

1 NIELSEN MERKSAMER PARRINELLO
GROSS & LEONI, LLP
2 CATHY CHRISTIAN (SBN 083196)
KURT R. ONETO (SBN 248301)
3 1415 L Street, Suite 1200
Sacramento, CA 95814
4 TELEPHONE: (916) 446-6752
FAX (916) 446-6106
5

6 Email: cchristian@nmgovlaw.com
Email: koneto@nmgovlaw.com

7 *Attorneys for Petitioner*
COUNTY OF AMADOR
8

9 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
10 BEFORE THE ENVIRONMENTAL APPEALS BOARD

11 In re: Buena Vista Rancheria Wastewater) NPDES Appeal Nos.: 10-05, 10-07, & 10-13
12 Treatment Plant) Buena Vista Rancheria (Casino)
13) **MOTION FOR LEAVE TO FILE REPLY**
14 NPDES Permit No. 0049675) **BRIEF TO OPPOSITION TO REQUEST**
15) **FOR STAY OF NOTICE TO PROCEED;**
16) **AND [PROPOSED] REPLY BRIEF**

17 After seeking and receiving a one month extension of time to respond to the Request for a
18 Stay of a Notice to Proceed ("NTP") in this matter filed by the County of Amador and others,
19 Region 9 of the Environmental Protection Agency ("Region 9") filed a lengthy Response which
20 both raised new issues and mischaracterized the County's position on several key points. In order
21 to ensure that the Environmental Appeals Board ("EAB") has a full and accurate statement of the
22 evidence and law, and to correct mischaracterizations in the Response, the County of Amador seeks
23 leave to file the attached reply brief.

24 Dated: August 24, 2011

25 NIELSEN MERKSAMER PARRINELLO
GROSS & LEONI, LLP

26 By: 
27 Cathy Christian, attorney for petitioner
28 AMADOR COUNTY

1 Resp. at 17, emphasis added.) "...[A] restraint on the project not contemplated by the MOA and
2 not otherwise available to Movants under CWA—i.e., a *ban on project construction* pending
3 completion of the CWA permitting process." (Region 9 Resp. at 19, emphasis added.) "...[T]he
4 Region believes it is neither necessary, nor appropriate, for EPA to prohibit construction of the
5 Buena Vista Tribe's project pending completion of EAB review of the NPDES permit. Indeed,
6 such action would run counter to the principles of the D.C. Circuit's precedent specifically finding
7 that EPA's CWA regulation of point source discharges does not include the authority to *ban*
8 *construction...*" (Region Resp. at 20, emphasis added.) Region 9 misconstrues relevant case law
9 and the County's position.

10 The case cited by Region 9, *NRDC v. EPA* (D.C. Cir. 1987) 822 F.2d 104, did find that EPA
11 lacked authority to regulate private property owners' actions through an NPDES regulation that
12 *directly* banned all construction activities until after final issuance of an NPDES permit. (*Id.* at
13 127.) But that in no way limits EAB's authority to stay issuance of the NTP. It is true that staying
14 the issuance of the NTP may have the *indirect* effect of putting the Tribe's construction activities on
15 hold, but that is not prohibited, and the *NRDC* opinion cited by Region 9 conceded as much. The
16 court stated that EPA lacked authority to "regulate the owner's activities under NEPA and the Clean
17 Water Act." (*Id.* at 129.) But the court also acknowledged that EPA's clear authority over NPDES
18 permits would continue to have a very persuasive effect on the actions of private parties. The court
19 explained: "While the discharge permit may, *in practical effect*, be needed for construction, it is
20 most certainly not a *legal condition precedent*. That is to say, a rational decisionmaker would not
21 likely build a facility prior to acquiring...an operating permit." (*Id.* at 130, emphasis added.)

22 The *NRDC* decision provides analogy to the present situation. Region 9 states that the lack
23 of an NTP is a barrier to construction. Although it may not be possible for EAB to *directly enjoin*
24 construction activities, EAB has full authority to stay Region 9's issuance of the NTP, which would
25 likely have the practical effect of allowing the jurisdictional question to be resolved before
26 construction commences. Only through the stay of the NTP will the paramount jurisdictional
27 question ever be addressed. Without a stay of the NTP, Region 9 and the Tribe have unequivocally
28

1 indicated that construction will invariably go forward, thereby rendering any after-the-fact ruling on
2 Region 9's jurisdiction over the *land* meaningless.

