

EPA REGION 8'S RESPONSE TO PETITION FOR REVIEW

## **Attachment O**

Administrative Record Document No. 17

Letter from Luke Duncan, Ute Indian Tribe, to EPA re: Comments on Title V Operating Permit:  
Deseret Power Electric Cooperative - Bonanza Power Plant  
(EPA-R08-OAR-2019-0350-0015-attachment 1)



**UTE INDIAN TRIBE**  
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March 22, 2021

ATTN: Federal Title V Coordinator  
Mail Code 8ARD-PM  
Air and Radiation Division  
EPA Region 8  
1595 Wynkoop Street  
Denver, CO 80202

**RE: Comments on Title V Operating Permit: Deseret Power Electric  
Cooperative - Bonanza Power Plant**

Dear Federal Title V Coordinator:

Enclosed please find the comments of the Ute Indian Tribe of the Uintah and Ouray Reservation on the above-referenced matter. Please take notice that the Tribe's submission of comments in no way substitutes for or satisfies the obligations of our federal trustee to engage in ongoing government-to-government consultation in this matter and to fulfill its fiduciary obligations toward the Tribe and its members.

On Behalf of the Ute Indian Tribe Business Committee:

Luke Duncan  
Business Committee Chairman



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**Ute Indian Tribe of the Uintah and Ouray Reservation**

**Comments to the Draft Title V Operating Permit: Deseret Power Electric Cooperative -  
Bonanza Power Plant, Docket Number EPA-R08-OAR-2019-0350**

**March 22, 2021**

For over 20 years, the Bonanza Power Plant, owned and operated by Deseret Power Electric Cooperative (“Deseret”), has operated on tribal lands within the Uintah and Ouray Reservation, spewing high levels of coal pollution into the air at the expense of the health, safety, and well-being of tribal members and communities. Deseret had been operating this Plant in plain violation of the Clean Air Act until 2015, when a settlement agreement between EPA Region 8, the Sierra Club, WildEarth Guardians, and Deseret Power resulted in a Title V Federal Operating Permit (“Operating Permit”) for the Bonanza Plant.

In spite of the conditions set forth in the Operating Permit intended to curtail the environmental impacts of the Bonanza Power Plant (“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.

Federal law requires the EPA to protect the Ute Indian Tribe (“Tribe”) from having to shoulder a disproportionate share of the adverse environmental impacts caused by the Bonanza Plant. As you are aware, the EPA has a trust responsibility to the Ute Indian Tribe and its members. The EPA must use its delegated federal authority to mitigate and prevent harmful impacts on the human and natural environment on the Uintah and Ouray Reservation, in accordance with the “exacting fiduciary standards,” incumbent upon the EPA as a federal trustee. *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942). In 1994, President Clinton issued Executive Order No. 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 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 EPA’s procedures

to renew Deseret's Operating Permit for the Bonanza Plant fall squarely under the purview of Executive Order 12898 and the EPA's fiduciary obligations toward the Tribe and its members.

Furthermore, neither EPA nor Deseret have redressed the decades of past harms incurred by tribal members resulting from Deseret's violations of the Clean Air Act. In its comments on the EPA's proposed Settlement Agreement with Deseret dated November 24, 2015, the Tribe stated as follows:

[W]e have concerns about some of the requested permit terms. We ask that EPA Region 8 ensure that Deseret Power install and operate low NOx burners and overfire air technology (LNB/OFA) no later than June 30, 2016, regardless of whether Region 8 issues a final Minor NSR Permit before December 31, 2015. Ensuring the prompt installation of LNB/OFA, will nearly halve NOx emissions from the Plant, bringing no greater than 5,700 tons per year. If the Tribe is to support the Agreement, then EPA must assure the Tribe that the December 31, 2015 deadline is realistic.

