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## **Notes & Comments**

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# **Environmental Jurisdiction in Indian Country: Why the EPA Should Change its Definition of Indian Agency Jurisdiction under the Safe Drinking Water Act**

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*Table of Contents*

I. INTRODUCTION .....	295
II. DEFINITIONS OF INDIAN COUNTRY .....	298
III. <i>HYDRO RESOURCES III'S</i> INTERPRETATION OF DEPENDENT INDIAN COMMUNITY .....	299
A. The "Community of Reference" Test is Compatible with Supreme Court Precedent.....	301
B. Ignoring the Community of Reference Goes Against Congress' Intent in Enacting 18 U.S.C. § 1151 .....	304
C. Hydro Resources III's Narrow Interpretation of Dependent Indian Community Conflicts with the Indian Tribal Energy Development and Self- Determination Act .....	305
IV. FOLLOWING <i>VENETIE</i> : THE DEPENDENT INDIAN COMMUNITY IN OTHER COURTS.....	307
V. PROBLEMS CREATED BY <i>HYDRO RESOURCES III</i> .....	308
A. Why Checkerboarded Jurisdictional Authority Poses Problems: Church Rock as Case Study .....	309
B. Control over underground injection control well Permitting in Church Rock.....	310
VI. IN RESPONSE TO <i>HYDRO RESOURCES III</i> : PROPOSAL FOR REFORM—THE EPA SHOULD UNHITCH ITS JURISDICTIONAL PROVISIONS FOR INDIAN LAND FROM 18 U.S.C. § 1151 .....	311
VII. CONCLUSION .....	314

## I. INTRODUCTION

The Navajo Nation has a bitter history with uranium mining. Uranium mining began in and around the Navajo Nation reservation in 1942, as the uses of uranium were just being discovered.<sup>1</sup> When the worldwide sprint for uranium began during World War II, the dangers associated with uranium were not yet well understood.<sup>2</sup> Even later on, however, when the dangers were known, appropriate mining procedures were often not implemented.<sup>3</sup> These precautions were especially lacking in hundreds of mines on the Navajo Nation reservation.<sup>4</sup> The negative environmental and health effects incurred from uranium mining took awhile to surface. Eventually, though, they did.<sup>5</sup>

Due to the negative effects of uranium mining on the Navajo Nation, President, Joe Shirley signed the Diné Natural Resources Protection Act in 2005, which instituted a moratorium on uranium mining within the reservation.<sup>6</sup> Although the moratorium remains in effect, “if you plot current uranium claims on a map of the Four Corners, they mass on the reservation’s borders like troops waiting to charge.”<sup>7</sup>

One of these claims lies in Church Rock, a chapter of the Navajo Nation located slightly outside the exterior boundaries of the reservation.<sup>8</sup> The Church Rock Chapter supports a thriving Navajo community. It has a Head Start center, an elementary school, and Chapter, tribal and Bureau of Indian Affairs buildings.<sup>9</sup> The Navajo Nation provides essential services for residents of Church Rock such as

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1. JUDY PASTERNAK, *YELLOW DIRT: AN AMERICAN STORY OF A POISONED LAND AND A PEOPLE BETRAYED* 39 (2010).

2. *Id.* at 65.

3. *Id.* at 68.

4. *Id.*

5. *Id.* at 146.

6. Diné Natural Resources Protection Act of 2005, NAVAJO NATION CODE ANN. tit. 18, § 1303.

7. Cindy Yurth, *New life for the yellow ore? Uranium mining claims pile up outside rez borders, industry reps speculate about the market*, NAVAJO TIMES (Mar. 19, 2009), <http://www.navajotimes.com/news/2009/0309/031909uranium.php#.VLxtLEsYHwI>.

8. *Home Page*, WELCOME TO CHURCH ROCK CHAPTER, <http://churchrock.navajochapters.org/> (last updated June 10, 2016). Currently, the Navajo Nation Council has 88 council delegates representing 110 Navajo Nation chapters. *History*, WELCOME TO THE NAVAJO NATION GOVERNMENT, <http://www.navajonsn.gov/history.htm>. Each of the Navajo Nation’s chapters has a chapter house and a Navajo Nation council delegate who represents the chapter to the entire legislative body of the Navajo Nation. *Hydro Res. Inc. v. U.S. Envtl. Prot. Agency (Hydro Resources II)*, 562 F.3d 1249, 1255 (10th Cir. 2009), *vacated* 608 F.3d 1137 (10th Cir. 2010) (en banc). The Navajo Nation certified Church Rock as a local government unit in 1955. *Id.*

9. *Hydro Resources II*, 562 F.3d at 1264.

managing the Chapter's water services and supplying a police department.<sup>10</sup> Additionally, residents of Church Rock vote in the Navajo Nation elections.<sup>11</sup> Almost ninety-eight percent of Church Rock's population of roughly 2,220 individuals is Navajo.<sup>12</sup> While land in Church Rock is checkerboarded, meaning that the ownership of land parcels alternates between the Navajo Nation, individual Navajos, the federal government, the State of New Mexico, non-Indian individuals, and private entities,<sup>13</sup> the majority of the land is held in trust for the Navajo Nation by the federal government.<sup>14</sup>

Checkerboarded areas such as this can pose problems when jurisdiction "depends upon the ownership of particular parcels of land."<sup>15</sup> In 1948, Congress attempted to ease jurisdictional disputes in checkerboarded areas by enacting 18 U.S.C. § 1151 to give tribes and the

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10. Letter from Bethany Berger, Professor at Wayne State Univ. Law Sch. et al., to David Albright, Ground Water Office Manager for the U.S. EPA, Region 9, 5 (Jan. 31, 2006).

11. *Id.*

12. U.S. DEP'T COMMERCE, NEW MEXICO: 2010, POPULATION AND HOUSING UNIT COUNTS 14 (2012), <https://www.census.gov/prod/cen2010/cph-2-33.pdf>; Hydro Res., Inc. v. U.S. Env'tl. Prot. Agency (*Hydro Resources III*), 608 F.3d 1137, 1180 (10th Cir. 2010) (en banc).