3 Apparently realizing that EAB's power to stay issuance of the NTP could have the *practical*
4 *effect* of halting commencement of private construction activities, Region 9 now erroneously argues
5 that EAB entirely lacks authority even to stay issuance of the NTP. Region 9 does so by conflating
6 an internal agency decision (staying the NTP) with a completely separate private action (delaying
7 construction) that may or may not actually happen. As explained in the *NRDC* decision, EPA (and
8 by extension EAB) maintains full authority to control licensing and permitting decisions (i.e., NTP
9 issuance) irrespective of the collateral impacts of those decisions (i.e., the Tribe's willingness to go
10 forward with construction without the NTP). Region 9 now seeks to improperly limit EAB's
11 inherent authority so that Region 9 can avoid a possible collateral result that it does not favor.

12 To be clear: EAB has full power and authority under both the *NRDC* decision and the
13 inherent authority granted to it by the EPA Administrator, discussed *infra*, to stay issuance of the
14 NTP. (EAB's jurisdiction over NHPA matters is discussed in sections 2 and 3, *infra*.) Staying the
15 NTP *could* have the *practical effect* of slowing down construction of the wastewater treatment
16 plant; which in turn could have the practical effect of delaying permanent alteration of Amador
17 County's landscape and pollution of its waters. That being said, under controlling judicial
18 precedent EAB need not concern itself with collateral impacts and practical effects when
19 determining the limits of its power over subordinate regional offices within the very same agency.
20 The short answer to Region 9's objection is that EAB has full authority to stay Region 9's issuance
21 of the NTP should it choose to do so.

22 To the extent that Amador County's original Motion could be read as asking EAB to stay
23 private construction activities, the County was simply responding to blanket assertions made by
24 Region 9 in its July 5, 2011 letter. Region 9's Response to the County's Motion engages in a bit of
25 doublespeak by asserting that "[T]he NTP itself is not an authorization for construction, nor does its
26 issuance indicate that any actual construction is imminent." (Region 9 Resp. at 3.) Region 9's July
27 5, 2011 letter, toward which Amador County's Motion was directed, took an entirely different
28

1 approach and indicated that issuance of the NTP would open the floodgates for immediate
2 construction activities. Page 2 of Region 9's July 5, 2011 letter states:

3
4 Under the NHPA MOA, the parties agreed to a variety of provisions *relating to the*
5 *Tribe's construction* of the proposed project. Of relevance here, *the parties*
6 *established a process for EPA to issue Notices to Proceed (NTP) with construction of*
7 *segments of the proposed project upon the occurrence of one or more specified events.*
8 (Emphasis added.)

9 The bottom of page 2 and top of page 3 of the same letter similarly state:

10
11 Given these potential risks to the Tribe's financing—and thus the proposed project as
12 a whole—the Tribe urged the Region to issue the NTP, *which is the only barrier to*
13 *commencement of construction of the proposed project*, as soon as possible.
14 (Emphasis added.)

15 The Tribe's Opposition only reinforces the notion that issuance of the NTP
16 will open the floodgates for construction. On the first page, the Tribe's Opposition states
17 that-

18
19 On July 5, 2011, the Region gave the Board notice that it planned to issue a Notice to
20 Proceed *authorizing Buena Vista to commence construction of the project facilities.*
21 (Emphasis added.)

22 Page 3 of the Tribe's Opposition states:

23
24 *The only legal barrier to construction derives from the NHPA MOA. It states that*
25 *'EPA may issue Notices to Proceed' with work on a 'particular construction*
26 *segment' if 'any' of the specified conditions are met. (Emphasis added.)*

27
28 Region 9 now seeks to somehow fault the County for asking EAB to "stay all
29 construction activities." To the contrary, Amador County merely asked that EAB apply the
30 brake to all that Region 9, in its July 5, 2011 letter, promised would directly flow from its
31 issuance of the NTP. While Region 9 is correct that EAB cannot *directly* stay construction
32 activities, EAB is certainly empowered both through the *NRDC* decision and its inherent
33 delegated authority to restrain issuance of the NTP by Region 9, a subordinate regional
34 office. The fact that staying the NTP may have *practical or incidental* effects on the

1 Tribe's construction decisions does not warrant inaction. If anything, the potential practical
2 or incidental effects that could flow from staying the NTP; i.e., preservation of Amador
3 County's due process rights to contest Region 9's jurisdiction over the BVR *lands* along
4 with protection of the County's pristine natural and human environment, are arguments in
5 *favor* of EAB granting the stay, not against it.

