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13 BEFORE THE ENVIRONMENTAL APPEALS BOARD
14 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
15 WASHINGTON, D.C.
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18 In re: Buena Vista Rancheria) NPDES Appeal Nos. 10-05 – 10-07 & 10-13
19 Wastewater Treatment Plant)
20)
21) **MOTION FOR LEAVE TO FILE**
22 NPDES Permit No. CA 0049675) **CLARIFICATION RESPONSE**
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19 Petitioner Amador County respectfully requests permission to file this brief
20 response in order to correct the record with respect to certain misrepresentations in EPA
21 Region IX's Opposition to Petitioner's Motion for Leave to File Reply Brief. Region IX
22 makes two unsupported claims that go directly to the question whether (1) issues raised in
23 Amador County's Reply Brief were actually raised in its Petition for Review, and (2)
24 whether Amador County can be collaterally estopped from asserting that Buena Vista
25 Rancheria is not an Indian reservation. First, EPA attempts to persuade EAB that
26 Amador County's Reply Brief must be rejected because the issues raised in the Reply
27 were not raised in the Petition for Review. Second, EPA now essentially concedes that
28 Amador County's assertion that Buena Vista Rancheria is not an Indian reservation is

1 accurate, but that Amador County should nonetheless be collaterally estopped from
2 relying on that fact. Since these misrepresentations could directly impact whether EAB
3 grants Amador County's petition for review or its motion to file a reply brief, not to
4 mention EAB's ultimate determination regarding EPA's jurisdiction over Buena Vista
5 Rancheria, Amador County must respectfully request permission to file this short
6 clarification response so that the record can be corrected and EAB will not be misled.

7 1. After correcting an "inadvertent" citation to a non-existent quote in their Response to
8 Amador County's Petition for Review, EPA now concedes that it can *only* have
9 jurisdiction over fee lands when they are within the exterior boundaries of an *Indian*
10 *reservation*—which excludes the fee lands at issue herein. The reservation status of
11 the Buena Vista Rancheria has been a central focus of these proceedings from their
12 inception and has been raised by Amador County at every opportunity.

13 In response to Petitioner Amador County's Reply, EPA filed a Corrected
14 Response claiming that when explaining the legal significance of *Circle T Feedlot* they
15 "inadvertently" quoted their own brief submitted in the *Circle T Feedlot* case instead of
16 EAB's actual *Circle T Feedlot* decision. Having now backtracked from the previous
17 position that *Circle T Feedlot* declared that *Mille Lacs* was not limited to finding that
18 EPA has jurisdiction over trust lands, EPA was forced to concede that *Circle T Feedlot*
19 merely affirmed that EPA has jurisdiction over fee lands located within the exterior
20 boundaries of an Indian reservation.

21 Therefore, the question before EAB is clearly whether Buena Vista Rancheria
22 (alternatively "BVR") is an *Indian reservation* over which EPA has jurisdiction. EPA
23 now claims that Petitioner Amador County cannot raise this issue because it was not
24 raised in Petitioner's original Petition for Review. The claim that the reservation status
25 of BVR was not raised in the original Amador County Petition is simply not true and
26 once again raises a troubling predilection by the EPA to distort or mischaracterize matters
27 related to this case.

28 Petitioner Amador County has no intention of raising additional arguments or facts
in response to the Sur-Reply request of the EPA, but rather respectfully requests the
opportunity to merely correct the record and specify those portions of Petitioner's

1 Petition for Review where Petitioner noted that Buena Vista Rancheria is not an Indian
2 reservation—and that the 1987 *Tillie Hardwick* stipulation signed by Amador County did
3 not and could not somehow convert the fee-owned BVR into a reservation.

4 In particular, Amador County clearly asserts that BVR is not an Indian reservation
5 in Exhibit 1 of its Petition for Review. (See Pet. for Rev., Exh. 1, p. 1 [“The EPA does
6 not have jurisdiction over the proposed BVR wastewater treatment plant *because the*
7 *Buena Vista Rancheria is not a reservation*, is not allotted lands, and is not Indian
8 country”], and p. 2 [“BVR is plainly *not a reservation* or an Indian allotment which
9 would require that the land be controlled and titled by the United States”]. Emphasis
10 added.) Notwithstanding EPA’s complete misrepresentation, Exhibit 1 is clearly
11 referenced on p. 2, ln. 14 of Amador County’s Petition for Review, where Amador
12 County reiterates its objection to EPA’s assertion of jurisdiction for the reasons cited in
13 Exhibit 1; i.e., that BVR is not an Indian reservation.

14 Exhibit 1 of Petitioner Amador County’s Petition for Review also directly
15 addresses the 1987 *Tillie Hardwick* stipulation, correctly pointing out that the United
16 States was not a party to the 1987 stipulation, and that it is legally impossible for Amador
17 County and individual plaintiffs to transform fee land into an Indian reservation. (See
18 Pet. for Rev., Exh. 1, p. 4 n. 1.)

19 2. Collateral estoppel does not bar Amador County’s argument in its Petition
20 for Review or Reply Brief.

21 EPA’s Opposition to Amador County’s proposed Reply Brief basically admits in
22 footnote 11 that Amador County and individual plaintiffs could not establish the status of
23 BVR in the 1987 stipulation (“As for the County’s role, the fact that it explicitly
24 stipulated to the court’s judgment in *Hardwick*...is significant *not for creating the legal*
25 *status of the Rancheria – which the Region agrees the County has no power to do...*”
26 (emphasis added)), and also acknowledges that a federal court cannot create an Indian
27 reservation on its own initiative because that authority is expressly reserved to Congress
28 (“Nowhere does the Region’s Response Brief suggest that is was the district court...that
was establishing the Rancheria’s status in the first instance.”). However, while

1 conceding the merits of Amador County's argument, EPA also asserts that Petitioner
2 should be barred from making such an argument because its current position is
3 inconsistent with signing the 1987 *Tillie Hardwick* stipulation almost quarter century ago.

