



INDIAN LAW TIMES

A MESSAGE FROM THE CHAIR

Welcome to the Summer 2009 issue of the *Indian Law Times*, the newsletter of the Indian Law Section of the State Bar of New Mexico. We hope that you will find this newsletter interesting and entertaining, as we try to provide information on issues relevant to the practice of Indian Law and to keep you informed on our Section's activities and events. We are hoping to publish two issues of the newsletter this year, this Summer issue and one during Winter.

I would like to announce the different committees of the Section, and briefly describe their work and current events. The Outreach & Recruiting Committee, chaired by Georgene Louis, has scheduled the Section's Summer Mixer at St. Clair Winery & Bistro, 901 Rio Grande Blvd. NW,

Albuquerque, on Friday July 31, 2009 for 6:00-8:30pm. Light appetizers and a cash bar will be available. This social event will provide an opportunity for new and existing members of the Section to gather in an informal setting to relax, get acquainted, and catch up with other attorneys that are interested in Indian law. Last month, this Committee coordinated a presentation of the Choose Law Program again this year to American Indian high school students attending Santa Fe Indian School's Summer Policy Academy on June 18, 2009, while the students visit the U.N.M. School of Law. The Section and the American Indian Law Center hosted the afternoon of activities for the high school students. We are also hoping to coordinate the same type of presentation at the Native American Community Academy in the very near future.

and support that you or your organization may be able to provide to this worthy cause. Our recent donations are much appreciated. However, the Section has not been able to secure as many donations as before and is facing the possibility of not awarding as many scholarships as we have in the past. Any support, including volunteering to help with the fundraising, would be a great way for you, as a Section member, to get involved in one of the most important initiatives of the Section.

Finally, thanks to the Media Committee, chaired by Pablo Padilla Jr., for the work in getting this newsletter published and for their continued work on assuring that the Section's website is updated. We look forward to publishing the second newsletter of the year sometime in December.

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The CLE Committee, chaired by Delilah Tenorio Choneska, held an Indian Law Section presentation at the Annual Meeting of the State Bar of New Mexico being held this year at the Buffalo Thunder Resort in Pojoaque Pueblo on July 9-12, 2009. *The Basics of the Indian Civil Rights Act* was presented by Bidtah Becker and Paul Spruhan on July 11, 2009 at 2:15pm. The CLE Committee is currently working on plans for the Section's Fall CLE, currently scheduled for Thursday, November 5, 2009 at the State Bar Center, in conjunction with the Section's Annual Meeting. Please mark your calendars for this event!

As the Chair of the Section, I thank all the members of the Board of Directors whose active participation is crucial to the continued success of the Section. I also invite any and all Section members to become more involved in any area that might be of interest to you. It is through your involvement that the Section can continue to grow and become a vital part of the State Bar of New Mexico. It can be great fun and a fulfilling way to stay involved with other attorneys that are practicing Indian Law throughout the state. Please feel free to contact me or any of the Committee Chairs for more information.

The Scholarship Committee, chaired by Vincent Knight Jr., is once again seeking donations for the Section's Bar Exam Scholarship Program. I ask for any help

Sincerely,

Helen B. Padilla
2009 Chair



FIGHTS OVER ENERGY RIGHTS-OF-WAY IN INDIAN COUNTRY MAY FURTHER LIMIT TRIBAL SOVEREIGNTY AND FEDERAL TRUST DUTIES

By Adam Rankin

Energy rights-of-way on western Indian tribal lands are proving their potential to be a new federal Indian law battleground regarding the precise contours of tribal sovereignty and federal trust duties. Tribal governments seeking to affirm control over reservation land, and perhaps to reassert tribal sovereignty, by leveraging their location within critical energy corridors in right-of-way negotiations are likely to increase right-of-way conflicts as demands for energy and natural resources increase. With these conflicts come great opportunity for tribal governments to assert their authority and negotiate favorable right-of-way lease terms. But at the same time, right-of-way conflicts also pose great risks should tribes overreach in some way, thereby provoking a legal challenge and a possible adverse court ruling or a direct statutory response from Congress¹ that expressly constrains tribal sovereignty or federal trust duties.



Located squarely within the corridor linking the Arizona and southern-California consumer markets to New Mexico's San Juan Basin, one of the country's most productive natural gas fields, the Navajo Nation is arguably in a prime location for energy corridor right-of-way conflicts to occur and is, therefore, a likely source for a test case probing the limits of tribal sovereignty and federal trust duties in this field. Not surprisingly, some of the most interesting right-of-way conflicts to recently arise involving energy corridors have developed on Navajo land. One such conflict resulted in a \$350 million, 20-year right-of-way settlement agreement in January 2009 between El Paso Natural Gas Co. (El Paso) and the Navajo Nation after nearly five years of negotiation. Another conflict arose as a direct response to the agreement and is currently pending disposition in New Mexico federal district court. In the former conflict, tribal sovereignty was subject to possible further curtailment; in the latter, federal trust duties may be further constrained.