13. The checkerboard pattern in the area south and east of the Navajo reservation resulted primarily during the early 1900s. The original Navajo Nation reservation was created by the Treaty of 1868 and subsequently expanded by executive orders. Treaty with the Navaho, 15 Stat. 667 (1868); Exec. Order of Oct. 29, 1878; Exec. Order of Jan. 6, 1880; Exec. Order of May 17, 1884; Exec. Order of Jan. 8, 1900. By the early 1900s, the reservation encompassed more than 11 million acres. *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1389 (10th Cir. 1990). While vast, it was still significantly smaller than the Navajo people's aboriginal territory. Many Navajo people continued to live outside the boundaries of the reservation, in land they had occupied for centuries. In 1907, due to increasing conflict between the Navajo people living south and east of the reservation's exterior boundaries and encroaching non-Indian stockmen, President Theodore Roosevelt issued Executive Order 709 to append land to the reservation while Navajo people living in the area secured 160-acre allotments around the area's sparse waterholes. Exec. Order No. 709 (1907) (This addition was reduced to roughly 1.9 million acres in Exec. Order No. 744 (1908)). Then, through executive orders in 1908 and 1911, all remaining unallotted lands were "restored to the public domain," and non-Indians again began settling in the area. Exec. Order No. 1000 (1908); Exec. Order No. 1284 (1911). As a result of this history, much of the area southeast of the exterior boundary of the Navajo reservation is checkerboarded, with parcel ownership alternating between the Navajo Nation, individual Navajos, the federal government, the State of New Mexico, non-Indian individuals, and private entities.

14. The federal government retains title to ninety-two percent of the area through tribal trust land, allotments, or BLM land. *Hydro Resources III*, 608 F.3d at 1182 (Ebel, J., dissenting). Only six percent of land in the Church Rock Chapter, including Section Eight, is privately held. *Id.* at 1168.

15. *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 358 (1962).

federal government broader jurisdictional authority.<sup>16</sup> The United States Environmental Protection Agency (“EPA”) explicitly adopted this definition in 40 C.F.R. § 144.3 to “be ensured of comprehensive coverage” for permitting underground injection control wells.<sup>17</sup> However, a recent Tenth Circuit decision, *Hydro Resources, Inc. v. EPA* (“*Hydro Resources III*”), narrowed its interpretation of Indian Country under § 1151, resulting in increased jurisdictional checkerboards.<sup>18</sup>

This Note begins by explaining what Indian Country is and how it is defined in different statutes. Next, this Note examines the definition of Indian Country under § 1151, and how the courts have interpreted the vaguest aspect of this statute: the “Dependent Indian Community”

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16. 18 U.S.C. § 1151 (2012).

17. Underground Injection Control Program: Federally-Administered Programs, 49 Fed. Reg. 45,292-01, 45,294 (Nov. 15, 1984). The underground injection control program protects national drinking water by regulating the injection of fluids into the ground. Safe Drinking Water Act—National Drinking Water Regulations, Underground Injection Control Regulations; Indian Lands, 53 Fed. Reg. 37,396 (Sept. 26, 1988). As tribes became more active with federal regulatory agencies, Congress took action to include tribes in major environmental statutes. See FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 10.02[1] (Nell Jessup Newton ed., 2012) [hereinafter COHEN’S HANDBOOK OF FEDERAL INDIAN LAW]; James M. Grijalva, *The Origins of EPA’s Indian Program*, 15 KAN. J. L. & PUB. POLY. 191 (2006). Notable examples of this are statutory treatment as a state provisions where tribes apply for primacy to administer federal environmental standards and programs. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 17, at § 10.02[2]. For example, in 1986, Congress amended the Safe Drinking Water Act to authorize the EPA to delegate primary enforcement responsibility for the underground injection control and public water system programs to tribes. 53 Fed. Reg. 37,396; 42 U.S.C. § 300j-11(a)(2) (the Administrator “may delegate to such Tribes primary enforcement responsibility for public water systems and for underground injection control”).

18. *Hydro Resources III*, 608 F.3d 1137, 1138 (10th Cir. 2010) (en banc). *Hydro Resources* wound its way through the Tenth Circuit multiple times. *Hydro Resources III* in this Note refers to the final Tenth Circuit decision regarding the Section Eight dispute between Hydro Resources Inc., and the EPA. The Tenth Circuit first addressed the case in 2000. *Hydro Res. Inc. v. U.S. EPA (Hydro Resources I)*, 198 F.3d 1224 (10th Cir. 2000). In *Hydro Resources I*, the court held that the United States Supreme Court decision in *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520, 527 (1998) (“*Venetie*”), altered the test for “dependent Indian community,” and remanded to the EPA to make a final determination of the status of Section Eight. *Hydro Resources I*, 198 F.3d at 1254. In dicta, however, the court stated that although *Venetie* did modify the *Watchman* test, the *Venetie* decision only modified the second step of the *Watchman* test, and the community of reference test remained intact. *Id.* at 1249. In *Hydro Resources II*, in 2009, the court similarly applied a “hybrid *Watchman/Venetie* test.” *Hydro Resources II*, 562 F.3d 1249,1267-68 (10th Cir. 2009). The court still thought it appropriate to find the appropriate community of reference, because it was still necessary to determine “the land in question” of the community before proceeding to the two *Venetie* factors. *Id.* at 1263. After deciding that the entire Church Rock Chapter was the community of reference, the court held that the area fulfilled the two *Venetie* requirements and was Indian Country. *Id.* at 1266-68.

provision. This Section focuses particularly on the decision in *Hydro Resources III*, and explains why the majority incorrectly defined dependent Indian community. Given this background, this Note then explains how *Hydro Resources III's* interpretation of dependent Indian community allows uranium mining within the Church Rock Chapter in spite of the Navajo Nation's moratorium. Finally, this Note recommends how the EPA should modify 40 C.F.R. § 144.3 to avoid the negative jurisdictional repercussions stemming from *Hydro Resources III*.

## II. DEFINITIONS OF INDIAN COUNTRY

Indian Country “is most usefully defined as country within which Indian laws and customs and federal laws relating to Indians are generally applicable.”<sup>19</sup> Defining Indian Country is difficult, but essential to defining who has jurisdiction over a particular piece of land—the United States, a tribe, or a state. One reason it is difficult to define Indian Country is that its boundaries can vary under different statutes and regulations.<sup>20</sup> For example, Congress defined Indian Country uniquely in § 1151 and the Indian Gaming Regulatory Act.<sup>21</sup> Despite variances, Indian Country is most commonly defined as Indian Country in § 1151.<sup>22</sup>

Congress enacted § 1151 in 1948 to address the issue of defining Indian Country in increasingly checkerboarded landscapes.<sup>23</sup> These landscapes appear throughout the country today primarily due to railroad grants and Indian land statutes from the late 1800s and early 1900s. First, the federal government gave alternating blocks of land to railroad

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19. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 17, at § 3.04[1], 183.