The proximity of the comment deadline to the cutoff date for EPA Region 8 to issue the permit gives the Tribe serious concern. The Agreement provides that should EPA Region 8 fail to issue a final Minor NSR Permit on or before December 31, 2015, Deseret Power will get another free pass and have until 2018 to install the LNB/OFA at the Plant. If it takes EPA through the end of December to finalize the proposed settlement agreement, then it seems increasingly unlikely that EPA Region 8 can meet this December 31, 2015 deadline. The Tribe understands that EPA was attempting to have Deseret Power install the new pollution controls in the spring during a previously scheduled outage. As the enforcement agency that owes a trust obligation to the Tribe and our members, we expect EPA Region 8 to ensure that the timeline under the proposed agreement is realistic.

EPA should approve a settlement agreement that respects the wishes of the Tribe. Given that the Plant is the largest individual NOx producer in the Basin and pollution control technologies should have been installed in 2001, immediate NOx reductions can protect the Tribe from enduring avoidable wintertime ozone episodes. The sooner the Plant installs the LNB/OFA and operates at a lower heat input rate, the better the Reservation's air quality will be. Should the Plant install and operate the LNB/OFA by June 30, 2016, then the 0.28lbs/Mlbtu heat input limit for NOx from Unit 1 will take effect the following year. Because this heat input limit will reduce coal consumption in year 2017-2018, the Tribe sees this as a great opportunity for Deseret Power to begin its coal consumption cap in 2018 rather than 2020.

The Tribe supports the lifetime limit on coal consumption at the Plant. Each year, the Plant burns around two million tons of coal without the Tribe's permission

and on the Reservation. By forcing the Plant to limit its coal consumption earlier, Deseret Power must make the Plant more efficient or face closing the facility. Either scenario will provide cleaner and healthier air for tribal members to breathe.

Despite the many benefits, the Agreement does not make up for past violations of the Clean Air Act. Since 2000, NOx emissions have increased between 365 and 1,124 tons per year. The Plant currently operates with no add-on controls for NOx and has the potential to emit 9,228 tons of NOx on an annual basis. Had Deseret Power obtained the appropriate PSD Permit, pollution control technologies would have reduced NOx emissions by 40%. Such a reduction in NOx emissions would have had an incredible impact on cleaning the air quality on the Reservation. Through the Agreement, EPA has the opportunity to make up for erroneously issuing the 2001 PSD Permit. The Agreement should include stricter compliance deadlines, and if Deseret Power fails to meet these requirements, Deseret Power should lose the privilege to operate on and pollute the Reservation. In addition, Deseret Power should be required to undergo mitigation measures, such as tree planting, contributing to a fund to address health impacts on tribal members, and other actions to address its impacts on air quality in the Uintah Basin and our Reservation.

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While the Agreement will ultimately promote cleaner air throughout the Uinta Basin, unique tribal interests have too often been neglected. Since the construction of the Plant, the Tribe suffered disproportionate human health and environmental harm as a result of coal pollution from the Plant. These effects were felt far too often in the lungs of tribal members and were magnified by Deseret Power's noncompliance with the CAA. While we understand that the parties negotiated the Agreement to provide for cleaner air and to reduce the impact of the Plant on climate change, we do not believe that either the Sierra Club or WildEarth Guardians negotiated with the unique interests of the Tribe in mind. Therefore, we are providing a brief overview of EPA's duty to prevent environmental injustices to populations such as the Tribe.

President Clinton issued Executive Order No. 12,898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, to address problems of environmental injustice in existing federal laws and regulations. The Executive Order states:

To the greatest extent practicable and permitted by law ... each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, 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 . . . .  
59 Fed. Reg. 7629.

Fair treatment means that no population should be forced to shoulder a disproportionate share of exposure to negative effects of pollution due to lack of political or economic strength. Yet, this is exactly what is happening to the Tribe. Members of the Tribe lived for decades in close proximity to the emissions from the Plant, which fueled the Reservation's growing air pollution problems. Each year, the plant emits more than 3.5 million tons of air pollution from a 600-foot smokestack, including approximately one third of the NOx in the Uintah Basin. As you know, NOx combines with Volatile Organic Compounds ("VOCs") to form ozone. Recorded ground level ozone concentrations in the Uintah Basin are higher than those recorded in Los Angeles. Ground level ozone is a major health concern on the Reservation, triggering asthma attacks, scarring the lungs of children, sending tribal elders to the emergency room, and even causing premature death.

