IN RE CIRCLE T FEEDLOT, INC., MORGAN FEEDLOT LLC, SEBADE FEEDYARD, & STANEK BROTHERS

NPDES Appeal Nos. 09-02 & 09-03

ORDER DENYING REVIEW

Decided June 7, 2010

Syllabus

Joel Lamplot and Teri Lamplot (collectively "Petitioners") each request that the Environmental Appeals Board ("Board") review National Pollutant Discharge Elimination System ("NPDES") permits issued by Region 7 ("Region") of the U. S. Environmental Protection Agency ("EPA") to four concentrated animal feeding operations ("CAFOs") pursuant to section 402 of the Clean Water Act ("CWA"). The Region issued these four NPDES permits (the "Final Permits") because it determined that the four facilities and the water bodies into which they discharge are located within the exterior boundaries of the Omaha and Winnebago Reservations (i.e., within Indian country) in Nebraska. The Region concluded it is the permitting authority because it has not approved either the Tribes or the State of Nebraska to implement the NPDES program within the Omaha or Winnebago Reservations. Petitioners contend that the State of Nebraska, rather than the EPA, should have issued the Final Permits.

Held: Review is denied. The Board concludes that Petitioners have not met their burden of demonstrating that the Region clearly erred or abused its discretion by issuing the Final Permits. Specifically, the Board determines as follows:

- *Timeliness of Petitions*. As a threshold procedural matter, the Board considers whether the petitions – which were both filed more than a week after the filing deadline – were timely. Because the delay in delivery of the petitions to the Board was due to U.S. Postal Service anthrax sterilization procedures, the Board concludes that "special circumstances" exist, relaxes the filing deadline, and treats the petitions as timely filed.

- *Region's Authority to Issue the Final Permits/Preemption*. Petitioners failed to demonstrate that the Region clearly erred or abused its discretion in determining it had the authority to issue the Final Permits. Petitioners' arguments appear to be based on a misunderstanding of the CWA, the controlling regulations, and the extent of the current delegation of NPDES authority to the State of Nebraska. The State of Nebraska does not currently have the authority to issue NPDES permits within the exterior boundaries of any reservations in Nebraska, including the Omaha and Winnebago Reservations. At this time, therefore, under the CWA and its implementing regulations, the State has no authority to and cannot issue the four NPDES CAFO permits at issue in this case. Because neither the State of Nebraska nor the Tribes

have been authorized to issue NPDES permits within the exterior boundaries of the Omaha and Winnebago Reservations, the only entity that currently *does* have any authority under the CWA and associated regulations to issue NPDES permits within those boundaries is EPA. Consequently, the Board concludes that the Region, in issuing the Final Permits, is neither exceeding its statutory authority nor preempting the State's authority as Petitioners allege.

- "*Indian Country*" *Definition and Non-Indian-Owned Fee Lands*. Petitioners failed to demonstrate that the Region clearly erred or abused its discretion in determining that the non-Indian-owned fee properties in question are within "Indian country" for purposes of the NPDES permitting regulations. The term "Indian country" as used in EPA's regulations and 18 U.S.C. § 1151 clearly and explicitly includes land within a reservation's boundaries for which a fee patent has been issued, consistent with the Region's determination and contrary to Petitioners' contentions. The Supreme Court, on more than one occasion, has interpreted the phrase "notwithstanding the issuance of any patent" in 18 U.S.C. § 1151 to mean that "Indian country" includes those parcels of land owned by non-Indians.

- *Challenge to Regulations*. Petitioners' challenge to EPA's "policies" is essentially a challenge to EPA's regulations implementing the CWA and the policy judgments underlying them. Because the Board generally does not entertain challenges to final Agency regulations in the context of permit appeals, the Board denies review of the Final Permits on these grounds.

- *Executive Order 13,132 on Federalism*. Mr. Lamplot failed to demonstrate that the Region clearly erred or abused its discretion in concluding that its issuance of the Final Permits is consistent with Executive Order 13,132, entitled "Federalism." The Board is unpersuaded by Mr. Lamplot's arguments disputing the Region's determination that EPA's administration of the NPDES permitting in Indian country is consistent with the Executive Order as it is statutorily authorized and addresses a problem that is national in scope and significance.

- *Applicability of Hawaii v. Office of Hawaiian Affairs*. Petitioners failed to show that the U.S. Supreme Court's recent case, *Hawaii v. Office of Hawaiian Affairs* (*OHA*), 129 S. Ct. 1436 (2009), applies here and demonstrates that the Region clearly erred in issuing the Final Permits. The Board concludes that Petitioners' theories that the Omaha and Winnebago Reservations had been extinguished prior to, or as a result of, Nebraska statehood lack merit.

- *Adequacy of Region's Response to Comments*. The Board also concludes that the Region satisfied its obligation under 40 C.F.R. § 124.17 to respond to all significant comments. That the Region responded to the various comments questioning EPA's authority to issue permits to these four CAFOs in a single combined response, rather than individually, does not constitute a failure to respond to the comments, contrary to Ms. Lamplot's suggestion. The Region succinctly addressed the essence of Ms. Lamplot's and like comments by explaining the basis for its authority to issue the Final Permits, as well as its rationale for concluding that the CAFOs were located in "Indian country" within the Omaha and Winnebago Reservation boundaries. Finally, the Region did not procedurally err, as Mr. Lamplot contends, because the Region did in fact address the applicability of the Executive Order to its Final Permits.

Before Environmental Appeals Judges Edward E. Reich, Charles J. Sheehan, and Anna L. Wolgast.

Opinion of the Board by Judge Wolgast:

Joel Lamplot (NPDES Appeal No. 09-02) and Teri Lamplot (NPDES Appeal No. 09-03) (collectively "Petitioners") each petitioned the Environmental Appeals Board ("Board") to review National Pollutant Discharge Elimination System ("NPDES") permits issued by Region 7 ("Region") of the U. S. Environmental Protection Agency ("EPA" or "Agency") to four concentrated animal feeding operations ("CAFOs") pursuant to section 402 of the Clean Water Act ("CWA" or "Act"). The Region issued these four NPDES permits (the "Final Permits") because it determined that the four facilities and the water bodies into which they discharge are located within the exterior boundaries of the Omaha and Winnebago Reservations (i.e., within Indian country) in Nebraska. Region's Response to Petitions for Review ("Response") at 1, 10. The Region concluded it is the permitting authority because it has not approved either the Tribes or the State of Nebraska to implement the NPDES program within the Omaha or Winnebago Reservations. *See id.* Ex. F (Response to Comments) at 1-2 [hereinafter RTC]. For the reasons stated below, the Board denies review of the petitions.

I. *ISSUES ON APPEAL*

Petitioners contend that the State of Nebraska, rather than the EPA, should have issued the Final Permits. *See* Joel Lamplot's Petition for Review ("J. Lamplot Petition") at 1; Teri Lamplot EPA Appeal Comments to issue NPDES Permits in Thurston County, Nebraska ("T. Lamplot Petition") at 8. Petitioners argue that the Region made several errors in determining that it should issue these permits.

The overarching issue the Board must decide is: Have Petitioners demonstrated that the Region clearly erred or abused its discretion by issuing the Final Permits? Before considering the substantive question raised by Petitioners' assertions, the Board must consider a threshold procedural issue: Should the petitions for review be dismissed because they were untimely filed?

II. *STANDARD OF REVIEW*

In determining whether to grant review of a petition filed under 40 C.F.R. § 124.19(a), the Board first considers whether the petitioner has met threshold pleading requirements such as timeliness, standing, and issue preservation. *See* 40 C.F.R. § 124.19; *In re Beeland Group LLC*, 14 E.A.D. 189, 194-95 (EAB 2008); *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 143 (EAB 2006); *In re Avon Custom Mixing Servs., Inc.*, 10 E.A.D. 700, 704-08 (EAB 2002);

In re Knauf Fiber Glass, GmbH, 9 E.A.D. 1, 5 (EAB 2000). For example, a petitioner seeking Board review must file its appeal within thirty days of permit issuance and ordinarily must have filed comments on the draft permit or participated in the public hearing. 40 C.F.R. § 124.19(a). In addition, a petitioner must demonstrate that any issues being appealed were raised with reasonable specificity during the public comment period or were not reasonably ascertainable during the public comment period. 40 C.F.R. §§ 124.13, 124.19(a); *see*, *e.g.*, *Indeck*, 13 E.A.D. at 143; *In re Mille Lacs Wastewater Treatment Facility*, 11 E.A.D. 356, 363 & n.7 (EAB 2004); *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 250 n.8 (EAB 1999). The Board has frequently rejected appeals where issues that were reasonably ascertainable during the comment period were not raised at that time but instead were presented for the first time on appeal. *In re Scituate Wastewater Treatment Plant*, 12 E.A.D. 708, 717 (EAB 2006), *appeal dismissed per stipulation*, No. 06-1817 (1st Cir. 2006); *In re Arecibo & Aguadilla Reg'l Wastewater Treatment Plants*, 12 E.A.D. 97, 120-22 (EAB 2005); *In re Wash. Aqueduct Water Supply Sys.*, 11 E.A.D. 565, 590-91 (EAB 2004).

Assuming that a petitioner satisfies its threshold pleading obligations, the Board then evaluates the petition on its merits to determine if review is warranted. *Indeck*, 13 E.A.D. at 143; *see also Beeland*, 14 E.A.D. at 194-95. Ordinarily, the Board will not grant review of a petition filed under 40 C.F.R. § 124.19(a) unless it appears from the petition that the permit condition in question[1] is based on a clearly erroneous finding of fact or conclusion of law or involves an exercise of discretion or an important policy consideration that the Board, in its discretion, should review. 40 C.F.R. § 124.19(a); *accord In re Chukchansi Gold Resort*, 14 E.A.D. 260, 264 (EAB 2009); *Scituate*, 12 E.A.D. at 717; *In re Gov't D.C. Mun. Separate Sewer Sys.*, 10 E.A.D. 323, 332-33 (EAB 2002); *In re New Eng. Plating Co.*, 9 E.A.D. 726, 729 (EAB 2001). In considering permit appeals, the Board is guided by the preamble to the part 124 regulations, which explains that review should be "only sparingly" exercised and that "most permit conditions

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[1] The Board reads both petitions filed in this matter to raise the overarching question of whether EPA erred by issuing the Final Permits. Nowhere in the petitions does the Board find any objections to a specific provision or a particular condition contained within the Final Permits. The Region, in its Response to Comments document, similarly noted that it had "received no specific comments concerning these four facilities." RTC at 1.

As the Board has noted in the past, the part 124 regulations authorize the Board to review "any condition of the permit decision," 40 C.F.R. § 124.19(a), as well as the permit decision in its entirety. *Indeck*, 13 E.A.D. at 198 n.138 (quoting 40 C.F.R. § 124.15(a) ("[A] final permit decision means a decision *to issue*, deny, modify, revoke and reissue, or terminate a permit.") (emphasis added in *Indeck* decision); *accord In re Chem. Waste Mgmt. of Ind., Inc.*, 6 E.A.D. 66, 76 (EAB 1995); *see also Mille Lacs*, 11 E.A.D. at 358, 363 (considering challenge to Region's jurisdiction to issue the permit in question); *In re W. Suburban Recycling & Energy Ctr.*, 6 E.A.D. 692, 698 (EAB 1996) ("[T]he Board has jurisdiction to consider any condition of a final [] permit decision, including a decision to deny a permit."). Consequently, even though Petitioners have not challenged a specific permit condition, the Board may consider Petitioners' challenge to the Region's issuance of the Final Permits.

should be finally determined at the Regional level." Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *accord Scituate*, 12 E.A.D. at 717; *In re City of Moscow*, 10 E.A.D. 135, 140-41 (EAB 2001).

When petitions are filed by persons who are unrepresented by legal counsel, like the petitions here, the Board endeavors to liberally construe the petitions so as to fairly identify the substance of the arguments being raised. *In re Sutter Power Plant*, 8 E.A.D. 680, 687 (EAB 1999); *see also Chukchansi*, 14 E.A.D. at 264; *In re Envtl. Disposal Sys., Inc.*, 12 E.A.D. 254, 292 n.26 (EAB 2005); *In re Envotech, L.P.*, 6 E.A.D. 260, 268 (EAB 1996). Nevertheless, the burden of demonstrating that review is warranted still rests with the petitioner challenging the permit decision. *New Eng. Plating*, 9 E.A.D. at 730; *Encogen*, 8 E.A.D. at 249-50; *see also Sutter*, 8 E.A.D. at 687; *In re Beckman Prod. Servs., Inc.*, 5 E.A.D. 10, 19 (EAB 1994).

