

RECEIVED  
U.S. E.P.A.

707 FEB 02 PM 3 15  
**BEFORE THE ENVIRONMENTAL APPEALS BOARD**  
**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
ENVIR. APPEALS BOARD WASHINGTON, D.C.

\_\_\_\_\_  
In re: Dry Creek Rancheria )  
Wastewater Treatment Plant )  
NPDES Permit No. CA 0005241 )  
\_\_\_\_\_ )

NPDES Appeal Nos. 07-14 & 07-15

**DRY CREEK RANCHERIA BAND OF POMO INDIANS**  
**RESPONSE TO PETITIONS FOR REVIEW**

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
I. INTRODUCTION.....	1
II. PETITIONERS' TRUE AGENDA IS TO TERMINATE (OR AT LEAST CURTAIL) THE TRIBE'S EXERCISE OF ITS RIGHT TO OWN AND OPERATE ITS GOVERNMENT GAMING PROJECT.....	2
III. PETITIONER AVA IMPROPERLY SEEKS TO OVERTURN WELL ESTABLISHED LAW HOLDING THAT INDIAN TRIBES, BY VIRTUE OF THEIR SOVEREIGN STATUS, ARE NOT SUBJECT TO STATE OR COUNTY CONTROL AND ARE IMMUNE FROM UNCONSENTED SUIT.....	4
IV. CONCLUSION.....	6

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>CASES</b>	
<i>Alaska v. Native Village of Venetie Tribal Government</i> , 522 U.S. 520 (1998) .....	5
<i>Cabazon v. Cabazon Band of Mission Indians</i> , 480 U.S. 202 (1987) .....	5
<i>EEOC v. Karuk Tribe Housing Authority</i> , 260 F.3d 1071 (9th Cir. 2001) .....	5
<i>In re City of Newburyport Wastewater Treatment Facility</i> , NPDES Appeal No. 04-06, slip op. at 22 (EAB, Dec. 8 2005) .....	3, 4
<i>Middletown Rancheria v. Workers' Comp. Appeals Bd.</i> , 60 Cal. App. 4th 1340 (1998) .....	5
<i>Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.</i> , 523 U.S. 751 (1998) .....	5
<i>New Mexico v. Mescalero Apache Tribe</i> , 462 U.S. 324 (1983) .....	5
<i>Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe</i> , 498 U.S. 505 (1991) .....	5
<i>Sac and Fox Nation v. Norton</i> , 240 F.3d 1250 (10th Cir. 2001) .....	3
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978) .....	5
<i>Santa Rosa Band of Indians v. Kings County</i> , 532 F.2d 655 (9th Cir. 1975) .....	5
<b>STATUTES</b>	
25 U.S.C. § 2701 .....	3
25 U.S.C. § 2702(3), 2704, 2705, 2706 .....	3
33 U.S.C. § 1251 .....	4
<b>OTHER AUTHORITIES</b>	
James M. Grijalva, <i>The Origins of EPA's Indian Program</i> , 15 Kan. J. L. & Pub. Pol. 191 (2006) .....	4

## **I. INTRODUCTION.**

The Dry Creek Rancheria Band of Pomo Indians ("Tribe")<sup>1</sup> respectfully submits this response to the Petitions for Review of NPDES Permit No. CA 0005241 ("Permit") filed by the County of Sonoma, California ("County"), and by the Alexander Valley Association ("AVA") (collectively, the "Petitions" or "Petitioners"). Region IX of the United States Environmental Protection Agency ("Region") properly issued the Permit with appropriate conditions to allow the Tribe to discharge treated wastewater into a tributary to the Russian River under the National Pollutant Discharge Elimination System ("NPDES"). It is the Tribe's understanding that the EPA will be filing a responsive pleading which addresses fully the Petitions' lack of merit, and the Tribe joins the EPA in its response.

