BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re: Circle T Feedlot, Inc., Morgan Feedlot LLC, Sebade Feedyard, Stanek Brothers NPDES Permit Nos. NE0134481, NE0134767, NE0135712, & NE0134775	NPDES Appeal Nos. 09-02 & 09-03

JOEL LAMPLOT'S AND TERI LAMPLOT'S ADDENDUM TO APPEALS

INTRODUCTION

This addendum is being filed pursuant to the Environmental Appeals Board's ("EAB") order of June 17, 2009, allowing Joel Lamplot and Teri Lamplot ("the petitioners") to file an addendum to support arguments as a result of United States Supreme Court opinions delivered after the original appeals were filed. The U.S. Environmental Protection Agency, Region 7 ("EPA" or "Region 7") and the EAB have responded to the petitioners NPDES appeal numbers 09-02 and 09-03 as being combined. This addendum will apply to NPDES appeal numbers 09-02 and 09-03 as being combined.

In the case of *Hawaii v. Office of Hawaiian Affairs*, 129 S Ct. 1436 (2009) ("Hawaii") a unanimous Supreme Court concluded that federal public lands, once they pass to a State, cannot be restored to federal jurisdiction by a federal act that purports to change the nature of the original grant to the state. This limitation protects the sovereignty of the state over the ceded lands from federal encroachment. The same limitation protects the lands that have been under

state jurisdiction by preventing the EPA from claiming a federal statute can allow it to encroach or attempt to remove land from state jurisdiction. As Justice Alito opined, "it would raise grave constitutional concerns" if Congress sought to "cloud Hawaii's title to its sovereign lands" after it had joined the Union. "We have emphasized that Congress cannot, after statehood, reserve or convey...lands that have already been bestowed upon a state..." *Hawaii v. Office of Hawaiian Affairs*, 129 S Ct. 1436, (2009).

BACKGROUND

The state of Nebraska was born from the territory defined in the Kansas – Nebraska Act of 1854, *10 Stat. 277* ("Kansas – Nebraska Act"). The present states of Kansas and portions of South Dakota, North Dakota, Montana, Wyoming and Colorado were also included within Kansas – Nebraska territories. A proviso in the first section of the Kansas - Nebraska Act provided; "That nothing in this act shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory so long as such rights shall remain unextinguished by treaty between the United States and such Indians, **or include any territory which, by treaty with any Indian tribe, is not, without the consent of said tribe, to be included within the territorial line or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the Territory of Nebraska, until said tribe shall signify their assent to the President of the United States to be included within the said Territory of Nebraska** or to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the government to make if this act had never passed." (emphasis added)

The act creating the Dakota Territory, *12 Stat. 239* (1861), which includes much of the Nebraska territory, includes a similar proviso in the first section; "That nothing in this act

contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, **or to include any territory which, by treaty with any Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory ; but all such territory shall be excepted out of the boundaries and constitute no part of the Territory of Dakota, until said tribe shall signify their assent to the President of the United States to be included within the said Territory**, or to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent for the government to make if this act had never passed." (emphasis added)

In the boundary definition of the Kansas Admission Act, *12 Stat. 126* (1861), ("Kansas Admission Act") the following is provided for Indian property; "That nothing contained in the said constitution respecting the boundary of said State shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with such Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory; **but all such territory shall be excepted out of the boundaries, and constitute no part of the State of Kansas.**" (emphasis added)

The enabling act for the states of South Dakota, North Dakota, Montana and Washington, *25 Stat. 676* (1889), ("Dakotas Enabling Act") addresses Indian lands differently; "That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title

thereto shall have been extinguished by the United States, the **same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.**" (emphasis added)