III. *FACTS*

A. *History of the Establishment of the Omaha and Winnebago Reservations*

The United States currently recognizes[2] both the Omaha Tribe of Nebraska and the Winnebago Tribe of Nebraska. *See* Indian Entities Recognized and Eligible to Receive Services from the U.S. Bureau of Indian Affairs ("BIA"), 73 Fed. Reg. 18,553, 18,553-57 (Apr. 4, 2008) (listing current federally-recognized tribes); *see also* 74 Fed. Reg. 40,218, 40,219-23 (Aug. 11, 2009) (most recent list, issued after Region's issuance of the Final Permits). The Omaha Reservation was established by treaty in 1854. Treaty between the United States of America and the Omaha Tribe of Indians, arts. 1, 3, Mar. 16, 1854, 10 Stat. 1043 [hereinafter 1854 Treaty with Omaha Tribe]. The original reservation encompassed the land that is currently part of the Omaha Reservation as well as the area now comprising the Winnebago Reservation. *See* Treaty between the United States of America and the Omaha Tribe of Indians, art. I, Mar. 6, 1865, 14 Stat. 667 [hereinafter 1865 Treaty with Omaha Tribe]; Response Ex. E (U.S. Department of the Interior ("DOI"), BIA, Map of Omaha and Winnebago Reservations) [hereinafter BIA Map of Omaha and Winnebago Reservations]. In 1865, the Omaha Tribe ceded a portion of the northern part of its reservation back to the United States. 1865 Treaty with Omaha Tribe, art. I, 14 Stat. at 667. Two days later, this parcel "situ-

[2] Congress has instructed the Department of the Interior to annually compile a list of federally recognized tribes. Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. § 479a-1. Federal recognition is a term of art: "[f]ederal acknowledgment or recognition of an Indian group's legal status as a tribe is a formal political act confirming the tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government." *Cohen's Handbook of Federal Indian Law* § 3.02[3] (Nell J. Newton et al. eds., 2005).

ated in the Territory of Nebraska" was "set apart for the occupation and future home of the Winnebago Indians, forever." Treaty between the United States of America and the Winnebago Indians, art. II, Mar. 8, 1865, 14 Stat. 671 [hereinafter 1865 Treaty with Winnebago Tribe].

The BIA recognizes the current boundary of the Omaha Tribe to be that of the original 1854 reservation excepting the land ceded to the Winnebago Tribe for that Tribe's Reservation.[3] *See* Response Ex. B (Letter from Tammie Poitra, Superintendent, BIA Winnebago Agency, DOI, to Jane Kloeckner, EPA (May 12, 2006)) [hereinafter BIA Letter Regarding Reservation Boundaries]; BIA Map of Omaha and Winnebago Reservations. Specifically, BIA states:

> [BIA] has consistently been of the opinion that the boundaries of the Omaha Indian Reservation have not changed since the survey of 1855 with the exception of the cession of land for the Winnebago Indian Reservation. The boundary of the Omaha Indian Reservation is a federal jurisdictional boundary that supersedes state property law.

BIA Letter Regarding Reservation Boundaries at 1. The BIA map shows that the four CAFOs are located within the Reservations' boundaries.[4] *See* BIA Map of Omaha and Winnebago Reservations.

B. *Procedural History: Issuance of the Final Permits and Filing of Petitions for Review*

On December 18, 2008, pursuant to CWA section 402, 33 U.S.C. § 1342, the Region issued NPDES permits to four CAFOs: Circle T Feedlot, Inc. (Permit No. NE0134481), Morgan Feedlot LLC (Permit No. NE0134767), Sebade Feedyard (Permit No. NE0135712), and Stanek Brothers (Permit No. NE0134775). *See* Region's Motion to Dismiss Petition for Review of Four Draft NPDES Permits at 2; *see also* Response Ex. A (copies of the Final Permits). Three of the permits authorize discharges into tributaries of South Omaha Creek, and the fourth, the Sebade Feedyard permit, authorizes discharges into a tributary of Middle Creek. *See* Final Permit No. NE0134481, at 1; Final Permit No. NE0134767, at 1; Final

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[3] The Supreme Court typically takes into consideration DOI's construction of historical reservation boundaries. *See*, *e.g.*, *Mattz v. Arnett*, 412 U.S. 481, 503-05 (1973); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 357 (1962).

[4] Notably, a dispute has arisen with respect to the *western* boundary of the Omaha Reservation. Response at 3-4 & n.3; *see* Act of Aug. 7, 1882, 22 Stat. 341 (authorizing the opening for settlement and sale of certain Omaha Reservation lands west of a railroad line running through the Reservation). The CAFO permits that are the subject of this appeal, however, are located in the eastern section of the Omaha Reservation and are not therefore within the currently disputed areas.

Permit No. NE0134775, at 1; Final Permit No. NE0135712, at 1. Relying on information from BIA, the Region concluded that South Omaha Creek and Middle Creek – and the four CAFOs – are located within the exterior boundaries of the Omaha and Winnebago Indian Reservations. *See* Response Ex. A; RTC at 2; *see also* BIA Map of the Omaha and Winnebago Reservations. The areas of the Omaha and Winnebago Indian Reservations at issue here are geographically located in Nebraska.[5] BIA Map of the Omaha and Winnebago Reservations.

On January 30, 2009, forty-three days after the issuance of the Final Permits, the Board received a petition from Mr. Joel Lamplot requesting the Board review the Region's four final permit decisions. *See* J. Lamplot Petition at 1. Several days later, on February 2, 2009, the Board received a petition for review of the Final Permits from Ms. Teri Lamplot.[6] *See* T. Lamplot Petition at 1. Petitioners later filed a joint addendum discussing the applicability of a recent Supreme Court case, *Hawaii v. Office of Hawaiian Affairs*, 129 S. Ct. 1436 (2009), to their NPDES permit appeals. *See* Joel Lamplot's and Teri Lamplot's Addendum to Appeals ("Joint Addendum"). The Region responded to the petitions and to the joint addendum. *See generally* Response; EPA's Surreply to Petitioners' Addendum to Appeals ("Region's Surreply").

IV. *ANALYSIS*

A. *Should the Petitions for Review Be Dismissed Because They Were Untimely Filed?*

As mentioned above in Part II, the permit regulations require petitions for review to be filed "[w]ithin 30 days after" the Region issues an NPDES final permit decision, 40 C.F.R. § 124.19(a), and failure to do so is grounds for dismissal, *In re Envotech, L.P.*, 6 E.A.D. 260, 266 (EAB 1996); *In re Beckman Prod. Servs., Inc.*, 5 E.A.D. 10, 15-16 (EAB 1994). The Region issued the Final Permits on December 18, 2008, but apparently served them on December 19, 2008. *See* Response Ex. A (permits signed December 18); T. Lamplot Petition at 1-2 (noting the Region sent response letter to commenters on December 19). Petitions for

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[5] A small portion of each reservation is located in Iowa. *See* BIA Map of Omaha and Winnebago Reservations.

[6] In addition to seeking review of the Final Permits, Ms. Lamplot also requested review of "the decision of EPA to postpone issuance of NPDES permits on 4 yards located in Thurston County, Nebraska." T. Lamplot Petition at 1 (referring to Bruns Feedlot, LLC (Draft NPDES Permit No. NE0135399); LBBJ Inc. (Draft NPDES Permit No. NE0134961); Ron Bruns Feed Yards, Homeplace (Draft NPDES Permit No. NE0135704); and Ron Bruns Feed Yards, Eastplace (Draft NPDES Permit No. NE0106526)). On June 17, 2009, the Board dismissed the portions of Ms. Lamplot's petition challenging the four draft NPDES permits for which no final permit decisions have been issued. *See* Order Granting Motion to Dismiss Petition for Review of Four Draft NPDES Permits at 4.

review were therefore due on January 21, 2009.[7]

As the Board has consistently held, petitions are considered "filed" when they are *received* by the Board, not when they are mailed. *E.g.*, *In re AES Puerto Rico L.P.*, 8 E.A.D. 324, 329 n.5 (EAB 1999), *aff'd*, *Sur Contra La Contaminación v. EPA*, 202 F.3d 443 (1st Cir. 2000); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 124 n.23 (EAB 1997); *Beckman*, 5 E.A.D. at 15 & n.8. Thus, although Mr. Lamplot's petition was postmarked January 16, 2009, several days prior to the deadline, his petition is considered filed on January 30, 2009, the date the Board received it. Similarly, even though Ms. Lamplot's petition was postmarked January 16, 2009, her petition is considered filed on February 2, 2009. Consequently, as a technical matter, both petitions appear to have been untimely.[8] However, because of the lengthy delay between the postmark date and the Board's receipt of the petitions, the Board investigated the source of the delay and determined that the reason the two petitions took over two weeks to reach the Board after mailing was that the post office sent these letters to an anthrax decontamination center.

In general, "the Board strictly construes threshold procedural requirements and 'will relax a filing deadline only where special circumstances exist.'"[9] *In re City & County of Honolulu*, NPDES Appeal No. 09-01, at 2 (EAB Feb. 2, 2009) (Order Granting Alternative Motion for Extension of Time to File Petitions for Review) (quoting *AES Puerto Rico*, 8 E.A.D. at 329); *accord In re BHP Billiton Navajo Coal Co.*, NPDES Appeal No. 08-06, at 2 (EAB Apr. 24, 2008) (Order Denying Extension of Time to File Petition for Review); *In re Town of Marshfield*, NPDES Appeal No. 07-03, at 4-5 (EAB Mar. 27, 2007) (Order Denying Review). The Board has found "special circumstances" to exist in cases where the

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[7] The permit regulations state that the thirty-day period within which a person may request review of a final permit decision "begins with the service of notice of the Regional Administrator's action unless a later date is specified in that notice." 40 C.F.R. § 124.19(a). According to Ms. Lamplot, the Region's letter was sent December 19, 2008, and provided thirty days in which to respond. T. Lamplot Petition at 1-2. It therefore appears that the Region did not provide additional time to petition for review beyond that specified in the regulations. Because service of the notice was by mail, three additional days are added to the time period. 40 C.F.R. § 124.20(d); *accord Envotech*, 6 E.A.D. at 265. Thus, Petitioners had thirty-three days from December 19, 2008, to file their petitions, which was January 21, 2009.

[8] The Board notes that the Region did not raise the issue of timeliness in its Response.

[9] Such practice is "consistent with the well-settled principle that 'it is always within the discretion of an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it.'" *Town of Marshfield*, at 5 n.4 (quoting *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970)); *see also In re Marine Shale Processors, Inc.*, 5 E.A.D. 751, 763 n.11 (EAB 1995), *aff'd*, 81 F.3d 1371 (5th Cir. 1996), *cert. denied*, 513 U.S. 1148 (1997); *In re Genesee Power Station*, 4 E.A.D. 832, 837 n.6 (EAB 1993).

delay stemmed "from causes not attributable to the petitioner, such as problems with the delivery service." *Town of Marshfield*, at 5; *see, e.g.*, *AES Puerto Rico*, 8 E.A.D. at 328-29 (delays due to hurricane and to aircraft problems experienced by overnight carrier). More particularly, the Board has relaxed the deadline where the delivery delay was due to U.S. Postal Service anthrax sterilization procedures. *E.g.*, *In re Avon Custom Mixing Servs., Inc.*, 10 E.A.D. 700, 703 n.6 (EAB 2002); *In re Minergy Detroit, L.L.C.*, PSD Appeal Nos. 02-01 & 02-02, at 1 n.2 (EAB Mar. 1, 2002) (Order Denying Review), *appeal dismissed per stipulation sub nom. Riehl v. EPA*, No. 02-3501 (6th Cir. Oct. 31, 2003). For these same reasons, the Board is relaxing the deadline in this case and is treating these petitions as timely filed.