20. The EPA uses the term “Indian land” instead of “Indian Country” in jurisdictional statutes and regulations. Because the term “Indian Country” is the common and traditional term used to demark areas where tribal and federal laws, as opposed to state laws, normally apply, this Note uses the term “Indian Country.” *See id.*

21. 25 U.S.C. § 2703 (2012). The term “Indian lands” means:

(A) all lands within the limits of any Indian reservation; and

(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

22. 18 U.S.C. § 1151 (2012). Although Congress wrote § 1151 as a criminal jurisdictional statute, the Supreme Court has found it “generally applies as well to questions of civil jurisdiction.” *DeCoteau v. Dist. Cty. Court for Tenth Jud. Dist.*, 420 U.S. 425, 427 n.2 (1975) (“While § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction.”).

23. Heather J. Tanana & John C. Ruple, *Energy Development in Indian Country: Working Within the Realm of Indian Law and Moving Towards Collaboration*, 32 UTAH ENVTL. L. REV. 1, 8 (2012).

companies to incentivize the companies' efforts to connect the country by rail.<sup>24</sup> Then, under the General Allotment Act of 1887, Congress transferred 160-acre blocks of tribal lands to individual tribal members and sold the "surplus" Indian land to non-Indian homesteaders.<sup>25</sup> Section 1151, is the most common way Indian Country is defined today:

- (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.<sup>26</sup>

While subsection (a) addresses reservation land, subsections (b) and (c) describe Indian Country that is not formally designated as reservations. Indian allotments, tribal lands that were parceled out to individual Indian families, are covered by subsection (c). Subsection (b) authorizes jurisdiction over all dependent Indian communities. Because the term dependent Indian community is vague and undefined in the Act, it has been the source of many jurisdictional disputes.

Section III further investigates different interpretations of the dependent Indian community. Specifically, this Section argues that the Tenth Circuit interpreted dependent Indian community too narrowly by misapplying Supreme Court precedent and not heeding congressional intent behind the statute. Section III concludes by analyzing how other courts currently interpret dependent Indian communities.

### III. *HYDRO RESOURCES III'S* INTERPRETATION OF DEPENDENT INDIAN COMMUNITY

*Hydro Resources III* concerned a jurisdictional dispute over whether a parcel of land constituted a dependent Indian community. Section Eight, the land at issue, is a parcel of land owned by Hydrologic

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24. CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* 84 (1992).

25. CHARLES F. WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS* 15-16, 43 (2005).

26. 18 U.S.C. § 1151 (emphasis added).

Research Institute (“HRI”), situated six miles north of Church Rock.<sup>27</sup> The dispute centered on whether the New Mexico Environmental Department or the EPA had authority to issue a underground injection control permit to HRI to allow it to mine uranium.<sup>28</sup>

Prior to *Hydro Resources III*, the Tenth Circuit relied on the *Watchman* test to determine whether the “land in question,” or the land at issue in the litigation, was part of a dependent Indian community. The Tenth Circuit conducted this analysis in a two-step inquiry originating from *Pittsburg & Midway Coal Mining Co. v. Watchman*.<sup>29</sup> In the first step, the court would determine the extent of the “land in question” by identifying the appropriate community of reference. To determine the community of reference, the court looked at: “(1) the geographical definition of the area proposed as a community; (2) the status of the area in question as a community; and (3) the community of reference within the context of the surrounding area.”<sup>30</sup> In the second step of the *Watchman* test, the court would determine whether the community of reference as a whole was a dependent Indian community using a four-factor test developed by the Eighth Circuit.<sup>31</sup>

In *Hydro Resources III*, however, a sharply divided Tenth Circuit court expressly overruled the *Watchman* test.<sup>32</sup> The court held that the *Watchman* test did not survive the Supreme Court’s decision in *Alaska v. Native Village of Venetie Tribal Government* (“*Venetie*”).<sup>33</sup> The court found that after *Venetie*, the only two factors relevant were whether the land at issue was set-aside by the federal government for Indian use, and under federal superintendence. Therefore, the court held that the community of reference test was no longer relevant and rejected the EPA’s argument that the land in question was the Church Rock Chapter instead of solely Section Eight.<sup>34</sup> Addressing only whether Section Eight

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27. *Id.* at 1169 (Ebel, J., dissenting).

28. *Id.* at 1139.

29. *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1545 (10th Cir. 1995).

30. *Hydro Resources III*, 608 F.3d at 1141 (explaining step one of the *Watchman* test).

31. *Id.* The Eighth Circuit utilized a four-factor test that also considered the cohesiveness of the community residents. *United States v. South Dakota*, 665 F.2d 837, 839 (8th Cir. 1981). Factor three analyzed “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.’” *Id.* (quoting *Weddell v. Meierhearny*, 636 F.2d 211 (8th Cir. 1980)).

32. The Court was sharply divided with six judges in the majority, and five judges dissenting. *Hydro Resources III*, 608 F.3d 1137.

33. *Id.* at 1166.

34. *Id.*

was explicitly set aside for Indian use by Congress and federally superintended (the two *Venetie* requirements), the court held Section Eight was not Indian Country.<sup>35</sup> The court found this even though Section Eight is located within the Church Rock Chapter where 97.7% of residents are Navajo,<sup>36</sup> and the federal government holds ninety-two percent of the land, primarily for the Navajo Nation.<sup>37</sup>

Subsection A explains that *Hydro Resources III* is incorrect because it misapplies *Venetie*, ignores past U.S. Supreme Court cases interpreting “community,” and improperly characterizes *United States v. McGowan*<sup>38</sup> and *United States v. Sandoval*<sup>39</sup>—the first two cases defining dependent Indian community. Subsection B then explains that the Tenth Circuit’s narrow interpretation of dependent Indian community goes against Congress’ anti-checkerboarding objective. Finally, Subsection C asserts that the Tenth Circuit’s interpretation of dependent Indian community conflicts with Congress’ interpretation of dependent Indian community under the Indian Tribal Energy Development and Self-Determination Act.

