BEFORE THE ENVIRONMENTAL APPEALS BOARD
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D.C.

In re:	)	
	)	
NPDES Permits:	)	
Circle T Feedlot, Inc. – No. NE0134481	)	
Morgan Feedlot LLC – No. NE0134767	)	Appeal Nos. NPDES 09-02
Sebade Feedyard – No. NE0135712	)	NPDES 09-03
Stanek Brothers – No. NE034775	)	
	)	
	)	

RESPONSE TO PETITIONS FOR REVIEW

I. INTRODUCTION

On December 18, 2008, the U.S. Environmental Protection Agency, Region 7 ("EPA" or "Region 7") issued final permit decisions granting National Pollutant Discharge Elimination System ("NPDES") permits to the following Concentrated Animal Feedlot Operations ("CAFOs"): Circle T Feedlot, Inc., Permit No. NE0134481; Morgan Feedlot LLC, Permit. No. NE0134767; Sebade Feedyard, Permit No. NE0135712; and Stanek Brothers, Permit No. NE034775 (Exhibit A). These permits authorize discharges to waters within the Omaha and Winnebago Indian Reservations and were issued pursuant to Section 402 of the Clean Water Act ("CWA"), 33 U.S.C. § 1342, and regulations promulgated thereunder, including 40 C.F.R. § 123.1(h), which authorizes EPA to administer the NPDES program on Indian lands if a State (or Indian Tribe treated in the same manner as a State) does not seek or have authority to regulate CWA activities on Indian lands.

EPA has not issued a final permit decision with respect to four additional CAFOs: Bruns Feedlot, L.L.C., Draft Permit No. NE0135399; LBBJ, Inc., Draft Permit No. NE0134961; Ron Bruns Feed Yards, Homeplace, Draft Permit No. NE0135704; and Ron Bruns Feed Yards, Eastplace, Draft Permit No. NE0106526. These permits are being held in abeyance pending resolution of issues regarding the western boundary of the Omaha Reservation, which are currently the subject of ongoing litigation in the Tribal court of the Omaha Tribe of Nebraska. [1] The outcome of this litigation may affect EPA's assessment of whether discharges from these four facilities are located within the Omaha Reservation.

Two petitions have been filed with the Environmental Appeals Board ("EAB") requesting review of EPA's final permit decisions. Region 7 is responding herein to the petitions for review filed on January 30, 2009, and February 2, 2009, respectively, by Joel Lamplot, President, Thurston County Farm Bureau (Appeal No. NPDES 09-02) ("JLamplot Pet.") and Teri Lamplot (Appeal No. NPDES 09-03) ("TLamplot Pet."). [2] Petitioners assert that: (1) EPA is not authorized pursuant to the CWA to administer the NPDES program in Indian country, and the State of Nebraska should be the permitting authority for these CAFOs; (2) lands held in fee simple by non-Indians within the exterior boundaries of the Omaha and Winnebago Reservations are not Indian country; and (3) EPA's assertion of permitting authority over these CAFOs is inconsistent with Executive

[1] *Pender v. Parker* (D. Neb. Case No. 4:07-cv-03101, Omaha Tribal Court Case No. 08-002). EPA is not a party to this litigation. The four CAFOs issued final permits on appeal here are not located within the area subject to litigation in *Pender v. Parker*.

[2] Because EPA has not issued a final permit decision for four of the abovementioned CAFOs, EPA is concurrently submitting a separate Motion to Dismiss Petition for Review of Four Draft NPDES Permits with respect to Petitioner Teri Lamplot's request that the EAB consider these four CAFOs in their deliberations. TLamplot Pet. at 1, 5, 7, 8 (referring to all 8 CAFOs).

Order 13132, "Federalism" ("EO 13132"). For the reasons set forth below, EPA respectfully requests that the EAB deny these petitions for review.

