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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

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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

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Abstract: When Congress set aside reservations as permanent homelands for American Indian people, it intended that the reservations remain "livable environments." When resource conflicts arise in "checkerboard" areas outside Indian reservations—where land ownership alternates between a tribe, state, the federal government and private, non-Indian landowners—disputes over regulatory jurisdiction and environmental protection intensify. Two recent Tenth Circuit opinions determining the next generation of uranium mining in the checkerboard area of the Navajo Nation, depart from the intent of environmental laws and fail to uphold federal agencies' trust responsibilities to the Tribe. These cases illustrate the legal vulnerabilities tribal communities in checkerboard areas face through the loss of their environmental and public health and the potentially massive cost of remediation. This comment urges the federal government to strike a more equitable balance of authority, risk and cost by retaining environmental regulatory jurisdiction in checkerboard areas and by writing Indian Trust Impact Statements that will help ensure that the federal government fulfills its trust responsibility to tribes.

Today, I am a man who has lost his health, his family and his ancestral way of life because of uranium.[1]

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1. *The Health and Environmental Impacts of Uranium Contamination in the Navajo Nation: Hearing Before the H. Comm. Oversight and Gov't Reform*, 110th Cong. (2007) [hereinafter *Cong. Hearing on Uranium*] (statement of Ray Manygoats, Navajo tribal member).

I. INTRODUCTION

Natural resource conflicts scar the history of Indian country.[2] The focus of these conflicts has evolved with changing modes of economic growth, from furs, to farmland, to gold, to energy resources. Of existing energy resources in the United States, four percent of onshore oil and gas reserves, thirty percent of Western coal, and forty percent of uranium deposits lie beneath lands in Indian country.[3] For some companies, the mineral wealth they own in Indian country represents the companies' "intrinsic value" to investors, and profits from those minerals depend upon companies' uncompromised access to them.[4]

The United States government and American Indian tribes, however, value these lands differently. Congress has recognized tribal lands as permanent homelands for American Indians,[5] and courts have recognized Congress' intent for these homelands to provide "livable environments."[6] American Indians' ancestral, spiritual and kinship ties continue to bind them to their land.[7] Thus, maintaining livable environments is

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2. Indian country generally refers to areas within which a tribe's laws and customs and federal laws relating to tribes and tribal members govern. For the legal definition of Indian country discussed in this comment, see 18 U.S.C. § 1151 (2006).

3. Robert T. Anderson et al., FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 965 (2005).

4. Hydro Resources, Incorporated (HRI), a subsidiary of Texas-based Uranium Resources, Inc. (URI), described its uranium holdings to investors: "URI's intrinsic value lies in the 183,000 acres and 101.4 million pounds of in-place mineralized uranium holdings in New Mexico." Company News: Uranium Resources, MINING, PEOPLE AND THE ENVIRONMENT (Aug. 30, 2010) http://www.mpe-magazine.com/company-news/uranium-resources. *See also* URANIUM RESOURCES, INC., http://www.uraniumresources.com (last visited Jan. 27, 2011).

5. Courts have recognized tribes' water rights as a necessary corollary to the establishment of Indian reservations as permanent homelands for tribes for over a century. *See, e.g.,* Winters v. United States, 207 U.S. 564, 577 (1908) (holding that the Fort Belknap Reservation was reserved as a "permanent home and abiding place of the Gros Ventre and Assiniboine" tribes and that the tribes' rights to the Milk River "necessarily continued through the years."); United States v. Adair, 723 F.2d 1394, 1414 (9th Cir. 1983) (same, *citing* Winters); *In re* the Gen. Adjudication of All the Rights to Use Water in the Gila River Sys. and Source (*In re* Adjudication of Gila River Sys.), 35 P.3d 68, 72 (Ariz. 2001) (same, *citing* Winters).

6. "We agree with the Supreme Court that the essential purpose of Indian reservations is to provide Native American people with a "permanent home and abiding place," that is, a "livable" environment." *In re* Adjudication of Gila River Sys, 35 P.3d at 72–74 (*citing* Arizona v. California, 373 U.S. 546, 599 (1963)) (internal citation omitted).

7. Our future is tied to the land. No matter how far we advance as a society, that

essential to American Indians' vibrant future.[8]

With continued global economic growth dependent on a steady supply of energy resources, resource extraction companies and tribes will be inextricably linked for the foreseeable future. Federal courts will continue to face the challenge of resolving resource conflicts in Indian country. In resolving these conflicts, courts are faced with the questions: What constitutes Indian country? And, which government—tribal, state or federal—has authority to approve resource development projects there? Courts have dealt with resource conflicts on reservations for many years,[9] but when these conflicts arise in "checkerboard" areas surrounding reservations—areas where land ownership alternates between tribal, state and federal governments—jurisdictional uncertainty complicates regulatory authority.[10] Such jurisdictional confusion intensifies resource conflicts and increases antagonism between tribes, states, the federal government and private companies.[11]

Two recent Tenth Circuit decisions, *Hydro Resources Inc. v. Environmental Protection Agency* (*HRI III*)[12] and *Morris v. Nuclear Regulatory Commission* (*Morris*),[13] address uranium

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> single fact persists and in some ways constrains our dreams for the future. . . . The land, they say, embodies a continuing legacy of natural wealth . . . .True environmental self-determination, however, depends upon the ability of Indian nations to preserve their landbases and engage in economic development according to their own policies and values.

Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 225, 330 (1996).

8. *See id*. at 286 n.356 (1996) (noting that Indian communities "cannot afford a catastrophe such as Love Canal, where the only means of protecting the population from hazardous conditions is removal").

9. *See, e.g*., Montana v. United States, 450 U.S. 544 (1981) (denying the Crow Tribe the right to regulate non-Indian hunting and fishing on non-Indian fee lands on the Crow Reservation).

10. *See, e.g*., South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998) (denying Yankton Sioux Tribe the right to regulate solid waste landfill site based on the determination that the site was no longer within the exterior boundaries of the reservation and that South Dakota had acquired regulatory jurisdiction over the site). *See generally* Judith V. Royster, *Of Surplus Lands and Landfills: The Case of the Yankton Sioux*, 43 S.D. L. REV. 283 (1998) for further discussion of this case.

11. *See, e.g*., *Yankton Sioux Tribe*, 522 U.S. at 329. *See generally* Royster, *supra* note 10.

12. Hydro Res., Inc. v. United States Envtl. Prot. Agency (*HRI III*), 608 F.3d 1131 (10th Cir. 2010) (en banc 6-5 decision).

13. Morris v. United States Nuclear Regulatory Comm'n (*Morris*), 598 F.3d 677 (10th Cir. 2010), *cert. denied*, U.S. Nov. 15 (2010) (Mem).

mining in the checkerboard region adjacent to the Navajo Nation reservation and exemplify a natural resource conflict amplified by jurisdictional confusion. This comment argues that the courts in *HRI III* and *Morris* employ a backward-looking approach to determine tribal jurisdiction, ignore the federal government's trust responsibility to tribes and undermine the text and purpose of environmental statutes. In doing so, the courts write a new, troubling chapter in the Navajo Nation's long history with uranium mining. To ensure that tribal lands offer "livable environments" for generations to come, consistent with congressional intent, this comment contends that federal agencies must (1) retain regulatory authority to ensure that tribes' natural resources and their communities' public health are adequately protected, and must (2) write "Indian Trust Impact Statements" to identify and mitigate potential harm to tribes' natural resources.

Part II of this comment presents and critiques the Tenth Circuit's approach in *HRI III* and *Morris* to jurisdictional disputes, environmental protection under the Safe Drinking Water Act (SDWA) and the National Environmental Policy Act (NEPA) and public health protection under the Atomic Energy Act (AEA). Part III examines the effect these decisions have on a Navajo community, on its environment and on democratic accountability to the tribal community. Part IV recommends first, that the federal government retain environmental regulatory authority over checkerboard areas; and second, that the federal government require agencies to write "Indian Trust Impact Statements" to clarify when a tribe's trust assets will be affected and how the trust assets will be protected. In these ways, the federal government can avoid or defuse natural resource conflicts in checkerboard areas, fulfill its trust responsibility to tribes and ensure that federal environmental laws protect public health and the environment as Congress intended.

II. THE LEGAL AND LOCAL HISTORIES OF *HRI III* AND *MORRIS*

Both *HRI III* and *Morris* involve Hydro Resources Incorporated (HRI), the Navajo Nation and its members, federal agencies and the State of New Mexico. As will be discussed in Part III.C, *infra*, the cases also raise crucial issues for similarly situated tribes and tribal communities across the country.

HRI is a groundwater development company that mines uranium through the in situ leach (ISL) uranium mining process[14] and is a subsidiary of Texas-based, Uranium Resources, Inc. (URI).[15] HRI owns 183,000 acres of land across seven sites in northwestern New Mexico on the boarder of the Navajo Nation reservation.[16] This area is home to the largest known deposit of uranium in the country and one of the largest deposits of uranium in the world.[17] HRI's seven sites contain 101.4 million pounds of mineralized uranium, of which its site in the Church Rock Chapter of the Navajo Nation holds more uranium than any other site.[18] Specifically, HRI's Church Rock site consists of two adjacent parcels of land in Sections 8 and 17, which are surrounded by lands predominantly owned by tribal members, the tribe itself or the federal government in trust for tribal members.[19]

The Navajo Nation occupies the largest reservation in the United States, spanning a 27,000 square mile area from southeastern Utah to northeastern Arizona to northwestern New Mexico.[20] The Navajo Nation is home to more than

14. *Id.* at 682 (explaining that in situ leach uranium mining is a recently developed uranium extraction method which requires injecting lixiviant, groundwater charged with oxygen and bicarbonate, into a well field and flushing out the uranium ore). According to the U.S. Geological Survey, "the use of these in-situ leach mining techniques at uranium mines is considerably more environmentally benign than traditional mining and milling of uranium ore. Nonetheless, the use of leaching fluids to mine uranium contaminates the groundwater aquifer in and around the region from which the uranium is extracted." J.A. DAVIS, G.P. CURTIS, U.S. GEOLOGICAL SURVEY, NUREG/CR – 6870, CONSIDERATION OF GEOCHEMICAL ISSUES IN GROUNDWATER RESTORATION AT URANIUM IN-SITU LEACH MINING FACILITIES V (2007), *available at* http://pbadupws.nrc.gov/docs/ML0706/ML070600405.pdf. See HRI's website for an overview of the company's capabilities, http://www.hydroresources.com/index.html (last visited Aug. 5, 2011).

15. URANIUM RESOURCES INC., 2010 ANNUAL REPORT 5 (2010).

16. *See generally* URANIUM RESOURCES INC., 2010 ANNUAL REPORT 4, 24–35 (2010), *available at* http://www.uraniumresources.com/projects/newmexico.html for a detailed description of URI'S operations, maps of mining sites, financial status forecast, legal and financial risks and litigation.

17. LETTER TO SHAREHOLDERS, URANIUM RESOURCES INC., 2010 ANNUAL REPORT (2010).

18. URANIUM RESOURCES INC., 2010 ANNUAL REPORT 5 (2010).

19. Hydro Res., Inc. v. United States Envtl. Prot. Agency (*HRI III*), 608 F.3d 1131, 1136–7 (10th Cir. 2010) (en banc 6-5 decision); Morris v. United States Nuclear Regulatory Comm'n (*Morris*), 598 F.3d 677, 683 (10th Cir. 2010), *cert. denied*, U.S. Nov. 15 (2010) (Mem).

20. *See History*, OFFICIAL SITE OF THE NAVAJO NATION, http://www.navajo-nsn.gov/history.htm (last visited Aug. 7, 2011).

175,228 Navajo people[21] for whom the environment remains a defining element of their identity, life ways, spirituality, economy and future wellbeing.[22] The Church Rock Chapter is located in the eastern portion of the Navajo Nation, which is central to Navajos' origins and spirituality.[23] Ninety-eight percent of residents in the Church Rock Chapter are Navajo[24] and eighty-eight percent of the land surrounding HRI's parcel is owned by the Tribe, tribal members or held in trust for the Tribe.[25]

For HRI to mine uranium at the Church Rock site, it needed a permit under the SDWA to allow its injection of fluid contaminants in to the groundwater,[26] as well as a "source materials license"[27] under the AEA to possess, process and transport uranium.[28] As a result of the Tenth Circuit's

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21. U.S. CENSUS, 2000, *Population Living on Selected Reservations, Trust Lands and Alaska Native Areas,* http://www.census.gov/ (search "population of Navajo Nation," then follow hyperlink to *Population Living on Selected Reservations and Trust Lands*) (last visited Aug. 5, 2011).

22. A. The four sacred elements of life, air, light/fire, water and earth/pollen in all their forms must be respected, honored and protected for they sustain life; . . . D. The Diné have a sacred obligation and duty to respect, preserve and protect all that was provided for we were designated as the steward of these relatives through our use of the sacred gifts of language and thinking; and E. Mother Earth and Father Sky is part of us as the Diné and the Diné is part of Mother Earth and Father Sky; . . . F. The rights and freedoms of the people to the use of the sacred elements of life as mentioned above and to the use of the land, natural resources, sacred sites and other living beings must be accomplished through the proper protocol of respect and offering and these practices must be protected and preserved for they are the foundation of our spiritual ceremonies and the Diné life way; and G. It is the duty and responsibility of the Diné to protect and preserve the beauty of the natural world for future generations.

1 Navajo Nation Code, Section 205, Nahasdzáán dóó Yádiłhił Bitsąądęę Beenahaz'áanii-Diné Natural Law (2002) http://www.navajocourts.org/Resolutions/CN-69-02Dine.pdf. *See also* Rebecca Tsosie, *supra* note 7, at 268–302 for a discussion of the intersection of the natural, spiritual, cultural and economic realms as they influence tribal environmental policy in several American Indian communities.

23. PETER IVERSON, DINÉ: A HISTORY OF THE NAVAJOS at 10–11, University of New Mexico Press (2002).

24. *HRI III*, 608 F.3d at 1169 (Ebel, J., dissenting).

25. *Id.* at 1168, 1180. *See* discussion of the physical, social and political make-up of the Church Rock Chapter in Part II.A.3 *infra*.

26. *See* Application for a [Underground Injection Control] permit; authorization by permit, 40 C.F.R. § 144.31 (2006); *see also* Criteria for establishing permitting priorities, 40 C.F.R. § 146.9.

27. Definitions, 42 U.S.C. § 2014(z) (2006) ("The term "source material" means (1) uranium, thorium, or any other material which is determined by the Commission . . . to be source material; or (2) ores . . .").

28. *See* License requirements for transfers, 42 U.S.C. § 2092 (2006); General requirements for issuance of specific licenses, 10 C.F.R. § 40.32 (2006).

decisions in *HRI III* and *Morris*, HRI overcame two major obstacles obstructing its ability to mine uranium at Church Rock. In *HRI III*, the court determined that because HRI's land in Section 8 was not within Indian country, the State of New Mexico, not the federal Environmental Protection Agency (EPA), had authority to permit HRI's activities under the SDWA.[29] In *Morris*, the court upheld the source materials license granted by the Nuclear Regulatory Commission's (NRC) to HRI.[30]

To evaluate the *HRI III* and *Morris* decisions and the alternative outcomes that were available to the Tenth Circuit, it is critical to understand the history of courts' "dependent Indian community" doctrine,[31] land ownership in the Church Rock Chapter and uranium mining involving the Navajo Nation. Following this history, this section analyzes the Tenth Circuit's decisions and motivations for its decisions in *HRI III* and *Morris*.

A. Hydro Resources, Inc. v. United States Environmental Protection Agency (HRI III): *Jurisdiction in Dependent Indian Communities*

In *HRI III,* the court considered which sovereign—the Navajo Nation, the State of New Mexico or the EPA—had the authority under the SDWA to permit HRI's ISL uranium mining project on Section 8 of the Church Rock Chapter of the Navajo Nation.[32] This question turned on whether HRI's land was within a "dependent Indian community" and therefore constituted "Indian country." If Section 8 was Indian country, the land would fall within federal, and potentially tribal, jurisdiction.[33] The court's answer to this question would determine the future of HRI-URI's future in uranium mining,[34]

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29. Hydro Res., Inc. v. United States Envtl. Prot. Agency (*HRI III*), 608 F.3d 1131, 1166 (10th Cir. 2010) (en banc 6-5 decision).

30. Morris v. United States Nuclear Regulatory Comm'n (*Morris*), 598 F.3d 677, 705 (10th Cir. 2010), *cert. denied*, U.S. Nov. 15 (2010) (Mem).

31. Dependent Indian communities are one category of Indian country as defined by 18 U.S.C § 1151(b) and discussed in Part II.A.1–2 *infra.*

32. *HRI III*, 608 F.3d at 1134.

33. *See* Indian Tribes, 40 C.F.R. §§ 145.52, 145.56, 145.58 (2006) (tribes are eligible to apply for primary enforcement of the Underground Injection Control Program within the area of the tribal government's jurisdiction).

