

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

IN THE MATTER OF:

**DESERT ROCK ENERGY COMPANY, LLC
PSD PERMIT NO. AZP 04-01**

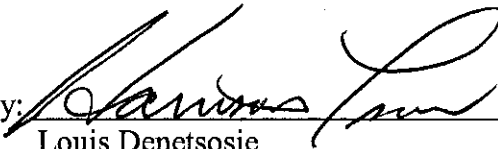
PSD APPEAL NOS. 08-03 and 08-04

**MOTION TO SUPERSEDE PREVIOUS FILING OF
NON PARTY BRIEF OF THE NAVAJO NATION**

Navajo Nation moves the Board for leave to file a revised Non Party Brief and supersede its previous filing of a Non-Party Brief dated February 13, 2009. The Board in its Order Denying Motion for Extension of Time to File NonParty Brief on February 17, 2009 determined that the Navajo Nation's NonParty Brief is not due until March 5, 2009. The Board determined that the Navajo Nation is free to file, by no later than March 5, 2009 a brief superseding the Motion and Brief it has already filed.

Respectfully submitted this 5th Day of March, 2009.

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BRIEF OF THE NAVAJO NATION

Background

On July 31, 2008, the United States Environmental Protection Agency, Region 9 (“Region”) issued a prevention of significant deterioration (“PSD”) permit (Number AZP 04-01) to Desert Rock Energy Company, LLC (“Desert Rock”) for the construction of a new 1500-megawatt (MW) coal-fired electric generating facility to be located on Navajo Nation trust lands, in the vicinity of the Burnham and Nenahnezad Chapters, New Mexico. The Region is the permitting authority for this permit because the proposed generating facility will be located within the exterior boundaries of the Navajo Nation and the Navajo Nation does not yet have an EPA-approved tribal PSD permitting program. The decision by EPA to issue the PSD has been appealed by various parties, and the Navajo Nation has been given permission by the Environmental Appeals Board to submit a Non-Party Brief in support of EPA’s decision.

ARGUMENT

The Navajo Nation respectfully opposes the Petitions for Review (of the Region's issuance of PSD permit AZP 04-01), the related arguments in the various Petitioners' Supplemental Briefs, and New Mexico's Motion to Supplement the Record on Appeal or, in the Alternative for Remand and Reopening of the Public Comment Period. The Board of Environmental Appeals should uphold the decision of the EPA in this matter, or, in the alternative, deny review of EPA's decision. EPA's decision is consistent with domestic and international principles and norms for equality and justice for indigenous peoples and for self-determination in the course of their economic and natural resource development; the decision is in harmony with Navajo Nation sovereignty; importantly, the decision is in full compliance with all applicable federal laws and the federal policy concerning the government to government and trust relationship of the Navajo Nation and the United States government.

I. BASED ON FEDERAL POLICY FOR NAVAJO NATION SELF-DETERMINATION AND SOVEREIGNTY, EPA RECORD IN THIS CASE SHOULD NOT BE SUPPLEMENTED ON APPEAL AND CASE SHOULD NOT BE REMANDED FOR FURTHER PUBLIC COMMENT.

A. Navajo Nation and United States Have Government to Government Relationship Which Respects Navajo Nation Sovereignty and Right of Navajo Nation to Self-Determination in Development of Tribe's Natural Resources.

The Navajo Nation and the United States maintain a government to government relationship based on two treaties, the Treaty of 1850, 9 Stat., 974, and the Treaty of 1868, 15 Stat. 667. In the Treaty of 1850, the Navajos agreed to recognize the United States' "sole and exclusive right of regulating the trade and intercourse with the Navajos" and agreed that the laws now in force with the various tribes would have the same force and effect on the Navajo "as if said laws had been passed for their sole benefit and protection." Treaty with the Navaho, Sept. 9, 1850, 9 Stat. 974, art. III (hereinafter "Treaty of 1850"). In return, the United States agreed "to legislate and act as to secure the permanent prosperity and happiness of said Indians." *Id.* at Article XI.