#### A. *The “Community of Reference” Test is Compatible with Supreme Court Precedent*

The *Hydro Resources III* majority improperly concluded that the “community of reference” aspect of the *Watchman* test did not survive *Venetie*. In *Venetie*, the Supreme Court directly addressed the meaning of dependent Indian community for the first time since § 1151 was enacted.<sup>40</sup> The Supreme Court found that in order to be a dependent Indian community the lands: (1) must have been set aside by the federal government for the use of the Indians as Indian land; and (2) must be under federal superintendence.<sup>41</sup> The Court noted that the Alaska Native Claims Settlement Act (“ANCSA”) revoked the existing *Venetie* reservation that the federal government had set aside for Native use.<sup>42</sup> When Congress, through ANCSA, transferred *Venetie* reservation lands to private Native corporations, the land could subsequently be used for non-Indian purposes.<sup>43</sup> Once the land could be used for non-Indian

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35. *Id.* at 1148.

36. *Id.* at 1180 (Ebel, J., dissenting).

37. *Id.* at 1166.

38. *United States v. McGowan*, 302 U.S. 535 (1938).

39. *United States v. Sandoval*, 231 U.S. 28 (1913).

40. *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520, 527 (1998).

41. *Id.*

42. *Id.* at 532.

43. *Id.* at 527.

purposes, the lands no longer met the federal set-aside requirement.<sup>44</sup> In addition, this land also failed the federal superintendence requirement because Congress gave ANCSA lands to state-chartered and state-regulated private business corporations.<sup>45</sup> The Court thus held that the land was not Indian Country because the Venetie Village's ANCSA lands failed to satisfy either requirement.<sup>46</sup> *Venetie*, however, cannot be broadly applied to interpreting dependent Indian communities because ANCSA lands are unique.<sup>47</sup> ANCSA transferred lands into state-regulated corporations. Indian lands in the lower forty-eight states are not held in this manner.<sup>48</sup> Thus, the premise of *Venetie* rests on facts that are inapplicable to most cases involving dependent Indian communities.

Additionally, the U.S. Supreme Court in *Venetie* did not need to address the community aspect of § 1151(b). The *Hydro Resources III* dissent explained that “Section 1151(b) requires three criteria to define Indian country: (1) it must be dependent; (2) it must be Indian; and (3) it must be a community.”<sup>49</sup> *Venetie* examined only whether the ANCSA lands met the first and second criteria. *Venetie* stood for the proposition that: (1) “the land is ‘dependent’ if it is under federal superintendence; and (2) the land is ‘Indian’ if it has ‘been set aside by the Federal Government for the use of the Indians as Indian land.’”<sup>50</sup> The third criterion, that it must be a “community,” requires the court to determine what “the land in question” is.<sup>51</sup> Because all 1.8 million acres of land owned in fee simple by the Native Village of Venetie Tribal Government were at issue in *Venetie*, the Court did not need to determine the appropriate community of reference under § 1151(b).<sup>52</sup> In *Venetie*, the Supreme Court did not express any intent to overrule the *Watchman* community of reference test, and it should not be read as doing so.

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44. *Id.*

45. *Id.* at 533.

46. *Id.* at 532.

47. “When Congress has not expressed its repudiation of trust status as in ANCSA, a more flexible approach may be possible.” COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 17, at, §3.04[2][c][iii] n.104.3.

48. While Indian land in the lower 48 states is generally held in trust or otherwise permanently protected by the federal government, Indian lands in Alaska are generally held by state-chartered village and regional corporations. CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS, *supra* note 25, at 237. Alaskan natives are shareholders of these corporations, which are chartered under Alaska state law. For further discussion of unique status of Alaskan Native Corporations, *see* DAVID CASE & DAVID VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 167-176 (3rd ed. 2012).

49. *Hydro Resources III*, 608 F.3d 1137, 1175 (10th Cir. 2010) (en banc) (Ebel, J., dissenting).

50. *Id.* at 1176 (quoting *Native Vill. of Venetie Tribal Gov’t*, 522 U.S. at 533).

51. *Id.* at 1175-76.

52. *Id.* at 1176.

Supreme Court precedent indicates that “community” “should be interpreted to mean the area within which one would logically expect a single jurisdictional framework to apply.”<sup>53</sup> In *United States v. Mazurie*, the defendants opened a bar on privately-held fee land within the Wind River reservation.<sup>54</sup> To determine whether the bar was in a “non-Indian community” within the reservation pursuant to 18 U.S.C. § 1154(c),<sup>55</sup> the Supreme Court acknowledged the fact that 170 of the 212 families in the area were Indian and 223 of the 243 students attending the local school were Indian.<sup>56</sup> The Court analyzed not just whether the parcel of land the bar occupied was a non-Indian community, but whether the area surrounding the bar was a non-Indian community. Partly because the area surrounding the bar was predominately Indian, the Court held that the bar was not located within a non-Indian community.<sup>57</sup> The *Hydro Resources III* dissent, interpreting *Mazurie*, thus argued that this demonstrated “that the word ‘communities,’ as used in the Indian statutes, requires an approach that places the specific parcel of land at issue in the context of the surrounding area.”<sup>58</sup> The *Hydro Resources III* majority opinion simply reads “community” out of the “dependent Indian community.”<sup>59</sup>

Finally, the Supreme Court’s original use of dependent Indian community does not necessitate the Tenth Circuit’s interpretation. When Congress enacted § 1151, it specifically stated it was drawing on the meaning of dependent Indian community as used in *Sandoval*<sup>60</sup> and *McGowan*.<sup>61</sup> Although § 1151(b) is based on the term as set forth in *Sandoval* and *McGowan*, neither *Sandoval* nor *McGowan* had to address the distinct issue presented in *Hydro Resources III* regarding whether a privately owned parcel of land, surrounded by land that clearly qualifies as Indian Country, is considered part of a dependent Indian community.

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53. Berger et al., *supra* note 10.

54. 419 U.S. 544 (1975).

55. “The term ‘Indian country’ as used in this section does not include fee-patented lands in non-Indian communities or rights-of-way through Indian reservations, and this section does not apply to such lands or rights-of-way in the absence of a treaty or statute extending the Indian liquor laws thereto.” 18 U.S.C. § 1154(c) (2012).

56. *Mazurie*, 419 U.S. at 551.

57. *Id.* at 553.

58. *Hydro Resources III*, 608 F.3d at 1174 (Ebel, J., dissenting). *Mazurie* indicates that in determining the applicable community, a court should consider “the logical jurisdictional area rather than isolated land in dispute.” Berger et al., *supra* note 10, at 2 n.3.

59. “There is no apparent reason why the term community should be accorded different meanings in the two statutes.” COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 17, at, § 3.04[2][c][iii] n.104.

60. *United States v. Sandoval*, 231 U.S. 28 (1913).