II. FACTUAL BACKGROUND

The Omaha and Winnebago Tribes are federally-recognized Indian Tribes included in the list of such tribes maintained by the U.S. Department of the Interior ("DOI"). 73 Fed. Reg. 18553, 18555-56 (April 4, 2008). The Omaha Reservation was established in 1854 by treaty between the United States and various Chiefs of the Omaha Tribe. Treaty with the Omahas, March 16, 1854, 10 Stat. 1043. Certain lands in the northern portion of the Omaha Reservation were ceded to the United States for purposes of settlement of the Winnebago Tribe in an 1865 Treaty with the Omaha. In 1882, Congress opened for settlement certain Reservation lands west of a railroad line running north-south through the Omaha Reservation. 22 Stat. 341 (the "1882 Act"). The 1882 Act did not, however, open for settlement Omaha Reservation lands east of the railroad line.[3]

A 2006 letter from the DOI, Bureau of Indian Affairs ("BIA"), which attaches certain prior BIA correspondence and information relating to the Omaha Reservation, recognizes the boundary of the Omaha Reservation, with the exception of lands ceded to the United States for settlement of the Winnebago Tribe, as it was originally established under the 1854 Treaty. Letter from Tammy Poitra, BIA Superintendent, Winnebago

[3] Issues regarding the status of lands west of the railroad line are the subject of the dispute noted above in *Pender v. Parker*. These issues do not affect the reservation status of lands east of the railroad line, which was not opened for settlement in the 1882 Act and which is where the four CAFOs issued permits subject to these appeals are located.

Agency, to Jane Kloeckner, EPA, May 12, 2006 (Exhibit B).[4] In addition, separate opinions issued by Nebraska Attorneys General in 2001 and 2007 generally recognize the State's limited interest (as opposed to that of the Tribes and federal government) in CWA permitting on the Omaha and Winnebago Reservations and that the resolution of any questions regarding the traditional reservation boundaries is ultimately a federal matter. Don Stenberg, Opinion 01026 (July 23, 2001); Jon Bruning, Opinion 07005 (February 15, 2007) (Exhibits C and D). The four permitted CAFOs and their discharge points are located within the exterior boundaries of the Omaha and Winnebago Reservations, as established by the 1854 Treaty and 1865 Act, and are located east of the railroad line.[5] *See* Exhibit E, Map of Omaha and Winnebago Reservations. Thus, irrespective of the outcome of litigation regarding the 1882 Act and the areas west of the railroad line, these four facilities are located within the Omaha and Winnebago Reservations as recognized by BIA.

On July 19, 2007, EPA placed on public notice draft NPDES permits for all eight CAFOs described above. EPA received timely comments and a request for a public hearing, which was held December 13, 2007. On December 18, 2008, Region 7 issued final NPDES permits for the four CAFO facilities located within Omaha and Winnebago Reservations' boundaries and east of the railroad line described in the 1882 Act.[6] As described above, lands in this area of the Reservations were not opened for sale to non-

[4] Although the Omaha Reservation was established pursuant to the 1854 Treaty with the United States, the BIA letter cites June 27, 1855 as the creation of the Omaha Reservation. This date refers to the approval by the Secretary of the Interior of a survey of the Omaha Reservation boundaries, not the 1854 Treaty. For purposes of these NPDES appeals, the key point demonstrated by Exhibit B is BIA's recognition of the original Omaha and Winnebago Reservations' boundaries.

[5] The Sebade Feedyard (NPDES Permit No. NE0135712) is located within the exterior boundaries of the Winnebago Reservation. The other three permitted facilities are located within the exterior boundaries of the Omaha Reservation.

[6] EPA also prepared a Response to Comments ("RTC") document (Exhibit F), which addressed all comments received on the four draft permits that were finalized.

Indians by the 1882 Act, and are recognized by BIA as being within the Omaha and Winnebago Reservations' boundaries. Neither the Petitioners in the present case, nor the plaintiffs in the pending Tribal court litigation relating to the western boundary, challenge these sections of the Omaha and Winnebago Reservations' boundaries. On January 30, 2009, and February 2, 2009, the EAB received petitions from, respectively, Joel and Terri Lamplot[7] requesting the EAB's review of Region 7's final permits, wherein Petitioners assert EPA lacked authority to issue such permits. EPA responds herein that: (1) EPA is authorized pursuant to the CWA to administer the NPDES program in Indian country where, as is the case here, EPA has not approved the Tribe or State to administer the permitting program; (2) Properties held in fee and located within Indian reservation boundaries are Indian country and thus subject to federal permitting authority, and; (3) EPA's exercise of its permitting authority within Indian country is consistent with EO 13132.

III. STANDARD OF REVIEW

> In order to merit review by the Board, a petition for review must:
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> . . . include a statement of the reasons supporting that review, including a demonstration that any issues being raised were raised during the public comment period (including any public hearing) to the extent required by these regulations and when appropriate, a showing that the condition in question is based on:
>
> (1) a finding of fact or conclusion of law which is clearly erroneous, or
>
> (2) an exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review.