4 The principle of collateral estoppel, however—which EPA essentially attempts to
5 assert against Petitioner Amador County—cannot apply in this instance. As EPA
6 acknowledges, the status the BVR fee property is purely a matter of law. Federal courts
7 have consistently held that collateral estoppel does not apply to issues of law when the
8 two actions involve claims that are substantially unrelated *or* a new determination of the
9 legal issue is warranted in order to take into account an intervening change in the
10 applicable legal context. (*Burlington Railroad Co. v. Hyundai Merchant Marine Co.* (3d
11 Cir. 1995) 63 F.3d 1227, 1229; *Segal v. American Tel. & Tel.* (9th Cir. 1979) 606 F.2d
12 842, 845; *Pharmaceutical Care Mgmt. Assoc. v. Fenty* (D.C. Cir. 2008) 522 F.3d 443,
13 446. See also *Restatement (Second) of Judgments*, § 28 (1982), further noting that
14 collateral estoppel does not apply in situations where either potential adverse impacts on
15 the interests of persons not themselves parties to the initial action could result *or* it was
16 not sufficiently foreseeable at the time of the initial action that the issue would arise in
17 the context of a subsequent action.) Federal courts have also generally held that
18 collateral estoppel applies to a much lesser degree as to matters of law as opposed to fact.
19 (See *Segal, supra*, “Issue preclusion has never been applied to issues of law with the
20 same rigor as to issues of fact”; and *Fenty, supra*, “Collateral estoppel does not apply
21 with the same force to unmixed questions of law”.)

22 Here, the claims at issue in the 1987 *Tillie Hardwick* stipulation are light years
23 removed from the claims at issue in this petition for review. The 1987 stipulation
24 involved a state tax controversy to which the United States was not a party. This petition
25 for review deals with EPA's jurisdiction to issue an NPDES permit under the Clean
26 Water Act. The claims are not just “substantially” unrelated; they are utterly, absolutely
27 unrelated.
28

1 Moreover, the legal issue in controversy in this petition for review; i.e., whether
2 BVR is an Indian reservation over which EPA has jurisdiction, was never determined at
3 all in the 1987 stipulation because, as EPA concedes in footnote 11 of its Sur-Reply,
4 neither the parties to the 1987 stipulation nor the federal district court had the
5 constitutional authority to confer any such status on BVR. Additionally, collateral
6 estoppel cannot apply given the potential adverse impact on the United States; i.e.,
7 usurpation of Congress's plenary authority to confer rights and responsibilities upon
8 Indian tribes, when the United States was not a party to the 1987 stipulation.¹ Nor was it
9 foreseeable in 1987 that issues pertaining to a state tax controversy would arise again a
10 quarter-century later in the context of the scope of EPA jurisdiction.

11 Beyond that, temporarily setting aside the uncontested fact that the status of the
12 BVR fee lands was never determined whatsoever in the 1987 stipulation, collateral
13 estoppel is flatly *inapplicable* in situations where the issue is, as here, "one of law and
14 treating it as conclusively determined would inappropriately foreclose opportunities for
15 obtaining reconsideration of the legal rule upon which it was based." (*Fenty, supra*, 522
16 F.3d at 446-47; *Chicago Truck Drivers Union Pension Fund v. Century Motor Freight,*
17 *Inc.* (7th Cir. 1997) 125 F.3d 526, 531. See also *Restatement (Second) of Judgments*, §
18 29 subds. (5) and (7) (1982), explaining that a party is not precluded from relitigating an
19 issue with a different party when the prior determination was based on a compromise
20 verdict or finding or when preclusion would foreclose opportunities for reconsideration
21 of the legal rule upon which the prior determination was based.) Here, Amador County
22 does not even seek *reconsideration* of an issue because the status of BVR's fee lands was
23 never determined in the 1987 stipulation—which as a stipulation for entry of judgment
24 was also clearly a compromise between the parties. Under these circumstances, collateral
25 estoppel cannot apply and Amador County is in no way prohibited from advancing its

26 ¹ Moreover, collateral estoppel cannot apply here because the State of California was not a party to any of
27 the *Tillie Hardwick* litigation (or the 1987 stipulation), either. If, as Amador County strenuously asserts, EPA lacks
28 jurisdiction over BVR, then the State of California would have jurisdiction over NPDES permitting at BVR. EPA's
attempt to use proceedings to which California was not a party as a way of depriving the State of jurisdiction would
have an enormously prejudicial impact upon the State of California.

1 position, to which EPA now largely acquiesces, that BVR is not an Indian reservation.
2 Accordingly, EPA cannot have jurisdiction over the Buena Vista Rancheria.

3 October 25, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is 1415 L Street, Suite 1200, Sacramento, CA 95814.

On, October 25, 2010, I caused the foregoing document(s) described as **MOTION FOR LEAVE TO FILE CLARIFICATION RESPONSE** to be served on the individual(s) listed below as indicated:

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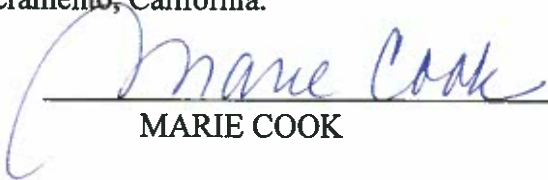
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(VIA E-MAIL SERVICE) By electronically transmitting these documents in Adobe PDF format to the e-mail address(es) listed above.

Executed October 25, 2010, at Sacramento, California.


MARIE COOK