BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC

In re Deseret Generation and Transmission Co-operative Bonanza Power Plant	)	CAA Appeal No. 24-01
Permit # V-UO-000004-2019.00	)	

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

With its Response to the Petition for Review by the Ute Indian Tribe (the "Tribe") of the Uintah and Ouray Reservation (the "Reservation"), Region VIII ("Region 8") of the United States Environmental Protection Agency ("EPA" or "Agency") has managed, in one fell swoop, to limit itself narrowly in its review of Clean Air Act ("CAA") permit renewals, disown its fundamental mission to protect human health and the environment, eviscerate thirty (30) years of Environmental Justice policies, and untether itself from its long-established Agency policies on Indian matters. The Tribe's Appeal in this case offers the Environmental Appeals Board ("EAB" or "Board") a unique opportunity to review EPA's failure to implement these important national policies, and to instruct EPA to meaningfully address the human health and environmental concerns that the Tribe has been seeking to have EPA honor for decades.

The Response Brief filed by Applicant Deseret Generation and Transmission Co-operative ("Deseret") bears similar shortcomings. Deseret emphasizes EPA's alleged compliance with minimal regulatory requirements for public participation in the permitting process, along with the fact that EPA responded to the Tribe's public comments. Nowhere in Deseret's Response does Deseret acknowledge the unique trust relationship between the EPA and the Ute Indian Tribe, established as a matter of federal law and repeatedly affirmed by the federal judiciary, much less does Deseret give any consideration to how this trust responsibility may apply to the EPA's application of Executive Orders ("E.O.") and Agency policies for a project located on Indian country lands under the civil regulatory jurisdiction of the Tribe. As discussed below, EPA's obligations to the Tribe far exceed its minimal obligations to the public.

EPA and Deseret ask this Board to allow Deseret to renew a 2015 CAA Major Source Operating Permit ("Permit") with no modifications despite almost twenty (20) years of new

science and policy, and in EPA's sole reliance on a study done eleven (11) years ago by the state of Utah, which has no Clean Air Act jurisdiction on the Reservation. The EPA and Deseret both insist that this eleven (11) year old third-party study is a single and sound basis for a five (5) year forward-looking Permit renewal.

EPA, claiming it has no discretion to modify the permit, has abused its discretion in failing to update the Permit in accordance with its own policies and guidance, and is clearly erroneous in rejecting its mandate to ensure that Native Americans:

> 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..."[1]

In the present case, a comprehensive assessment of cumulative environmental impacts and issues of environmental justice is inseparable from Deseret's past violations of the Clean Air Act, which resulted in annual increases in NOx emissions between 365 and 1,124 tons per year between 2000 and 2015.[2] In consideration of the federal trust responsibility, particularly in light of the location of the plant on Indian country lands within the Uintah and Ouray Reservation, the study of environmental impacts also must account for how the Title V permit impacts the Tribe's ability to exercise its own jurisdictional authority to protect its environmental and natural resources in the future. EPA has fallen short on all of these requirements under federal law.

I. EPA Requests the Board Defer to Its Decision Without Inquiry, Contrary to 40 C.F.R. § 124.19

EPA asks the Board to automatically and mechanically defer to EPA's decision rather than scrutinize it as required under the standards of 40 C.F.R. § 124.19. EPA provides no legal basis

[1] https://www.epa.gov/environmentaljustice (Official Source) [last viewed April 18, 2024].
[2] Petition for Review at 3.

for this request, especially since it based its decision on an outdated, third-party antiquated study that would not be subject to any *Chevron* deference, as it was not an EPA study.[3] EPA cites an almost thirty (30) year old Board decision, *In Re Chemical Waste Management,* 6 E.A.D. 66, 80 (E.A.D. 1995), for the proposition the Board should defer to EPA's decision rather than review it. However, in that case, where the Tribe had argued in part, as is argued here, that EPA failed to consider Environmental Justice concerns of a disadvantaged community in issuing a Resource Conservation and Recovery Act ("RCRA") permit, the Board affirmatively decided to review the case, not dismiss the case due to blind deference as EPA requests here. The Board also held that EPA should implement the federal Executive Order on Environmental Justice "as a matter of policy, to the greatest extent practicable." The Board noted that deference to the Agency was possible "absent compelling circumstances."[4] At the time of the *Chemical Waste* decision in 1995, EPA had not yet developed and implemented an Agency Environmental Justice strategy, leaving the Board without specific Agency guidelines to review. Here, nearly thirty (30) years later, EPA has created and implemented at least thirty-four (34) actions to develop and promote Environmental Justice in decision-making, including at least seven (7) Guidance documents, three (3) Action Plans, two (2) Policies, multiple Memoranda, Reports, Toolkits, a Treatise, and two (2) Strategies. EPA's wholesale rejection of this substantial body of directives constitutes "compelling circumstances" for the Board to hold EPA to abide by its well-developed Environmental Justice initiative, which was declared an Agency priority in 2010. The Board should not automatically defer to EPA's decision to exclude Environmental Justice accommodations in its Permit renewal.