By enacting the Energy Policy Act of 2005,² Congress directed federal agencies to identify critical energy corridors on federal lands and to integrate them into land-management plans, as well as to designate certain corridors as necessary to improve energy reliability, relieve transmission congestion, and enhance the capability of the national grid to deliver electricity.³ The Act also directed the secretaries of the departments of Energy and the Interior to study issues regarding energy rights-of-way on tribal lands.⁴ At the time, the Na-

vajo Nation was in the midst of renegotiating a 900-mile pipeline right of way with El Paso. The pipeline primarily serves the San Juan Basin and the right-of-way expired in October 2005.⁵ El Paso has held the right of way granted by the tribe for more than 50 years.⁶ In 1985, El Paso paid the Navajo Nation \$29 million for a 20-year extension. During the course of the most recent renewal negotiations, the Navajo Nation sought as much as \$440 million for a 20-year extension through 2025.⁷ El Paso, in turn, offered \$138 million in cash, plus another \$60 million in non-cash consideration.⁸

During these often difficult negotiations⁹ the Navajo Nation expressed surprise over the Energy Policy Act of 2005 and its terms.¹⁰ Navajo Nation's Resources Committee Chairman George Arthur revealed his thinking on the right-of-way issue that likely had a significant impact on negotiations with El Paso if it was generally representative of the tribe's approach: "[T]he Nation is a sovereign state. Whether people realize it or not, everything stops at the border."¹¹ At about the same time, El Paso directly petitioned the Department of Interior to approve the company's application for a right-of-way renewal absent tribal consent.¹²

The Navajo Nation then enacted a version of the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),¹³ known as the Navajo Superfund Law (NSL)¹⁴ on March 10, 2008. But unlike its federal counterpart, the NSL defines oil and gas products as "hazardous substances"¹⁵ and charges transporters a tariff for the transportation of all petroleum products across Navajo land, including natural gas.¹⁶

In the context of the right-of-way negotiation with El Paso, enactment of the NSL could be seen as a leverage tool applied against holders of rights of way. The risk to the Navajo Nation in bringing such strong leverage to bear is that a challenge of the tribe's authority to enforce the NSL provisions against non-Indians could possibly prevail, resulting in additional general curtailment of tribal sovereign authority. Since the 1981 *Montana*¹⁷ ruling, the Supreme Court has expanded the *Montana* test beyond its original, narrow application, where tribes assert regulatory authority against non-Indians on non-Indian fee land, to a general rule, where land status merely informs the *Montana* test.¹⁸ At the same time, the Court has narrowed the

Montana exceptions. For example, *Plains Commerce Bank v. Long Family Land & Cattle Co.*¹⁹ offers some guidance on how the Court may decide future cases. The Court stated that tribal “residual sovereignty” gives tribes the power to tax certain nonmember activities, “[b]ut tribes do not, as a general matter, possess authority over non-Indians who come within their borders.”²⁰ So while the *Montana*²¹ exceptions still apply, these exceptions are “limited” ones and cannot be construed in a manner that would “swallow the rule,” or “severely shrink” it.²² Since *Plains Commerce Bank*, tribal “laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions,” and “[e]ven then, the regulation must stem from the tribe’s inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.”²³ Given this trend in Supreme Court jurisprudence under the *Montana* line of cases, the question of the NSL’s validity as applied to non-Indians, even on reservation land, is more of an open question now than it has ever been.

Within a month of completing the Navajo right-of-way agreement,²⁴ certain Navajo allottees filed a lawsuit²⁵ in New Mexico federal district court in February 2009 against eight different energy companies²⁶ and Department of Interior Secretary Ken Salazar. The lawsuit alleges that the United States breached its trust duties by “failing to advise and assist them” in negotiations for similar right-of-way agreements across their allotted lands and for “agreeing to far less than fair market value.”²⁷ The lawsuit further alleges that the energy companies are constructive trustees because they knew or should have

known of the trust violations, making their right-of-way agreements void and subject to remedial action.²⁸

The Navajo Nation has suffered recent losses over the question of trust duties. The Court has interpreted trust duties to be narrowly applicable only when there are “specific rights-creating or duty-imposing statutory or regulatory prescriptions.”²⁹ Given recent precedent, these Navajo allottees may be setting themselves up for more disappointment unless they can conclusively establish that 25 U.S.C. § 325 and its regulations under 25 C.F.R. §§ 169.1ñ.28 create the requisite duties.

