

I. Introduction

Petitioner Ione Band of Miwok Indians ("Tribe") opposes the EPA's proposed issuance of a Notice to Proceed ("NTP") for the proposed Buena Vista Rancheria casino project and hereby moves the Environmental Appeals Board to stay the issuance of any such NTP. The Tribe's petition (and the other parties' petitions) raise issues regarding the adequacy and legality of the processes which led to the issuance of the Memorandum of Agreement, and through which the proposed NTP would be issued. The Board should stay the issuance of any NTP until the proceedings before the Board are completed and any appeals therefrom have been exhausted.

II. The Board Should Stay The Issuance Of Any Notice To Proceed

The July 5, 2011 letter from Jo Ann Asami, Assistant Regional Counsel, EPA Region 9, to the Board states that, because of certain developments, U.S. EPA Region 9 ("Region") "intend[s] to issue a NTP to the [Buena Vista Rancheria] no sooner than 21 days from the date of this letter[,]" i.e., no sooner than July 26, 2011. *See* Region 9 Letter p.3, attached as Exhibit A to Declaration of William Wood filed herewith. Those developments are (1) the submission of field work under an Archaeological Testing Program ("ATP") established under the Memorandum of Agreement among the Region and other parties, and (2) a letter from Credit Suisse Securities regarding proposed financing for the Buena Vista casino project. *Id.* at pp. 2-3. But neither development justifies issuance of the proposed NTP, which is premature at this point, and the Board's refusal to stay the issuance of any NTP would violate EPA regulations, the Tribe's due process rights, and the Administrative Procedure Act.

A. The Submission Of The Field Work Under The Archaeological Testing Program Does Not Provide A Basis For Issuing The NTP; The Law Requires That The NTP Be Stayed

According to its letter, "the Region believes [Buena Vista Rancheria ("BVR")] is eligible for a NTP as contemplated by the governing [Memorandum of Agreement]" "[b]ecause [BVR] has satisfied the condition at Section IV.C of the ... MOA" through the submission of the fieldwork under the ATP. *Id.* at 3. But it is the very adequacy and legality of the process which led to the MOA that the Tribe is challenging here. As explained in the Tribe's petition for review (*see* docket entry # 6), the Region erred by, among other things, failing to properly evaluate the site affected by the proposed project and related construction, concluding that the project site is not part of a single traditional cultural property that is eligible for listing on the National Register of Historic Places, and, as a result, in determining the proposed project's adverse effects. The MOA, which is designed to mitigate impacts to cultural and historical resources at the project site, is the product of a legally-flawed National Historic Preservation Act ("NHPA") consultation process.

The Region should not be allowed to circumvent the Tribe's petition and issue an NTP based on this flawed process and purported satisfaction of a condition in the MOA.¹ If the Board does not grant the Tribe's motion and stay the issuance of any NTP, it would violate the regulations at 40 C.F.R. § 124.60, the Tribe's due process rights and the

¹ The Tribe's petition also noted the Region's failure to conduct proper archaeological testing at the site. *See* Tribe's petition for review pp.6-7. Though some testing has now been done, as evidenced by the submission of the fieldwork, the Tribe is unable to evaluate the adequacy of the fieldwork and prepared report because the map showing the location of the trenches was redacted in the copy of the report provided to the Tribe. *See* Wood Dec. ¶ 3, Exh. B; *see also id.* p. 10 (page 6 of the report) (noting that the "trenches were excavated within a relatively small area").

Administrative Procedure Act, and effectively deny the Tribe the ability to challenge the agency's actions.²

The EPA regulations governing NPDES permits provide that when, as here, an appeal of an initial permit decision is filed under § 124.19, "the force and effect of the contested conditions of the final permit shall be stayed until final agency action under § 124.19(f)" – i.e., until agency review procedures are exhausted. *See* 40 C.F.R. §§ 124.60(b)(1), 124.19(f). Here, those contested conditions include the Region's compliance with the NHPA: the fact sheet for the proposed permit states that "[c]onditions applicable to all NPDES permits are included in accordance with 40 CFR, Part 122," *see* docket # 12.02 (page 44 of Administrative Record), and 40 C.F.R. § 122.49(b) mandates compliance with the NHPA. The Tribe is contesting whether the Region properly complied with the NHPA – including whether the Region properly identified and evaluated the site and, based on that evaluation, adopted appropriate mitigation measures – and thus the conditions of the permit.