40 C.F.R. § 124.19(a). As the Board has previously noted, the petitioner bears the burden of demonstrating that review is warranted. *See, e.g., In re Environmental Waste Control,*

[7] Comments from Joel and Terri Lamplot were received during the public comment period after EPA issued the draft CAFO permits, thus satisfying standing requirements of 40 C.F.R. § 124.19(a).

Inc., 5 E.A.D. 264, 266, RCRA Appeal No. 92-39 (EAB May 13, 1994); *In re Amoco Oil Company Mandan North Dakota Refinery*, 4 E.A.D. 954, 957, RCRA Appeal 92-21 (EAB November 23, 1993). The Board has further noted that "this power of review should be only sparingly exercised" and "most permit conditions should be finally determined at the Regional level." *In re Environmental Waste Control, Inc.*, 5 E.A.D. 264, 266 *quoting* 45 Fed. Reg. 33412 (May 19, 1980). *See also*, *In re Ross Incineration Service*, 5 E.A.D. 813, 816, RCRA Appeal No. 92-3 (EAB April 21, 1995).

The Region will demonstrate in the following section that the Agency's response was not clearly erroneous and both Petitioners failed to demonstrate any clearly erroneous finding of fact or conclusion of law in the Region's final permitting decisions and/or Response to Comments. Thus, the Petitions for Review should be denied.

IV. ARGUMENT

A. EPA is authorized pursuant to the CWA to administer the NPDES program on the Omaha and Winnebago Reservations.

Congress has authorized EPA to issue NPDES permits under Section 402 of the CWA, 33 U.S.C. § 1342, which regulates the discharge of pollutants from point sources into navigable waters of the United States. In Section 102 of the CWA, 33 U.S.C. § 1251, Congress authorized EPA to establish regulations pursuant to the CWA, which are published in the Code of Federal Regulations (C.F.R.).

State and eligible tribal governments may apply to EPA for authorization to administer the NPDES permit program. State program requirements were enacted in the CWA in 1972 under Sections 402(b) and 304(i) of the CWA, 33 U.S.C. §§1342(b), 1314(i), and regulations promulgated thereunder in 40 C.F.R. Part 123. Notably, if a

state seeks authority to administer the program in Indian lands, the regulations specifically require that the state's application must contain an appropriate analysis of the state's authority in such area (40 C.F.R. § 123.23(b)). EPA would then need to make an explicit finding that the state had demonstrated such authority and an explicit determination that the state's program is approved for the Indian lands. In 1987, Congress amended the CWA to provide that eligible federally-recognized Indian tribes may be treated in the same manner as states with respect to administering the NPDES permitting program (as well as other CWA programs) on their reservations. Section 518(e) of the CWA, 33 U.S.C. § 1377(e). Regulations governing tribal eligibility for purposes of the NPDES program were promulgated in 1993 and are found at 40 C.F.R. §§123.31 to 123.34.

In the current appeals, Petitioners argue that the State of Nebraska, as opposed to EPA, should issue NPDES permits to the four CAFOs because they are located on non-Indian owned fee land within the Omaha and Winnebago Reservations. See JLamplot Pet. at 3-4; TLamplot Pet. at 8-9. However, EPA's NPDES regulations clearly provide that "EPA will administer the program on Indian lands if a State (or Indian tribe) does not seek or have authority to regulate activities on Indian lands." 40 C.F.R. § 123.1(h).[8] Here, neither the Omaha or Winnebago Tribes, nor the State of Nebraska, have applied for or received authorization from EPA to implement the NPDES permit program on the

[8] The EPA has consistently interpreted the term "Indian lands" to be the same as "Indian country," which is a term defined at 18 U.S.C. § 1151 and which includes all land within the exterior boundaries of an Indian reservation. See *State of Washington Department of Ecology v. U.S. Environmental Protection Agency*, 752 F.2d 1465, 1467 (9th Cir. 1985). EPA's interpretation has been set forth in a number of circumstances. For example, regulations under the Safe Drinking Water Act define "Indian lands" to be "Indian country." 40 C.F.R. § 144.3; see also, 40 C.F.R. § 122.2 (defining "Indian country" in EPA's NPDES regulations). While the definition of "Indian country" contained in 18 U.S.C. § 1151 appears in the criminal code, the definition applies to questions of both criminal and civil jurisdiction. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n.5 (1987); *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975).