Section 2 of the Nebraska Enabling Act, *13 Stat. 47* (1864), ("Nebraska Enabling Act") describes the boundaries of the state without mention of Indian Country, Indian Reservations or Indian Lands. "SEC. 2. *And be it further enacted*, That the said State of Nebraska shall consist of all the territory included with the following boundaries, to wit: Commencing at a point formed by the intersection of the western boundary of the State of Missouri with the 40th degree of north latitude; extending thence due west along said 40th degree of north latitude to a point formed by its intersection with the 25th degree of longitude west from Washington; thence north along said 25th degree of longitude to a point formed by its intersection with the 41st degree of north latitude; thence west along said 41st degree of north latitude to a point formed by its intersection with the 27th degree of longitude west from Washington; thence north along said 27th degree of north longitude to a point formed by its intersection with the 43d degree of north latitude; thence east along said 43d degree of north latitude to the Keya Paha River: thence down the middle of the channel of said river, with its meandering, to its junction with the Niobrara River; thence down the middle of the channel of the said Niobrara River, and following the meanderings thereof, to its junction with the Missouri River; thence down the middle of the channel of said Missouri River, and following the meanderings thereof, to the place of beginning."

The Nebraska Admission Act, *14 Stat. 391* (1867), ("Nebraska Admission Act") contains the "fundamental condition" that no person, regardless of race or color, shall be denied elective franchise or any other right in section 3. "SEC. 3. *And be it further enacted*, That this act shall not take effect except upon the **fundamental condition that within the State of Nebraska there shall be no denial of the elective franchise, or of any other right, to any person by reason of race or color, excepting Indians not taxed; and upon the further fundamental**

condition that the Legislature of said State, by a solemn public act, shall declare the assent of said State to the said fundamental condition, and shall transmit to the President of the United States an authentic copy of said act; upon receipt whereof the President, by proclamation, shall forthwith announce the fact, whereupon said **fundamental condition shall be held as a part of the organic law of the State**; and thereupon, and without any further proceedings on the part of Congress, the admission of said State into the Union shall be considered as complete." (emphasis added) The Nebraska State Legislature assented to the "fundamental condition" on February 21, 1867. President Andrew Johnson reaffirmed section 3 of said act by proclamation on March 1, 1867.

Nebraska's boundaries were later redefined by two additional act of Congress. In the first act, *An act to redefine a Portion of the Boundary Line between the State of Nebraska and the Territory of Dakota*, 16 Stat. 93 (1870), section 2 declares jurisdiction; "And be it further enacted, that the respective **jurisdictions of State** and Territory (and of the United States) **shall extend to and or all of the territory, within their limits, according to the line herein designated**, to all intents and purposes as fully and completely as if no change had taken place in the channel of said Missouri river." (emphasis added) In the second act, *An act to extend the northern boundary of the State of Nebraska*, 22 Stat. 35 (1882), "That the northern boundary of the State of Nebraska shall be, and hereby is, subject to the provisions hereinafter contained, extended so as to include all that portion of the Territory of Dakota lying south of the forty-third parallel of north latitude and east of the Keya Paha River and west of the main channel of the Missouri River; and **when the Indian title to the lands thus described shall be extinguished the jurisdiction over said lands shall be, and hereby is, ceded to the State of Nebraska**, and subject to all the conditions and limitations provided in the act of Congress admitting Nebraska into the Union, and the northern boundary of the State shall be extended to said forty-third parallel as fully and effectually as if said lands had been included in the boundaries of said State

at the time of its admission to the Union; reserving to the United States the original right of soil in said lands and of disposing of the same: *Provided* , That **this act, so far as jurisdiction is concerned, shall not take effect until the President shall by proclamation declare that the Indian title to said lands has been extinguished**, nor shall it take effect until the State of Nebraska shall have assented to the provisions of this act; and if the State of Nebraska shall not by an act of its legislature consent to the provisions of this act within two years next after the passage hereof this act shall cease and be of no effect." (emphasis added) The Nebraska state legislature consented to the provisions Nebraska on May 23, 1882. President Benjamin Harrison proclaimed the extinguishment of Indian title on October 23, 1890.

