

Tenth Circuit Addresses "Indian Country"
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The recent decision in HRI, Inc. v. Environmental Protection Agency, 198 F.3d 1224 (10th Cir. 2000), once again illustrates the jurisdictional struggles and attendant regulatory uncertainty for sources located within "Indian country." In HRI, the Tenth Circuit held that there is a "legitimate dispute" whether a HRI's fee owned land located east of the Navajo Reservation, but within a checkerboarded area of mixed Indian and non-Indian lands, falls within a dependent Indian community. Because the court determined that a "legitimate dispute" exists on that question, the court ruled that EPA and not the New Mexico Environment Department ("NMED") has jurisdiction over underground injection control activities on that property. In reaching that conclusion, the court made clear that a determination of the "proper community of reference" is still the first step in dependent Indian community analysis, at least in the Tenth Circuit.

A. Statutory Framework:

The federal Safe Drinking Water Act ("SDWA" or the "Act") establishes overall minimum drinking water protection standards for the nation and provides for delegation of specific regulation and enforcement authority to states and Indian tribes. The SDWA directs EPA to establish minimum requirements for control of underground injection processes to protect sources of drinking water. The Act further provides for state primary enforcement of underground injection control ("UIC") programs upon a showing by the state that its program meets the requirements of the Act. For states that do not have a UIC program, or whose program has been disapproved by the EPA, the EPA is required to prescribe federal UIC requirements. The Act also provides that until an Indian tribe assumes primary responsibility for UIC programs, the "currently applicable underground injection control program shall continue to apply," and if such a program does not exist, EPA shall prescribe one.

B. Factual Background:

Hydro Resources, Inc.'s ("HRI"), a non-Indian corporation, proposes to operate an in situ leach mining operation on the Church Rock Mine Site in northwestern New Mexico within an area commonly known as the "checkerboard" because of its pattern of mixed Indian and non-Indian land title. HRI's proposed site consists of two parcels. The first parcel contains approximately 160 acres located in the southeast portion of Section 8, Township 16 North, Range 16 West, owned by HRI in fee simple (the "Section 8 property"). The second parcel is in Section 17, Township 16 North, Range 16 West, south of and contiguous to the Section 8 property ("Section 17 property"). The Section 17 property is a split estate. The United States owns the surface estate in trust for the Navajo

Nation. HRI owns the mineral estate together with certain surface use rights under a 1929 Reservation and a 1959 Surface Owners Agreement between the Navajo Nation and one of HRI's predecessors in interest.

Both the Section 8 and the Section 17 property are located within an area referred to as the "EO709/744 area" because of that area's prior establishment as an Indian reservation under two Executive Orders bearing those numbers. The lands encompassed within the EO709/744 area were restored to the public domain by two subsequent Executive Orders in 1908 and 1911.

In 1989, NMED approved a "discharge plan" for underground injection by HRI on the Section 8 property and applied for an aquifer exemption for the underlying aquifer. On June 21, 1989, EPA approved NMED's request for an aquifer exemption for HRI's Section 8 mine site. Subsequently, in April, 1992, HRI sought an extension of the discharge permit to the Section 17 property and NMED applied for an additional aquifer exemption for that property. Following a hearing, the director of the Water Management Division of EPA Region 6 issued a letter declining to approve the Section 17 aquifer exemption on the ground that Section 17 is "Indian land" under 40 C.F.R. § 144.3. NMED nonetheless continued to process HRI's application. The Navajo Nation moved to dismiss that proceeding for lack of jurisdiction on the ground that the Section 17 property is Indian country. Following a hearing, NMED issued a ruling in mid-1994 that it had authority to regulate the Section 17 property and that that property was not Indian country.

In 1995, NMED again requested from EPA an extension of the Section 8 property aquifer exemption to the Section 17 property. Region 6 of EPA again rejected that exemption and declared that HRI must obtain a federal UIC permit prior to obtaining an aquifer exemption. That letter directed HRI and NMED to submit applications to EPA Region 9 for an aquifer exemption under the federal UIC program.