Omaha or Winnebago Reservations. As explained in EPA's Response to Comments, in these circumstances EPA alone has authority – as explicitly set forth in the regulations at section 123.1(h) – to issue CWA NPDES permits. RTC at 2-3. EPA's exercise of this authority in no way preempts any State program – as apparently argued by Petitioner Joel Lamplot (JLamplot Pet. at 3-4) – because the State has never sought or been approved by EPA in the first instance to administer the CWA program over this area.[9]

The EAB has previously addressed and affirmed EPA's authority to administer the NPDES program within Indian country, and in particular within an Indian reservation. In *In re: Mille Lacs Wastewater Treatment Facility,* 11 E.A.D. 356 (EAB 2004), the EAB carefully analyzed EPA's authority over a tribal wastewater treatment facility owned and operated by the Mille Lacs Band of Ojibwe Indians (the "Band") in Minnesota. Although the procedural history of that appeal (which is thoroughly reviewed in the EAB's Decision) is somewhat complex, the salient facts are that the permitted facility was located on land that EPA (and DOI) determined to be within the historical boundaries of the Band's formal reservation, which provided a primary basis upon which EPA Region 5 was authorized to issue the permit (since neither the Band, nor the State of Minnesota, was approved to administer the NPDES program in Indian country). *Id.* at 359-61. In addition, during the pendency of an appeal of the initial permit, DOI acquired the land upon which the facility was located in trust for the Band. Following a remand and

[9] Similarly, Petitioner Teri Lamplot's citation to *Nevada v. Hicks*, 533 U.S. 353 (2001) is inapposite. TLamplot Pet. at 3, 7-8. As explained in EPA's Response to Comments, *Hicks* addresses tribal authority over non-members of the tribe on tribal land. RTC at 2-3. The case does not relate to federal authority in Indian country and casts no doubt upon EPA's authority under the CWA and regulations. Nor, as further discussed in the RTC, does *Hicks* upset the settled principle that primary jurisdiction in Indian country rests with the federal government and the relevant Indian tribe. *Native Village of Venetie Tribal Government,* 522 U.S. 520, 527 (1998). RTC at 2-3. Ms. Lamplot's apparent assertion that *Hicks* somehow supports State issuance of the four permits on appeal here simply ignores the fundamental facts that the State has not applied, and EPA has not approved the State, to administer the NPDES program over the Omaha Reservation. In the circumstances presented here, only EPA can issue the relevant permits.

reissuance of the permit, the trust status of the land provided an additional basis – apart from its location within the traditional boundaries of the Band's reservation – supporting both the Indian country status of the facility location, and, therefore, EPA's authority under 40 C.F.R. § 123.1(h) to issue the permit. *Id.* at 361-62. After reviewing these circumstances and the relevant legal precedent, the EAB found that the petitioners had failed to identify any facts to refute EPA Region 5's determination that the trust land at issue constituted an informal or *de facto* Indian reservation (and thus Indian country) and upheld the Region's authority to issue the permit under EPA's regulations.[10] *Id.* at 375-78. In so doing, the EAB also recognized that EPA's authority to issue federal permits under section 123.1(h) extends throughout Indian country, which is broader than, but includes, all land within the limits of an Indian reservation. *Id.* at 366-67.

The *Mille Lacs* decision is directly relevant here. Region 7's position in these appeals is that, because the four CAFOs are located within the exterior boundaries of the Omaha and Winnebago Reservations, they are within Indian country and, therefore, fall squarely within EPA's federal permitting authority under section 123.1(h). The EAB explicitly recognized such authority throughout Indian country in *Mille Lacs*, and that precedent controls here. Petitioner Teri Lamplot misinterprets the EAB's focus in *Mille Lacs* on the trust status of the relevant facility location. TLamplot Pet. at 7. As described above, the trust (and thus informal reservation) status of the relevant land in *Mille Lacs* simply provided an alternative basis on which to conclude that the land was Indian country and thus within EPA's permitting authority under the CWA and regulations. Nowhere in that case did EPA argue, nor did the EAB find, that the ownership of land

[10] Having affirmed this basis to uphold the federal permit, the EAB did not need to reach the alternative argument that the facility was situated in Indian country based on its location within the historical boundaries of the Band's formal reservation. *Id.* at 375 n. 24.