34. URI's financial future is precarious. Its 2010 Annual Report warns:

the extent of New Mexico's regulatory authority and the Church Rock community's air and water quality. The evolution of courts' interpretations of "dependent Indian community" was central to the Tenth Circuit's decision that HRI's land was not part of a dependent Indian community. This comment argues that the court's opinion was motivated by an "allotment era" perspective and a preference for administrative expedience.

1. *The Genesis of Dependent Indian Communities*

Indian country defines the area within which a tribe's laws and customs, and federal laws relating to tribes and tribal members generally govern, as distinct from state law.[35] Indian country is most often defined by 18 U.S.C. § 1151,[36] commonly referred to as the "Indian country statute." According to that statute, Indian country is recognized in three areas: reservations,[37] dependent Indian communities,[38] and Indian allotments.[39] The dependent Indian communities portion of the

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> [w]e are not producing uranium at this time, nor do we expect to begin production in the near future unless uranium prices recover to sustained profitable levels. As a result, we currently have no sources of operating cash. If we cannot monetize certain existing Company assets, partner with another Company that has cash resources, . . . or have the ability to access additional sources of private or public capital we may not be able to remain in business . . . We do not have a committed source of financing for the development of our New Mexico Properties, including the Churchrock Property, which is the property we expect to develop first in New Mexico."

URANIUM RESOURCES INC., 2010 ANNUAL REPORT 10–14 (2010).

35. *See, e.g.*, Ex parte Crow Dog, 109 U.S. 556, 571–72 (1883) (federal laws are not applicable to Indian country unless Congress so expressly legislates); Worcester v. Georgia, 31 U.S. 515, 561 (1832) ("The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have not force.").

36. 18 U.S.C. § 1151 is found within the criminal code, however, jurisdiction under the statute can also extend to the civil context. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 208 n.5 (1987).

37. 18 U.S.C. § 1151(a) (2006) ("[t]he term "Indian country" . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including the rights-of-way running through the reservation").

38. *Id.* § 1151(b) ("[t]he term "Indian country" . . . means (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").

39. *Id.* § 1151(c) ("[t]he term "Indian country" . . . means (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same").

statute, 18 U.S.C. § 1151(b), at issue in *HRI III*, codified two Supreme Court cases—*United States v. Sandoval*[40] (recognizing the Santa Clara Pueblo as a dependent Indian community) and *United States v. McGowan*[41] (recognizing the Reno Indian Colony as a dependent Indian community).

In both *Sandoval* and *McGowan*, the Court looked to the purpose of the applicable statute to determine whether Congress had intended to recognize a dependent Indian community. In *Sandoval*, the Court focused on the purpose of a federal liquor law to protect Indian people from non-Indians' exploitive sales to Indian people, and the federal government's treatment of the Pueblo—its provision of agricultural implements, irrigation and education to the people.[42] The Court also found the fact that Pueblo lands were not held in trust by the federal government, but by the people in communal fee simple, did not preclude recognition of the Pueblo as a dependent Indian community.[43] Finally, the Court affirmed Congress' authority to determine Indian country status, as opposed to the courts, and patently rejected the notion that any community would be labeled an Indian tribe, but rather, only "distinctly Indian communities."[44]

In *McGowan*, the Court introduced a rule to determine dependent Indian country status: whether the land had been "validly set apart for the use of the Indians as such, under the superintendence of the government."[45] The majority of the Court's discussion reviews Congress' intent to set aside a homeland for displaced Indian people in Nevada and the federal government's similar treatment of the Indian Colony to other reservations.[46] In addition, the Court approached the issue of Indian country status flexibly: "[w]e must consider 'the changes which have taken place in our situation, with a view of determining from time to time what must be regarded as Indian country,'"[47] and within the context of the federal

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

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

42. *Sandoval*, 231 U.S. at 39–42.

43. *Id.* at 48.

44. *Id.* at 46.

45. *McGowan*, 302 U.S. 535, 539.

46. *Id.*

47. *Id.* at 537 *citing* Ex parte Crow Dog, 109 U.S. 556, 561 (1883).

government's long-standing relationship with Indians.[48]

2. *Courts' Evolving Interpretation of Dependent Indian Communities*

After the enactment of the Indian country statute in 1948, courts recognized a third category of dependent Indian communities (in addition to Pueblos and Indian colonies)—those that exist outside the boundaries of a reservation.[49] Dependent Indian communities located outside the exterior boundaries of reservations are the product of allotment era policy from the 1880s to the 1920s. During that time, Congress allotted land to individual Indians on and off reservations in an effort to assimilate Indians into agricultural society.[50] Subsequently, many allotments were transferred lawfully and unlawfully into non-Indian ownership, resulting in a total loss of 150 million acres of land to Indian tribes.[51] In addition, Congress restored some of the remaining reservation land that had not been allotted to "public domain" and sold it to non-Indian homesteaders.[52]

In jurisdictional disputes since the allotment era, many courts have diminished Indian reservations' original boundaries established by treaties and executive orders.[53] In this way, allotment resulted in "checkerboard" land ownership on and off reservations where land parcels may be owned by the tribe, by individual Indians, by the federal government in trust for the tribe, or by private, non-Indian owners.[54] In cases

48. *Id.* at 539 ("[w]hen we view the facts of this case in the light of the relationship which has long existed between the government and the Indians-and which continues to date-it is not reasonably possible to draw any distinction between this Indian 'colony' and "Indian country.'").

49. Robert T. Anderson et al., *supra* note 3, at 194.

50. *See id.* at 77–78.

51. *Id.*

52. *Id.* 77–79 (explaining that by 1934, tribes retained only forty-eight million acres, down from 156 million acres in 1881, the end of the treaty making era). *See also* Douglas Nash & Eric Eberhard, Forward at the Seattle University Symposium, Perspectives on Tribal Land Acquisition, 23–24 (Jun. 3, 2010) (transcript available in the Seattle University School of Law Library) (explaining that prior to the arrival of Europeans, Indian tribes occupied 1.9 billion acres in North America).

53. *Compare* Solem v. Bartlett, 465 U.S. 463, 472 (1984) (concluding that Congress did not intend to diminish the reservation), *with* South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 358 (1998) (concluding that Congress intended to diminish the reservation).

54. Hydro Res., Inc. v. United States Envtl. Prot. Agency (*HRI III*), 608 F.3d 1131,

involving disputes in such checkerboard areas adjacent to reservations, courts must often determine dependent Indian community status.[55] As a result, dependent Indian communities are recognized on an ad hoc basis without an official method to quickly confirm their status. In addition, because federal agencies are most familiar with tribal authority on reservations,[56] they sometimes view dependent Indian communities as anomalous and problematic.[57] As illustrated below, the absence of a modern dependent Indian community statute leaves communities in checkerboard areas adjacent to reservations subject to the shifting winds of federal common law.

Over twenty years after the passage of the Indian country statute, *United States v. Martine* was the first case to construe 18 U.S.C. § 1151(b).[58] In that case, the Tenth Circuit construed *Sandoval*'s "federal treatment of the Indian community" factor as requiring the court's inquiry into "the nature of the area in question, the relationship of the inhabitants of the area to Indian Tribes and to the federal government, and the established practice of government agencies toward the area."[59] As in *Sandoval*, the *Martine* court also assuaged any fear that dependent Indian community status would be recognized arbitrarily.[60]

In *Pittsburgh & Midway Coal Mining Company v. Watchman*,[61] the court formalized *Martine*'s additional, community-specific factors into a two-step analysis to

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1136 (10th Cir. 2010) (en banc 6-5 decision).

55. *See, e.g.*, Pittsburgh & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531, 1542–46 (10th Cir. 1995) (outlining a multi-factor dependent Indian community analysis) (overruled in Hydro Res., Inc. v. United States Envtl. Prot. Agency (*HRI III*), 608 F.3d 1131 (10th Cir. 2010) (en banc 6-5 decision)); United States v. Martine, 442 F.2d 1022, 1023 (10th Cir. 1971) (checkerboard area outside Navajo Reservation is a dependent Indian community).

56. *See generally HRI III,* 608 F.3d 1131; *see also* Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985).

57. *See generally HRI III,* 608 F.3d 1131.

58. *Martine*, 442 F.2d at 1023.

59. *Id.* at 1023.

60. *Id.* at 1024 ("Appellant urges that such a holding implies that wherever a group of Indians is found, e.g., in Los Angeles, there is a dependent Indian community . . . The mere presence of a group of Indians in a particular area would undoubtedly not suffice.").

61. Pittsburgh & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531, 1542–46 (10th Cir. 1995).

determine dependent Indian community status. Though the *Watchman* analysis was partially rejected in *Alaska v. Native Village of Venetie Tribal Government*,[62] lower courts' continued to distinguish *Venetie* and applied parts of the *Watchman* analysis.[63] This trend indicated courts' understanding of the importance of community-specific factors to a proper determination of dependent Indian community status,[64] the presumption in favor of the continued existence of Indian country[65] and the requirement that congressional intent to terminate Indian country status must be clearly expressed.[66]

In *Watchman*, the Tenth Circuit considered whether the Navajo Nation could impose a levy on source gains from Pittsburgh & Midway Coal Mining Company's (P&M) coal mines located adjacent to the reservation.[67] The lands at issue in *Watchman* are typical of checkerboard areas. P&M shared its ownership interest in the surface estate with the Tribe, Tribal allottees, the State of New Mexico and the federal government. P&M shared its coal estate with the federal government, the State of New Mexico and the Cerillos Land

62. *See* Alaska v. Native Village of Venetie Tribal Gov't (*Venetie)*, 522 U.S. 520 (1998) (overruling *Watchman*'s multi-factor analysis and replacing it with a two-step bright-line rule).

63. Despite *Venetie*'s partial dismissal of the *Watchman* test, some courts distinguished *Venetie* and continued to apply *Watchman*'s "community of reference test." *See* United States v. Arrieta, 436 F.3d 1246, 1250–52 (10th Cir. 2006) (applying *Watchman*'s "community of reference test" to an entire Pueblo (not only the road in question) before applying *Venetie*'s two-pronged rule); Garcia v. Gutierrez, 217 P.3d 591, 599–600 (N.M. 2009) (holding that the fee land in question is "Indian country" for the purpose of the Uniform Child-Custody Jurisdiction and Enforcement Act because § 1151(b) does not determine civil jurisdiction, and therefore, *Venetie* does not apply); State v. Romero, 142 P.3d 887, 891–93 (N.M. 2006) (applying *Watchman*'s "community of reference" test and holding that non-Indian fee land within the exterior boundaries of a Pueblo is part of a dependent Indian community); *but see* State v. Frank, 52 P.3d 404, 407–10 (N.M. 2002) (adopting *Venetie*); Thompson v. Franklin, 127 F. Supp.2d 145, 156–159 (N.D.N.Y. 2000) (adopting *Venetie*).

64. *But see* Hydro Res., Inc. v. United States Envtl. Prot. Agency (*HRI III*), 608 F.3d 1131, 1156 (10th Cir. 2010) (en banc 6-5 decision) (noting that "[n]othing in *Sandoval* or *McGowan* suggests that the metes and bounds of "dependent Indian communities" should be determined by a court's perceptions about local social, political or geographic affinities).

65. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 594 (1977); Lone Wolf v. Hitchcock, 187 U.S. 553, 556–68 (1903).

66. South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998).

67. *See, e.g.*, Pittsburgh & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531, 1534 (10th Cir. 1995).

Company.[68]

Watchman largely concretized the dependent Indian community tests courts had used for the past twenty years.[69] The first part of the *Watchman* two-step analysis requires courts to locate the relevant "community of reference."[70] The *Watchman* court rejected the district court's narrow definition of the community of reference as the mine site (excluding the surrounding area) noting, "the existence of a dependent Indian community does not depend on the relative size of the geographical area."[71] Building upon *Martine*'s precedent, the second step of the *Watchman* test considers:[72] (1) whether the United States retained title to the lands; (2) the relationship of the residents to the Tribe and the federal government; (3) whether the area demonstrates cohesiveness; and (4) whether the lands have been set apart for the use, occupancy and protection of the dependent Indian peoples.[73]

In *Venetie*,[74] the United States Supreme Court partially replaced *Watchman*'s analysis of a community's social, physical and legal contours with a bright-line rule. Under *Venetie*'s two-step test, a dependent Indian community's land must (1) have been set aside by the federal government for the benefit of Indians, and (2) the federal government must provide sufficient superintendence over the land.[75] In *Venetie*, because the Alaska Native Claims Settlement Act extinguished tribes' aboriginal title and enabled non-Indians to own former

68. *Id.* at 1534–36.

69. *See, e.g.*, United States v. Driver, 755 F. Supp. 885 (D.S.D. 1991) (holding that a dependent Indian community exists where homes were built with federal funds and preferences for leasing were given to tribal members satisfied the "federal set aside" requirement and the provision of tribal services in the housing community satisfied the "cohesiveness" requirement); Mound v. Spotted Horse, 477 F. Supp. 156, 160 (D.S.D. 1979) (applying a four-factor analysis similar to *Watchman*); United States v. Martine, 442 F.2d 1022, 1023 (1971) (examining the area in question, the relationship between the tribal community, the tribe and the federal government, and federal agencies' treatment of the community).

70. *Watchman*, 52 F.3d at 1542–43.

71. *Id.* at 1543.

72. *Id.* at 1546.

73. *Id.* at 1545.

74. Alaska v. Native Village of Venetie Tribal Gov't (*Venetie)*, 522 U.S. 520 (1998).

75. *Venetie*, 522 U.S. at 530–31. *Cf.* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 7 (1942) (defining dependent Indian communities as "any lands occupied by 'distinctly Indian communities' recognized and treated by the Government as 'dependent communities' entitled to protection").

reservation land, the Village of Venetie failed to meet the federal set-aside requirement.[76] In addition, the Court decided that the federal government's provision of "health, social, welfare and economic programs," did not amount to "federal superintendence"—a tribal-federal relationship the Alaska Native Claims Settlement Act specifically sought to avoid.[77]

Lower courts partially distinguished *Venetie* on two grounds. First, *Venetie*'s analysis turned on the distinct purpose of the Alaska Native Claims Settlement Act to extinguish tribes' aboriginal title and did not intend to address Indian country status in areas outside of Alaska, such as New Mexico's Pueblos.[78] Second, *Venetie* did not expressly discuss or overrule *Watchman*'s community of reference test.[79] As a result, *Venetie* did not end debate regarding the "land in question" from which to begin the dependent Indian community analysis.[80] For instance, in *United States v. Arrieta*[81] and *State v. Romero*,[82] the courts looked to the larger Pueblo as the relevant "land in question," and held that a county road and privately-owned fee land, respectively, were part of dependent Indian communities due to their location within or between Pueblos.[83] Despite the Supreme Court's best efforts, dependent Indian communities defy simple designation.

3. *The Landscape of Navajo Nation's Church Rock Chapter*

Federal land policy left an indelible mark on land status in the Church Rock Chapter. During the late nineteenth century, the federal government granted railroad companies

76. *Venetie*, 522 U.S. at 533.

77. *Id.* at 533–34.

78. *See Romero,* 142 P.3d at 891 (N.M. 2006); Garcia v. Gutierrez, 217 P.3d 591, 599–600 (N.M. 2009).

79. *See* United States v. Arrieta, 436 F.3d 1246, 1249–51 (10th Cir. 2006) (state highway right-of-way within the exterior boundaries of a Pueblo, surrounded on both sides by non-Indian fee land, falls within a dependent Indian community); *Romero*, 142 P.3d at 891–95 (non-Indian owned fee lands within a Pueblo fall within a dependent Indian community).

80. Hydro Res. Inc. v. United States Envtl. Prot. Agency (*HRI I*), 198 F.3d 1224, 1249 (10th 2000) (*rev'd on other grounds*, *HRI III*, 608 F.3d 1331 (2010) (en banc 6-5 decision)) .

81. *Arrieta*, 436 F.3d at 1250–51.

82. *Romero,* 142 P.3d at 887.

83. *Arrieta*, 436 F.3d at 1249–51; *Romero*, 142 P.3d at 891–95.

alternating parcels of land adjacent to the reservation.[84] When it became clear that private, non-Indian landowners were appropriating scarce water resources, the government changed course and added land to the reservation, while preserving existing non-Indian property rights.[85] In 1911, the government changed course again, opening unallotted lands for sale to the public.[86] In 1928, Congress reversed course once again, purchasing former railroad tracts to be held in trust for the benefit of the Navajo.[87] In this way, the federal government's land policies caused extreme checkerboarding in the Church Rock Chapter and created the jurisdictional quagmire the *HRI III* court sought to reconcile.

