

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

In Re:

Deseret Power Electric Cooperative,
Bonanza Power Plant,

Permit # V-UO-000004-2019.00

Appeal No. _____

NOTICE OF APPEAL

The UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, by and through its undersigned counsel, hereby seeks review of Environmental Protection Agency Region 8's approval of Permit # V-UO-000004-2019.00, renewing the Air Pollution Control Permit to Operate Deseret Generation and Transmission Co-operative Bonanza Power Plant under Title V, 40 CFR Part 71.

An appellate brief is attached.

Respectfully submitted,

DATE: January 3, 2024

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INTRODUCTION

Pursuant to 40 C.F.R. § 71.11(l), the Ute Indian Tribe of the Uintah and Ouray Reservation (“Ute Indian Tribe” or “Tribe”) hereby petitions the Environmental Appeals Board (“EAB” or “Board”) to review the December 4, 2023, decision by Region 8 of the Environmental Protection Agency (“EPA” or the “Agency”) to renew the federal operating permit for Deseret Generation and Transmission Co-Operative Bonanza Power Plant (“Bonanza Plant”) under subchapter V of the Clean Air Act, 42 U.S.C. §§ 7661-7661f, and 40 C.F.R. pt. 71 (“Title V Permit”). The Bonanza Plant is located on Indian Country lands within the boundaries of the Uintah and Ouray Reservation (“Reservation”), the homeland of the sovereign Ute Indian Tribe. Yet, EPA has approved the Title V Permit renewal without taking the necessary steps to ensure that the environmental and human health concerns of the Ute Indian Tribe are addressed in the Permit conditions, flouting its trust obligation to the Tribe and controverting law, Executive Orders, and its own policies on Environmental Justice (sometimes referred to herein as “EJ”). Because EPA’s decision is inconsistent with federal law and undermines its own policies, EPA’s decision to approve the Title V Permit renewal is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. EPA’s decision should be set aside and the Board should remand the Permit back to EPA to correct these fatal flaws. This Brief contains Attachments that are enumerated in the Table that is attached hereto as **Appendix A**.

STATEMENT ON JURISDICTION

The Ute Indian Tribe participated in the public comment period for the Title V Permit renewal that is the subject of the present Petition. The Ute Indian Tribe also participated in government-to-government consultation with EPA in connection with the challenged action, due to its status as a federally recognized, sovereign Indian tribe whose lands, airspace, and natural

resources are directly impacted by the challenged action. Therefore, the Environmental Appeals Board has jurisdiction to preside over this appeal pursuant to 40 C.F.R. § 124.19(a)(2).

FACTUAL AND PROCEDURAL BACKGROUND

A. HISTORY OF THE BONANZA PLANT, MODIFICATIONS, AND PERMITTING

The chronology of the Bonanza Plant Clean Air Act permitting was unusually lengthy, stretching from its initial Clean Air Act Prevention of Significant Deterioration (“PSD”) construction permit in early 1981, to multiple amendments and permit issuances until the final permit was renewed in December 2023, over more than 40 years later. The Tribe asserts that EPA made numerous errors in that process, contrary to law and the facts, as well as an abuse of discretion that warrant the EAB to review the Agency’s process in the context of the Agency’s unique responsibilities to the Tribe from the United States and the Agency’s own Environmental Justice mandates and the federal government’s Indian trust duties.

The Bonanza Plant is a 500-megawatt coal-fired power plant. It is currently owned and operated by Deseret Power Electric Cooperative (“Deseret Power”) and is located in Indian Country within the Ute Indian Tribe’s Uintah and Ouray Reservation (“Reservation”) in Utah. The Ute Indian Tribe has the second largest land base of any Indian tribe in the United States. The Tribe’s present-day Reservation was reserved by the Tribe in the 1800s and comprises a diminutive portion of the region that served the Tribe’s ancestral homeland from time immemorial. Consequently, protecting Tribal air and water resources on what remains of its homeland is of vital, immeasurable importance to the Tribe. The Bonanza Plant is located on lands that have been conclusively affirmed as “Indian Country” by the Tenth Circuit.¹ Accordingly, this land is subject to concurrent Tribal and federal civil regulatory jurisdiction.

¹ *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985).

From 1998 through 2000, Deseret Power underwent construction of substantial physical modifications to increase the facility's capacity and extend its life, including upgrades for ruggedized rotor installation.² These modifications, which were completed in 2000, resulted in actual, significant increases in air pollution that not only exceeded regulatory limits, but also posed a real and immediate threat to the Tribe's human health and the environment. Emissions of NOx increased between 365 and 1,124 tons per year. Similarly, emissions of SOx increased by upwards of 1,171 tons per year, and the emissions of PM10 increased upwards of 686 tons per year.³

Title V of the Clean Air Act requires that major sources of air pollution "obtain comprehensive operating permits to assure compliance with the requirements of the [Clean Air] Act." *In re: Peabody Western Coal Co.*, CAA Appeal No. 11-01, slip op. at 3, 15 E.A.D (EAB March 13, 2012). Title V permitting for sources within Indian Country initially became effective March 2, 1999, and required that EPA take final action on permit applications by March 2, 2001. 40 C.F.R. §§ 71.4(b)(2) and (3). Yet, despite Title V requirements, Deseret Power was allowed to operate the Bonanza Plant on the Tribe's Reservation without an Air Pollution Control Permit to Operate ("Title V Permit") pursuant to 40 C.F.R Part 71, for over 14 years, in violation of the Clean Air Act (the "CAA" or "Act").