(*e.g.*, fee or trust) within the exterior boundaries of a *formal* Indian reservation makes any difference to the Indian country status of the land. Quite to the contrary, EPA's position in *Mille Lacs* was that, even prior to DOI's trust acquisition of the relevant parcel, the facility was located within the traditional boundaries of the Band's formal reservation and was thus in Indian country irrespective of land ownership. By virtue of the subsequently acquired trust status, the EAB did not need to reach any question regarding the integrity of the original formal reservation boundary. However, as noted above, the EAB did observe that EPA's federal permitting authority under section 123.1(h) extends throughout Indian country, which (per the statutory and regulatory definition) includes all land within an Indian reservation.

With regard to the four CAFOs at issue here, the Petitioners have not asserted that the fee lands upon which the facilities are sited are not located within the exterior boundaries of the Omaha and Winnebago Reservations; nor have they identified any facts calling into question Region 7's determination that the facilities are, in fact, within the Omaha and Winnebago Reservations. These facilities are thus directly within the EPA's permitting authority under Section 123.1(h).

Petitioner Teri Lamplot also mistakes EPA's authority to issue federal permits in Indian country in the absence of an EPA-approved state or tribal program with an eligible tribe's authority to issue permits within its reservation under section 518(e) of the CWA. In her petition (which appears simply to restate this point verbatim from her comments submitted on the draft permits), Ms. Lamplot appears to assert that EPA is claiming jurisdiction on behalf of an Indian tribe under section 518(e). TLamplot Pet. at 4. Citing certain case law arising under the Clean Air Act ("CAA"), the petition also appears to

state that EPA cannot implement a federal NPDES program in the absence of clear state or tribal authority. See *Michigan v. EPA*, 268 F.3d 1075 (D.C. Cir. 2001). Ms. Lamplot, however, mistakes the fundamental issue presented in *Michigan*. In that case, the D.C. Circuit addressed the issue of EPA's authority to indefinitely administer the CAA Title V permit program for facilities located on lands where the Indian country status was in question. In the current appeals, there is no question that the four CAFOs and their discharge points are on lands within the boundaries of the Omaha and Winnebago Reservations and thus clearly within EPA's authority. Indeed, the court in *Michigan* specifically recognized that – per the statutory definition – Indian country includes "all land within the limits of any Indian reservation" and "denotes the geographic scope where 'primary jurisdiction...rests with the Federal Government and the Indian tribe inhabiting it, and not with the States.'" *Id.* at 1079 (quoting *Alaska v. Native Village of Venetie*, 522 U.S. at 527 n. 1). Similarly, the EAB has recognized the distinction between EPA and tribal authority under the CWA and concluded that EPA's permitting authority over "Indian lands" pursuant to 40 C.F.R. § 123.1(h) is broader in scope than the authority available to eligible Indian tribes, which is limited to Indian reservations pursuant to CWA section 518(e) and 40 C.F.R. 123.31. *Mille Lacs* at 15-16. EPA's authority in this case under section 123.1(h) is thus clear.

EPA notes that Nebraska authorities have acknowledged EPA's permitting authority in Indian country when neither the state nor a tribe has been authorized to carry out the NPDES program. In 2001, the Nebraska Department of Environmental Quality ("NDEQ"), the agency authorized to implement the State's NPDES program, informed EPA that it would not be pursuing approval of a State NPDES program for any Indian

reservation areas (including non-Indian fee lands within reservations) based on a lack of State authority in such areas. Letter to U. Gale Hutton, EPA, from Annette Kovar, NDEQ Legal Counsel, October 3, 2001. (Exhibit G). Also in 2001, Nebraska Attorney General Don Stenberg issued an opinion recognizing EPA's NPDES permitting authority with respect to a wastewater treatment facility within the boundaries of the Omaha Reservation: "EPA will issue the NPDES permits within the exterior boundaries of the reservation when neither the tribe nor the state have been given that authority." *See* Exhibit C. Significantly, as noted above, DOI – which has special expertise and responsibility for Indian country affairs and land status determinations – also recognizes the current validity of the Omaha and Winnebago Reservation boundaries as including the area where the four CAFOs subject to these appeals are located.