6
7 **2. While Region 9 and the Tribe Attempt to Compartmentalize Issues in Order to Shield them from**
8 **EAB Review, the NHPA and CWA Issues Boil Down to the Same Question; i.e., Whether EPA**
9 **has Jurisdiction over BVR.**

10 At various points, Region 9 and the Tribe articulate an argument that can be distilled in the
11 words of the old adage as this: the County cannot object to the entire forest but only to individual
12 trees. In essence, the Region seeks to silo off NPDES and CWA issues from NHPA and NTP
13 issues, arguing that NTP Issuance is separate and apart from Region 9's CWA authority and
14 therefore non-reviewable by EAB. (See Region 9 Resp. at 8-9; see also Tribe Opp. at 6-7.)
15 Likewise, Region 9 and the Tribe attempt to convince EAB that EAB cannot intervene in any way
16 whatsoever to correct an illegal assertion of jurisdiction by the Region because only "permit
17 conditions" are reviewable, not jurisdictional questions. (Region 9 Resp. at 10-11; Tribe Opp. at 8.)

18 The Region and the Tribe either misrepresent or misunderstand how the NHPA works. As
19 noted in the *NRDC* case cited by Region 9 and the Tribe, CWA and NEPA do not give Region 9
20 authority to regulate private action. However, the National Historic Preservation Act (16 USC § 470
21 et seq.) ("NHPA") does give federal agencies control over federally assisted or licensed private
22 actions. The key point to understand is how federal agencies acquire jurisdiction under the NHPA.
23 As stated in section 106 of the NHPA (16 USC § 470f), the-

24 head of any federal agency having direct or indirect jurisdiction over a proposed
25 Federal or federally assisted undertaking in any State and the head of any federal
26 department or independent agency having authority to license any undertaking shall,
27 prior to the approval of any expenditure or any federal funds on the undertaking or
28 prior to the issuance of any license...take into account the effect of the undertaking
on any district, site, building, structure, or object that is included in or eligible for
inclusion in the National Register. (Emphasis added.)

1 Under the NHPA's implementing regulations (see 36 CFR § 800.3 et seq.), federal agencies enter
2 into memorandums of agreement ("MOA") with appropriate parties to mitigate effects on historic
3 properties, etc.

4 Therefore, federal agencies *only* have authority to engage in the NHPA process when they
5 *also* have jurisdiction to license an undertaking. And Region 9 *only* has jurisdiction to issue an
6 NPDES permit in California on Indian lands. As such, Region 9's NHPA authority turns on the
7 same question as its CWA authority—whether or not BVR is Indian lands. By operation of law, a
8 finding that Region 9 lacks NPDES permitting authority at BVR also means that Region 9 lacks
9 authority to engage in the NHPA process at BVR as well. Region 9 and the Tribe's argument that
10 Region 9 cannot control construction under CWA, but can control construction under NHPA, and
11 also that EAB can only review actions under CWA but not under NHPA, is legally wrong and
12 factually impossible. BVR is either Indian lands and Region 9 has *both* CWA and NHPA authority
13 over it; or BVR is not Indian lands and Region 9 has *neither* CWA nor NHPA authority over it.
14 Arguing that EAB can only consider CWA and not NHPA matters in this context is a false
15 dichotomy because the NHPA issue is entirely dependent on the outcome of the CWA jurisdictional
16 issue.

17 Similarly, Region 9 and the Tribe's argument that a challenge to Region 9's jurisdiction is
18 not a permit condition and therefore cannot halt issuance of either the NPDES permit or the NTP
19 under NHPA turns the law and common sense on its head.

