160 acres of which lie in Section 8, Township 16N, Range 16W (Section 8).[67] The land sits in a checkerboard region, where land ownership alternates by parcel between "the state, the federal government, the Navajo Nation, individual Navajos, and private persons and entities."[68] Although Hydro purchased its Section 8 land outright,[69] it falls within the bounds of the Navajo Church Rock Chapter.[70] The Chapter is a "political and social unit of the Navajo Nation," with its borders determined by the Navajo.[71] In addition, Hydro owns the mineral rights to Section 17, which is adjacent to Section 8 in the checkerboard.[72] However, the "federal government holds the Section 17 land in trust for the Navajos" and retains most of the surface rights.[73]

A. Facts and Procedural Posture

In the 1980s, Hydro, not thinking its Section 8 land constituted "Indian country," applied to the New Mexico Environmental Department (NMED) for its UIC permit.[74] NMED then requested from EPA an "aquifer exemption" to approve Hydro's application, an exemption that Hydro would need in order to mine.[75]

In 1989, NMED approved Hydro's UIC permit for Section 8, and EPA approved NMED's request for the aquifer exemption.[76] In 1992,

64. *Id.* at 531 n.7.
65. *Id.* at 530.
66. *HRI III*, 608 F.3d 1131, 1141 n.6 (10th Cir. 2010) (en banc).
67. *Id.* at 1136–37.
68. *Id.* at 1136.
69. *Id.* at 1134.
70. *Id.* at 1137.
71. *Id.*
72. *HRI I*, 198 F.3d 1224, 1231 (10th Cir. 2000).
73. *HRI III*, 608 F.3d at 1141 n.6.
74. *Id.* at 1140.
75. *See id.* The SDWA generally prohibits aquifer contamination, but exempts aquifers that do not now or will not in the future "serve as a source of drinking water." 40 C.F.R. § 146.4 (2011).
76. *HRI I*, 198 F.3d at 1234.

Hydro requested that its UIC plan be extended to cover its Section 17 land, and NMED applied for the mandatory aquifer exemption.[77] In the mid-1990s, a jurisdictional dispute between NMED, EPA, and the Navajo Nation led the EPA to find the Section 17 land to be "Indian country" and the status of the Section 8 land to be in dispute.[78] On Hydro's and NMED's appeal of the EPA's determination, the Tenth Circuit held that the EPA did not exceed its authority or abuse its discretion by determining the status of the Section 8 land to be in dispute, and it remanded the matter to the EPA to make a final determination as to whether that land was a "dependent Indian community."[79] Separately, the Tenth Circuit's holding that the Section 17 area constituted "Indian country" under § 1151(a) was not appealed.[80] Therefore, the Section 17 area falls under EPA jurisdiction[81] because the EPA has retained authority over Class III injection wells on Indian country.[82]

On remand, EPA concluded that *Venetie* modified the second step of the *Watchman* test, but that the first step—determining a community of reference—survived.[83] Applying both steps of this test, EPA determined Hydro's Section 8 land to be "Indian country."[84] Hydro appealed EPA's decision, and the three-judge panel upheld EPA's land status determination.[85] Hydro then petitioned the Tenth Circuit for rehearing en banc.[86]

B. Majority Opinion

After finding that it had subject matter jurisdiction,[87] that Hydro had standing,[88] and that it would review EPA's interpretation of § 1151(b) *de novo*,[89] the Tenth Circuit majority turned to the issue of whether EPA

77. *Id.*
78. *See id.* at 1235.
79. *Id.* at 1254.
80. *HRI III*, 608 F.3d at 1141 n.6.
81. *Id.*
82. *See supra* Part I.A.
83. *HRI III*, 608 F.3d at 1142.
84. *Id.* at 1143 (quoting U.S. ENVTL. PROT. AGENCY, LAND STATUS DETERMINATION 13 (2007), *available at* http://www.epa.gov/region9/water/groundwater/determination_comments/hri-signed-land-status-determination-feb-07.pdf).
85. *HRI II*, 562 F.3d 1249, 1267–68 (10th Cir. 2009).
86. *HRI III*, 608 F.3d at 1143. The panel held the Section 17 land to be Indian country under § 1151(a) and, therefore, the EPA retains jurisdiction. *Id.* at 1141 n.6. The Section 17 holding was not appealed. *Id.*
87. *See id.* at 1145.
88. *Id.* at 1144–45. EPA challenged HRI's standing on the basis that the "final land status determination imposed no constitutionally cognizable injury on HRI." *Id.* at 1144. The majority agreed with the panel opinion that "the outlay of funds necessary to secure a second UIC permit from EPA, on top of the one HRI ha[d] already secured from NMED, amply qualifie[d] as a concrete and particularized, actual and imminent injury." *Id.* (internal quotation marks omitted).
89. *Id.* at 1146.