Based on these facts and its review of the record and relevant maps and history of the Omaha and Winnebago Reservations, Region 7 thus correctly determined that the four CAFOs at issue are located within the boundaries of the Omaha and Winnebago Reservations, and thus under EPA's permitting authority. Region 7's factual determination in this regard is entitled to substantial deference. *See Arkansas v. Oklahoma*, 503 U.S. 91, 112-13 (1992). Deference is particularly due to EPA's factual determination regarding the Reservation status of the land because that determination was informed and supported by the factual findings of DOI, which has been entrusted by Congress with "the management of Indian affairs and of all matters arising out of Indian relations." 25 U.S.C. § 2. See *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 357 (1962) (recognizing DOI's expertise with respect to Indian affairs); *Cheyenne-Arapaho Tribes of Oklahoma v. Oklahoma*, 618 F.2d 665, 667-

68 (10th Cir. 1980) (determining that certain land was Indian country under 18 U.S.C. § 1151(a) partly because DOI had issued an opinion in which it determined that the land had reservation status).

EPA is the appropriate permitting authority for the four permitted CAFO facilities because: (1) neither the State of Nebraska, nor the Omaha and Winnebago Tribes, have been approved to carry out the NPDES program within the Omaha and Winnebago Reservations, and (2) the facilities and their points of discharge are located within Omaha and Winnebago Reservations' boundaries that are unchallenged.

B. Properties held in fee by Non-Indians within the Omaha and Winnebago Reservations are Indian country and subject to federal NPDES permitting authority.

Petitioner Teri Lamplot's principal assertion appears to be that the permitted feedlot facilities are not located in Indian country by virtue of the fact that the lands on which they are sited – although located within the intact and unchallenged historical boundaries of the Omaha and Winnebago Reservations – are owned in fee by nonmembers of the Tribe. (TLamplot Pet. at 3-8). Ms. Lamplot argues, without any citation to case law, that by virtue of their nonmember-owned status, these lands are necessarily not "under the jurisdiction of the United States Government" under the CWA definition of Indian reservation, and thus are not Indian country. As described below, this argument disregards the plain language of the Indian reservation definition as well as the consistent interpretation of that language by the Supreme Court. The petition thus raises no valid issue about Region 7's determination that the relevant fee land here is part of the Omaha and Winnebago Reservations, and is thus Indian country and within EPA's NPDES permitting authority.

Section 518(h)(1) of the CWA, 33 U.S.C. § 1377(h), and EPA regulations at 40 C.F.R. §§ 122.2 and 124.2 define "Federal Indian Reservation" as all land within the limits of any Indian reservation under the jurisdiction of the United States Government, *notwithstanding the issuance of any patent* and including rights-of-way running through the reservation" (emphasis added). *See also,* 40 C.F.R. § 122.2 (defining "Indian country" as including all land within the limits of any Indian reservation and using identical language as above in referring to reservation lands); 18 U.S.C. § 1151 (same). Contrary to Ms. Lamplot's assertion, the plain language of this definition explicitly includes land within a reservation's boundaries to which a patent (*e.g.*, a patent of ownership in fee simple) has been issued. Thus, Ms. Lamplot's argument that jurisdiction depends not on historical reservation boundaries, but on land ownership status (TLamplot Pet. at 5), is without merit.

The Supreme Court has consistently held that lands owned by non-tribal members within a reservation remain part of the reservation and that only Congress can divest land of its reservation status. *See, e.g., Solem v. Bartlett,* 465 U.S. 463, 470 (1984) ("Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise"); *United States v. Celestine,* 215 U.S. 278, 285 (1909) ("... all tracts included within [the reservation] remain a part of the reservation until separated therefrom by Congress."). Indeed, the Court has specifically rejected a contention strikingly similar to that proposed by Ms. Lamplot here. *Seymour*, 368 U.S. at 357-58. In *Seymour*, the Supreme Court addressed whether the Colville Reservation in the State of Washington had been diminished by a 1906 Act of Congress, which, among

other things, provided for the homesteading of certain reservation lands by non-Indians. *Id.* at 354-55. At issue in the case was whether the State or federal government had jurisdiction over a crime committed on land held in fee by a non-Indian within the opened area of the reservation. *Id.* at 352-53, 357. With regard to this fundamental question, the Court held that the 1906 Act had not diminished the reservation's boundaries and that the State was without jurisdiction to prosecute the underlying crime, notwithstanding the non-Indian fee status of the land. *Id.* at 359. Of particular note here, the Court considered, and rejected, an argument by the State of Washington that reservation lands opened for sale and purchased by non-Indians were no longer part of the reservation "because land owned in fee by non-Indians cannot be said to be reserved for Indians." *Id.* at 357. As the Court found, any question regarding the continued reservation status of undiminished reservation lands owned in fee simple by non-Indians "has since been squarely put to rest by congressional enactment of the currently prevailing definition of Indian country in § 1151 to include 'all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent…'"). *Id.* at 357-58. The Court went on to find that the relevant language including patented lands within the definition included lands patented to non-Indians. *Id.* at 358.