In addition to joining the EPA's response, the Tribe submits this Response to defend against the Petitioners' unsupportable attacks on the Tribe's sovereignty and rights. The County's and AVA's Petitions are just another step in their ongoing march to stop the Tribe from exercising its sovereignty and its rights under federal law to build, own, and operate a government gaming project on its reservation. The Tribe's wastewater treatment facility treats water from this gaming project (the River Rock Casino, hereinafter the "Casino") and other government operations on its reservation. Moreover, AVA is attempting to improperly use this permitting procedure to obtain a waiver of the Tribe's sovereignty and to subject the Tribe to County enforcement control over the Permit. The EAB should not allow the County or AVA to succeed in either of these unlawful goals, and, for the reasons stated in the EPA's Response (adopted and incorporated herein by the Tribe), the County's and the AVA's agenda-driven Petitions

---

<sup>1</sup> The Dry Creek Rancheria Band of Pomo Indians is a federally-recognized Indian tribe with a 75-acre reservation near Geyserville, California – the Dry Creek Rancheria. The Tribe currently has approximately 950 members and is growing. As of the last federal census, however, over 70% of Tribal members had incomes below the federal poverty line.

should be denied.

**II. PETITIONERS' TRUE AGENDA IS TO TERMINATE (OR AT LEAST CURTAIL) THE TRIBE'S EXERCISE OF ITS RIGHT TO OWN AND OPERATE ITS GOVERNMENT GAMING PROJECT.**

The Petitions are nothing more than another groundless attempt to cause further harm to the Tribe's right to own and operate its government gaming project. Simply put, Petitioners hope that attacking the Permit will hurt the Tribe's ability to operate and expand the Casino. This is a tactic that Petitioners' have used before. Both the County and the AVA have engaged in an onslaught of legal harassment against the Tribe and its Casino since the Tribe announced its plans to build a casino on its Rancheria. This harassment has included a protest filed in an effort to stop the Tribe from getting a liquor license for its casino;<sup>2</sup> lawsuits filed to stop the federal government from taking land adjacent to the casino into trust for the Tribe;<sup>3</sup> a lawsuit filed seeking to eradicate the Tribe's jurisdiction over building and fire code inspections on the Rancheria (in which the Tribe prevailed at both the district and appeals court);<sup>4</sup> and a lawsuit filed by members of the AVA claiming that the Tribe had no right to use the road to the Rancheria for casino patrons (which suit they lost).<sup>5</sup>

The Petitioners' true agendas are evident in the filing of their meritless Petitions. As clearly outlined in the Region's Response, the Petitions are meritless. Accordingly, such Petitions would only be brought to obtain the advantage of further harming the Tribe's rights to own and operate its government gaming project. The AVA's true agenda is further demonstrated by its bold and improper request that the EAB determine that the Permit authorizes a violation of the gaming compact between the Tribe and the State of

---

<sup>2</sup> See Ex. 1.

<sup>3</sup> See Exs. 2 and 3.

<sup>4</sup> See Exs. 4 and 5.

<sup>5</sup> See Ex. 6.

California ("Compact") and the Indian Gaming Regulatory Act ("IGRA")<sup>6</sup> because it allegedly allows the Tribe to apply effluent onto a 12-acre spray field outside the Rancheria.<sup>7</sup> This issue was not raised on the record and thus should not be subject to review at this time.<sup>8</sup>

Moreover, this argument is based on supportable facts regarding the location of the sprayfields. The only evidence in the record is that the sprayfields would be within reservation boundaries.<sup>9</sup> Even if this issue had been raised and were based on supportable facts, this is not a matter for the EAB to review. Compliance with the Compact is not a matter properly before the EAB but is a contract matter between the State of California and the Tribe.<sup>10</sup> Similarly, IGRA compliance is not within the EAB's jurisdiction. The National Indian Gaming Commission is the agency charged with *exclusive* federal jurisdiction to regulate gaming on Indian lands – and to enforce compliance with IGRA.<sup>11</sup> Accordingly, AVA's position in this regard should be rejected so as to prevent the Petitioners' from achieving their underlining goal of harming the Tribe's right to own and operate its government gaming project.