[3] The *Chevron* Deference standard, arising from *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984), has been eroded and is now before the United States Supreme Court this term, likely to be uprooted or diminished.
[4] *In Re Chemical Waste Management*, 6 E.A.D. 66, 80 (E.A.D. 1995).

II. Respondents' Position that EPA Has No Authority to Consider Anything Outside of the Four Corners of the 2015 Permit is Clearly Erroneous

EPA takes the short-sighted position that it cannot comply with its own policies and guidance in renewing the twenty (20) year old permit. At least three (3) times, EPA insists that it cannot develop permit conditions "unless necessary to assure compliance."[5] While a 2000 EPA Memorandum ("2000 Memo") states a lack of clarity as to the role of Environmental Justice issues in Title V permitting because Title V permits do not "impose substantive emission control requirements," it does note that public participation should "serve as a motivating factor for applying closer scrutiny to a Title V permit's compliance with applicable CAA requirements."[6]

Here, the Tribe has suggested ways to address Environmental Justice outside of imposing substantive emission requirements, such as using penalties that should have been assessed against Deseret for operating for years without a permit to improve environmental conditions to those affected, all of which EPA has summarily rejected. The Tribe has repeatedly asked EPA to put hard limitations on coal use at the Plant. Further, the permit includes existing enforceable emission limitations and standards.[7] EPA further acknowledges that it has "some discretion" to require additional monitoring to "assure compliance with applicable requirements, but it declines to do so despite Environmental Justice and Trust considerations. Instead, Region 8 states that the Tribe "has not identified any applicable requirements that would serve as a basis for the EPA to include [such] additional limitations" as a cap on coal consumption. The Tribe has identified, in great detail, EPA's obligations under its Environmental Justice policies and Trust Obligations, which EPA circuitously then claims it cannot consider.

[5] "EPA Region 8's Response to Petition For Review", at 19, 20, 29.
[6] "*EPA Statutory and Regulatory Authorities Under Which Environmental Justice Issues May be Addressed in Permitting*," (Dec. 1, 2000).
[7] EPA Response, at 2.

It is important to note that the 2000 Memo affirms EPA's ability to include Environmental Justice considerations in Prevention of Significant Deterioration ("PSD") Permits "on a case-by-case" basis and cites several late-1990s EAB decisions affirming EPA's ability to consider Environmental Justice in PSD Permits. Had EPA fully considered and incorporated Environmental Justice concerns in the Bonanza Plant's PSD Permits in 1981, 2001, and 2007 resulting in substantive permit requirements, those provisions could have been carried over into the current Title V Permit. Instead, as EPA notes in its Response, when the 2007 permit was appealed and remanded to EPA, it did nothing.[8]

Adopting a similar position to the Permitting Agency, Deseret argues that EPA lacks discretion to alter or condition the Permit on environmental justice grounds where the permittee has complied with all applicable statutory and regulatory requirements under Title V. This argument falls short for two reasons. First, the EAB decisions cited by Deseret are reliant on the "self-limiting" language in the Executive Order providing that the E.O. must be applied only to the extent "existing law allows."[9] However, as this Board explained in the *Muskegon* opinion relied on by Deseret, the statutory and regulatory requirements of a permittee under Title V normally "define what existing law allows."[10] The present situation is distinguishable from *Muskegon* because applicable "existing law" is defined not just by the permittee's statutory and regulatory requirements under Title V, but also the agency's federal trust responsibility to the Tribe and its membership residing within the impacted area. There is nothing in the "self-limiting" language of the Executive Order suggesting that "existing law" excludes *all* established law and policy applicable to permittee and/or the agency. It is facially arbitrary to suggest that the self-

[8] EPA Response, at 4.
[9] Deseret Resp. at 11 (citing *In re Muskegon Dev. Co.*, 18 E.A.D. 88, 106 (EAB 2020)).
[10] Petition for Review at 11.

limiting language of the Executive Order can simultaneously override existing federal law while circumscribing the same Executive Order within the confines of other existing federal law.