61. *United States v. McGowan*, 302 U.S. 535 (1938).

At issue in *Sandoval* was whether Congress had authority to designate by statute that the land owned by Santa Clara Pueblo was Indian Country even though it was not a reservation.<sup>62</sup> The Court held that Pueblo communities were similar to communities on reservations, and could be included as Indian country. The Court stated:

[T]he legislative and executive branches of the Government have regarded and treated the Pueblos of New Mexico as dependent communities entitled to its aid and protection, like other Indian tribes, and, *considering their Indian lineage, isolated and communal life . . .* this assertion of guardianship over them cannot be said to be arbitrary but must be regarded as both authorized and controlling.<sup>63</sup>

In determining whether the land was Indian Country, the Court did not have to consider what the community of reference was, because the Santa Clara Pueblo owned all the land at issue.<sup>64</sup> Notably, however, the Court did consider the Pueblo's lineage and communal life in its analysis.<sup>65</sup>

*McGowan* similarly arose over a parcel of land that Congress had purchased and held in trust for the Reno Indian Colony and had designated as a permanent settlement for Indians.<sup>66</sup> In *McGowan*, therefore, the Court likewise was only determining whether a congressionally designated parcel of land for Indian use was Indian country.<sup>67</sup> The *McGowan* Court also did not have to define the scope of the community of reference or address the more complex question presented by *Hydro Resources III* of who has jurisdictional authority over a privately held parcel of land surrounded by what is clearly Indian Country.

### *B. Ignoring the Community of Reference Goes Against Congress' Intent in Enacting 18 U.S.C. § 1151*

The Tenth Circuit's narrow interpretation of dependent Indian community conflicts with Congress' anti-checkerboarding objective in enacting § 1151. The purpose of Congress' codification of § 1151, as the *Hydro Resources III* dissent explained, was "to smooth out much of the checkerboard jurisdiction that complicated enforcement of criminal

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62. *Sandoval*, 231 U.S. at 36.

63. *Id.* at 47.

64. *Id.* at 39.

65. *Id.* at 47.

66. *United States v. McGowan*, 302 U.S. 535, 537 (1938).

67. *Id.*

law.”<sup>68</sup> A parcel-by-parcel approach, or land title approach to a dependent Indian community would merely perpetuate the checkerboard problem, the problem Congress sought to fix when enacting § 1151.<sup>69</sup>

Congress’ understanding of § 1151 is illuminated through 18 U.S.C. § 1154, another statute defining Indian Country enacted at the same time as § 1151.<sup>70</sup> Section 1154(c) defines Indian Country similarly to § 1151, but specifically notes that it does not include fee patented lands in non-Indian communities within reservations.<sup>71</sup> The *Hydro Resources III* dissent explained that this indicates that Congress did not consider the fee-patented status of land determinative of its status as Indian Country.<sup>72</sup>

### *C. Hydro Resources III’s Narrow Interpretation of Dependent Indian Community Conflicts with the Indian Tribal Energy Development and Self-Determination Act*

Since the passage of § 1151, Congress has passed other statutes involving dependent Indian communities. For example, under the Indian Tribal Energy Development and Self-Determination Act (the “Act”), Congress defines Indian land in pertinent part:

- (A) any land located within the boundaries of an Indian reservation, pueblo, or rancheria;
- (B) any land not located within the boundaries of an Indian reservation, pueblo, or rancheria, the title to which is held—
  - (i) in trust by the United States for the benefit of an Indian tribe or an individual Indian;
  - (ii) by an Indian tribe or an individual Indian, subject to restriction against alienation under laws of the United States; or

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68. *Hydro Resources III*, 608 F.3d 1137, 1172 (10th Cir. 2010) (en banc) (Ebel, J., dissenting) (the *Hydro Resources III* dissent reasoned that Congress’ intent in enacting § 1151 “shows that a ‘community’ approach, rather than an isolated parcel-by-parcel approach” is proper when determining whether land is within a dependent Indian community); see also Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 507 (1976).

69. “A central purpose of the 1948 codification was to avoid checkerboard jurisdiction.” COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 17, at § 3.04[2][c][iii] n.104.

70. 18 U.S.C. § 1154(c) (2012). This statute defines jurisdiction for alcohol regulation in Indian Country.

71. *Id.*

72. *Hydro Resources III*, 608 F.3d at 1173 (Ebel, J., dissenting).

(iii) by a dependent Indian community.<sup>73</sup>

Unlike § 1151, the Act specifically states that title of the land must be held “by” a dependent Indian community. Being held “by” a dependent Indian community indicates that a type of entity holds the land. If the only requirements of a dependent Indian community were to be set-aside and under federal superintendence, using “in” or “within” a dependent Indian community would be more appropriate. The idea that Congress considered a dependent Indian community an entity is supported by the use of “by” in the rest of 25 U.S.C. § 3501(2). Indian Country can be land held “in trust *by* the United States”<sup>74</sup> or “*by* an Indian tribe or individual Indian.”<sup>75</sup> In the same way that the United States, tribes, and individuals are entities that hold the land, a dependent Indian community can also be an entity that holds land.

Of course, a dependent Indian community clearly has two meanings: a community and an area over which either a tribe or the federal government has primary jurisdiction, i.e., Indian Country. However, Congress’ view of dependent Indian communities as entities guides the interpretation of what a dependent Indian community is as a geographical area. For, it would make little sense for Congress to use the same term, dependent Indian communities, when defining a jurisdictional area as when defining an Indian community if the word “communities” was devoid of meaning in the jurisdictional application.

Further, the Act states that Indian land is “any land located within the boundaries of an Indian reservation” and that the term Indian reservation includes “a dependent Indian community.” If a dependent Indian community could only be viewed on a parcel-by-parcel basis, the phrase “any land located within the boundaries of” would be superfluous, as title would already be determinative of the issue. Additionally, in § 3501(3)(C) of the Act, Congress stresses that even when considering a dependent Indian community as an area of land, it still considered the community. Specifically, the Act states that the term “Indian reservation” includes:

- (C) a dependent Indian community located within the borders of the United States, regardless of whether the *community* is located—
  - (i) on original or acquired territory of the community; or
  - (ii) within or outside the boundaries of any State or

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73. 25 U.S.C. § 3501(2) (2012).

74. 25 U.S.C. § 3501(2)(B)(i).

75. 25 U.S.C. § 3501(2)(B)(ii).