was correct in determining that the *Watchman* "community of reference" test survived *Venetie.*[90]

The majority first looked to *Venetie*'s interpretation of the plain meaning of § 1151(b). The requirement that the federal government set aside the land, the majority explained, "ensures that the land in question is occupied by an 'Indian community.'"[91] Next, the federal superintendence requirement "guarantees that the Indian community is sufficiently 'dependent' on the Federal Government."[92] The majority then applied this test to find that the federal government had not set aside Hydro's Section 8 land, which Hydro owned outright, and did not superintend the land.[93] Therefore, Hydro's Section 8 land did not constitute "Indian country."[94] The court reasoned that if it continued to allow *Watchman*'s "community of reference" test, land that had not been "set aside by Congress for Indians [could] *become* Indian country simply because of its *proximity* to other lands that are federally set aside and superintended."[95] The majority then provided an illustration to demonstrate this flaw of *Watchman*'s "community of reference" test.

The majority hypothesized that a couple popping a bottle of champagne could be charged with a federal crime if they were on land that a "Navajo Chapter ha[d] asserted for itself."[96] The majority reasoned that only a court could determine, by conducting the "community of reference" test *post hoc*, whether the land constituted Indian country.[97] Thus, the "legality of one's actions would . . . become a . . . guessing game."[98] Such a result would disregard Congress's intent and, therefore, the *Watchman* "community of reference" test was no longer valid.[99]

The majority then reviewed the statute's history to determine whether the *Watchman* "community of reference" prong survived *Venetie*. The majority noted the *Venetie* Court's reasoning that § 1151(b)'s "use of the phrase 'dependent Indian community' was intended to codify language from the Supreme Court's decisions in *United States v. Sandoval* and *United States v. McGowan.*[100] The Tenth Circuit reasoned that "[n]othing in *Sandoval* or *McGowan* suggests that . . . 'dependent Indian communities' should be determined by a court's perceptions about local

90. *Id.* at 1147.
91. *Id.* at 1149 (quoting *Venetie II*, 522 U.S. 520, 531 (1998)).
92. *Id.* (quoting *Venetie II*, 522 U.S. at 531).
93. *Id.*
94. *Id.*
95. *Id.* at 1152.
96. *Id.* at 1161 (explaining that the introduction of alcohol into a dependent Indian community could be a federal crime under 18 U.S.C. §§ 1154, 1156).
97. *Id.*
98. *Id.*
99. *See id.*
100. *Id.* at 1155 (quoting *Venetie II*, 522 U.S. 520, 527–31 (1998)).

social, political, or geographic affinities."[101] Therefore, the court concluded that whether land constitutes a "dependent Indian community" does not depend on the community, but rather on whether Congress has set it aside for Indian use and whether it remains federally superintended.[102]

Finally, the majority examined the statute's structure to determine the "community of reference" test's survival. Indian reservations, classified as "Indian country" under § 1151(a), are "traditionally created by and delineated according to boundaries Congress has set or sanctioned."[103] Similarly, allotments, as recognized under § 1151(c), are "a product of congressional action."[104] Section 1151(b) describes areas that are neither reservations nor allotments, but that are still "explicitly set aside for Indians by congressional mandate and superintended by the federal government."[105] Therefore, the majority reasoned, "the creation of Indian country hinges on some explicit action by Congress."[106] Because Hydro's land did not pass this "explicit action" test, the majority held it was not a "dependent Indian community."[107] Thus, neither the federal government nor the Navajo will have control over the aquifer, and New Mexico will control granting Hydro's UIC permit.

C. Dissenting Opinions

1. Judge Ebel

Judge Ebel disagreed with the majority primarily on the applicability of the *Venetie* test.[108] While agreeing that the *Venetie* two-part test applies to the land in question, Judge Ebel argued that a new "community of reference" test must be used initially to determine the land in question *before* applying the *Venetie* test.[109] Although the Court in *Venetie* rejected the Ninth Circuit's multi-factor test, Judge Ebel read *Venetie* to allow for consideration of "[t]he degree of federal ownership of and control over the area, and the extent to which the area was set aside for the use, occupancy, and protection of dependent Indian peoples."[110]

Judge Ebel propounded a three-step test to determine the appropriate community of reference.[111] This test would analyze whether the pro-