B. *Have Petitioners Demonstrated That the Region Clearly Erred or Abused Its Discretion in Issuing the Final Permits?*

As noted above, both Petitioners contend that EPA erroneously issued the Final Permits and that the State of Nebraska should have issued them instead. *See* J. Lamplot Petition at 1; T. Lamplot Petition at 2, 5, 8. Petitioners argue that the Region made several underlying errors, both procedural and substantive, in concluding it could and should issue the Final Permits. Mr. Lamplot asserts that, in "wrongly assum[ing]" NPDES permit-issuing authority from Nebraska and issuing the permits, the Region exceeded its statutory authority and, in doing so, preempted the State. J. Lamplot Petition at 1. He also claims that, in issuing the permits, the Region violated Executive Order 13,132[10] and failed to respond to his comments concerning the Executive Order. *Id*. In conjunction with these arguments, he questions the Region's statements that "Congress has authorized EPA to administer the CWA in Indian Country," *id*. at 3, arguing that the Region's interpretation of its authority is "based on policy not law," *id*. at 4.

Ms. Lamplot primarily argues that the Region, in issuing the permits, was "incorrect in asserting that privately owned *fee* land, not owned by a tribal member, is Indian Country." T. Lamplot Petition at 5; *see also id.* at 6 (asserting that "there is no federal jurisdiction on non-tribal fee land"). In connection with this claim, she challenges the Region's reliance on the definition of Indian country in 18 U.S.C. § 1151. *Id*. at 5-6. She also asserts that the Region failed to address her comments on this issue. *Id*. at 5-6.

In their joint addendum, Petitioners raise another argument based on the recent case, *Hawaii v. Office of Hawaiian Affairs*, 129 S. Ct. 1436 (2009), which the Supreme Court decided after Petitioners appealed the Final Permits. Petitioners assert that, in that case, the Supreme Court concluded that "federal lands, once

[10] Executive Order 13,132, 64 Fed. Reg. 43,255 (Aug. 10, 1999), which is entitled "Federalism," is discussed in more detail in Part IV.B.4.a below.

they pass to a [s]tate, cannot be restored to federal jurisdiction by a federal act that purports to change the nature of the original grant to the state." Joint Addendum at 1. Petitioners further assert that this limitation prevents EPA from "claiming a federal statute can allow it to encroach or attempt to remove land from state jurisdiction."[11] *Id*.

Thus, to answer the overarching issue in this case, the Board must examine several additional questions. First, have Petitioners demonstrated that the Region clearly erred or abused its discretion in determining it had the authority to issue the Final Permits? Second, have Petitioners demonstrated that the Region clearly erred or abused its discretion in determining that the non-Indian-owned fee properties in question are within "Indian country" for purposes of the NPDES permitting regulations? Third, insofar as Petitioners seek to challenge the Agency regulations implementing the CWA (i.e., the Agency's "policies" in Indian country), may they do so in the context of this permit appeal? Fourth, have Petitioners demonstrated that the Region clearly erred or abused its discretion in concluding

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[11] In addition to this contention, Petitioners raise at least two new arguments in their addendum that are unrelated to the issues the Supreme Court addressed in *Office of Hawaiian Affairs*. Petitioners claim that EPA and the Nebraska Department of Environmental Quality are denying equal protection of the law to CAFO operators in the Omaha and Winnebago Reservations. Joint Addendum at 15-18. Petitioners also assert that EPA is violating the civil rights of CAFO operators and acting in violation of 42 U.S.C. § 1981(a). *Id*. at 18-19.

Even reading the Petitions broadly, neither of these arguments were initially raised by either Petitioner. The Board has consistently held that "new issues raised at the reply stage of the[] proceedings are equivalent to late filed appeals and must be denied on the basis of timeliness." *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9 (EAB 1999); *accord In re Steel Dynamics, Inc*., 9 E.A.D. 165, 219 n.62 (EAB 2000) (dismissing as untimely an issue first raised by petitioner in its rebuttal brief); *see also In re Dominion Energy Brayton Point*, 12 E.A.D. 490, 595 (EAB 2006) (denying review of an issue first raised in response briefs); *In re City of Ames*, 6 E.A.D. 374, 388 n.22 (EAB 1996) (denying petitioner's request to file a supplementary brief where the supplementary brief was filed after the appeal period had run and raised a related but "distinct" new issue). Furthermore, in its Order of June 17, 2009, the Board granted Petitioners their request to "file an addendum discussing the applicability of the recent Supreme Court case to the present matter." Order at 2. The Board did not authorize the raising of new issues. *See id.* Accordingly, because the issues are beyond the scope of the petitions and because these issues are outside the issues the Board authorized Petitioners to raise in their addendum, the Board concludes they are untimely and will not consider them further in this decision.

Moreover, not only are Petitioners raising the equal protection and civil rights arguments for the first time on appeal in their addendum, but Petitioners also do not appear to have raised these two arguments in their comments on the draft permit nor do Petitioners suggest that any other commenter raised them. *See* J. Lamplot Petition, attach. 1 (copy of Mr. Lamplot's public comments); T. Lamplot Petition at 2-5 (copy of Ms. Lamplot's public comments). Both the equal protection and civil rights arguments, unlike the arguments based directly on the recent Supreme Court case, are issues that Petitioners could have reasonably ascertained. As the Board explained above, *see supra* Part II, in order to preserve an issue for appeal before the Board, a petitioner must demonstrate that any reasonably ascertainable issues it is appealing were raised during the public comment period. These two issues, therefore, are procedurally barred for this reason as well.

that the Final Permits are consistent with Executive Order 13,132 on federalism? Fifth, have Petitioners shown that the *Office of Hawaiian Affairs* case applies here and demonstrates that the Region clearly erred in issuing the Final Permits? The Board considers each of these questions below.

1. *Have Petitioners Demonstrated That the Region Clearly Erred or Abused Its Discretion in Determining It Had the Authority to Issue the Final Permits?*

Mr. Lamplot argues that, in issuing the Final Permits, Region 7 "exceeded statutory authority," J. Lamplot Petition at 1, and "is preempting the State of Nebraska the authority to issue permits to entities located on fee-simple land under the jurisdiction of the State," *id*. at 2.[12] He claims that Nebraska has a "delegation of authority" from EPA to administer the NPDES program within the State. *Id*. at 1; *see also id.* at 3. Although Ms. Lamplot does not explicitly raise questions about "statutory authority" and "preemption" in her Petition, the Board reads Ms. Lamplot's Petition to raise similar arguments.[13] Thus, to the extent she raises these questions, they are addressed in this section.

In response to these arguments, the Region contends that, as it explained in its Response to Comments document, "because neither the Omaha or Winnebago Tribes, nor the State of Nebraska, have applied for or received authorization from EPA to implement the NPDES permit program on the Omaha or Winnebago Reservations," under the NPDES regulations, EPA alone has the authority to issue NPDES permits there. Response at 7-8; *see also* RTC at 2. The Region further asserts that "EPA's exercise of this authority in no way preempts any State program * * * because the State has never sought or been approved by EPA in the first instance to administer the CWA program over this area." Response at 8.

a. *Applicable Statutes and Regulations*

i. *The CWA and the NPDES Program Generally*

Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a). The CWA makes it unlawful for any person to discharge any pollutant into the waters of the United States from any point source, except as authorized by specified permitting provisions. CWA §§ 301(a), 402(a), 33 U.S.C.

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[12] To the extent Mr. Lamplot raises a question about the significance of properties owned in fee, the Board addresses this aspect of the issue in the next section.

[13] For example, she argues that there is no federal jurisdiction over the feed yards at issue. T. Lamplot Petition at 8-9; *see also id.* at 7 ("[W]here is the federal jurisdiction, or EPA authority coming from?").

§§ 1311(a), 1342(a). Section 402, 33 U.S.C. § 1342, is one such provision, establishing one of the Act's principal permitting programs, the National Pollutant Discharge Elimination System. *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 497 (EAB 2006); *In re City of Moscow*, 10 E.A.D. 135, 137 n.1 (EAB 2001); *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 662 n.1 (EAB 2001). In general, NPDES permits are issued for up to five years, contain discharge limitations, and establish related monitoring and reporting requirements. *See* CWA § 402(a)(1)-(2), (b), 33 U.S.C. § 1342(a)(1)-(2), (b); 40 C.F.R. §§ 122.45, .46(a), .48. *See generally* 40 C.F.R. parts 122-25, 136 (containing the majority of the NPDES implementing regulations).

ii. *What Governmental Authority Issues NPDES Permits?*

For a particular location, either EPA, an authorized state, or an authorized tribe administers the NPDES program and issues any necessary NPDES permits. Section 402(a) generally provides that "the [EPA] Administrator may * * * issue a permit for the discharge of any pollutant, or combination of pollutants" in accordance with certain statutory and regulatory conditions. CWA § 402(a), 33 U.S.C. § 1342(a). Congress, however, gave states the option, if certain requirements are first satisfied, to assume the responsibility to administer the NPDES permit program, or a partial program, in lieu of EPA, "for discharges into navigable waters within [their] jurisdiction." CWA § 402(b), 33 U.S.C. § 1342(b); *accord Arkansas v. Oklahoma*, 503 U.S. 91, 103 (1992); *see also* CWA § 402(n), 33 U.S.C. § 1342(n) (authorizing partial/phased state programs). Even when a state, tribe, or territory obtains authorization, EPA retains oversight authority. *E.g.*, CWA § 402(c)(3), (d)(2), 33 U.S.C. § 1342(c)(3), (d)(2); 40 C.F.R. §§ 123.44 (governing EPA review of and objections to state-issued permits), 123.63 (containing procedures for EPA withdrawal of state program approval); *see also Oklahoma v. Arkansas*, 503 U.S. at 102.

To obtain authorization to administer its own NPDES program, a state must submit a description of the proposed state program to EPA demonstrating that the program satisfies certain federal requirements. CWA § 402(b), (c), 33 U.S.C. § 1342(b), (c). The state must also submit a statement from the state's attorney general (or other relevant legal officer) demonstrating that the laws of the state "provide adequate authority to carry out the described program." CWA § 402(b), 33 U.S.C. § 1342(b); *accord* 40 C.F.R. § 123.23(a). Once EPA determines that the state program meets the minimum federal requirements, the Agency "suspend[s] the issuance of [EPA] permits under [section 402(a)] as to those discharges subject to such [state] program." CWA § 402(c)(1), 33 U.S.C. § 1342(c)(1). Thus, while the CWA essentially makes EPA the "default" permit-issuing authority under the Act, states may assume primary authority as long as they meet certain statutory and regulatory requirements. *Oklahoma v. Arkansas*, 503 U.S. at 102-03.

Section 518, which Congress added to the CWA in 1987, authorizes EPA "to treat an Indian tribe as a state for purposes of" numerous CWA provisions, including section 402, where certain criteria are met. CWA § 518(e), 33 U.S.C. § 1377(e); *see also In re Mille Lacs Wastewater Treatment Facility*, 11 E.A.D. 356, 364 (EAB 2004). Congress specified that EPA may treat an Indian tribe as a state only if "the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, * * * or otherwise within the borders of an Indian reservation."[14] CWA § 518(e)(2), 33 U.S.C. § 1377(e)(2); *Mille Lacs*, 11 E.A.D. at 364. Congress instructed EPA to issue regulations implementing this section. CWA § 518(e), 33 U.S.C. § 1377(e).

In 1993, the Agency issued final regulations implementing section 518 as it pertained to several CWA provisions, including section 402. Treatment of Indian Tribes as States for Purposes of Sections 308, 309, 401, 402, and 405 of the CWA, 58 Fed. Reg. 67,966 (Dec. 22, 1993) (codified in scattered sections of 40 C.F.R. pts. 122, 123, 124) [hereinafter 1993 TAS Rule]. The final rule "authorize[d] EPA to treat an Indian Tribe in the same manner as a State for assumption of the NPDES permit program if the Indian Tribe meets the eligibility criteria." *Id.* at 67,968; *accord* 40 C.F.R. § 123.31(a); *see also Mille Lacs*, 11 E.A.D. at 365.

Significantly, "[t]he 1993 rulemaking also revised [40 C.F.R.] section 123.23 to clarify the process by which a State * * * may seek authority over activities on 'Indian lands.'" *Mille Lacs*, 11 E.A.D. at 365 (citing 58 Fed. Reg. at 67,981). The regulations require such state, in the attorney general's statement that it submits to EPA, to include an analysis of the state's authority to run the program in Indian lands. 40 C.F.R. § 123.23(b). The 1993 rule explained that, "[i]n many cases, States * * * will lack authority to regulate activities on Indian lands." 40 C.F.R. § 123.1(h).