EPA finally issued a Title V Permit in December 2014. This December 2014 Permit was appealed to the Environmental Appeals Board by WildEarth Guardians and the Sierra Club, both of whom alleged that the Title V Permit fell short in environmental terms in bringing the Bonanza Plant into compliance with applicable regulatory requirements associated with Prevention of Significant Deterioration ("PSD") and, as a result, failed to ensure the Bonanza Plant operates in

² See Petition for Review Permit No. V-UO-000004-00.00 at 8, Appeal No. CAA 15-01 (Jan. 7, 2015).

³ Attachment 4 at 2-3, Comments of the Ute Indian Tribe (March 22, 2021).

compliance with Best Available Control Technology (“BACT”).⁴ WildEarth Guardians described the harmful emissions from the Bonanza Plant as follows:

The Plant releases significant amounts of harmful air pollution, including criteria pollutants, hazardous air pollutants, and greenhouse gases. On an annual basis, the Bonanza Power Plant has the potential to emit 1,968 tons of sulfur dioxide (“SO₂”), 9,228 tons of nitrogen oxides (“NO_x”), 574 tons of particulate matter (“PM₁₀”), 68 tons of hazardous air pollutants, and more than three million tons of carbon dioxide (“CO₂”). See AR Docs. 082 at 5 (disclosing potential to emit for criteria pollutants and hazardous air pollutants) and 134 at 8 (disclosing total greenhouse gas emissions). According to the EPA’s Toxic Release Inventory, in 2013 the Plant’s smokestack released 17,259 pounds of sulfuric acid, 17,148 pounds of hydrochloric acid, 7,222 pounds of hydrofluoric acid, 30 pounds of lead, and 1.9 pounds of mercury, as well as other toxic emissions...The Plant currently operates with no add-on controls for NO_x emissions, a baghouse to control particulate matter emissions, and a scrubber to control SO₂ emissions.⁵

These appeals culminated in a 2015 Settlement Agreement among EPA Region 8, WildEarth Guardians, Sierra Club, and Deseret Power, but not the Tribe. The Settlement Agreement established certain conditions attached to Deseret’s Title V Operating Permit for the Bonanza Plant. Pertinent to the present action, the Settlement Agreement established a coal consumption limit at the Bonanza facility. The Parties stipulated that, beginning January 1, 2020, through the end of service, the Bonanza Plant could consume no more than 20,000,000 short tons of coal.⁶ This limit could be lifted upon the installation and operation of selective catalytic prevention technology (“SCR”) prior to December 31, 2029, if Unit 1 of the facility achieves and continuously complies with a NO_x emissions limit of 0.05 lb./MMBtu on a 12-month rolling basis.⁷ The very same conditional requirements are present in the renewed Title V Permit.⁸

⁴ Petition for Review, *Supra* note 2 at 8.

⁵ *Id.* at 7.

⁶ Attachment 2 at 6-7, Settlement Agreement between and among EPA Region 8, Sierra Club, WildEarth Guardians, and Deseret Generation and Transmission Co-operative.

⁷ *Id.*

⁸ Attachment 7 at 56-57, Air Pollution Control Permit to Operate Title V Operating Permit Program at 40 CFR Part 71.

Despite the fact that the Bonanza Plant is located on Indian Country lands within the Reservation, EPA did not include the Tribe in settlement discussions, merely offering an ability to comment as part of the public on the draft Settlement Agreement before finalizing the Settlement. Most of the Tribe's comments were rejected. The Title V Permit in its final form was devoid of meaningful measures to protect the health and environment of the Tribe and its members despite 14 years of unregulated emissions of hazardous pollutants affecting the Tribe and its lands. The Settlement had no financial penalty for Deseret Power despite construction and operation of the Plant without a permit for 14 years, and prohibited financial penalties against Deseret Power for any violation of the Settlement.

B. HISTORY OF THE TRIBE'S PARTICIPATION AND EFFORTS TO PROTECT THE ENVIRONMENT ON ITS RESERVATION IN RELATION TO BONANZA PLANT OPERATIONS

The Tribe provided comments on the draft Settlement Agreement among EPA, WildEarth Guardians, Sierra Club, and Deseret Power. In its comments to the then-proposed Settlement Agreement, the Tribe acknowledged the benefits that would result from the pollution control measures required under the Agreement and expressed support for a lifetime limit on coal consumption at the Bonanza Plant. But the Tribe also posited that the Agreement "does not make up for past violations of the Clean Air Act."⁹ Citing EPA's trust responsibility to the Tribe as a federal agency, alongside EPA's obligations to uphold Environmental Justice, the Tribe called for the Settlement Agreement to establish a trust fund dedicated to developing projects to mitigate the harmful impacts of Deseret's unbridled emission of toxic pollutants into Tribal airspace.¹⁰ Had EPA included financial penalties in the Settlement, that money could have been used to remediate the damage done by the unlawful operation of the Plant. The Tribe also called for an abbreviated

⁹ Attachment 1 at , Ute Indian Tribe Comments on Proposed Settlement Agreement.

¹⁰ *Id.*

timeline to implement the pollution control measures that were required as permit conditions under the Settlement Agreement. Neither of these two comments from the Tribe were incorporated into the final Settlement Agreement, nor the Title V Permit in its final form.