By the Treaty of 1868, the United States and the Navajo Nation established a permanent homeland for the Navajo people. Treaty between the United States of America and the Navajo tribe of Indians, 15 Stat. 667, July 25, 1868, art. II (hereinafter "Treaty of 1868"). The proposed site of the Desert Rock Energy Project is within the exterior boundary of the permanent homeland guaranteed by the Treaty of 1868 as enlarged by Executive Order of January 6, 1880. In the 1868 Treaty, the United States agreed that "no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employees of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article." *Id.* This language emphasizes an important concept into the existing relationship of the Navajo Nation and the federal government vis a vis third parties: the Navajo Nation has the right to exclude extraterritorial actors and influences in the conduct of its sovereign affairs.

Since the inception of the federal and tribal relationship, the contours of the political relationship between the Navajo Nation and the United States have been refined by statutes, court decisions and federal regulations. Most notably, the Nonintercourse Act of 1790 provides that no lease or other encumbrance of Indian land is valid under United States law without the consent of the federal government. In *Johnson v. M'Intosh*, 21 U.S. 543, 8 Wheat 543 (1823), Chief Justice Marshall held that the tribes hold their lands by "Indian Title." This gives the tribes the right to occupy the land and to retain possession of it. *Id.* Nonetheless, Justice Marshall concluded that "discovery" by European governments vested in those governments the ultimate dominion in the land subject only to Indian Title. *Id.* at 574. Based on the principles set forth in the Nonintercourse Act and *Johnson v. M'Intosh*, the United States has taken pervasive control over the management of Tribal trust lands and resources.

In 1938, in order to allow for mineral resource extraction on tribal trust land, Congress enacted the Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. §§ 396. As a practical matter, however, the Navajo Nation had little decision making under that statute for mineral leases entered into by the federal government on the Navajo Nation's behalf, and little control over mineral development by non-Indians on Navajo Nation lands. The federal government set standard lease terms and developed standard lease forms, and the Navajo Nation was effectively prevented from renegotiating lease terms. The Navajo Nation also received royalty rates that

were significantly below fair market value. The reality of the role of political sovereignty and self-determination in resource development on the Navajo Nation was that from the 1930s through the 1960s the federal government retained most of the practical decision-making about the Navajo Nation's natural resources development.

Congressional and Executive Branch policy toward the Navajo Nation and other Indian tribes began to shift dramatically in the 1970s.¹ In 1982, in accordance with the now decade plus shift in Congressional and Executive branch policy toward Indian self-determination, and reflecting that the IMLA had resulted in little control and financial returns for tribes, the United States Congress enacted the Indian Mineral Development Act ("IMDA"). The most substantive section of the IMDA provides that "any Indian tribe, subject to the approval of the Secretary, ... may enter into any joint venture, operating, production sharing, service, managerial, lease or other agreement (hereinafter referred to as a 'Minerals Agreement') providing for the exploration for, or extraction, processing, or other development of ... coal ... resources (hereinafter referred to as 'mineral resources') in which such Indian tribe owns a beneficial or restricted interest, or providing for the sale or other disposition of the production or products of such mineral resources." 25 USC § 2102(a).

More recently, in 2005, Congress enacted the Indian Tribal Energy Development and Self-Determination Act (ITEDSA) as part of the Energy Policy Act of 2005. 25 U.S.C. §§ 3501-3506 (2000). The Act authorizes Indian tribes to enter into tribal energy resource agreements (TERAs) with the Department of the Interior. Judith V. Royster, *Practical Sovereignty, Political Sovereignty, and the Energy Development and Self-Determination Act*, 12 Lewis & Clark L. Rev. 1065, 1080-81 (2008). Once a tribe has an approved TERA, which comes with significant statutory requirements (and is essentially an over-arching plan for various aspects of energy development by the tribe), the tribe can enter into leases and business agreements for energy resource development, and can grant rights of way (ROWs) for pipelines and electric transmission and distribution lines, without seeking approval from the federal government. *Id.* ITEDSA came on the heels of separate authority granted solely to the Navajo Nation to enter into business site leases without BIA approval, provided they were approved by the Nation pursuant

