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

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ENVIRONMENTAL PROTECTION AGENCY-REGION VII REGIONAL HEARING CLERK

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	)	
	)	
	)	

EPA'S SURREPLY TO PETITIONERS' ADDENDUM TO APPEALS

I. INTRODUCTION

On April 20, 2009, Petitioners Joel Lamplot and Teri Lamplot filed a motion with the Environmental Appeals Board ("Board") requesting leave to file an addendum to their January 2009 petitions contesting four final National Pollutant Discharge Elimination System ("NPDES") permits issued by the United States Environmental Protection Agency, Region 7 ("EPA"). Petitioners' specified purpose for requesting leave to file an addendum was to discuss the alleged applicability of the 2009 Supreme Court decision, *Hawaii v. Office of Hawaiian Affairs*,[1] to the above-captioned matter. On June 17, 2009, the Board granted Petitioners' motion to file an addendum to their petitions to discuss "the applicability of the recent Supreme Court case." Petitioners filed the addendum with the Board on July 20, 2009. On July 27, 2009, the Board granted EPA's motion to file a surreply to Petitioners' addendum.

[1] 129 S. Ct. 1436 (2009).

The Supreme Court's decision in *Hawaii* has no bearing on these appeals or on EPA's authority to implement the NPDES program in Indian country. *Hawaii* addresses the very unique circumstances surrounding the history of the State of Hawaii and its entry into the Union as well as the specific rights and interests of that State and the potential relevance to those rights and interests of a Congressional Resolution addressing Native Hawaiians. The historical circumstances relating to Nebraska, and the history and treatment of Indian tribes and Indian country in Nebraska, are entirely distinguishable and leave no doubt regarding EPA's authority to implement the NPDES program on clearly established Indian country lands.

In addition, after reviewing Petitioners' addendum, EPA notes that Petitioners have introduced arguments outside the scope of their expressed purpose to file an addendum, which was to discuss the applicability of *Hawaii* to the present case.[2] Additionally, Petitioners reassert arguments from their initial appeal to which EPA responded in its initial filing with the Board. In keeping with the Board's Orders, EPA is limiting its surreply to arguments addressing the *Hawaii* case. Accordingly, EPA will not respond to the re-asserted and additional arguments and respectfully requests that the Board not review arguments outside the scope of Petitioners' motion to file its addendum. In the alternative, should the Board decide to review additional arguments presented by Petitioners in their addendum, EPA requests additional time to file a surreply explaining why none of Petitioners' new assertions present any defect in EPA's permitting actions.

[2] These additional arguments include assertions that EPA's permitting of CAFO owners in the present case violates the owners' equal protection and civil rights.

II. ARGUMENT

HAWAII IS NOT APPLICABLE TO THE PRESENT CASE

In *Hawaii,* the Supreme Court ruled that the 1993 joint "Apology Resolution" enacted by Congress, which apologized to the Native Hawaiian people for the "illegal overthrow" of the Kingdom of Hawaii, could not be used to "strip Hawaii of its sovereign authority" to transfer land granted to the State in absolute fee when it was admitted into the Union in 1959. *Hawaii*, 129 S. Ct. at 1443. Petitioners assert that *Hawaii* is applicable to the present case because, in their words, the 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."[3] Joel Lamplot's and Teri Lamplot's Addendum to Appeals, Appeal Nos. NPDES 09-02 and 09-03 (hereinafter "Addendum") at 1.

In an attempt to apply *Hawaii's* ruling to the present case, Petitioners assert that certain acts of Congress attempt to strip from Nebraska "what was bestowed upon it at its admission to the Union." Addendum at 19. These "acts of Congress" include various land acquisitions approved by Congress with respect to the Omaha Tribe of Nebraska's reservation and authorities granted to EPA under the Clean Water Act ("CWA"). Addendum at 2-15.

Hawaii is neither analogous nor applicable to the present case and is relevant only to the unique facts and history of Hawaii's native population, Hawaii's admission into the Union, and the specific Congressional action – the Apology Resolution – at issue in that case. To wit, *Hawaii* involved land ceded in absolute fee to the State by the federal

[3] Petitioners err in asserting that the contested land in *Hawaii* was to be "restored to federal jurisdiction." In fact, the "Leiali'i Parcel" in *Hawaii* was to be redeveloped by the Housing Finance and Development Corporation, a State agency.

government at the time the State was admitted into the Union in 1959. *Hawaii,* 129 S. Ct. at 1440. In particular, the case revolved around whether a largely non-substantive Congressional Resolution could affect the State's right to remove such land from the public trust (a right explicitly established in State law) notwithstanding the State's absolute fee title. Conversely, the present case involves land set aside as Indian reservation *prior* to the State of Nebraska's admission that has never been ceded to the State or deprived of its Indian country character. *See* EPA's Response to Petitions for Review, Appeal Nos. NPDES 09-02 and 09-03 at 3 (hereinafter, "Response"). The relevant State interests at issue are thus entirely distinct. Similarly, EPA's CWA regulation in Indian country has no bearing on the State of Nebraska's ability to dispose of any interest in any land it may have acquired upon statehood. There is thus simply no analogy to be made to the facts or principles at issue in *Hawaii.*

The Omaha Reservation was established in 1854 by treaty between the United States and the Omaha Tribe. Response at 3. Thirteen years later, Congress admitted Nebraska into the Union. 14 Stat. 391 (1867). Acts of Congress passed subsequent to Nebraska's admission continued to recognize the existence of the Omaha and Winnebago Reservations. *See* Omaha Indian Reservation, 22 Stat. 341(1882), Public Law 83-280, 67 Stat. 588 (1953). Congress enacted Public Law 83-280 ("PL 280") in 1953, delegating *limited* jurisdiction over Indian country to several states, including Nebraska.[4]

[4] Codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. §§ 1360). The Supreme Court ruled that PL 280's grant of civil jurisdiction was limited. See *Bryan v. Itasca County, 426* U.S. 373 (1976) and *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214 (1987) (PL 280 does not extend into Indian country state laws regulating pollution discharges, but does extend to state laws prohibiting murder). Furthermore, Nebraska accepts that EPA has authority to issue NPDES in Indian country within the State. See Response at 4, citing to Nebraska Attorney General Don Stenberg, Opinion 01026 (July 23, 2001).