States.<sup>76</sup>

Congress' use of the word "community" on its own further indicates that a community can be an entity. It makes sense that Congress would view a dependent Indian community as a logical governmental entity. This definition of community works with the idea that a dependent Indian community can encompass any land located within its boundaries, as the area is dependent on how the community occupies the land at issue, not the title of particular parcels of land. Considering the community of reference is thus uniquely appropriate for determining the scope of a dependent Indian community.

Notably, Congress enacted the Act in 2005, after *Venetie* but before *Hydro Resources III*.<sup>77</sup> In 1948 and in 2005, Congress gave the word "community" in the phrase "dependent Indian community" its natural meaning, a meaning the *Hydro Resources III* court refused to give it. A narrow parcel-by-parcel approach as the Tenth Circuit has now adopted, undermines Congress' intent to decrease jurisdictional checkerboards. By looking solely at a dependent Indian community in a parcel-by-parcel manner, the Tenth Circuit does not acknowledge, as Congress does, that a dependent Indian community is a community.

#### IV. FOLLOWING *VENETIE*: THE DEPENDENT INDIAN COMMUNITY IN OTHER COURTS

Despite the inadequacies of the opinion, other courts have adopted similar analyses of dependent Indian community. Few cases since *Venetie* have presented a similar issue concerning "the land in question," so it remains difficult to determine how other circuits will interpret dependent Indian community post-*Venetie*. However, most courts appear to agree with the *Hydro Resources III* majority opinion. The Supreme Court of New Mexico expressly rejected the *Watchman* test after *Venetie* in *State v. Frank*.<sup>78</sup> In addition, the Supreme Court of South Dakota in

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76. 25 U.S.C. § 3501(3)(C) (emphasis added).

77. In 2004, 25 U.S.C. § 3501(2) read in its entirety:

the term "Indian reservation" includes Indian reservations; public domain Indian allotments; former Indian reservations in Oklahoma; land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.); and 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.

25 U.S.C. § 3501(2) (2004).

78. *State v. Frank*, 132 N.M. 544, 549 (N.M. 2002) (holding that "[w]e adopt the

*State v. Owen* held the land must satisfy only the two *Venetie* requirements.<sup>79</sup>

The Ninth Circuit and the Second Circuit, as well, have relied on the two-factor test alone. In *Blunk v. Arizona Department of Transportation*, the Ninth Circuit decided whether land purchased in fee simple by the Navajo Nation could fit § 1151(b).<sup>80</sup> The court just considered the two *Venetie* factors and did not analyze the proximity or the importance of the Navajo reservation to the area.<sup>81</sup> Because the land was near the Navajo Nation, and thus could have undergone a community of reference analysis, the fact that the court only considered the two *Venetie* factors indicates the Ninth Circuit no longer considers the community of reference in its analysis.<sup>82</sup> In *Citizens Against Casino Gambling v. Chaudhuri*, the Second Circuit used only the *Venetie* two-factor test to define a dependent Indian community under the Indian Gaming Regulatory Act.<sup>83</sup>

## V. PROBLEMS CREATED BY *HYDRO RESOURCES III*

By focusing solely on land title, the Tenth Circuit's new interpretation of dependent Indian community has increased jurisdictional checkerboards. This checkerboard can produce blocks of land where the state has jurisdictional authority but little incentive to safely regulate environmental dangers.<sup>84</sup> The Tenth Circuit's interpretation is especially problematic concerning jurisdictional control over underground injection control well permits, because a majority of uranium within the United States is in the Four Corners area and many

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two-prong test adopted in *Venetie* to resolve questions of Indian jurisdiction in civil and criminal cases; therefore, no examination of the community of reference is required before applying the two-prong test established in *Venetie*.”)

79. *State v. Owen*, 2007 SD 21, 729 N.W.2d 356.

80. *Blunk v. Arizona Dep't of Transp.*, 177 P.3d 879 (9th Cir. 1999).

81. *Id.*

82. *See id.*

83. 802 F.3d 267, 282 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 2387 (2016) (In *Venetie*, the Supreme Court defined “dependent Indian communities” as referring to “a limited category of . . . 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.” *Id.* at 251, *quoting* *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998)).

84. For further information on the “environmental no-man’s land” that can result from jurisdictional checkerboards, *see* Claire R. Newman, Note, *Creating an Environmental No-Man’s Land: The Tenth Circuit’s Departure from Environmental and Indian Law Protecting a Tribal Community’s Health and Environment*, 1 WASH. ENVTL. L. & POL’Y 352, 389 (2011).

tribes are located in this area. This area, also known as the Colorado Plateau Uranium Province, is the source of much of the United States' uranium. The Navajo Nation reservation is larger than ten of the fifty states, covering over 27,000 square miles.<sup>85</sup> This vast expanse also contains some of the most profitable uranium in the world.<sup>86</sup> In fact, a quarter of the recoverable uranium within the United States is located on the Navajo Nation's land.<sup>87</sup>

This Section first presents an in-depth view of the current situation in Church Rock. Using the Church Rock Chapter as a case study, this Section then delves deeper into the environmental jurisdictional problems created by increased checkerboarding for underground injection control well permitting authority.

#### *A. Why Checkerboarded Jurisdictional Authority Poses Problems: Church Rock as Case Study*

The Church Rock community has a tragic history with uranium mining, most notably from the Church Rock uranium mill spill of 1979.<sup>88</sup> On July 16, 1979, 1,000 tons of radioactive mill waste and 93 million gallons of radioactive tailings broke out of a disposal pond and flowed into the Puerco River, an essential source of water for Church Rock.<sup>89</sup> It was the largest release of radioactive material in the history of the United States.<sup>90</sup>

As the spill at Church Rock illustrates, uranium mining on non-Indian land can have extraordinarily destructive consequences on Indian lands. There are three reasons for this: (1) radiation exposure from uranium can be hazardous to health even at a distance; (2) uranium pollution is extremely difficult to clean; and (3) uranium wells have the potential to pollute water in water-scarce areas. First, radiation contamination cannot be completely contained within the boundaries of a small parcel. Uranium dust can easily blow across borders, and contaminated water can leech through geologic and manmade barriers.<sup>91</sup> Second, uranium pollution lasts for an extremely long time and is

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85. *History*, OFFICIAL SITE OF THE NAVAJO NATION GOVERNMENT, <http://www.navajo-nsn.gov/history.htm>.

86. PASTERNAK, *supra* note 1, at 39.

87. Rebecca Tsosie, *Indigenous Peoples and Epistemic Injustice: Science, Ethics, and Human Rights*, 87 WASH. L. REV. 1133, 1174 (2012).