Even more important in the context of this permit appeal, the 1993 rule provided that "EPA will administer the program on Indian lands if a State (or Indian Tribe) does not seek or have authority to regulate activities on Indian lands." *Id.* Although the regulations do not explicitly define "Indian lands," they do define "Indian country." *Id.* § 122.2. The Agency has consistently interpreted "Indian lands" to be equivalent to "Indian country."[15] Response at 7 n.8; *see also*

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[14] The CWA defines "Federal Indian reservation" 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 rights-of-way running through the reservation." CWA § 518(h), 33 U.S.C. § 1377(h).

[15] This distinction does not appear to be at issue in the case. Petitioners also refer to "Indian country" throughout their briefs and Ms. Lamplot refers to both terms. *See, e.g.*, T. Lamplot Petition
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Mille Lacs, 11 E.A.D. at 366-67.

As of this date, EPA has authorized most states to administer part or all of the NPDES program within their jurisdiction, typically within the state boundaries excepting Indian country located therein. *See* Office of Wastewater Management, Office of Water, U.S. EPA, NPDES State Program Status, http://cfpub2.epa.gov/npdes/statestats.cfm (last visited May 17, 2010) [hereinafter State Program Status Chart];[16] *see also* 40 C.F.R. § 123.1(h) (noting that the lack of authority to regulate activities on Indian lands "does not impair that State's authority to obtain full [NPDES] program approval"); Final Modification of NPDES General Permit for Storm Water Discharges from Construction Activities, 69 Fed. Reg. 76,743, 76,744-45 (Dec. 22, 2004) (explaining that the modified general permit applied to areas where EPA was the NPDES permitting authority, explicitly including Indian country). EPA administers the NPDES program in most of Indian country within the United States, including Nebraska. *See*, *e.g.*, 69 Fed. Reg. at 76,744-45.

b. *Analysis of Issue*

Petitioners' arguments appear to be based on a fundamental misunderstanding of the CWA, the controlling regulations, and the extent of the current delegation of NPDES authority to the State of Nebraska. First, as explained above, *see* Part IV.B.1.a.ii *supra*, section 402(a) of the Act essentially grants EPA – and not the states – underlying "default" authority to issue permits nationwide. While states or tribes *may* administer part or all of the NPDES program within their jurisdiction, they are not required to do so. Moreover, they may only do so after submitting an application to EPA, which EPA approves if the application meets certain statutory and regulatory criteria. CWA § 402(b), 33 U.S.C. § 1342(b); 40 C.F.R. § 123.1; *Arkansas v. Oklahoma*, 503 U.S. at 102 (explaining that one

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at 5, 8; J. Lamplot Petition at 1, 3; *see also* T. Lamplot Petition at 6 (using both "Indian land" and "Indian country").

[16] See also, for example, Issuance of Final NPDES General Permits for Facilities/Operations That Generate, Treat, and/or Use/Dispose of Sewage Sludge by Means of Land Application, Landfill, and Surface Disposal in EPA Region 8, 72 Fed. Reg. 57,031, 57,031 (Oct. 5, 2007), in which the EPA specifically issued two different general biosolids permits in several states that had not been authorized to administer a biosolids (sludge) program. The first general permit was for facilities/operations in the states, but not including Indian country located therein; the second was for facilities/operations in Indian country located within those states. *Id.* The Agency has made similar distinctions between the two types of jurisdictions in a number of Federal Register notices addressing NPDES issues. *See*, *e.g.*, Approval of Modification to Michigan's Approved NPDES Permitting Program to Administer a Partial State Sewage Sludge Management Program, 71 Fed. Reg. 65,509 (Nov. 8, 2006) (noting that Michigan will run the program "where it has jurisdiction," and not including Indian country located therein); NPDES General Permits for Discharges from CAFOs, 63 Fed. Reg. 48,731 (Sept. 11, 1998) (proposed rule).

type of NPDES permitting regime consists of "state permit programs that must satisfy federal requirements and be approved by the EPA"). Importantly, therefore, in the absence of an approved state or tribal program, the CWA authorizes EPA to issue any relevant NPDES permits, including NPDES CAFO permits. CWA §§ 402(a), 518(e), 33 U.S.C. §§ 1342(a), 1377(e); *accord* 40 C.F.R. §§ 122.23(c)(1)(ii), 123.1(h); *Oklahoma v Arkansas*, 503 U.S. at 103.

Second, as explained above, the Agency's *regulations*[17] implementing the CWA require a state, if it desires to administer the NPDES permitting program within Indian country, to submit "an appropriate analysis of the [s]tate's authority" over activities in Indian country as part of the requisite state attorney general statement.[18] 40 C.F.R. § 123.23(b); *see also* discussion *supra* Part IV.B.1.a.ii. The regulations further provide that if a state (or Indian tribe) *does not seek or have authority* to regulate activities in Indian country, EPA will administer the program.[19] 40 C.F.R. § 123.1(h); *accord Mille Lacs*, 11 E.A.D. at 365-66.

Third, while it is true that the State of Nebraska has been authorized to administer the NPDES program in much of Nebraska, both EPA *and Nebraska* have explicitly stated that the State has *neither requested nor received* the authority to issue NPDES permits within Indian country, which is a prerequisite for exercising such authority under the statute and implementing regulations. RTC at 2; Response at 7; Response Ex. C at 1 (Neb. Op. Att'y Gen. 01026 (July 23, 2001)); Response Ex. G at 1 (Letter from Annette Kovar, Legal Counsel, Neb. Department of Environmental Quality ("DEQ"), to U. Gale Hutton, Director, Water, Wetlands & Pesticide Division, U.S. EPA Region 7 (Oct. 3, 2001)) [hereinafter 2001 DEQ Letter]. More particularly, the Nebraska State Attorney General issued an opinion in 2001 addressing the State's jurisdiction to regulate water discharges on non-Indian-owned land within the exterior boundaries of a reservation, i.e., the same issue raised here. In the opinion, the Nebraska Attorney General concluded that the Attorney General's Statement that had been submitted to EPA to obtain delegation of the NPDES permitting program within Nebraska "does not include a jurisdictional Statement as to the State's authority to regulate water discharge facilities on non-Indian-owned land within the exterior boundaries of a reservation." Neb. Op. Att'y Gen. 01026 at 1 (referring to Nebraska Attorney Gen-

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[17] Petitioners seem to confuse Agency regulations with policies. They seem to believe that the Agency's actions under the part 122 and 123 regulations are "policy" decisions rather than regulatory actions. The Board addresses Petitioners' arguments disagreeing with the Agency's "policies" below. *See infra* Part IV.B.3.

[18] Of course, in order for the State to be authorized to run such a program, the application must also be approved by EPA pursuant to CWA section 402(b), 33 U.S.C. § 1342(b), and the implementing regulations.

[19] These regulations are fully consistent with EPA's underlying "default" authority to run a partial or full NPDES program where no other entity has been authorized to do so.

eral Statement of September 19, 1973). The Nebraska Attorney General further stated that it is "unable to supplement the Statement to demonstrate the State' [sic] authority to regulate water discharge facilities on non-Indian-owned land within the exterior boundaries of a reservation," as had been requested by the Nebraska DEQ. *Id*. at 11. In other words, the 2001 Nebraska Attorney General opinion acknowledged that the State *had never submitted the requisite analysis of its authority* over activities in Indian country *and was unable to do so.*

Moreover, based on its attorney general's determination, the Nebraska DEQ likewise stated in a letter to the Region that "it appears that *the [Nebraska DEQ] does not have the authority to exercise authority under the federal NPDES program within the exterior boundaries of tribal reservations*." 2001 DEQ Letter at 1 (emphasis added). The letter further stated that "the [Nebraska DEQ] will not be pursuing NPDES delegation for these areas of the state." *Id*.

In sum, as acknowledged by Nebraska's Attorney General and the Nebraska DEQ – and despite Petitioners' contentions to the contrary[20] – the State of Nebraska does not currently have the authority to issue NPDES permits within the exterior boundaries of any reservations in Nebraska, including the Omaha and Winnebago Reservations.[21] At this time, therefore, under the CWA and its implementing regulations, the State has no authority to and cannot issue the four NPDES CAFO permits at issue in this case.

As the Region pointed out in its Response to Comments document, because neither the State of Nebraska nor the Tribes[22] have been authorized to issue NPDES permits within the exterior boundaries of the Omaha and Winnebago Reservations, the only entity that currently *does* have any authority under the CWA and associated regulations to issue NPDES permits within those boundaries is EPA. CWA § 402(a), 33 U.S.C. § 1342(a); 40 C.F.R. § 123.1. Consequently, the Region, in issuing such NPDES permits, including the four NPDES CAFO permits at issue here, is neither "exceeding its statutory authority" nor "preempting" the State's authority as Mr. Lamplot alleges. EPA is instead exercising the

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[20] As indicated above, Mr. Lamplot appears to believe that Nebraska currently has a delegation of authority to issue NPDES permits throughout the entire State. J. Lamplot Petition at 3 (questioning EPA's "authority to preempt a [s]tate[']s authority to issue NPDES permits within its boundaries"). Ms. Lamplot's arguments also presuppose that this authority exists. Neither Petitioner addresses or even acknowledges the Nebraska Attorney General's or DEQ's statements.

[21] Notably, the Region has issued NPDES permits within the exterior boundaries of the Omaha and Winnebago Reservations, at least since the time of the Attorney General's opinion. *See, e.g., In re Village of Pender Waste Water Treatment Facility*, NPDES Appeal Nos. 07-05 through 07-07, at 2-3 (EAB Apr. 19, 2007) (Order Dismissing Petitions for Review) (noting that the Region, and not the State of Nebraska, issued the permit).

[22] According to the Region, neither Tribe has requested or received authority to run the NPDES program within the exterior boundaries of its Reservation. RTC at 2.

underlying authority it has under the Act. The Region cannot preempt State authority if, as here, it does not exist.[23]

For these reasons, Petitioners have failed to demonstrate that the Region clearly erred or abused its discretion in determining it had the authority to issue the Final Permits. Petitioners have also failed to show that this issue involves an exercise of discretion or an important policy consideration that the Board, in its discretion, should review. The Board therefore denies review of the Region's four Final Permits on these grounds.

2. *Have Petitioners Demonstrated That the Region Clearly Erred or Abused Its Discretion in Determining That the Non-Indian-Owned Fee Properties in Question are Within "Indian Country" for Purposes of the NPDES Permitting Regulations?*

a. *Substantive Issue*

Ms. Lamplot's primary substantive contention is that the Region should not have issued the Final Permits because "privately owned *fee* land, not owned by a tribal member," is not Indian country, and thus, there is no federal jurisdiction over it. T. Lamplot Petition at 5. She asserts that "[g]eographical historical reservation boundaries from the 1800s do not depict federal jurisdiction[;] rather, the land status, whether it is fee or trust, does." *Id*. In a related argument, Ms. Lamplot claims that because the non-Indian owners of the fee properties pay state taxes, their properties cannot be part of Indian country. *Id*. at 7 (citing 25 U.S.C. § 379); *see also id.* at 6 (citing 25 U.S.C. § 349).[24] She further argues that the Region's

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[23] Apparently, some of the confusion in this case may stem from the fact that the State of Nebraska previously issued several NPDES permits within the exterior boundaries of the Omaha and Winnebago Reservations prior to the State's and EPA's consideration of whether the State had authority to do so. *See* Neb. Op. Att'y Gen. 01026 at 1-2; *see also* 1993 TAS Rule at 67,977 (acknowledging that some states may have issued permits within reservation boundaries without specific authorization to do so). The fact that the State may have issued permits in the past does not mean that the State may continue issuing such permits now that the authority question has been properly analyzed and decided. 1993 TAS Rule at 67,977 (explaining that EPA "will reissue and exercise Federal jurisdiction when previous [s]tate permits expire" where such state "does not have the requisite jurisdiction and authorization on Federal Indian reservations"); *see also Village of Pender*, at 2-3 (noting that State of Nebraska originally proposed to issue permit to wastewater treatment facility but, upon consideration, Region ultimately issued it); *see also* Neb. Op. Att'y Gen. 01026 (indicating that opinion was requested in light of questions regarding the Pender and Walthill wastewater treatment plants).