Of the Church Rock Chapter's 57,000 acres, the federal government holds fifty-two percent in trust for the Navajo Nation and twenty-six percent in trust for individual Indians.[88] The Bureau of Land Management (BLM) owns ten percent of the land, subject to grazing permits granted to Navajos.[89] Thus, the federal government owns a total of eighty-eight percent of the land used or occupied by Navajos.[90] Of the remaining land, private landowners own six percent and the State of New Mexico owns four percent.[91]

The Chapter is divided into sections, of which HRI owns one parcel in Section 8 in fee and owns subsurface rights to the adjacent parcel in Section 17 (the locus of the dispute in *Morris*).[92] Together, HRI's two parcels contain 7.8 tons of uranium—nearly a quarter of its total uranium holdings in New Mexico.[93] HRI's 160 acre parcel is located in the southeast quadrant of Section 8, adjacent to the southern and eastern

84. *HRI III*, 608 F.3d at 1136.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 1168, 1180 (Ebel, J., dissenting) (noting that land ownership estimates are precise within 2.4 percent). The *HRI II* court estimated federal ownership to be ninety-two percent of land in the Chapter. Hydro Res., Inc. v. United States Envtl. Prot. Agency, 562 F.3d 1249, 1267 (10th Cir. 2009).

91. *Id.* at 1168 (Ebel, J., dissenting).

92. *Id.* at 1157; Morris v. United States Nuclear Regulatory Comm'n, 598 F.3d 677, 705 (10th Cir. 2010).

93. URANIUM RESOURCES, INC., http://www.uraniumresources.com (last visited Jan. 27, 2011).

boundaries of Navajo Nation's reservation.[94] The neighboring three quadrants in Section 8 are held in trust for Navajo whose grazing permits there span multiple contiguous sections.[95] Section 8 also sits above the Westwater Canyon Aquifer, which provides potable water to approximately 12,000 people living in the eastern half of the reservation.[96] The aquifer meets primary Safe Drinking Water Act SDWA standards.[97]

The Navajo Nation and the federal government dominate economic, political and cultural life of the Church Rock Chapter. In 1927, the Bureau of Indian Affairs divided the Navajo tribal government into Chapters, which were later certified by the Tribe and approved by the Department of the Interior (DOI).[98] The Chapter House, built by local Navajo in 1946, is the social and political center of the Chapter and offers a Head Start program, an elementary school, churches, and other social and health facilities.[99] Of the Chapter's 2,802 residents, ninety-eight percent are Navajo, and eighty-eight percent of residents frequent the Chapter House at least once a month.[100]

"The Navajo Nation provides housing, electricity, drinking water, wastewater treatment, sewer services and utilities, as well as police protection to the residents of the Chapter, and the Chapter itself provides scholarships, home repair and

94. *HRI III,* 608 F.3d at 1136–39 (Ebel, J., dissenting).

95. *Id.* at 1168–69 (Ebel, J., dissenting) (noting Section 8's integration with surrounding land sections).

96. Rebecca Tsosie, *Climate Change, Sustainability and Globalization: Charting the Future of Indigenous Environmental Self-Determination*, 4 ENVT'L & ENERGY L. & POL'Y J. 188, 224 (2009); Southwest Research and Information Center, *Facts and History About: HRI's Crownpoint Uranium Solution Mining Project*, http://www.sric.org/uranium/CUPstat.html (last visited Feb. 3, 2011).

97. *HRI III*, 608 F.3d at 1161, 1179 (Ebel, J., dissenting) (noting that Westwater Canyon water is "outstanding"); Petitioners' Revised Opening Brief at 10 Morris v. United States Nuclear Regulatory Comm'n, 598 F.3d 677 (2010) (No. 07-9505) 2007 WL 4732316 at 16 (noting that according to the final environmental impact statement, water from the Westwater Canyon Aquifer meets New Mexico's drinking water standards).

98. *HRI III*, 608 F.3d at 1137; EPA's Supplemental Brief for the *En Banc Court* at 28 n. 18 Hydro Res., Inc. v. United States Envtl. Prot. Agency (*HRI III*), 608 F.3d 1131 (2010) (No. 07-9506), 2009 WL 3375299.

99. *HRI III*, 608 F.3d at 1169 (Ebel, J., dissenting).

100. *Id.*

purchase assistance, and meals for seniors."[101] The federal government provides road maintenance, grazing management and social and health services.[102] Finally, the local Superintendent of the Bureau of Indian Affairs asserted that the Navajo people living in the Chapter rely "primarily" upon federal and tribal services.[103] McKinley County, in which the Church Rock Chapter is located, "provides essential public services to [the] private lands," which comprise six percent of Church Rock Chapter; HRI pays annual property taxes on its land to the County.[104]

4. *The* HRI III *Decision*

The jurisdictional dispute over HRI's land began in 1988 when HRI applied to the State of New Mexico for a permit to begin uranium mining.[105] HRI assumed that because its proposed operation was on private land, it should seek a SDWA permit from the State of New Mexico[106] under the State's Underground Injection Control (UIC) program.[107] Because HRI's land was surrounded by trust lands, however, the EPA argued that the site fell within a "dependent Indian communit[y]."[108] Prior to *HRI III*, the Tenth Circuit held in *HRI II*, that Section 8 was part of a dependent Indian community.[109] HRI petitioned for en banc review, contending that *Venetie* had eliminated *Watchman's* "community of reference" test employed in *HRI II*.[110] In *HRI III*, the court considered the validity of the EPA's Land Status Determination, in which the EPA affirmed Section 8's status as a dependent Indian community.[111] Reversing its decision from the previous year in *HRI II*, the en banc court vacated the

101. *Id*.

102. *Id*.

103. *Id*.

104. *Id*. at 1137.

105. Morris v. United States Nuclear Regulatory Comm'n (*Morris*), 598 F.3d 677, 681–682 (10th Cir. 2010).

106. *HRI III*, 608 F.3d at 1169 (Ebel, J., dissenting).

107. *Id*. at 1139–40.

108. *Id*. at 1142–44.

109. Hydro Res., Inc. v. United States Envtl. Prot. Agency (*HRI II*), 562 F.3d 1249, 1267 (10th Cir. 2009).

110. *HRI III*, 608 F.3d at 1135.

111. *Id*. at 1142–43.

EPA's Land Status Determination and held that Section 8 did not meet the requirements of a dependent Indian community after all.[112]

By holding that *Venetie* had eliminated the "community of reference" test, the *HRI III* court narrowed the scope of its dependent Indian community analysis and decided that the appropriate "land in question" was HRI's land parcel, in isolation from the rest of Section 8 and the Chapter.[113] Although the *Venetie* Court did not address the community of reference issue or the status of non-Indian fee land in dependent Indian communities,[114] the *HRI III* court determined that the community of reference test had been eliminated and that HRI's parcel was the appropriate "land in question."[115]

The *HRI III* court then examined HRI's parcel in terms of *Venetie*'s federal set-aside and federal superintendence tests. Because HRI's land was held in fee-simple, the court decided the land was not "set-aside" for Indians.[116] The court's interpretation of the "set-aside" requirement depends solely on land title, despite Supreme Court precedent stating that the status of dependent Indian communities should be analyzed in the light most favorable to its Indian inhabitants,[117] and that "Congress has defined Indian country broadly."[118] When the court isolates its analysis to HRI's parcel, only HRI's taxes to McKinley County and the County's maintenance of a road to Section 8 is relevant, while federal superintendence of eighty-

112. *Id*. at 1166.

113. *Id*. at 1149.

114. Hydro Res., Inc. v. United States Envtl. Prot. Agency (*HRI I*), 198 F.3d 1224, 1241 (10th Cir. 2000) (*rev'd on other grounds*, *HRI III*, 608 F.3d 1331 (2010) (en banc 6-5 decision)).

115. *HRI III*, 608 F.3d at 1152–53.

116. *Id*. at 1148–49.

117. In *McGowan*, one of two cases on which 18 U.S.C. § 1151(b) is premised, the Court stated, "[w]hen we view the facts of this case in the light of the relationship which has long existed between the government and the Indians-and which continues to date it is not reasonably possible to draw any distinction between this Indian 'colony' and 'Indian country.'" United States v. McGowan, 302 U.S. 535, 539 (1938).

118. Oklahoma Tax Comm'n. v. Sac & Fox Nation, 508 U.S. 114, 125 (1993). *See also* Justice Blackmun's opinion in Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 457 (1989) (3-2-3 opinion) ("[O]nce the tribe's valid regulatory interest is established, the nature of land ownership does not diminish the tribe's inherent power to regulate in the area.").

eight percent of the surrounding land becomes insignificant.[119]

In dissent, Judge Ebel joined by four other judges stated, "it is difficult to imagine a situation in which a piece of property owned in fee by a private individual, examined in isolation from the community in which the parcel of land is located could meet these two criteria."[120] By adopting *Venetie*, the court significantly altered its reading of prior dependent Indian community doctrine.

5. *Critique of the Court's Reasoning*

The Tenth Circuit's decision that HRI's parcel in Section 8 is not part of a dependent Indian community is erroneous for three reasons: (1) the court misinterpreted the Indian country statute; (2) the court overstepped Supreme Court precedent set out in *Venetie* and misread subsequent case law; and (3) the court undermined the historic approach and current federal policy governing jurisdiction in Indian country. The court's reasoning also proceeds from three flawed assumptions: that Indian country can expand uncontrollably; that the *Watchman* test was "outcome determinative;" and that a title-determinative approach to dependent Indian communities will advance the goal of administrative expedience.

First, by tying dependent Indian community status to land title, the *HRI III* court misinterprets the Indian country statute by reading the term "community" out of the statute. Sections 1151(a) (Indian reservations) and 1151(c) (Indian allotments) of the Indian county statutes pecifically reference land title, however, 1151(b) (dependent Indian communities) does not.[121] This difference demonstrates that Congress understood the importance of land title and intentionally

119. *HRI III*, 608 F.3d at 1169.

120. *Id*. at 1173 n.3 (Ebel, J., dissenting). *See* Judith V. Royster, *Decontextualizing Federal Indian Law: The Supreme Court's 1997-998 Term*, 34 TULSA L.J. 329, 342–43 (1999) (concluding that *Venetie* "all-but require[s] trust status for lands to be considered a dependent Indian community").

121. 28 U.S.C. § 1151 ("[t]he term "Indian country", . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including the 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," (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.").

exempted land title from the definition of a dependent Indian community. Not only does the court's interpretation render the word "community" superfluous, contrary to traditional methods of statutory interpretation,[122] it effectively negates recognition of any dependent Indian community that is not a Pueblo or "Indian colony."[123] Aside from Pueblos, in the Tenth Circuit, going forward, Indian allotments are likely the only areas of "Indian country" that can exist outside of a reservation.

The *HRI III* court's title-determinative approach to dependent Indian communities rests on the assumption that such an approach will promote "administrative simplicity."[124] According to the court, *Venetie* rightfully replaced *Watchman*'s community of reference test because it "ensure[s] that the boundaries of dependent Indian communities will be precisely and predictably defined."[125] The court reasons that because Congress enacted 18 U.S.C. § 1151 as a criminal statute, predictability to ensure "fair warning" is of the highest importance.[126] Yet, as the dissent points out, subtracting slices of private land from Indian country causes jurisdiction to alternate every few acres, which will increase confusion among law enforcement agents, rather than advancing administrative expedience.[127] If checkerboard lands created the jurisdictional complexity that led to the instant dispute, perpetuating checkerboarding defies logic.[128] Finally, the court promotes administrative expedience primarily for HRI's benefit: "[S]imple jurisdictional rules . . . promote greater predictability [, which] is valuable to corporations making business and

122. *HRI III*, 608 F.3d at 1170 (Ebel, J., dissenting).

123. *Id*. at1170–72.

124. *Id*. at 1159.

125. *Id*.

126. *Id*. at 1160.

127. *Id*. at 1172–73 (Ebel, J., dissenting); EPA's Supplemental Brief for the *En Banc Court* at 9–14 Hydro Res., Inc. v. United States Envtl. Prot. Agency (*HRI III*), 608 F.3d 1131 (2010) (No. 07-9506), 2009 WL 3375299. *See* Garcia v. Gutierrez, 217 P.3d 597, 602 (N.M. 2009) ("In the criminal context, Section 1151's 'Indian country' designation provides necessary homogenizing force, creating uniformity out of the sometimes chaotic jumble of land titles on, near, and within tribal boundaries."); Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351, 358 (1962) (holding that Congress's intent in enacting 18 U.S.C. § 1151 was to avoid checkerboard jurisdiction).

128. *HRI III*, 608 F.3d at 1173–74 (Ebel, J., dissenting).

investment decisions."[129] In the end, the *HRI III* court's title-determinative approach misinterprets § 1151(b) and is motivated by the false assumption that that approach will lead to greater administrative expedience.

Second, *HRI III*'s title-determinative approach oversteps Supreme Court precedent set out in *Venetie* and misreads subsequent case law.[130] If the *Sandoval* Court had employed a title-determinative approach, it could not have recognized Pueblos as a dependent Indian community.[131] In addition, the *Venetie* court did not explain how courts should determine to which land the two-step test should be applied.[132] And, contrary to *HRI III*, the *Venetie* Court examined the entire Native Village of Venetie, not only the land from which the dispute arose.[133] The *Venetie* court did not purport to address anything other than the status of lands held by Native villages in Alaska under the Alaska Native Claims Settlement Act, much less dependent Indian communities adjacent to reservations.[134]

Finally, although the *HRI III* court's decision formally rests on land title in isolation from other community-specific facts, the court found compelling that HRI's parcel in Section 8 was

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129. *Id*. at 1160 n.23 (alterations in original) (*quoting* Hertz Corp v. Friend, ___ U.S. ___, 130 S.Ct 1181, 1193 (2010)).

130. *See also* Royster, *supra* note 120 (arguing that *Venetie* shifted the 18 U.S.C. § 1151 doctrine dramatically and unnecessarily).

131. United States v. Sandoval, 231 U.S. 28, 48 (1913).

132. *HRI III*, 608 F.3d at 1175 (Ebel, J., dissenting).

133. *Id*. at 1170–72 (Ebel, J., dissenting) ("One would therefore expect, if it were following the [*HRI III*] majority's analysis, that the *Venetie* Court would have narrowly considered whether just the land on which the school was to be built was a dependent Indian community. But the Court decidedly did not do so. Instead, the Court in *Venetie* looked at *all of the land that previously composed the Venetie Reservation*-not just the site of the proposed school-to determine whether that land constituted a dependent Indian community. *Venetie,* 522 U.S. at 523, 118 S.Ct. 948." (emphasis in original)).

134. *See* State v. Romero, 142 P.3d 887, 891 (N.M. 2006) (noting that in deciding *Venetie*, the Supreme Court had "specific Alaskan facts in mind" and that *Venetie* did not consider "the unique circumstances of New Mexico's Pueblos"). The *HRI III* court criticizes *Watchman*'s community of reference test is "outcome determinative" in favor of tribes. (*See HRI III* 608 F.3d at 1154). Ironically, the *Venetie* test is similarly "outcome determinative" because a court must first determine to which land it will apply the two-step test. A court's discretionary selection of the "land in question" is a normative, rather than an objective, process. For example, will a court choose to look at the entire scope of tribal lands, as in *Venetie* and *Arrieta*? Or will a court restrict its examination to the discrete parcel being claimed? (*See* Alaska v. Native Village of Venetie Tribal Gov't (*Venetie),* 522 U.S. 520, 521–22, 534 (1998)). The question, therefore, is how the court will conduct this normative analysis.

"rugged," "isolated" and "uninhabited."[135] Yet, what percentage of Navajo land is "inhabited?" If land is rugged and isolated, it still may be valuable for activities other than resource extraction, such as grazing or harvesting traditional medicine, among other cultural and economic activities. The court's assumption that valuable land must be inhabited reveals its pro-development bias and fails to recognize the value of Church Rock's land in the eyes of ninety-eight percent of HRI's neighbors.[136] Thus, contrary to the court's own preference for a title-determinative analysis, these community-specific factors creep into the majority's analysis.

Third, *HRI III* undermines the historic approach and current policies governing Indian country status. The *HRI III* court's reasoning proceeds from an antiquated, allotment era perspective. Congress abandoned allotment policy and strove to mitigate its damage with the adoption of the Indian Reorganization Act of 1934 and Indian Self-Determination and Education Assistance Act in 1975.[137] As Judge Ebel's dissent points out, the purpose of § 1151 was to avoid checkerboard jurisdiction, not further it.[138] Indian law scholar, Dean Suagee, aptly notes that the "congressional intent of the allotment era

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135. *HRI III*, 608 F.3d at 1138, 1143.

136. Note that when courts diminish reservation boundaries, they do not hesitate to look at the "Indian character of the land" to make their determination. *Compare* Solem v. Bartlett 465 U.S. 463, 471–72, 480 (1984) (holding that after land was opened to settlement, the land had not lost its "Indian character," but also "[w]hen an area is predominately populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of state and local governments.") *with* Hagen v. Utah, 510 U.S. 399, 420–21 (1994) (looking to the area's eighty-five percent non-Indian population to find that the area had lost its Indian character). According to land ownership, population and service provision, the Church Rock Chapter has undeniably *retained* its "Indian character."

137. Alex Tallchief Skibine, Seattle University Symposium, Perspectives on Tribal Land Acquisition, 9 (Jun. 3, 2010) (transcript available in the Seattle University School of Law Library) (discussing the Indian Reorganization Act (25 U.S.C. § 465) as a recognition of the failure of the allotment era); Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450–458 (2006). *But see* Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 423 (1989) (noting that "[a]lthough the [IRA] may have ended the allotment of further lands, it did not restore to the Indians the exclusive use of those lands that had already passed to non-Indians…).