101. *Id.* at 1156.
102. *Id.*
103. *Id.* at 1157.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 1166.
108. *See id.* at 1168 (Ebel, J., dissenting).
109. *Id.* at 1179.
110. *Id.* at 1177 (quoting *Venetie II*, 522 U.S. 520, 531 n.7 (1998)). The Navajo Nation agrees. *See* Brief of Intervenor-Respondent Navajo Nation at 20, *HRI II*, 562 F.3d 1249 (10th Cir. 2009) (No. 07-9506).
111. *HRI III*, 608 F.3d at 1179.

posed community had "reasonably ascertainable boundaries," the coherence of the land within those boundaries, and the coherence of "the uses to which the land is put and the people inhabiting the land."[112]

Applying this test, Judge Ebel would determine the Church Rock Chapter to be the appropriate "community."[113] Applying the *Venetie* test to the Church Rock Chapter, then, Judge Ebel determined that it was a dependent Indian community and therefore subject to federal jurisdiction[114] because the federal government had set aside most of this community for Navajo use and superintended it.[115]

Judge Ebel also considered § 1151's purpose of avoiding checkerboard jurisdiction to support employment of a "community of reference" test.[116] By looking only to title, Judge Ebel reasoned that the majority's approach "would completely eviscerate this congressional purpose."[117]

Additionally, Judge Ebel argued that the concept of community in § 1151(b) should be afforded "heightened importance" in an environmental context because aquifers extend beyond definite land boundaries.[118]

2. Judge Henry

Judge Henry, who agreed with Judge Ebel, wrote separately to underscore his disagreement with the majority's opinion.[119] Judge Henry noted that the majority is "veer[ing] away from that fundamental concern" of avoiding checkerboard jurisdiction.[120] Judge Henry referenced the "grave consequences," one of which being groundwater contamination, that previous mining operations have had on the Navajo to explain his hesitation in applying § 1151.[121]

III. ANALYSIS

Both *HRI III* and *Venetie* interpreted and applied § 1151(b) because the EPA used that criminal statute to define jurisdictional bounds under the SDWA.[122] But reliance on § 1151 is inappropriate in the mining context given its pedigree. Further, granting UIC permitting jurisdiction to the State of New Mexico for *in situ* wells may lead to the contamination of a Navajo drinking water source. In the alternative, adoption by the

112. *Id.*
113. *Id.* at 1180.
114. *See id.* at 1182.
115. *See id.* at 1181–82.
116. *Id.* at 1172–73.
117. *Id.* at 1172.
118. *Id.* at 1174.
119. *Id.* at 1182 (Henry, J., dissenting).
120. *Id.* at 1184.
121. *Id.*
122. 40 C.F.R. § 144.3 (2011).

EPA of a different definition of "Indian lands" would respect Navajo sovereignty while minimizing checkerboard jurisdiction.

A. Section 1151 is a Weak Basis upon Which to Establish Civil Jurisdiction

The Tenth Circuit in *HRI III* accepted that § 1151 applied[123] because the EPA tied the SDWA "Indian lands" language to the definition of "Indian country" under 18 U.S.C. § 1151.[124] Section 1151, though, is a criminal statute describing where the federal government, rather than a state, retains criminal jurisdiction.[125] Although it is a criminal statute, the court in *HRI III* explained that § 1151 had been used "often" to "define the scope of federal authority over civil and regulatory matters" and cited page 527 of *Venetie* and § 3.04[1] of Cohen's Handbook of Federal Indian Law.[126] First, this section will follow the *Venetie* trail and then pursue the Cohen's authority to determine the precedential strength of applying § 1151 to the context of uranium mining.[127]

1. *Venetie*

Like the Tenth Circuit in *HRI III*, the Supreme Court in *Venetie* stated that § 1151 "generally applies to questions of civil jurisdiction."[128] For authority, the Court looked to footnote two of *DeCoteau v. District County Court for the Tenth Judicial District*.[129] In footnote two, the Supreme Court in *DeCoteau* recognized the application of § 1151 to questions of civil jurisdiction.[130] The *DeCoteau* Court cited there, as authority, footnotes from three U.S. Supreme Court opinions.[131]

First, the Court in *DeCoteau* cited a footnote of *McClanahan v. Arizona State Tax Commission*,[132] a case involving Arizona's attempt to impose an "income tax on a reservation Indian whose entire income derives from reservation sources."[133] This footnote, however, did not refer to § 1151.[134] Rather, both the footnote itself and the sentence that it supports stated that consent of the tribe was required for the state to assume criminal and civil jurisdiction over Indian reservations.[135] Therefore, this authority supports the proposition that tribal sovereignty should be re-