With the Court’s jurisprudence stacked against them, the Navajo Nation and Navajo allottees may have an uphill battle seeking to assert tribal authority against non-Indians and to impose trust duties in right-of-way negotiations. As demands for energy and natural resources increase, however, more opportunities will arise for the Navajo Nation and other western tribes to assert these claims. The risks, and they are big ones, are that tribal sovereignty and federal trust duties may be further constrained.

About the Author:

Adam Rankin is a recent graduate of the University of New Mexico School of Law and will be serving as law clerk during the 2009–2010 term for Justice Edward Chavez of the New Mexico Supreme Court. His opinions are his own and do not reflect those of the State Bar of New Mexico or the Indian Law Section.

ENDNOTES

¹ It should be noted that a recent U.S. Dept. of Interior and U.S. Dept. of Energy report to Congress recommends Congress approach right-of-way conflicts between tribes and energy companies on a case-by-case basis, “rather than making broader changes that would affect tribal sovereignty or self-determination generally.” REPORT TO CONGRESS: ENERGY POLICY ACT OF 2005, SECTION 1813 INDIAN LAND RIGHTS-OF-WAY STUDY at x (May 2007), available at http://www.oe.energy.gov/DocumentsandMedia/EPAAct_1813_Final.pdf (last visited June 24, 2009).

² Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (codified as amended in scattered sections of 42 U.S.C.).

³ Energy Policy Act of 2005, § 368, 42 U.S.C. § 15926.

⁴ Energy Policy Act of 2005, Pub. L. No. 109-58, § 1813, 119 Stat. 594 (codified as amended in scattered sections of 42 U.S.C.).

⁵ See *El Paso Natural Gas Co., El Paso Natural Gas Company and the Navajo Nation* <http://www.elpaso.com/about/navajo/history.shtm> (last visited May 19, 2009).

⁶ *Id.*

⁷ *El Paso Natural Gas Co., Question and Answer*, <http://www.elpaso.com/about/navajo/qa.shtm> (last visited May 19, 2009).

⁸ *Id.*

⁹ Felicia Fonseca, Navajos, Gas Company Reach Deal on Pipeline Pay, INDIAN COUNTRY NEWS, available at http://indiancountrynews.net/index.php?option=com_content&task=view&id=5542&Itemid=33.

¹⁰ Kathy Helms, National Energy Corridors May Impact Navajo Reservation Land, ENVT’L NEWS SERVICE (Nov. 16, 2005), available at <http://www.ens-newswire.com/ens/nov2005/2005-11-16-03.asp>.

¹¹ *Id.*

¹² *El Paso Natural Gas Co., Question and Answer*, <http://www.elpaso.com/about/navajo/qa.shtm> (last visited May 19, 2009).

¹³ 42 U.S.C. § 9601 *et seq.* (2000).

¹⁴ 4 N.N.C. §§ 2101–2805 (2008).

¹⁵ *Id.* §§ 2103(B), 2104(A)(17) (2008).

¹⁶ *Id.* at § 2704 (2008).

¹⁷ *United States v. Montana*, 450 U.S. 544 (1981).

¹⁸ *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2720 (2008).

¹⁹ 128 S. Ct. 2709 (2008).

²⁰ *Id.* at §§ 2718–19 (2008) (citations and internal quotes omitted).

²¹ *Montana*, 450 U.S. at 565–566.

²² *Plains Commerce Bank*, 128 S. Ct. at 2720.

²³ *Id.* at 2724 (citations omitted).

²⁴ Felicia Fonseca, Navajos, Gas Company Reach Deal on Pipeline Pay, INDIAN COUNTRY NEWS, available at http://indiancountrynews.net/index.php?option=com_content&task=view&id=5542&Itemid=33.

²⁵ *Begay v. Public Service Co. of N.M.*, 2009-cv00137 (Feb. 11, 2009) (“*Begay*”).

²⁶ Defendants are Public Service Co. of N.M., N.M. Gas Co., El Paso Corp., Enterprise Products Partners L.P., Kinder Morgan, Transwestern Pipeline Co., Tuscon Electric Power Co., LLC, and Western Refining, Inc. See *Begay* Complaint at 3–5.

²⁷ See *Begay* Complaint at 5.

²⁸ *Id.* at 6.

²⁹ *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003); see also *United States v. Navajo Nation*, 556 U.S. ____ (2009).