During the Title V Permit renewal process, the Tribe voiced its concerns during each step of the process. Upon receiving notice of the proposed renewal of the Title V Permit in 2020, on October 14, 2020, the Tribe issued a letter to the Acting Director of the Region 8 Air and Radiation Division putting EPA on notice once again of ongoing deleterious impacts of the Bonanza Plant's coal-fired power operations on the Tribe's Reservation:

In spite of the conditions set forth in the Operating Permit intended to curtail the environmental impacts of the Bonanza Plant, the Tribe and its members continue to experience serious health issues attributable to poor air quality on the Reservation. Further, Deseret's operation of the Bonanza Plant has had deleterious impacts on vegetation and wildlife on tribal lands in the surrounding area.¹¹

The Tribe reiterated these concerns in its March 2021 public comments on the proposed permit renewal. In these comments, the Tribe also reinstated its previous request to establish a mechanism to channel the monetary value of any fines and penalties for Clean Air Act violations toward air quality mitigation measures on the Reservation for the harm to Tribal lands and people.¹² As noted above, EPA imposed no fines or penalties on Deseret Power for blatant violations of the Clean Air Act. These violations caused actual health impacts to the Tribe, its members, and its land, in violation of EPA's mission in general and trust duties to the Tribe specifically.

Nearly 18 months after the Tribe submitted these public comments on the proposed Permit Renewal, EPA supplied the Tribe with a draft Response to Comments ("Draft RTC").¹³ After

¹¹ Attachment 3, Letter from the Ute Indian Tribe to Carl Daly re: Request for Hearing and Objections to Renewed Title V Permit for the Deseret Generation and Transmission Cooperative, Bonanza Power Plant (Oct. 14, 2020).

¹² Attachment 4, Ute Indian Tribe Comments (March 22, 2021).

¹³ Attachment 5, Clean Air Act (CAA) Title V Permit Renewal Draft Response to Comments.

reviewing the Draft RTC, it was apparent that the Tribe's concerns had once again been either inadequately addressed or entirely unaddressed. The Tribe then filed comments to the Draft RTC on October 10, 2023. In its comments, the Tribe once again reminded EPA of its trust duties to the Tribe and its members, as well as its obligations to uphold and promote Environmental Justice for the Tribe, which had been disproportionately impacted by emissions from the Bonanza Plant. In furtherance of these obligations under federal law, the Tribe demanded that the EPA incorporate into the Permit the Tribe's self-government demands for environmental and health protection. The Tribe also commented on EPA's superficial analysis of potential impacts to air quality, groundwater, and vegetation and wildlife on the Reservation.¹⁴

C. NEIC REPORT ON ISSUES FROM COAL COMBUSTION RESIDUALS

On December 12, 2023, EPA Region 8 issued a letter to the Ute Tribal Business Committee Chairman notifying the Tribe of the publication of reports following offsite and onsite EPA inspections of the Bonanza Plant under the authority of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6927. The inspections took place in August and October of 2022. The Civil Investigation Report prepared by the EPA's National Enforcement Investigations Center ("NEIC") identifies six (6) distinct observations of non-compliance or potential non-compliance with RCRA regulations that directly impact groundwater and other natural resources, as enumerated below:

1. The south evaporation pond (SEP) and north evaporation pond (NEP) may meet the definition of existing surface impoundments. Coal combustion residuals (CCR), including bottom ash and flue gas desulfurization (FGD) sludge, appears to accumulate in Bonanza's wastewater evaporation ponds in greater than de minimis quantities during normal operations. Material resembling CCR was observed around the discharge point into the SEP.

¹⁴ Attachment 6, Ute Indian Tribe Comments on RTC Title V Permit Bonanza (Oct. 12, 2023).

2. Bonanza’s “emergency holding tank” may be operating as a new CCR surface impoundment without meeting the required location design, operating, and groundwater monitoring criteria.
3. The groundwater monitoring system certification for Bonanza’s two CCR landfills does not provide a basis supporting the determination that the system requires only the minimum number of monitoring wells at each landfill to meet the groundwater monitoring reporting standard.
4. Historical use of emergency holding pond to manage CCR and current use of the emergency holding tank as a potential new CCR surface impoundment may impact the ability of the upgradient groundwater monitoring well of the bottom ash landfill...to accurately represent the quality of background groundwater that has not been affected by leakage from a CCR unit.
5. The annual CCR fugitive dust control report for 2018 was not clearly identifiable or available on Bonanza’s CCR rule compliance data and information website, as reviewed on November 16, 2022.
6. Bonanza generates waste lead-acid batteries, and it is unclear if the batteries are managed as hazardous waste or universal waste while accumulated onsite. If the batteries are managed as hazardous waste, Bonanza does not appear to count the batteries in its monthly hazardous waste generation rate. If the batteries are managed as universal waste, Bonanza is not meeting the applicable universal waste management standards.¹⁵

Even though these observations were made in October 2022, the Tribe did not receive notice of these matters until December 12, 2023, after EPA’s approval of the Title V Permit renewal became final. Therefore, the Tribe was not able to issue comments or engage in consultation to address the findings of the NEIC report before EPA approved the Permit renewal.

Despite being repeatedly put on notice of the Tribe’s unambiguous goals and objectives in relation to the past, current and future operation of coal-fired power on its Reservation, supported by the presence of current and outstanding environmental impacts from coal combustion residuals at the Bonanza Plant, EPA has approved a five-year renewal of the Title V Permit that once again

¹⁵ Attachment 9, NEIC Civil Investigation Report, Deseret Power – Bonanza Power Plant.

ignores the Tribe's comments and continues to expose Tribal members and residents of the Reservation to unacceptable human health and environmental risks.

ARGUMENT

EPA has disregarded the well-documented priorities and concerns of the Tribe by approving the Title V Permit renewal for the Bonanza Power Plant with no new measures to mitigate environmental harms or otherwise promote air quality on the Reservation. EPA's action is irreconcilable with its trust duty to the Tribe and its obligations to uphold Environmental Justice. Therefore, EPA's action is arbitrary, capricious and not in accordance with applicable law.