20 Region 9 and the Tribe put the cart before the horse. In their view, EPA regional offices can
21 issue NPDES permits and NHPA Notices to Proceed first and then worry about whether or not they
22 actually had legal jurisdiction to do so later on. This argument eviscerates the relevance of
23 jurisdictional review because the jurisdictional act (i.e., issuance of the permit and construction of
24 facilities) is already complete. Region 9 and the Tribe assert that there is no harm to remedy
25 because no actual discharge will take place until the appeal process is complete. The harm,
26 however, is actually in the unsupported assertion of jurisdiction *over the land* by a federal agency.
27 By analogy, a trespasser could enter another person's land and begin obtaining building permits and
28 constructing a house and the landowner would be defenseless to halt the trespasser, with the

1 exception that the trespasser promises not to occupy the home until the validity of the building
2 permits is conclusively determined. It ignores the fact that the trespasser has no lawful right to
3 enter another's land and it completely rules out the possibility that construction of the house could
4 ever be altered or prevented.

5 Region 9 and the Tribe repeatedly attempt to characterize Amador County's request as a
6 stay of construction activities. That is not ultimately what Amador County seeks. To the contrary,
7 Amador County asks EAB to overrule Region 9's illegal assertion of jurisdiction over the BVR
8 *lands*. The County does not want to prevent the trespasser from building the house; it wants to
9 prevent the trespasser from entering the land in the first place in order to allow the proper sovereign,
10 the State of California, to determine any parameters of the proposed project.

11
12 3. EPA and the Tribe Seek to Distract EAB with Procedural Jargon and Mischaracterize the Relief
13 Sought as Somehow Being "Extraordinary".

14 Region 9 and the Tribe attempt to scare EAB away from granting Amador County's request
15 by characterizing it as a request for injunctive relief—an "extraordinary remedy." (Region 9 Resp.
16 at 14.) This characterization of the situation is quite an exaggeration.

17 A bit of background may be helpful. The EAB was created by the EPA Administrator in
18 1992 "to give greater credence to, and inspire confidence in, the final adjudicatory decisions of the
19 EPA" and also to "lend greater authority to the agency's decisions." (Wolgast, Stein, and Epp,
20 "The United States' Environmental Adjudication Tribunal," 3 *Journal of Court Innovation* (Winter
21 2010) no. 1, at 186.) More specifically, the EPA Administrator delegated *his* authority to EAB to
22 decide appeals. (*Id.*, emphasis added.) To that end, the EAB is an independent body "exercising
23 the *full authority* of the [EPA] Administrator." (*Id.* at 187, emphasis added.) EAB is an
24 administrative tribunal "within the *executive branch* of the U.S. Government." (*Id.*, emphasis
25 added.)

26 Region 9 and the Tribe's citation of caselaw relating to *judicially-imposed* injunctions is
27 largely irrelevant in this context. The significant point is that the EPA Administrator has authority
28 to control the actions of the subordinate regional offices. Moreover, EAB exercises the *full*

1 authority of the EPA Administrator that was directly delegated by EPA Administrator Reilly to
2 EAB in 1992. (*Id.* at 186.) To the extent that the EPA Administrator could control the actions of
3 Region 9 in the CWA context—and by extension the NHPA process that is completely dependent
4 upon Region 9 having jurisdiction under CWA—EAB is likewise empowered to exercise its
5 inherent authority in this regard. (See Wolgast et al., *supra*, at 193 – EAB interpretations of its own
6 governing regulations are granted “substantial deference” by the courts.) At least to this point,
7 Region 9 has not yet argued that it is beyond the inherent control of EPA’s chief executive, the EPA
8 Administrator. Its argument that it is beyond EAB’s inherent authority in this context fails for the
9 same reason.

10 Additionally, Region 9 and the Tribe lament the alleged injury to the Tribe if issuance of the
11 NTP is stayed. (Region 9 Resp. at 6, 19; Tribe Opp. at 4, 12.) They entirely ignore the harm to
12 Amador County and the State of California, identified here and in the County’s Motion, which
13 would result from the completed construction of a wastewater treatment plant under illegal and
14 invalid auspices. To reiterate, proceeding with issuance of the NTP would have the de facto effect
15 of eviscerating the County’s right to appeal Region 9’s jurisdiction over the BVR *lands* (as opposed
16 to the *discharge*), would violate the sovereignty of the State of California (of which Amador County
17 is a political subdivision), and would move the process one step closer to resulting in the discharge
18 of effluent that, based on nearly identical circumstances at Thunder Valley casino, almost certainly
19 violates the California Toxics Rule. (See Amador Co. Pet. at 6.)