138. *HRI III*, 608 F.3d at 1172 (Ebel, J., dissenting) (noting that in *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 358, the Supreme Court explicitly denounced "such an impractical pattern of checkerboard jurisdiction" and that checkerboarding "was avoided by the plain language of § 1151.").

should be irrelevant because during that era, there was no body of environmental protection law, and so Congress would not have given any thought to how allotment era legislation would affect the implementation of federal environmental laws."[139] In essence, employing an allotment era perspective in the resolution of modern tribal resource conflicts is analogous to applying Jim Crow laws to resolve modern racial zoning conflicts. Instead, courts should effectuate Indian self-determination,[140] according to which tribes may assume primary authority for environmental protection in their communities.[141]

Lastly, the *HRI III* decision reflects Judge Frizzell's lone dissent in *HRI II*. He cautioned that with the application of the community of reference test "we take an unprecedented step. Never before has non-Indian fee land outside the exterior boundaries of a reservation or Pueblo been held to be a dependent Indian community."[142] From Judge Frizzell's perspective, the *Watchman* test was "outcome determinative," Indian country threatens to grow uncontrollably, and it will inevitably encroach upon private, non-Indian land. The *HRI III* majority adopts this assumption, stating that "land that once *wasn't* Indian country *becomes* Indian country by tribal preference or judicial decree rather than congressional action."[143] These statements are inaccurate. In fact, the courts have diminished reservation boundaries, wiping out large swaths of land formerly under tribal jurisdiction[144] and tribes'

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139. Dean B. Suagee, *The Supreme Court's "Whack-a-Mole" Game Theory in Federal Indian Law, a Theory that has No Place in the Realm of Environmental Law*, 7 GREAT PLAINS NAT. RESOURCES J. 90, 112–14 (2002).

140. There are numerous statutes which incorporate the "self-determination" model of tribal-federal relations. *See, e.g.*, Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450–458 (2006) *and* the Clean Water Act, 33 U.S.C. § 1377 (2006).

141. President Nixon, Special Message to Congress on Indian Affairs 213 (Jul. 8, 1970) ("We have concluded that Indians will get better programs and that public monies will be more effectively expended if the people who are most affected by these programs are responsible for operating them."). *See also* discussion of EPA's Indian Policy and "treatment as state" programs in Part III, *infra*; Rebecca Tsosie, *supra* note 7 at 330 ("True environmental self-determination, however, depends upon the ability of Indian nations to preserve their landbases and engage in economic development according to their own policies and values.").

142. *HRI III*, 608 F.3d at 1143 (*quoting HRI II*, 562 F.3d 1249, 1270–71 (10th Cir. 2009) (Frizzell, J., dissenting in part)).

143. *Id*. at 1153.

144. *See, e.g.*, South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998); Hagen v.

petitions to the Secretary of Interior to take land back into trust status are severely delayed or denied all together.[145] Furthermore, *Sandoval*[146] and *Martine*[147] specifically assuaged fear that tribal or Indian country status would be designated arbitrarily and directed that any change to dependent Indian community status must come from Congress, not the courts.

The net effect of the *HRI III* court's assumptions is to eliminate a sub-category of Indian country—dependent Indian communities located outside the exterior boundaries of a reservation.[148] The court's focus on land title obscures any consideration of Church Rock community's legitimate concerns about the safety of its drinking water.[149] Instead, as discussed in Part III *infra,* the *HRI III* court ensured that neither tribal government, state government, nor the federal government would be directly accountable to the Church Rock community.

B. *Morris v. United States Nuclear Regulatory Commission*

In *Morris*, the Tenth Circuit upheld the decision of the Nuclear Regulatory Commission (NRC) to grant a source materials license to HRI for its uranium mining operation on

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Utah, 510 U.S. 399, 414 (1994).

145. In 1934, Congress passed the Indian Reorganization Act, which authorized DOI to take land into trust status under certain conditions. Conflict over DOI's criteria for taking land into trust, as well as the Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009), have severely complicated the process. *See generally* Amanda D. Hettler, *Beyond A Carcieri Fix: The Need For Broader Reform of The Land-Into-Trust*, 96 IOWA L. REV. 1377, 1387– 1391, (May, 2011). *See also* NATIONAL CONGRESS OF AMERICAN INDIANS, LAND INTO TRUST (2010) http://www.ncai.org/fileadmin/ncai_ events/2010_WH_Summit/2a_-_Land_into _trust_-_FINAL.pdf.

146. United States v. Sandoval, 231 U.S. 28, 46 (1913).

> Of course it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities, the question whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts.
>
> *Id.*

147. United States v. Martine, 442 F.2d 1022, 1024 (10th Cir. 1971).

148. *See HRI III*, 608 F.3d 1131, 1173 n.3 (Ebel, J., dissenting) (noting, "it is difficult to imagine a situation in which a piece of property owned in fee by a private individual, examined in isolation from the community in which the parcel of land is located could meet these two criteria"); Royster, *supra* note 130.

149. *Contra HRI III,* 608 F.3d at 1179–81, 1184–86 (10th Cir. 2010) (Lucero J. and Henry J., dissenting) (noting the reliance of the Church Rock community on the Westwater Canyon Aquifer for drinking water and the likelihood that contamination from mining would endanger surrounding communities).

Section 17 land in the Church Rock Chapter of the Navajo Nation.[150] The court made this decision despite radiation levels already above the public exposure limit and without certainty that HRI could restore contaminated groundwater to drinking water quality.[151] In a two to one decision, the Tenth Circuit decided that because HRI's uranium mining would only increase rates of radiation by a negligible amount, and because HRI would "likely" and "eventually" be able to restore the groundwater to some degree, NRC did not err in granting HRI a license to proceed with the mining.[152] A brief review of the history of uranium mining in Navajo country provides the necessary context to the court's decision. This review offers a single source for historical data otherwise found in various law review articles, congressional testimony and books.

1. The *History of Uranium Mining and Its Impact on Navajo Country*

Since the 1940s, the United States and private companies have extracted large amounts of uranium from over 500 uranium mines within the Navajo Nation.[153] In 1975, the U.S. Commission on Civil Rights described the Navajo Nation as an "energy colony."[154] Despite some environmental remediation by the federal government, large amounts of mining tailings and waste remain exposed and compromise local air and water quality and the health of Church Rock Chapter's residents.[155]

a. *Strip Mining in Navajo Country*

In the Navajo Nation, the federal government found a favorable environment to seed its nuclear weapons program—a

150. Morris v. United States Nuclear Regulatory Comm'n (*Morris*), 598 F.3d 677, 705 (10th Cir. 2010).

151. *Id*. at 691–694, 697, 700, 704.

152. *Id*.

153. *Cong. Hearing on Uranium*, *supra* note 1 (statement of Wayne Nastri, Regional Administrator U.S. Envtl. Prot. Agency – Region 9); Bradford Cooley, *The Navajo Uranium Ban: Tribal Sovereignty v. National Energy Demands*, 26 J. LAND RESOURCES & ENVTL. L. 393, 395 (2006).

154. U.S. Commission on Civil Rights, *The Navajo Nation: An American Colony* (1975), *cited in Cong. Hearing on Uranium*, *supra* note 1 (statement of George Arthur, Chairman Resources Committee Navajo Nation Council).

155. *Cong. Hearing on Uranium*, *supra* note 1 (statement of Wayne Nastri, Regional Administrator U.S. Envtl. Prot. Agency – Region 9); Cooley, *supra* note 153, at 395.

place rich in uranium, with few environmental, health and safety regulations, and a place with readily available, cheap labor close to the mineral source.[156] Between 1944 and 1986, the government and private companies extracted nearly four million tons of uranium ore from over 500 mines in Navajo Country—all of which was blasted, hauled and processed by Navajo miners.[157] By the 1960s, one half of all uranium miners in the country, roughly 1,500, were employed in New Mexico's uranium mines.[158] Many Navajo recall growing up in mining camps, drinking water and inhaling dust from poorly ventilated mines, while family members washed contaminated clothing and used mining implements at home.[159]

Two factors significantly slowed states' and the federal government's response to known dangers surrounding uranium mining. First, although scientists had been aware of the link between uranium mining and low life expectancy among European miners since the sixteenth century, debate about the causal connection between the two continued throughout the first half of the twentieth century and stymied regulatory progress.[160] Second, neither states nor the federal government assumed responsibility for establishing mine safety standards.[161] In effect, the uranium boom came and went without the imposition of substantive safety standards to protect uranium miners or their families.[162] One court noted that Utah, Arizona and New Mexico did "little or nothing" to improve conditions in their uranium mines.[163] As a result, rates of exposure in some mines were one thousand times the maximum level recommended by the Public Health Service (PHS) and exceeded radiation doses from the atomic bombs in Japan.[164]

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156. Bradford Cooley, *supra* note 153 at 395.

157. *Cong. Hearing on Uranium*, *supra* note 1 (statement of Wayne Nastri, Regional Administrator U.S. Envtl. Prot. Agency – Region 9); Cooley, *supra* note 153, at 395.

158. Begay v. United States, 591 F. Supp. 991, 994 (D. Ariz. 1984).

159. *Cong. Hearing on Uranium, supra* note 1 (statement of Phil Harrison, Navajo Nation Council Member).

160. *Begay*, 591 F. Supp. at 991–92, 1005, 1011.

161. *Id*. at 1001, 1009.

162. In 1967, for the first time, the Secretary of Labor established safety and health standards for uranium mining. *Id.* at 1004, 1009.

163. *Id*. at 1007.

164. *Id*.

The single most devastating event occurred in 1979, several months after the accident at Three Mile Island, when a mud dam retaining uranium slurry burst.[165] As a result, ninety-four million gallons of radioactive wastewater and 1100 tons of radioactive and toxic uranium waste entered the Puerco River, a main source of drinking water in Church Rock.[166] Although the spill was far larger than that at Three Mile Island, the accident remains largely unknown, and its health effects are still unfolding.[167]

Finally, in 1984, 200 Navajo miners sued several federal agencies for failing to warn them of the dangers of the uranium mining that they alleged caused them to contract various illnesses.[168] Evidence indicated that PHS did not inform the miners of health risks associated with uranium mining because they were concerned about disrupting the work force and the potential difficulty of replacing workers given that the "fear of cancer . . . would seriously interrupt badly needed production of uranium."[169] When the court denied the miners' claim,[170] Congress adopted the Radiation Exposure Compensation Act in 1990.[171] Obtaining actual compensation, however, has proven an uphill battle for many former Navajo miners.[172]

b. *The Impact of Incomplete Remediation on Public Health and the Environment*

The federal government closed the Church Rock mine after

165. *Cong. Hearing on Uranium*, *supra* note 1 (statement of Doug Brugge, Professor of Public Health at Tufts University School of Medicine).

166. *Id.*

167. *Id.*

168. *Begay*, 591 F. Supp. at 993.

169. Cooley, *supra* note 153 at 395 (*quoting*, Begay, 591 F. Supp. at 995). PHS decided not to warn miners of the potential radiation from uranium mining in order to ensure miners' participation in the study and mine owners' cooperation. *Begay*, 591 F. Supp. at 995.

170. Begay v. United States, 768 F.2d 1059, 1060, 1065 (9th Cir. 1985) (The court denied the miners' claims because PHS's decision not to warn the miners fell within the "discretionary function exception" of the Federal Tort Claims Act, 28 U.S.C. § 2680(a), which bars claims against the United States for acts or omissions of its employees that are discretionary, even when that discretion is abused.).

171. Radiation Exposure Compensation Act, 28 C.F.R. § 79 (2001).

172. *Compensation of Navajo Uranium Miners*, WORLD INFORMATION SERVICE ON ENERGY, http://www.wise-uranium.org/ureca.html (last visited Apr. 13, 2011).

the United Nuclear Corporation abandoned it in 1982—before the company had undertaken environmental remediation.[173] The EPA has determined that the scope of environmental remediation in Navajo Country encompasses over 500 abandoned uranium mines and 1000 potential remediation sites across an area the size of West Virginia.[174] To date, the Department of Energy (DOE) has "decommissioned" four uranium processing sites.[175] This process involves capping the mine shafts, containing tailings, posting public warning signs and remediating groundwater.[176]

Although current environmental regulations require landfills to be lined to avoid groundwater contamination,[177] United Nuclear disposed of its mine waste by dumping soft tailings (slurry) into unlined ponds and by piling solid tailings beside each mine.[178] As a result, mine tailings sit uncovered in unlined ponds and stand sixty to seventy feet tall. The consequences of these disposal practices are many. Dust from piles of mine tailings blow into nearby bodies of water, grazing lands and homes, carrying with it radiation from radon gas and toxic carcinogens.[179] Consequently, Navajo livestock, which local residents consume and sell, are exposed to radiation and toxic substances as they graze amidst tailings

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173. *See* Morris v. United States Nuclear Regulatory Comm'n (*Morris*), 598 F.3d 677, 705 (10th Cir. 2010) (Lucero, J., dissenting); Petitioners' Revised Opening Brief at 10 Morris v. United States Nuclear Regulatory Comm'n, 598 F.3d 677 (2010) (No. 07-9505) 2007 WL 4732316 at 15.

174. *Cong. Hearing on Uranium*, *supra* note 1 (statement of Wayne Nastri, Regional Administrator U.S. Envtl. Prot. Agency – Region 9). *See Health and Environmental Impacts of Uranium Contamination in the Navajo Nation Five-Year Plan as Requested by H. Committee on Oversight and Gov't Reform*, U.S. ENTL. PROT. AGENCY, 4 (Jun. 9, 2008), http://www.epa.gov/region9/superfund/navajo-nation/ (follow link to "Five Year Plan").

175. *Cong. Hearing on Uranium*, *supra* note 1 (statement of Stephen Etsitty, Executive Director of the Navajo Nation Envtl. Prot. Agency).

176. *Id.*

177. *Id.* (statement of statement of Stephen Etsitty, Executive Director of the Navajo Nation Envtl. Prot. Agency and statement of George Arthur, Chairman Resources Committee Navajo Nation Council).

178. Paul Robinson, *Uranium Mill Tailings Remediation Performed by US DOE*, SW. RESEARCH AND INFO. CENTER 9 (2004), *available at* http://www.vbgov.com /government/departments/public-utilities/Documents/08.DOE_Overview_Uranium _Tailing_Remediation.pdf.

179. *Cong. Hearing on Uranium*, *supra* note 1 (statement of Ray Manygoats and Edith Hood, Navajo tribal members).

piles and drink from slurry pools.[180] In 2007, Church Rock residents testified in Congress that children play in tailings piles and suffer skin burns from contact with highly contaminated water.[181] In addition, various cancers (including lung cancer, bone cancer, cancer of the sinuses, leukemia and skin cancer), kidney failure, miscarriages, lymphoma, birth defects, neurotoxicity, respiratory illnesses and skin diseases are frequent in neighboring Navajo communities.[182] Medical researchers have traced these illnesses to gamma radiation, heavy metals and toxins associated with uranium mining waste.[183] Finally, uranium mine tailings contain high levels of heavy metals such as selenium, molybdenum, cadmium, arsenic and lead, as well as chloride, nitrate, ammonia and sulfate that can seep into surface or groundwater and can contaminate drinking water.[184]

While the federal government highlights the exorbitant cost of compensating former miners and of environmental remediation,[185] it has "forgotten" uranium mining's concomitant benefit to national security and the energy industry.[186] Unfortunately, these benefits have come at a high cost to the Navajo people.

c. *The Navajo Nation's Moratorium on Uranium Mining and Community Remediation Efforts*

> We are still undergoing what appears to be a never-ending federal experiment to see how much devastation can be endured by a people . . . from exposure to radiation in the air, in the water, in the mines and on

180. *See id*. (statement of Ray Manygoats, Navajo tribal member).

181. *See id*. (statement of Phil Harrison, Navajo Nation Council Member and Edith Hood, Navajo tribal member).

182. *See id* (Stephen Etsitty, Executive Director of the Navajo Nation Envtl. Prot. Agency and Doug Brugge, Professor of Public Health at Tufts University School of Medicine).

183. *See id*. (statement of Stephen Etsitty, Executive Director of the Navajo Nation Envtl. Prot. Agency and Doug Brugge, Professor of Public Health at Tufts University School of Medicine). *See also* Robinson, *supra* note 178, at 11–12; *Cong. Hearing on Uranium*, *supra* note 1 (statement of David Geiser, Deputy Director, Office of Legacy Management, Dep't of Energy).

184. Robinson, *supra* note 178, at 11.

185. *Cong. Hearing on Uranium*, *supra* note 1 (statement of Wayne Nastri, Regional Administrator U.S. Envtl. Prot. Agency – Region 9).

