NIELSEN, MERKSAMER, PARRINELLO,
MUELLER & NAYLOR, LLP
CATHY CHRISTIAN (S.B. NO. 83196)
KURT R. ONETO (S.B. NO. 248301)
1415 L Street, Suite 1200
Sacramento, CA 95814
Telephone: (916) 446-6752
Facsimile: (916) 446-6106

e-mail: cchristian@nmgovlaw.com
koneto@nmgovlaw.com

Attorneys for Petitioner, County of Amador

BEFORE THE ENVIRONMENTAL APPEALS BOARD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C.

In re: Buena Vista Rancheria Wastewater Treatment Plant	NPDES Appeal Nos. 10-05 – 10-07 & 10-13
NPDES Permit No. CA 0049675	**MOTION FOR LEAVE TO FILE REPLY BRIEF; AND [PROPOSED] REPLY BRIEF**

Petitioner Amador County moves for leave to file a Reply to the briefs submitted in the above-captioned matter. Amador County filed its Petition for Review on July 23, 2010. Respondent Region IX of the United States Environmental Protection Agency ("EPA" or "Region") filed its Response on September 27, 2010.

In support of its motion, Petitioner Amador County states that the Response brief raises new issues that Petitioner did not previously have the opportunity to address. Specifically, in its Response EPA has made material misrepresentations with respect to two Environmental Appeals Board ("EAB") decisions. In fact, EPA has gone so far as to attribute quotes to a recent EAB decision that never appear in the decision. In addition, EPA stakes its entire claim of jurisdiction over the Buena Vista Rancheria on the basis of a federal court order that unequivocally fails to

stand for what EPA alleges. Indeed, EPA's characterization of the court order would violate constitutional principles. Petitioner Amador County had no way of anticipating that EPA would misrepresent EAB precedent, attribute nonexistent quotes to prior EAB decisions, and advance unconstitutional theories as its basis for jurisdiction.

Petitioner Amador County respectfully requests EAB grant its motion for leave to file this Reply brief so that the record can be corrected and EAB will not be biased by EPA's unfounded claims.

Dated: October 7, 2010

Respectfully submitted,

NIELSEN, MERKSAMER, PARRINELLO, MUELLER & NAYLOR, LLP

By: _____
Cathy Christian
Attorneys for Petitioner

REPLY BRIEF OF PETITIONER COUNTY OF AMADOR

1. EPA has misrepresented the conclusions reached in EAB's *In re Mille Lacs Wastewater Treatment Facility* and *In re Circle T Feedlot* decisions and cited to quotes from those cases that do not exist.

In its Petition for Review, Petitioner Amador County asserted that EPA lacks jurisdiction over the proposed Buena Vista Rancheria wastewater treatment plant because the Buena Vista Rancheria is not a reservation, is not allotted lands, and is not Indian Country.[1] Petitioner correctly pointed out that EPA's reliance on EAB's *In re Mille Lacs Wastewater Treatment Facility*, 11 E.A.D. 356 (EAB 2004) decision is misplaced because the land at issue in that case was held in trust for the tribe by the federal government—and the Buena Vista Rancheria is not held in trust by the federal government, but rather merely held in fee by the tribe.[2] In its Response, the EPA countered as follows:

> In its petition, the County suggests that the *Mille Lacs* decision only applies to trust land. County Petition at 3. In a recent EAB decision, the Board addressed this exact argument and noted the "Petitioner [] misinterprets the EAB's focus in *Mille Lacs* on the trust status of the relevant facility location." In finding *Mille Lacs* controlling precedent, the Board noted that the trust status of the land at issue in *Mille Lacs* "simply provided an alternative basis on which to conclude that the land was Indian Country"..."and that [n]owhere in [*Mille Lacs* decision] did EPA argue, nor did the EAB find, that ownership of the land (e.g., fee or trust) within the exterior boundaries of a *formal* Indian reservation make any difference to the Indian status of the land." *See In re Circle T Feedlot, Inc.*, NPDES Appeal Nos. 09-02 & 09-03, slip. op. at 9 (EAB June 7, 2010) (emphasis in original).[3]

---

1 Amador County Petition, pp. 2-4.

2 *Id.* at p. 3.