A. SUMMARY OF THE LAW

The Executive Branch of the federal government issued two Executive Orders on Environmental Justice, one in 1994 and another in April 2023.

In 1994, President William J. Clinton issued Executive Order No. 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* ("1994 EO") directing all federal agencies to identify and address "disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States." The Executive Branch expounded on this policy of Environmental Justice via Executive Order No. 14096, April 21, 2023 ("2023 EO") was issued. The 2023 EO defines "Environmental Justice" as:

*ensuring that disadvantaged communities are "fully protected from disproportionate and adverse human health and environmental effects (including risks) and hazards, including those related to climate change, the cumulative impacts of environmental and other burdens, and the legacy of racism or other structural or systemic barriers."*¹⁶ [emphasis added]

¹⁶ Executive Order 14096 of April 21, 2023, 88 Fed. Reg. No. 80 25251, 25253, §2(b)(1).

EPA's Environmental Justice obligations and associated tribal consultation requirements are inseverable from the EPA's trust responsibility to Indian tribes. The origin of the federal trust responsibility toward Indian tribes arises from the settlement of lands creating the United States out of lands that were already occupied and used by Indian tribes. According to the U.S. Department of the Interior ("DOI"):

The trust responsibility consists of the highest moral obligations that the United States must meet to ensure the protection of tribal and individual Indian lands, assets, resources, and treaty and similarly recognized rights. . . .¹⁷ [The United States'] conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.¹⁸

The Supreme Court has also ruled that some trust obligations of the federal government are so basic "that the United States must be held accountable for failing to conduct itself in a manner that meets the standard of a common law trustee" in areas such as management and preservation of tribal assets.¹⁹ Clean air must be considered a fundamental tribal asset, because without clean air (and clean water) the Reservation cannot serve as a sustainable permanent homeland for the Tribe and its members.

The Agency must render decisions directly impacting Tribal air quality and, by extension, the health and welfare of the Tribal member communities, in accordance with its trust responsibility, Environmental Justice, and contemporary environmental conditions such as rapidly worsening climate change as a cumulative whole.

B. EPA'S CURSORY DISMISSAL OF MOST OF THE TRIBE'S COMMENTS AND THE ISSUES RAISED THEREIN WAS AN ABUSE OF DISCRETION AND NOT IN ACCORDANCE WITH LAW

¹⁷ U.S. Department of the Interior Order # 3335, 1 (August 20, 2014), *citing*, generally, Cohen's Handbook of Federal Indian Law § 5.04 (Nell Jessup Newton ed., 2012); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

¹⁸ *Seminole Nation v. United States*, 316 U.S. 286 (1942).

¹⁹ U.S. DOI, *supra*, at 2, *citing United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475(2003).

At all times relevant, the Ute Indian Tribe has voiced its concerns over coal-fired power on its Reservation and its disproportionate impacts on the Tribe, its membership, and its natural resources. A table summarizing the Tribe's technical comments on the Title V Permit renewal and EPA's responses is attached as **Appendix B** and incorporated into this Brief as if fully set forth herein. EPA dismissed most of the Tribe's comments on improper grounds, discussed below.

a. EPA's Continued Disregard of Tribal Health and Environmental Concerns Violated the Federal Trust Responsibility, EPA's Own Policies, and Constituted an Abuse of Discretion

EPA's Environmental Justice obligations and its federal Indian Trust duties are separate and distinct from and take precedence over the Agency's public participation procedures. EPA has a separate, paramount obligation to the Tribe under both the Agency's Environmental Justice directives and its federal Indian trust responsibilities. That obligation requires EPA to formally consult with the Tribe in a government-to-government capacity, on an ongoing basis. These obligations are distinct from, and superior to, any steps EPA took to include the Tribe in standard public participation efforts, such as considering comments by the Tribe in open public comment periods.

EPA failed in its duties under the Executive Branch Environmental Justice Executive Orders, EPA's own Environmental Justice policies and directives, and the federal government's (of which EPA is a part) historic fiduciary trust obligations to Native American Tribes, as well as the federal policy of Tribal self-governance.

The Tribe submits that the Title V Permit renewal process for the Bonanza Plant affords the EAB the opportunity to correct these Agency errors and bring justice to the Tribe after its long struggle to protect its members and communities. Despite its extensive efforts, the Tribe has not

been heard by EPA, nor been treated as the sovereign entity that it is in EPA's determination of criteria for the Bonanza Plant final permit.

b. EPA Has Failed to Comply with the Executive Branch's Executive Orders on Environmental Justice and EPA's Own Policies and Process

Despite these intervening events, EPA has consistently failed to ensure meaningful and collaborative dialog with the Tribe, continuing to summarily dismiss the Tribe's comments on deficiencies in the Bonanza Plant permit, failing to evaluate the cumulative impacts of environmental pollution affecting the Tribe that should have caused the Agency to take more precaution in protecting the health and welfare of this disadvantaged community when determining permit conditions for the Bonanza Plant, and failing in even the basic federal fiduciary trust duties responsibilities it owes to the Tribe.

In responding to the Tribe's comments, EPA repeatedly discounts Tribal concerns, while recognizing that its "EJScreen" analysis "*indicated communities within the entire census block group in which Bonanza is located may be disproportionately impacted by total pollution, non-pollution, and climate change burdens.*"²⁰ [emphasis added]. Yet EPA then asserts, based on historic data, that due to the inversion layer height in the Uinta Basin, and the stack height at the Bonanza Plant, which discharges emissions into the air above the inversion layer, that "The air emissions from the facility would not significantly contribute to winter ozone formation in the Basin..."²¹

First and most importantly, the 2023 EO requires that EPA evaluate "additional disproportionate burdens" on Tribes to address Environmental Justice concerns. This requires EPA to evaluate "*cumulative impacts*" to the public health of [EJ] communities, even those not caused

²⁰ Attachment 8 at 6-7, Cover Letter and RTC for Final Permit_Deseret Bonanza Power Plant (Dec. 4. 2023); Attachment 5 at 4-7, Clean Air Act (CAA) Title V Permit Renewal Draft Response to Comments.