Following receipt of that letter, NMED entered into a lengthy process with EPA Region 9 and the Navajo Nation to resolve the jurisdictional dispute through "joint permitting" of the Section 17 property. Those negotiations resulted in a July 14, 1997 letter from EPA which formed the basis for the appeal to the Tenth Circuit. In that letter, the EPA stated that it "believes that Section 17 clearly is Indian country," but also "treat(s) the status of Section 17 as in dispute" requiring federal permitting but not requiring NMED to concede jurisdiction. Also, based on EPA's determination that "the Navajo Nation has presented substantial arguments to support its claim that Section 8 is within Indian country," the letter indicates that EPA would treat Section 8 as in dispute under the dispute rules of the Indian lands UIC rule preamble. HRI and NMED treated that letter as a final agency action and initiated an appeal to the Tenth Circuit challenging the EPA's decision to implement the direct federal UIC program on both the Section 8 and the Section 17 property.

C. Tenth Circuit's Analysis:

With respect to the Section 8 property, HRI argued on appeal that the EPA's assertion of jurisdiction over that private fee land violated the SDWA provision that "until an Indian tribe assumes primary enforcement responsibility, the currently applicable underground injection control program shall continue to apply." 42 U.S.C. § 300h-1(e). HRI argued that because EPA recognized New Mexico's jurisdiction over the Section 8 property by granting the 1989 aquifer exemption, the NMED program was the "currently applicable" UIC program and thus should continue to apply until a tribe assumes primary responsibility. The Tenth Circuit rejected that argument stating that the analysis "mischaracterizes the scope of EPA's authority under the SDWA. EPA does not have the power to change the Indian country status of land - that is a status conferred by Congress. If Section 8 is indeed Indian country, then New Mexico's program could not extend to it in the first instance and cannot be 'currently applicable' within the meaning of the statute. An aquifer exemption by EPA cannot change the Congressionally-defined jurisdictional status of the land."

The Tenth Circuit also rejected the argument that, by subjecting Sections 8 and 17 to the direct federal implementation UIC program, EPA violated the terms of the preamble to its Indian lands UIC regulations because the Section 8 and 17 properties were "later adjudged" to be non-Indian land. According to the Tenth Circuit, because EPA was not a party the prior state court proceedings concerning the status of the Section 8 and 17 properties and because EPA "as an agency of the federal government, has an independent duty to protect Indian interests, . . . the agency did not err in finding, despite the state adjudications, a legitimate dispute as to the jurisdictional status of the lands in question." According to the Tenth Circuit, the "EPA's decision . . . implicates the core federal trust responsibilities of administering - and safeguarding - Indian lands." While there was no allegation before the Tenth Circuit of a breach of a specific statutory, treaty, or trust obligation, the court nonetheless affirmed "the federal executive is to consider its strict fiduciary obligation when interpreting regulations that directly affect its 'administration of Indian lands.'" According to the court, the trust duty "is most relevant . . . when an agency decision necessarily incorporates a determination as to whether certain lands are within the scope of tribal territorial sovereignty."

Next, the Tenth Circuit considered whether EPA committed reversible error in finding a legitimate dispute as to the Indian country status of the Section 8 property and in finding Section 17 to be Indian country. With respect to the Section 8 property, the Tenth Circuit emphasized that it did not "determine definitively whether Section 8 is Indian country because the question is not ripe for judicial review." The court, however, did "conclude that there is "a legitimate dispute" following Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 (1998), as to "whether Section 8 falls within a 'dependent Indian community' under 18 U.S.C. § 1151(b)." Specifically, the court believed that there are grounds for dispute as to "what constitutes the proper 'community of reference' in determining the Indian country status of Section 8?" While the court acknowledged that the Supreme Court's decision in Venetie "may require some modification" of the Tenth Circuit's multi-step dependent Indian community test in Pittsburg & Midway Coal Co. v. Watchman, 52 F.3d 1531 (10th Cir. 1995), the court concluded that "nothing in Venetie speaks to the propriety of the first element of that test - determination of the proper

community of reference." The court believed that because Venetie did not speak directly to the issue, Watchman "continues to require a 'community of reference' analysis prior to determining whether land qualifies as a dependent Indian community under the set-aside and supervision requirements of 18 U.S.C. § 1151(b)."

With respect to the Section 17 property, the court determined that that property is Indian country under 18 U.S.C. § 1151(a) because that property was purchased with funds from a 1928 Act of Congress appropriating funds for the "purchase of additional land and water rights for the use and benefit of Indians of the Navajo Tribe" and because there was "uncontested evidence in the record that the Section 17 land is supervised by the Bureau of Indian Affairs in the same manner as lands within the formal Navajo Reservation."