HRI v. EPA: A VICTORY FOR INDIAN COUNTRY FOR NOW.

by Eric Jantz

Looking at the land, you'd never guess that it was the center of a legal storm. The rolling scrubland disappears to the northwest into a canyon and abuts a mesa that ascends dramatically from the earth. A few cattle graze, unaware of passersby. The letters "UNC" can barely be discerned on an abandoned building – the sole structure on the land. Nearby, more cattle and sheep graze on the Navajo ranches that dot the landscape. But the southeast quarter section of Township 16 N, Range 16 W, known as "Section 8", in the Church Rock Chapter of the Navajo Nation in northwestern New Mexico, may be the most important tract of real estate for advocates of tribal interests in the Rocky Mountain West.



Section 8 lies at the heart of a recent decision by a panel of the United States Court of Appeal for the 10th Circuit that upheld an administrative decision by the Environmental Protection Agency that Section 8 is within a "dependent Indian community" and therefore "Indian Country". Section 8 is a quarter Section of land, owned in fee by Hydro Resources, Inc., or HRI, a non-Indian corporation, that is within the exterior boundaries of the Church Rock Chapter of the Navajo Nation. It is surrounded by tribal trust land, individual Indian allotments, and Federal land administered by the Bureau of Land Management, largely for the benefit of Navajo Nation tribal members. And HRI also wants Section 8 to be the location of the first new uranium mine in New Mexico in over 25 years.

In 1988 HRI submitted an application to the U.S. Nuclear Regulatory Commission for a source and byproduct materials license to mine uranium at four sites within Church Rock and Crownpoint within the Navajo Nation. HRI proposes to use a uranium extraction method called "in situ leach" or ISL mining. In contrast to conventional uranium mining, where uranium is extracted from the ground by digging it out of huge pits or underground shafts, ISL mining involves pumping a chemical mixture through a network of wells into an aquifer that contains uranium. In its natural

and undisturbed state, uranium in an aquifer is immobile. Water near the uranium deposits in the aquifer is unaffected by the uranium's radioactive and chemically toxic properties and may be very good quality, such as the municipal drinking water supply in Crownpoint, about 20 miles from Church Rock, where HRI also intends to mine uranium. There, drinking water is drawn from the same aquifer where substantial ura-

anium deposits lie, but which meets all EPA drinking water standards without treatment.

However, when the ISL mining chemicals are injected into an aquifer, they react with the uranium making it mobile and spreading it over large areas. Once the uranium is mobilized, the mining company uses its network of wells to pump uranium saturated groundwater to the surface where it is processed into fuel for nuclear power plants or fodder for nuclear weapons. Problems arise when 1) uranium saturated groundwater escapes from the mine zone into clean groundwater and 2) after uranium extraction ceases to be economical and uranium mining companies are unable to restore groundwater in the mine zone to pre-mining conditions. In fact, in over 35 years of ISL experience in the United States, **no** mining company has ever been able to restore groundwater to pre-mining conditions. Invariably, levels of uranium, radium, and other toxics such as arsenic and mercury remain at levels dangerous to human health. Given ISL extraction's history (and the history of the uranium mining industry in general), it is no surprise that most Church Rock and Crownpoint residents are opposed to renewed uranium mining and that the Navajo Nation passed a ban on uranium mining and processing within Navajo Indian country in 2005. *Diné Natural Resources Protection Act*, No. CAP-18-05, codified at 18 N.N.C. §§ 1301-1303.

Which brings us back to the 10th Circuit panel's decision, *Hydro Resources Inc. v. U.S. EPA*, No. 07-9506 (10th Cir. 2009). In that decision, the majority held that the Church Rock Chapter is a "dependent Indian community" under 18 U.S.C. §1151(b).

The panel's decision is notable for two reasons. First, the majority rightly refused to disturb 10th Circuit precedent that requires a court to define a "community of reference" to land in question before applying the *Venetie* test. Defining the community of reference frames and contextualizes the area where a parcel of land lies and avoids artificially fragmenting living communities. That the majority's interpretation of 18 U.S.C. § 1151(b) refused to eliminate the word "community" from the statute's plain language preserving Congress's intent to avoid jurisdictional balkanization.

Second, although the panel expressly refused to address the question of whether its decision would give the Navajo Nation regulatory authority over any mining operations on Section 8, its decision leaves the door open for the Navajo Nation to regulate uranium operations in the future. *See*, slip op. at 29-30, n. 17. More interestingly, it may also provide a way for the Navajo Nation to apply its uranium mining and processing ban.