²¹ *Id.*

by federal actions²² [emphasis added]. EPA acknowledges that EJ communities experience disproportionate and adverse health or environmental burdens, including:

“inequitable access to clean water, clean air . . . the concentration of pollution...toxic exposures, and underinvestment in . . .basic infrastructure...The cumulative impacts of exposure to those types of burdens and other stressors, including those related to climate change and the environment, further disadvantage communities with [EJ] concerns . . . People in these communities suffer from poorer health outcomes and have lower life expectancies than those in other communities in our Nation. Moreover, gaps in environmental and human health data can conceal these harms from public view, and in doing so, are themselves a persistent and pernicious driver of environmental injustice.”²³

While recognizing that Ute Indian Tribal communities may be disproportionately impacted by emissions from the Bonanza Plant, EPA nevertheless has failed to evaluate these cumulative effects in its decision to grant the Title V Permit. This alone is a fatal flaw in its analysis. The 2023 EO requires that EPA incorporate disproportionate impacts as well as “respecting and elevating Indigenous knowledge” into its decision-making process.²⁴

Second, the meetings referenced above were inadequate to satisfy government-to-government consultation requirements with the Tribe. The 2023 EO “underscores the vital importance of Tribal consultation and coordination, including to strengthen nation-to-nation relationships on issues involving Environmental Justice.”²⁵ Four (4) meetings in as much as four (4) years is not sufficient for either “collaboration” or “meaningful engagement.” The Tribe views these meetings as “check the box” efforts rather than “consultation” and “collaboration”. Despite the Tribe’s repeated concerns over the years, these meetings did not cause EPA to make any

²² 88 Fed. Reg. No. 80, 25253.

²³ 88 Fed. Reg. No. 80, 25252.

²⁴ April 21, 2023, “FACT SHEET, supra, p.17.

²⁵ April 21, 2023, “FACT SHEET: President Biden Signs Executive Order to Revitalize Our Nation’s Commitment to Environmental Justice for All” accompanying E.O. 14096, p.5.

significant improvements in the Bonanza Plant Permit that would have been responsive to the Tribe's health and environmental concerns.

Third, EPA did not acknowledge Tribal cultural values, such as a profound, spiritual respect for elders (who have become ill likely attributable to local air pollution) and reverence for the natural environment. On its website, "Environmental Justice for Tribes and Indigenous Peoples"²⁶ EPA cites the 1994 EO²⁷ to require EPA to consider "traditional ecological knowledge" in its science and policy decision-making.²⁸ Despite the great value that this would bring to the Bonanza Plant permitting process, this requirement has not been addressed at all by EPA, much less satisfied.

Fourth, the Tribe does not agree that historic data on the inversion trapping "emissions" in the air is predictive of future stability of the inversion, nor does it agree that trapping emissions in the air due to historic inversions is a protective environmental policy. EPA asserts, without explanation, that it does "not expect" that the inversion will disburse in the future, which would cause the community to be exposed to these emissions. Due to our rapidly changing climate, one cannot assume that historic climate properties will remain stable and unchanging.

Fifth, the 2023 EO requires that EPA take into account "historic inequities" in Environmental Justice communities. The Bonanza Plant operated for many years without a permit. Had the Bonanza Plant complied with the law and sought an operating permit when it made a major modification to its plant in 2000 that significantly increased toxic emissions, it would have been subject to multiple regulatory restrictions in air emissions and construction. The Bonanza

²⁶ <https://www.epa.gov/environmentaljustice/environmental-justice-tribes-and-indigenous-peoples>, last viewed 12/15/2023.

²⁷ Executive Order 12898 of February 11, 1994, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations", 59 FR 7629; February 16, 1994.

²⁸ E.O. 12898 (59 FR 7629) February 16, 1994.

Plant, unregulated, did not meet the requirements for controlling emissions and environmental protection that would have been required in the federal permit process. The Tribe asserts, based on its experience, that this “historic inequity” likely would not have happened in a non-EJ community in an urban area. The Tribe, as an EJ community, did not have the resources to identify and assess the impact this had on the Bonanza Plant, and the harm that was caused to the Tribe, its members, and its natural environment, by not having a permit. As noted previously, the Tribe has just received a copy of a 14-month-old October 24-26, 2022, EPA NEIC Civil Investigation Report on the Bonanza Plant. NEIC identified six (6) potential violations of environmental laws impacting groundwater and the Tribe’s natural resources. To our knowledge, no enforcement action has been taken in over a year since the report was prepared. This is a failure by EPA of its Environmental Justice (and federal trust obligations) to protect the Tribe from historic inequities.

The EAB has not seldom opined on Environmental Justice issues in the specific and – in this case – salient context of the federal trust responsibility to Indian tribes. The current appeal presents an apt situation for the Board to reconsider EJ in light of the new EO and the trust responsibility to Indian tribes and the new, more robust EO.