123. *See HRI III*, 608 F.3d at 1134–35 (majority opinion).
124. 40 C.F.R. § 144.3 (2011).
125. 18 U.S.C. § 1151 (2006); *HRI III*, 608 F.3d at 1138.
126. *HRI III*, 608 F.3d at 1138.
127. Judge Ebel, in his dissenting opinion, cites the additional authority of *Enlow v. Moore*, 134 F.3d 993, 995 n.2 (10th Cir. 1998), but this trail merely reaches the same destinations as those of *Venetie* and Cohen's.
128. *Venetie II*, 522 U.S. 520, 527 (1998).
129. 420 U.S. 425 (1975)
130. *Id.* at 428 n.2.
131. *Id.*
132. *Id.* (citing McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 178 n.17 (1973)).
133. *McClanahan*, 411 U.S. at 165.
134. *See id.* at 178 n.17.
135. *See id.* at 178 & n.17.

spected unless the tribe relinquishes it, and not that criminal jurisdiction statutes, such as § 1151, may apply to questions of civil jurisdiction.

Next, the Court in *DeCoteau* cited a footnote of *Kennerly v. District Court of Montana*,[136] a case regarding the attempt of the owner of a grocery store located on an Indian reservation to collect against reservation Indians who "purchased some food on credit.[137] This footnote provided examples of explicit extensions of civil and criminal jurisdiction to states before the passage of the Civil Rights Act of 1968.[138] The examples mentioned neither § 1151 nor the application of federal criminal statutes to civil contexts.[139] Therefore, this footnote does not provide support for the proposition that § 1151 can be applied to civil or regulatory questions.

Last, the *DeCoteau* Court cited footnotes five, six, and ten of *Williams v. Lee*, [140] a case concerning the attempt of an operator of a general store on an Indian reservation to collect against two Indians for goods sold on credit.[141] Footnote five mentioned § 1151, but only because it stated that federal courts have jurisdiction over crimes on Indian reservations committed against Indians by non-Indians.[142] Footnote six did not mention § 1151, but described congressional grants of civil and criminal jurisdiction to states.[143] It did not describe how or when federal criminal statutes have been applied to determine civil jurisdiction.[144] Neither did footnote ten mention § 1151; rather, it described a federal statute that grants federal consent to state criminal and civil jurisdiction over reservation Indians.[145] This footnote did not describe the application of federal criminal jurisdiction statutes to questions of civil or regulatory jurisdic-

136. *DeCoteau*, 420 U.S. at 428 n.2 (citing Kennerly v. Dist. Court of Mont., 400 U.S. 423, 424 n.1 (1971)).

137. *Kennerly*, 400 U.S. at 424.

138. *Id.* at 425 n.1.

139. *Id.*

140. *DeCoteau*, 420 U.S. at 428 n.2 (citing Williams v. Lee, 358 U.S. 217, 220 n.5, 221 n.6, 223 n.10 (1959)).

141. *Williams*, 358 U.S. at 217–18.

142. *Id.* at 220 n.5. Footnote five also cites a previous edition of Cohen's, which discusses federal criminal jurisdiction over crimes committed in Indian country by and against Indians and non-Indians. *See* U.S. DEPT. OF INTERIOR, FEDERAL INDIAN LAW 307 (1958). Crimes committed by Indians against Indians are ordinarily subject to tribal jurisdiction. *Id.* 319. Crimes committed by Indians against non-Indians in Indian country are ordinarily subject to federal jurisdiction. *Id.* at 320. Crimes committed by non-Indians against Indians are ordinarily subject to federal jurisdiction. *Id.* at 323. And crimes committed by non-Indians against non-Indians are ordinarily subject to state jurisdiction. *Id.* at 324.

143. *Williams*, 358 U.S. at 221 n.6.

144. *Id.* Footnote six also cites to the 1958 Revision of Cohen, but only to refer the reader to a discussion of special Indian laws relating to Oklahoma. *See* U.S. DEPT. OF INTERIOR, *supra* note 140, at 985.

145. *Williams*, 358 U.S at 223 n.10. Subsequent to this opinion, "Congress passed the Indian Civil Rights Act which changed the prior procedure to require the consent of the Indians involved before a State was permitted to assume jurisdiction." McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 178 n.17 (1973) (citing 25 U.S.C. § 1322(a)).

tion.[146] Therefore, these footnotes do not provide support for the proposition that § 1151 can be applied in civil or regulatory contexts.

2. Cohen's 3.04[1]

In addition to *Venetie*, the court in *HRI III* also cited Cohen's Handbook on Federal Indian Law to support its proposition that § 1151 has been applied to civil issues.[147] Section 3.04[1] of Cohen's, in relevant part, states that the "modern definition of Indian country is found in the criminal code, but applies in the civil context as well."[148] The footnote to this statement[149] references, as one authority, a footnote from a case[150] which, in turn, cites *DeCoteau*, described above.

