

BEFORE THE ENVIRONMENTAL APPEALS BOARD 709 JUN 11 PM 3:44
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. ENVIR. APPEALS BOARD

IN THE MATTER OF:

DESERT ROCK ENERGY COMPANY, LLC

PSD PERMIT NO. AZP 04-01

**PSD APPEAL NOS. 08-03, 08-04,
08-05, and 08-06**

**DINÉ POWER AUTHORITY'S OPPOSITION TO
EPA REGION 9'S MOTION FOR VOLUNTARY REMAND**

Diné Power Authority ("Diné Power" or "DPA") respectfully submits this Opposition to EPA Region 9's Motion for Voluntary Remand. DPA joins in the arguments set forth in the briefing herein by its co-developer, Desert Rock Energy Company, LLC ("Desert Rock"). DPA makes the additional arguments set forth below in opposition to Region 9's Motion for Voluntary Remand.

BACKGROUND

Diné Power was established by the Navajo Nation Council pursuant to Resolution CN-87-85 and CJA-2-96, codified at 21 Navajo Nation Code (NNC) § 201, *et seq.*, as an enterprise of the Navajo Nation. Diné Power is an instrumentality of the Navajo Nation, subject to the control of oversight authorities delegated by the Navajo Nation Council. Pursuant to this authority, the Navajo Nation Council authorized and approved Diné Power to develop the Desert Rock project for the social, economic, and cultural well-being of the Navajo people.

The underlying permit at issue in this matter relates to a coal-fired power plant on land held by the United States Government in trust for the benefit of the Navajo Nation.

The United States Government through two treaties, 9 Stat. 574 (1850) and 15 Stat. 667 (1868), established a relationship with the Navajo Nation coupled with numerous responsibilities including supporting the Navajo Nation's sovereignty and self-governance. As the Navajo Nation's primary authority to develop energy projects, Diné Power is a sponsor and co-developer of the plant on Navajo trust land along with Desert Rock Energy Company, LLC ("Desert Rock"). In addition, Diné Power was a co-plaintiff with Desert Rock in a recent action pursuant to section 304(a) of the Clean Air Act ("CAA"), 42 U.S.C. § 7604(a), which resulted in EPA issuing the final PSD permit for the project. *See Desert Rock Energy Company, LLC, et al. v. U.S. Environmental Protection Agency, et al.*, U.S. District Court for the Southern District of Texas, Houston Division, Civil Action No. 4:08-CV-872. The Navajo Nation through Diné Power, along with the Navajo people who will receive jobs, income, and other benefits from the project, are ultimate beneficiaries of the Desert Rock project.

The Navajo Nation, working through Diné Power, has been seeking to improve and protect the economic well-being of the Navajo Nation and its people by responsibly developing energy resources within its borders. The subject power plant would be operated primarily by Navajo workers, and would be powered by coal owned by the Navajo Nation and mined on tribal land. In addition, the Navajo Nation has significant ownership and investment options in the plant. In 2006, the Navajo Nation Council, the legislative branch of the Navajo government, approved the project lease, water supply and tax agreements in one of the largest supermajority votes on record for that body. In 2009,

the Navajo Nation Council approved by an even greater supermajority the legislation necessary for the Navajo Nation to consent to the granting of rights of way across Navajo lands for the Desert Rock project by the United States Department of Interior. It is difficult to over-estimate the importance of the Desert Rock project to the Navajo economy, and the impact of the project's delay to the independence and lives of the Navajo people.

Once it begins operating, the facility will provide additional revenues to the Navajo Nation equal to approximately one-third of the annual operating budget for the Navajo Nation. Presently, about 50 percent of the Navajo Nation members are unemployed, and, according to the Census 2000, 43 percent of Navajo individuals were living below the poverty level. Every month that the Desert Rock project is delayed, the Navajo Nation loses approximately \$5 million per month, with critical programs continuing to suffer, including health care, housing, education, law enforcement, all areas where the Navajo Nation ranks among the worst in the United States. The Desert Rock project will fund programs that will literally save lives on the Navajo Nation, in an environmentally responsible way.