¹ For an overview of the development of federal policy toward Indian self-determination in resource development and other areas, see Judith V. Royster, *Practical Sovereignty, Political Sovereignty, and the Energy Development and Self-Determination Act*, 12 Lewis & Clark L. Rev. 1065 (2008).

to Navajo tribal regulations approved by the Secretary of the Interior. These regulations were put in place by the Navajo Nation just over a year ago, and the Nation is now taking advantage of its new business site leasing authority to spur economic development. The Navajo Nation has not yet had an opportunity to develop a TERA, but plans to do so as the Nation takes on increasing authority over development of its own natural resources.

B. As a Joint Economic Development Project with the Navajo Nation Owned Diné Power Authority, Desert Rock Energy Project Is Consistent with Navajo Nation Sovereignty and Self-Determination and Congressional and Executive Branch Policy for Navajo Nation Resource Development.

As discussed *supra*, 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. In accordance with this policy, the Navajo Nation Council enacted legislation in 1985 to establish the “Diné Power Authority” (DPA) to provide an instrumentality of the Nation to participate in the development of a major coal-fired, mine-mouth steam electric generating station. 21 N.N.C. § 201 (A). In its enabling legislation, the Navajo Nation Council acknowledged “that the creation of the [DPA] is necessary and desirable in order to promote the development of the Navajo Nation's resources and new sources of electric energy and transmission capacity, to develop the social, economic and cultural well-being of Navajo People including those subjected to relocation from Hopi Partitioned Lands, to promote the economic vitality of the Navajo Nation through the production of goods and services, the employment of Navajo People and the utilization of Navajo businesses, to promote the efficient utilization and distribution of energy, to facilitate management of the Navajo Nation's interest in energy development activities and to limit the Navajo Nation's liability with respect thereto.” 21 N.N.C § 201 (B).

In this case, DPA is a wholly owned enterprise of the Navajo Nation, and was formed by the Navajo Nation to begin the process of developing its own coal fired electric generating station in order to utilize Navajo resources, including coal, water, lands, and labor of Navajo tribal members. On May 25, 2006, Navajo Nation President Joe Shirley, Jr. signed Council Resolution CMY-06 into law which approved the Master Lease for DPA as well as the Sublease for Desert Rock Energy Project, LLC. The Navajo Nation is a sovereign and enjoys a government to government relationship with the federal government. Federal policy clearly promotes the Desert Rock project as within the parameters of the Navajo Nation's right to self-

determination over its own lands and resources. Additionally, the Desert Rock project as currently permitted *will be the cleanest coal-fired power plant in the United States*. Nonetheless, in spite of all these factors, now that a PSD permit has finally been approved, New Mexico and other extraterritorial special interests seek to further delay crucial economic development on the Navajo Nation by alleging “new evidence” and seeking to introduce that evidence into the EPA record in this case, and to reopen the public comment period. After the years of delay in this case, and given the important federal policy promoting Navajo Nation self-determination in its tribal resource development, for EPA to reopen the record in this case or to further extend the public comment period would be unfair to the Navajo Nation and inconsistent with federal policy.

C. Navajo Nation has the Authority to Designate Attainment Status of Tribal Land, and New Mexico Must Raise any Claim about Alleged Future Non-Attainment through Mediation with Navajo Nation.