20
21 **4. The Paramount Public Interest Involved in this Case is Properly Resolving Jurisdictional**
22 **Conflicts and Matters of Federalism.**

23 Region 9 makes a considerable effort to elevate efficient administration and implementation
24 of the CWA/NPDES permitting process and NHPA compliance as matters of utmost public
25 importance. (Region 9 Resp. at 3, 13, 20.) While the public no doubt has an interest in the
26 implementation of NPDES permitting, it has an even greater interest in ensuring that the CWA is
27 implemented *properly and legally* and that the administrative review process is not short-circuited.
28 To a large extent, the EAB appeals process itself was established to ensure that the CWA is

1 implemented properly and to give *greater credence* to, and *inspire confidence* in, final adjudicatory
2 decisions at EPA. (Wolgast, Stein, and Epp, “The United States’ Environmental Adjudication
3 Tribunal,” 3 *Journal of Court Innovation* (Winter 2010) no. 1, at 186.) Here, moving forward
4 under, at best, questionable authority before the administrative review process has been completed
5 runs contrary to those public interest principles.

6 Furthermore, any interest in administrative efficiency cannot trump the interest in resolving
7 state-federal jurisdictional conflicts that go to the core of our federal system. NPDES program
8 authority has been delegated to the State of California except on “Indian lands” located within the
9 State’s boundaries. (Amador Co. Mot. at 7.) Therefore, the question whether BVR qualifies as
10 “Indian lands” must be resolved first. Questions of federalism and sovereign jurisdiction rise to a
11 level of importance far beyond administration of a single regulatory program. “Significant public
12 interests would be harmed by failure to promote harmonious federal-state relations in domestic
13 governmental affairs.” (*Dow Jones & Co. v. Harrods, Ltd.* (S.D.N.Y 2002) 237 F. Supp.2d 394,
14 444.)

15 Resolution of the jurisdictional question is not an idle exercise. Its outcome has real-world
16 environmental consequences. With the exception of a few *on-reservation* wastewater discharge
17 permits noted in the County’s Motion,¹ Region 9 simply does not review and monitor the
18 construction and operation of wastewater treatment plants in California. Rather, the State has taken
19 over responsibility for compliance with the Clean Water Act and has staffed its Regional Water
20 Quality Control Boards to accomplish that purpose.² If, as stated by Region 9 and the Tribe,

21 ¹ Amador Co. Mot. at 8, n. 13.

22 ² As stated on the State of California’s Water Resources Control Board website:

23 *It is the responsibility of the Water Boards to preserve and enhance the quality of the State’s waters*
24 *through the development of water quality control plans and the issuance of waste discharge*
requirements (WDRs). WDRs for discharges to surface waters also serve as NPDES permits.

25 *The State Water Board establishes policies and regulations that help protect and restore the water*
26 *quality in California. The State Water Board also coordinates with and supports Regional Water*
27 *Board efforts, and reviews Regional Water Board actions. The Regional Water Boards monitor and*
28 *enforce State and federal plans, policies, and regulations. Each Regional Water Board makes critical*
water quality decisions for its region. Regional Boundaries are on watersheds. In addition to issuing
WDRs, these decisions include setting standards, determining compliance with WDRs, and taking
appropriate enforcement actions.

1 issuance of the NTP would open the door for construction to commence, actions would be quickly
2 taken that could not be undone. The landscape would be irreversibly altered by the wastewater
3 treatment plant, and discharges into Jackson Creek and related tributaries would become practically
4 inevitable. The impact on the surrounding environment and its inhabitants would be negative and
5 permanent. Despite Region 9's attempts to downplay similarities with the wastewater treatment
6 plant operating at nearby Thunder Valley casino, the environmental dangers are the same: excessive
7 levels of toxic chemicals and pollutants flowing into Amador County's streams and seeping into its
8 groundwater. (Amador Co. Pet. at 6-7.)