Perhaps more interesting than the majority's decision is the dissent, because it raises issues that counter the designation of Section 8 as a dependent Indian community that are likely to be raised in any future *en banc* and Supreme Court review. Judge Frizzell disagreed with the majority's decision on two primary bases.

First, while acknowledging that the panel could not avoid the community of reference test, Judge Frizzell would have applied it in what seems to be an arbitrary way. Instead of applying the community of reference test to the Church Rock Chapter as a whole, Judge Frizzell would have divided the Chapter into two areas – the area around the Chapter house and the remainder of the land within the Chapter's boundaries. Dissent slip op. at 3-4. Judge Frizzell reasoned that since only the area around the Chapter house had the characteristics of a "modern" community, using the entire Chapter as the community of reference has no basis in law. *Id.*

Judge Frizzell's rationale, however, fails to understand the nature of Navajo communities and discounts the nature of rural communities nationwide. The dissent describes the area where Section 8 is located as consisting of "rugged mountain ranges, canyons, and highlands incapable of sustaining community". *Id.* at 3. However, the area around Section 8 consists of numerous Navajo family camps who share the common bonds of language, culture and livelihood, in this case ranching and subsistence agriculture. The dissent's idea of community ignores the reality of what is actually happening in Church Rock. Moreover, Judge Frizzell's view of what constitutes a community would marginalize rural communities, both Indian and non-Indian, throughout the country.

Second, the dissent expresses concern that the majority's "unprecedented" decision holding that non-Indian fee land outside the reservation is Indian Country will result in tribes annexing, unchecked, non-tribal lands throughout the West. *Id.* at 6-7. Judge Frizzell ignores both the reality of tribal power and relevant case law limiting that power.

Judge Frizzell assumes that the Navajo Nation would be able to unilaterally designate Chapter boundaries, without checks from either Congress or the Federal judiciary. *Id.* Anyone who has ever grappled with a municipal annexation and its invariable attendant litigation, however, would realize immediately that attributing this kind of unchecked power to an Indian tribe is unrealistic. Moreover, should a tribe seek to expand its political boundaries, it could simply apply to have a particular tract of land placed in trust, which requires application to the U.S. Bureau of Indian Affairs and notification by BIA to jurisdictions having regulatory jurisdiction over the acquired land, such as state and local governments. 25 C.F.R. §§151.10 and 151.11(d). Additionally, it seems unlikely that Congress would remain unaware of any "land grab" by a tribe and refuse to exercise its plenary power under those circumstances. Finally, given the recent trends in Federal Indian law, it would be naïve to assume a Federal court would allow unfettered tribal annexation of non-Indian land. *See, e.g., Montana v. U.S.*, 450 U.S. 544 (1981) (determining tribes' inherent sovereign power do not extend to non-member activities); *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998) (limiting Alaska native village land base and jurisdiction); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) (limiting Navajo Nation taxation authority over non-Indian business on fee land surrounded by reservation); *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S.Ct. 2709 (2008) (tribal court lacked jurisdiction to adjudicate discrimination claim between tribal members and a non-Indian corporation conducting activity on fee land within a reservation).

At its core, *HRI v. EPA* represents the clash of philosophies regarding how Indian tribes are to be treated that have been competing since nearly the beginning of Federal Indian jurisprudence. The majority opinion represents, at least in part, the more progressive and enlightened philosophy that tribes and their subdivisions must be acknowledged as distinct communities with distinct needs and distinct political power. The dissent, on the other hand, represents the more traditional European colonialist view that our system of government cannot accommodate tribal sovereigns and Indian tribes as distinct cultural and political entities must be assimilated into the "dominant" culture, as expressed in an unwillingness to countenance tribal regulation of non-Indian private property. Only time will tell which view will ultimately prevail, both in the 10th Circuit and in the society at large.

About the Author:

Eric Jantz has been a staff attorney with the New Mexico Environmental Law Center since 2001. He practices in the areas of energy resource development and environmental justice. His opinions are his own and do not reflect those of the State Bar of New Mexico or the Indian Law Section.

INDIAN COUNTRY: COURTS SPLIT ON TEST AND OUTCOME

The community of reference analysis creates complication and uncertainty

by Brian Nichols

Overview

In two recent decisions, state and federal courts in New Mexico have developed different tests to determine whether land is “Indian country.” Predictably, the two tests have led to different results. In the first case, the New Mexico Supreme Court determined that land adjacent to two New Mexico Indian Pueblos was not Indian country. *State v. Quintana*.¹ By contrast, the Tenth Circuit Court of Appeals, which includes New Mexico, determined that land within the Navajo Church Rock Chapter but six miles from the Chapter House² was Indian country. *HRI Inc. v. EPA*.³



The determination is important for Native Americans and businesses considering development or commerce near Indian reservations or Pueblos. Whether land is Indian country can play a critical role in determining whether state authorities or federal and tribal authorities have jurisdiction over the land. The test for Indian country is particularly important for those considering business in New Mexico,⁴ as it is home to 19 Pueblos and 3 reservations. This article explains the concept of Indian country, its consequence for jurisdiction, the split between federal and state courts and the outcomes in *Quintana* and *HRI*.