During the planned four-year construction period, the Desert Rock project will create between 2,000 and 3,000 jobs. In addition to significant additional service jobs and a wide range of secondary employment, upon commencement of operations, the Desert Rock facility will train and employ more than 200 individuals; the related coal-mining operation will employ in excess of 200 individuals. Every month the project is delayed,

these family-wage jobs and the benefits and opportunities these jobs bring to Navajo families are not realized by the people who need them the most.

The Navajo Nation, the largest sovereign Indian Nation in the United States, along with Diné Power, has worked cooperatively with EPA on the Desert Rock project for nearly six years. This work, when completed, will result in the cleanest coal-fired plant in the United States, using highly-efficient supercritical boiler technology with the most advanced pollution controls. Further delay in this process will inhibit the growth and independence of the Navajo Nation.

Yet, now, after years of compliance with all necessary requirements, with all issues fully briefed on appeal, and with only this Board's decision pending, Region 9 seeks with no sound precedent or reasoning to pull the rug out from under the entire project and send the parties back to square one. The impact of this move, if successful, would be nothing short of devastating to the Navajo.

ARGUMENT

On April 27, 2009, without warning to the other parties, and, importantly, without the consultation to which the Navajo are entitled under the law, EPA Region 9 filed its unprecedented Motion for Voluntary Remand. DPA's co-developer, Desert Rock, provides in its opposition to voluntary remand the legal points and authorities under the environmental laws which compel the Board's denial of Region 9's motion. Denial of that motion is further compelled by EPA's utter disregard of its government-to-government obligations to consult on such matters with the tribal interests in this proceeding. EPA

simply filed its motion with no prior tribal consultation whatsoever. In doing so, EPA ignored its trust obligations and its own internal policies and procedures.

In 1850, the United States entered into a Treaty with the Navajo Tribe. “Treaty Between the United States of American and the Navajo Tribe of Indians”, 9 Stat. 974 (Ratified by the Senate September 9, 1850 and Proclaimed by the President September 24, 1850) (“Treaty of 1850”). The Treaty of 1850 provides for express rights and obligations of the United States and the Navajo, including that “the Government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians.” *Id.* at Article XI. The Treaty of 1850 is in full force and effect today.

Over the last 30 years, the United States has increasingly recognized the inherent sovereign right of the Navajo Nation to manage and develop its own natural resources for the benefit of its citizens. Under Executive Order 13,175, the EPA is required to recognize its “unique legal relationship with Indian tribal governments,” Exec. Order No. 13,175, 65 Fed. Reg. 67,249, Section 3 (November 6, 2000), and to respect tribal self-government and sovereignty, tribal rights, and tribal responsibilities whenever the EPA formulates “policies that have tribal implications.” *See* Sections 3-5. “Policies that have tribal implications’ means “regulations, legislative comments or proposed legislation, and other policy statements *or actions* that have substantial direct effects on one or more Indian tribes[.]” *Id.* at Section 1 (emphasis added); *see also* Exec. Order No. 12,898, Section 6-606 (February 11, 1994) (requiring consultation with tribal leaders).

The EPA’s own policies and procedures prohibit its action herein:

Each federally-recognized Tribal government is a sovereign entity that has an individual government-to-government relationship with the federal government. EPA should coordinate and consult meaningfully with Tribes to the greatest extent practicable for agency actions that may affect the tribes. This Policy complements EPA's efforts to consult with Tribes. *See* Executive Order 13175, Consultation and Coordination With Indian Tribal Governments November 6, 2000.

Consultation should be a meaningful and timely two-way exchange with Tribal officials that provides for the open sharing of information, the full expression of Tribal and EPA views, a commitment to consider Tribal views in decision making, and respect of Tribal self-government and sovereignty.