[24] Section 349 is a provision of the General Allotment Act, 24 Stat. 388 (Feb. 8, 1887), as amended by the Burke Act, 34 Stat. 182 (May 8, 1906), which authorizes the Secretary of the Interior to allow "a patent in fee simple" to be issued to an Indian allottee. 25 U.S.C. § 349. Once a patent in fee is issued, "all restrictions as to sale, incumbrance, or taxation of said land shall be removed." *Id*.;
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position is inconsistent with previous Agency statements that it has jurisdiction over "trust land," even though the trust land was not within the historical boundaries of an Indian reservation. *Id*. at 7 (referring to *In re Mille Lacs Wastewater Treatment Facility*, 11 E.A.D. 356 (EAB 2004)). Although Mr. Lamplot primarily challenges the Region's actions based on preemption grounds, see discussion in Part IV.B.1 above, his Petition does include some of the same concerns Ms. Lamplot raises.[25] Thus, to the extent he raises the issue of whether the Region properly considered properties held in fee by non-Indians to fall within the definition of Indian country, the issue is addressed in this section.

In responding to Petitioners, the Region maintains 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." Response at 13; *see also* RTC at 1-3. The Region asserts that Petitioners' argument "disregards the plain language of the Indian reservation definition as well as the consistent interpretation of that language by the Supreme Court." Response at 13; *see also* RTC at 2-3.

Upon examination of the statutes, regulations, case law, and arguments of the parties, the Board concludes that Petitioners have failed to demonstrate that the Region clearly erred or abused its discretion in determining that the non-Indian-owned fee properties in question are within "Indian country" for purposes of the NPDES permitting regulations.

First, as the Region explained in its Response to Comments document, it relied on two regulations in concluding that it was authorized to issue NPDES permits in Indian country: 40 C.F.R. § 123.1(h) and 40 C.F.R. § 122.23(c)(1)(ii). RTC at 2. The first generally authorizes EPA to "administer the NPDES program on Indian lands if a State (or Indian Tribe) does not seek or have authority to regulate activities on Indian lands," 40 C.F.R. § 123.1(h), and the second autho-

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see also Yankton Sioux Tribe v. Podhradsky, Nos. 08-1441 & 08-1488, 2010 WL 1791365, at *2-3 (8th Cir. May 6, 2010) (discussing the history of the General Allotment and Burke Acts). Section 379 of Title 25, although not enacted as part of the General Allotment or Burke Acts, also concerns allotted lands. It provides that certain allotted lands "so patented to a white allottee shall thereupon be subject to taxation under the laws of the State" where the land is situated. 25 U.S.C. § 379.

In connection with her arguments on this point, Ms. Lamplot also refers to "various Acts of Congress and laws that allowed settlement and unrestricted property ownership of historical land" to which she had referred in her comments on the draft permit. T. Lamplot Petition at 8. In her comments, she specifically cited the General Allotment Act, the Burke Act, and sections 349 and 379 of Title 25. *See id.* at 2-3. Thus, the Board reads the statement in her Petition to refer to these Acts and provisions and relate to her primary argument as noted above.

[25] For example, Mr. Lamplot asserts that the permittees as well as their "discharge points" are all located on "fee-simple properties." J. Lamplot Petition at 2.

rizes EPA to designate CAFOs in "Indian country where no entity has expressly demonstrated authority and has been expressly authorized by EPA to implement the NPDES program," *id*. § 122.23(c)(1)(ii).[26] EPA's regulations define "Indian country" to include "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."[27] *Id*. § 122.2 (emphasis added). This definition is drawn from the statutory definition of "Indian country" found at 18 U.S.C. § 1151.[28] *See* RTC at 2 (quoting the statutory definition); *see also Mille Lacs*, 11 E.A.D. at 366-67 (discussing the various definitions). Based on this definition[29] and the fact that the CAFOs were located on land BIA had identified as part of the Omaha and Winnebago Indian Reservations, the Region concluded that the CAFOs were within Indian country and that it had authority to issue the permits. *See id.*

As noted above, EPA's regulations define Indian country to include all land within the limits of an Indian reservation "notwithstanding the issuance of any patent." In the property law context, a "land patent" is defined as "[a]n instrument by which the government conveys a grant of public land to a private person." Black's Law Dictionary 1147 (7th ed. 1999). Thus, the term "Indian country" as used in EPA's regulations and 18 U.S.C. § 1151 clearly and explicitly includes within a reservation's boundaries that land for which a fee patent has been issued, consistent with the Region's determination and contrary to Petitioners' contentions.

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[26] As noted earlier, the Agency has interpreted "Indian lands," the term used in section 123.1(h) but not explicitly defined in the regulations, to be synonymous with the term "Indian country," a term that is defined in section 122.2. *See supra* note 15 and accompanying text; *see also Mille Lacs*, 11 E.A.D. at 366 (noting Agency interpretation).

[27] "Indian country" is also defined to include "[a]ll dependent Indian communities with[in] the borders of the United States whether within the originally or subsequently acquired territory thereof, and whether within or without the limits of a state" and "Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." 40 C.F.R. § 122.2.

[28] In adding the definition of "Indian country" to the NPDES regulations, the Agency essentially adopted the 18 U.S.C. § 1151 definition. *See* NPDES Permit Application Requirements for Publicly Owned Treatment Works and Other Treatment Works Treating Domestic Sewage, 64 Fed. Reg. 42,434, 42,443 (Aug. 4, 1999) (stating that the regulatory definition "incorporates" the section 1151 statutory definition); *see also Mille Lacs*, 11 E.A.D. at 367 (same). Notably, although section 1151 is a criminal law statute, its definition of Indian country has been adopted and relied upon in other Indian law contexts as well. *See, e.g.*, *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998) (recognizing that definition in 18 U.S.C. § 1151 applies generally to questions of civil jurisdiction as well as criminal); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n.5 (1987) (same); *DeCoteau v. Dist. County Court for the Tenth Judicial Dist.*, 420 U.S. 425, 427 n.2 (1975) (same).

[29] In its Response to Comments, the Region primarily relied upon the 18 U.S.C. § 1151 definition rather than the regulatory definition. *See* RTC at 2.

Moreover, in *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 357-59 (1962), the Supreme Court considered a nearly identical question to that raised by Ms. Lamplot: was a parcel of land held under a patent in fee by a non-Indian properly considered to be within an Indian reservation? In that case, the State of Washington argued that the Colville Indian Reservation limits had been diminished when non-Indian settlers purchased parcels of land on the reservation, as authorized by an act of Congress. 368 U.S. at 357 (referring to Act of March 22, 1906, 34 Stat. 80). The State of Washington contended that the "land owned in fee by non-Indians cannot be said to be reserved for Indians." *Id*. The State further argued that the words "notwithstanding the issuance of any patent" in the Indian country definition were restricted to "the issuance of any patent to an Indian" and not to a non-Indian. *Id*. at 358. The Supreme Court disagreed with the State and declined to interpret the Indian country definition – and thus the existence or nonexistence of an Indian reservation – to be dependent on the ownership of particular parcels of land within the historical boundaries of the reservation.[30] *Id*.

To the contrary, the Court concluded that the "notwithstanding the issuance of any patent" language was plainly intended to include within "Indian country" those parcels of land owned by non-Indians. *Id*. The Court has subsequently reiterated this interpretation. *E.g.*, *Solem v. Bartlett*, 465 U.S. 463, 470 (1994) ("Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise."); *Mattz v. Arnett*, 412 U.S. 481, 504 (1973) (explaining that the mere presence of an allotment provision "cannot be interpreted to mean that the reservation was terminated," especially in light of the "notwithstanding the issuance of any patent" language in the Indian country definition); *see also United States v. Celestine*, 215 U.S. 278, 285 (1909) ("[W]hen Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress."); *Yankton Sioux Tribe v. Podhradsky*, 2010 WL 1791365, at *11 (8th Cir. May 6, 2010) (explaining that the "notwithstanding the issuance of any patent" language in the Indian country definition explicitly "separates the concept of jurisdiction from the concept of ownership"); *cf. DeCoteau v. Dist. County Court for the Tenth Judicial Dist.*, 420 U.S. 425, 447-49 (1975) (concluding that a portion of the reservation had been terminated where, unlike the reservations at issue in *Mattz* and *Seymour* in which Congress allowed the "mere opening of lands to settlements," the tribe explicitly ceded, sold, and relinquished its claim, right, title and interest in and to all the unallotted lands within the reservation). Thus, the plain language of the statutes and regulations, and the case law discussing that language, all demon-

[30] The Colville Indian Reservation, and its boundaries, had been established by Executive Order rather than by treaty. 368 U.S. at 354.

strate that the mere fact that a parcel of land is in "fee patent status" is *not* determinative of whether it is within Indian country, contrary to Ms. Lamplot's assertion.

Along these same lines, the Board is unpersuaded by Ms. Lamplot's argument that, because the non-Indian owners of the "fee patent" properties pay state taxes, these properties cannot be part of Indian country. *See* T. Lamplot Petition at 7. This argument is essentially identical to her first. The very same acts of Congress that authorized the issuance of patents in fee for these parcels also authorized the state to tax them following issuance of the patents. *See, e.g.*, 25 U.S.C. § 349. Thus, the same principles articulated by the Supreme Court in *Seymour*, *Solem*, and *Mattz* with respect to the fee patent status of a parcel must apply with equal force to the parcel's state taxation status; otherwise, the holdings in these cases would be rendered moot by the fact that the owners of the properties pay state taxes.[31]

Ms. Lamplot also attempts to argue that EPA's assertion over land held in trust and located outside a reservation's boundaries is inconsistent with also categorizing as Indian country fee land located within the reservation's boundaries. T. Lamplot Petition at 7 (citing the Board's *Mille Lacs* decision). 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.[32] *See id*. at 377. The fact that the definition of "reservation" may include trust land that may be located *outside* historic reservation boundaries is a separate question from (and irrelevant to) whether fee land *inside* historic reservation boundaries identified by DOI is part of Indian country.

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[31] The Board's conclusion is supported by the Supreme Court's decision in *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992). In that case, the Court considered the taxation question in another context. There, the Yakima Nation argued that fee-patented reservation land either owned by tribal members or by the Tribe itself should not be subject to real estate taxes by the County. *See* 502 U.S. at 256. The Supreme Court held that, even though Congress essentially repudiated the General Allotment Act in 1934, *see* 25 U.S.C. § 461, Congress did not return allotted land back to pre-General Allotment Act status. 502 U.S. at 264. Thus those allotted properties, although within the reservation, remain "fully alienable," and the state and/or county may impose certain real estate taxes upon them. *Id*. The Court's decision therefore indicates that the question of whether a fee-patented parcel is subject to state taxation is a separate question from whether it is located within a reservation. *See id.* at 262-66.

[32] The Board specifically noted that it did not address the Region's alternative basis for its determination of jurisdiction in that case, which was based on the position that "the wastewater treatment plant discharge [was] within the exterior boundaries of the formally proclaimed Mille Lacs Indian Reservation." 11 E.A.D. at 375 n.24.

b. *Procedural Issue*

In addition to her substantive claim, Ms. Lamplot alleges that "significant comments and evidence submitted on December 13, 2007, supporting commenter's claim that the [] above mentioned feed yards were not 'Indian country' were not commented on by EPA" in its Response to Comments document. T. Lamplot Petition at 5; *see also id.* at 2 (arguing that the Region "generally does not address comments submitted"). Ms. Lamplot further questions the adequacy of the response the Region did provide, claiming that, by combining "[t]he 'comments made by some individuals'" together and responding to them in one response, the Region has "generalized [those comments] and reworded [them] to the point that they are unrecognizable by those that submitted the comments."[33] *Id.* at 2.

