INDIAN COUNTRY: COURTS SPLIT ON TEST AND OUTCOME

The community of reference analysis creates complication and uncertainty

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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 House[2] 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

[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").

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

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[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) (indicating 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, dependent 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].

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 a parcel of land is a "dependent Indian community" 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 the use 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

[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] *H.R.I.*, 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).

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*.

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."[23]

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.[24]

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.[25]

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[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] *HRI 2,* Slip op. at 21-22.
[24] *Quintana*, 2008-NMSC-012, ¶¶ 1-2.
[25] *Quintana*, 2008-NMSC-012, ¶ 7.

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.[26]

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.[27] 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.[28] 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.[29]

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.

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[26] *HRI 2*, Slip op. at 4-6.
[27] *HRI 2*, Slip op. at 23-27.
[28] *HRI 2*, Slip op. at 31-32.
[29] *HRI 2*, Slip op. at 32-34.