PUBLIC INVOLVEMENT POLICY OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA May 2003); *see also* Administrator Leavitt Reaffirmation EPA Indian Policy 2004 (EPA 9/26/2005) ("EPA is recognizing that the United States has a unique legal relationship with tribal governments.... This relationship includes a recognition of the right of Tribes as sovereign governments to self-determination, and an acknowledgement of the federal government's trust responsibility to Tribes."); GUIDE ON CONSULTATION AND COLLABORATION WITH INDIAN TRIBAL GOVERNMENTS AND THE PUBLIC PARTICIPATION OF INDIGENOUS GROUPS AND TRIBAL MEMBERS IN ENVIRONMENTAL DECISION MAKING (National Environmental Justice Advisory Council, Indigenous Peoples Subcommittee Nov. 22, 2000), p. 5 ("Tribal sovereignty is thwarted when federal government agencies and departments attempt to treat tribes in the same manner as any other interested members of the public, in a conventional public participation process. Rather, in recognition of their status as sovereign nations, the federal government should collaborate directly with tribal

governments in a consultative process, which leads to decision-making); Executive Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000).

Indeed, it is the EPA's long-standing policy 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." EPA Policy for the Administration of Environmental Programs on Indian Reservations (11/8/1984). In addition, the EPA has assured tribal governments that the agency "in keeping with the federal trust responsibility, will assure that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect reservation environments."

Instead of acting in line with these duties, high-level political appointees (as well as one EPA staff attorney on this case), have been meeting with various Petitioners—and *not* the Navajo--to discuss critical matters relating to the PSD permit, cutting the Navajo Nation and its representatives out of their closed-door process. *See* Desert Rock Energy's Response to EPA Region 9's Motion for Voluntary Remand. EPA Region 9's motion is the end result of such meetings with selected interest groups who, unlike the Navajo, are *not entitled* to government-to-government deference, but are apparently receiving it anyway. These negotiations affect tribal interests and the Tribe was shut out. EPA Region 9's motion flouts the EPA's trust responsibilities to the Navajo Nation and its representatives and should be denied.

The EPA has acknowledged that 40 CFR §124.19(d) bars it from withdrawing the

PSD permit at this point in the administrative proceedings. *See* EPA's Motion at 7. To get around this, the EPA filed a "Motion for Voluntary Remand," a procedural technique not contemplated by the applicable administrative rules, policies or other materials governing these proceedings. EPA Region 9 admits there is no support for its motion under applicable law. *See* EPA's Motion at 7 (there is nothing in "[t]he regulations, EAB Practice Manual, and EAB precedent" to support its request for voluntary remand). In the alternative, it asks that the Board reverse its decision to grant review of the PSD permit. Such an arbitrary, retroactive change of rules and procedure is not only lacking in legal support, it is also unfair and flies in the face of the trust responsibilities owed to the Navajo Nation. "Federal officials are 'bound by every moral and equitable consideration to discharge the federal government's trust with good faith and fairness' when dealing with government tribes." GUIDE ON CONSULTATION AND COLLABORATION WITH INDIAN TRIBAL GOVERNMENTS AND THE PUBLIC PARTICIPATION OF INDIGENOUS GROUPS AND TRIBAL MEMBERS IN ENVIRONMENTAL DECISION MAKING (National Environmental Justice Advisory Council, Indigenous Peoples Subcommittee Nov. 22, 2000), p. 8 (quoting authority omitted). "Voluntary remand" is a political device, not a legal device, that would silence the Tribe's interests and should not be permitted.

For the foregoing reasons and those set forth in the points and authorities in its co-developer, Desert Rock's, opposition filed concurrently herewith, Diné Power respectfully requests an order denying Region 9's Motion for Voluntary Remand.

DATED this 17th day of June 2009.

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CERTIFICATE OF SERVICE

I hereby certify that I served DINÉ POWER AUTHORITY'S OPPOSITION TO
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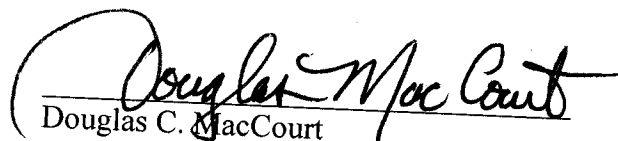
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