As another authority, the Cohen's footnote instructs the reader to see *Oklahoma Tax Commission v. Sac and Fox Nation*,[151] a case regarding the power of Oklahoma to "impose income taxes or motor vehicle taxes on [Indians]."[152] While that case does mention § 1151, the page cited by Cohen's does not. Rather, the case discusses § 1151 as it pertains to the inability of states to tax[153] members living not only on reservations, but anywhere in "Indian country" as defined by § 1151.[154] While this case demonstrates the extension of § 1151 to a civil context, the extension is made out of deference to tribal sovereignty.[155] Therefore, this case supports the proposition that § 1151 can be applied in civil contexts, but only to the extent that states generally do not have jurisdiction to tax within "Indian country." The acceptance in *HRI III* of § 1151's valid application to civil matters illustrates how, by distorting precedent, extensions of § 1151 have progressed from respecting tribal sovereignty to seizing it.

The Tenth Circuit in *HRI III* cited *Venetie* and Cohen's to support the EPA's linkage of "Indian lands" in the SDWA to "Indian country" in § 1151.[156] At bottom, the authorities the *HRI III* majority used to support the application of § 1151 are not persuasive. The *Venetie* and Cohen's trails lead to footnotes that do not justify applying § 1151 to determine jurisdiction for mining purposes. Rather, the precedential cases listed in the various footnotes, at best, apply to the extension of criminal jurisdic-

146. *See Williams*, 358 U.S. at 223 n.10.
147. *HRI III*, 608 F.3d 1131, 1138 (10th Cir. 2010) (en banc).
148. COHEN'S, *supra* note 9, § 3.04[1] at 182.
149. *Id.* at 182 n.333.
150. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 208 n.5 (1987) (citing DeCoteau v. Dist. Cnty. Court, 420 U.S. 425, 427 n.2 (1975)).
151. 508 U.S. 114, 128 (1993).
152. *Id.* at 116.
153. *See id.* at 128.
154. *Id.* at 123.
155. *See id.* at 126.
156. When the EPA, in 1984, linked the definition of "Indian lands" in the SDWA to "Indian country" under § 1151, the Supreme Court had already applied § 1151 in most of the cases discussed in this section.

tion to cover tax obligations and debt collection and to keep states from taxing Indians in Indian country. At worst, reliance on the cited authority allows the federal government to further encroach upon Indian sovereignty, as shown by the *HRI III* holding.

Apparently, the doctrine of stare decisis trumps any injustice leveled against Native Americans through the federal intrusion into tribal sovereignty. Although the Tenth Circuit was bound to apply EPA's definition of "Indian lands" under *Venetie*'s interpretation of § 1151, reliance on the particular authority cited, as shown by *HRI III*, threatens the ability of the Navajo Nation to protect its drinking water sources from contamination.

B. Implications of Granting Jurisdiction to New Mexico

As a result of *HRI III*, the Tribe, despite its ban on uranium mining,[157] will not be able to prevent devastation of tribal land from uranium mining and, more importantly, the contamination of a source of drinking water for its people. Although the EPA has not yet granted UIC permitting authority to the Navajo for Class III wells, it could do so in the future, and thereby give the Navajo control over the fate of the aquifer that Hydro seeks to mine.

Because the court held that Hydro's land is not "Indian country," Hydro must get its UIC permit from NMED rather than the EPA, which controls tribal permits. Although NMED regulations must be as stringent as those of the EPA,[158] Hydro does not have to get approval from the Navajo, who use the aquifer for drinking water[159] and who would have input to the EPA permit process.[160]

When the EPA approved NMED's request for an aquifer exemption in 1989,[161] it concluded that the aquifer did not serve, and would not in the future serve, as a source for drinking water.[162] Currently, however, the aquifer serves as a drinking water source for thousands of people.[163]

157. *See* Diné Natural Resources Protection Act of 2005, NAVAJO NATION CODE ANN. tit. 18, § 1303 (2005).

158. *See* 42 U.S.C. §§ 300h, 300h-1 (2006); *HRI I*, 198 F.3d 1224, 1232 (10th Cir. 2000); *see also* Bradford D. Cooley, *The Navajo Uranium Ban: Tribal Sovereignty v. National Energy Demands*, 26 J. LAND RESOURCES & ENVTL. L. 393, 397 (2006).

159. Brief of Intervenor-Respondent Navajo Nation, *supra* note 110, at 12; E-mail from Chris Shuey, Dir. of the Uranium Impact Assessment Program, Sw. Research & Informational Ctr., to Andrew Brooks, Student, Denver Univ. Sturm Coll. of Law (Sept. 17, 2010, 22:09 MST) (on file with author).

