LAW OFFICES OF
NIELSEN, MERKSAMER,
PARRINELLO, MUELLER & NAYLOR, LLP

MARIN COUNTY
591 REDWOOD HIGHWAY, #4000
MILL VALLEY, CALIFORNIA 94941
TELEPHONE (415) 389-6800
FAX (415) 388-6874

1415 L STREET, SUITE 1200
SACRAMENTO, CALIFORNIA 95814
TELEPHONE (916) 446-6752
FAX (916) 446-6106

SAN FRANCISCO
225 BUSH STREET, 16TH FLOOR
SAN FRANCISCO, CALIFORNIA 94104
TELEPHONE (415) 389-6800
FAX (415) 388-6874

March 17, 2006

Mr. John Tinger
U.S. Environmental Protection Agency, Region IX
CWA Office of Permits and Standards, WTR-5
75 Hawthorne Street
San Francisco, CA 94105

Re: County of Amador Comments Concerning Issuance of an NPDES Permit for the Buena Vista Rancheria

Dear Mr. Tinger:

On behalf of our client, the County of Amador, we appreciate the opportunity to submit the following additional comments on the notice of proposed action to issue a new National Pollutant Discharge Elimination System (NPDES) Permit for the Wastewater Treatment Plant at the Buena Vista Rancheria (BVR) for the proposed Flying Cloud Casino. This letter addresses two issues. First, the County questions the jurisdiction of the U.S. Environmental Protection Agency (EPA) over the NPDES permit because the BVR land is not a reservation, is not allotted lands, and is not Indian country. Second, the County notes that the proposed wastewater treatment plant is not a Publicly Owned Treatment Works because it is not operated on a reservation. Thus, the BVR wastewater treatment plant is subject to the terms of the National Environmental Policy Act.

The EPA does not have jurisdiction over the proposed BVR wastewater treatment plant because the Buena Vista Rancheria is not a reservation, is not allotted lands and is not Indian country. During an all-agency meeting held on March 1, 2006, we were informed by the regional counsel staff of the EPA that EPA had jurisdiction over the NPDES permit. In response to the County's question about the scope of EPA jurisdiction, staff counsel advised us that even though the Buena Vista Rancheria is not federal land because it is owned in fee by the tribe, it was nevertheless "Indian country" as that term is used in the federal criminal code. Counsel then stated that it was EPA "policy" (no regulation or statutory authority was cited) to assert jurisdiction over wastewater discharge permits in "Indian country."

The County has not been provided with any policy document from the EPA concerning its jurisdiction in "Indian country" and has not uncovered any regulatory or statutory basis for this assertion. In subsequent discussions with the Office of Regional Counsel, we have been informed that the policy basis for the EPA's jurisdiction is based

on the fact that the Clean Water Act specifically precludes states from exercising jurisdiction in "Indian country." Thus, the EPA will step into the void and assert jurisdiction over Indian country wastewater discharge issues.

Even if the EPA generally has jurisdiction over the issuance of NPDES permits in Indian country, the County notes that the Buena Vista Rancheria land does not meet the statutory definition of Indian country. The Regional Counsel's office has advised the County that the term Indian country for EPA purposes is the same as that found in Title 18. Section 1151 of Title 18 of the United States Code is the section of the federal criminal code dealing with Indians. It provides as follows:

> "Except as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian country,' as used in this chapter, means (a) 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 rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

BVR is plainly not a reservation or an Indian allotment which would require that the land be controlled and titled by the United States. Nor is it a "dependent Indian community."

The term 'dependent Indian community' is a codification of a line of Supreme Court cases beginning with one in which the Court considered the New Mexico Pueblos, which held their land in fee simple under Spanish grants and were not formally designated as reservations. The court held that the New Mexico Pueblos were 'wards dependent upon the federal government's guardianship' and therefore were located in Indian country even though their lands were not within a recognized reservation. See *United States v. Sandoval,* 231 U.S. 28 (1913). In *Sandoval*, the U.S. Supreme Court upheld a prohibition against the introduction of liquor on the Pueblo lands, even though the lands were held in fee by the New Mexico Pueblos.

> "It also is said that such legislation cannot be made to include the lands of the Pueblos, because the Indians have a fee simple title. It is true that the Indians of each pueblo do have such a title to all the lands connected therewith, excepting such as are occupied under executive orders, but it is a communal title, no individual

> owning any separate tract. In other words, the lands are public lands of the pueblo, and so the situation is essentially the same as it was with the Five Civilized Tribes, whose lands, although owned in fee under patents from the United States, were adjudged subject to the legislation of Congress enacted in the exercise of the Government's guardianship over those tribes and their affairs. *Stephens v. Cherokee Nation, 174 U.S. 445, 488; Cherokee Nation v. Hitchcock, supra; Heckman v. United States, 224 U.S. 413; Gritts v. Fisher, id.* 640; *United States v. Wright, supra.* Considering the reasons which underlie the authority of Congress to prohibit the introduction of liquor into the Indian country at all, it seems plain that this authority is sufficiently comprehensive to enable Congress to apply the prohibition to the lands of the Pueblos." *(United States v. Sandoval, supra,* at p. 48.)