ARGUMENT

NEBRASKA STATEHOOD

"We have emphasized that "Congress cannot, after statehood, reserve or convey submerged lands that have already been bestowed upon a State." *Idaho* v. *United States*, 533 U. S. 262, 280, n. 9 (2001) (internal quotation marks and alteration omitted); see also *id.*, at 284 (Rehnquist, C. J., dissenting) ("[T]he consequences of admission are instantaneous, and it ignores the uniquely sovereign character of that event . . . to suggest that subsequent events somehow can diminish what has already been bestowed"). *Hawaii v. Office of Hawaiian Affairs*, 129 S Ct. 1436, (2009)

The state of Nebraska was admitted to the Union upon an equal footing with the original states, in all respects whatsoever. Section 2 of the Nebraska Admission Act declared the entitlements, conditions and restrictions of admission to the Union. (Sec. 2. And be it further enacted, That the said state of Nebraska, shall be, and is hereby, declared to be entitled to all the rights, privileges, grants and immunities, and to be subject to all the conditions and restrictions of

an act entitled "An act to enable the people of Nebraska to form a constitution and state government, and for the admission of such state into the Union on an equal footing with the original states." Approved, April 19th, 1864.) There are no "conditions and restrictions" pertaining to Indian reservations, Indian country, or Indian lands in the Nebraska Enabling Act. Even when Congress extended the northern boundary of the State of Nebraska, provisions were included to ensure that all Indian title was to be extinguished before jurisdiction of those lands would be ceded to the State of Nebraska and subject to all the conditions and restrictions provided in the act of Congress admitting Nebraska into the Union.

The congressional acts that created Nebraska's statehood are in sharp contrast to the admission act that granted statehood to Kansas. The Kansas Admission Act included territorial and jurisdictional exclusions regarding Indian lands. Without the consent of an Indian tribe, none of their territory was to be included within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the State of Kansas.

A similar contrast to the Nebraska Admission Act is seen in the enabling acts for South Dakota, North Dakota, Montana and Washington. In the Dakotas Enabling Act, Congress retained absolute jurisdiction over Indian lands and barred the people of those states to claim right or title to lands owned or held by an Indian or Indian tribe. The Indian lands in the Dakotas also remained subject to the disposition of the United States, but the Nebraska Admission Act contains no such provisions.

The only time in Nebraska's history there was congressional limitations on Indians and Indian lands is found in the Kansas – Nebraska Act. Nebraska was not to include any territory which, by treaty with any Indian tribe, is not, without the consent of said tribe, to be included within the territorial line or jurisdiction of any State or Territory; but all such territory shall excepted out of the boundaries, and constitute no part of the Territory of Nebraska, until said

tribe shall signify their assent to the President of the United States to be included within the said Territory of Nebraska or to affect the authority of the government of the United States make any regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the government to make if this act had never passed as long as the Indian rights remained unextinguished.

A treaty with the Omaha Indians was signed on March 16, 1854, *10 Stat. 1043* ("1854 Omaha treaty"), ratified on April 17, 1854, creating a reserve for said Indians. In Article 6 of said treaty, land assignments could be made and patents issued to Indians with the lands being exempt from levy, sale or forfeiture until a State constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions. The 1854 Omaha treaty extinguished Indian rights to the lands in that the treaty, and allowed for the state to have an authority over those lands.

On March 6, 1865, the Omaha tribe signed another treaty with the United States *14 Stat. 667* ("1865 Omaha treaty"), ratified on February 16, 1866, allowing for a reserve for the Winnebago Indians. In Article 4 of this treaty, lands held in common by the tribe were abolished and lands were to be assigned in severalty to members of the tribe. "The lands to be so assigned, including those for the use of the agency, were to be in as regular and compact a body as possible, and so as to admit of a distinct and well-defined exterior boundary. The whole of the lands, assigned or unassigned, in severalty, shall constitute and be known as the Omaha reservation." Congress never redefined exterior boundaries of the Omaha reservation, leaving it disestablished; further the congressional act that defines Nebraska's boundaries is void of any reference to Indian lands assigned or unassigned.

Following the 1865 Omaha treaty, on August 7, 1882, Congress passed *an act to provide for the sale of a part of the reservation of the Omaha tribe of Indians in the State of Nebraska, and for other purposes. 22 Stat. 341* ("1882 Act") Section 5 of said act allowed the Secretary of

the Interior to allot lands in severalty to the Indians of the Omaha tribe. The Omaha tribe consented to the allotment process on May 5, 1883. Section 6 of the act provides that on approval of the allotments, "the Secretary of the Interior, he shall cause patents to be issued in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State of Nebraska, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatsoever."