The Board, in its March 2023 “Guide to the EPA Environmental Appeals Board,” specifically discusses Environmental Justice in the context of the 1994 EO in place at the time. Even under the 1994 EO, the Board stated:

Since the issuance of the Executive Order 12898 on Environmental Justice, the EAB has played an important role in the context of reviewing permitting decisions to resolve allegations that the permit issuer did not meet its obligations with respect to environmental justice in its permitting decision. For example, the EAB has remanded permit cases where the record did not support a finding that the permitting authority reasonably considered the contested environmental justice issues in the permitting process.²⁹

²⁹ Guide to the U.S. Environmental Protection Agency’s ENVIRONMENTAL APPEALS BOARD, Publication No. 100B23001, March 2023, (“2023 EAB Guide”) at 35-36, citing *In Re: Muskegon Dev. Co.*, 17 E.A.D. 740 (“EAB 2019”) and *In Re: Shell Gulf of Mexico, Inc.* 15 E.A.D. 103, 148-61 (“EAB 2010”).

For the reasons stated herein, the Tribe asserts that EPA failed to “reasonably consider” the Environmental Justice issues in regard to the Bonanza Plant, the Reservation, and Indian Country.

In *In Re: Energy Answers Arecibo*, the Board relied on the 1994 EO to state that EPA should exercise discretion to examine any “superficially plausible” claim of Environmental Justice where an underserved population claims it was disproportionately affected by the facility seeking the PSD permit under the Clean Air Act. Here the Tribe’s comments to EPA on the draft and final permit throughout the years are replete with demonstrations of how the Tribe has been, and will continue to be, disproportionately affected by the permit. The Tribe has identified illnesses, particularly among its elder and youngest populations, of diseases caused by air pollution, such as emphysema and breathing difficulties. These concerns must be addressed in the context of Environmental Justice and disproportionate impact on the Tribe.

No Board cases have addressed the multiple, combined factors in this appeal that need to be applied to EPA’s re-permitting decision at the Bonanza Plant: (1) Environmental Justice considerations; (2) under the 2023 EO; (3) as they impact an Indian tribe; (4) in conjunction with the federal government’s historic fiduciary trust obligation to Indian tribes; and (5) EPA’s obligation to “meaningfully and collaboratively” consult with the Tribe on a government-to-government basis. EPA’s 2014 Policy on Environmental Justice and Indian Tribes recognizes the federal government’s trust responsibility towards tribes and promotes tribal self-determination to allow tribes to make decisions to protect their members, recognizing and respecting traditional native beliefs and ways of life.³⁰

³⁰ EPA Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples, July 24, 2014, <https://www.epa.gov/sites/default/files/2017-10/documents/ej-indigenous-policy.pdf>.

The Tribe commented on EPA’s Environmental Justice failures in its 2015 comments on the Bonanza Plant. However, because the 2023 EO had not been published then, we provided new information, not available at that time, on EPA’s current obligations to incorporate Environmental Justice considerations into its permit decisions, and its failure to do so here under those terms.

The 1994 EO focused primarily on establishing federal Environmental Justice programs and enforcing existing laws of that time, particularly the National Environmental Policy Act (“NEPA”), in a non-discriminatory way. It ordered studies of Environmental Justice, established inter-agency workgroups and reporting obligations for federal agencies. It recognized the unique situation of Indian tribes, and instructed DOI to take steps to implement the policy as it affects tribes.

The 2023 EO is far more specific and detailed. It relies on the foundation established by the 1994 EO. As noted, it emphasizes the consideration of “cumulative impacts” and disparate treatment of Environmental Justice communities. It requires “meaningful engagement and collaboration with underserved and overburdened communities” and “ensure they do not face additional disproportionate burdens or underinvestment.”³¹

In addition, the 2023 EO:

- Recognizes that more work needs to be done to make Environmental Justice a reality almost three (3) decades after the 1994 EO;
- Identifies areas within boundaries of Tribal Nations as historically discriminated against;
- Takes notice of the additional impact of climate change on these communities, which disadvantage them to greater extent;
- Repeatedly references the need for *meaningful* participation in agency decision-making that affects the health of these communities [emphasis added];
- Requires federal agencies to respect tribal sovereignty and support self-governance;
- “Recognize, honor and respect different cultural practices—including subsistence practices, ways of living, Indigenous Knowledge, and traditions”³²;

³¹ 2023 Executive Order, Section 1.

³² *Id.*

- Instructs federal agencies to ensure that disadvantaged communities “**are fully protected** from disproportionate and adverse human health and environmental effects (including risks) and hazards, **including those related to climate change, the cumulative impacts** of environmental and other burdens, and the legacy of racism or other structural or systematic barriers...”³³ [emphasis added]

Without changes to the 2023 Permit, the Tribe will continue to experience disproportionate impacts and further human health and environmental damage. Of particular concern to the Tribe, and raised repeatedly in comments and discussions with EPA, is the fact that the current Permit imposes no limits on how much coal the Bonanza Plant can burn, so long as they install scrubbers (“SCRs”). While effective SCRs can reduce NOx emissions, they do not curb the impacts of coal combustion residuals that were real, immediate issues potentially impacting Tribal groundwater and other Tribal natural resources in the NEIC report received by the Tribe on December 12, 2023. Further, EPA’s “unchanging inversion capture” theory is unsupported and not predictive of future impacts of climate change in the Uinta Basin. These risks are unacceptable in light of EPA’s obligations to ensure the most exacting fiduciary standards in protecting the health and welfare of the Tribe, and to consider cumulative risks, including climate change, in its paramount obligation to protect disadvantaged communities.

The EAB has previously recognized and addressed the federal government’s trust obligations to Indian tribes in the context of EPA’s approval of a Clean Air Act PSD permit. *In Re: Desert Rock* only speaks to the implications of trust duty on whether EPA had an obligation under its fiduciary duties to Indian tribes to consult with the tribe on an EPA request to the EAB for a remand of its permit decision.³⁴ The EAB held that the tribe had not established that EPA’s failure to consult to the extent that the tribe requested was sufficient grounds for denying EPA’s

³³ *Id.* at Section 2.