Under the NPDES procedural regulations, permit issuers are required to "*[b]riefly* describe and respond to all significant comments on the draft permit * * * raised during the public comment period, or during any hearing." 40 C.F.R. § 124.17(a)(2) (emphasis added). As the Board has explained on several occasions, "'[t]his regulation does not require a [permit issuer] to respond to each comment in an individualized manner,' nor does it require the permit issuer's response 'to be of the same length or level of detail as the comment.'" *In re Kendall New Century Dev.*, 11 E.A.D. 40, 50 (EAB 2003) (quoting *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 583 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3rd Cir. 1999)); *accord In re Hillman Power Co.*, 10 E.A.D. 673, 696 & n.20 (EAB 2002); *see also In re Hoechst Celanese Corp.*, 2 E.A.D. 735, 739 n.7 (Adm'r 1989) ("Once the Agency has reached a reasonable and legally proper permit decision based on the administrative record, it need not provide detailed findings and conclusions, but instead must reply to all significant comments * * * as required by 40 C.F.R. § 124.17."). Thus, the Board has concluded that even though a permit issuer's response document was shorter than petitioner's comments and did not provide individual responses to each comment, because "the responsiveness summary and supplemental response to comments succinctly addressed the essence of each issue raised by [p]etitioners," the permit issuer satisfied its obligation under the procedural regulations. *NE Hub*, 7 E.A.D. at 583. In addition, while the permit issuer should demonstrate in its response to comments documents that it considered all significant comments, a permit issuer "may provide a unified response to related comments" rather than individually responding to each and every comment. *Kendall*, 11 E.A.D. at 50 n.13; *accord NE Hub*, 7 E.A.D. at 583. In fact, as the Board has noted, providing a unified response for each issue raised is "an efficient technique" in responding to a group of similar comments and, in and of itself, does not indicate that the permit issuer is unresponsive. *NE Hub*, 7 E.A.D. at 583.

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[33] The Board notes that the Region did not respond to this argument.

In this case, in its Response to Comments document, the Region stated that the "comments made by some individuals" had asserted that the NPDES program as implemented by Region 7 "should not apply to the CAFOs located within the Omaha and Winnebago Indian Reservation because they are not within Indian Country" and that commenters had also argued that "EPA has no authority to issue the permits" to those CAFOs. RTC at 1. The Region then provided one unified response to this group of comments. The Region first provided a summary of its rationale for issuing the permits: "(1) EPA is authorized to issue NPDES in Indian country * * * where no State or Tribe has been authorized; (2) EPA has not approved the State or Tribe to implement the NPDES program within the Omaha Reservation and Winnebago; and (3) the facilities are within the Omaha and Winnebago Indian Reservations." RTC at 2. The Region went on to explain its rationale in more detail, describing the CWA, the implementing regulations, and the fact that neither the Tribes nor the State of Nebraska had requested approval to establish a program within the exterior boundaries of Indian country within Nebraska. *Id*. The Region further explained the basis for its definition of Indian country (and Indian lands) in general as well as the basis for its conclusion that the four CAFOs were located within the boundaries of the specific reservations in question. *Id*. (citing 18 U.S.C. § 1151(a) and BIA letter regarding the Omaha and Winnebago Reservation boundaries). The Region additionally explained why several cases and statutory provisions the commenters cited, such as *Michigan [DEQ] v. EPA*, 268 F.3d 1075 (D.C. Cir. 2001), *Nevada v. Hicks*, 533 U.S. 353 (2001), and 33 U.S.C. § 1377, were not applicable. RTC at 2.

Upon consideration of the Response to Comments document, the Board concludes that the Region satisfied its obligation under 40 C.F.R. § 124.17 to respond to all significant comments. The Region's combined response to the various comments questioning EPA's authority to issue permits to these four CAFOs does not mean that the Region failed to respond to the comments, contrary to Ms. Lamplot's suggestion that it does. Nor does the Region's lack of reciting the comments verbatim. The Region reasonably grouped and addressed the comments questioning the Region's conclusion that the CAFOs were located in "Indian country" together in one response. Furthermore, while a point-by-point rebuttal on each and every point raised by commenters might have helped Ms. Lamplot and other members of the public understand the Region's rationale more clearly, "the absence of such a direct response is not grounds for granting review under the circumstances of this case where [the permit issuer's] general explanation in its response to comments was sufficient to articulate the basis of its decision." *Kendall*, 11 E.A.D. at 50 n.13; *accord Hillman*, 10 E.A.D. at 696-97 & n.20 (denying review where permit issuer provided no specific response to comments presenting soil sampling data but where administrative record made clear the permit issuer had considered impacts of emissions on soils). The Region succinctly addressed the essence of Ms. Lamplot's and like comments by explaining the basis for its conclusion that it had the authority to issue these four permits and its rationale for concluding that the CAFOs were located in "Indian country" within

the Omaha and Winnebago Reservation boundaries. As discussed above, this is all the regulations require, "especially in light of the call for brevity."[34] *NE Hub*, 7 E.A.D. at 583; *accord Kendall*, 11 E.A.D. at 50 n.13.

3. *May Petitioners Challenge the Agency's Regulations Implementing the CWA in the Context of a Permit Appeal?*

Throughout their Petitions, Mr. Lamplot and Ms. Lamplot both challenge the Region's reliance on Agency "policies." For example, Mr. Lamplot asserts that "[t]he policies that EPA has developed are the crux of the problem," J. Lamplot Petition at 5, and that the Region's interpretation of its authority to administer the CWA in Indian country is "based on policy not law." J. Lamplot Petition at 4; *see also id.* at 5 ("EPA *policy* on 'Indian country' does not reflect language in the CWA written by Congress.") (emphasis added). Ms. Lamplot similarly argues that "EPA's 'settled policy' is incorrect. The State of Nebraska is the only entity with jurisdiction to issue NPDES permits on private fee land property." T. Lamplot Petition at 8; *see also id.* at 6 ("EPA, as well as other federal agencies, have misinterpreted the definition of Indian country in policy development and implementation.").

In its Response to Comments document, the Region did not cite any particular Agency policy or guidance documents. *See* RTC at 1-4. Instead, the Region primarily based its determination that it was the appropriate permit issuer for the four NPDES CAFO permits on CWA section 402(a) and the Agency's regulations at 40 C.F.R. §§ 123.1(h) and 122.23(c)(1)(ii).[35] *See id.* at 2. The Region also cited the definition of Indian country in 18 U.S.C. § 1151(a), *see id.* at 2, the BIA's letter and map delineating the boundaries of the Omaha and Winnebago Reservations, *see id.*, and Supreme Court case law, *see id.* at 3 (quoting *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998)). Thus, reading Petitioners' arguments in light of the Region's explanation for its decision, the Board concludes that Petitioners' challenge to the "policies" of the Agency is really a challenge to the Agency's implementing regulations and the policy consid-

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[34] The Region's failure to address the myriad citations on points the Region seemingly believed irrelevant to the overall analysis – e.g., Ms. Lamplot's comments concerning 25 U.S.C. §§ 349 and 379 and her comment on the applicability of the General Allotment Act of 1887 and the Burke Act of 1906 – does not change this conclusion.

[35] The Region's conclusion was based on a three-step analysis. First, relying on section 402(a) of the Act and sections 123.1(h) and 122.23(c)(1)(ii) of the Agency's regulations, the Region stated that it was authorized to issue NPDES permits in Indian country "where no State or Tribe has been authorized." RTC at 2. Second, the Region stated that "EPA has not approved the State or Tribe to implement the NPDES program within the Omaha Reservation and the Winnebago [Reservation]." *Id.* For this determination, the Region relied on part 123 and the 1993 TAS rule. Third, based on 18 U.S.C. § 1151(a) and the BIA's letter and map, the Region concluded that "the facilities are within the Omaha and Winnebago Indian Reservations." *Id.*

erations upon which those regulations are based.[36] This conclusion is further bolstered by the fact that, at bottom, Petitioners' real disagreement in this case is with the Agency's regulations, in particular, the provision at 40 C.F.R. § 123.1(h), promulgated in 1993, which authorizes EPA to administer the NPDES program in Indian country if a state or tribe does not seek or have authority to do so.

As the Board has often stated, it generally will not entertain challenges to final Agency regulations in the context of permit appeals. *In re USGen New Eng., Inc.*, 11 E.A.D. 525, 555 (EAB 2004), *dismissed appeal for lack of juris.*, 443 F.3d 12 (1st Cir. 2006); *In re City of Irving*, 10 E.A.D. 111, 123-25 (EAB 2001), *petition for review denied sub nom. City of Abilene v. U.S. EPA*, 325 F.3d 657 (5th Cir. 2003); *In re Tondu Energy Co.*, 9 E.A.D. 710, 715-16 (EAB 2001); *In re City of Port St. Joe*, 7 E.A.D. 275, 286 (EAB 1997); *see also In re Suckla Farms, Inc.*, 4 E.A.D. 686, 699 (EAB 1993); *In re Ford Motor Co.*, 3 E.A.D. 677, 682 n.2 (Adm'r 1991). The Board has repeatedly emphasized that the reason for this is that "a permit appeal proceeding is not the appropriate forum in which to challenge either the validity of Agency regulations or the policy judgments that underlie them." *Port St. Joe*, 7 E.A.D. at 286; *Suckla Farms*, 4 E.A.D. at 699. Furthermore, the regulations that govern the Board's review of permits authorize the Board to review *conditions* of the permit decision, not the statutes or regulations that are the predicates for such conditions. 40 C.F.R. § 124.19(a); *see also USGen*, 11 E.A.D. at 555; *City of Irving*, 10 E.A.D. at 124; *Ford Motor*, 3 E.A.D. at 682 n.2. Because Petitioners' challenge to the Agency's "policies" is essentially a challenge to the Agency's regulations implementing the CWA and the policy judgments underlying them, the Board denies review of the Final Permits on these grounds.

4. *Have Petitioners Demonstrated That the Region Clearly Erred or Abused Its Discretion in Concluding That the Final Permits Were Consistent with Executive Order 13,132?*

a. *Substantive Issue*

Mr. Lamplot also contends that the Region, in issuing the four NPDES permits, "violated" Executive Order 13,132, a 1999 Executive Order entitled "Federalism." J. Lamplot Petition at 1, 4 (referring to Exec. Order No. 13,132, 64 Fed.

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[36] The Region may have contributed to at least part of the confusion underlying this issue by inaccurately referring to EPA's NPDES regulations as "policies" in its Response to Comments document. RTC at 2 (stating that "EPA's *policies* and procedures are set forth in the CFR") (emphasis added). The "CFR," otherwise known as the Code of Federal Regulations, is exactly that – a collection of agency *regulations*. Additionally, when it quoted the Supreme Court's statement that "primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribes inhabiting it, and not with the State," the Region referred to the Court's precedential language as "settled policy." RTC at 3 (quoting *Venetie*, 522 U.S. at 527 n.1).

Reg. 43,255, 43,256 (Aug. 10, 1999)). He disagrees with the Region's interpretation of the Executive Order, claiming that the Region's response to his comment is "hypocritical" because it allows Nebraska to have "CWA authority in all of the State but Thurston County." *Id*. at 4. Although he acknowledges that "the CWA is national in scope," he maintains that the Region's interpretation of the Executive Order is inconsistent with section 101(b) of the CWA, which "recognizes the rights and responsibilities of States." *Id*.

As a general matter, Executive Order 13,132 instructs federal agencies to "be guided by" certain "fundamental federalism principles" that are listed in section 2 "when formulating and implementing policies that have federalism implications." Exec. Order No. 13,132, § 2. Section 3 further directs agencies to "adhere, to the extent permitted by law," to certain enumerated criteria. *Id*. § 3. Section 4 contains special requirements for an agency when taking an action that preempts state law. *Id*. § 4.

In its Response to Comments document, the Region addressed the applicability of Executive Order 13,132 to the Region's permitting action. *See* RTC at 3. The Region first acknowledged that the Executive Order "requires federal agencies to follow 'fundamental federalism principles.'" *Id*. at 3. As noted above, these "fundamental federalism principles" are listed in section 2 of the Executive Order and are the principles to which Mr. Lamplot referred in his comments. *See* Exec. Order No. 13,132, § 2. The Region went on to explain that section 3 of the Executive Order "requires that federal agency preemption of states' policymaking discretion should be taken 'only where there is constitutional and statutory authority for the action and the national activity is appropriate in light of the presence of a problem of national significance.'"[37] RTC at 3 (quoting Exec. Order No. 13,132, § 3(b) (one of the enumerated criteria)). The Region then explained that "Congress has authorized EPA to administer the Clean Water Act in Indian Country. Under Section 101 of the CWA, Congress established goals to 'restore and maintain the chemical, physical and biological integrity of the Nation's waters.' These goals are national in both scope and significance." *Id*. Reading these statements together, the Region's rationale is essentially that, because EPA's administration of the CWA in Indian country, including the issuance of NPDES permits, is statutorily authorized and addresses a problem that is national in scope and significance, the action is consistent with the Executive Order. The Region makes this

[37] This criterion closely follows the first of the "fundamental federalism principles," which states that "Federalism is rooted in the belief that issues that are not national in scope or significance are most appropriately addressed by the level of government closest to the people," i.e., typically the states or local governments. Exec. Order No. 13,132, § 2(a); *see also* J. Lamplot Petition at 4 (citing this principle).

same argument in its response to Mr. Lamplot's Petition.[38] *See* Response at 17-19.