Section 7 of the 1882 act clearly shows that Indian rights described in the Kansas – Nebraska Act were extinguished; "that upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of said tribe of Indians shall have the benefit of and be subject to the laws, both civil and criminal, of the State of Nebraska; and said State shall not pass or enforce any law denying any Indian of said tribe the equal protection of the law."

The Winnebago tribe never had aboriginal right or title to lands in Nebraska. Originating in Wisconsin, the Winnebago tribe had been moved to Minnesota, and then to Nebraska. Each move was conducted by treaty. Like the Omaha treaties, the Winnebago treaties build upon themselves. In a Treaty with the Winnebago in 1855, *10 Stat. 1172*, like the 1854 Omaha treaty, land assignments could be made; "patents issued to them for the tract so assigned to them respectively; said tracts to be exempt from taxation, levy, sale, or forfeiture, until otherwise provided by the legislature of the State in which they may be situated, with the assent of Congress." In a treaty with the Winnebago in 1859, *12 Stat. 1101*, the treaty called for the assignment of lands to all members of the tribe in severalty. On February 21, 1863, Congress passed *an act for the removal of the Winnebago Indians and for the sale of their reservation in*

Minnesota for their benefit, 12 Stat. 658 ("1863 Winnebago Act"). In section 4 of said act, the money arising from the sale of said lands in Minnesota was to be expended for improvements upon their new reservation. "It shall also be the duty of the Secretary of the Interior to allot the said Indians in severalty lands which they may respectively cultivate and improve." Section 5 of the act parallels section 7 of the Omaha 1882 Act as far as jurisdiction of the State is concerned that; "Said Indians shall be subject to the laws of the United States, and to the criminal laws of the State or Territory in which they may happen to reside." This provision coincides with the Omaha 1882 Act that the Indian rights described in the Kansas – Nebraska Act had been extinguished. The treaty with the Winnebago in 1865 simply amends the previous treaties with the Winnebago as to where the Winnebago Indians were to be relocated.

Lands within the Winnebago reserve were further allotted by the General Allotment Act of 1887, *24 Stat. 388.* ("General Allotment Act") Lands allotted to an Indian were held in trust for a period of 25 years for the sole benefit and use by the individual Indian and his heirs. After the trust period, the land was then conveyed by patent to the Indian or his heirs, "in fee, discharged of said trust and free of all charge or incumbrance whatsoever." "Upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." The land conveyance was recorded in the General Land Office with the fees for such conveyance paid by the Treasury of the United States, as if such lands had been entered under the general laws for the disposition of the public lands. Congress even labeled the Indian lands that the General Allotment Act pertained to as "public lands," as referred to in section 5 in said act; "And if any religious society or other organization is now occupying any of the public lands to which this act is applicable... "

Charles Kappler, an expert on Indian Affairs, defines Indian lands in Senate Document No. 719, 62nd Congress, 2nd Session, pgs. 728-729, as - *A. Title and rights—1. Nature of title—*

(a) In general.—Indian tribes hold their right to the soil by virtue of aboriginal occupancy and possession. To sustain the title, their use and occupancy must have been actual, not merely desultory or constructive. Their title is a perpetual right of possession and occupancy, the fee remaining in the United States or in the State where the land is situated as successor to the rights of the European discoverers. The United States, as original proprietor, has power to dispose of public lands even within an Indian reservation without the consent of the Indians.

(b) Reservations and grants to tribes.—Where tribal Indians have been assigned lands and reservations as places of domicile, they have no vested rights therein, but simply a right to occupy at the will of the Government. Where they hold by grant, their title does not depend upon aboriginal possession, but its nature and extent are measured by the terms of the grant.

(c) Land grants conflicting with Indian title.—The United States, or a State holding the fee, may, before a cession by the Indians, convey an unencumbered title in fee simple or a title subject to their right of possession; but such intention is not to be presumed; and Indian lands are not affected by an act giving the right of preemption, or a grant in general terms.