The Congress’ stated purpose of enacting Part C of the Clean Air Act, United State Code, Title 42, Chapter 85, is to “insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources.” 42 USC §7470(3). The EPA has afforded adequate procedural opportunities for informed public participation in the decisionmaking process and has carefully evaluated all the consequences of issuing PSD Permit NO. AZP 04-01. 42 USC §7470(5). The Desert Rock project is governed by the Navajo Nation, from the mere fact that the project is located within the territorial boundaries of the Navajo Nation. Importantly, Congress recognized the sovereign status of Indian tribes by determining that during an area designation for issuing air permits, “lands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated only by the appropriate Indian governing body body.” 42 USC §7474(c). As a sovereign entity the Navajo Nation governs all affairs within the boundaries of the Nation. In doing so, it has rightfully exercised its authority in approving the Desert Rock project pursuant to Title 2 and Title 5 of the Navajo Nation Code.¹

¹ On May 25, 2006 the Navajo Nation Presidents signed Navajo Nation Council resolution CMY-06 into law. This Resolution approved the Lease for Dine’ Power Authority and the Sublease for Desert Rock Energy Project, LLC.

The Navajo Nation and the United States have an inherent trust relationship. This has established a legal, fiduciary relationship between the Navajo Nation and EPA, as a federal agency. As discussed in the next Section, EPA administering of the Federal Statute on trust land enlarges the relationship between the Navajo Nation and EPA. Since the Desert Rock project is on lands of the Navajo Nation and only federal law applies, the relationship remains exclusively between the Navajo Nation and EPA. The Navajo Nation's supports the position that the PSD permit has been properly issued, pursuant to all applicable federal statutes, regulations and after a through review of all relevant information including the Petitioner's comments.

Importantly, the Clean Air Act provides that "if a permit is proposed to be issued for any new major emitting facility proposed for construction in any State which the Governor of an affected State ... determines will cause or contribute to a cumulative change in air quality in excess of that allowed in this part within the affected State ..., the Governor ... may request the Administrator to enter into negotiations with the parties involved to resolve such dispute." 42 USC §7474(e). The Navajo Nation has not received notice from the Administrator that New Mexico objects to the permitting of the Desert Rock Energy facility because it will cause or contribute to a cumulative change in air quality in excess of that allowed in the Clean Air Act, 42 USC §§7401-7671q.

D. EPA Must Balance Petitioner's Interests against Federal Trust Responsibility to Navajo Nation.

Furthermore, as a federal agency, EPA is obligated to balance Petitioner's interests against the federal government's trust responsibility to the Navajo Nation. Based on treaties, statutes, Executive Orders, and case law, the federal government has recognized that it has a federal trust responsibility to Indian tribes. That responsibility extends to agency actions and means that the EPA must consider any merits of Petitioners claims vis a vis the impact to the Navajo Nation. Here, the Navajo Nation would be heavily impacted by a decision of the Board to reopen the record, or to remand to EPA for further public comments. The Board of Environmental Appeals should uphold the decision of the EPA in this matter, or, in the alternative, deny review of EPA's decision.

IV. PETITIONERS' ENVIRONMENTAL JUSTICE ARGUMENTS ARE WITHOUT MERIT.

A. The Navajo Nation is the Environmental Justice Community in this Case and EPA Must Defer to Navajo Nation Policy Decisions in its Environmental Justice Analysis.

Petitioners fail to recognize that the Navajo Nation is the Environmental Justice (EJ) Community at issue in this case, and that EPA is required to defer to the Navajo Nation on policy questions impacting the EJ Community and within the Navajo Nation's sovereign jurisdiction. Under Executive Order 13,175, the EPA is mandated to recognize its "unique legal relationship with Indian tribal governments," Executive 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 generally id. 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). Executive Order 12,898, which mandated the adoption of environmental justice policies by executive branch agencies, likewise mandated that "tribal leaders" be consulted in how environmental justice policies were developed and implemented in respect to federally recognized Indian tribes. See Executive Order 12,898 Section 6-606 (February 11, 1994).