Upon consideration, the Board concludes that, even if Executive Order 13,132 is applicable in the present context,[39] Petitioner's assertions are unpersuasive and fail to demonstrate that the Region clearly erred or abused its discretion in concluding that its issuance of the Final Permits is consistent with the Executive Order.[40] Petitioner, in disputing the Region's determination that its NPDES activity in Indian country is national in both scope and significance focuses solely on the Region's determination as it applies in Thurston County, Nebraska, and to the Omaha and Winnebago Reservations. In fact, the Region's rationale mirrors the Agency's rationale which applies nationally to any portion of Indian country in the United States where neither the state nor the tribe have an authorized program. 40 C.F.R. § 123.1(h). EPA has relied on these principles nationally in other NPDES permitting situations.[41] *See, e.g.*, Final Modifications of NPDES General Permit for Storm Water Discharges from Construction Activities, 69 Fed. Reg. 76,743, 76,744-45 (Dec. 22, 2004) (stating that the general permit modifications applied in those areas where EPA was the NPDES permitting authority and thus was applicable within Indian country in twenty-seven states, including Nebraska).

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[38] The Region argues that the 1999 Executive Order "directs executive agencies to adhere to principles of federalism by, *inter alia*, encouraging national (versus state) action only when 'appropriate in light of the presence of a problem of national significance,'" Response at 17 (quoting Exec. Order 13,132 § 3(b)), and that EPA's administration of the CWA in Indian country does address a problem that is national in scope and significance, *id*. at 19.

[39] In its response brief, the Region seemingly implies that Executive Order 13,132 may not be applicable to its permitting action. *See* Response at 19. Because the Region did not rely upon this particular argument in its response to comments and is therefore raising it for the first time on appeal, the Board will not consider it. *See In re Gov't of D.C. MS4*, 10 E.A.D. 323, 343 (EAB 2002) (declining to consider Region's explanation expressed for the first time on appeal); *see also In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 595 n.168 (EAB 2006) (declining to consider arguments raised for the first time in response and reply briefs).

[40] As a preliminary note, to the extent the Region's arguments in any way suggest that the Board may not review Mr. Lamplot's claim regarding the Executive Order, *see* Response at 19 (noting that the Executive Order "is, by its clear language, unenforceable by a party against an agency of the United States" and thus any issues arising under it would not "create any legal error in Region 7's permits"), the Board disagrees. As the Board has explained, "while the Region is correct that [a section of the Executive Order] precludes *judicial* review of the Agency's efforts to comply with the Executive Order, it does not affect implementation *within* an agency. More specifically, it does not preclude the *Board*, in an appropriate circumstance, from reviewing a Region's compliance with the Executive Order as a matter of policy or an exercise of discretion to the extent relevant under section 124.19(a)." *In re Chem. Waste Mgmt., Inc.*, 6 E.A.D. 66, 76 (EAB 1995).

[41] To the extent that Mr. Lamplot may be questioning whether EPA's section 123.1 and 123.23 regulations are consistent with Executive Order 13,132, those regulations were issued prior to the issuance of Executive Order 13,132, and thus, that Executive Order would not have applied at the time of promulgation. Moreover, as explained above in Part IV.B.3, the Board does not entertain challenges to Agency regulations in a permit appeal proceeding.

Mr. Lamplot's suggestion that CWA section 101(b) somehow demonstrates that the Region's interpretation of its authority is inconsistent with Executive Order 13,132 is similarly unavailing. By relying solely on one subsection of the Act, subsection 101(*b*), he fails to consider, not only other section 101 provisions, such as subsection (*d*),[42] but also other sections of the Act as well. He also fails to appreciate the national character of the overall statutory scheme. Thus, although Mr. Lamplot correctly notes that one of the "policies" of the CWA is "to recognize, preserve and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution," J. Lamplot Petition at 4 (citing CWA § 101(b), 33 U.S.C. § 1251(b)), he fails to recognize that this policy does not alter the fact that, in section 402, Congress establishes EPA, and not the states, as the underlying "default" NPDES permit issuer. Consequently, while section 402(b), consistent with the policy objectives of section 101(b), authorizes states to take over primary NPDES permitting authority, section 402(a), consistent with section 101(d), establishes EPA as the underlying permit-issuing authority in those jurisdictions where states or tribes have not been authorized.

For these reasons, Mr. Lamplot's arguments fail to demonstrate that the Region clearly erred or abused its discretion in concluding that its Final Permits are consistent with Executive Order 13,132.[43]

b. *Procedural Claim*

In addition to his substantive claim, Mr. Lamplot also alleges that the Region failed to respond to his comment that "'EPA's claim to have sole authority for issuing these permits is questionable on being faithful with section 2 of'" the Executive Order. J. Lamplot Petition at 4 (quoting J. Lamplot, Public Comments for EPA Hearing, cmt. 7 (Dec. 13, 2007)). As is evident from the summary of the Region's response described above, the Region did address the applicability of the Executive Order to its Final Permits. Mr. Lamplot himself acknowledges this fact in his Petition, stating that "the Region has erred in its interpretation of the Executive Order 13132, Federalism" and quoting statements from the Region's Re-

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[42] Section 101(d) states that "[e]xcept as otherwise expressly provided in this chapter, the Administrator of the [EPA] shall administer this chapter." 33 U.S.C. § 1251(d).

[43] The Board also agrees with the Region that Petitioner's arguments regarding the Executive Order – like his earlier statutory authority and preemption arguments – are based on a misinterpretation of the CWA, regulations, and the current status of Nebraska's program. As the Board explained earlier, *see supra* Part IV.B.1.a.ii, the State of Nebraska does not have authority to administer the NPDES program in Indian country, as the State itself has acknowledged. Neither does either Tribe. Thus, under the CWA and its implementing regulations, EPA is the only authority that currently has CWA authority to issue NPDES permits within the Omaha and Winnebago Reservations. In issuing the four NPDES CAFO permits at issue here, the Region is not preempting the State (as the State has no authority) nor is it acting inconsistently with the principles in section 2 of the Executive Order (as Mr. Lamplot argues) or inconsistently with the policymaking criteria of section 3.

sponse to Comments document that discuss the Executive Order. *Id*. at 3. Because it is clear that the Region discussed the implications of Executive Order 13,132 on the permitting decision, the Board reads Mr. Lamplot's procedural challenge as questioning the Region's failure to specifically address *section 2* of the Executive Order, as opposed to discussing the Executive Order as a whole.

As discussed above, *see supra* Part IV.B.2.b, under the NPDES procedural regulations, permit issuers are required to "*[b]riefly* describe and respond to all significant comments on the draft permit * * * raised during the public comment period, or during any hearing." 40 C.F.R. § 124.17(a)(2) (emphasis added); *accord In re Hillman Power Co.*, 10 E.A.D. 673, 696 (EAB 2002); *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 583 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3rd Cir. 1999). Also as mentioned above, the Board has previously explained that "'[t]his regulation does not require a [permit issuer] to respond to each comment in an individualized manner,' nor does it require the permit issuer's response 'to be of the same length or level of detail as the comment.'" *In re Kendall New Century Dev.*, 11 E.A.D. 40, 50 (EAB 2003) (quoting *NE Hub*, 7 E.A.D. at 583); *accord Hillman*, 10 E.A.D. at 696 n.20. Rather, the Region must "address[] the *essence* of each [significant] issue raised," *NE Hub*, 7 E.A.D. at 583 (emphasis added), and should be "thorough enough to adequately encompass the issues raised" by the commenter, *Hillman*, 10 E.A.D. at 696-97 & n.20.

Upon consideration, the Board concludes that the Region satisfied its obligation under section 124.17 in responding to this particular comment in its Response to Comments document. In addressing Mr. Lamplot's comment, the Region did address the applicability of Executive Order 13,132 to its Final Permits. A determination that an agency action is consistent with an Executive order as a whole necessarily encompasses a determination that the action is consistent with the individual provisions of the Executive order.[44] Thus, even though the Region's response was relatively brief and did not directly respond to the commenter's reference to section 2, the Region's discussion addressing its Final Permits' consistency with Executive Order 13,132 as a whole succinctly addressed the essence of and adequately encompassed the issue Petitioner raised. Petitioner has failed to

[44] This is particularly true in this case. Section 3 of Executive Order 13,132 explicitly incorporates section 2 within its requirements, stating that, "*[i]n addition to adhering to the fundamental federalism principles set forth in section 2*, [federal] agencies shall adhere, to the extent permitted by law, to the following [enumerated] criteria." Exec. Order No. 13,132, 64 Fed. Reg. 43,255, 43,256 (Aug. 10, 1999) (emphasis added). Such statement makes sense in light of the fact that section 2 contains a list of federalism "principles" whereas section 3 contains the criteria that agencies should apply when implementing actions that have federalism implications. Thus, the Region's discussion of its compliance with section 3 necessarily included a consideration of section 2 principles. By addressing the more expansive section 3, the Region's discussion did therefore "adequately encompass the issues raised" by Mr. Lamplot concerning section 2.

demonstrate that the Region clearly erred in its response. *See, e.g.*, *In re Peabody W. Coal Co.*, 12 E.A.D. 22, 50 n.69 (EAB 2005) (where record shows permit issuer evaluated issue, even while failing to directly respond to particular comment on that issue, remand is not appropriate); *Kendall*, 11 E.A.D. at 50 n.13 (explaining that, while a more direct response might have been helpful, "the absence of such a direct response is not grounds for granting review under the circumstances of this case where [the permit issuer's] general explanation in its response to comments was sufficient to articulate the basis of is decision").

5. *Have Petitioners Shown That the Hawaii v. Office of Hawaiian Affairs Case Applies Here and Demonstrates That the Region Clearly Erred in Issuing the Final Permits?*

In their joint addendum, Petitioners raise an additional issue. They allege that the Supreme Court's decision in *Hawaii v. Office of Hawaiian Affairs* (*OHA*), 129 S. Ct. 1436 (2009), supports their argument that the Region erred in issuing the Final Permits. *See generally* Joint Addendum.

In *OHA*, the U.S. Supreme Court considered the question of whether Congress, in issuing a 1993 joint resolution ("Apology Resolution") that, in part, apologized to the native Hawaiians for the federal government's role in overthrowing the Kingdom of Hawai'i in 1893, "strip[ped] Hawaii of its sovereign authority to sell, exchange, or transfer lands that the United States held in absolute fee and granted to Hawaii, effective upon its admission into the Union." 129 S. Ct. at 1443 (quotations and citations omitted). The Hawai'i Supreme Court had concluded that several "whereas" clauses prefacing the Apology Resolution had in fact altered the State's sovereign authority to alienate such lands. *Id.* at 1444 (citing *Office of Hawaiian Affairs v. Hous. & Comty. Dev. Corp. of Haw.*, 177 P.3d 884, 901 (Haw. 2008)). The U.S. Supreme Court disagreed with this conclusion for three reasons.

The U.S. Supreme Court first explained that the "whereas" clauses were nonsubstantive and could not be given operative effect. *Id*. at 1444. The Court next noted that even if the "whereas" clauses were interpreted to have some kind of legal effect, they could not be read to "repeal by implication" the Hawaiian Admission Act of 1959, Pub. L. No. 86-3, 73 Stat. 4 (1959), because "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest." *Id*. at 1445 (quoting *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007)). Third, the Court explained that its prior statements concluding that "Congress cannot, after statehood, reserve or convey submerged lands that have already been bestowed upon a [s]tate," apply even more strongly to the public lands of a state. *Id*. (quoting *Idaho v. United States*, 533 U.S. 262, 280 n.9 (2001)). For these reasons, the Court concluded that it was inappropriate to "read the Apology Resolution's non-

substantive 'whereas' clauses to create a retroactive 'cloud' on the title that Congress granted to the State of Hawaii in 1959." *Id*. at 1445.