186. Begay v. United States, 591 F. Supp. 991, 1011 (D. Ariz. 1984).

> the surface of the land. We are unwilling to be subjects of that ongoing experiment any longer.[187]

In response to the Bush administration's reinvigoration of America's nuclear energy program,[188] the Navajo Nation Council enacted the Diné Natural Resources Protection Act of 2005.[189] The Act places a moratorium on uranium mining "on any sites within Navajo Indian Country as defined by Title 7 of Navajo Nation Code Section 254 and 18 U.S.C. § 1151"[190] and provides Navajos with the right to a healthy environment.[191] The Act also codifies traditional Navajo beliefs that warn against the disturbance of harmful substances.[192] The moratorium is supported by a description of the cost of uranium mining to residents, including diminished work years, illness and death, the economic loss associated with unproductive land, diminished property value and contaminated livestock.[193] Finally, the Act forecasts that "future [uranium] mining . . . will generate further economic detriments to the Navajo Nation," including remediation costs, veterinary costs, loss of access to and use of vegetation and loss of potable water supplies.[194]

In addition, when federal remediation efforts for uranium damages were slow to come, the Church Rock Uranium Mining Project (CRUMP), a community-based research, education and monitoring organization, began its own remediation effort to educate the local community and to advocate for comprehensive remediation.[195] CRUMP's documentation of

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187. *Cong. Hearing on Uranium*, *supra* note 1 (statement of George Arthur, Chairman, Resources Committee, Navajo Nation Council member).

188. *See, e.g.*, Energy Policy Act of 2005, 42 U.S.C. §§ 16021–16025 (2006) (establishing the "Next Generation Nuclear Plant Project").

189. Diné Natural Resources Protection Act (DNRPA), 18 Navajo Nation Code §§ 1301–1303 (2005).

190. *Id.* § 1302(A).

191. *Id.* § 1301(C) ("[i]t is the right and freedom of the people to be respected, honored and protected with a healthy physical and mental environment").

192. "[T]he people now know that uranium is one such substance and that its extraction should be avoided as traditional practice and prohibited by Navajo law." *Id.* § 1301(D).

193. *Id.* § 1301(E)–(F).

194. *Id.* § 1301(G).

195. CHRIS SCHUEY & MELINDA RONCA-BATTISTA, CHURCH ROCK URANIUM MONITORING PROJECT, REPORT OF THE CHURCH ROCK URANIUM MONITORING PROJECT iii, *available at* http://www.sric.org/uranium/CRUMPReportSummary.pdf.

elevated radiation levels and contaminated water wells and soils provided scientific evidence supporting the public health risks and environmental damage that residents have reported for years.[196] Both the Navajo Nation and the Church Rock community have responded to the effects of uranium mining to ensure a safer future for the Navajo people.

2. *The* Morris *Decision*

In *Morris*, the Tenth Circuit upheld NRC's decision to grant a source materials license for uranium mining to HRI.[197] The court accepted NRC's determination that increased radiation levels from HRI's operation would be "negligible" and that HRI could "probably" and "eventually" restore the groundwater to drinking water quality.[198] In essence, the court upheld only one of the missions that the AEA imposes on NRC—to advance uranium development—but failed to recognize NRC's concomitant obligation under the AEA—to deny licenses that are "inimical to" public health.[199]

a. Morris' *Procedural Background*

In 1984, the United Nuclear Corporation sold HRI its mineral rights to Section 17 in the Church Rock Chapter, the site of the Old Church Rock (uranium) Mine.[200] Although the mine shaft has been capped, HRI has recorded gamma radiation levels seventeen to twenty-nine times higher than "typical" radiation levels for the area due to the mine tailings remaining there.[201] Unlike Section 8, the federal government holds Section 17 land in trust for the Navajo Nation and leases it to three families who live and graze livestock there.[202] Church Rock residents draw their drinking water from fourteen wells within the Westwater Canyon Aquifer beneath

196. *Id*. at iv–v.

197. Morris v. United States Nuclear Regulatory Comm'n (*Morris*), 598 F.3d 677, 705 (10th Cir. 2010), *cert. denied*, U.S. Nov. 15 (2010) (Mem).

198. *Id*. at 691–93, 704.

199. Prohibitions against issuance of a license, 42 U.S.C. § 2099 (2006).

200. *Morris*, 598 F.3d at 705.

201. Petitioners' Revised Opening Brief at 10 Morris v. United States Nuclear Regulatory Comm'n, 598 F.3d 677 (2010) (No. 07-9505) 2007 WL 4732316 at 15.

202. *Morris,* 598 F.3d at 708 (Lucero, J., dissenting).

Section 17[203] and 12,000 people living in the eastern portion of the Navajo Nation can use the aquifer for drinking water, grazing and agriculture.[204]

In 1988, HRI's application for ISL mining at four sites in Navajo Country, including Sections 8 and 17, triggered the environmental impact statement (EIS) process.[205] The Navajo Nation declined to participate in the EIS in opposition to the project.[206] When Petitioners, a community organization, environmental organization and two local ranchers,[207] moved to intervene in the EIS process, NRC approved their intervention because they "use a substantial quantity of water personally or for livestock" near the mining site.[208] After completing the final EIS (FEIS) in 1997, NRC, the Bureau of Land Management and Bureau of Indian Affairs recommended that NRC grant HRI's license, which NRC did in 1998.[209]

b. *The Court Approved HRI's License Despite Levels of Radiation Above the Exposure Limit Set by the Atomic Energy Act*

The *Morris* court reviewed whether the conditions NRC's license imposed on HRI conformed to the AEA and its regulations.[210] The AEA prohibits NRC from granting a license "if, in the opinion of the Commission, the issuance of a license to such person for such purpose would be inimical to the common defense and security or the health and safety of the public."[211] Although radiation levels from previous uranium mining at Church Rock already exceed the safe limit for human exposure, the Tenth Circuit upheld NRC's decision to grant a source materials license to HRI.[212] The court's decision

203. Hydro Res., Inc. v. United States Envtl. Prot. Agency (*HRI III*), 608 F.3d 1131, 1179 (10th Cir. 2010) (en banc 6-5 decision) (Ebel, J., dissenting).

204. Rebecca Tsosie, *supra* note 96.

205. *Morris*, 598 F.3d at 681–82.

206. *Id*. at 682 n.2.

207. *Id*. at 681. Petitioners include Eastern Diné Against Uranium Mining, Southwest Research and Information Center, and two local ranchers, Grace Sam and Marilyn Morris.

208. *Id*. at 682.

209. *Id*.

210. *Id*. at 694–95.

211. Prohibitions against issuance of a license, 42 U.S.C. § 2099 (2006).

212. *Morris*, 598 F.3d at 705.

turned on its acceptance of (1) NRC's interpretation of "licensed operation" under the AEA's implementing regulations, and (2) NRC's determination that HRI's operation would increase radiation levels only "negligibly," and did not constitute "cumulative impacts" under NEPA.[213]

In making its licensing decisions, the NRC must adhere to the AEA's public health standard—"total effective dose equivalent" (TEDE)—the total allowable amount of radiation that may be absorbed by an individual member of the public.[214] The Petitioners in *Morris* disputed NRC's interpretation of the AEA and regulations, under which radiation from existing mine waste was excluded from the TEDE calculation.

AEA regulations authorize NRC to:

> [c]ontrol the receipt, possession, use, transfer, and disposal of licensed material by any licensee in such a manner that the total dose to an individual (including doses resulting from licensed and unlicensed radioactive material from radiation sources other than background radiation) does not exceed the standards for protection against radiation prescribed in the regulations in this part.[215]

Section 20.1301 of the AEA requires each licensee to conduct operations "so that the total effective dose equivalent to individual members of the public from the licensed operation does not exceed 0.1 rem (1 mSv) in a year." Notably, "background radiation" is excluded from the TEDE calculation. Section 20.1003 defines background radiation as:

> radiation from cosmic sources; naturally occurring radioactive material . . . and global fallout as it exists in the environment from the testing of nuclear explosive devices or from past nuclear accidents. . . and are not under the control of the licensee. 'Background radiation' does not include radiation from source, byproduct or special nuclear materials regulated by the Commission.[216]

NRC argued that because HRI was not responsible for producing the existing mine waste on Section 17, the mine

213. *Id*. at 687, 690, 693.

214. *See* 10 C.F.R. § 20.1003 (2011) (definitions).

215. *Id*. § 20.1001(b) (purpose).

216. *Id*. § 20.1003 (definitions).

waste was not within its control, and thus, the mine waste was not part of the "licensed operation" to which the TEDE applies.[217] NRC's assertion contradicts its earlier finding that the mine waste at Section 17 fell under HRI's control because the chain of title includes the acts of the prior land owner.[218] However, background radiation is the only material exempt from the TEDE calculation and existing mine waste is not included in its definition. As Judge Lucero pointed out in his dissent, NRC's narrow focus on the "licensed operation" conflicts with § 20.1301's exclusion of "background radiation."[219] If TEDE was only meant to apply to the licensed operation, then excluding "background radiation" would be superfluous, contrary to established principles of statutory interpretation.[220] Nevertheless, without offering an explanation, the court upheld NRC's exclusion of existing radiation at Section 17 because it "makes sense in its own right."[221]

The Petitioners' argument that NRC's interpretation of the AEA and associated regulations is inconsistent with previous interpretations is compelling.[222] For example, NRC previously acknowledged in the FEIS that "[r]adiological effects during project construction would include natural background plus remnant radiation stemming from previous mining and milling activities near the Church Rock site."[223] Due to NRC's internal inconsistency and questionable resolution of difficult scientific issues, Judge Lucero argues that NRC's interpretation of its regulations does not warrant the court's absolute deference.[224]

Even if NRC's calculation of TEDE is limited to the "licensed operation," AEA regulations authorize NRC to impose protective measures when necessary.[225] The purpose of NRC's regulations echoes the AEA's broad "inimical to" public health

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217. *Morris*, 598 F.3d at 688.

218. Petitioners' Revised Opening Brief at 17 Morris v. United States Nuclear Regulatory Comm'n, 598 F.3d 677 (2010) (No. 07-9505) 2007 WL 4732316 at 38–9.

219. *Morris*, 598 F.3d at 706 (Lucero, J., dissenting).

220. *Id*. at 705 (Lucero, J. dissenting).

221. *Id*. at 687, 690 n.13.

222. Petitioners' Revised Opening Brief at 22–3 Morris v. United States Nuclear Regulatory Comm'n, 598 F.3d 677 (2010) (No. 07-9505) 2007 WL 4732316 at 60–63.

223. *Morris,* 598 F.3d at 691–92.

224. *Id.* at 705 (Lucero, J., dissenting).

225. *See* 10 C.F.R. § 20.1001(b) (2006).

standard: "nothing in this part shall be construed as limiting actions that may be necessary to protect health and safety."[226] This means that NRC could condition HRI's license on its remediation of existing mine waste at Section 17 before or concurrent with its operations, as the FEIS required.[227] The court's limited focus on NRC's regulation of "licensed material" obscures other available protective measures. Ultimately, the human body cannot discriminate between licensed and unlicensed sources of radioactive material.

Second, the court accepted NRC's finding that the expected increase in radiation at Section 17 would be "negligible" and rejected Petitioners' claim that NRC failed to take a "hard look" at the "cumulative impacts"[228] of HRI's uranium mining.[229] This conclusion is plausible only by ignoring the already elevated levels of radiation at Section 17. In addition, NRC's negligible impacts conclusion is based on HRI's ISL method of uranium mining that "does not result in large amounts of tailings," but requires that HRI to capture and re-inject radon gas back into the ground.[230] The court defers to NRC's conclusion even though it is unsupported by any quantitative indication of what "negligible" impact means because, according to the court, NEPA does not mandate that the agency offer hard data.[231] Without this data, it is unclear whether HRI's "negligible" impacts will be inimical to public health, and whether NRC deserves the court's deference at all. It was the same lack of data that originally prevented states and the federal government from regulating uranium strip mining, which contributed to the injury and the death of hundreds of Navajo miners and their family members.

If, in addition to affirming NRC's licensing decision, the court were to have required adequate remediation, arguably, it would have eliminated a major dispute between the parties,

226. *Id*.

227. *Morris*, 598 F.3d at 693 n.15.

228. The Council on Environmental Quality, the administrative body charged with overseeing NEPA, defines "cumulative impacts" as, "[t]he impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions . . . Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." Cumulative impact, 40 C.F.R. § 1508.7 (2006).

229. *Morris*, 598 F.3d at 693.

230. *Id*. at 692–93.

231. *Id*. at 693.

and may have better protected the Church Rock community. The court missed an opportunity to demonstrate that responsible, profitable resource extraction and public health can coexist.

c. *The Court Approved HRI's License Despite Its Inability to Ensure Groundwater Restoration*

Both HRI and NRC agree that ISL uranium mining will inevitably contaminate the aquifer, both during and after mining.[232] The Petitioners disputed HRI's baseline water quality assessment. They argued that the nine "flushings" HRI proposed to restore water quality was too few, and that as a result, HRI's surety to cover the cost of restoration was woefully inadequate.[233] Finding that NRC had taken a "hard look" at the Petitioners' environmental concerns, the court denied Petitioners' claims.[234]

To conduct its ISL mining operations, HRI plans to inject "lixiviant"—a solution of groundwater mixed with oxygen and bicarbonate—into wells drilled into the geological layer containing uranium where the lixiviant absorbs the uranium as it is pumped back to the surface.[235] HRI will then separate the uranium from the lixiviant and process the uranium for use.[236] After mining all available ore, HRI will flush groundwater through the pores in the wellfield to return the groundwater to acceptable water quality levels.[237]

AEA regulations require HRI to restore the groundwater after the completion of an ISL operation, either to its pre-existing condition or the maximum contamination level under the SDWA.[238] Those regulations required HRI to provide an

232. *Id*. at 694 ("Although . . . 'in situ' leach mining techniques are considered more environmentally benign [than] traditional mining and milling practices they still tend to contaminate groundwater.") (*quoting* CONSIDERATION OF GEOCHEMICAL ISSUES IN GROUNDWATER RESTORATION AT URANIUM IN-SITU LEACH MINING FACILITIES, U.S. NUCLEAR REGULATORY COMM'N, NUREG-CR-6870 (Jan. 2007), *available at* http://pbadupws.nrc.gov/docs/ML0706/ML070600405.pdf).

233. *Morris*, 598 F.3d at 693–94.

234. *Id*.

235. *Id*. at 682.

236. *Id*.

237. *Id*. at 695.

238. *See* Domestic Licensing of Source Material, 10 C.F.R. § 40, Appendix, Technical Criterion 5 (2011).

"adequate financial surety" based on the estimated cost of restoration.[239] The cost of restoration, however, depends upon the level of water quality to which HRI pegs its restoration efforts. The FEIS stated that pre-mining groundwater quality in the Westwater Canyon aquifer is "good and meets New Mexico drinking quality standards."[240] However, because HRI averaged groundwater quality data from water within the Church Rock mining site and outside the site from a different section, contrary to NRC's directive, it calculated a lower level water quality.[241] On this limited, potentially inaccurate water quality data, NRC and the court accepted HRI's assumption that Section 17's water quality was poor and HRI's proposal to flush the wellfield nine times.[242] Until the actual water quality of Section 17 has been determined, neither HRI nor NRC knows the proper restoration standards or surety amount. By allowing HRI proceed before these requirements are met, the opportunity for public comment will have passed.

In addition, contrary to the AEA's requirement that NRC protect public health, NRC and the court tolerated high amounts of uncertainty as to whether HRI's license would protect drinking water supplies during mining and ensure its restoration afterwards. For example, although the FEIS and the court acknowledged that the lixiviant used in ISL mining may migrate to groundwater beyond the wellfield area, the court approved HRI's license without mitigation requirements.[243] In addition, the FEIS conceded that "successful restoration of a production-scale ISL wellfield has not previously occurred" and that "site-specific tests conducted by HRI have not demonstrated that the proposed restoration standards can be achieved at a production scale."[244] NRC's hydrologist noted that HRI was not able to restore arsenic, uranium and radium levels after substantial restoration testing, but "it 'was very close to' and 'was for all practical purposes at the primary water standard' for arsenic and 'uranium was nearly in compliance with NRC standard, and

239. 10 C.F.R. § 40, Financial Criterion 9 (2006); *Morris,* 598 F.3d at 694.

240. Petitioners' Revised Opening Brief at 10 Morris v. United States Nuclear Regulatory Comm'n, 598 F.3d 677 (2010) (No. 07-9505) 2007 WL 4732316 at 16.

241. *Id*. at 52.

242. *Morris*, 598 F.3d at 700–01.

243. *Id*. at 704.

244. *Id*.

radium concentrations were restored to anticipated baseline conditions."[245] Based on these findings, the FEIS concluded that HRI could "eventually" achieve restoration.[246]

HRI's past performance does not support this optimistic conclusion. Between 1997 and 2000, URI reported ten spills at its ISL sites in Texas, contaminating a total of 90,000 gallons of water.[247] Because NRC acknowledged these concerns in the FEIS, however, the court held that NRC had complied with NEPA.[248] Whether or not NRC sufficiently fulfilled its duty under NEPA, until HRI demonstrates its ability to fully restore the groundwater to its pre-mining quality, HRI's license may be "inimical to" public health and safety under the AEA.