Second, as Deseret admits in its Response Brief, EPA does have substantial discretion to assure environmental justice by enhancing public participation in the permitting process. As explained in the Tribe's Petition and herein *supra*, EPA's obligations to the Tribe extend above and beyond EPA's obligations to the public at large.[11] Thus, if EPA has discretion to enhance public participation in the name of environmental justice, it stands to reason that EPA is not only within its discretion, but is in fact duty-bound under law, to consider and address the Tribe's environmental justice concerns in addition to rigidly applying its one-size-fits-all EJScreen analysis. If the Board has authority to require the Agency to more thoroughly and meaningfully respond to public comments on a proposed permit, as was the case in the *Muskegon* opinion relied upon by Deseret, then the Board undoubtedly has authority to require the agency to meaningfully address the concerns raised by the Tribe, which is both a public commentor, but more critically, the Agency's trust beneficiary. EPA's refusal to incorporate the impact of cumulative environmental and non-environmental effects, and to account for the disparate impact of the Plant's effect on a severely disadvantaged population, is clear error and abuse of discretion.

III. EPA's Assertion that the Board Should Dismiss the Petition Because the Tribe Did Not Use EPA "Magic Words" in its Petition is Spurious

In an effort to undermine the Tribe's appeal on hyper-technical grounds not rooted in applicable law, EPA argues that the EAB should set aside the Tribe's objections on carbon dioxide ("CO_2") because EPA asserts the Tribe did not properly reference this issue during the public comment period. However, the Tribe did reference the CO_2 issue several times in its comments to

[11] *In re Muskegon Dev. Co.*, 18 E.A.D. 88, 106 (EAB 2020); *In re Envotech*, 6 E.A.D. 260 (EAB 1996).

EPA, just not with the "magic words" EPA unilaterally thinks it should have used. Contrary to EPA statements, the Tribe repeatedly raised CO_2 concerns in its Comments in 2021 and 2023.

First, EPA acknowledges that the Tribe referenced "high levels of air pollution into the air" in both of its comment letters. But EPA presumes, with no justification, that this reference only refers to emissions of Nitrogen Oxide ("NO_X") and Volatile Organic Compounds ("VOCs") and dismisses this reference.

In its March 22, 2021 Comments on the Permit (the "2021 Comments"), the Tribe objects to Deseret "spewing high levels of coal pollution into the air at the expense of the health, safety, and well-being of tribal members and communities"[12] and links those emissions to health and environmental degradation. According to the federal government, "Coal-fired power plants release carbon dioxide, mercury, and other emissions that can harm human health."[13] The Tribe further references disproportionate human health and environmental harm "as a result of coal pollution from the Plant."[14] The 2021 Comments specifically reference that "the plant emits more than 3.5 million tons of air pollution from a 600-foot smokestack . . ."[15] The reference to "3.5 million tons of air pollution" in the 2021 Comments can only be understood as a reference to CO_2 emissions. Again, in its 2023 Comments to EPA's Response to Comments ("RTC"), the Tribe references that the plant is "spewing high levels of coal pollution into the air" and "emit[ting] toxic

[12] 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) at 1.
[13] U.S. Government General Accountability Office (GAO). https://www.gao.gov/blog/federal-government-efforts-reduce-emissions-coal-fired-power-plants#:~:text=Coal%2Dfired%20power%20plants%20release,that%20can%20harm%20human%20health. (original source). [Last viewed April 18, 2024].
[14] 2021 Comments, at 3.
[15] 2021 Comments, at 4.

pollutants into our Tribal Airspace with impunity."[16]

In an earlier Board decision regarding this same facility, the Board allowed the Petitioner's rationale to be supplemented on appeal where a "missing explanation was fairly deductible from the record." At the least, any error in failing to articulate CO_2 in the Tribe's earlier comments are fairly deductible from the Administrative Record provided by EPA and should be read into those comments.[17]

Besides the fact that EPA is objecting based on a subjective opinion of what constitutes a "reference" in a public comment, it is a well-known and long-standing canon of construction for court interpretations of Indian disputes with the federal government that ambiguities must be decided in favor of Indians.[18] While this legal principle, consistently interpreted for over two hundred (200) years, originally referred to ambiguous statutes and treaties, the same consideration should be given here. While Region 8 may view the Tribe's wording as inartful, the benefit of any doubt should be given to the Tribe that its references to "coal pollution" and the like are references that include a key element of coal pollution: carbon dioxide.

EPA also claims, as another reason to dismiss a part of the Petition, that the Tribe only referenced CO_2 and the "lifetime limit on coal consumption" in its Attachment to the Petition for review, which for some reason EPA believes is insufficient to properly raise the issue. This hyper-technical argument has no basis, and the objection should be summarily dismissed.