3 EPA Response, p. 16 n. 39.

The first, and potentially gravest, deficiency in EPA's Response is that the quotes it attributes to the *In re Circle T Feedlot* slip opinion decision are found nowhere in the decision itself and simply do not exist. In fact, the terms *misinterprets*, *relevant facility*, *simply*, *ownership of the land*, *formal Indian reservation*, *nor did EAB find,* and *make any difference* are plainly not used in the *In re Circle T Feedlot* decision.[4] EAB should completely disregard these statements in EPA's Response because they do not exist in the authoritative source cited by EPA; i.e., the *In re Circle T Feedlot* decision. Fabricated statements are entitled to no weight, and can serve no purpose but to mislead EAB.

Second, EPA's response fundamentally misrepresents the reasoning of both *In re Mille Lacs* and *In re Circle T Feedlot*. Contrary to EPA's fabrications, the *Mille Lacs* case was in fact decided on the basis that the land in question was trust land, and EAB did not rely on the trust status of the land merely as an "alternative basis on which to conclude the land was Indian country."[5] The facts of the *Mille Lacs* case are somewhat convoluted, but what is indisputably clear is that the EAB's decision in that case was based upon the fact that the lands in question were held in trust by the United States. In *Mille Lacs,* 11 E.A.D. 356 (EAB 2004), EPA Region 5 issued a NPDES permit to the Mille Lacs Band of Ojibwe Indians ("Band"). (*Id.* at 358.) Mille Lacs County then filed a petition for review with the EAB. (*Id.*) While the petition for review was pending before EAB, the Department of Interior ("DOI") transferred the land in question into trust for the Band. (*Id.* at 361.) EAB remanded the case to Region 5 for consideration of the new rationale that the trust designation meant that the land in question should be regarded "as a de facto or informal reservation." (*Id.*) Favoring this rationale over previous ones, Region 5 actually reissued the permit on the basis that the new trust status of the land elevated it to the level of a de facto or informal reservation. (*Id.* at 362, underscoring

---

[4] Petitioner was surprised that the quoted passages from the EPA's Response brief could not be found in the EAB *Circle T Feedlot* opinion and initially thought the EPA's Response brief may have simply incorrectly cited the page number of the slip opinion. However, after reading the slip opinion several times and doing computerized word searches of the slip opinion, it became clear that the language quoted in the EPA brief appears nowhere in the *Circle T Feedlot* opinion.

[5] EPA Response, p. 16 n. 39.

added.) Thereafter, petitioners once again filed a petition for review with EAB. (*Id.*) At that point, it was unquestionably clear that Region 5 was justifying issuance of the (reissued) permit on the basis that the land was held in trust. As Judge Fulton stated, "it is uncontested that at the time of the permit decision the land in question had become 'trust land' and it is likewise uncontested that the Region based its exercise of permitting jurisdiction primarily *on the trust status of the land.*" (*Id.* at 364 n. 8, emphasis added.) Judge Fulton continued to explain:

> The Region's decision that it has authority to issue the Permit in this case *is based on the Region's conclusion that the Facility is located within a de facto or informal reservation. The Region made this decision in the context of a recent decision by DOI to transfer the property on which the Facility is located into trust for the Band. This transfer of the land into trust for the Band and DOI's process for the transfer are particularly relevant* to the question whether the area has been 'validly set apart for the use of the Indians as such, under the superintendence of the Government...'" (*Id.* at 372-73, emphasis added.)

The EAB's ruling in the *Mille Lacs* case was clearly based on the trust status of the land in question. The decision concluded that "Petitioners have not...cast doubt upon, the Region's determination that the Facility is located within a de facto or informal reservation...*This failure to identify specific facts relevant to a de facto or informal reservation determination*, or to refute the fact relied upon by the Region, is fatal to Petitioners' request..." (*Id.* at 375-76, emphasis added.)

As can be seen, EPA's position in this appeal that the trust status of the land in *Mille Lacs* was merely an "alternative basis" on which to conclude EPA had jurisdiction is patently false and can serve no purpose other than to mislead the EAB. As stated in Petitioner's Petition for Review, *Mille Lacs* is totally inapplicable to the case at hand because the sole basis for the *Mille Lacs* decision—that the land was held in trust—is lacking with respect to the Buena Vista Rancheria, which is merely held in fee by the tribe.