Indian Country: Its Importance

In 1948 Congress provided the modern definition of Indian country,⁵ which expressly defined the criminal jurisdiction of the federal and state governments.⁶ Within Indian country the federal government, and to some extent tribal nations, have jurisdiction over crimes. Outside of Indian country, the state has jurisdiction.

Since 1948, Congress has sometimes relied on the definition to expressly allocate civil regulatory jurisdiction. For instance, in the *H.R.I.* case, if the land in question is Indian country, then the U.S. Environmental Protection Agency has authority to implement the Safe Drinking Water Act. If the land is not Indian country, then the New Mexico Environment Department has such authority.

In addition, courts have sometimes relied on the definition of Indian country to determine civil jurisdiction among federal, state and tribal governments when Congress has not expressly allocated jurisdiction.⁷ Whether the definition of Indian country should be relied upon to determine jurisdiction, in the absence of Congressional action, is debated. The United States Supreme Court has provided inconsistent indications on this issue.⁸

Finally, tribal nations have enacted similar definitions to assert jurisdiction. For instance, the Navajo Nation asserts its jurisdiction over “Navajo Indian Country.”⁹ Without expressly incorporating the federal statute, the Navajo Code includes the same types of land, including “dependent Navajo Indian communities.” The Code goes on to include all land within the Eastern Navajo Agency,¹⁰ an area within which federal agencies provide services to Navajo members. But, as a federal matter, jurisdiction over this land is contested. For instance, the land at issue in *HRI* is within the Eastern Navajo Agency. While the Navajo Nation’s Code is not binding on state and federal courts, it expresses the Nation’s determination of its authority.

Indian Country: Its Definition

Congress’ definition of Indian country has three components: reservations, allotments and dependent Indian communities.¹¹ The first two are susceptible to fairly easy determination. Reservations are those areas which the United States has set aside for permanent residence of Native Americans. Such lands can usually be determined by the treaty, statute or executive order which created the reservation or added land to it.¹² Allotments are those lands owned by individual Native Americans which may not be transferred without the consent of the United States. These lands may be determined by title documents.¹³

The third component of Indian country, dependent Indian communities, is a complex and ambiguous term. Congress adopted the phrase from Supreme Court cases to encompass New Mexico Indian Pueblos and other areas where the federal government has

criminal jurisdiction, even though the land is not a reservation or allotment.¹⁴ Although the historical and cultural reasons are too complex to develop here, Pueblos are not reservations or allotments and within several Pueblos is land owned by non-Indians.¹⁵

Although not intended to be a “catch-all,” the statute did not include a definition of dependent Indian communities and the term came to be used, at least outside of courts, for non-Indian land outside of, but near, a reservation or Pueblo. In addition to Pueblos, one area has particular importance for New Mexico, the “Navajo checkerboard.” In sum, significant land in northwest New Mexico was established as a reservation and then removed from reservation status in the early 20th Century. Additionally, alternating sections of public land were granted to railroads in the mid-19th Century.¹⁶ As a result, in a large area of northwest New Mexico jurisdiction is uncertain and contested.

In sum, whether land is a dependent Indian community has particular importance in New Mexico, given the presence of many Pueblos and the Navajo checkerboard. It is thus unfortunate that the New Mexico Supreme Court and the Tenth Circuit have developed different tests to determine whether land is a “dependent Indian community,” and therefore Indian country.

The Tests Used by Federal and State Courts

The United States Supreme Court set forth a test for determining whether lands are a “dependent Indian communities” in a case originating in Alaska. *Alaska v. Native Village of Venetie Tribal Government*.¹⁷ Under *Venetie*, land is a dependent Indian community, and thus Indian country, if it was “set aside by the Federal Government for of the Indians as Indian land [and is] under federal superintendence.”¹⁸

In 2002, the New Mexico Supreme Court determined it would apply this test without embellishment.¹⁹ That is, New Mexico looks only at the title to the land on which an act occurred or will occur and determines whether this land was set aside for use by Indians and is supervised by the federal government. However, the Tenth Circuit Court of Appeals applies the *Venetie* test after determining a “community of reference.”²⁰ The concept of the community of reference was developed before the *Venetie* case,²¹ and used a multi-factor test similar to one developed in the Ninth Circuit.²² In *Venetie*, the Supreme Court rejected the Ninth Circuit’s test, but the Tenth Circuit subsequently determined that its test survived *Venetie*.²³