The Tribe notes in its cover letter to its 2021 Comments that its "submission of comments in no way substitutes for or satisfies the obligations of our federal trustee to engage in ongoing

[16] Ute Indian Tribe of the Uintah and Ouray Reservation, "*Comments on U.S. Environmental Protection Agency Response to Comments on the proposed Title V Operating Permit: Deseret Power Electric Cooperative—Bonanza Power Plant*," October 10, 2023, at 1.
[17] *In Re Deseret Power* 11/13/2008.
[18] *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832).

government-to-government consultation in this matter and to fulfill its fiduciary obligations toward the Tribe and its members." While the "public" may be restricted to appeals of issues that were raised in public comments, the Board must allow, in its discretion, the consequences of forty (40) years of EPA ignoring the health and environmental impacts of the Bonanza Plant based on principles of the federal trust duty, environmental justice, and the federal government's obligation to go further than public comment limitations for sovereign Indian governments.

IV. EPA Cannot Ignore Its Own Environmental Justice Policies Merely Because the Agency States that They Are Not "Enforceable"

EPA's argument that its environmental justice policies are unenforceable is a red herring. The Tribe recognizes that guidance and policy are not independently enforceable to the extent of federal laws and regulations; hence, the Tribe is not endeavoring to enforce agency policy against the promulgating agency. To the contrary, the Tribe is arguing that EPA's ignoring of its own policies contributes to the arbitrary and capricious abuse of discretion, and clearly erroneous character of the Agency action being challenged. Agency policies must be interpreted as having purpose and meaning. According to the Department of Justice, ". . . guidance documents still serve many valuable functions. For example, interpretive guidance can "'advise the public' of how the agency understands, and is likely to apply, its binding statutes and legislative rules."[19] Guidance may also help explain an agency's programs and policies or communicate other important information to regulated entities and the public . . . And guidance materials often convey important information to the public in language that is clearer and more accessible than the underlying statutes and regulations. Guidance documents can thus serve as an important tool to promote

[19]Justice Manual 1-10.000 – "Principles for Issuance and Use of Guidance Documents" (Official Source)[Last viewed April 22,2024]; *see* also *Kisor v. Wilkie*, 139 S. Ct. 2400, 2420 (2019) (plurality opinion) (quoting Perez, 575 U.S. at 97, "the meaning of a legislative rule remains in the hands of courts, even if they sometimes divine that meaning by looking to the agency's interpretation," 2415-2419.

transparency, fairness, and efficiency.[20]

EPA takes the position in its Response that because the government inserts a statement in its policies, guidances, and Executive Orders that they are "not enforceable" EPA can ignore those directives at will, and the Tribe has no recourse. This interpretation would render those important policy documents immaterial and irrelevant in federal actions. If that is true, these documents are meaningless. "Although guidance cannot be enforced, the expectation is that it will be followed or will provide answers when the law is unclear."[21] As to Executive Orders, E.O.s are issued by the White House and are used to direct the Executive Branch of the federal government. Executive Orders state mandatory requirements for the Executive Branch and have the effect of law.[22]

The Tribe's dispute is that EPA is looking at the Title V renewal as an isolated, automatic process in which EPA's role is to only look at the monitoring, inspection, and recordkeeping elements of the Clean Air Act and rotely re-approve permit conditions that were established in an original approval. Surely that cannot be the case. The Tribe forcibly asserts that EPA must use its discretion and decision-making authority to refine the permit based on its unique obligations to Indian Tribes and disadvantaged communities, and new information such as the rapidly worsening effects of climate change. Utah is not immune to the degenerative effects of climate change; ground level ozone is impacting the state. Focusing on Utah air inversions, National Geographic recently concluded that "The increase in ground-level ozone caused by climate change raises the chance of respiratory problems – people with asthma, emphysema, or chronic bronchitis are especially at risk."[23] The effects are much worse for Environmental Justice communities,

[20] Justice Manual, *Supra.*
[21] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6243447/
[22] Congressional Research Service, "Executive Orders: An Introduction" (March 29, 2021), 1.
[23] National Geographic, "Ground-level ozone is getting worse. Here's what it means for your health" April 15, 2024. https://www.nationalgeographic.com/premium/article/climate-change-ozone-worse-respiratory-diseases?loggedin=true&rnd=1713722795323. [last viewed April 21, 2024].

including Indian tribes, due to disparate risks and cumulative impacts.

EPA has been developing and refining its Environmental Justice policies for over forty (40) years, starting about the time of the construction of the Bonanza Plant. In 2010, EPA established Environmental Justice as an Agency-Wide Priority.[24] EPA must interpret its statutes and regulations consistent with its own guidance and policies, not ignorant of or contrary to them.