EPA's principal guidance document for assessing environmental justice concerns is the EPA's 165 page "Toolkit for Assessing Potential Allegations of Environmental Injustice." ENVTL PROT. AGENCY, EPA DOC. NO. 300-R-04-002, TOOLKIT FOR ASSESSING POTENTIAL ALLEGATIONS OF ENVIRONMENTAL INJUSTICE (2004) (hereinafter "Guidance Document"). Specifically citing to Executive Order 13,175 (above), the Guidance Document provides, in part, that "given the different dynamics of tribal decision making compared with U.S. democratic governmental processes, appropriate contacts with and representation of the Tribes in the process should be established." Id. at 51. The Guidance Document further provides that "several Executive Orders require federal departments/agencies to address possible impacts to tribal communities separately," and "[t]hese orders provide an opportunity for the tribal governments to interact with federal departments/agencies in a 'government-to-government' manner. Because of this, it is critical to determine the Native American tribe or tribes that comprise the 'community'." Id. at 45.

In their environmental justice arguments, NGO Petitioners (Petitioners) essentially assert that where EPA deferred to the Navajo Nation on internal political questions, EPA therefore failed to respond adequately to environmental justice concerns raised in comments. For example, at Section XI.(2)(A) of Petitioners' Supplemental Brief, Petitioners cite to Comment 112 at AR 69, where the comment maker "object[s] to subjecting the land to more air pollution which will have severe repercussions on the agriculture and pastoral lifestyle on which local residents' income rely." To this comment EPA responded that "Comments regarding the impacts of air quality on vegetation are addressed in response II.E.28. Additionally, the response states that EPA will ensure that the Bureau of Indian Affairs is informed of this concern and we encourage the commenters to raise it through the NEPA process and work with the Navajo Tribal government and BIA. Additional information is found at Section 4.6 and Section 4.13 of the DEIS." Petitioners claim that this response relies "entirely on its soils and vegetation analysis," and that it is not responsive to environmental justice concerns.

Similarly, Petitioners cite as insufficient EPA's response to comments which raised the issue of inadequate public health services on Navajo Nation land. Petitioner's Supplemental Brief, Section XI.(2)(C). Here, again, EPA responded that it "had shared the concern with the Bureau of Indian Affairs, and suggest that the commenters raise their concern with Indian Health Service, the Navajo Tribal government, and the Bureau of Indian Affairs."

In this case, EPA, consistent with the mandate of Executive Order 13,175 and in accordance with the right of the Navajo Nation to self-determination over its own lands and resources, *see Williams v. Lee*, 358 U.S. 217 (1959), is required to refer such policy questions regarding environmental justice to the EJ Community itself, i.e. to the Navajo Nation government. Whether any alleged detrimental impacts on the local agricultural and pastoral lifestyle are an acceptable cost of the Desert Rock project, and whether current public health facilities are "inadequate" when weighed against expected tribal economic development and increased tribal revenues, are both policy questions that the Navajo Nation government is entitled to decide by itself through its own tribal institutions and processes.

B. Impacted Navajo Citizens Were Closely Consulted and Voiced Support for the Desert Rock Project Through Their Local Navajo Nation Governmental Institutions.

As discussed *supra*, the Equal Justice Community in this case is the Navajo Nation, a sovereign nation with which the federal government must interact with on a government to government basis, and EPA must defer to the Navajo Nation government on internal policy questions affecting Navajo Nation citizens. However, Petitioners' equal justice arguments are additionally misleading because Petitioners fail to acknowledge that local Navajo citizens were very informed and were consulted through local Navajo Nation governmental institutions. The Navajo Nation is made up of 110 local governmental bodies called "chapters." It is in the chapter forum where local Navajo citizens are informed and consulted on Navajo Nation policies, where local Navajo citizens can voice their concerns to their Council delegates and other chapter officials, and where individual Navajo citizens can make local policy statements through the adoption of official Chapter resolutions. In addition, the chapters of the eastern portion of the Navajo Nation participate in an "Eastern Navajo Agency Council," which is composed of chapter officers, council delegates, Land Board members and School Board members from the thirty-one (31) chapters. The Eastern Navajo Agency Council is the representative voice of the whole of the Eastern Navajo Agency and chapters.

