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

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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 SURREPLY TO PETITIONS FOR REVIEW**

Diné Power Authority ("DPA") respectfully submits this Surreply to Petitions for Review. DPA joins in the arguments set forth in the briefing herein by its co-developer, Desert Rock Energy Company, LLC ("Desert Rock"), including those arguments in Desert Rock's Surreply. DPA further joins in the Brief of the Navajo Nation, and DPA makes the additional arguments set forth below in opposition to the Petitions for Review.

The State of New Mexico (though not the other Petitioners) takes issue with the special status enjoyed by the Navajo Nation as a result of the federal government's trust obligation with respect to Indian tribes. Rather than restate the points and authorities already in the record in DPA's prior briefing, the Brief of the Navajo Nation, and the briefing of Desert Rock (see in particular Desert Rock Energy Company's Response to Petitions for Review, pp. 3-5), DPA provides the following response to the State of New Mexico's misinterpretation of the impact of the federal government's trust obligation in this matter.

The State of New Mexico, in its Reply Brief states:

[Desert Rock] also suggests that the Board should consider "the federal government's trust obligation with respect to Indian tribes and the impacts of its actions on the Navajo Nation." [citation omitted] But the "trust responsibility can only arise from a statute, treaty, or executive order," and [Desert Rock] cites no authority that this trust obligation compels issuance of a deficient PSD permit or requires the EAB to overlook procedural defects in the permitting process. *North Slope Borough et al. v. Andrus*, 642 F.2d 589,

611 (D.C. Cir. 1980). Indeed, the federal government best satisfies its trust obligation by ensuring that the PSD permit provides the maximum protection available to the Navajo people and other citizens of the region under the Act.

State of New Mexico's Reply Brief, p.3. The State of New Mexico mischaracterizes the issue; the issue is not whether EPA may issue a "deficient" permit or whether the EAB may "overlook procedural defects in the permitting process." *Id.* Nor does the State of New Mexico's argument that the trust responsibility "can only arise from a statute, treaty, or executive order" end the inquiry. The question is whether the EAB, in its discretion, must consider the unique status of the Navajo Nation when making its determination herein, and the answer is "Yes."

First, as cited in Desert Rock's Response to Petition for Review, p. 3, there in fact is an Executive Order (Executive Order 13175, 65 Fed. Reg. 67, 249 (Nov. 9, 2000)) which requires EPA and the Board to consider the trust obligation and, in particular, to "respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments."

Second, even if there were no applicable "statute, treaty or executive order," New Mexico ignores the federal government's common law fiduciary trust obligation ("trust doctrine") with respect to Indian tribes. In this matter, the Board has discretion and must consider the impact of its action on the tribe. *See Northwest Sea Farms, Inc. v. United States Army Corps of Engineers*, 931 F. Supp. 1515, 1519-1520 (W.D. Wa 1996) (noting that the "Supreme Court has recognized 'the undisputed existence of a general trust relationship between the United States and the Indian people.' This obligation has been interpreted to impose a fiduciary duty owed in conducting 'any Federal government action' which relates to Indian

Tribes.”) (cited authorities omitted); *see also* Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000). The *Northwest Sea Farms* court further emphasized that “[i]t is this fiduciary duty, rather than any express regulatory provisions, which mandates that the [agency] take treaty rights into consideration.” *Id.* at 1520. Ignoring tribal interests, as suggested by the State of New Mexico, negates this fiduciary obligation. Because the Board’s decision in this matter has “tribal implications,” the Board must carefully consider the Navajo’s own decisions regarding their social and economic interests. To argue that the Board may ignore tribal interests whenever a statute or regulation applies would eliminate the trust obligation altogether, since any fiduciary obligations would be met simply by complying solely with the statutes and regulations at hand.

Third, the State of New Mexico argues that *it* knows what is best for the Navajo people. It argues that, “the federal government best satisfies its trust obligation by ensuring that the PSD permit provides the maximum protection available to the Navajo people[.]” By doing so, it ignores not only the aforementioned right of the *Navajo* to determine what is in their best interests, but also the very real-world benefits the Desert Rock project would bring to the Navajo who presently suffer unemployment in excess of 50% and a per capita income of roughly \$7,400. *See* Desert Rock’s Response to Petitions for Review, p.4, and authorities cited therein. Despite the State of New Mexico’s arguments to the contrary, the sovereign Nation of the Navajo are capable of self-government and determination of their best interests, and they have spoken resoundingly in favor of the Desert Rock project. *See* Brief of the Navajo Nation, pp. 5-11.

For the foregoing reasons, DPA respectfully requests that the EAB deny review of the PSD permit. In the alternative, DPA requests that the EAB uphold the PSD permit.

DATED this 27th day of March, 2009.

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## CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing DINÉ POWER AUTHORITY'S SURREPLY TO PETITIONS FOR REVIEW on the following via electronic mail and U.S. First Class Mail, this 27th day of March 2009:

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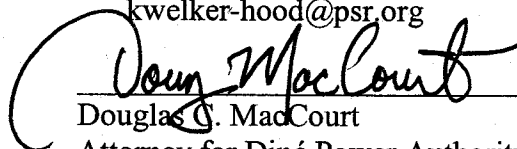
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