Of primary consideration in EPA's policy is that it requires that EPA look at <u>all</u> contributing factors to environmental inequity in disadvantaged communities, including disparate and cumulative impacts. EPA must consider these factors even if they are not environmentally-based.[25] In its "Final Guidance for Consideration of Environmental Justice in Clean Air Act 309 Reviews" EPA instructs reviewers to "consider these multiple, or cumulative effects, **even if certain effects are not within the control or subject to the discretion of the agency proposing the action.**"[26][emphasis added]. According to EPA's website, "EPA's environmental justice ("EJ") mandate extends to all of the Agency's work" specifically including setting standards, **permitting facilities**, and reviewing proposed actions.[27] [emphasis added]. In Executive Order 14096 on Environmental Justice, President Biden stated:

> We must advance environmental justice for all by implementing and enforcing the Nation's environmental and civil rights laws, preventing pollution, addressing

[24] "EPA's Involvement in the Environmental Justice Movement" timeline, https://www.epa.gov/environmentaljustice, (Official Source) [last viewed April 18, 2024].

[25] "**Environmental justice** means the just treatment and meaningful involvement of all people . . .so that people . . . 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. . .***" https://www.epa.gov/environmentaljustice/learn-about-environmental-justice [emphasis added].

[26] "Final Guidance for Consideration of Environmental Justice in Clean Air Act 309 Reviews", US Environmental Protection Agency/Office of Federal Activities (2252A) at 8 (July 1999). (Original Source)[Last viewed April 21, 2024]

[27] https://www.epa.gov/environmentaljustice/learn-about-environmental-justice, (Official Source)[Last viewed April 18, 2024].

> climate change and its effects, and working to clean up legacy pollution that is harming human health and the environment.
>
> Communities with environmental justice concerns face entrenched disparities that are often the legacy of racial discrimination and segregation, redlining, exclusionary zoning, and other discriminatory land use decisions or patterns. These decisions and patterns may include the placement of polluting industries . . . that cause cumulative impacts to the public health of communities . . .
>
> Communities with environmental justice concerns experience disproportionate and adverse human health or environmental burdens. . .

Permitting is clearly a "federal activity" as that term is defined in E.O. 14096, as it is an "action that affects or has the potential to affect human health and the environment, including an agency action related to climate change." Therefore, in this circumstance, EPA must incorporate Environmental Justice considerations into its permitting decisions, to ensure that the Tribe is not disproportionately impacted from the cumulative effects of its history of environmental inequity.

For example, in response to the Tribe's objection to EPA not notifying the Tribe of its 2022 Inspection of the Bonanza Plant for potential violations of RCRA hazardous waste storage, EPA and Deseret both assert that it must segregate RCRA compliance from its Title V Permitting process. The Tribe is not disputing this. What the Tribe is objecting to is the lack of inclusion of the findings of the RCRA inspection in the Title V permitting process as a significant factor in evaluating "cumulative risk" from the facility prior to approving the unchanged terms from the 2015 permit, particularly when the RCRA inspection revealed several potential areas of environmental noncompliance prior to EPA's final approval of the Title V permit. In EPA's "small box" view of what it can consider in a Title V permit renewal, it must wear blinders and not look beyond the initial monitoring and paperwork requirements of that permit. However, the basis of the Environmental Justice policy and guidance is exactly the opposite: That these other environmental (and non-environmental) impacts to a community must be taken into account. EPA has made no adjustments to the Permit to ensure the Permit compensates for these other harms.

EPA asserts that despite its Environmental Justice Policies being "not enforceable" it has nevertheless complied with them by doing and "considering" an "EJScreen" using national default standards. EPA asserts that the EJScreen, by itself, is all EPA needs to do to determine whether there is an Environmental Justice impact from its action and has no obligation to do any further analysis.[28] This is clearly erroneous. According to EPA's website, the purpose of the EJScreen is to allow the public "to access high-resolution environmental and demographic information for locations in the United States and compare their selected locations to the rest of the state, EPA region, or the nation."[29] It is ***not*** a substitute for a particularized evaluation of whether Environmental Justice concerns are present in a community and need to be addressed. As EPA cautions, the EJScreen:

> …is a useful first step in understanding or highlighting locations that may be candidates for further review. ***However, it is essential to remember that screening-level results:***
>
> - ***do not, by themselves, determine the existence or absence of environmental justice concerns in a given location;***
> - ***they do not provide a risk assessment and have other significant limitations*****. . .**EJScreen is **not a detailed risk analysis.** It is a screening tool that examines **some** of the relevant issues related to environmental justice, and there is uncertainty in the data included. It is important to understand [two major] limitations. . . The first limitation arises because a screening tool cannot capture all the relevant issues that should be considered (e.g., other environmental concerns). . . Therefore, its initial results should be supplemented with additional information and local knowledge whenever appropriate, for a more complete picture of a location.

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> The second important limitation is that EJScreen relies on demographic and environmental estimates that involve substantial uncertainty. This is especially true when looking at a small geographic area, such as a single Census block group. . .