In addition to seeking and gaining consent from individual customary land users affected by Rights of Ways and other Desert Rock project related land withdrawals, Navajo Nation chapters and the Eastern Agency Council were also informed and consulted, and given an opportunity to provide policy statements/resolutions in regard to the Desert Rock project. Navajo Eastern Agency Council gave near unanimous support for the project in two separate resolutions (96 in favor, 0 opposed, and 03 abstained). Burnham Chapter originally opposed a local land withdrawal for the project, Exhibit A, but subsequently acknowledged that it would be in the best interests of the chapter members to support the project and to negotiate agreements with developers to ensure local benefits to Chapter residents, including job training, scholarships, and local capital improvement projects. The Chapter also asked for environmental concerns to be adequately addressed. Upper Fruitland Chapter supported the Desert Rock project, conditioned on full disclosure of environmental studies and findings, on the Navajo Nation not waiving any of its environmental laws, and on Navajo preference being provided in hiring for project jobs.

The Nenahnezad Chapter voiced similar support for the Desert Rock project in a Chapter resolution and a letter to the Natural Resources Standing Committee of the Navajo Nation

Council, recognizing the local benefits of economic development and job creation, and stipulating that developers address environmental concerns and impacts. In fact, Nenahnezad Chapter entered into a separate agreement with developers to secure and ensure direct local benefits from the project. Several other locally affected chapters provided supporting resolutions, including Nageezi Chapter and San Juan Chapter, citing economic benefits and job creation. Finally, upwards of two-hundred (200) public hearings held in regard to the project, with most of those held at the most impacted Navajo Nation chapters.

Here, again, there simply is no merit to Petitioners' arguments that the Navajo EJ Community impacted by the Desert Rock project was not meaningfully informed and consulted about the project. On the contrary, local Navajo citizens were very informed and were given the opportunity to comment and voice their policy and environmental concerns through the Navajo Nation governmental process. Nonetheless, EPA remained obligated to consult with the Navajo Nation on a government to government basis and to defer to the Navajo Nation government on any final Navajo Nation policy decisions in regard to the project.

C. Contrary to Petitioners' Assertion, Under its Environmental Justice Analysis, EPA Should not Exercise Discretionary Regulatory Authority which Would Hamper Tribal Sovereignty and Development of Tribal Resources.

Even if there was any merit to Petitioners' argument that EPA had discretionary regulatory authority in the PSD permitting process to consider mercury, water resource consumption, and other alleged "collateral" impacts, EPA was nonetheless correct to restrain itself from exercising such discretionary authority in its environmental justice analysis. Executive Order 13,175 recognizes "the right of Indian tribes to self-government" and to "tribal sovereignty and self determination." Executive Order 13,175 at Section 2(c). Where agency regulatory authority for statutory or regulatory requirements is discretionary, EPA is required to first consult with any affected tribal governments, to streamline and increase flexibility in the process for securing Indian tribal waivers of any such requirements, and even to pay the direct costs incurred by the tribe as a result of any such discretionary regulation. See generally id., Sections 5 and 6.²

² The United States is a party to the United Nations Framework Convention on Climate Change, 1771 UNTS 107; S. Treaty Doc No. 102-38; U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 ILM 849 (1992) (effective March 21, 1994) (hereinafter "UNFCCC"), which recognizes that environmental management objectives and priorities "should reflect the environmental and

In this case, Petitioners argue that EPA's failure to consider mercury contamination in its environmental justice analysis was arbitrary, because EPA could have looked elsewhere for discretionary authority to consider concerns about mercury which were raised in comments. Petitioner's Supplemental Brief, Section XI.(2)(B). Petitioners argue that because the mercury issue implicates "Environmental Justice concerns" it is therefore obligatory for EPA to seek alternative avenues for considering the mercury question, even where not statutorily required. *Id.* However, executive branch directives clearly state that where discretionary regulatory authority is exercised on tribes, tribes must be consulted, compensated if suffering direct costs, and given a reasonable process for securing a waiver if desired by the tribe. Here, the affected EJ Community is the tribe, and the Navajo Nation has made it very clear to EPA that it has weighed the policy considerations and does not want the EPA to further hamper the permitting process by exercising authorities it is not statutorily obligated to. Where the tribe clearly does not want such discretionary regulatory authority exercised, and where the tribe is the EJ Community which is intended to be protected under the environmental justice directives, EPA was right not to exercise such authority even if it could have.