Given the devastation from previous uranium mining in Church Rock and current, elevated rates of radiation, even the most "negligible," cumulative impacts to air and water quality should not be tolerated.[249] When the Tenth Circuit approved NRC's licensing decision, expansive uranium mining projects it was not writing on a blank slate; nor was the failure to acknowledge the Navajo Nation's history with uranium mining in *Morris* out of ignorance of that history. Arguably, the Tenth Circuit's decision in *Morris* will allow that history to repeat itself.

In conclusion, in *HRI III*, the court validated New Mexico's regulatory authority over HRI's mining operation under the SDWA; and in *Morris*, the court dismissed substantial protections to the Church Rock community's public health and environment provided by the AEA and NEPA. As discussed in Part III below, these decisions jeopardize the immediate and long-term health of the Church Rock community[250]—a community already saddled with the degradation of environmental and public health from previous experiments in uranium mining.

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245. *Id*. at 701.

246. *Id*. at 704.

247. Cooley, *supra* note 151, at 399.

248. *Morris*, 598 F.3d at 703–05.

249. *See* Petitioners' Revised Opening Brief at 22 Morris v. United States Nuclear Regulatory Comm'n, 598 F.3d 677 (2010) (No. 07-9505) 2007 WL 4732316 at 56–59.

250. *See Morris*, 598 F.3d at 705–6 (Lucero, J., dissenting).

III. CHALLENGES FOR CHURCH ROCK AND SIMILARLY SITUATED TRIBES AND TRIBAL COMMUNITIES

> The spirit of our Federal trust responsibility and the clear intent of Congress demand full and equal protection of the environment of the entire nation without exceptions or gaps under the programs for which the EPA is responsible.[251]

HRI III and *Morris* alter the legal and environmental landscape for Indian tribes across the United States. First, the decisions depart from traditional common law upholding the federal trust responsibility to Indian tribes and undermine modern Indian self-determination policy. Second, the decisions undermine the objective of federal environmental laws to provide comprehensive protection and to respond to the needs of local communities. Third, the decisions create a fundamental inequity between the companies extracting valuable minerals, the tribal communities bearing the brunt of the resulting pollution and the state agencies that do not bear a trust responsibility to the tribal community. In sum, the *Morris* and *HRI III* decisions set tribes, resource extraction companies, states and federal agencies on a collision course.

A. HRI III *and* Morris *Fail to Uphold the Federal Trust Responsibility to Tribes*

The Tenth Circuit's failure to uphold the federal trust responsibility may have far-reaching consequences for tribal communities and their environments if other courts follow the Tenth Circuit's lead. Although courts are not entirely settled as to when federal agencies should apply the principles of the federal trust responsibility, courts have, albeit unevenly, upheld tribes' claims against the Secretary of Interior and private companies for polluting activities occurring off the reservation that harm the tribes' natural resources.[252]

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251. Memorandum from Barbara Blum, Deputy Adm'r on EPA Policy for Program Implementation on Indian Lands, U.S. Envtl. Prot. Agency, to Regional Administrators, Assistant Administrators, Office Directors and General Counsel 3 (Dec. 19, 1980) [hereinafter *EPA's 1980 Indian Policy*] (on file with author) (*quoted in* James M. Grijalva, *The Origins of EPA's Indian Program*, 15 WTR KAN. J.L. & PUB. POL'Y 191, 227 (2006)).

252. *See, e.g.*, Pit River Tribe v. U.S. Forest Service, 469 F.3d 768, 788 (9th Cir. 2006) (reversing summary judgment for federal agencies which failed to take a "hard look" at the impact of a geothermal project on the Pit River Tribe's sacred, ancestral

The federal trust responsibility arose from Indian tribes' land cessions and their allegiance to the United States in return for the United States' recognition of tribal sovereignty and its long-term fulfillment of treaty obligations.[253] The federal trust responsibility was also viewed as a safeguard against state aggression towards Indian tribes.[254] The original perception that the federal trust responsibility only extended to the Bureau of Indian Affairs, Congress and the courts eventually gave way to the conclusion that the entire federal government bears a trust responsibility to Indian tribes.[255] The Supreme Court has described this responsibility as one of "moral obligations of the highest responsibility and trust."[256]

In the environmental context, courts have held that the federal trust responsibility includes a "duty to protect against damage or destruction"[257] of natural resources such as forests[258] and wildlife, and to correct mismanagement of oil and gas leases.[259] In recent years, the Court has interpreted

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sites off the reservation. The court ordered the agencies to undo the company's lease extensions and set aside its right to develop the land.); Northern Cheyenne Tribe v. Hodel, 851 F.2d 1152, 1158 (9th Cir. 1988) (invalidating privately-held, off-reservation coal leases); United States v. Winans, 198 U.S. 371, 381 (1905) (upholding off-reservation hunting and fishing rights on off-reservation private lands).

253. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831); Worcester v. Georgia, 31 U.S. 515, 555–56 (1832).

254. *See, e.g.*, United States v. Kagama, 118 U.S. 375, 384 (1886) (upholding the authority of the federal government to prosecute certain crimes in Indian country in part due to states' ill will towards tribes: "[b]ecause of local ill feeling, the people of the states where [the Indian tribes] are found are often their deadliest enemies.").

255. Hydro Res., Inc. v. United States Envtl. Prot. Agency (*HRI I*), 198 F.3d 1224, 1245 (10th Cir. 2000) (explaining that "[t]he federal trust responsibility imposes strict fiduciary standards on the conduct of executive agencies—unless, of course, Congress has expressly authorized a deviation from these standards") (quoting Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 225(1982) (citations omitted)). *See* United States v. Eberhardt, 789 F.2d 1354, 1363 (9th Cir. 1986); *see also* Mary Christina Wood, *Fulfilling the Executive's Trust Responsibility Toward The Native Nations On Environmental Issues: A Partial Critique Of The Clinton Administration's Promises And Performance*, 25 ENVTL. L. 733, 749–62 (1995) (describing several agencies' approaches towards tribes and the formal national Indian policies of the EPA and the Dep't of the Interior).

256. Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942) ("Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, [the United States] has charged itself with moral obligations of the highest responsibility and trust.").

257. White Mountain Apache Tribe v. United States, 11 Cl. Ct. 614, 672 (1987).

258. *Id.*

259. Jicarilla Apache Tribe v. Supron Energy Corp., 782 F.2d 855 (10th Cir. 1986) (per curium) (en banc) adopting Judge Seymour's dissenting opinion, Jicarilla Apache

the federal trust responsibility in the environmental context[260] more narrowly, making the judicial resolution of federal mismanagement of natural resources unpredictable.[261]

Courts and agencies alike are unsettled as to when a federal agency should apply the principles of the trust doctrine. Some scholars argue that agencies' trust responsibility should be applied when writing regulations affecting Indian country or when administering statutes "for the benefit of Indians."[262] Others scholars argue that when statutes give an agency discretion in its decision making, the agency should employ its trust responsibility in making those decisions.[263] Several courts have significantly narrowed the trust responsibility to statutory provisions imposing a specific duty upon a federal agency.[264] For example, in *Navajo Nation v. United States,*[265] the Tribe sued the United States for approving coal leases at a rate that was half of their market value. Although the Mineral Leasing Act of 1938 imposed a duty on the Secretary of Interior to approve higher lease rates for the Tribe, the Court

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Tribe v. Supron Energy Corp., 728 F.2d 1555, 1556 (10th Cir. 1984) (affirming the trial court's decision that the federal government had breached its duties under the Indian Mineral Leasing Act of 1938 when it mismanaged Tribe's oil and gas leases).

260. For a comprehensive review of the "Indian trust doctrine" and related cases *see* WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW IN INDIAN COUNTRY § 1.9 (2005).

261. *Compare* United States v. Mitchell, 463 U.S. 206 (1983) (holding the Bureau of Indian Affairs liable for damages to the Quinault Tribe for mismanagement and damage to its old-growth forests), *with* North Slope Borough v. Andrus, 642 F.2d 589 (D.C. Cir. 1980) (Secretary of the Interior did not breached its fiduciary duty to Native Alaskans because the Secretary had complied with NEPA and the Endangered Species Act, despite the Secretary's sale of federal property with oil and gas potential threatening the Inupiat communities' subsistence reliance on the Bowhead whale and other species) *and* United States v. Navajo Nation, 537 U.S. 488, 507 (2003) (5–3 decision) (Souter, J., dissenting) (no breach of trust where the Indian Mineral Leasing Act of 1938 imposed no fiduciary duty on the federal government to negotiate coal lease rates higher than statutory minimums).

262. *See* Skibine, *supra* note 137, at 4; Scott Hall, *The Indian Law Canon of Construction* v. *the Chevron Doctrine: Congressional Intent and the Unambiguous Answer to the Ambiguous Problem,* 37 CONN. L. REV. 495 (2004).

263. Skibine, *supra* note 137, at 4.

264. *See* Gros Ventre Tribe v. United States, 469 F.3d 801 (9th Cir. 2006) (holding that there may be a "distinctive obligation of trust . . . [t]hat alone, however, does not impose a duty on the government to take action beyond complying with generally applicable statutes and regulations."); Morongo Band of Mission Indians v. F.A.A., 161 F.3d 569 (9th Cir. 1998); Miccosukee Tribe of Florida v. United States, 980 F. Supp. 448 (S.D. Fla. 1997); Skokomish Indian Tribe v. Fed. Energy Regulatory Comm'n, 121 F.3d 1303 (9th Cir. 1997); North Slope Borough v. Andrus, 642 F.2d 589 (D.C. Cir. 1980).

265. United States v. Navajo Nation, 537 U.S. 488, 507 (2003).

declined to find a breach of the federal trust responsibility.[266]

In *HRI I*, however, the court unanimously upheld the federal trust responsibility, stating, "[t]he federal government bears a special trust obligation to protect the interests of Indian tribes, including protecting tribal property and jurisdiction."[267] The court adhered to traditional Indian law jurisprudence when it interpreted 18 U.S.C. § 1151(b) and SDWA regulations according to the Indian canons of construction,[268] and adhered to Supreme Court precedent instructing courts to resolve ambiguity in favor of the Indians when determining jurisdiction in dependent Indian communities.[269] The *HRI I* court stated: "[W]e . . . reaffirm that the [EPA] is to consider its strict fiduciary obligation when interpreting regulations that directly affect its 'administ[ration of] Indian lands.'"[270] Notably, the *HRI III* and *Morris* courts do not overrule *HRI I* on the issue of the federal government's trust responsibility—they simply ignore it all together.[271]

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266. The court found that the Act was intended to entrust Indian tribes with primary authority to negotiate coal leases on Indian lands, in spite of the Secretary's approval and veto power over coal leases on Indian lands. *Id*. at 516 (Souter, J., dissenting) (noting that "the 'basic purpose' of the Secretary's powers under IMLA is thus to "maximize tribal revenues from reservation lands" (*quoting* Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195, 200 (1985)).

267. Hydro Res., Inc. v. United States Envtl. Prot. Agency (*HRI I*), 198 F.3d 1224, 1245–48 (10th Cir. 2000) (*rev'd on other grounds*, Hydro Res., Inc. v. United States Envtl. Prot. Agency (*HRI III*), 608 F.3d 1131 (10th Cir. 2010)) (en banc 6-5 decision) (Lucero, J., dissenting on this point) ("Jurisdictional status of land implicates not only ownership, but also the core sovereignty interests of Indian tribes and the federal government in exercising civil and criminal authority over tribal territory . . . [The trust duty] is most relevant, however, when an agency decision necessarily incorporates a determination as to whether certain lands are within the scope of tribal territorial sovereignty.").

268. *Id*. at 1245. Two of the Indian canons of construction require that treaties, agreements, statutes and executive orders be liberally construed in favor of the Indians, (Choctaw Nation v. United States, 318 U.S. 423, 431–432 (1943); Worcester v. Georgia, 31 U.S. 515, 551–557 (1832)) and that all ambiguities in them must be resolved in favor of the Indians (McClanahan. Ariz. State Tax Comm'n 411 U.S. 164, 174 (1973); Winters v. United States, 207 U.S. 564, 576–77 (1908)); *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 193–200 (1999).

269. *HRI I*, 198 F.3d 1224, 1244 note 13, 1245–48 (applying the Indian canons of construction to its dependent Indian community analysis).

270. *HRI I,* 198 F.3d at 1246 (quoting Osage Tribal Council v. Dep't of Labor, 187 F.3d 1174, 1183 (10th Cir. 1999); Seminole Nation v. United States, 316 U.S. 286, 296 (1942)).

271. For further discussion of courts' movement away from fundamental tenants of Indian law, see Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177 (2001); David Getches,

Because the federal government has regulatory authority on Section 17 land, the Tenth Circuit should have applied the canons of construction to its interpretation of the AEA and required federal agencies involved to act in accordance with their federal trust responsibility. In *Morris*, the court did not invoke the federal trust responsibility in its interpretation of AEA regulation 10 C.F.R. § 20.1301.[272] Instead, the *Morris* court approved HRI's license which included only the minimum number of "flushings" to restore the groundwater, despite HRI's concession that it could not guarantee successful groundwater remediation.[273] Such experimentation with new technology is inconsistent with a fiduciary's responsibility to act with the diligence of a prudent trustee to manage trust assets of a beneficiary.[274]

The location of HRI's mining does not wholly excuse the federal government from exercising its trust responsibility against private, non-Indian activity even if Section 8 is no longer considered Indian country. Tribes have successfully asserted claims for hunting and fishing rights on off-reservation private land.[275] Indian tribes have also succeeded in NEPA-based suits against federal agencies to restrict non-Indian development threatening natural resources and sacred sites off the reservation.[276] In *Northern Cheyenne Tribe v.*

Conquering the Cultural Frontier: the New Subjectivism of the Supreme Court in Indian Law, 84 CAL. L. REV. 1573, 1620–23 (1996).

272. *See* Brief Amicus Curiae of the Navajo Nation in Support of Appellants' Petition for Rehearing and Rehearing En Banc at 6–8 Morris v. United States Nuclear Regulatory Comm'n, 598 F.3d 677 (2010) (No. 07-9505) 2007 WL 4732316 at 6–8.

273. Morris v. United States Nuclear Regulatory Comm'n (*Morris*), 598 F.3d 677, 700–701 (10th Cir. 2010).

274. *See* Cobell v. Norton, 240 F.3d 1081, 1101 (D.C. Cir. 2011) (applying general trust principles trust responsibility of the Bureau of Indian Affairs in its role as the administrator of trust accounts); Cobell v. Babbitt, 91 F. Supp.2d 1, (D.D.C. 1999) (mismanagement of individual Indian trust funds amounted to a breach of the government's trust responsibility); Manchester Band of Pomo Indians Inc. v. United States, 363 F. Supp. 1238, 1245 (N.D. Cal. 1973) ("[t]he Government as trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary" *quoted in* Restatement (Second) of Trusts, § 170(1) (1959)); United States v. Mason, 412 U.S. 391, 398 (1973) (The federal government as trustee must manage the assets of an tribal beneficiary according to the same standards as a private trustee). *Cf.* Navajo Tribe of Indians v. United States, 624 F.2d 981, 988 (Ct. Cl. 1980) (not all principles of trust law should apply unless they warrant application).

275. United States v. Winans, 198 U.S. 371, 381 (1905).

276. Pit River Tribe v. U.S. Forest Service, 469 F.3d 768, 788 (9th Cir. 2006) (reversing summary judgment for federal agencies which failed to take a "hard look" at

Hodel, the court invalidated privately-held, off-reservation coal leases and ordered the district court to stay the mining operation if it found irreparable harm to the Tribe's environmental, cultural, social and economic interests.[277]

More recently, in *Gros Ventre Tribe v. United States*, however, the Ninth Circuit failed to find a breach of the federal trust responsibility when tribal waters were contaminated by cyanide heap-leach gold mining permitted by the Bureau of Land Management because the mining occurred on off-reservation private lands.[278] In contrast to *Gros Ventre Tribe*, in *HRI III* and *Morris*, the federal government, Tribe and individual Navajo retained rights and interests in the land to be used for uranium mining. The federal government retained regulatory authority over both Section 8 (part of the dependent Indian community of Church Rock) and Section 17 land (where the federal government administers the AEA).[279] Therefore, unlike in *Gros Ventre*, the Tribe has an unmistakable property interest in the land and the federal government manages those properties, giving rise to a clear trust responsibility. Although *Gros Ventre Tribe* may limit tribes' success in suits challenging polluting activities off the reservation where the tribe is without a property right, the federal trust responsibility theory remains viable in future cases.

B. HRI III Undermines Comprehensive Environmental Regulation

The checkerboarding that *HRI III* produces will undermine comprehensive environmental protection in checkerboard areas for three reasons. First, on a practical level, the *HRI III* decision creates a multi-sovereign regulatory regime among tribal, state and federal governments. Under this regime, companies will encounter a dizzying array of potentially

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the impact of a geothermal project on the Pit River Tribe's sacred, ancestral sites off the reservation. The court ordered the agencies to undo the company's lease extensions and set aside its right to develop the land.).