88. PASTERNAK, *supra* note 1, at 149. For further information about how uranium mining affected the Church Rock Chapter see Newman, *supra* note 84, at 380-83.

89. PASTERNAK, *supra* note 1, at 149.

90. *Id.* at 150.

91. *Id.* at 7.

expensive to clean. For example, in 2007, nearly thirty years after the spill, remediation activities at Church Rock were still ongoing.<sup>92</sup> Third, uranium mines can pollute water. Although the spill at Church Rock concerned a mill tailings spill and thus primarily affected surface water, one of the greatest concerns of uranium mines is groundwater contamination from the potential leaking of injected fluids into underground safe drinking water wells.<sup>93</sup> Especially in an area as dry as the Church Rock Chapter and where nearly ninety percent of drinking water comes from groundwater, groundwater pollution is particularly troubling.<sup>94</sup> For example, the Westwater Canyon aquifer lies underneath Section Eight, the section disputed in *Hydro Resources III*.<sup>95</sup> This aquifer provides drinking water for roughly 12,000 people in the region.<sup>96</sup> Contamination to this aquifer could devastate the surrounding communities and environment.

### *B. Control over underground injection control well Permitting in Church Rock*

Congress gave the EPA authority to regulate underground injection control wells under the Safe Drinking Water Act,<sup>97</sup> and based on this authority, the EPA could issue all underground injection control permits. However, in the 1980s, the EPA began a Primacy Program in which a state or tribe could achieve primary enforcement authority by creating their own underground injection control program subject to EPA approval.<sup>98</sup> If a state or tribe does not achieve primacy, then the EPA will continue to direct the program.<sup>99</sup> Currently thirty-four states and three territories have approved primacy programs.<sup>100</sup>

The underground injection control program regulates six types of

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92. *Id.* at 235.

93. ENVIRONMENTAL PROTECTION AGENCY: OFFICE OF WATER, TECHNICAL PROGRAM OVERVIEW: UNDERGROUND INJECTION CONTROL REGULATIONS 6 (2001), [http://www.epa.gov/safewater/uic/pdfs/uic\\_techovrview.pdf](http://www.epa.gov/safewater/uic/pdfs/uic_techovrview.pdf).

94. Tanana & Ruple, *supra* note 23, at 24.

95. Bradford D. Cooley, *The Navajo Uranium Ban: Tribal Sovereignty v. National Energy Demands*, 26 J. LAND RESOURCES & ENVTL. L. 393, 396 (2006).

96. *Id.* at 398.

97. *Safe Drinking Water Act* (SDWA), ENVTL. PROTECTION AGENCY, <http://water.epa.gov/lawsregs/rulesregs/sdwa/index.cfm> (last updated July 30, 2014).

98. *Safe Drinking Water Act—National Drinking Water Regulations, Underground Injection Control Regulations*; Indian Land, 53 Fed. Reg. 37,396 (Sept. 26 1988).

99. *Underground Injection Control Primacy Program*, ENVTL. PROTECTION AGENCY, <http://water.epa.gov/type/groundwater/uic/Primacy.cfm> (last updated Oct. 5, 2015).

100. *Id.* Two tribes, including the Navajo Nation, also have primacy programs for Class II wells. *Id.*

wells.<sup>101</sup> Uranium mining is usually done by class III injection wells.<sup>102</sup> Eighty percent of uranium extraction in the United States uses class III injection wells because it is much simpler than manually mining out uranium.<sup>103</sup> Class III mines inject fluid underground to dissolve uranium ore and bring it to the surface.<sup>104</sup> No tribes yet have approved programs for Class III underground injection control wells.<sup>105</sup>

In 1997, the EPA informed the New Mexico Environmental Department of its decision to treat Section Eight as disputed Indian Country and to implement the federal underground injection control program.<sup>106</sup> This decision threatened to revoke the primacy the EPA had granted to New Mexico for this area in 1983.<sup>107</sup> This would mean that the Class III underground injection control permit that the New Mexico Environmental Department had previously granted to HRI for Section Eight would become invalid. Because HRI needed an underground injection control permit to mine its property, HRI sued the EPA.<sup>108</sup> As explained above, the New Mexico Environmental Department prevailed in court, regained jurisdictional authority over Section Eight, and re-issued a Class III underground injection control permit to HRI.<sup>109</sup>

The Church Rock example perfectly illustrates the problem created when too many jurisdictions control an area. In this instance, a Class III underground injection control well permit has been granted within a community of Navajo residents fundamentally opposed to uranium mining.

## VI. IN RESPONSE TO *HYDRO RESOURCES III*:

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101. Class I wells “inject hazardous wastes, industrial non-hazardous liquids, or municipal wastewater beneath the lowermost USDW.” *Classes of Wells*, ENVTL. PROTECTION AGENCY, <http://water.epa.gov/type/groundwater/uic/wells.cfm> (last updated Aug. 2, 2012). Class II wells “inject brines and other fluids associated with oil and gas production and hydrocarbons for storage.” *Id.* Class IV wells “inject hazardous or radioactive wastes into or above USDWs.” *Id.* Class V wells generally “inject non-hazardous fluids into or above USDWs and are typically shallow, on-site disposal systems.” *Id.* Class VI wells “inject Carbon Dioxide for long term storage.” *Id.*

102. *Mining Wells Class III*, ENVTL. PROTECTION AGENCY, [http://water.epa.gov/type/groundwater/uic/wells\\_class3.cfm](http://water.epa.gov/type/groundwater/uic/wells_class3.cfm) (last updated Mar. 6, 2012).

103. *Id.*

104. *Id.* Class III wells are also used to extract salt and copper, but the predominate use of the wells is for uranium. *Id.*

105. *Id.*

106. *Hydro Resources I*, 198 F.3d 1224, 1235 (10th Cir. 2000).

107. 40 C.F.R. § 147.1601 (2015).

108. *Hydro Resources I*, 198 F.3d at 1235.

109. *Hydro Resources III*, 608 F.3d 1137, 1138 (10th Cir. 2010) (en banc).