D. As a matter of "Environmental Justice," the Navajo Nation Has the Right to Own, Use, Develop and Control its Own Lands and Natural Resources.

Although the U.S. is not a party to international treaties which recognize the right of indigenous peoples to own and develop their traditional lands and resources, the U.S. is party to two treaties with the Navajo Nation which give the Navajo Nation jurisdiction over its traditional lands and resources. See 9 Stat. 574 (1849) and 15 Stat. 667 (1868). Moreover, Congressional and executive branch laws, regulations and policies over the last forty years have effectively

developmental context to which they apply, and that standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries." UNFCCC, Preamble. This is identical to language in Principle 11 of the Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992), and both reflect an emergent norm under international law that "developing countries" should not necessarily be held to the same environmental standards as developed countries. Consistent with this international norm and the executive order cited above, as the functional equivalent of a "developing country," the Navajo Nation should not be subject to discretionary regulation by EPA unless the Nation is compensated for the direct costs of such regulation.

ratified the emergent norm under international law that indigenous peoples have the right to develop their own lands and resources. (Note discussion, above, on the evolution of U.S. policy toward development of tribal natural resources). See UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly*, 2 October 2007. A/RES/61/295. Online. UNHCR Refworld, available at: <http://www.unhcr.org/refworld/docid/471355a82.html> [accessed 12 February 2009] (recognizing that “Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired”).

Petitioners allege that EPA has failed to give adequate consideration to environmental justice concerns in its environmental justice analysis, and in fact, “to perform any Environmental Justice assessment” at all. Again, Petitioners fail to address the fact that the “minority and low-income population” which is affected under the permitting process, the EJ Community, is the Navajo Nation itself. The Navajo Nation is an indigenous people with a right under treaty, international law, federal statute, and Congressional and executive branch policy to develop its coal resources for the benefit of its people.

III. THE NAVAJO NATION ADOPTS AND SUPPORTS THE POSITIONS AND ARGUMENTS OF THE DESERT ROCK ENERGY PROJECT, LLC, AND THE DINÉ POWER AUTHORITY IN THEIR BRIEFS.

The Navajo Nation supports the positions and arguments raised by Desert Rock Energy Project, LLC, and by Diné Power Authority, in all Briefs submitted by those parties in this matter.

CONCLUSION

For the reasons set forth herein, and for the reasons set forth in all briefs of Desert Rock Energy Project, LLC, and Diné Power Authority, submitted to the EAB in this matter, the Navajo Nation respectfully requests that this Board deny review of EPA’s decision to issue the

Desert Rock PSD permit, or, in the alternative, that this Board affirm EPA's decision to issue the PSD permit to Desert Rock Energy Project, LLC.

DATED this 5th day of March, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing MOTION BY THE NAVAJO NATION TO FILE NON PARTY BRIEF on the following:

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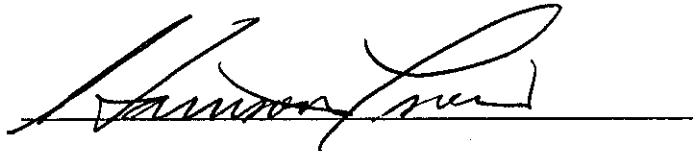
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by mailing; hand delivery; facsimile a true and correct copy thereof to said parties on the date stated below.

DATED this 5th day of March, 2009



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