Ms. Lamplot's focus on the definitional language "under the jurisdiction of the United States Government" adds nothing to her argument. TLamplot Pet. at 6-8. Indeed, her petition is circular in that it assumes the jurisdictional outcome she favors (*i.e.*, that the area is not under federal jurisdiction by virtue of the non-Indian ownership) as the primary support for her conclusion that the area does not meet the definition of Indian

reservation (and thus is not Indian country) due to the absence of federal government jurisdiction (which is what she has assumed in the first instance). In fact, as demonstrated in the above Supreme Court precedent, non-Indian fee lands within reservation boundaries remain Indian reservation lands for purposes of determining jurisdiction. Ms. Lamplot has cited no judicial precedent, and Region 7 is aware of none, creating any question regarding the Reservation status of the non-Indian fee lands within the eastern exterior boundaries of the Omaha and Winnebago Reservations where the four CAFOs and their discharge points are located.[11]

In this case, the State has not attempted to demonstrate CWA NPDES jurisdiction over this area of the Omaha and Winnebago Reservations (including the fee lands located thereon), and EPA has not approved the State for such purposes. In fact, the previously cited 2001 Nebraska Attorney General Opinion generally recognizes that EPA retains regulatory jurisdiction over lands owned by non-Indians within reservations. See Exhibit C ("EPA will issue the NPDES permits within the exterior boundaries of the reservation when neither the (T)ribe nor the state have been given that authority.")

In summary, EPA is the appropriate permitting authority over the four CAFO facilities located on non-Indian fee land within the Omaha and Winnebago Reservations because: (1) notwithstanding the fee ownership status of the relevant lands, they are

[11] Ms. Lamplot's citations to portions of the General Allotment Act of 1887 and the Burke Act of 1906, which implemented federal policy to allow the sale in fee simple of certain Indian reservation lands to non-Indians, are not to the contrary. First, the practice of allotment was generally reversed through passage of the Indian Reorganization Act in 1934. Second, Ms. Lamplot argues that lands of the Omaha Reservation acquired by non-Indians in the allotment era are not subject to "federal superintendence" and have thus lost their Indian reservation character. As confirmed by the Supreme Court precedent cited above, only Congress can remove lands from reservation status, and the key inquiry thus becomes Congressional intent. This is precisely the issue currently being adjudicated in the Omaha Tribal Court with regard to the western boundary of the Omaha Reservation. However, Ms. Lamplot has identified no facts or legal precedent questioning the integrity of the eastern portion of the Reservation, which is where the four CAFOs at issue are located.

within the exterior Omaha and Winnebago Reservations' boundaries and, thus, part of the Reservations, and (2) EPA implements the NPDES program over Indian lands in circumstances where, as here, there is no approved tribal or state program.

C. EPA's permitting authority within Indian country is consistent with EO 13132.

Petitioner Joel Lamplot argues that EPA's issuance of the four permits to CAFOs on reservation fee lands is inconsistent with the principles and criteria of EO 13132. JLamplot Pet. at 4. This argument, however, mistakenly relies on two premises: that EPA's federal implementation of the NPDES program in this case is (1) not authorized by Congress, or (2) is preemptive of an existing State authority. As discussed below, Mr. Lamplot's assertions are directly contradicted by the CWA and EPA's regulations, the current status of authorized programs on the Omaha Reservation, and prior statements of the Nebraska Attorney General.

In 1999, President Clinton signed EO 13132, which directs executive agencies to adhere to principles of federalism by, *inter alia*, encouraging national (versus state) action only when "appropriate in light of the presence of a problem of national significance" and discouraging the preemption of state law unless there is "an express preemption provision or … some clear evidence that the Congress intended preemption of State law." These principles apply with regard to federal agency actions that have "federalism implications," which broadly refers to actions that have "substantial direct effects on States, on the relationship between the States and the national government, or on the distribution of power and responsibilities among the various levels of government." EO 13132 Section 1. In Section 3, the EO sets out "federalism policymaking criteria." Under these criteria, it is appropriate for an agency to take an

action "limiting the policymaking discretion of the States … where there is constitutional and statutory authority for the action and the national activity is appropriate in light of the presence of a problem of national significance." EO 13132 Section 3. Section 4 of the EO specifically addresses the issue of preemption. In regard to adjudications, Section 4 states that "[w]hen an agency proposes to act through adjudication or rulemaking to preempt State law, the agency shall provide all affected State and local officials notice and an opportunity for appropriate participation in the proceedings." EO 13132 Section 4. EO 13132 concludes that it "is not intended to create any rights or benefit, substantive or procedural, enforceable at law by a party against the United States (or) its agencies …" EO 13132 Section 11.