³⁴ *In Re Desert Rock* EAB PSD Appeal Nos. 08-03, 08-04, 08-05 & 08-06 (2009).

request to remand because the tribe did not provide a standard upon which the sufficiency of EPA’s consultation efforts should be reviewed. Here, the Tribe seeks to hold EPA to the proper standard under law, defined by the federal trust responsibility and the 2023 EO: meaningful government-to-government collaboration tailored to identify and address the environmental concerns and priorities of the Ute Indian Tribe on matters directly impacting its sovereign homeland. This means that EPA must not just “check the box” for consultation but take into account and act on Tribal concerns that impact the human health and environment of its members. In light of the new 2023 EO and the facts of this case, that standard has not been met.

EPA has offered little more than ordinary public comment and disregarded most, if not all, of the Tribe’s substantive comments on the human health and environmental impacts to the Tribe of the Bonanza Plant . As we have stated previously, the federal trust duty to Indian tribes, as well as Environmental Justice initiatives, are separate from, supreme to, and require far more than basic opportunities for the public to comment on EPA decisions.

c. The Failure of EPA to Notify the Tribe of an Investigation into the Bonanza Plant Until After the Final Permit Was Issued is an Abuse of Discretion and Violation of EPA’s Trust Responsibilities

As outlined *supra*, the Tribe did not receive notice of the NEIC multiple findings of actual or potential groundwater impacts from CCRs until December 12, 2023, after EPA’s approval of the Title V Permit renewal became final. As evidenced by the 18-month period of time that elapsed between the Tribe’s March 2021 comments and EPA’s draft RTC, EPA was not operating on any meaningful timeline in overseeing this permit renewal process. Yet, EPA was certain to approve the Permit renewal before the Tribe could be apprised of a series of serious environmental concerns directly resulting from continued coal consumption at the Bonanza Plant. Withholding this

important information from the Tribe undermines the government-to-government consultation process and violates EPA's trust responsibility.

At least five (5) of the six (6) observations of actual or potential noncompliance listed in the NEIC revolve around the monitoring and disposal of CCR and how failure to address the issues identified could lead to adverse environmental impacts on groundwater.³⁵ Deseret Power's Title V Operating Permit, as renewed on December 4, 2023, does not establish measures to address environmental harms caused by CCRs, despite providing a mechanism for Deseret Power to continue coal consumption at the Bonanza Plant of an indefinite quantity so long as SCRs are installed to limit NOx emissions. This SCR alternative is therefore wholly inadequate without accompanying measures to address CCRs.

Because the Tribe did not receive the NEIC report until December 12, 2023, the Tribe did not have an opportunity to raise the issues identified in the report during the comment period or otherwise prior to EPA's final approval of the Title V Permit renewal. However, EPA was aware of these problems throughout its final efforts to re-issue the Permit yet did not make changes in the final Permit to mitigate these environmental and health hazards. At the very least, EPA should have apprised the Tribe of the NEIC report results and given the Tribe another opportunity to submit comments and engage in government-to-government consultation prior to the approval of the Title V Permit renewal. Instead, EPA either failed to coordinate internally or deliberately issued its approval before the Tribe could comment on real, empirical findings associated with CCRs from the Bonanza Plant operations.

³⁵ *Supra*, n. 15.

CONCLUSION

EPA Region 8 has approved Deseret Power's Title V Permit renewal for the Bonanza Plant without addressing any of the Tribe's well-documented significant concerns about human health and the environment surrounding the mitigation of adverse impacts of the Bonanza Plant within the Reservation. EPA's action is therefore irreconcilable with its trust responsibility to the Tribe and its Environmental Justice obligations, is arbitrary and capricious, an abuse of discretion, and otherwise inconsistent with federal law. For these reasons, EPA's approval of the Title V Permit renewal must be set aside and remanded to require the Agency to satisfy its trust and Environmental Justice obligations to the Tribe in accordance with federal law and its own policies.

Respectfully submitted this 3rd day of January, 2024.

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STATEMENT OF COMPLIANCE

This brief complies with the type-volume limitation because this brief contains 6,508 words excluding the parts of the brief exempted.

By: /s/ Michael W. Holditch
Michael W. Holditch

CERTIFICATE OF SERVICE

I certify that the foregoing NOTICE OF APPEAL and PETITIONER'S BRIEF in the matter of In Re: Deseret Generation and Transmission Co-Operative, Bonanza Power Plant, Permit # V-UO-000004-2019.00, was filed with the Environmental Appeals Board through its efilng system on January 3, 2024, and was sent to the following persons in the manner indicated.

By U.S. Mail

KC Becker
Regional Administrator
U.S. Environmental Protection Agency Region 8
1595 Wynkoop Street
Denver, Colorado 80202

