

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In re: Buena Vista Rancheria)
Wastewater Treatment Plant)

) NPDES Appeal Nos. 10-05 - 10-07 & 10-13

) **EPA Region IX's Opposition to Petitioner**
) **Amador County's Motion for Leave to File**
) **Clarification Response**

) NPDES Permit No. CA 0049675)
_____)

On October 7, 2010, the County of Amador (the "County"), one of the Petitioners in these appeals, moved the Environmental Appeals Board (the "EAB" or the "Board") for leave to file a reply brief (the "Reply Motion") in support of its Petition for Review (the "Petition"). On October 18, 2010, EPA Region IX opposed that motion (the "Reply Opposition") arguing that that County had failed to identify any new issue raised in the Region's Response to Petitions for Review (the "Response to Petitions") that would warrant an opportunity for reply. The County now moves the Board (the "Motion") for leave to file an additional brief in response to the Region's Reply Opposition. As described below, the County's current Motion asserts two principal points, both of which fundamentally mischaracterize the Region's arguments in its Reply Opposition and thereby create issues that are not in dispute between the parties. To assist the Board by limiting the scope of matters at issue in this motion practice, EPA now files this Opposition to the County's Motion.

I. The Indian Reservation Status of the Buena Vista Rancheria

In its current Motion, the County first addresses an argument – which it mistakenly believes the Region has proffered – that the County should be precluded from asserting that the Buena Vista Rancheria is not an Indian reservation or Indian country for purposes of federal

Clean Water Act permitting jurisdiction.¹ The Region acknowledges – and has consistently done so – that the County disputes the reservation status of the Rancheria.² The County raised this issue in comments on the draft permit to the Rancheria as well as in its Petition.³ What the Region does dispute is the County’s assertion in its Reply Motion that the Region’s Response to Petitions somehow raises a new issue regarding the Rancheria’s status that justifies permissive filing of the County’s proposed reply brief.

In its response to comment document, the Region relied on valid federal court precedent adjudicating the Indian country status of the Rancheria. *Hardwick v. United States*, No. C-79-1710 SW (N.D. Cal. Dec. 22, 1987).⁴ In its Petition, the County declined to provide any additional argument on the relevance or effect of the *Hardwick* judgment.⁵ Having no additional arguments to address, the Region again cited *Hardwick* in its Response to Petitions as the relevant federal court precedent on the point in dispute – and the Region’s position continues to

¹ See Motion at 2-3.

² See Response to Petitions at 15-17; Reply Opposition at 3, 5 n.6, 6-7.

³ See Petition at 2.

⁴ See AR at 76-77 (RTC at 30-31, Response to Comments 11a and 11b); Response to Petitions at 16-17; Reply Opposition at 6-7.

⁵ In its current Motion, the County asserts that it did address *Hardwick* in its Petition. See Motion at 3. In this regard, the County points to a discussion of *Hardwick* in a footnote to an exhibit attached to the Petition. *Id.* That exhibit is a copy of the March 17, 2006 comment letter submitted by the County to the Region in connection with the draft permit to the Rancheria. The Region notes that the appearance of an argument in an exhibit to a petition for review, but not addressed in the petition itself, does not appear to meet the Board’s “minimum standard of specificity.” (EAB Practice Manual at 42 (September, 2010)). Even if it did, the Region also notes that the mere recitation of comments on a draft permit – in this case by literally attaching the prior comment without any explanation of why the Region’s response to comment and reliance on *Hardwick* is inadequate – does not properly present an issue for review by the Board. See, e.g., *In re: NPDES Permit for Wastewater Treatment Facility of Union Township, Michigan*, NPDES Appeal Nos. 00-26 & 00-28, slip op. at 10-11 (EAB January 23, 2001) (Order Denying Petitions for Review). More to the point here, however, is that the County’s acknowledgment that it was aware of and addressed *Hardwick* in its Petition affirms the Region’s position that the citation to *Hardwick* in the Response to Petitions raised no new issue to which the County could assert a right to reply. The County had a clear opportunity to address the Region’s response to comment and argue the merits and effect of the *Hardwick* judgment in its Petition.

be that its reliance on unequivocal federal court precedent adjudicating that the Rancheria is Indian country presents no error or other basis for EAB review.⁶

In its Reply Motion, the County attempts to raise several arguments regarding *Hardwick* that it failed to assert in its Petition.⁷ The Region argues in its Reply Opposition that the County had a full opportunity to raise these issues in its Petition and declined to do so. Nothing in the Region's Response to Petitions raises a new argument regarding *Hardwick* or otherwise warrants an opportunity for the County to reply with regard to that judgment. This continues to be the Region's position. For purposes of this Opposition, however, the Region's main point is that it did not in its Reply Opposition (or elsewhere) assert that that County had failed to preserve its more general allegation questioning the Indian reservation status of the Rancheria. Because there is no dispute on that point, the County's current Motion presents no issue for the Board to decide and should be rejected.

II. Collateral Estoppel and the County's Prior Adjudicated Commitment to Treat the Buena Vista Rancheria as an Indian Reservation

The County devotes the remainder of its current Motion to addressing issues relating to collateral estoppel associated with the County's prior commitment in the stipulated judgment in *Hardwick* to treat the Buena Vista Rancheria as an Indian reservation.⁸ In response, the Region simply notes that while the applicability of collateral estoppel may be an open issue in these circumstances, the Region has not argued that the County's participation in *Hardwick* estops it as a legal matter from asserting a contrary view in these proceedings. The Region does continue to

⁶ See Response to Petitions at 16-17.

⁷ The Region notes that the County's arguments regarding *Hardwick* are based on misinterpretations of federal law. As stated in the Region's Reply Opposition, should the Board decide that additional information regarding the County's arguments would assist the Board in deciding these appeals, the Region respectfully requests an opportunity to submit further briefing on this issue. See Reply Opposition at 7.


⁸ See Motion at 3-6.

believe that the evident inconsistencies in the County's positions are of significance in these appeals and that the County's commitment to treat the Rancheria as an Indian reservation is relevant to the Board's consideration of whether the County's contrary argument in these proceedings presents an issue meeting the standard for Board review. However, because the Region has raised no legal issue of collateral estoppel, the County's current Motion presents no issue for the Board to decide and should be denied.

For the foregoing reasons, the Region respectfully requests that the EAB deny the County's Motion for Leave to File Clarification Response.

Respectfully submitted,

Dated: November 3, 2010



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CERTIFICATE OF SERVICE

I hereby certify that the original EPA Region IX's Opposition to Petitioner Amador County's Motion for Leave to File Clarification Response (signed copy) *In the Matter of Buena Vista Rancheria Wastewater Treatment Plant, NPDES Appeal No. 10-05 - 10-07 & 10-13*, were filed electronically with the Environmental Appeals Board and copies were e-mailed to:

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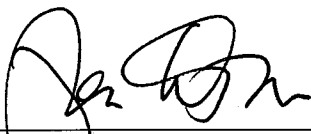
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