[28] EPA Response, 27.
[29] https://www.epa.gov/ejscreen/purposes-and-uses-ejscreen

Thus, EPA concludes ***that "it is generally not appropriate to rely on any screening tool as the basis for a key decision."*** Nonetheless, EPA did just that here.

Additionally, in its EJScreen, EPA focused only on ozone generated from the Bonanza Plant and whether emissions authorized in the Permit contributed to ozone. Ironically, ozone is caused in large part by CO_2, which is not regulated under the Permit despite its massive contribution to air pollution from the Bonanza Plant, and the effects of which EPA argues should be excluded from this Petition.[30] Using the 2013 third-party study on ozone in the Uinta Basin, which the Tribe asserts is outdated and should not be solely relied upon the Region concluded that "renewal of the Title V permit will not result in air quality impacts to the surrounding communities."[31] Based on this, EPA urges the Board to dismiss the entire Environmental Justice claim simply due to "deference" to EPA for doing an EJScreen and adopting the third-party 2013 study.[32]

EPA's statements on this are inconsistent. On the one hand, EPA acknowledges its screen has found that "communities within the census block group in which Bonanza is located may be disproportionally impacted by total pollution, non-pollution and climate change burdens."[33] But EPA determined that because of stack height, and based on the outdated 2013 study, the permit *would not have any effect* on air quality, groundwater, vegetation, wildlife, or cultural resources, despite common sense and actual health effects reported by the Tribe.[34] This conclusion, based on over-reliance on a screening tool not meant to determine federal decision-making, and an out-of-date study that ignores actual effects and an ensuing decade of intensifying climate-change,

[30] EPA Response, 16.
[31] EPA Response, 22.
[32] EPA Response, 22-23.
[33] EPA Response, 26.
[34] EPA Response, 26.

defies logic, is clearly erroneous and is an abuse of discretion. E.O. 14096 specifically requires EPA to consider climate change impacts in decision-making, which EPA has failed to do. The Board must review this decision in accordance with the criteria for EAB review in 40 C.F.R. § 124.19 as an exercise of discretion and an important policy consideration, as well as a finding of fact and conclusion of law that is clearly erroneous.

V. EPA Mis-states Recent Caselaw on the Federal Government Trust Obligation to Indian Tribes, and Ignores the 200-Year Old Body of Law that Establishes That Obligation

In its Response, EPA places reliance on the 2023 Supreme Court decision in *Arizona v. Navajo Nation*.[35] EPA overstates the ruling in that case.

In the *Navajo Nation* case, the Supreme Court affirmed the existence of a federal trust duty to Indian Tribes. "To be sure, this Court's precedents have stated that the United States maintains a general trust relationship with Indian Tribes. . ."[36] The Court narrowly held, based on the facts of that case, that absent specific language in a statute or Treaty with a Tribe, the federal government did not have an *affirmative duty* to physically procure sufficient amounts of water for the Navajo Nation, including construction of physical water infrastructure such as pipelines and wells.[37][Emphasis in original]. The case was further narrowed by the subject matter of federal Indian Reserved Water Rights, a unique and specialized area of federal Indian jurisprudence. Nonetheless, EPA takes this ruling to conclude that, *inter alia*, there is no obligation to consult with the Tribe under the general trust duty,[38] nor does the trust duty impose any obligations on EPA to communicate with the Tribe when it does a RCRA non-compliance facility inspection at the Bonanza Plant in Indian country, despite the environmental and health findings of that

[35] *Arizona v. Navajo Nation*, 599 U.S. 555 (2023).
[36] *Ibid*, 565.
[37] Ibid, 488.
[38] EPA Response, footnote 57.

inspection.[39]

EPA asserts that it fulfilled any federal trust duty to the Tribe merely by complying with the permitting process of the Clean Air Act and the legal provisions of RCRA. EPA's interpretation renders the trust duty meaningless by suggesting that the federal government owes no additional or unique obligations to Tribes in carrying out statutory duties under federal law. To the contrary, the federal trust duty imposes:

> a legal obligation under which the United States "has charged itself with moral obligations of the highest responsibility and trust" toward Indian tribes (*Seminole Nation v. United States*, 1942). . .The federal Indian trust responsibility is also a legally enforceable fiduciary obligation on the part of the United States to protect tribal treaty rights, lands, assets, and resources, as well as a duty to carry out the mandates of federal law with respect to American Indian and Alaska Native tribes and villages. In several cases discussing the trust responsibility, the Supreme Court has used language suggesting that it entails legal duties, moral obligations, and the fulfillment of understandings and expectations that have arisen over the entire course of the relationship between the United States and the federally recognized tribes. [40]

As an agency of the United States, EPA must protect the Tribe's homeland, sovereignty, economic integrity, and resources.[41] The Tribe once again appeals to the Board to hold EPA accountable to this "highest moral" and legally enforceable fiduciary obligation to protect the health and welfare of its members and protect its remaining homeland from devastating deleterious health impacts caused by centuries of disparate treatment and disadvantage. EPA cannot wash its hands of this fundamental federal obligation merely by going through the motions of implementing environmental statutes for which it is the steward.