## PROPOSAL FOR REFORM—THE EPA SHOULD UNHITCH ITS JURISDICTIONAL PROVISIONS FOR INDIAN LAND FROM 18 U.S.C. § 1151

At the end of their opinion the majority of *Hydro Resources III* did suggest that “[s]omeday, EPA may seek to avoid these difficulties by unhitching its [underground injection control] permitting authority from § 1151.”<sup>110</sup> The EPA has not since followed this suggestion. Because the Tenth Circuit has narrowed the definition of dependent Indian community, the *Hydro Resources III* court’s suggestion for the EPA to unhitch its definition of dependent Indian community in 40 C.F.R. § 144.3 from § 1151 is compelling. The EPA should modify § 144.3 to explicitly adopt the *Watchman* test, as modified in the Tenth Circuit’s 2009 decision (“*Hydro Resources II*”).

In *Hydro Resources II*, the court acknowledged that *Venetie* had modified the second step of the *Watchman* test.<sup>111</sup> The court therefore modified the *Watchman* test by keeping the first step, identifying the community of reference, but removing the second step, the Eight Circuit’s four-factor test, and replacing it with the two factors from *Venetie*.<sup>112</sup> The *Hydro Resources II* test thus applied the community of reference test followed by *Venetie*’s set-aside and superintendence requirements.

The *Hydro Resources II* test is preferable to the Tenth Circuit’s current definition of dependent Indian community because it allows the EPA to consider “the community in question.”<sup>113</sup> The *Hydro Resources II* test decreases checkerboarding by considering the parcel of land within the surrounding community as opposed to simply land ownership.<sup>114</sup> Because “encouraging uniform and efficient jurisdiction is best served by considering the logical jurisdictional community as a whole,”<sup>115</sup> redefining § 144.3 to explicitly state that the *Hydro Resources II* test should be employed in interpreting dependent Indian communities would ease the strain of competing sovereign agendas (the Navajo Nation’s desire to prevent uranium mining and New Mexico’s goal of increasing uranium mining). The Tenth Circuit’s current interpretation of

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110. *Id.* at 1166.

111. *Hydro Resources II*, 562 F.3d 1249, 1265 (10th Cir. 2009), *vacated* 608 F.3d 1137 (10th Cir. 2010) (en banc).

112. *Id.*

113. *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1545 (10th Cir. 1995).

114. *Hydro Resources II*, 562 F.3d 1249 (10th Cir. 2009).

115. Berger et al., *supra* note 10, at 3.

dependent Indian community increases checkerboard jurisdiction. As explained earlier, checkerboard jurisdiction is particularly problematic with respect to permitting underground injection control wells for uranium mining, because radiation from uranium pollution is hazardous even at a distance, very difficult to remediate, and devastating if it contaminates an essential aquifer. The Safe Drinking Water Act was passed in 1974 with the purpose to “assure that water supply systems serving the public meet minimum national standards for protection of public health.”<sup>116</sup> The people who could be most affected by uranium pollution should have a voice in well permitting.

The EPA is not constrained to define Indian Country pursuant to § 1151. Importantly, Congress did not specify how the EPA was to define Indian Country under the Safe Drinking Water Act.<sup>117</sup> When it updated § 144.3, the EPA chose to use the § 1151 definition of Indian Country in order to “be ensured of comprehensive coverage.”<sup>118</sup> In fact, when issuing § 144.3, the EPA explained that its adoption of the “Indian Country” definition was to make sure “that all underground injection activities on all lands, including Indian lands, are regulated.”<sup>119</sup> Because it is uncertain what Congress intended Indian Country to cover, it would be within the EPA’s authority and discretion, to expand its interpretation of Indian Country to the limits of what Congress and the courts have considered Indian Country. As Congress has shown with its varying definitions of Indian Country, one definitive definition of Indian Country is not necessary, and not advisable, as different jurisdictional issues bring various problems. Although the EPA chose to use the “generic definition to identify those lands to be covered by Indian lands programs,”<sup>120</sup> this definition of Indian Country is no longer as comprehensive as the EPA intended. The EPA, as the expert on underground injection control wells, best knows how to ensure comprehensive jurisdictional coverage over these wells.<sup>121</sup> Because Congress did not specify how the EPA was to define Indian Country for underground injection control well jurisdiction, EPA’s definition should be given deference.<sup>122</sup>

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116. *Montgomery County v. Env'tl. Prot. Agency*, 662 F.2d 1040, 1041 (4th Cir. 1981), *quoting* H.R. Rep. No. 1185, 93d Cong., 2d Sess. 1 (1974).

117. *See* Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-26 (2012).

118. Underground Injection Control Program: Federally-Administered Programs, 49 Fed. Reg. 45,292-01, 45,294 (Nov. 15, 1984).

119. Safe Drinking Water Act—National Drinking Water Regulations, Underground Injection Control Regulations; Indian Lands, 53 Fed. Reg. 37,396, 37,400 (Sept. 26, 1988).

120. 49 Fed. Reg. at 45,294.

121. *Am. Mining Cong. v. Marshall*, 671 F.2d 1251, 1255 (10th Cir. 1982).

122. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). When “Congress has no particular intent on the subject, but meant to leave its resolution to the

The EPA should not wait for Congress to modify the definition of § 1151. The Court in *Venetie* suggested that Congress might want to modify the definition of Indian Country.<sup>123</sup> However, this definition has not been modified for decades, and is not likely to be changed anytime soon. A congressional modification to § 1151, which has not been altered since 1948, will take time, and permitting of underground injection control wells needs to be addressed now. If other circuits adopt the Tenth Circuit's dependent Indian community interpretation, Congress should take the Supreme Court's advice in *Venetie* and rework § 1151. But it is uncertain if or when that day will come. In the meantime, the EPA should modify the definition of Indian lands under 40 C.F.R. § 144.3 to counteract the Tenth Circuit's overly-narrow interpretation of dependent Indian community.

## VII. CONCLUSION

The EPA's jurisdiction currently does not extend to all land within the Church Rock Chapter because of the Tenth Circuit's interpretation of statute and case law. The Navajo Nation now cannot work with the EPA to protect itself from the lethal effects of uranium mining and Class III underground injection control wells on its doorstep.

Although increased checkerboarding is a problem in relation to other jurisdictional issues as well, it is too early to tell if other courts will adopt *Hydro Resources III's* interpretation of dependent Indian community. Additionally, different jurisdictional issues present different questions, and it is not necessary to have one jurisdictional provision for all criminal and civil Indian Country definitions. However, the question presented in *Hydro Resources III* is particularly pressing for underground injection control wells used in uranium mining, and the EPA should act soon and unhitch the jurisdictional provisions for underground injection control wells from § 1151.

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agency. . . . the only question of law presented to the courts is whether the agency acted within the scope of its discretion." Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516.

123. *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527, 533 (1998).