Moreover, contrary to the misrepresentations made by EPA, this conclusion is not in any way contradicted by the *In re Circle T Feedlot* case. In fact, the *Circle T Feedlot* case confirms the fact that EPA jurisdiction only extends to lands held in trust by the United States or land

within the exterior borders of an Indian reservation—neither of which applies to the Buena Vista Rancheria. In *Circle T Feedlot*, NPDES Appeal Nos. 09-02 & 09-03, slip op. (EAB June 7, 2010), EPA Region 7's issuance of four NPDES permits was challenged on the basis that the facilities in question were located on "privately held *fee* land" that merely happened to be located within the exterior boundaries of a formal Indian reservation. (*Id.* at 12, emphasis in original; underscoring added.) Substantively, the primary contention was that the Region lacked jurisdiction to issue a final permit because the facilities were located on "privately owned *fee* land" and thus there was no federal jurisdiction over it. (*Id.* at 23-24, emphasis in original.) In response, Region 7 maintained that "properties held in fee by non-Indians *within the Omaha and Winnebago Reservations* are Indian Country and are subject to federal NPDES permitting authority," relying on EPA regulations and statements found in Supreme Court opinions. (*Id.* at 25, emphasis added.) In reaching its decision, EAB noted that "Federal Indian Reservation" was defined by the Clean Water Act to mean "*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 any rights-of-way running through the reservation" and concluded that fee properties situated within the exterior boundaries of an Indian reservation were still subject to NPDES jurisdiction. (*Id.* at 17 n. 14, 25, emphasis added.)

As can be seen, contrary to the mischaracterizations and fabrications advanced by EPA, neither the *Mille Lacs* nor the *In re Circle T Feedlot* cases provide a basis for EPA to assert jurisdiction to issue NPDES Permit No. 0049675 to the Buena Vista Rancheria because (1) the Buena Vista Rancheria is not held in trust by the United States but rather merely held in fee by the tribe, and (2) the Buena Vista Rancheria is not within the exterior boundaries of a formal Indian reservation. Furthermore, *In re Circle T Feedlot* does not support EPA's misrepresentation of the *Mille Lacs* decision. In truth, *In re Circle T Feedlot* only reinforces Petitioner's articulation of *Mille Lacs*:

> "The primary issue the Board considered in *Mille Lacs* was whether the Region erred in treating *trust lands* as part of a de facto or informal reservation and thus within "Indian Country." 11 E.A.D. at 372-77. The Board concluded that the Region had not

> erred in concluding that it had jurisdiction to issue the permit *based on the existence of a de facto or informal reservation.*" (*In re Circle T Feedlot*, at p. 29.)

Unable to support its jurisdictional claim over the Buena Vista Rancheria, EPA has desperately resorted to misrepresenting, and even fabricating, the *Mille Lacs* and *In re Circle T Feedlot* decisions. EAB should ignore the attempted deception.

2. Contrary to EPA's assertion, any agreement by Amador County to treat the Buena Vista Rancheria as "both Indian country and reservation land" does not establish EPA jurisdiction over the Rancheria because both local governments and federal courts lack the authority to confer such status.

Knowing that it is on shaky jurisdictional ground, EPA undertakes an impressive bootstrapping campaign in order to advance a specious argument that the Buena Vista Rancheria is "both Indian country and reservation land."[6] To reach this conclusion, EPA argues first that a federal court order somehow "declared" all lands within the boundaries of the Buena Vista Rancheria to be "Indian Country" to be treated as a "federally recognized Indian Reservation"; second, that by being a party to those federal court proceedings Amador County "explicitly agreed" that the Buena Vista Rancheria "is both Indian country and reservation land"; and third, given the court order and the County's alleged acquiescence in it, the Rancheria qualifies as both Indian country and reservation land for the purposes of EPA jurisdiction.[7] EPA's reasoning simply cannot withstand legal scrutiny.