9 Region 9 and the Tribe also assert that the public interest favors expeditiously moving
10 forward with the casino project given the "potential beneficial impact" on "employment" in "a
11 region that has long been economically depressed." (Region 9 Resp. at 20; Tribe Opp. at 13.) Even
12 if Region 9 and the Tribe's motives are purely philanthropic, such charity is misplaced and actually
13 runs *contrary* to the public's interest—and further demonstrates the lack of any connection between
14 Region 9 and California's communities. In fact, the individuals most likely to benefit from any
15 additional employment—the residents of Amador County—overwhelmingly oppose construction of
16 the BVR casino project. In a 2005 advisory vote, 84.5 percent of County voters *opposed*
17 construction of the BVR casino project. (See Stand Up California, *Indian Gaming 2005: The*
18 *Convergence of Public Backlash, Tribal Competition and Political Scandals* at pg. 4.
19 <http://www.standupca.org/reports/1-4-05%20ABA%20tribal%20gaming%20paper.pdf>.) More
20 importantly, Region 9 and the Tribe most likely wildly overstate the employment opportunities that
21 the proposed project could generate. Just this month, the existing Indian casino located in Amador
22 County, the Jackson Rancheria casino, laid off 150 employees, which came on top of 115 layoffs in
23 2009. (Matthew Hedger, "Rancheria Layoffs Reach Upper Management," *Amador Ledger-*

24
25
26 *While the State Water Board has issued a few NPDES permits, the vast majority of NPDES permits*
27 *are issued by the Regional Water Boards.*

28 (http://www.waterboards.ca.gov/water_issues/programs/npdes/#role.)

1 *Dispatch*, Aug. 2, 2011. <http://www.ledger-dispatch.com/?p=3481>.) Evidence on the ground
2 strongly suggests that many of the jobs touted by Region 9 and the Tribe will never materialize.

3
4 **5. EAB Should Not be Fooled by Region 9 and the Tribe's Manufactured Sense of Urgency in Issuing the NTP.**

5
6 Both Region 9 and the Tribe ring an alarmist tone that unless the NTP is immediately issued,
7 the Tribe may be unable to finance its proposed project due to speculation that the "high-yield bond
8 market" is volatile and "risks closing at any time." (Region 9 Resp. at 6; Tribe Opp. at 4, 12.) The
9 Tribe provides nothing to support this assertion other than an un-corroborated opinion from the
10 Tribe's own financier—which likely will reap financial benefits from putting the financing into
11 place. Further, the Tribe notes that its proposed project has been pending for *more than six years*.
12 (Tribe Opp. at 2.) But the Tribe itself bears significant responsibility for much of the delay.
13 Specifically, the Tribe was required to withdraw its original tribal environmental impact report
14 ("TEIR") and start the environmental review process completely from scratch due to serious
15 deficiencies in its first TEIR.³ This caused a significant delay in the Tribe's plans of well over one
16 year. Such self-inflicted delays would not be expected if time truly was of the essence. Beyond
17 that, the notion of market volatility itself is not an anomaly warranting emergency action but rather
18 simply a fact of modern economic life. It goes without saying that *all* U.S. financial markets,
19 indeed to some extent *all world* markets, have experienced significant volatility in recent years.

20 In any event, EAB cannot sanction illegal assertions of jurisdictional authority on the basis
21 of financial exigency. The law applies uniformly in good economic times and in bad ones.

22
23 **6. Amador County Properly Preserved All of its Jurisdictional Challenges.**

24 Both Region 9 and the Tribe allege that Amador County somehow waived its argument that
25 the discharge point source is located outside of BVR because it was not raised either in the public
26 comment period or in Amador County's prior filings. (Region 9 Resp. at 15, n. 9; Tribe Opp. at 10,
27 n. 2.) That is simply not accurate.

28
³ See Feb. 13, 2006 Buena Vista Tribe Press Release, attached hereto at Exhibit 1.

1 First, in the public comments, comment 8(b) stated that “Public does not know the exact
2 route of wastewater to Jackson Creek.”⁴ That comment is directly on point to the issue of the
3 discharge point source location. Region 9’s response to comment 8(b) actually concedes the fact
4 that the discharge point source is outside of the BVR fee lands.⁵ Second, Amador County’s opening
5 brief on appeal points to the fact that the proposed discharge point source is located outside of
6 BVR’s boundaries. (See Amador Op. Br. at 8 and Exh. 8.) To the extent Region 9 and the Tribe
7 believe that additional briefing on this point is warranted, Amador County urges EAB to grant its
8 petition for review and request additional briefing, which EAB is clearly authorized to do. (See 40
9 CFR § 124.19 and EAB Practice Manual, pg. 40, n. 41 citing *In re City of Marlborough* (EAB
10 2005) 12 E.A.D. 235, 253, n. 23.)