Petitioners argue that the U.S. Supreme Court's third line of reasoning applies to the facts and circumstances of this case and "prevent[s] EPA from claiming a federal statute can allow it to encroach or attempt to remove land from state jurisdiction."[45] Joint Addendum at 2. According to Petitioners, "the Indian title to all lands in the Territory of Nebraska had been extinguished prior to the admission of Nebraska as a State into the Union." *Id*. at 12. Based on this premise, Petitioners assert that, because "fee remained with the United States" for these alleged "prior Indian lands" within the Nebraska Territory, Nebraska obtained fee title to all those public lands when it was granted statehood. *Id*.

In response, the Region contends that *OHA* "has no bearing on these appeals or on EPA's authority to implement the NPDES in Indian country." Region's Surreply at 2. The Region argues that *OHA* addresses "unique circumstances surrounding the history of the State of Hawaii and its entry into the Union" and the relevance of the Apology Resolution on the rights and interest of that state and that "the history and treatment of Indian tribes and Indian country in Nebraska[] are entirely distinguishable." *Id*. For the following reasons, the Board agrees with the Region's conclusion and is unpersuaded by Petitioners' arguments concerning the applicability of *OHA* here.

As the Region correctly points out, the outcome in *OHA* is based on the underlying fact that the United States acquired title to the lands in Hawaii in "absolute fee" and that this land passed to the State in absolute fee upon its admission into the Union. *Id*. at 3-4, 5 (citing 129 S. Ct. at 1440). In attempting to apply *OHA* here, Petitioners argue, as they must,[46] that the Omaha and Winnebago Reservations were somehow disestablished *prior* to, or at the time of, Nebraska statehood so that, when the United States passed title to public lands to the State upon statehood in 1867, the State acquired the lands in fee. All of Petitioners' arguments attempting to demonstrate that these Reservations were somehow disestablished prior to 1867 lack merit.

Petitioners attempt to argue that even if the Reservations were in existence just prior to Nebraska statehood, the Reservations became disestablished through implied repeal allegedly accomplished through Nebraska's enabling and admission statutes. Petitioners first assert that the congressional acts that created Nebraska's statehood – the Nebraska Enabling Act and the Nebraska Admission

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[45] The federal statute to which Petitioners refer is the CWA. *See* Joint Addendum at 12-15.

[46] If the Reservations were not disestablished at the time of statehood, the United States could not have passed fee title to the State of Nebraska, and therefore, the Supreme Court's third line of reasoning in *OHA* would not be applicable here as Petitioners claim.

Act[47] – did not contain any conditions, restrictions, or exceptions "pertaining to Indian reservations, Indian country, or Indian lands," unlike the admission acts that granted statehood to other states, such as Kansas, South Dakota, North Dakota, Montana, and Washington, which did contain various statements that explicitly excepted out Indian lands from the land granted to them by Congress. *Id*. at 7. Petitioners note that the earlier Kansas-Nebraska Act, which established the territories of Nebraska and Kansas, did specifically except out Indian lands.[48] *Id*. (referring to Act to Organize the Territories of Nebraska and Kansas, ch. 59, 10 Stat. 277 (1854)).

Petitioners' argument is essentially based on some type of "implied repeal" or "repeal by omission" theory. Petitioners, however, fail to recognize two fundamental legal canons of construction. First, although "Congress may abrogate Indian treaty rights, [] it must clearly express its intent to do so." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999); *accord United States v. Dion*, 476 U.S. 734, 740 (1986) (requiring "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty"); *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968). For this reason, the Supreme Court declined to read Minnesota's admission act, which included no mention of Indian treaty rights, to abrogate a treaty with the Chippewa. *Mille Lacs Band*, 526 U.S. at 203 (construing Act of May 11, 1858, 11 Stat. 285). Second, Congress's "intent to authorize the extinguishment of Indian title must be 'plain and unambiguous'" and should not be "'lightly implied.'" *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 276 (1985) (quoting *United States ex rel. Hualpai Indians v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 346 (1941)); *see also Mattz v. Arnett*, 412 U.S. 481, 505 (1973) (declining to infer an intent to extinguish the reservation); *see also OHA*, 129 S. Ct. at 1445 (noting that legislative "repeals by implication are not favored" and that clear evidence of the legislature's intent is necessary (quoting *Nat'l Assn. of Homebuilders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007)). Petitioners do not point to any evidence of

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[47] Nebraska Enabling Act, ch. 59, 13 Stat. 47 (1864); Nebraska Admission Act, ch. 36, 14 Stat. 391 (1867).

[48] Shortly after the United States agreed to reserve land for the Omaha Tribe, Congress created the territories of Nebraska and Kansas through the passage of what is commonly known as the Kansas-Nebraska Act of 1854. 10 Stat. 277. The Kansas-Nebraska Act of 1854 essentially excepted "property [] pertaining [to] the Indians" in the two territories. *Id*. § 1 (Territory of Nebraska); *id*. § 19 (Territory of Kansas). The Kansas-Nebraska Act further stated that treaties with "the Indian tribes inhabiting the territories embraced within th[is Act] shall be faithfully and rigidly observed." *Id*. § 37.

In 1867, two years after the establishment of the Winnebago Reservation, Nebraska was admitted into the Union as a state. Nebraska Admission Act § 1; Proclamation of President, 14 Stat. 820 (Mar. 1, 1867). The Nebraska Admission Act did not explicitly mention any of the tribes or reservations located within the new state, except for a brief mention of voting rights that could "except[] Indians not taxed." § 3.

clear intent in the statutes, instead relying on the theory that Congress somehow implicitly disestablished the Reservations.

Moreover, Petitioners' arguments on this point are further contradicted by the fact that Congress itself – subsequent to Nebraska's statehood in 1867 – has recognized the existence of the Omaha and Winnebago Reservations on several occasions. *See, e.g.*, Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended in scattered sections, including in relevant part, at 18 U.S.C. § 1162(a)) (granting the State of Nebraska "jurisdiction over offenses committed by or against Indians in the areas of Indian country" within the state, which has been interpreted by the State and the federal government to include both the Omaha and the Winnebago Reservations); Act of Aug. 7, 1882, ch. 434, 22 Stat. 341 (authorizing survey and appraisal of certain lands on the Omaha Reservation); Act of June 10, 1872, ch. 436, 17 Stat. 391 (authorizing survey of portion of Omaha Reservation). Petitioners, in fact, cite one of those statutes as part of their argument. *E.g.*, Joint Addendum at 8-9 (citing Act of Aug. 7, 1882, 22 Stat. at 341). If Congress had indeed disestablished these Reservations, then it would not have continued to refer to their existence for the next 100 years. In addition, as noted above, the United States currently recognizes the existence of both the Omaha and the Winnebago Reservations as does the State of Nebraska. *See supra* Parts III.A and IV.B.1.b; *see also, e.g.*, *Tyndall v. Gunter*, 840 F.2d 617 (8th Cir. 1988) (providing history of Nebraska's retrocession *in 1970* of jurisdiction back to the United States for crimes committed by or against Indians on the Omaha Reservation).

In light of these facts and legal principles, the Board is not persuaded by Petitioners' arguments that inconsistencies between the Kansas-Nebraska Act, the Nebraska Enabling Act, the Nebraska Admission Act, and other state admission statutes somehow negated the treaties between the United States and the Omaha and Winnebago Tribes, thereby leading to the disestablisment of the Omaha and Winnebago Reservations prior to, or at the time of, the State's admission into the Union in 1867.

Petitioners' other arguments for disestablishment prior to statehood are even less persuasive. Petitioners next assert that article 6 of the 1854 treaty between the United States and the Omaha Indians "extinguished Indian rights to the lands in that treaty, and allowed for the state to have an authority over those lands." Joint Addendum at 8. The contention that any article of the 1854 treaty - *the very treaty that established the Omaha Reservation* - somehow disestablished the Reservation is completely illogical. *See* 1854 Treaty with Omaha Tribe, arts. 1, 4, 10 Stat. at 1043-44.

Petitioners next assert that, in the 1865 Treaty between the United States and the Omaha Tribe, "Congress never redefined exterior boundaries of the Omaha reservation, leaving it disestablished." Joint Addendum at 8. The treaty to

which Petitioners refer is the one in which the Tribe ceded a portion of its Reservation to the United States for the creation of the Winnebago Reservation and in which the "remaining portion" of the Omaha Reservation was intended to be divided and assigned "in severalty" among the members of the Tribe.[49] 1865 Treaty with Omaha Tribe, art. IV, 14 Stat. at 668. While Petitioners' arguments on this point are not altogether clear, Petitioners seem to be suggesting that because the 1865 Treaty authorized the land within the Omaha Reservation to be divided in severalty, this somehow led to its disestablishment. Petitioners' arguments suggest that Petitioners are confusing and conflating two separate issues: The status of property rights of individual parcels of land within the Omaha Reservation and the existence of the Reservation itself. The fact that the parcels within the exterior boundaries of the Omaha Reservation may have been divided in severalty does not, in and of itself, change the outer boundaries of the Reservation or its existence.[50] Accordingly, the Board is unpersuaded by this assertion.

Petitioners' next set of contentions, that several treaties and acts of Congress stating that land assignments for Winnebago tribal members could be made via land patents, via allotments, or in severalty somehow demonstrate that the Winnebago Reservation was disestablished, similarly illustrates Petitioners' confusion between individual parcel status within the Winnebago Reservation and the status of the Reservation itself and are likewise unconvincing. *See* Joint Addendum at 9-10 (referring to Treaty between the United States and the Winnebago Tribe of Indians, Feb. 27, 1855, 10 Stat. 1172; Treaty between the United States and the Winnebago Tribe of Indians, Apr. 15, 1859, 12 Stat. 1101; Act for the Removal of the Winnebago Indians, and for the Sale of their Reservation in Minnesota for their Benefit ("1863 Winnebago Act"), ch. 53, 12 Stat. 658 (1863)). Petitioners further assert that section 5 of the 1863 Winnebago Act, which states that "[s]aid Indians shall be subject to the laws of the United States, and to the criminal laws of the State or Territory in which they may happen to reside," demonstrates that "the Indian rights described in the Kansas-Nebraska Act had been extinguished." *Id*. at 10 (quoting § 5, 12 Stat. at 660). In light of the fact that the United States entered into a treaty with the Winnebago Tribe two years later establishing its current Reservation in *Nebraska*, the location at issue in the present case, Petitioners' reliance on the 1863 Winnebago Act removing the Winnebago Tribe from *Minnesota* is unconvincing. *See* 1865 Treaty with Winnebago Tribe, 14 Stat. at 671.

Finally, in further support of their arguments that Congress had somehow disestablished the Omaha and Winnebago Reservations prior to Nebraska state-

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[49] Some of the land was also intended to be set aside for the "occupancy and use of the agency for said Indians." 1865 Treaty with Omaha Tribe, art. IV, 14 Stat. at 668.

[50] This contention is similar to the arguments made earlier by Petitioners that were already addressed. *See supra* Part IV.B.2.a.

hood, Petitioners cite to an 1882 act that "provide[d] for the sale of a part of the reservation of the Omaha [T]ribe of Indians in the State of Nebraska," Joint Addendum at 8 (quoting Act of Aug. 7, 1882, 22 Stat. at 341), and to the General Allotment Act of 1887, ch. 119, 24 Stat. 388, and its application to the Winnebago Reservation, *id*. at 10. Nothing in those statutes suggests that either the Omaha or Winnebago Reservations were disestablished.[51]

Accordingly, for the foregoing reasons, the Board concludes that Petitioners' theories that the Omaha and Winnebago Reservations had been extinguished prior to, or as a result of, Nebraska statehood completely lack merit. Consequently, Petitioners' argument that the *OHA* case is applicable here and somehow demonstrates that the Region clearly erred in issuing its Final Permits is also unconvincing.[52]

V. *CONCLUSION AND ORDER*

For the reasons discussed above, the Board treats the Petitions as timely filed. The Board further concludes that Petitioners have failed to demonstrate that the Region clearly erred or abused its discretion by issuing the Final Permits. Accordingly, the Board denies review of the petitions.

So ordered.

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[51] In fact, the 1882 act specifically references the Omaha Reservation, thereby indicating its continued existence.

[52] Insofar as Petitioners' arguments in their Joint Addendum challenge the Agency's part 123 regulations, the Board has already addressed this claim. *See supra* Part IV.B.3.