The court order referred to by EPA (actually a stipulation for entry of judgment), *Tillie Hardwick v. United States*, No. C-79-1710 SW (N.D. Cal. 1987),[8] plainly does not support the claims made by EPA. First, the Buena Vista Tribe was not even a party to that stipulation. The plaintiffs were merely various individuals. Plaintiffs stipulated to the judgment "*on their own*

---

6 EPA Response, at p. 17.

7 *Id.*

8 EPA erroneously cited the date of the order as 1979. EPA Response, at p. 17.

behalf and on behalf of class members from the Buena Vista Rancheria." (*Id.* at 1, emphasis added.) Furthermore, the defendants who stipulated to the judgment were the tax collector, assessor, and board of supervisors for Amador County. (*Id.* at 1-2.) The United States was not a party to the 1987 order and did not stipulate to the judgment. More to the point, all of the statements in the stipulation relied upon by EPA were only stipulated to by the individual plaintiffs and the County—not the United States. The stipulation defines "The Parties" as "the Plaintiffs and Defendants" (i.e., named individuals and Amador County public officers). Paragraph 2 of the stipulation then states that "The Parties…stipulate that the court may enter judgment as follows…" (*Id.* at 3.) Thereafter, the stipulation specifies that *"The Parties"* stipulate that, among other things, that land within the Buena Vista Rancheria is declared to be Indian country (*Id.* at 4 ¶ 2(C)) and that the Rancheria shall be treated *by the County of Amador* and the United States of America[9] as any other federally recognized Indian Reservation. (*Id.* at 4 ¶ 2(D).)

The fatal flaw in EPA's argument is that, as is widely known, a county government lacks authority to make any determination about, confer any status upon, or restore any right or responsibility to an Indian tribe. Only the federal government can take such steps. U.S. Const., art. I, § 8, cl. 3 states that Congress has the power to regulate commerce with Indian tribes. As the Supreme Court has stated:

> [T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as *plenary and exclusive*…The independence of the tribes is subject to *exceptionally great powers of Congress to regulate and modify the status of the tribes*…The central function of the Indian Commerce Clause…is to *provide Congress with plenary power* to legislate in the field of Indian affairs." (*United States v. Lara* (2004) 541 U.S. 193, 200. Emphasis added, internal citations omitted.)

9 Although the United States was mentioned in the 1987 stipulation, the United States was not a party to the 1987 stipulation signed by the County of Amador and the individual class member plaintiffs, and was therefore not bound by it.

Amador County has no more authority to declare the Buena Vista Rancheria to be Indian country or a federally recognized Indian Reservation than it does to coin money, raise armies, or declare war on a foreign power. The fact that Amador County agreed to treat Buena Vista Rancheria as a reservation or Indian country does not establish EPA's jurisdiction over it any more that a declaration of war by Amador County would force the United States into a state of hostility. Unless and until Congress, either directly or through delegated authority, confers the status of "Indian Country" on the Buena Vista Rancheria, such status simply does not exist. While Amador County might prefer to have the ability to determine EPA's jurisdictional rights, such a position would turn the Constitution on its head.

Other factors pertinent to the 1987 *Tillie Hardwick* stipulation further undermine EPA's attempt to manufacture an assertion of jurisdiction based on that order. As noted above, the stipulation to which Amador County was a party only involved certain individuals instead of the Tribe as a whole. Additionally, the companion 1983 stipulation for entry of judgment to which the federal government was a party, *Tillie Hardwick v. United States*, No. C-79-1710 SW (N.D. Cal. 1983), only dealt with the status of certain *individuals* rather than the status of the *land* associated with the Buena Vista Rancheria: "The status of the named individual plaintiffs...as Indians under the laws of the United States shall be restored and confirmed." (*Id.* at 3 ¶ 3.) Therefore, nowhere in either stipulation associated with the *Tillie Hardwick* case was the status of the Buena Vista Rancheria *land* validly established. Any assertion to the contrary is simply false. EPA cannot assert jurisdiction based on issues that were never decided and circumstances which never existed.

Second, the 1983 *Tillie Hardwick* stipulation gave the fee owners of the Buena Vista Rancheria the opportunity to elect to restore such land to trust status held by the United States at any time within two years of the notice of judgment. (See 1983 Stipulation, p. 4 ¶¶ 6 & 7.) Under the *Mille Lacs* decision, conversion of the fee land into trust would have established EPA jurisdiction over the Buena Vista Rancheria. However, the Buena Vista Rancheria was <u>not</u> restored to trust status held by the United States. In fact, the Tribe's 1996 attempt to convey the

land to the United States was rejected by the federal government.[10] Therefore, contrary to EPA's argument, it has been affirmatively established that the Buena Vista Rancheria is not trust land and as such cannot qualify as a "de facto or informal reservation" regardless of what Amador County—a local government entity—may or may not have stipulated to nearly a quarter-century ago.