VI. EPA's Position Eviscerates Its Forty-Year Old Indian Policy

[39] EPA Response, 39.
[40] United States Department of the Interior, Indian Affairs, https://www.bia.gov/faqs/what-federal-indian-trust-responsibility. (Official Source) [Last viewed April 19, 2024].
[41] *E.g.*, *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1984); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973); *Seminole Nation v. United States,* 316 U.S. 286, 297 (1942).

EPA's 1984 Indian Policy, reaffirmed in 2021 by the current Administration, instructs all agency staff and managers to act in accordance with several enumerated principles for EPA's dealings with tribal governments and "responding to the problems of environmental management on America [sic] Indian reservations in order to protect human health and the environment," specifically: (1) promotion of self-government, and (2) a "government-to-government" relationship, recognizing the unique sovereign status of tribes.[42] That Policy, which has been supplemented and detailed in numerous subsequent documents, states that the "keynote" of the effort "will be to give special consideration to tribal interests in making Agency policy, and to insure the close involvement of Tribal Governments in making decisions and managing environmental programs affecting reservation lands" based on the following principles, *inter alia*:

- A "One-to-One" Government-to-Government Relationship;
- Tribal governments as the primary parties for setting standards, making environmental policy decisions, and managing programs on reservations;
- Taking affirmative steps to encourage and assist tribes in assuming program management;
- Removing legal and procedural impediments to working directly and effectively with tribal governments;
- In keeping with the federal trust responsibility, ***assuring "that Tribal concerns and interests are considered in EPA actions and decisions that may affect reservation environments";***
- EPA will incorporate these . . . goals into its … ongoing policy and regulation development processes…

[emphasis added].

The 2021 Reaffirmation recognizes the federal government's trust responsibility to tribes, the "unique legal relationship" with tribal governments and "the right of the tribes as sovereign governments to self-determination." Instead, EPA makes short shrift of these moral and legal principles by minimizing tribal involvement, undercutting the Tribe's efforts to have actual and

[42] "EPA Policy for the Administration of Environmental Programs on Indian Reservations" (November 8, 1984).

devastating environmental risks addressed and its members protected from environmental harm and degradation. EPA in its response rejects virtually every comment made by the Tribe in multiple settings, including Tribal consultations and public comment opportunities. It fails to recognize the unique relationship between Indian tribes and the federal government that sets tribal governments apart from the public. Rather than make efforts to work "directly and effectively" with the Tribe, EPA:

- Minimizes tribal concerns over the health and welfare of tribal members;
- Fails to keep the Tribe informed in any meaningful way of environmental actions such as the RCRA inspection (providing the inspection report over a year after the inspection and almost the same time as the notice of permit renewal);
- Disrespects and disregards tribal cultural values for a healthy environment and protection of honored elders and the young;
- Asks the Board to deny the Petition for hyper-technical reasons, and show unfounded and unquestioning deference to EPA without reviewing the permit approval for clear errors, abuse of discretion, and major national policy implications;
- Confuses the government-to-government relationship as being satisfied by two (2) meetings in four (4) years and treating the Tribe as a member of the public subject to public limitations on input and decision-making.

VII. Despite EPA's Assertion, "Check the Box" Tribal Consultation is Insufficient to Adhere to the "Meaningful Consultation" Requirement with Indian Tribes

Executive Order 14096 states that:

> The Federal Government must also continue to respect Tribal sovereignty and support self-governance by ensuring that Tribal Nations are consulted on Federal policies that have Tribal implications. In doing so, we must recognize, honor, and respect the different cultural practices—including subsistence practices, ways of living, Indigenous Knowledge, and traditions—in communities across America. As our Nation reaffirms our commitment to environmental justice, the Federal Government must continue to be transparent about, and accountable for, its actions.