As the proposed NTP would apparently allow for "construction of the proposed project consistent with the terms of the NHPA MOA" (*see* Region 9 Letter p.3), and is intended to be the result of the NHPA consultation and MOA, its issuance is a contested permit condition that must be stayed under 40 C.F.R. § 124.60(b)(1). The Region cannot lawfully issue an NTP based on supposed satisfaction of a condition of an MOA that

² In addition the Tribe, Mr. Glen Villa, Jr., has filed a petition challenging the Region's compliance with the National Historic Preservation Act. *See* docket entry no. 1. Mr. Villa has also submitted a letter to the Board requesting that the Region not be allowed to issue an NTP. *See* Wood Dec. ¶ 4, Exh. C ("It is reckless and irresponsible for the ... EPA to issue a NTP when the construction will adversely affect sites ... when the legality of the project is being challenged").

came out of, and is intended to mitigate impacts – namely, the impacts from construction – identified during, the NHPA consultation process that is under challenge.

The Board also has the authority to stay the issuance of any NTP by virtue of its discretion to apply its procedural rules so as to orderly transact its business and promote the ends justice. *See Am. Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539 (1970). *See also* Environmental Appeals Board Practice Manual (Sept. 10) at p.44, *id.* n.48 (citations omitted). Allowing the Region to issue an NTP for construction that would adversely *and irreparably* impact the site for which the evaluation, and resulting measures to mitigate impacts from construction and other activities, are at issue in the Tribe's appeal would violate the Tribe's due process rights and the Administrative Procedure Act. The interests of justice require that the NTP be stayed pending resolution of these agency review proceedings.

B. The Letter From Credit Suisse Securities Does Not Provide A Basis For Issuing The NTP

The second reason the Region gives for issuing the proposed NTP is because of information in a letter from Credit Suisse Securities, the bank that is helping arrange financing for the Buena Vista casino project, regarding conditions in the high-yield bond market. Indeed, the information in this letter is the apparent reason for the Region's proposed issuance of the NTP at this point in time, as the Region's letter states that "in light of th[is] information, the Region believes it appropriate to issue the NTP *expeditiously*."³ Region 9 Letter p.3 (emphasis added).

³ While the Region's letter references "the information contained in the Tribe's letter" to the Region dated May 26, 2011 (attached to the Region's July 5, 2011 letter), the May 26, 2011 letter to the Region simply repeats the information in the Credit Suisse letter. *Compare* Letter from Arnold Samuel, General Counsel, Buena Vista Rancheria of Me-

The Region should not be duped into prematurely and unlawfully issuing an NTP based on unverified, speculative, and irrelevant information about complex and dynamic financial markets in a two-month old letter from a bank that stands to earn substantial fees from the proposed financing. There is no evidence in the May 9, 2011 Credit Suisse letter or the May 26, 2011 BVR letter that the issuance of the NTP will in any way aid BVR in securing the hundreds of millions of dollars in financing it apparently seeks. Perhaps more importantly, there is no evidence that the non-issuance of any NTP is at all hindering BVR's efforts to obtain financing or affecting the project's ultimate viability. *Cf.* Region 9 Letter p.2. As is evident from the Credit Suisse letter (and BVR letter), any supposed risks to project financing are the result of market conditions in the high-yield bond market – outside conditions determined by factors subject to great uncertainty and far beyond the Region's influence.

The Region cannot simply take the information in the Credit Suisse and BVR letters at face value and rely on it to issue an NTP as part of the flawed NHPA consultation process that the Tribe is contesting here. The irreparable damage to the site that would occur if construction were to proceed under the proposed NTP cannot be justified based on any purported aim of helping BVR obtain financing at a favorable or "acceptable interest rate." *See* Credit Suisse letter. In sum, the information in the Credit Suisse letter provides no basis or justification for the issuance of an NTP.

Wuk Indians, to Alexis Strauss, U.S. EPA Region 9 (May 26, 2011), p.2 ¶ 2, *with* Letter from Dean Decker, Credit Suisse Securities, to Thomas Wilmot, Sr., Wilmorite Management Group (May 9, 2011).