As applied this year in *HRI*, the Tenth Circuit follows a “three-step procedure” to determine the community of reference. First, it identifies “the geographical definition of the area proposed as a community.” Second, it analyzes “the status of the area in question as a community.” Third, it considers “that locale or ‘community of reference’ within the context of the surrounding area.”²⁴

In essence, the “community of reference” allows courts to look at a broader area to determine whether that area meets the *Venetie* test of set-aside and superintendence. It is an imprecise standard which

provides very little guidance to businesses, Native Americans and others as to the jurisdictional status of land. The test may be applied in a manner for a court to reach the outcome it prefers. The factors considered in a “community of reference” analysis appear to be reasonable for Congress to employ in *determining* whether an area should be set aside for use by Native Americans, but poor ones when a court is *recognizing* whether Congress has done so.

The Outcomes in *Quintana* and *H.R.I.*

In *Quintana*, the New Mexico Supreme Court determined that land adjacent to two Pueblos was not a dependent Indian community, and thus not Indian country.

The case involved an accident which occurred on New Mexico State Road 16. The road is on land owned by the federal government, specifically the United States Forest Service, which granted an easement allowing the New Mexico Highway Department to build the road. The road is bordered on one side by Santo Domingo Pueblo and by Cochiti Pueblo on the other. An accident occurred on the road and the State of New Mexico sought to bring criminal charges against a driver.²⁵

The New Mexico Supreme Court determined that the federal government had never “set aside” the land upon which State Road 16 runs for use by Native Americans as Indian land. Notably, a “set-aside” would be indicated by Congressional or executive action, which would provide helpful guidance to businesses and others as to the jurisdictional status of land without a lawsuit.²⁶

In *HRI* the area at issue is 160 acres of un-occupied land (“Section 8”). It is owned by HRI and was previously owned by another corporation. It is about 6 miles from the nearest community, the Navajo community of Church Rock. State or county agencies provide services to the land. As referenced above, Section 8 is part of the Navajo checkerboard. In about 1908, Section 8 was part of land set aside as a reservation but reservation status was soon terminated. The land is not currently within a reservation.²⁷

The Tenth Circuit determined that the Navajo Chapter of Church Rock was the appropriate community of reference. The Chapter’s geographic area includes Section 8, though the Chapter does not provide services to Section 8 and does not own it. The town of Church Rock is six miles from Section 8. The area is populated predominately by Navajo people, who share cultural identity and economic pursuits.²⁸ For these reasons, the Navajo Chapter was selected as the community of reference.

Having shifted focus from the land which HRI owns, and upon which its regulated activities would occur, to the Church Rock Chapter, the Tenth Circuit then applied the *Venetie* test. Because the federal government held “odd-numbered parcels” of land in the area in trust for Navajos, the Tenth Circuit determined that the set-aside requirement was met.²⁹ In contrast to the New Mexico Supreme Court, then, a person must look to the title of land in the area of the land in question to determine whether the latter has been set aside.

As to federal superintendence, the Tenth Circuit noted that the federal government owns significant land in the area, provides services to Navajos in the Church Rock Chapter, and protects various natural and financial resources for the Navajos in Church Rock. Because the federal government supervises land near Section 8, the Tenth Circuit decided that it supervises Section 8.³⁰

Conclusion

The community of reference analysis is problematic. Employing it, a court may apply the *Venetie* test to land, and people, miles away from the land at issue. By creating confusion about what governmental authorities have jurisdiction over land, it creates uncertainty, delay and expense. It is an analysis more appropriate to decide whether land should be set aside for use by Native Americans, rather than to determine if Congress has done so.

About the Author:

Brian Nichols' practice with Modrall Sperling is primarily litigation, with focuses on natural resources and Indian law. He also consults with businesses doing or considering commerce on the Navajo Nation. He is licensed on the Navajo Nation and the states of New Mexico and Arizona. Prior to joining Modrall, he clerked for the Honorable Pamela B. Minzner of the New Mexico Supreme Court and the Honorable Fredrick J. Martone of the United States District Court for the District of Arizona. His opinions are his own and do not reflect those of the State Bar of New Mexico or the Indian Law Section.

ENDNOTES

¹ 2008-NMSC-012, 143 N.M. 535, 178 P.3d 820.