160. *See* Memorandum from Alvin L. Alm, Deputy Adm'r to Assistant Adm'rs et al. 5 (Nov. 8, 1984) (on file with author); *see also* James M. Grijalva, *The Origins of EPA's Indian Program*, 15 KAN. J.L. & PUB. POL'Y 191, 290 (2006).

161. *HRI I*, 198 F.3d at 1234.

162. *HRI III*, 608 F.3d 1131, 1140 (10th Cir. 2010) (en banc).

163. Brief of Intervenor-Respondent, *supra* note 110, at 12; E-mail from Chris Shuey to Andrew Brooks, *supra* note 159. Apparently, the discrepancy exists because the Nuclear Regulatory Commission "averaged good quality groundwater from outside the ore zone with bad quality water from inside the ore zone for an *average* pre-mining water quality that look[ed] bad." E-mail from

Because *HRI III* ruled that New Mexico has jurisdiction over Hydro's land, Hydro will seek its permit from NMED.[164]

Unlike the EPA, New Mexico does not grant "aquifer exemptions," but it will grant "temporary aquifer designation status" for certain Class III wells.[165] Temporary aquifer designation status allows the mining of aquifers that can be used as sources for drinking water as long as the aquifer, in whole or a "portion thereof," (1) does not serve as a "domestic or agricultural water supply"[166] and (2) either is currently situated in a "location which makes recovery of water for drinking or agricultural purposes" impractical[167] or is already so contaminated that "render[ing] that water fit for human consumption or agricultural use" is impractical.[168] In addition, miners must show that, once mining operations are complete, they will restore the groundwater's quality to pre-mining levels or better.[169]

To comply with these regulations, Hydro must show that the portion of the aquifer it seeks to mine is "not currently used" as a domestic water supply.[170] Because thousands of people currently use the aquifer for drinking water,[171] Hydro will have to argue that only the portion it will mine is not currently used for drinking water. Specifically, because New Mexico regulations require measurement of a minimum of one-quarter mile surrounding the well site to determine the toxicity of an aquifer,[172] Hydro must show that the water in the portion of the aquifer within one-quarter mile around the proposed uranium *in situ* injection and recovery wells is too toxic to be used for domestic or agricultural use.

Additionally, Hydro will have to show that it will restore the groundwater's quality. Multiple authorities explain that restoration of groundwater to pre-mining conditions after ISL mining is impossible.[173]

Eric Jantz, Staff Attorney, N.M. Envtl. Law Ctr., to Andrew Brooks, Student, Denver Univ. Sturm Coll. of Law (Sept. 22, 2010, 3:01 MST) (on file with author). The issue is moot, though, because HRI will have to get a new permit from New Mexico before it can mine, and therefore a new calculation would be made. Telephone Interview with William C. Olson, Chief, N.M. Ground Water Quality Bureau (Sept. 17, 2010).

164. E-mail from Eric Jantz, Staff Attorney, N.M. Envtl. Law Ctr., to Andrew Brooks, Student, Denver Univ. Sturm Coll. of Law (Sept. 19, 2010, 10:45 MST) (on file with author).

165. *See* N.M. CODE R. § 20.6.2.5101(C) (LexisNexis 2010); N.M. CODE R. § 20.6.2.5103(A)(2).

166. N.M. CODE R. § 20.6.2.5103(C)(1).

167. N.M. CODE R. § 20.6.2.5103(C)(2)(a).

168. N.M. CODE R. § 20.6.2.5103(C)(2)(b).

169. *See* N.M. CODE R. § 20.6.2.5101(C)(2) (mandating that discharge permits address the manner by which the permit holder will ensure that affected ground water will not have excess levels of toxic pollutants); *see also* N.M. CODE R. § 20.6.2.3103 (listing various pollutants and the acceptable concentrations thereof in New Mexico groundwater).

170. N.M. CODE R. § 20.6.2.5103(C)(1).

171. *See* Brief of Intervenor-Respondent Navajo Nation, *supra* note 110, at 12–15; *see also* E-mail from Chris Shuey to Andrew Brooks, *supra* note 159.

172. *See* N.M. CODE R. § 20.6.2.5202(B).

173. SUSAN HALL, GROUNDWATER RESTORATION AT URANIUM IN-SITU RECOVERY MINES, SOUTH TEXAS COASTAL PLAIN 30 (2009) (concluding that no ISL mine in the U.S. returned post-

The United States Nuclear Regulatory Commission[174] (NRC) admitted as much in an August 2010 report.[175] Responding to comments that "restoration of groundwater to baseline values for all groundwater constituents in any ISL wellfield to date" has not been accomplished, the NRC stated that "to date, *restoration to backgroundwater quality* for all constituents has proven to be *not practically achievable* at licensed NRC [ISL] sites."[176]

Although New Mexico is not certain to grant Hydro's petition for temporary aquifer designation status, approval could result in contamination of a Navajo drinking water source.