C. The Board Should Stay The Issuance Of Any Notice To Proceed Pending The Outcome Of These Proceedings And Ongoing Federal Court Litigation

As the other petitioners have noted (*see* docket nos. 21 and 22; Wood Dec. ¶ 4, Exh. C), ongoing litigation regarding, *inter alia*, the "Indian country" status of the Buena Vista Rancheria – and thus whether the Region even has jurisdiction to issue the permit at issue or any NTP related thereto – provides additional grounds for staying the issuance of any NTP. Petitioners Amador County and Friends of Amador County have lawsuits pending in separate U.S. district courts challenging the "Indian country" status of the Buena Vista Rancheria, an issue which both petitioners also raise here before the Board. *See Amador County v. Salazar*, 640 F.3d 373 (D.C. 2011) (remand to district court), Case No. 1:05-cv-00658RWR (D.D.C.); *Friends of Amador County v. Salazar*, Case No. 2:10-cv-00348-WBS-GGH (E.D. Cal.).⁴ Were the Board or the court in either of these cases to rule (as Amador County and Friends of Amador County ask them to) that the Buena Vista Rancheria is not "Indian country," then the Region would not have jurisdiction to issue an NTP for the proposed project. Thus the interests of promoting judicial efficiency, and promoting justice itself by allowing the petitioners to have the opportunity to be heard before the Board, weigh in favor of staying the issuance of any NTP.⁵

⁴ For the Board's reference, copies of the dockets in the *Amador County* and *Friends of Amador County* litigation are attached as Exhibits D and E, respectively, to the Declaration of William Wood filed herewith.

⁵ Indeed, it is these pending lawsuits regarding the Rancheria's land status and proposed project, and not the non-issuance of any NTP, that "pos[e] a risk to the 'ultimate viability of the project.'" *Cf.* Region 9 Letter p.2. If the Rancheria is determined not be "Indian country," not only would the Region be unable to issue any NTP or permit, but BVR would not be able to operate a casino on the Rancheria, or to construct any facilities there without receiving the necessary approvals from the State of California and Amador County. It is perhaps no coincidence that this litigation has been pending for the same six years during which BVR has apparently been working to secure long-term financing for the proposed project. *See* Credit Suisse letter.

III. Conclusion

The Region should not be able to bypass the Tribe's and other petitioners' pending appeals and issue a Notice to Proceed with construction when the Region's authority to do so, and the legality of the process pursuant to which any NTP would be issued, is being contested before the Board. Nor should the Region be allowed to be misled by speculative and irrelevant information in a letter from a bank that hopes to arrange financing for the proposed project. Instead, the Board should grant the Tribe's request and stay the issuance of any NTP pending completion of the proceedings before the Board, which themselves should be stayed pending the conclusion of the ongoing *Amador County* and *Friends of Amador County* litigation.

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The Region's letter states that the district and appellate court decisions in the *Amador County* litigation "do not reach the merits of the 'Indian land' issue ... [and] do not affect the Region's position regarding the land status of the Buena Vista Rancheria and the Region's authority to issue the NPDES permit for the proposed project." Region 9 Letter p.3. But the Amador County case was remanded to the district court so that it could "assess the merits" of the County's argument regarding the "Indian country" and "Indian lands" status of the Buena Vista Rancheria. *See Amador County*, 640 F.3d at 383-84. It is irrelevant that the Region's position is that "the [Buena Vista] Rancheria is ... Indian country[] for purposes of federal NPDES permitting authority[]" or that "this position is entirely consistent with that of the United States as a whole" Region 9 Letter p.4. Whether that position is correct is at issue in the *Amador County* litigation (which will now be heard on the merits) and the *Friends of Amador County* litigation. If either court, or the Board, were to determine that the Rancheria is not Indian country, there would be no NPDES permitting authority – or jurisdiction to issue any NTP.

Attorneys for Petitioner
IONE BAND OF MIWOK INDIANS

IONE BAND OF MIWOK INDIANS,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

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) NPDES Permit No. CA 0049675 –
) Buena Vista Casino
) Wastewater Treatment Plant
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) **CERTIFICATE OF SERVICE**
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I am over the age of 18 and not a party to this action. I am counsel for the Ione Band of Miwok Indians ("Tribe") in this action. My business address is 400 South Hope Street, 8th Floor, Los Angeles, California 90071.

On July 19, 2011, I caused the documents described as:

**IONE BAND OF MIWOK INDIANS' MOTION TO STAY ISSUANCE OF
PROPOSED NOTICE TO PROCEED;** and

**DECLARATION OF WILLIAM WOOD IN SUPPORT OF IONE BAND OF
MIWOK INDIANS' MOTION TO STAY ISSUANCE OF PROPOSED NOTICE
TO PROCEED**

to be served via electronic mail on the persons listed below.

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I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct. Executed this 19th day of July, 2011, at Los Angeles, California.

/s William Wood
William Wood

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