Throughout the permitting process, the Tribe has sought to be treated fairly and to have its Permit judged on the merits and that is all it requests here. The Tribe has the sovereign right, recognized under federal law, to own and operate a government gaming project. The County and AVA should not be allowed to use this forum to further their attempts to deny or harm the Tribe's efforts to exercise this right. Fairness and the merits dictate that the County's and AVA's agenda-driven Petitions requesting review of the

---

<sup>6</sup> 25 U.S.C. § 2701 *et seq.*

<sup>7</sup> AVA Petition at 17-19.

<sup>8</sup> See *In re City of Newburyport Wastewater Treatment Facility*, NPDES Appeal No. 04-06, slip op. at 22 (EAB, Dec. 8 2005).

<sup>9</sup> See AR at 348 (Supplement to Application at Figure 2A-1); AR at 180 (Permit Application at 3 (Form 3510-2A)).

<sup>10</sup> See Ex. 7, Compact Section 9.0.

<sup>11</sup> See 25 U.S.C. §§ 2702(3), 2704, 2705, and 2706; *Sac and Fox Nation v. Norton*, 240 F.3d 1250, 1265 (10th Cir. 2001).

Permit conditions be denied.

**III. PETITIONER AVA IMPROPERLY SEEKS TO OVERTURN WELL ESTABLISHED LAW HOLDING THAT INDIAN TRIBES, BY VIRTUE OF THEIR SOVEREIGN STATUS, ARE NOT SUBJECT TO STATE OR COUNTY CONTROL AND ARE IMMUNE FROM UNCONSENTED SUIT.**

AVA boldly asserts that the Tribe should be forced to give up its sovereignty and subject itself to County control to obtain the Permit.<sup>12</sup> The AVA seeks such a waiver to give the County the authority to bring an action directly against the Tribe to enforce the Permit.<sup>13</sup> This in effect would give the County enforcement jurisdiction and control over the Tribe's federal Permit.

Because AVA at no time raised this issue on the record, it is not properly addressed here.<sup>14</sup> In any case, AVA does not – and cannot – cite any other instance where a tribe has been compelled to so cede its sovereignty and subject itself to local control just to get an NPDES permit. And nothing in the Clean Water Act ("CWA")<sup>15</sup> authorizes the EPA to require a Tribe to waive its sovereign immunity or subject itself to local control as a condition to obtaining an NPDES permit. Indeed, the ostensible purpose of the EPA's Indian program is to promote – and not undermine – tribal sovereignty.<sup>16</sup>

Given the County's and AVA's continuous and improper attempts (noted above) to utilize legal procedures and processes in an effort to bludgeon and stifle the Tribe's lawful pursuit of economic development on its reservation, it is not surprising that AVA

---

<sup>12</sup> AVA Petition at 19-21.

<sup>13</sup> AVA Petition at 20.

<sup>14</sup> See *In re City of Newburyport Wastewater Treatment Facility*, NPDES Appeal No. 04-06, slip op. at 22 (EAB, Dec. 8 2005).

<sup>15</sup> 33 U.S.C. § 1251 *et seq.*

<sup>16</sup> James M. Grijalva, *The Origins of EPA's Indian Program*, 15 Kan. J. L. & Pub. Pol. 191 (2006).

would now suggest that the Tribe should not be entitled to retain its basic sovereign status as recognized under federal law. Longstanding and well-established principles of federal Indian law hold that tribes are not subject to state or county jurisdiction or laws and are immune from state and local control.<sup>17</sup> And it is a fundamental principle of federal Indian law that tribes enjoy sovereign immunity from unconsented suit except where a tribe has expressly and unequivocally waived this immunity or where it has been abrogated by Congress.<sup>18</sup>

In light of this long chain of precedent and the absence of any authority or example to the contrary, it is apparent that AVA's position (that the Tribe must somehow waive its sovereignty and be subordinated to the County in the manner suggested as a condition to obtaining the Permit) should be denied. Such an argument is simply erroneous and contrary to well-established law. And such an abrogation of sovereign immunity or exercise of County enforcement control is unnecessary. As AVA notes, the EPA will retain jurisdiction to enforce the Permit (should this become necessary),<sup>19</sup> and the Permit has all necessary and appropriate conditions.