(d) Rights of individual Indians in tribal lands.—All Indian lands were originally communal property. Where land is conveyed to tribes' individual members of the tribe can acquire no vested interest in any specific tract, but they may have a right of perpetual occupancy in lands improved and occupied by them, under the laws of the tribe; and such interest may be transferred to another member of the tribe. A lease of pasture lands made by the Creek council to an Indian conveys a leasehold estate of all lands included within its exterior boundaries; and one taking up a farm therein is a trespasser.

Definition (*a*) applies to the Omaha tribe, as the tribe had aboriginal occupancy and possession to the soil the reserve was created upon. Their title of perpetual right of possession and occupancy was extinguished by the 1865 Omaha treaty. Congress, fully aware that the discontinuance of the Omaha tribe, as a collective, to hold lands in common and distribute the lands in severalty to the members of the tribe to eventually be subject to the laws and jurisdiction of the State, quieted the title of perpetual right of possession and occupancy.

Definition (*b*) applies to the Winnebago tribe, as the tribe had no aboriginal ties to the land; rather the land was granted to them by the 1865 Winnebago treaty. Although the 1865 Winnebago treaty does not provide for the allotment in severalty to tribal members, it also did not repeal the 1863 Winnebago Act that empowered the Secretary of the Interior to allot lands in severalty at their new home. The 1863 Winnebago Act also quieted title to right of possession and occupancy by enacting that; "Said Indians shall be subject to the laws of the United States, and to the criminal laws of the State or Territory in which they may happen to reside."

The Indian title to all lands in the Territory of Nebraska had been extinguished prior to the admission of Nebraska as a State into the Union. The fee remained with the United States as public lands for the prior Indian lands, and so was the fee for the remaining public lands in Nebraska that was dispersed by public land laws.

CLEAN WATER ACT

In Hawaii, Justice Alito opined, "Turning to the merits, we must decide whether the Apology Resolution "strips Hawaii of its sovereign authority to sell, exchange, or transfer" (Pet. for Cert. i) the lands that the United States held in "absolute fee" (30 Stat. 750) and "grant[ed] to the State of Hawaii, effective upon its admission into the Union" (73 Stat. 5). We conclude that the Apology Resolution has no such effect." In application to this appeal the petitioners contend this question; has the Clean Water Act ("CWA") stripped the State of Nebraska of its authority to

issue National Pollutant Discharge Elimination System ("NPDES") permits to Confined Animal Feeding Operations ("CAFO") in Thurston County Nebraska?

Petitioners agree with the EPA that the CWA is national in scope to protect the waters of the United States. Congress knew that implementing such a broad and national program would be nearly impossible without the cooperation of the States. Congress also recognized that by delegating to the States the authority to administer the CWA after formal acceptance that the responsibilities, rights and jurisdiction of the States were not to be infringed upon. "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act." (CWA §101(b), 33 USC §1251(b)) "**It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources**." (emphasis added) (CWA §101(g), 33 USC §1251(g))

Petitioners also recognize that the EPA may have the authority to regulate environmental law on lands held in federal trust by the United States government on behalf of an Indian or Indian tribe; but that authority is restricted to those lands only. The EPA is treating the privately held fee lands in the geographical area where the CAFO's are located as trust lands and as if they are not within the jurisdiction of the State of Nebraska. Petitioners have shown in the preceding argument that Nebraska has jurisdiction to implement the CWA in all areas within her boundaries. Upon admittance to the Union, "the said State of Nebraska shall be, and is hereby

declared to be, entitled to all the rights, privileges, grants and immunities, and to be subject to all the conditions and restrictions of an act entitled "An act to enable the people of Nebraska to form a Constitution and State Government and for the admission of such State into the Union on an equal footing with the original states," approved April 19, 1864." (Nebraska Admission Act sec. 2). The Nebraska Enabling Act, implemented into the Nebraska Admission Act, does not exclude any areas within the boundaries defined. Further, it does not exclude the lands where the CAFO's are located.