² A Navajo Chapter is a local unit of government, somewhat analogous to a county or township. A Chapter House is a building which serves as a meeting place and other functions. While some Chapter Houses are remote, the Church Rock Chapter House is within what is essentially a town.

³ 562 F.3d 1249, No. 07-9506 (10th Cir. 2009) ("*HRI 2*").

⁴ For historical reasons beyond the scope of this article, the type of land included within the definition of Indian country can differ substantially between states.

⁵ 18 U.S.C. § 1151, 62 Stat. 683.

⁶ Cohen's Handbook of Federal Indian Law §§ 1.06, 3.04[1] (2005 ed. Lexis Nexis) ("Cohen's 2005").

⁷ For instance, the New Mexico Supreme Court relies on the federal statute. See *Tempest Recovery Services, Inc. v. Belone*, 2003-NMSC-019, 134 N.M. 133, 74 P.3d 67.

⁸ *Compare Atkinson Trading Co., Inc. v. Shirley*, 52 U.S. 645, 651 (2001) (indicat-

ing that the definition of Indian country does not apply to civil jurisdiction absent "statutorily conferred power"), with *DeCouteau v. Dist. Country Crt.*, 420 U.S. 425, 427 n.2 (1975) (indicating that the definition of Indian country "generally applies to questions of civil jurisdiction").

⁹ 7 N.N.C. §§ 253, 254.

¹⁰ The definition in the Navajo Nation Code includes reservations, dependant Navajo Indian communities and lands allotted to individual Navajos, which tracks the federal statute. The Code also includes fee land owned by the Nation, all land within the Eastern Agency and all land held in trust for or leased to the Nation, which goes beyond the federal statute. 7 N.N.C. § 254(A).

¹¹ 18 U.S.C. § 1151.

¹² Cohen's 2005 § 3.04[2][c][ii].

¹³ Cohen's 2005 § 3.04[2][c][iv].

¹⁴ Cohen's 2005 § 3.04[2][c][iii].

¹⁵ See Cohen's Handbook of Federal Law at 383-400 (1942 ed. U.S. GPO) (reprinted 1971 UNM Press).

¹⁶ *HRI 2*, Slip op. at 4-6.

¹⁷ 522 U.S. 520 (1998).

¹⁸ *Venetie*, 522 U.S. at 527.

¹⁹ *State v. Frank*, 2002-NMSC-026, ¶¶ 21-22, 132 N.M. 544, 52 P.3d 404; see also *State v. Romero*, 2006-NMSC-039, 140 N.M. 299, 142 P.3d 887.

²⁰ *United States v. Arrieta*, 436 F.3d 1246, 1250 (10th Cir. 2006); *HRI, Inc. v. EPA*, 198 F.3d 1224 (10th Cir. 2000).

²¹ See *Pittsburgh & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1544 (10th Cir. 1995).

²² See *Alaska v. Native Village of Venetie Tribal Gov't*, 101 F.3d 1996 (9th Cir. 1996) reversed by *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998).

²³ See *HRI 2*, Slip op. at 19-21 (discussing a previous appeal of the same matter, *HRI, Inc. v. EPA*, 198 F.3d 1224, 1248-49 (10th Cir. 2000)).

²⁴ *HRI 2*, Slip op. at 21-22.

²⁵ *Quintana*, 2008-NMSC-012, ¶¶ 1-2.

²⁶ *Quintana*, 2008-NMSC-012, ¶ 7.

²⁷ *HRI 2*, Slip op. at 4-6.

²⁸ *HRI 2*, Slip op. at 23-27.

²⁹ *HRI 2*, Slip op. at 31-32.

³⁰ *HRI 2*, Slip op. at 32-34.

The articles contained in this newsletter solely reflect the views of its authors, and should not be regarded as legal advice. The articles are intended for general information and do not necessarily reflect the opinions and beliefs of the State Bar of New Mexico or the Indian Law Section.

SAVE THE DATE

Section Summer Mixer
Friday, July 31, 2009
St. Clair Winery & Bistro
6:00 – 8:30 p.m.

Please join the Indian Law Section for a Summer Mixer at St. Clair Winery & Bistro, 901 Rio Grande Blvd. NW, Albuquerque, on Friday July 31, 2009. Light appetizers and a cash bar will be available. This social event will provide an opportunity for new and existing members of the Section to gather in an informal setting to relax, get acquainted, and catch up with other attorneys that practice Indian law.

Section members and new bar members are free. Non-section members can join the Section for \$20. All other guests can join in on the fun for \$20. All mixer attendees will be eligible for door prizes to be given away at the event.

If you have any questions, please contact Georgene Louis at georgenelouis@yahoo.com.



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