EPA must explain to the Tribe how these concerns were raised and addressed in the settlement negotiations. To the extent that the Agreement does not yet address these past impacts, EPA should consult with the Tribe on how these impacts should be addressed. For example, the Agreement should include tree planting or contributions to a fund to address the health impacts on tribal members.

Under the federal trust responsibility, EPA is expected to meet exacting fiduciary standards in carrying out responsibilities affecting Indian tribes and treaty rights. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). EPA must protect the interests being threatened here, including the threat to the Tribe's homeland, sovereignty, economic integrity, and resources. *See, e.g., Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973). With each passing day that the Plant operates in noncompliance with the CAA, the Tribe's sovereignty, homeland, health, and economic opportunities will continue to be compromised.

Another way to redress such instances of environmental injustice done to the Ute Indian Tribe is for the parties to establish a trust fund to promote cleaner air for tribal members. Deseret Power should remain liable for violations of the Clean Air Act and the monetary value of any such fines or penalties should be used to benefit the Tribe. Until Deseret Power complies with the Clean Air Act, it should continue to be fined for each and every violation of the Act. Fines resulting from violations by Deseret Power should be used to fund the trust account created by this settlement agreement, which could then be used by the Tribe and its

members for projects to mitigate the damage caused by Deseret Power to the air quality on the Uintah and Ouray Reservation. The funding for this settlement trust fund would dissipate upon Deseret Power's compliance with the Clean Air Act.

Such a trust fund is not without precedent. In fact, at least one trust fund has been created on behalf of the Ute Indian Tribe as a way to settle certain violations of the Clean Air Act by outside parties. The funds are used to assist in reducing emissions of air pollution, reducing deleterious impacts of air pollution on public health and the environment on the Uintah and Ouray Reservation, screening for air pollution, or educating tribal members about the deleterious impacts of air pollution on public health and the environment. If ever there were an opportunity to help members of the Ute Indian Tribe, there is no more deserving opportunity than the Agreement that is the subject of this comment. Yet there has been no discussion throughout the proposed settlement about ways to improve the lives of tribal members. A settlement trust fund is an appropriate component of the Agreement.

While the Plant's pollution of our Reservation homeland is an issue of the utmost importance, EPA should not rush to complete the Agreement and finalize an Operating Permit. It is more important that EPA issue the best Operating Permit possible rather than attempting to meet arbitrary deadlines, or even deadlines that are convenient to Deseret Power. Consultation with the Tribe on the Agreement, once all the comments are received, is necessary to develop an Operating Permit that will address the Plant's past and ongoing impacts on the Tribe.

As you know, EPA's May 4, 2011, "Policy on Consultation and Coordination with Indian Tribes" provides in Section V.B.I. that "regulations or rules" and "permits" are "normally appropriate for consultation" among a number of other EPA activities. In addition, EPA's commitment to consult on regulations and rules fulfills Executive Order No. 13175 on "Consultation and Coordination with Indian Tribal Governments" which requires that, "Each agency shall ... ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications."

While we understand the constraints of litigation now that a permit is being developed based on the Agreement, EPA must consult with the Tribe on the details on the Operating Permit. There is nothing unusual about EPA's new Permit that would exempt them from EPA's consultation policy.

The Tribe stands by these comments and continues to hold its federal trustee to ensure these critical protections are implemented. Yet, the Tribe still has not seen its federal trustee follow

through in these critical matters. Notably, EPA has yet to establish a trust fund to promote cleaner air for tribal members.

The Tribe's comments in relation to the proposed renewal of Deseret's Operating Permit shall in no way replace or diminish the EPA's ongoing obligation to engage in government-to-government consultation with the Ute Indian Tribe. Pursuant to Executive Order No. 13175 and EPA's "Policy on Consultation and Coordination with Indian Tribes," the EPA must consult with the Tribe on a government-to-government basis throughout this renewal process.