EPA's American Indian Environmental Office states as a mission priority to "Advance robust EPA Tribal Consultation under President Biden's 2021 Tribal Consultation and Strengthening Nation-to-Nation Relationships and Executive Order 13175: Consultation and

Coordination with Indian Tribal Governments (2000)."[43]

Consistent with the foregoing, EPA's 2011 "Consultation and Coordination Policy With Indian Tribes" requires that consultations be government-to-government (not public meetings); "meaningful" (not one-sided); coordinating between the two governments (not EPA telling the Tribe what EPA interprets that it is locked in to doing); protecting human health and the environment (not rotely siding with the Plant Operator to reinstate limited permit requirements); and early enough in time that the consultation can affect EPA's decision (not less than two (2) months before the permit revision is finalized). None of this occurred.[44]

EPA again defends its lack of meaningful consultation by stating that E.O. 14096 does not create any legally enforceable obligation for EPA to meet its requirements, despite the "highest level of moral obligation" the federal government has towards Indian Tribes, and the legal affect of Executive Orders. The cases EPA cites to support its position that any consultation satisfies the consultation requirement have more extensive and meaningful consultation than in the present case. In *In Re Desert Rock*, cited by EPA, the consultation was not about the substance of the permit, but whether EPA should have consulted with the Tribe before moving to have its prior decision remanded back to the Agency.[45] The Board held that the consultation on this procedural issue was sufficient. However, in Desert Rock, EPA appears to have held formal consultation with the Navajo Tribe twice in one year. Here EPA held formal consultation twice in ***nine (9)*** years, with no formal consultation in the last ***two and a half (2.5) years*** before the permit renewal was issued.

[43] EPA American Indian Environmental Office: Mission, https://www.epa.gov/tribal/american-indian-environmental-office-aieo (Original Source)[Last viewed April 19, 2024].

[44] "EPA Policy on Consultation and Coordination with Indian Tribes", May 4, 2011.

[45] *In Re Desert Rock p. 501.*

Yet EPA takes a dismissive view of the government-to-government consultation process in its Response. It asserts that, in essence, any consultation equals all consultation. In the nine (9) years since the original 2015 permit, EPA, by its own admission, has had two formal consultations with the Tribe, one on August 30, 2023, and another on September 20, 2023, one day after it sent its draft Response to Comments and two (2) days after it sent a second RTC to the Tribe, respectively. EPA had *two (2)* government-to-government consultations in almost a decade.

The Tribe was not included in the 2015 settlement discussions between EPA, Deseret, Wild Earth Guardians and Sierra Club, despite the Bonanza Plant being located on the Reservation and Tribal members being the affected party from the Bonanza Plant emissions. The Tribe provided comments on the Settlement after it was done; all of which were ignored and the settlement was unchanged.

In the nine (9) years since the original 2015 permit, EPA has not made one significant change based on the Tribe's repeated input regarding CO_2 emissions, lifetime coal consumption cap, health and environmental exposures from the Plant, cumulative impacts, cultural concerns, and substantive changes to the Permit. This certainly calls into question the validity and sincerity of EPA's consideration of the Tribe's comments, its adherence to its obligations under its Indian Policy, federal trust obligations, and its Environmental Justice considerations. All Tribal substantive comments were rejected. EPA has not identified any substantive change made due to these meetings and comments, meaning that EPA was 100% right and the Tribe was 100% wrong in every concern it raised. This defies logic. The Tribe views this as EPA going through the motions to merely check off its "consultation" requirement, rather than "meaningfully consider" the Tribe's concern and working in partnership with the Tribe to protect its homeland and members.

CONCLUSION

By effectively eliminating the trust responsibility with its narrow reading of *Arizona v. Navajo Nation* to incorrectly propose no duty whatsoever absent a specific provision in a Treaty or statute, refusing to look beyond the four corners of the Title V permitting elements from the 2015 permit despite the requirement to consider cumulative effects and disproportionate impacts; the rapidly worsening effects of climate change on air pollution, stating that because EPA's own policies and guidance are not "enforceable" per se EPA has not duty to honor them or incorporate them into its decision-making; and seeking an entire dismissal of the Petition because of words used or not used in the Petition, and failing to incorporate Environmental Justice principles into its permit decision, EPA dishonors the Tribe, fails to honor its trust obligation, and errs in approving the permit renewal. The Board cannot let this stand and should remand the permit to EPA to correct these grave mistakes. The Board has the opportunity with this Appeal to consolidate and update its rulings on Title V permit considerations, Environmental Justice, and the EPA Indian Policy to ensure that EPA uses its vast authorities to protect vulnerable and disadvantaged communities from real and worsening environmental harm.

Respectfully submitted this 22nd day of April 2024.

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STATEMENT OF COMPLIANCE

Pursuant to 40 C.F.R. § 124.19(d)(3), the foregoing document complies with the type-volume limitation because this brief contains 6,661 words excluding the parts of the brief exempted.

By: /s/ Michael *W. Holditch*
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petitioner's Reply Brief filed electronically with the Environmental Appeals Board's E-filing system, and was served on the following persons, this day of 22nd day of April 2024, by U.S. mail.

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