

**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 OF THE NAVAJO NATION TO FILE NON PARTY BRIEF

Background

The Navajo Nation and the United States maintain a government to government relationship pursuant to two treaties; the Treaty of 1850 and the Treaty of 1868, 15 Stat. 667. In the Treaty of 1850, the Navajos agreed to recognize the United State's "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". In turn the United States agreed "to legislate and act as to secure the permanent prosperity and happiness of said Indians." *Id.* Article XI.

By the Treaty of 1868, 15 Stat. 667, the parties established a permanent homeland for Navajo people. The proposed site of the Desert Rock Energy Project at issue in this matter is within the exterior boundary of this permanent homeland as enlarged by Executive Order of January 6, 1880. In the 1868 Treaty at Article II, 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.* Article II.

The contours of this political relationship, since inception, between the Navajo Nation and the United States has 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. (8 Wheat) 543 (1823), Chief Justice Marshall concluded 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. However, he concluded that "discovery" by European governments vested in those governments the ultimate dominion in the land subject only to Indian title. Judith V. Royster, *Practical Sovereignty, Political Sovereignty, and The Energy Development and Self-Determination Act*, 12 Lewis and Clark L. Rev. 1065 (2008).

Based on these principles set forth in the Nonintercourse Act and *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543 (1823), the United States has taken pervasive control over the management of Tribal trust lands and resources. On the matter of mineral resources development, Congress enacted the Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. §§ 396. The Navajo Nation has found that mineral resource development under the IMLA has resulted in little control and returns for the Navajo Nation.

In 1982, the United States Congress enacted the Indian Mineral Development Act ("IMDA"). The most substantive section of the IMDA provides "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). By this enactment the Navajo Nation envisioned greater control and management in the development of the mineral reserves located within the boundaries of their permanent homeland.

To take advantage of this new found autonomy, the Navajo Nation Council enacted legislation in 1985 to establish the Dine' Power Authority to provide an instrumentality of the Nation to participate in the development of a major coal-fired, mine-mouth steam electric generating station. 21 NNC § 201 (A). The Navajo Nation Council also declares "that the creation of the Authority 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).

After its creation, Dine' Power Authority, a wholly owned enterprise of the Navajo Nation began the process of developing the coal fired electric generating station which would utilize Navajo resources including coal, water, air space, lands and the labor of Navajo tribal members. Despite the notion that the Navajo Nation is a sovereign nation, the laws and regulations applicable to developing a project on Indian lands has resulted in many compliance delays during the course of this development.

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 have an EPA-approved tribal PSD permitting program.

As envisioned during the creation of the Dine' Power Authority, the Desert Rock Energy Project is an economic development project of the Navajo Nation. The Navajo Nation anticipates direct benefits from development of its natural resources including coal reserves, water, and lands. Additionally, the Nation anticipates direct monetary benefits in the form of taxes, royalties, fees and rents.

ARGUMENT

I. Navajo Nation Opposes the Petitions for Review of PSD Permit AZP 04-01, related supplemental Briefs and Motions by New Mexico.

The Navajo Nation respectfully opposes the Petitions for Review (of the Region's issuance of PSD permit AZP 04-01), the related 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 (“New Mexico’s Motion”).

II. The Navajo Nation supports the position of Desert Rock Energy Company and Dine’ Power Authority

The Navajo Nation supports the position and arguments raised by Desert Rock Energy Company and Dine’ Power Authority in all Briefs submitted to the Environmental Appeals Board, United States Environmental Protection Agency in the above matter.

III. The State of New Mexico Unlawfully Asserts Authority over the Navajo Nation and Infringes on the Navajo Nation Right to Govern Its Affairs within the Territorial Boundaries of the Navajo Nation.

The State of New Mexico fails to recognize that 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. 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

New Mexico’s position of the high ozone levels in the region surrounding the Desert Rock project undermines these fundamental principles of tribal self governance and self-determination. Although the State is arguing technical aspects of the Clean Air Act, its arguments indirectly impact the Navajo Nation. In *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 the state cannot assert authority that would cause an indirect effect to the tribe, thereby frustrating tribal self-determination. New Mexico’s argument would impede the Navajo Nation in its ability to govern and develop its natural resources, which is a core of the principle of self-determination.

Moreover, a state cannot exert authority over tribal trust land unless the state has a compelling interest that would preempt both federal law and tribal self-governance. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 103 S.Ct. 2378, 76 L.Ed.2d. 611. The Desert Rock

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.

project rests within the Navajo Nation, utilizes the natural resources of the Navajo Nation and the pollution would primarily exist on the Navajo Nation. Where is the interest of the State?

New Mexico makes the argument that the Desert Rock project would increase the high ozone levels making the Desert Rock region a nonattainment area. It is astonishing that the State would make such an argument, considering that the high ozone levels are a result of the failure of New Mexico to properly regulate the oil and gas industries that have contributed to the area's current air quality. If the high ozone levels were a concern of New Mexico, it should have previously taken action to properly regulate these industries and move to reduce these high ozone levels. Instead New Mexico infringes on the self-government of the Navajo Nation, a sovereign entity. Unlike New Mexico, the Navajo Nation is proposing to develop its natural resources in an environmentally sound manner. The Desert Rock project as currently permitted will be the cleanest coal-fired power plant in the United States.

Even if there exists a State interest, this interest cannot preempt federal law. *New Mexico v. Mescalero Apache Tribe* 462 U.S. 324, 103 S.Ct. 2378, 76 L.Ed.2d. 611. The PSD permit is governed by the Clean Air Act, United State Code, Title 42, Chapter 85. EPA is the responsible regulatory entity for implementing and administering this Federal Statute. For the purposes of this Section, New Mexico has no governing authority over this Federal Statute and there is no applicable New Mexico law.

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. There is no State authority or interest that would preempt this relationship. 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.

The exercise of New Mexico's authority has undermined these fundamental principles of tribal sovereignty and self-governance that are recognized and respected by the Federal

Government. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985) *see, e.g.*, 25 U.S.C. § 3601(2) The Navajo Nation finds no merit in the New Mexico's arguments.

IV. Petitioners' Environmental Justice Arguments Are without Merit.

A. The Navajo Nation is the Environmental Justice Community in this Case and EPA Must to 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, 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, 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, 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. 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 6.¹

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

¹ 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 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.

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 that it 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.

C. 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 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”).

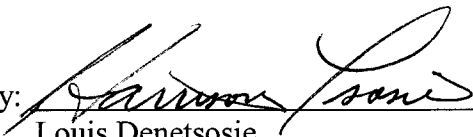
Petitioners allege that EPA has failed to give adequate consideration to environmental justice concerns in its environmental justice analysis, and in fact, “to perform any Environmental Justice assessment” at all. Again, Petitioners fail to address the fact that the “minority and low-

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.

The Navajo Nation adopts the points and authorities set forth in all Desert Rock and Dine’ Power Authority’s briefs submitted to the EAB. For the reasons set forth herein, the Navajo Nation respectfully requests that this Board deny review of Desert Rock’s PSD permit or, in the alternative, uphold the PSD permit because the Petitioners have unlawfully infringed on the trust relationship between the Navajo Nation and the United States. Furthermore, the Petitioners have failed to demonstrate clear error in EPA Region 9’s decision to grant the permit.

DATED this 12th day of February, 2009.

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