C. A Proposal Respecting Both Tribal Sovereignty and Venetie

The decision in *HRI III*, while correct under the SDWA and *Venetie*, undermines the legislative intent behind § 1151 of avoiding checkerboard jurisdiction[177] by reading out the word "communities" from § 1151(b). If New Mexico approves Hydro's permit, *HRI III* will lead to the mining of an aquifer that the Navajo use for drinking water, ignoring the Navajo's uranium mining ban. These problems can be remedied with a simple solution.[178]

Because the EPA chose to equate "Indian lands" in the SDWA to "Indian country," as defined under § 1151,[179] it can simply change its definition of "Indian lands." Disassociation of § 1151 with the SDWA would also dispose of the concomitant problems arising from reliance on *Venetie*, which interpreted § 1151(b).

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mining groundwater to pre-mining conditions based on data from Texas), *available at* http://pubs.usgs.gov/of/2009/1143/pdf/OF09-1143.pdf; *Impacts of Uranium In-Situ Leaching*, WISE URANIUM PROJECT, http://www.wise-uranium.org/uisl.html (last updated Nov. 20, 2010); E-mail from Eric Jantz to Andrew Brooks, *supra* note 164.

174. "[T]he NRC regulates in situ recovery facilities." *Uranium Recovery*, U.S. NUCLEAR REGULATORY COMM'N, http://www.nrc.gov/materials/uranium-recovery.html (last visited Apr. 1, 2011).

175. U.S. NUCLEAR REGULATORY COMM'N, ENVIRONMENTAL IMPACT STATEMENT FOR THE MOORE RANCH ISR PROJECT IN CAMPBELL COUNTY, WYOMING: SUPPLEMENT TO THE GENERIC ENVIRONMENTAL IMPACT STATEMENT FOR IN-SITU LEACH URANIUM MILLING FACILITIES B-36 (2010). Thanks to Eric Jantz for directing me to this report.

176. *Id.* (emphasis added). This statement directly contradicts one that the International Atomic Energy Agency made in 2005. "[W]ith nearly three decades of operations, the [U.S.] ISL mining industry has *never* caused a serious environmental, health or safety risk or *failed to restore an aquifer at one of its projects*." INT'L ATOMIC ENERGY AGENCY, GUIDEBOOK ON ENVIRONMENTAL IMPACT ASSESSMENT FOR IN SITU LEACH MINING PROJECTS 56 (2005) (emphasis added).

177. The holding in *HRI III* was that Section 8 was not "Indian country," *HRI III*, 608 F.3d 1131, 1166 (10th Cir. 2010) (en banc), and therefore New Mexico retains UIC permitting jurisdiction over Section 8. The adjacent Section 17 *was* held to be "Indian country," *HRI I*, 198 F.3d 1224, 1254 (10th Cir. 2000), and, therefore, EPA retains UIC permitting jurisdiction there.

178. The *HRI III* majority suggested such a possibility: "EPA may seek to . . . unhitch[] its UIC permitting authority from § 1151." *HRI III*, 608 F.3d at 1166.

179. 40 C.F.R. § 144.3 (2011).

EPA should change the definition of "Indian lands" to refer to areas that are occupied or substantially surrounded by tribal lands.[180] Two elements should be used to make such a determination, factors that the Supreme Court in *Venetie* implicitly approved, but did not use, in interpreting § 1151(b): "the degree of federal ownership of and control over the area, and the extent to which the area was set aside for the use, occupancy, and protection of dependent Indian peoples."[181] To achieve administrative ease and judicial efficiency, the EPA should set specific targets or thresholds that the areas must meet to constitute "Indian land." For example, an area consisting of land, 50.1% of which is controlled by the federal government and was set aside for Indians, could constitute "Indian lands." Specific thresholds should also be used to define "area," such as requiring an analysis of land within a radius of, for example, three miles of the disputed land. EPA should specify such thresholds after receiving input from all interested parties: namely, the tribes, the states, the federal government, and private landowners. Specificity will allow both Indian communities and private parties to determine whether disputed land constitutes "Indian lands" without the need for courts to undergo an unpredictable *post hoc* analysis. Such specificity would avert the *HRI III* majority's issues with *Watchman* "community of reference" test, while simultaneously conforming to congressional authority.