With regard to CWA permitting, as discussed in detail above, the CWA and EPA's regulations clearly provide authority for Region 7 to issue NPDES permits on the Omaha and Winnebago Reservations. Additionally, the State of Nebraska has not applied – nor has it been approved by EPA – to administer a State NPDES program on the Omaha and Winnebago Reservations. Indeed, statements by the Nebraska Attorney General recognize that the degree of State (as opposed to Tribal and federal) interest in CWA permitting on the Omaha Reservation, including non-Indian fee lands, would likely not support an application by the State to assume such permitting. *See* Exhibit C. EPA's issuance of federal permits to the CAFOs is clearly authorized by Congress and cannot be said to be preemptive of any existing State authority, since the State is not administering, and has not requested to administer, the NPDES program in this area. Indeed, there is currently no authority other than EPA that could issue a NPDES permit under the CWA on the Omaha and Winnebago Reservations. In these circumstances, it is difficult to

conceive of any State law that might be preempted, or of a State interest that might be substantially and directly affected.

With respect to EO 13132's requirement that national actions require a problem of national significance, EPA notes that the CWA addresses issues that are nationwide in scope. Ensuring implementation by an entity with appropriate authority in the relevant area, including areas throughout Indian country, is similarly a national concern. *See, e.g.*, Section 101(a), 33 U.S.C. § 1251(a) (establishing as its goal the restoration and maintenance of the "chemical, physical and biological integrity of the Nation's waters"); Section 101(d), 33 U.S.C. § 1251(d) (authorizing the EPA to administer the CWA). As part of addressing these national goals and issues, EPA is currently the only entity authorized to issue NPDES permits on the Omaha and Winnebago Reservations. Therefore, it is both appropriate and essential for EPA to issue these permits, and nothing in EO 13132 expresses any policy objective to the contrary.

In summary, EPA's permits are consistent with EO 13132 because: (1) the Agency's administration of the CWA in Indian country addresses a problem that is national in scope and significance, and (2) the issuance of federal permits in an area not covered by the State's program does not preempt or otherwise affect the State's administration of its own NPDES program. Finally, assuming, *arguendo*, that the policy concerns of EO 13132 are somehow implicated in these circumstances, Region 7 notes that the EO is, by its clear language, unenforceable by a party against an agency of the United States. Any issue arising under the EO would not, therefore, create any legal error in Region 7's permits.

V. CONCLUSION

Petitioners Lamplot have failed to meet the standards for EAB review by showing that Region 7's permitting of four CAFOs within the Omaha and Winnebago Reservations was based on an erroneous finding of fact or conclusion of law, or that Region 7 exercised discretion or made a policy decision in a way that warrants EAB's review. As we have shown in this response, Region 7's final decision to permit these facilities is grounded in settled facts, policy and law.

VI. REQUEST FOR RELIEF

For the foregoing reasons, we respectfully request that Petitioners Lamplots' petitions for review be denied.

Dated: March 26, 2009

Respectfully submitted,

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List of Exhibits:

A1. NPDES permits: Circle T Feedlot, Inc., Permit No. NE0134481; Morgan Feedlot LLC, Permit. No. NE0134767; Sebade Feedyard, Permit No. NE0135712; and Stanek Brothers, Permit No. NE034775

B. Letter from Tammy Poitra, BIA Superintendent, Winnebago Agency, to Jane Kloeckner, EPA, May 12, 2006

C. Nebraska Attorney General Don Stenberg, Opinion 01026 (July 23, 2001)

D. Nebraska Attorney General Jon Bruning, Opinion 07005 (February 15, 2007)

E. Map of Omaha and Winnebago Reservations

F. EPA Region 7 Response to Comments, January 2008

G. Letter to U. Gale Hutton, EPA, from Annette Kovar, NDEQ Legal Counsel, October 3, 2001