11 Region 9 and the Tribe’s argument on this point is further perplexing in light of the fact that
12 federal courts have stated that the importance of raising an issue is based on the rationale that
13 opponents should be given the opportunity to respond to it. (*Intermountain Municipal Gas Agency*
14 *v. FERC* (D.C. Cir. 2003) 326 F.3d 1281.) Region 9 and the Tribe were given a significant length
15 of time to respond to Amador County’s Motion (in fact the County agreed to an extension of time to
16 respond for Region 9) but neither chose to address the discharge point argument head-on, thereby
17 conceding its strength.

18 At a minimum, however, Amador County has met the minimum standards to preserve all of
19 its jurisdictional challenges.

20
21 **7. Region 9 Continues its Pattern of Obfuscation and Misrepresentation of the Law and of Amador**
22 **County’s Arguments.**

23 Region 9’s Response, and to a lesser extent the Tribe’s Opposition, contain a litany of other
24 inaccuracies and misrepresentations with respect to the law and Amador County’s arguments, some
25 of which are so egregious that Amador County is compelled to respond so that the record can be
26 corrected and the truth be known.

27 ⁴ *Buena Vista Rancheria NPDES Permit CA0049675, Final Comment Response Document*, page 27. (Attached
28 to NPDES Permit CA0049675, issued Jun. 22, 2010.)

⁵ *Id.*

1 First, Region 9 declares that “The record is replete with information supporting the Region’s
2 jurisdiction...” (Region 9 Resp. at 7.) In fact, to the contrary, Region 9 has never cited to any
3 authority which established that BVR is a reservation, allotted lands, or Indian Country. The best it
4 could do was reference two completely distinguishable EAB decisions where lands held in federal
5 trust and lands inside the exterior boundaries of an Indian reservation were subject to EPA’s
6 NPDES jurisdiction. (Amador Co. Reply Br., at 1-6.) BVR is not held in trust and is not within the
7 exterior boundaries of an Indian reservation. The lands are owed in fee by the Tribe.

8 Second, Region 9 declares that simply because the United States asserts that BVR is an
9 Indian reservation, that assertion somehow magically makes BVR an Indian reservation, and that
10 Amador County has presented no evidence to the contrary. (Region 9 Resp. at 7, 15.) Quite the
11 opposite, all that Region 9 can muster for this position is two inapplicable EAB decisions and an
12 unpublished court order to which the United States and a Buena Vista “tribe” were not even parties.
13 (Amador Co. Reply Br., at 7.) Furthermore, just because an executive agency or two say BVR is an
14 Indian reservation does not automatically make it so. That determination must ultimately be made by a
15 court of law. “It is emphatically the province and duty of the judicial department to say what the
16 law is.” (*Marbury v. Madison* (1803) 5 U.S. 137, 177.) Essentially, Region 9 bases its assertion of
17 jurisdiction over the BVR lands on its own statement and belief that it has jurisdiction over BVR
18 and nothing more. Courts have warned that a government agency’s estimation of its own authority
19 must be taken with a large grain of salt:

20
21 The more intense scrutiny that is appropriate when the agency interprets its own
22 authority may be grounded in the unspoken premise that government agencies have a
23 tendency to swell, not shrink, and are likely to have an expansive view of their
24 mission. Not surprisingly, therefore, an agency ruling that broadens its own
25 jurisdiction is examined carefully. (*Hi-Craft Clothing, Inc. v. NLRB* (3d Cir. 1981)
26 660 F.2d 910, 916.)