Deseret Power Electric Cooperative
12500 East 25500 South
Vernal, Utah 84078

DATE: January 3, 2024

/s/ Catherine Wiland
Catherine Wiland
Paralegal/Legal Assistant

Appendix A
Table of Attachments

Attachment #	Document Description
1	Ute Indian Tribe Comments on the Environmental Protection Agency's Proposed Settlement Agreement for the Operation of the Bonanza Power Plant within the Uintah and Ouray Indian Reservation Docket ID No. EPA-HQ-OGC-2015-0678 (Nov. 24, 2015).
2	Settlement Agreement between and among EPA Region 8, Sierra Club, WildEarth Guardians, and Deseret Generation and Transmission Co-operative.
3	Letter from the Ute Indian Tribe to Carl Daly re: Request for Hearing and Objections to Renewed Title V Permit for the Deseret Generation and Transmission Cooperative, Bonanza Power Plant (Oct. 14, 2020).
4	Comments of the Ute Indian Tribe (March 22, 2021).
5	Clean Air Act (CAA) Title V Permit Renewal Draft Response to Comments.
6	Ute Indian Tribe Comments on RTC Title V Permit Bonanza (Oct. 12, 2023), Dkt. ID EPA-R08-OAR-2019-0350-0020.
7	Air Pollution Control Permit to Operate Title V Operating Permit Program at 40 CFR Part 71, Dkt. ID EPA-R08-OAR-2019-0350-0016
8	Cover Letter and RTC for Final Permit_Deseret Bonanza Power Plant (Dec. 4, 2023), Dkt. ID EPA-R08-OAR-2019-0350-0017.
9	NEIC Civil Investigation Report, Deseret Power – Bonanza Power Plant

Appendix B
Table of Technical Comments
(see the following page)

CROSS-REFERENCE (March 2021 Comments)	TRIBAL COMMENT	EPA RESPONSE TO COMMENT(S)	ERRONEOUS/ABUSE OF DISCRETION
Sec. II. P. 2	Bonanza Plant emits approximately 3.5MM tons of CO2/year.	Bonanza Plant emits approximately 3.5MM tons of CO2/year. To date, Bonanza has not changed or modified emissions units at the facility. Thus there are no additional air quality impacts associated with the Permit renewal.	Abuse of discretion and inconsistent with Trust duties to ignore disproportionate impact/ cumulative effect on Tribal lands.
Sec. III. P. 3	Tribe's members continue to experience serious health issues due to poor Reservation air quality. Bonanza emissions have had deleterious impacts on vegetation wildlife on Tribal lands in surrounding area; federal law requires that EPA must protect the Tribe from disproportionate share of adverse impacts from Plant. EPA is obligated to mitigate and prevent" harmful impacts pursuant to its federal trust responsibility and E.O. 12898. (same comment submitted in response to EPA proposed settlement with Sierra Club and WEG submitted 2015.)	EPA used a "nationally consistent dataset and approach" (p.4) called "EJScreen" to determine whether the Tribe was disproportionately impacted from the Plant. EPA concluded it was not because there was no population within up to a 10-mile radius of the Plant. One of 12 EJ Screen indicators requires a showing of 80th percentile or higher when compared with the rest of the state. The EJScreen found exceedances (beyond state average) but some were below the 80th percentile, although greater than 50% (low income; people of color). Unemployment was more than double state average, and double state average for limited English proficiency. Heart disease in 77th percentile and asthma in 96th percentile. A large portion of the area including the Plant was considered "Medically Underserved" and are in 88th percentile for broadband access. Wildfire exposure was in the 8th percentile for the United States; flood risk at 72nd percentile compared to state.	Use of a nationwide template for determination of EJ status is insufficient, as it does not take into account the unique situation of Indian reservations and its population. Tribal lands are consistently underserved in health, economic development, and safety due to economic conditions of Tribal lands and Tribal government. EPA concludes that the Tribe "may be disproportionately impacted by total pollution, non-pollution, and climate change burdens". At p.7. EPA should have done an analysis of conditions on the Reservation, rather than a generic nationwide model that may not be representative of actual conditions. Plant should be required to take mitigation measures, including but not limited to, tree planting, funding to address health impacts, other action such as future trust fund. Tribe suggested this as part of 2015 settlement.
2021 B. p. 9	Ozone from the Plant disproportionately impacts the Tribe.	See comment above in 2014 G.3. above. EPA notes it is more likely that oil and gas emissions are trapped under the inversion layer in the Uinta Basin; "EPA believes that regulation of io and gas sources is the most effective way to address ozone-related air quality concerns in the Uinta Basin.	In its obligation to consider cumulative effects, EPA cannot disregard alternative sources of pollution. EPA must reduce emission levels in the Bonanza Permit to compensate for the cumulative effects of other facilities. Until EPA further regulates oil and gas sources impacting the reservation, it must take action to address the cumulative impacts, either through the Bonanza permit or

CROSS-REFERENCE (March 2021 Comments)	TRIBAL COMMENT	EPA RESPONSE TO COMMENT(S)	ERRONEOUS/ABUSE OF DISCRETION
			other compensatory enforcement.
2021 C. p. 12	Bonanza Plant deleteriously impacts wildlife and vegetation on Tribal lands.	<ol style="list-style-type: none"> 1. EPA does not know what wastewaters are collected at the Plant North Evaporation Pond (NEP) and therefore cannot evaluate impacts to groundwater. Because this Permit does not evaluate wastewater no changes are needed to the Permit. (at p. 13). Nonetheless, EPA concludes that recordkeeping and reporting requirements at the Plant are “sufficiently adequate.” 2. Due to the inversion layer trapping emissions above ground, EPA does not expect air emissions from the Plant to “result in localized dispersion of pollutants to terrestrial resources” at 16. 	Arbitrary and Capricious and Abuse of Discretion for EPA to shrug its shoulders and say because it hasn’t met its enforcement obligations at Plant to know what is being discharged in regulated ponds, it cannot assess environmental harm. EPA MUST look at cumulative impact from the Plant’s operations in order to issue a Permit that addresses disproportionate adverse effects. 2. See comments above on inversion.
	EPA should impose a lifetime limit on coal use at the Plant.	Title V does not require lifetime limit.	Given disproportionate impact of the Plant, the 3.5 million tons/year of CO2 emitted, and the growth of new technologies, EPA must consider limitations on coal use as part of its trust duty and environmental justice prerogatives.