277. *See* Northern Cheyenne Tribe v. Hodel, 851 F.2d 1152, 1158 (9th Cir. 1988).

278. Gros Ventre Tribe v. United States, 469 F.3d 801, 812–13 (9th Cir. 2006).

279. *See* Robert T. Anderson et al., *supra* note 3, at 431–32 (discussing the extent of federal "control and supervision" under a statute required to create enforceable duties upon which a tribe may succeed on a breach of trust claim against the federal government, including tribal trust assets subject to a "comprehensive and pervasive" regulatory scheme and federal control over trust assets to the exclusion of the tribe).

conflicting regulations and administrative decisions. Second, uncertainty and confusion regarding Indian country jurisdiction may increase the cost of regulatory enforcement beyond the means and willpower of any agency, resulting in less enforcement. Jurisdictional uncertainty will heighten the stakes of each administrative decision and may exacerbate existing tension between states and tribes.[280] Finally, the sheer administrative cost and duplication of tribal, state and federal agencies' research, monitoring and enforcement counsels against a multi-sovereign regulatory scheme in environmental law. *HRI III* will create an environmental "no-man's land," in which resident tribal communities will be left unprotected.

One need not speculate. Scholars and tribal leaders already criticize multi-sovereign jurisdictional schemes in checkerboard areas in the context of criminal and zoning law. For example, history shows that when states possess criminal jurisdiction in Indian country under Public Law 280, their lack of attention to tribal needs and the jurisdictional complexity in checkerboard areas produce "legal vacuums."[281] The resulting public safety crisis has forced some states to concede that checkerboard jurisdiction is unworkable and that it is necessary to work with tribes to mitigate its effects.[282] In a case involving a dispute over the Yakima Nation's zoning authority, Justice Blackman asked:

> [H]ow can anyone doubt that a tribe's inability to zone substantial tracts of fee land within its own reservation—tracts that are inextricably intermingled with reservation trust lands—would destroy the tribe's ability to engage in the systematic and coordinated

280. For example, the opposition of the Yankton Sioux Tribe to South Dakota's development of an unlined landfill in a checkerboard area culminated in the Supreme Court's decision that the area was no longer Indian country. South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998). For a critique, see Royster, *supra* note 10.

281. For a discussion of "legal vacuums" created in Indian country when criminal jurisdiction passed to several states under Public Law 280 see Carol Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1418–26 (1997). In relevant part, Goldberg-Ambrose discusses the dispute over the dumping of human waste sludge on the Torres-Martinez Reservation, which erupted into violence because neither the tribe, state nor federal government had clear authority to stop the dumping.

282. Carol Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data At Last,* 38 CONN. L. REV. 697, 726–29 (2006) (discussing tribal-state concurrent jurisdiction and cross-deputization agreements to ensure law enforcement in Indian country in Public Law 280 states).

> utilization of land that is the very essence of zoning authority?[283] . . . The threat to the tribe does not derive solely from the proposed uses of specific parcels of fee lands . . . [T]he threat stems from the loss of the general and longer term advantages of comprehensive land management.[284]

Courts, states and federal agencies alike should heed the lessons learned from the criminal and zoning contexts and spare tribal communities the burden of coping with judge-made jurisdictional entanglement.

Second, at the policy level, the public and federal government should be concerned by the ease with which *HRI III* and *Morris* undermine Congress's intent for federal environmental laws. For example, the purpose of the SDWA was to "assure that all citizens . . . would be provided high quality water supplies."[285] The SDWA and its amendments place special emphasis on protecting groundwater and sought to streamline enforcement under the Act.[286] Specifically, EPA chose to treat tribal lands as single administrative units to ensure comprehensive environmental protection under the SDWA.[287] In its brief to the en banc court in *HRI III*, the EPA explicitly stated that "[a]voiding checkerboarding is especially important for purposes of the SDWA [Underground Injection Control] program because groundwater aquifers are not delineated by land ownership boundaries."[288] As Judge Lucero's dissent highlighted, checkerboard jurisdiction makes little sense if the purpose of the SDWA is to protect surrounding groundwater.[289] After *HRI III* and *Morris*, if no

283. Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 458 (1989) (plurality opinion determining the Yakima Nation's authority to zone land use on its reservation).

284. *Id*. at 460.

285. S. REP. No. 99-56, at 1–3 (1985).

286. *Id*.

287. Memorandum from EPA Administrator William K. Reilly on EPA, Federal, Tribal and State Roles in the Protection and Regulation of Reservation Environments to Assistant Administrators, General Counsel, Inspector General, Regional Administrators, Associate Administrators, and Staff Office Directors (July 10, 1991).

288. EPA's Supplemental Brief for the *En Banc Court* at 13 Hydro Res., Inc. v. United States Envtl. Prot. Agency (*HRI III*), 608 F.3d 1131 (2010) (No. 07-9506), 2009 WL 3375299.

289. Hydro Res., Inc. v. United States Envtl. Prot. Agency (*HRI III*), 608 F.3d 1131, 1174 (10th Cir. 2010) (Ebel, J., dissenting).

single sovereign is responsible for coordinating the regulatory enforcement efforts among tribal, state and federal governments, SDWA enforcement efforts will lack consistency and will not be streamlined.

Third, *HRI III* and *Morris* fail to recognize the EPA's long-standing concern that if the state has regulatory authority over tribes, they may neglect tribal interests. In 1982, the EPA's Director of Federal Activities warned that "reservation needs and priorities . . . may not be adequately reflected in the state's environmental policies, funding and program implementation" if states assumed regulatory jurisdiction over tribal lands.[290] The EPA's concern stems from the original impetus of federal trust responsibility—to defend tribes from harmful state policies[291]—and reflects the consensus that states had been negligent in their duty to protect the environment.[292] In recognition of these concerns, Congress authorized tribes to assume primary implementation authority under the "treatment as state" provisions in several federal environmental laws.[293] Although tribal environmental protection can implicate non-Indian activities in neighboring counties and cities, courts have affirmed tribes' regulatory action and authority under treatment as state provisions.[294]

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290. Grijalva, *supra* note 251, at 261 n.412. *See also EPA's 1980 Indian Policy, supra* note 251 (noting that "[t]he environmental is generally best protected by those who have the concern and the ability to protect it.").

291. *See, e.g.,* United States v. Kagama, 118 U.S. 375, 384 (1886) (upholding the authority of the federal government to prosecute certain crimes in Indian country in part due ill will of the states: "[b]ecause of local ill feeling, the people of the states where [the Indian tribes] are found are often their deadliest enemies.").

292. Grijalva, *supra* note 251, at 199.

293. *Id*. at 228. Programs with "treatment as state" provisions include: Clean Air Act, 40 C.F.R. § 9, 35, 49, 50, and 81; Clean Water Act, 40 C.F.R. §§ 131.8, 123.31, 233.60, 501.22; Safe Drinking Water Act, 40 C.F.R. §§ 142.72, 145.52; the Toxic Substance Control Act, 40 C.F.R. § 745.324 (2008); and Federal Insecticide, Fungicide and Rodenticide Act, 40 C.F.R. § 171.10 (2008).

294. *See, e.g*., Wisconsin v. EPA, 266 F.3d 741, 748 (7th Cir. 2001) ("[O]nce a tribe is given TAS [treatment as state] status, it has the power to require upstream off-reservation dischargers, conducting activities that may be economically valuable to the state . . . to make sure that their activities do not result in contamination of the downstream on-reservation waters."); City of Albuquerque v. Browner, 97 F.3d 415, 423-24 (10th Cir. 1996) (upholding EPA's authority to require upstream water user (Albuquerque) to comply with downstream tribe's water quality standards under the Clean Water Act). For discussion of other statutes implicating non-Indian, off-reservation interests, see Alex Tallchief Skibine, *Tribal Sovereign Interests Beyond The Reservation Borders*, 12 LEWIS & CLARK L. REV. 1003 (2008).

The Navajo Nation currently administers two of the three parts of the SDWA, including the UIC program, both on and off the reservation.[295] Had tribal jurisdiction extended to HRI's parcel, HRI would have had to obtain a permit from the Tribe. Thus, when the court determined that Section 8 is not Indian country, it eliminated any prospect of the Navajo Nation providing regulatory protection for its own community and ignored local demand for a livable environment. A multi-sovereign regulatory regime in the Church Rock Chapter is unworkable. Overall, the *HRI III* decision undermines the EPA's policy of comprehensive environmental protection "without exceptions or gaps."[296]

C. HRI III *and* Morris *Increase the Vulnerability of Tribal Communities Living Adjacent to Reservations*

The *HRI III* and *Morris* decisions inequitably distribute the risks and costs of environmental damage between tribes, states, the federal government and private companies. Going forward, companies in checkerboard areas adjacent to reservations will extract valuable resources, tribal communities will bear the costs of degraded environments and public health, and states may avoid direct accountability to the tribal community.

1. *Clarifying Church Rock's Unique Predicament*

Understanding the unique predicament of tribal communities living adjacent to reservations reveals the broader implications of *HRI III* and *Morris*. It also suggests possible solutions to correct the inequitable distribution of environmental damage, costs and liabilities. Three characteristics of Church Rock help illustrate the community's

295. 40 C.F.R. § 147.3400 Navajo Indian Lands--Class II wells (2008) (delegating primary authority to Navajo Nation for the UIC program for Class II wells both on and off the reservation, but not including the Sections of the Church Rock Chapter at issue in *HRI III* or *Morris*) *incorporating* Underground Injection Control (UIC) Program; Primacy Approval, 73 Fed. Reg. 65556 (Nov. 4, 2008). Although several environmental laws restrict tribal regulatory jurisdiction to the exterior boundaries of the reservation, the SDWA extends tribal jurisdiction to "the area of the Tribal Government's jurisdiction," which, under 18 U.S.C. § 1151(b) and (c) may extend to dependent Indian communities and trust allotments off the reservation. *See* Indian Tribes, 40 C.F.R. §§ 142.52, 56, 58 (2011).

296. *EPA's 1980 Indian Policy, supra* note 251.

predicament.

First, if Church Rock was located on the reservation, the tribe could potentially regulate uranium mining under the SDWA's "treatment as state" provision.[297] Yet, as a tribal community located adjacent to the reservation, whose members are enrolled in the tribe, receive tribal services and participate in tribal affairs, Church Rock cannot benefit from the protections their relatives and neighbors enjoy on the other side of the reservation boundary. Second, after *HRI III*, the Church Rock community must take its grievances for damage stemming from HRI's activities on Section 8 lands to the SDWA licensing authority—the State of New Mexico. However, the State of New Mexico bears no trust responsibility to the tribal community and, as noted, states typically offer less protection of tribal interests.[298]

Third, if a non-Indian community's health and environment were severely impacted by resource extraction, members of such a community may decide to relocate in response to the public health threat. However, due to kinship, ancestral and spiritual ties to the land, opportunities for education in the native language and local grazing leases, "relocation is not an option for Indian people."[299] Church Rock residents should not have to relocate. Judicial doctrine and treaties recognize that tribal lands were set aside for the purpose of creating a permanent homeland for American Indians.[300] Thus, "voting with one's feet"—a crucial aspect of democratic federalism—will not protect Church Rock residents. Because tribal lands are the only homeland for future generations of American

297. *See* statutes cited *supra* notes 293 and 295.

298. *See, e.g.,* United States v. Kagama, 118 U.S. 375, 384 (1886) (upholding the authority of the federal government to prosecute certain crimes in Indian country in part due ill will of the states: "[b]ecause of local ill feeling, the people of the states where [the Indian tribes] are found are often their deadliest enemies.").

299. *See* Justice Blackmun's opinion in Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 458 (1989) (noting that "[t]his fundamental sovereign power of local governments to control land use is especially vital to Indians, who enjoy a unique historical and cultural connection to the land." (citation omitted)); *EPA 1980 Indian Policy*, *supra* note 251 (recognizing that "only if we preserve our natural environment, only then, will future generations of Indian people have the opportunity to choose to follow traditional ways . . ."). *See generally* Rebecca Tsosie, *supra* note 7.

300. Courts have recognized tribes' water rights as a necessary corollary to the establishment of Indian reservations as permanent homelands for tribes for over a century. *See* cases cited *supra* note 5.

Indians, environmental protection to sustain tribal vitality is essential.

The Tenth Circuit's decisions place an inordinate burden upon the Church Rock community which had no voice in jurisdictional policy and which is ill-equipped to absorb the health, environmental and economic costs from further degradation. When tribes cannot protect their communities living adjacent to a reservation, tribal communities are left without a directly accountable sovereign—tribal, state or federal. This fundamental inequity offends democratic notions of accountability and is plainly unjust. If future courts follow *HRI III* and *Morris*, the Church Rock community will not be the only tribal community facing increasing threats to health and environment.

2. *Implications of the Tenth Circuit's Inequitable Distribution of Authority, Risk and Cost*

History reveals that companies may find less restrictive regulatory environments on lands adjacent to Indian reservations. Extractive industries began development on tribal lands in the late 1960s, when the DOI and DOE began encouraging their development.[301] At that time, federal enforcement of environmental laws on tribal lands was scant, creating a favorable business climate.[302] In fact, it was the resulting industrial pollution on reservations and lands adjacent to them that motivated the EPA to move towards tribal implementation of environmental programs.[303]

As environmental regulation has improved on reservations themselves, the regulatory gaps have moved from reservations to adjacent lands. Similar to *HRI III*, *Yankton Sioux Tribe v. United States Environmental Protection Agency*[304] illustrates how tribes can lose land and jurisdiction when companies pursue environmentally-risky projects on private land in checkerboard areas. In *Yankton Sioux Tribe*, the Tribe sued to

301. Grijalva, *supra* note 251, at 213–15.

302. *Id*. at 213.

303. *EPA 1980 Indian Policy, supra* note 251 (noting that "some reservations face the prospect of large-scale energy development, either on-reservation or nearby, with potentially massive environmental consequences for reservation lands.").

304. Yankton Sioux Tribe v. Southern Missouri Waste Management Dist., 890 F. Supp. 878, 888–92 (D.S.D. 1995), *overruled by* South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998). For an explanation of this case, see Royster, *supra* note 10.

enjoin the construction of a solid waste landfill on private land within the exterior boundaries of its reservation, and to contest the EPA's waiver of the federal requirement to line the landfill to protect groundwater quality.[305] The district court recognized the EPA's regulatory authority over the landfill because it was located on non-Indian land in Indian country.[306] When the Eighth Circuit affirmed the decision, the State appealed, and the Supreme Court held that in fact, the landfill site was no longer Indian country at all. [307] Regulatory authority passed to the State of South Dakota, and the clay liner requirement was not enforced. Thus, *Yankton Sioux Tribe* illustrates how a tribe's attempt to protect its communities from environmental degradation can provoke contentious jurisdictional issues resulting in a tribe's loss of land, jurisdiction and environmental protection.

It is in the interest of tribal, state and federal leaders to address the predicament of tribal communities adjacent to reservations because natural resource conflicts in these areas are likely to continue. As illustrated in *Yankton Sioux Tribe*, resource extraction companies may find checkerboard areas off the reservation appealing if regulations in those areas are perceived to be relaxed or ineffective.[308] In addition, tribes may increasingly seek to provide environmental protection to *all* of their communities, both on and adjacent to the reservation. Since the 1980s, thirty-six tribes have developed water quality standards under the Clean Water Act,[309] and thirty-two tribes are now eligible to administer programs under the Clean Air Act.[310] The financial and administrative investment Congress requires of tribes to apply for, develop and implement environmental programs is a testament to tribes' commitment

305. Royster, *supra* note 10, at 297–99.

306. *Yankton Sioux Tribe*, 890 F. Supp. at 893.

307. *Yankton Sioux Tribe*, 522 U.S. at 329.

308. *See, e.g.*, Yankton Sioux Tribe v. United States Envtl. Prot. Agency, 950 F. Supp. 1471, 1482 (D.S.D. 1996).

309. TRIBAL WATER QUALITY STANDARDS APPROVED BY EPA, U.S. ENVTL. PROT. AGENCY, http://water.epa.gov/scitech/swguidance/waterquality/standards/wqslibrary/tribes.cfm (last visited Mar. 3, 2011).

310. *Tribal Air, Basic Information*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/oar/tribal/backgrnd.html (last visited Mar. 3, 2011) (In addition, 99 tribes are receiving air grant support, 78 tribes are monitoring hazardous air pollutants, 22 tribes are implementing programs to reduce toxic air pollutants, 56 tribes have completed inventories of emission sources on their reservation.).

to protect the environment for future generations.

Because tribal environmental regulation makes it more tedious and risky for energy companies to pursue resource development on a reservation, companies will gravitate towards land adjacent to the reservation that offers the same resources under state jurisdiction. In such situations, tribes must face the difficult decision whether to pursue environmental protection to protect their communities in these areas, while risking their territorial sovereignty and jurisdiction in the process. This trade-off is unnecessary and unjust.