Hydro's land would constitute "Indian lands" under such a definition. Applying the first element, Hydro's parcel on Section 8 would be subject to EPA jurisdiction because "[t]he government has set aside 78% of the land in the [Navajo Church Rock] Chapter for the use of Indians either as trust land either for the tribe or for individuals in the form of allotments."[182] Similarly, the second element leads to the same conclusion because "the federal government retains title to 92% of the land in the Chapter, and[,] as . . . owner [in fee,] certainly retains superintendence over the land."[183]

Ideally, the EPA would then delegate to the Navajo UIC permitting authority over such land. This would give the Tribe the most respect for its sovereignty and allow it to make its own decisions regarding its land and the resources beneath such land. Even if the EPA retained jurisdiction, the Navajo would be able to provide input when reviewing UIC applications.

The advantages of such a definition would outweigh the disadvantages. First, it would allow courts to avoid the checkerboard jurisdiction problems resulting from *Venetie* and *HRI III* because interested parties

180. The proposal incorporates Indian reservations and Indian allotments as described in § 1151(a) and (c), respectively, into the definition of "Indian lands."

181. *Venetie II*, 522 U.S. 520, 531 n.7 (1998) (quoting *Venetie I*, 101 F.3d 1286, 1301 (9th Cir. 1996)) (internal quotation marks omitted).

182. *HRI III*, 608 F.3d at 1181 (Ebel, J., dissenting).

183. *Id.* at 1182.

would be able to determine upfront whether land constituted "Indian lands." Second, the new definition would allow courts to respect tribal sovereignty. In Hydro's case, if the Navajo were granted UIC permitting authority from the EPA, the permit would be refused. If EPA retained UIC permitting authority, EPA would seek input from the Chapter, and the Chapter would emphasize the Navajo's ban on uranium mining, thus allowing a certain level of respect for Navajo sovereignty.

Although the proposed definition of "Indian lands" breathes new life into the "degree of federal ownership" and "extent set aside" factors abrogated by *Venetie*, it does not resurrect the previous Ninth and Tenth Circuit tests in their entirety. Rather, the proposal consists of the "more relevant [factors]"[184] adopted by the Ninth Circuit. Although courts may analogize the proposed definition to *Venetie*, they would not be bound by it because *Venetie* interpreted § 1151(b) and the proposed definition would no longer be tethered to that section of the federal criminal code. To avoid the § 1151 analogy, the EPA could, in the new definition of "Indian lands," expressly proscribe reliance on § 1151 jurisprudence.[185]

CONCLUSION

The decision of *HRI III* demonstrates the Tenth Circuit's preference for predictability over respect for tribal sovereignty. Although the decision allows property owners and authorities to easily determine which government has jurisdiction, it relies on a criminal statute that was enacted to facilitate consistent enforcement of criminal law by federal authorities. As a result of the opinion, Hydro must obtain temporary designation status not from the Navajo, but from the State of New Mexico for its Section 8 land, in addition to an aquifer exemption from the EPA for its adjacent Section 17 land. Should New Mexico allow Hydro to mine, the Navajo community could suffer the contamination of a primary drinking water source. This result may be avoided if EPA either grants the Tribe UIC permitting authority or unlinks its definition of "Indian

184. *Venetie II*, 522 U.S. at 531 n.7.

185. Alternatively, Congress could amend the SDWA to drop the term "Indian lands" altogether. Because aquifers are underground and do not follow land borders, tying jurisdiction to the land under which the aquifer sits is certain to lead to disputes, as evidenced by *HRI III*. One possibility already exists in the oil recovery context. *See, e.g.*, Cheyenne-Arapaho Tribes of Okla. v. United States, 966 F.2d 583, 585 (10th Cir. 1992). Congress could mandate all overlying landowners to enter into "unitization agreements" before any permits are granted. *See generally* BOSSELMAN ET AL., ENERGY, ECONOMICS AND THE ENVIRONMENT 310–11 (2nd Ed. 2006) (describing such agreements in the oil recovery context and problems with arriving at such agreements). Unitization agreements, however, are not a panacea. Because the Navajo are unlikely to agree to any extraction of uranium from aquifers under Navajo land, Congress may force capitulation if the nation's need for uranium becomes more urgent. Forced capitulation, then, would negate any respect for tribal sovereignty. *See* 25 U.S.C. §§ 396a, 396d (2006) (giving the Secretary of the Interior discretion to approve oil and gas unitization agreements involving Indian tribes). *But see* 25 C.F.R. 211.28(b) (2011) (stating that "the Secretary [of the Interior] shall consult with the Indian mineral owner prior to making a determination concerning [a unitization agreement]").

lands" from § 1151. A two-part test that analyzes the extent to which the federal government has set aside and controls a particular area would both limit checkerboard jurisdiction and, more importantly, allow tribes to retain the power to control the destiny of their valuable resources.

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