The Hawaii opinion refers to *Idaho* v. *United States*, 533 U. S. 262, 280, n. 9 (2001) ("Idaho") (internal quotation marks and alteration omitted); see also *id.*, at 284 (Rehnquist, C. J., dissenting) ("[T]he consequences of admission are instantaneous, and it ignores the uniquely sovereign character of that event . . . to suggest that subsequent events somehow can diminish what has already been bestowed"). The CWA, as passed by Congress, does not diminish what has been bestowed upon the State of Nebraska at admission; rather, the interpretation and implementation of the CWA by the EPA does.

The EPA claims that because historical Indian reserves exist within the boundaries of the State of Nebraska, regulations promulgated for Indian country supersede or diminish the jurisdiction of the State, a sharp contrast to what Chief Justice Rehnquist opined in Idaho. At the time of Nebraska's admission to the Union, the definition for Indian country was explained by Justice Miller, "The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress" *BATES v. CLARK*, 95 U.S. 204 (1877). In 1903 Justice White opined, "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning","Congress possessed a paramount power

over the property of the Indians, by reason of its exercise of guardianship over their interests, and that such authority might be implied, even though opposed to the strict letter of a treaty with the Indians." AND "The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the **interest of the country** and the Indians themselves, that it should do so." (emphasis added) *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) The CWA does not convey plenary authority over the tribal relations of the Indians to the EPA, nor does it convey plenary authority to diminish a States authority.

EQUAL PROTECTION

In section one of the Nebraska Admission Act, Nebraska was, "declared to be one of the United States of America, and is hereby admitted into the Union upon an equal footing with the original states, in all respects whatsoever." Further, section 3 states, "there shall be no denial of the elective franchise, **or of any other right**, to any person, by reason of race or color **excepting Indians not taxed**."(emphasis added) Because of the admittance on equal footing, and no denial of jurisdiction within any portion of the territorial limits of the State, all Nebraskans, including the CAFO operators, are entitled to the equal protection and application of the law. None of the CAFO operators are Indians, and all are taxed by the State of Nebraska and the United States.

The Fourteenth Amendment of the United States Constitution Section 1 declares, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The EPA is denying

the CAFO operators the right to be governed as other Nebraska CAFO operators located outside of Thurston County, Nebraska. The State of Nebraska had previously issued all necessary NPDES permits in Thurston County until; "1993 the EPA issued notice in the Federal Register that the EPA had never expressly authorized any State to operate an NPDES permit program on Indian lands despite the fact that some States had issued permits in Indian land. In Nebraska some of these NPDES permits in Indian land have been issued and reissued three times or more." *Nebraska Attorney General Opinion 01026,* (2001). The EPA, as well as the State of Nebraska are in error by not recognizing that all lands in Nebraska's territorial limits are governed by the State of Nebraska; further "Indian lands" are not recognized by the Nebraska Admission Act.

Justice Alito opined in Hawaii, "Third, the Apology Resolution would raise grave constitutional concerns if it purported to "cloud" Hawaii's title to its sovereign lands more than three decades after the State's admission to the Union." The EPA's erred judgment of treating the properties as Indian country clouds the title to the land that the CAFO's are located on. The CAFO's are all located on fee-simple patented property without restriction or limitations to the fee. The fees to the properties were acquired by decent from the United States, by laws enacted by Congress. The EPA's assertion that the State of Nebraska cannot issue NPDES permits to the CAFO's, is placing a *de facto* restriction on their fee titles; further, the EPA, using lands formerly reserved by the United States to be denoted as "Indian lands" or "Indian Country", imposes new limitations and restrictions on all white landowners' properties, placing a *de facto* restriction on their fee titles as well.