Alternatively, EPA's contention that the boundaries of the Buena Vista Rancheria were "reinstated by an order issued by a federal district court" is equally unmeritorious.[11] As stated by the Supreme Court in *Lara*, *supra*, 541 U.S at 200—and in countless other decisions—Congress is the branch of government constitutionally empowered to *regulate and modify the status of the tribes*. With respect to other branches of the federal government, the Supreme Court has stated, "Since the Constitution places the authority to dispose of public lands *exclusively in Congress*," any authority to convey any interest in federal public lands "*must be traced to Congressional delegation of its authority*." (*Sioux Tribe of Indians v. United States* (1942) 316 U.S. 317, 326, emphasis added.) With respect to the judicial branch in particular, the Supreme Court has held that "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and *the power has always been a political one, not subject to be controlled by the judicial department of the government.*" (*Lone Wolf v. Hitchcock* (1903) 187 U.S. 553, 565, emphasis added.) This position has been adhered to by the same court that issued the *Tillie Hardwick* stipulations. "Congress at all times exercises plenary authority over the tribal relations of Indians. The power thus exercised is in its nature *political, and not judicial*. It has accordingly been held not to be subject to the control of the *judicial department of government*." (*Donahue v. Butz* (N.D. Cal. 1973) 363 F.Supp. 1316, 1322.)

Consequently, while the courts may *interpret* laws and policies Congress adopts with respect to Indian tribes (see *Marbury v. Madison* (1803) 5 U.S. 137, 177 – "It is emphatically the province and duty of the judicial department to say what the law is"), courts are not permitted

---

[10] See Amador County Petition, Exh. 3.

[11] EPA Response, p. 16.

under the constitutional construct and Supreme Court precedent to bestow, modify, extinguish, or restore *in the first instance* any right or status upon an Indian tribe. EPA's assertion that the Buena Vista Tribe's land was "reinstated by an order issued by a federal district court" does not comport with settled legal principles. While the federal court could have determined whether *Congress* has reinstated the Buena Vista Tribe, the federal courts lack authority to grant such a reinstatement in their own right.

EPA has failed to point to any action taken by the appropriate authority—Congress—that creates a basis for a claim of jurisdiction. It has failed to do so because none exists. The 1987 *Tillie Hardwick* stipulation, lacking any congressional acquiescence or participation, is little more than an interesting side note. While EPA's attempt to assign Amador County and the district court new powers they do not currently possess; i.e., powers granted exclusively to Congress, is generous, it must ultimately fail. Try as it might, EPA has found nothing to base its assertion of jurisdiction upon other than misrepresentations, fabrications, and legally unsupportable theories. Without more, EPA's jurisdictional claim over the Buena Vista Rancheria must fail.

For the foregoing reasons, in addition to those cited in Petitioner's Petition for Review, Petitioner requests that EAB grant its petition for review.

Dated: October 7, 2010

Respectfully submitted,

NIELSEN, MERKSAMER, PARRINELLO, MUELLER & NAYLOR, LLP

By: _____
Cathy Christian
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is 1415 L Street, Suite1200, Sacramento, CA 95814.

On, October 7, 2010, I caused the foregoing document(s) described as **MOTION FOR LEAVE TO FILE REPLY BRIEF; AND [PROPOSED] REPLY BRIEF** to be served on the individual(s) listed below as indicated:

Mr. Jerry Cassessi
Chairman, Friends of Amador County
100 Cook Road
Ione, CA 95640
e-mail: lucydog@wildblue.net

Mr. Glen Villa, Jr.
901 Quail Court
Ione, CA 95640
e-mail: glenvilla@sbcglobal.net

Mr. William Wood
Holland & knight LLP
Legal Counsel for Ione band of Miwok Indians
633 Fifth Street, 21st Floor
Los Angeles, CA 90071
e-mail: William.wood@hklaw.com

Erica Maharg, Assistant Regional Counsel
Office of Regional Counsel, EPA, Region 9
75 Hawthorne Street
San Francisco, CA 94105
e-mail: Maharg.erica@epa.gov

✓ (VIA E-MAIL SERVICE) By electronically transmitting these documents in Adobe PDF format to the e-mail address(es) listed above.

Executed October 7, 2010, at Sacramento, California.

Marie Cook

MARIE COOK