The Supreme Court much more recently, however, clarified the meaning of "dependent Indian communities." In *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998), the Court held that land that lost its reservation status pursuant to the Alaska Native Claims Settlement Act ("ANCSA") and was transferred to state chartered businesses wholly owned by Native Alaskans could no longer be deemed a dependent Indian community because the land didn't meet a two-part test specified by the Court beginning with *Sandoval* and subsequently codified in 18 U.S.C. section 1151.

> "Because ANCSA revoked the Venetie Reservation, and because no Indian allotments are at issue, whether the Tribe's land is Indian country depends on whether it falls within the 'dependent Indian communities' prong of the statute, § 1151(b). (Footnote omitted.) Since 18 U.S.C. § 1151 was enacted in 1948, we have not had an occasion to interpret the term 'dependent Indian communities.' We now hold that it refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements--first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence. Our holding is based on our conclusion that in enacting § 1151, Congress codified these two requirements, which previously we had held necessary for a finding of 'Indian country' generally." (*Id.*, at p. 527.)

The Buena Vista Rancheria does not meet either prong of the *Venetie* test.

First, the federal set-aside requirement is not met because the Buena Vista Rancheria was terminated pursuant to the California Rancheria Act (1958) (Public Law 85-671) and the land has since that date either been held in fee by individual Indians or by the tribe.[1] The former rancheria lands were not offered to the United States to be placed into trust until 1996, when the trust application was denied. Under these facts, the land plainly has not been set aside by the federal government. As the Supreme Court noted in the *Venitie* decision:

> "The Tribe argues . . . that the ANCSA lands were set apart for the use of the Neets'aii Gwich'in, 'as such,' because the [lands were] acquired pursuant to an ANCSA provision allowing Natives to take title to former reservation lands in return for forgoing all other ANCSA transfers. [Citation omitted.] The difficulty with this contention is that ANCSA transferred to private, state-chartered Native corporations, without any restraints on alienation or significant use restrictions, and with the goal of avoiding 'any permanent racially defined institutions, rights, privileges, or obligations,' [citations omitted]. . . . Because Congress contemplated that non-Natives could own the former Venetie Reservation, and because the Tribe is free to use it for non-Indian purposes, we must conclude that the federal set-aside requirement is not met." (*Alaska v. Native Village of Venetie Tribal Gov't, supra,* 522 U.S. 520, 532-533.

See also *United States. v. McGowan*, 302 U.S. 535, 539 (1938), which the *Venetie* court distinguished, stating that one of the deciding criteria for determining the federal

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[1] The federal government's compliance with the terms of the California Rancheria Act was challenged in *Tillie Hardwick v. United States*, No. C-79-1710 SW (N.D. Cal.). Arguing that the federal government's failure to comply invalidated the Rancheria Act, the plaintiff tribal members also challenged the ability of county governments to collect real property taxes on the former rancheria lands.

In 1987, a stipulation for entry of judgment was filed in the Hardwick case, in which the Amador County Tax Collector, Assessor, and the Board of Supervisors agreed to resolve the property tax dispute with the Buena Vista Rancheria. These county entities also agreed to treat the original boundaries of the rancheria as "restored", "to be treated" as any other reservation, and to declare the land within the boundaries to be "Indian Country." However the United States never signed the 1987 stipulation, and the legal significance of this stipulation by the County tax collector and assessor and Board of Supervisors is problematic. It is certainly not tenable that the County and the individual Indian plaintiffs, without the consent and approval of the tribe and the federal government, could transform fee land into reservation land or Indian country. Four years earlier, in 1983, the United States agreed to the entry of stipulated judgment, but that stipulation provided for restoration of the individual plaintiffs to their status as Indians entitled to certain federal benefits and services and exempted them from payment of taxes on property distributed to them under the Rancheria Act; it made no provision for the status of the rancheria land.

set-aside question is that the United States retained titled to the land which it permitted the Indians to occupy and has the authority to enact regulations and protective laws respecting the territory.

Although the facts of the transfer differ, the same principle applies to the Buena Vista Rancheria. Thus, the land fails to meet the first prong of the "Indian country" test because the land was not set aside by the federal government and the Tribe is free to sell it or otherwise dispose of the property – the land is held in fee by the Tribe.

Second, it cannot be said that there is federal superintendence over the Tribe's property. As noted above, the United States has never accepted the Buena Vista Rancheria into trust. (See February 22, 2006 NPDES comment letter from John Hahn to John Tinger attaching correspondence from the Bureau of Indian Affairs (BIA) confirming that the land is not in trust.) Indeed, the BIA has advised the County that it will not act as the lead agency concerning the NPDES permit application because the land is not in trust. As you will recall, at the March 1, 2006 meeting of federal agencies, the representative from the Army Corps of Engineers noted the need for a lead agency and assumed that the BIA would fill that role. The BIA's decision to decline that role due to the fact that the land is not in trust is further evidence that there is no federal superintendence over the land.