In 1875 Chief Justice Lake of the Nebraska Supreme Court opined; "On the 19th day of April 1864, Congress passed "AN ACT to enable the people of Nebraska to form a constitution and state government, and for the admission of such state into the Union, on an equal footing with the original States." 13 *U. S. Statutes at Large,* 47. The second section of this act provided what the boundaries of the proposed state should be, and they embraced the reservation in

question. This act further declared, in substance, that the state of Nebraska should consist of all the territory included therein, without any exception or restriction whatever. It is true that this proposition was not accepted within the time limited by the act, but when, in February 1866, our present constitution was framed with the view of asking Congress to admit us, reference was distinctly made thereto by section six of the schedule, as follows: "This constitution is formed, and the state of Nebraska asks to be admitted into the Union on an equal footing with the original states, on the condition and faith of the terms and propositions stated and specified in an act of Congress, Approved April 19, 1864, authorizing the people of the territory to form a constitution and state government, the people of Nebraska hereby accepting the conditions, in said act specified." And, again, in the act of admission, we find, that special reference is made to said enabling act, and it is distinctly asserted, "that the said state of Nebraska shall be, and is hereby declared to be entitled to all the rights, privileges, grants and immunities," in said act contained, and "is hereby admitted into the Union on an equal footing with the original states, in all respects whatever."" *Painter v. Ives*, 4 Neb. 128 (1875).

Irrespective of the *Painter v. Ives* decision, the Nebraska Attorney General instructed the Nebraska Department of Environmental Quality ("NDEQ") in 2001 (exhibit A), to surrender the United States Constitutional rights granted in the Tenth Amendment, and forfeit the State of Nebraska's authority to issue NPDES permits in the geographical areas where the CAFO's are located.

Both the United States Constitution and the Nebraska State Constitution do not allow denial of "the equal protection of the laws." Both the EPA and the NDEQ, under the authority of the Governor of Nebraska, are denying equal protection of laws that clouds title, abrogates federalism, and alienates the CAFO operators from their State government.

CIVIL RIGHTS

The "fundamental condition" in the Nebraska Admission Act is also being violated by the EPA. The EPA is denying the right of the CAFO operators to be governed by the State of Nebraska. The EPA is disregarding section 3 of the Nebraska Admission Act that; "within the State of Nebraska there shall be no denial of . . . any other right, to any person by reason of race or color." The petitioners also find the EPA in violation of 42 USC §1981(a). The EPA is treating the CAFO operators as if they are Indian. "**All persons within the jurisdiction of the United States shall have the same right in every State and Territory** to make and enforce contracts, to sue, be parties, give evidence, and to the **full and equal benefit of all laws and proceedings for the security of persons and property** as is enjoyed by **white citizens**, and **shall be subject** to like punishment, pains, penalties, taxes, **licenses, and exactions of every kind, and to no other."** *42 USC §1981(a)* (emphasis added)

In violation of 42 USC §1982, "All citizens of the United States shall have the **same right,** in every State and Territory, as is **enjoyed by white citizens thereof** to inherit, purchase, lease, sell, **hold,** and convey **real and personal property**," (emphasis added) The EPA and the State of Nebraska are treating Thurston County CAFO operators, white citizens, as if they are Indians. Other white citizens residing in the State of Nebraska requiring NPDES permits are not denied of the State of Nebraska's sovereign authority to issue such permits.

The EPA and the State of Nebraska are held liable under 42 USC §1983, to "every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." CAFO operators in Thurston County, Nebraska, have been wrongly reclassified as Indians, and regulated as such, by both the EPA and the State of Nebraska. All citizens of Thurston County, whom are not Indians, are required to

pay state income tax and state sales tax, and as such are entitled to enjoy the benefits of their State government. The EPA and the State of Nebraska are discriminating against all citizens in Thurston County whom are not Indian by placing them under different rules and standards enjoyed by other white citizens in the State of Nebraska.

The EPA, acting beyond statutory authority, is violating 42 USC §1981(a), 42 USC §1982, and the "fundamental condition" of the Nebraska Admission Act. "The consequences of admission are instantaneous, and it ignores the uniquely sovereign character of that event . . . to suggest that subsequent events somehow can diminish what has already been bestowed." *Hawaii v. Office of Hawaiian Affairs*, 129 S Ct. 1436, (2009)

CONCLUSION

As decided in Hawaii, an act of Congress cannot strip from a State what was bestowed upon it at its admission to the Union. The EPA was not empowered by the CWA to remove lands from State jurisdiction nor can it resurrect tribal interests lost at Nebraska's admission to the Union, as the United States had to reserve the tribal interest before statehood to overcome the Public Trust Doctrine rights of the state. *See Idaho v. U.S.*, 533 U.S. 262, 280, n.9 (2001).