Application of the 1882 Act and PL 280 would have been unnecessary if no Indian reservations existed in Nebraska. Today, both the federal Bureau of Indian Affairs and the State of Nebraska recognize the existence of the Omaha and Winnebago Reservations, and the State explicitly recognizes EPA's authority to implement federal environmental laws on the Reservations. *See* Response at 5, 12.

Petitioners assert that the absence of language in Nebraska's Enabling Act with respect to existing tribal reservations somehow results in disestablishment or extinction of those reservations. This argument is without merit and directly contradicts both the State's and federal government's acknowledgment of Indian reservations, including those at issue here, in Nebraska, as well as clear Supreme Court precedent regarding Congressional treatment of existing Indian reservations. Congress cannot extinguish Indian country without a "plain and unambiguous" expression of intent. *United States v. Santa Fe P. R. Co.*, 314 U.S. 339, 346 (1941). Nor can Congress abrogate a treaty unless it "clearly expresses its intent to do so." *Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999). At no time subsequent to the 1854 Treaty which establishes the Omaha Reservation has Congress expressly abrogated the treaty. The Reservation thus both pre-dates Nebraska statehood and continues to exist today.

In contrast to the present case, the former Hawaiian monarchy ceded "in absolute fee" all of its land to the United States when Hawaii was annexed in 1898. *Hawaii,* at 1440. Absolute fee title to the vast majority of the ceded land - 1.4 million acres - was then transferred by the federal government, through Act of Congress, to Hawaii upon admission to the Union in 1959. *Id.* at 1436, *Cohen's Handbook of Federal Indian Law* 374 (Nell Jessup Newton et al. eds., 2005). Prior and subsequent to Hawaii's admission

to the Union, Congress has never established reservations for Native Hawaiians nor has it recognized Native Hawaiians as a federally-recognized Indian tribe. *Id.* at 371, 374. In light of this transfer of absolute fee title, as well as the absence of any reservation of rights or interests for Native Hawaiians, the Supreme Court rejected the proposition that the subsequent Congressional Apology Resolution could be read to cloud the State's title or ability to remove its land from the public trust.

Hawaii's admission to the Union was completely different from Nebraska's admission. Indian reservations existed prior to and at the time of Nebraska's admission, and subsequent Acts of Congress addressing Indian reservations in Nebraska reinforce the existence of these reservations. As set forth above, Congress has never established reservations for Native Hawaiians. The facts in this matter are in no way analogous to the circumstances surrounding *Hawaii*, and any principles relating to application of the Apology Resolution to Hawaii's absolute fee title interest have no relevance to EPA's ability to implement CWA regulation on clearly established Indian country land. Moreover, Petitioners' assertions fail to show how any subsequent acts of Congress either extinguished Indian reservations in Nebraska or strip Nebraska of its State sovereignty. As such, Petitioners' arguments that *Hawaii* is relevant to this matter must fail.

Petitioners also claim that *Hawaii* is relevant because EPA is attempting to strip Nebraska's "jurisdiction to implement the CWA in all areas within her boundaries" through EPA's permitting of concentrated animal feedlot operations ("CAFOs") within Indian country. Addendum at 13. The holding in *Hawaii* is limited to that State's sovereignty over, and ability to remove from public trust under State law, land granted to it in absolute fee upon statehood. *Hawaii,* 129 S. Ct. at 1445. It in no way upsets, or

even addresses, the bedrock principles of federal Indian law (as recognized by the Supreme Court) regarding jurisdiction in Indian country. *See Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 527 n.1 (1998) (jurisdiction in Indian country generally rests with the federal government and the relevant Indian tribe, and not with the states). Petitioners fail to show how the CWA authority granted to EPA by Congress – exercised here over land that was reserved as Indian reservation prior to Nebraska statehood and that remains Indian reservation today – strips Nebraska of its sovereign land.

Apart from the fact that neither the facts nor the legal principles at issue in *Hawaii* have any relevance to EPA's implementation of the CWA in Indian country, EPA also notes that, contrary to Petitioners' belief, the states, including Nebraska, cannot implement the NPDES program without EPA's approval. Under Section 402(b) of the CWA, the EPA approves and authorizes states to administer the NPDES program. Absent such approval from EPA, no state can administer the NPDES program within its boundaries. Furthermore, neither Nebraska nor the Indian Tribes in the State have sought or received authorization from EPA to implement the NPDES program in Indian country, as required under the CWA. See Response at 7-8. And as noted above, Nebraska has explicitly recognized EPA's authority to implement the program over Indian country lands.

In summary, *Hawaii* is inapplicable to EPA's permitting of CAFOs within the Omaha and Winnebago Reservations.

III. REQUEST FOR RELIEF

For the foregoing reasons, and for the reasons expressed in EPA's March 2009 Response to Petitions for Review, EPA respectfully requests that Petitioners Lamplots' petitions for review be denied.

Dated: August 26, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion to File Surreply to Petitioners' Addendum in the Matter of Circle T Feedlot, Inc., et al., NPDES Appeal Nos. 09-02 & 09-03 were sent to the following persons in the matter indicated:

By Pouch Mail and Electronic Submission:

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Dated: 8/26/09 Deanna J. Smith