Nor does the fact that tribal members may be receiving federal services establish that the rancheria is a dependent Indian community. The *Venetie* court noted that the Alaska Native Claims Settlement Act had revoked all but one Alaska reservation and allowed the Alaska natives sole control over the land. In rejecting the notion that there was nonetheless federal superintendence over the land, the court stated

> "The Tribe contends that the requisite federal superintendence is present because the Federal Government provides 'desperately needed health, social, welfare, and economic programs' to the Tribe. [Citation omitted.] . . . Our Indian country precedents, however, do not suggest that the mere provision of 'desperately needed' social programs can support a finding of Indian country. Such health, education, and welfare benefits are merely forms of general federal aid, . . .[and] are not indicia of active federal control over the Tribe's land sufficient to support a finding of federal superintendence." (*Alaska v. Native Village of Venetie Tribal Gov't, supra,* 522 U.S. 520, 532-533.)

The *Venetie* court held that the federal government must actively control the land in question. (*Id.*, at p. 533.) Given that the BIA rejects any role in the use of the land, and

that the federal government has no ownership of the land, it seems clear that the federal superintendence requirement is not met.[2]

The Buena Vista Rancheria's proposed wastewater treatment plant is not a Publicly Owned Treatment Works. During the all-agency meeting held on March 1, 2006, we were also informed by the EPA staff that the issuance of the NPDES permit would not be subject to the National Environmental Policy Act (NEPA) because the project included a Publicly Owned Treatment Works (POTW). EPA staff stated that POTW's are exempt from NEPA compliance because they are not considered new sources of waste discharge. However, the County disputes the assertion that the Wastewater Treatment Plant proposed at the Flying Cloud Casino would be a POTW.

A POTW is defined in 40 CFR Section 403.3(o) as a treatment works that is owned by a State or municipality. The term "municipality" is defined in the Federal Clean Water Act (CWA) as including an Indian Tribe or an authorized Indian tribal organization (Section 502[4]). The term "Indian Tribe" is defined in CWA Section 518(f)(2) as any Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation. "Federal Indian reservation" is defined in CWA Section 518(f)(1) as 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 rights-of-way running through the reservation.

The Buena Vista Rancheria does not meet the Clean Water Act definition of a Federal Indian Reservation. The land is not a reservation: According to records held by Amador County (and acknowledged by the Tribe) the land is owned in fee by the Tribe; there is no ownership by or trust relationship with the United States government. Congress has not recognized the land as a reservation. Therefore, the Buena Vista Tribe does not meet the CWA definition of an "Indian Tribe" and cannot be considered a "municipality".

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[2] See also *Blunk v. Arizona Department of Transportation*, 177 F.3d 879, 883-884 (9th Cir. 1999) in which the Ninth Circuit, following the *Venetie* decision, held that:

> "The Navajo Fee Land is not a dependent Indian community because the land was purchased in fee by the Navajo Nation rather than set aside by the Federal Government. The Federal Government does not 'actively control[] the land[] in question, effectively acting as a guardian for the Indians,' nor does the Government exercise any lesser level of superintendence over the Navajo Fee Land. [Citation omitted.] The Navajo Fee Land does not become Indian country simply because of its tribal ownership or because of its proximity or importance to the Navajo Reservation."

Because the proposed wastewater treatment plant at the casino would not be operated by a municipality, it would not be considered a publicly owned treatment works. Therefore, the proposed wastewater treatment plant would be considered a new source of waste discharge and the issuance of the NPDES permit would be required to comply with NEPA. Accordingly, based on the facts, laws, and applicable regulations, it is beyond serious dispute that full NEPA compliance must be completed for this project prior to any decision on the NPDES permit by EPA in order to provide the public and interested local, state and federal agencies with the information necessary to understand the full range of environmental impacts that could occur with project implementation.

In conclusion, the County's position is: (1) EPA has no jurisdiction over the proposed wastewater treatment plant; and (2) in the event EPA were to assert such jurisdiction, full NEPA compliance is required.

Given the importance to the County and its residents, we request that you provide us with a written response setting forth your position on these two important issues.

If you have any questions regarding this letter or our concerns, please do not hesitate to contact me at (916) 446-6752.

Cordially,

Cathy Christian
Counsel for Amador County

CAC/mc
cc: Members, Amador County Board of Supervisors
Andrea Hoch, Legal Affairs Secretary to Governor Arnold Schwarzenegger
Sara Drake and Robert Mukai, California Attorney General's Office
Richard McHenry, California Regional Water Quality Control Board
Frances McChesney, Senior Staff Counsel, Water Resources Control Board
Chris Nagano, U.S. Fish & Wildlife Service
Tom Hoover, Jackson Valley Irrigation District
Joe Spano, California Department of Health Services
Patrick Blacklock, County Administrative Officer, Amador County
John Hahn, County Counsel, Amador County
Rhonda Morningstar Pope, Buena Vista Rancheria
Doug Brown, Douglas Environmental