27 On a related point, the Tribe argues that the determination of whether BVR is Indian land
28 “lies wholly within the authority and expertise of the Department of Interior and the federal courts”
and that “[n]either the Region nor the Board has authority to reconsider the position” of Interior.
(Tribe Opp. at 10.) The Department of Interior has responsibility to determine whether BVR is

1 Indian lands for the purposes of the Indian Gaming Regulatory Act (“IGRA”), and the federal
2 courts must ultimately interpret federal statutes. But that does not give Region 9 a green light to
3 violate its own jurisdictional limitations. Region 9’s jurisdiction is governed by CWA, not IGRA.
4 Further, the Tribe’s position is simply unsupportable in light of the *In re Mille Lacs* and *In re Circle*
5 *T Feedlot* cases. (See Amador Co. Reply at 4-6.) In both of those decisions, EAB directly ruled on
6 the question of whether the lands in question qualified as Indian lands subject to EPA NPDES
7 permitting authority. There is no reason to assume EAB cannot rule on the same jurisdictional
8 question here.

9 Third, Region 9 grossly mischaracterizes Amador County’s position in footnote 5 of its
10 Response. Region 9 asserts that-

11 the County also repeatedly acknowledges that issues regarding the NHPA process
12 and the Region’s compliance with that statute have no bearing on CWA
13 requirements or the County’s jurisdictional claims...The Region agrees with this
14 view, which further supports the Regions position that the NHPA process did not
15 result in any CWA permit conditions.

16 To the contrary, what the County actually stated was that Region 9’s possible compliance with the
17 NHPA process does *not* somehow lead to Region 9 acquiring jurisdiction over the BVR lands.
18 While the CWA jurisdictional issues do directly bear on Region 9’s NHPA jurisdiction because
19 NHPA jurisdiction must be built upon CWA jurisdiction, the reverse is not true. A lack of CWA
20 jurisdiction guarantees a lack of NHPA jurisdiction. But NHPA compliance does *not* guarantee
21 CWA jurisdiction. This point has *nothing* to do with permit conditions, despite Region 9’s attempt
22 to distort the County’s position.

23 Fourth, EAB states that “the County’s jurisdictional argument relates solely to regulatory
24 authority over the discharge” and since no *discharge* can take place until final agency action on the
25 NPDES permit, there is no need to delay issuance of the NTP or related construction. This is
26 perhaps the most fundamental misrepresentation Region 9 has made. At this point, it should be
27 clear that the central feature of Amador County’s position does not concern regulatory authority
28 over the *discharge*. Quite the contrary, the County has focused on regulatory authority over the

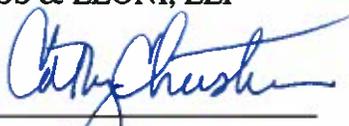
1 *land* at BVR. If Region 9 lacks authority over the *discharge*, it is only because it lacks jurisdiction
2 over the *land*. That has been the County's consistent position from the outset and is central to both
3 the County's legal arguments and the harm it will suffer should permitting and construction take
4 place under invalid authority.

5 **C. CONCLUSION**

6 For each of the reasons set forth above and in the County's original Motion, and because Region
7 9 has stated that it will issue the Notice to Proceed by September 5, 2011 (21 days after it filed its
8 Response), the County renews its urgent appeal to the EAB to stay issuance of the Notice to
9 Proceed while the jurisdictional issues raised by the County in its appeal of the NPDES permit
10 remain unresolved.

11
12 Dated: August 24, 2011

13 NIELSEN MERKSAMER PARRINELLO
14 GROSS & LEONI, LLP

15 By: 

16 Cathy Christian, attorney for petitioner
17 AMADOR COUNTY
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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, Suite 1200, Sacramento, CA 95814.

On August 24, 2011, I caused the foregoing document(s) described as **MOTION FOR LEAVE TO FILE REPLY BRIEF TO OPPOSITION TO REQUEST FOR STAY OF NOTICE TO PROCEED; 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.eric@epa.gov

Jo Ann Asami
Assistant Regional Counsel
EPA Region IX
75 Hawthorne Street
San Francisco, CA 94105
e-mail: Asami.joann@epa.gov

Dawn Messier
Tod Siegal
Office of General Counsel, U.S. EPA
1200 Pennsylvania Ave., N.W.
Washington, DC 20460
e-mail: Messier.dawn@epa.gov
e-mail: Siegal.tod@epa.gov

Arnold D. Samuel
General Counsel
Buena Vista Rancheria of Me-Wuk Indians
P.O. Box 62283
Sacramento, CA 95816
e-mail: Arnold@buenavistatribe.com

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

Executed on August 24, 2011, at Sacramento, California.



BRENDA WISE