The EPA and the State of Nebraska assume that the NDEQ cannot issue NPDES permits to the CAFO's within the geographical area they are located. This assumption is unfounded, and as previously argued, violates equal protection and civil rights laws.

REQUEST FOR RELIEF

With this argument, the petitioners contend that the State of Nebraska is the proper authority to issue the NPDES permits of this appeal. Petitioners request that the EAB find that the EPA has wrongly labeled the CAFO locations as "Indian lands" or "Indian country", and is wrongly categorizing the CAFO operators as Indians, and in error, is superseding the authority granted to the sovereign State of Nebraska acquired by its admission to the Union over its citizens.

Dated: July 20, 2009

Respectfully submitted,

Joel Lamplot
582 21st Road
Thurston, NE 68062
Phone: 402-385-2452
Fax: 402-385-2452

Teri Lamplot
582 21st Road
Thurston, NE 68062
Phone: 402-385-2452
Fax: 402-385-2452

List of Exhibits:

A: 10-2001 NDEQ letter

Exhibit A

STATE OF NEBRASKA

Mike Johanns
Governor

DEPARTMENT OF ENVIRONMENTAL QUALITY
Michael J. Linder
Director
Suite 400, The Atrium
1200 'N' Street
P.O. Box 98922
Lincoln, Nebraska 68509-8922
Phone (402) 471-2186
FAX (402) 471-2909

October 3, 2001

U. Gale Hutton, Director
Water, Wetlands & Pesticide Division
U.S. Environmental Protection Agency
Region VII
901 N. 5th St.
Kansas City, KS 66101

Dear Mr. Hutton:

This letter is written in follow up to Director Michael Linder's previous letter to you dated April 23, 2001, and in response to your letter to Mr. Linder dated June 15, 2001.

The Nebraska Attorney General has advised this office that the Attorney General's statement of Nebraska authority for delegation of the federal National Pollutant Discharge Elimination System (NPDES) permit program, dated September 19, 1973, did not address the State's authority to regulate non-Indians on non-Indian owned land within an Indian reservation. The reason for this, in his view, is that at the time neither the Environmental Protection Agency nor the Attorney General's office believed such a jurisdictional question needed to be addressed. The Attorney General has further advised, however, that his office cannot supplement the previous Attorney General's statement of authority because it appears that the Department does not have the authority to exercise authority under the federal NPDES program within the exterior boundaries of tribal reservations.

Therefore, the Department will not be pursuing NPDES delegation for these areas of the state. If you have any questions, please do not hesitate to contact me.

Sincerely,

Annette Kovar

Annette Kovar
Legal Counsel

xc: Pat Rice

CERTIFICATE OF SERVICE

We hereby certify that copies of the Addendum in the matter of Circle T Feedlot, Inc., et al., NPDES Appeals Nos. 09-02 & 09-03, were postmarked and sent via certified U.S. Postal Service, on July 20, 2009, according to the Order Granting Motion of Extension of Time, dated June 25, 2009, to the following persons:

✓United States Environmental Protection Agency – 5 copies
Eurika Durr, Clerk of the Board
Environmental Appeals Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Ave., N.W.
Washington, DC 20460-0001

Chris Muehlberger
Assistant Regional Counsel
EPA Region 7
901 North Fifth Street
Kansas City, KS 66101

Michael Linder, Director
Nebraska Department of Environmental Quality
1200 "N" Street, Suite 400
PO Box 98922
Lincoln, Nebraska 68509

Joel Lamplot

582 21st Road
Thurston, NE 68062
Phone: 402-385-2452
Fax: 402-385-2452

Teri Lamplot

582 21st Road
Thurston, NE 68062
Phone: 402-385-2452
Fax: 402-385-2452

July 20, 2009
Date