---

<sup>17</sup> See, e.g., *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 527 n. 1 (1998) ("[P]rimary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States."); *Cabazon v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987) ("[T]ribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States."); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332, (1983) ("Because of their sovereign status, tribes and their reservation lands are insulated in some respects by a historic immunity from state and local control, and tribes retain any aspect of their historical sovereignty not inconsistent with the overriding interests of the National Government.") (internal quotations and citations omitted); *id.* ("[Supreme Court] cases establish that absent governing Acts of Congress, a State may not act in a manner that infringe[s] on the right of reservation Indians to make their own laws and be ruled by them."); *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975); *Middletown Rancheria v. Workers' Comp. Appeals Bd.*, 60 Cal. App. 4th 1340, 1347 (1998).

<sup>18</sup> See, e.g., *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978)). See also *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998).

<sup>19</sup> AVA Petition at 19. See also *EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071, 1075 (9th Cir. 2001) (noting that tribal sovereign immunity does not protect tribes against unconsented suit by the federal government) (citations omitted).

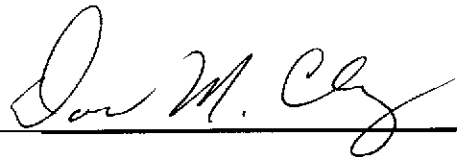


**IV. CONCLUSION**

For the foregoing reasons, the Tribe requests that the Petitions be rejected and that no review be undertaken. The Tribe further requests that, in the event that any review is ordered, the Tribe be permitted to brief any issues that may be considered at that time.

Dated: February 21, 2008

HOLLAND & KNIGHT LLP

By:  \_\_\_\_\_

Donald M. Clary  
Holland & Knight LLP  
633 West Fifth Street, 21<sup>st</sup> Floor  
Los Angeles, California 90071  
Tel: (213) 896-2400  
Fax: (213) 896-2450

Attorneys for  
DRY CREEK RANCHERIA BAND  
OF POMO INDIANS

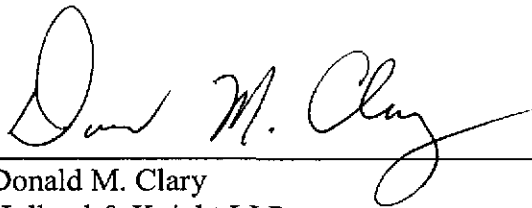
**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing **DRY CREEK RANCHERIA BAND OF POMO INDIANS RESPONSE TO PETITIONS FOR REVIEW** in the matter of Dry Creek Rancheria Wastewater Treatment Plant, NPDES Permit No. CA 0005241, Appeal Nos. 07-14 & 07-15, were served by United States First Class Mail on the following persons, this 22<sup>nd</sup> day of February, 2008:

Thomas M. Hagler  
Attorney Advisor  
EPA - Region IX  
75 Hawthorne Street  
San Francisco, CA 94105  
T: (415) 972-3945  
F: (415) 947-3570

Jeffrey M. Brax  
Office of the Sonoma County Counsel  
575 Administration Drive, Room 105A  
Santa Rosa, CA 95403-2881  
T: (707) 565-2421  
F: (707) 565-2624

Dennis J. Whittlesey  
Margaret A. Coughlin  
H. Scott Althouse  
Dickinson Wright PLLC  
1901 L Street NW, Suite 800  
Washington, DC 20036  
T: (202) 659-6928  
F: (202) 659-1559



---

Donald M. Clary  
Holland & Knight LLP  
633 West Fifth Street, 21<sup>st</sup> Floor  
Los Angeles, California 90071  
T: (213) 896-2400  
F: (213) 896-2450

Attorneys for  
**DRY CREEK RANCHERIA BAND  
OF POMO INDIANS**