IV. REMAINING OPPORTUNITIES FOR THE PROTECTION OF ENVIRONMENTAL AND PUBLIC HEALTH IN CHECKERBOARD AREAS

In recognition of its trust responsibility and the objectives of the AEA, NEPA and SDWA, the federal government has the opportunity to take two steps that could significantly decrease natural resource conflicts in checkerboard areas. First, the federal government can retain environmental regulatory authority over checkerboard areas in order to fulfill its trust responsibility to protect a tribe's natural resources located on or off the reservation. Second, the federal government can mandate that federal agencies write "Indian Trust Impact Statements" to clarify when a tribe's natural resources will be affected and how those resources will be protected.

A. *Retention of Federal Environmental Regulatory Authority Over Checkerboard Areas*

When a tribal community adjacent to a reservation will bear the brunt of environmental and public health damage from a resource extraction project located on private land, and tribal environmental regulation is unable to protect that community, this comment argues that the federal government should retain regulatory authority over that land. The legal basis for retaining federal authority over private land in checkerboard areas adjacent to a reservation is twofold. First, the federal government's trust responsibility to tribes includes the protection of certain natural resources.[311] Second, the federal

311. *See* White Mountain Apache Tribe v. United States, 11 Cl. Ct. 614, 672 (1987)

government's retention of regulatory authority can uphold the purpose of environmental laws to provide comprehensive environmental protection and accountability at the local level.[312] The goal of this recommendation is not to prevent resource extraction, or unnecessarily impede state jurisdiction, but rather, to maximize the protection of the environment and public health by avoiding the multi-sovereign regulatory regimes produced by *HRI III*.

Under trust law, a fiduciary is required to manage the trust with the skill and prudence of a reasonable person in the conduct of his own business.[313] The duties that apply to a private fiduciary generally apply to the federal government as well.[314] Because the Navajo Nation's water rights extend to groundwater,[315] and because the federal government must protect that groundwater under the AEA and SDWA (UIC program), the federal government's trust responsibility includes the protection of the Westwater Canyon Aquifer. In

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(Where regulations required the federal government to responsibly manage and obtain revenue from Tribe's forests in a manner "consistent with eth proper protection and improvement of forests," the government's excessive timber harvesting constituted a breach of the trustee's [government's] fiduciary duty.); United States v. Mitchell, 463 U.S. 206 (1983) (holding the Bureau of Indian Affairs liable for damages to the Quinault Tribe for mismanagement and damage to its old-growth forests); Rodgers, *supra* note 260.

312. *See, e.g.*, 33 U.S.C. § 1252 (2006) (requiring states to develop comprehensive programs or preventing and eliminating pollution in surface and groundwaters); 42 U.S.C. § 7410 (2006) (requiring states to develop implementation plans for national ambient air quality standards to enforce in each air quality control region).

313. George Bogert, TRUSTS (6th ed.) § 93 (1987).

314. *Id*. *See also* cases cited *supra* note 274.

315. 22 Navajo Nation Code § 1103(A) (2011) (Navajo Nation asserts title to "all surface and groundwaters which are contained within hydrologic systems located exclusively within the lands of the Navajo Nation; and . . . all groundwaters located beneath the surface of the lands held in trust by the United States of America for the Navajo Nation."); *See* Title X Water Rights, Subtitle A--San Joaquin River Restoration Settlement of the Omnibus Public Land Management Act of 2009, PL 111–11, 123 Stat 991. In addition, the majority of federal and state courts recognize that tribally reserved water rights include groundwater based upon the *Winters* doctrine. *See* Winters v. United States, 207 U.S. 564 (1908). *See, e.g.,* United States v. Washington Dep't of Ecology, 375 F. Supp.2d 1050, 1058 (W.D. Wash. 2005) (recognizing the rights of the Lummi Tribe to groundwater beneath the Reservation and the Lummi Peninsula); In re the General Adjudication of All Rights to Use Water in the Gila River System and Source, 989 P.2d 739, 745, 747–48 (Ariz. 1999) (recognizing tribal reserved water rights to groundwater); Confederated Salish and Kootenai Tribes v. Stults, 59 P.3d 1093, 1099 (Mont. 2002) (same); *But see* Big Horn I, 753 P.2d 76, 99 (Wyo. 1988) (tribal reserved water rights do not extend to groundwater), aff'd by an equally divided Court, Wyoming v. United States, 492 U.S. 406 (1989).

Morris, HRI already conceded that its ISL mining will contaminate the aquifer and that complete restoration of the groundwater to drinking-water quality is not guaranteed.[316]

In the aftermath of *HRI III*, HRI is moving forward with operations that threaten Indian trust assets,[317] triggering the EPA's trust responsibility to protect the underlying aquifer. Federal delegation of SDWA permitting authority to a state over projects that directly and severely impact tribal members' health and tribal trust resources, either on or off the reservation, is inconsistent with the EPA's trust responsibility. Fortunately, three alternative options are available to the EPA. First, the *HRI III* majority specifically left open to the EPA the possibility of revising its regulations in order to reassume jurisdiction over Section 8.[318] For example, if the EPA were to define its regulatory authority on the basis of an aquifer or an aquifer's geo-spatial relationship to a predominantly tribal community, the EPA would not necessarily encounter the same issue of checkerboard jurisdiction and the *HRI III* decision.

Second, the SDWA provides for "revision" of New Mexico's UIC program under 40 C.F.R. § 145.32. This Section permits the EPA to unilaterally revise the State's UIC program, such that the EPA reassumes jurisdiction over certain lands (which EPA did in order to assume authority over Section 8 prior to the *HRI I* decision).[319] The EPA regulations under 40 C.F.R.

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316. Morris v. United States Nuclear Regulatory Comm'n (*Morris*), 598 F.3d 677, 694 (10th Cir. 2010). *See* J.A. DAVIS, G.P. CURTIS, *supra* note 14 (noting that "[i]ndustry experience shows that elevated concentrations of arsenic, selenium, radium, uranium, molybdenum, radium, uranium, and vanadium still existed after extensive groundwater restoration activities." (internal citations omitted)).

317. 317. LETTER TO SHAREHOLDERS, URANIUM RESOURCES INC., 2010 ANNUAL REPORT (2010).

318. Hydro Res., Inc. v. United States Envtl. Prot. Agency (*HRI III*), 608 F.3d 1131, 1135 (10th Cir. 2010)) (en banc 6-5 decision) ("None of this is to say that EPA must tether its SDWA permitting authority to a statute defining the scope of the federal government's criminal jurisdiction over Indian lands. Had EPA chosen to define its authority under the SDWA in a different way, the result in this case might have been different.").

319. Hydro Res., Inc. v. United States Envtl. Prot. Agency (*HRI I*), 198 F.3d 1224, 1243–44 (10th Cir. 2000). (affirming EPA's revision of New Mexico's authority under the SDWA, UIC program such that EPA reassumed jurisdiction over Section 8 because Section 8's Indian country status was "in dispute."). The final rule establishing the Underground Injection Program for Certain Indian Lands, 53 Fed. Reg. 43096–7 (1988), provides EPA with the discretion to reassume jurisdiction of non-Indian lands even after the status of those lands is no longer Indian country, or no longer "in

Section 145.33, Criteria for withdrawal of State programs, however, effectively restrict the EPA's ability to revise State UIC programs to situations in which a state is failing to meet the requirements of the program or to enforce penalties.

Third, the EPA can retain authority over Section 8 according to its trust responsibility, to ensure adequate protection of substantial trust resource—drinking water from the Westwater Canyon Aquifer. Returning regulatory authority to the EPA would not amount to a de-delegation of the entire UIC program from the State of New Mexico.[320] Nor would a reversion offend the *HRI III* decision, since the land status of private property like Section 8 would not change from "non-Indian country" to "Indian country." Returning SDWA regulatory authority to the EPA would not stem from the jurisdictional status of HRI's parcel of land, but rather from the federal government's trust responsibility to protect a tribal trust resource underlying private land. This solution applies the federal trust responsibility to licensing decisions and would increase the likelihood of comprehensive environmental protection and accountability to the community.

Courts have protected tribal environmental resources from harm stemming from off-reservation industrial development in the past.[321] Due to the highly political nature of natural resource conflicts, however, the federal government has lacked a uniform approach to its protection efforts. Without a coordinated approach, companies can develop resources adjacent to the community and potentially damage trust resources with impunity, threatening Indian communities' ability to continue living there. Therefore, when companies pursue risky development projects on private lands in tribal communities adjacent to the reservation, and tribal environmental regulatory authority is unable to protect those

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dispute:" "the intent of the last sentence of section 1422(e) is to make sure that all Indian lands are covered by some UIC program There will be cases in which a Tribe does not apply for primacy or cannot demonstrate its jurisdiction, but a State could not administer the UIC program on those lands. The EPA must administer the UIC programs for those lands."

320. *HRI I*, 198 F.3d 1224, 1241–44 (10th Cir. 2000) (rejecting HRI's "tail wags the dog" argument that a small jurisdictional reversion to the EPA amounted to a determination that the state's UIC program no longer satisfied the federal requirements set forth in SDWA regulations. *See* State primary enforcement responsibility, 40 C.F.R. § 300h-1(b)(3) (2011).

321. *See* cases cited *supra* note 252.

lands, the federal government must assume primary regulatory authority.

B. *Indian Trust Impact Statements*

As discussed in Part III.A.1, the *HRI III* and *Morris* decisions highlight the critical problem of courts' lack of enforcement of the federal trust responsibility.[322] In particular, the *Morris* decision demonstrates how this problem can stem from a court's choice between applying *Chevron* deference[323] or the "Indian canons of construction."[324] Thus, the *Morris* decision forces us to look for better ways to reconcile federal agencies' dual roles as regulators and tribal fiduciaries.[325]

Before a court offers broad *Chevron* deference to an agency's statutory interpretation, it should take special care to determine whether the agency is acting in its "regulating" capacity with plenary authority or as fiduciary.[326] Where an agency's role as regulator and fiduciary conflict, Judith Royster posits that courts should not accept *any* "reasonable" statutory interpretation an agency offers.[327] Rather, courts can require an agency to harmonize its roles as regulator and fiduciary. Agencies can harmonize their dual role by drafting "Indian Trust Impact Statements," a description of the trust resource that will be impacted by a particular project and the steps an

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322. *See* discussion, *supra* Part III.A.

323. *See* Chevron, U.S.A., Inc. v. Natural Resources Defense Council Inc., 467 U.S. 837, 840 (1984) (agency's interpretations of a statute it administers is entitled to judicial deference if it is based on a reasonable construction of the statute).

324. *See* cases and accompanying text cited *supra* note 268.

325. *See* United States v. Kagama, 118 U.S. 375, 378–82 (1886) (upholding the authority of the federal government to prosecute certain crimes in Indian country in part due ill will of the states: "[b]ecause of local ill feeling, the people of the states where [the Indian tribes] are found are often their deadliest enemies"); Lone Wolf v. Hitchcock, 187 U.S. 553, 567 (1903) (holding that Congress has the power to abrogate treaties with Indian tribes).

326. *See* Jicarilla Apache Tribe v. Supron Energy Corp., 782 F.2d 855 (10th Cir. 1986) (per curium) (en banc) adopting Judge Seymour's dissenting opinion, Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555, 1556, 1567 (10th Cir. 1984) (finding that "[w]hen the Secretary is acting in his fiduciary role rather than solely as a regulator and is faced with a decision for which there is more than one 'reasonable' choice as that term is used in administrative law, he must choose the alternative that is in the best interests of the Indian tribe. In short, he cannot escape his role as trustee by donning the mantle of administrator, a principle recently made explicit by this court in *Jicarilla Apache Tribe v. Andrus,* 687 F.2d 1324 (10th Cir.1982).").

327. Royster, *supra* note 10, at 301.

agency will take to mitigate that impact. At a minimum, Indian Trust Impact Statements would increase agencies' transparency and would potentially mitigate the federal government's abrogation of its trust responsibility to tribes.

The American Indian Policy Review Commission, an investigative body established by Congress in 1975 to review and report on federal Indian policy,[328] recommended that agencies prepare and submit an Indian Trust Impact Statement to an appropriate congressional committee for approval before taking action that may abrogate or infringe on treaty rights or non-treaty rights protected by the trust responsibility.[329] A variation on the concept of an Indian Trust Impact Statement would incorporate the Statement as the last step in an agency's tribal consultation process.[330] Tribal consultation was established as a means of improving government-to-government relations between the federal government and tribes. However, tribes have been disappointed by this promising practice due to its lack of substantive requirements and agencies' failure to integrate tribal preferences in their decisions.[331] An Indian Trust Impact Statement would concretize the tribal consultation process with a judicially or congressionally reviewable product that would demonstrate that an agency had carried out its trust responsibility in making its decision.

Specifically, the Indian Trust Impact Statement would (1) describe the project to be undertaken and its expected impact on an identified tribal community; (2) describe the tribal

328. 1 Am. Indian Policy Review Comm'n, Final Report 3 (1977).

329. *Id*. at 137, *cited in* Rodgers *supra* note 260.

330. *See* Executive Order No. 13175 FR 67249 (Nov. 6, 2000) (requiring each federal agency to develop an "accountable process" to ensure meaningful consultation with tribes and their input into federal policy and regulation). For an example of an agency's tribal consultation process, see Fish and Wildlife Service, Secretarial Order No. 3206: American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act, http://www.fws.gov/ (search "Secretarial Order No. 3206").

331. *See White House Meeting with Tribal Leaders*: *Background Paper on Tribal Consultation and Tribal Sovereignty*, NATIONAL CONGRESS OF AMERICAN INDIANS (Aug. 25, 2009), http://www.ncai.org (follow "About" tab to "News Archive," choose August 2009 and follow link to the Background Paper); *see also* Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dept. of Interior, 755 F. Supp.2d 1104 (S.D.Cal., 2010) (granting a preliminary injunction on the grounds that the tribe was likely to prevail on claim that the Bureau of Land Management had failed to adequately consult Tribe before approving solar energy project).

consultation process and decisions made pursuant to consultation; (3) set forth chosen statutory interpretations and rejected alternatives; (4) describe the nature and extent of tribal consent to the project; (5) identify any treaty or non-treaty rights infringed or abrogated; and (6) describe steps the agency will take to mitigate impact to the trust resource(s). Where an agency's fiduciary duty cannot be reconciled with its regulatory function, the agency would seek congressional approval for a project abrogating or infringing upon a tribe's treaty or non-treaty rights. Congress could then approve or deny the project, and appropriately compensate the tribe.[332]

The final benefit of an Indian Trust Impact Statement would be to restrict the role of the courts in decisions regarding the fiduciary duties of federal agencies and limit judicial subjectivity in this area.[333] In the end, Indian Trust Impact Statements would provide an agency-based, pre-emptive approach to reconciling the dual role of federal agencies as regulator and fiduciary. In doing so, Indian Trust Impact Statements may help slow the current erosion of the federal trust responsibility and reinvigorate environmental protection in vulnerable tribal communities.

V. CONCLUSION

Jurisdictional disputes arising from natural resource conflicts implicate the sovereign interests of tribes, states and the federal government as well as a company's bottom line. After HRI has recovered uranium from its lands in Section 8 and Section 17, the land will have little value to HRI. In contrast, the Navajo people will depend on the land, water from the Westwater Canyon Aquifer, and other resources in Church Rock for generations to come. This natural resource conflict could be substantially defused outside the courtroom. If the EPA retained jurisdiction over HRI's Section 8 land parcel and developed an Indian Trust Impact Statement, the tribe could at least appeal to the federal government, a directly-accountable sovereign, for ensuing damages.

In the meantime, HRI is planning to proceed with its mining

332. Final Report of the American Indian Policy Review Commission, Vol. 1, ch. 4 (1977).

333. *See* sources cited *supra* note 271.

operations in Church Rock beginning in 2013.[334] The Petitioners in *Morris* have submitted a petition against the United States in the Inter-American Commission on Human Rights alleging violations of the American Declaration of the Rights and Duties of Man and the United Nations Declaration on the Rights of Indigenous Peoples.[335]

The federal government's trust responsibility extends to all tribal communities. Thus the federal government should work to clarify regulatory jurisdiction over air and groundwater resources in checkerboard areas adjacent to reservations in order to ensure livable environments for future generations. The federal government should act swiftly to correct the inequitable distribution of authority and risk produced by the Tenth Circuit's decisions. Without such action, the federal government will contribute to the endangerment of many lives and the promise of a "livable environment" to future generations of Navajo people.

334. LETTER TO SHAREHOLDERS, URANIUM RESOURCES INC., 2010 ANNUAL REPORT (2010).

335. *See* Petition of the Eastern Navajo Diné Against Uranium Mining, et. al, against the United States of America to the Inter-American Commission on Human Rights, *available at* http://nmenvirolaw.org/images/pdf/ENDAUM_Final_Petition_with_figures.pdf; *see also* April Reese, *Navajo Group to Take Uranium Mine Challenge to Human Rights Commission*, N.Y. TIMES (May 12, 2011) http://www.nytimes.com/gwire/2011/05/12/12greenwire-navajo-group-to-take-uranium-mine-challenge-to-33718.html?pagewanted=all.