

In Re: Deseret Power Electric Cooperative,
Bonanza Power Plant,

Permit # V-UO-000004-2019.00

ATTACHMENT 1



UTE INDIAN TRIBE
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November 24, 2015

Janet McCabe
Acting Assistant Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Jane Nishida
Principal Deputy Assistant Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

**RE: Concerns Involving the Settlement Agreement for Bonanza Power Plant
Docket ID No. EPA-HQ-OGC-2015-0678**

Dear Administrators McCabe and Nishida:

The Ute Indian Tribe is very concerned with the Environmental Protection Agency's (EPA) pending Settlement Agreement with Deseret Power Electric Cooperative (Deseret) for its Bonanza Power Plant (Plant). As you know, for over 15 years, the Plant has been operating within the Tribe's Uintah and Ouray Reservation in violation of the Clean Air Act (CAA). It appears that through the Agreement and its resulting Operating Permit, EPA will finally curtail the pollution that spews from the Plant's smokestack onto our Reservation. For this reason, the Tribe generally supports the proposed settlement agreement between EPA, the Sierra Club, WildEarth Guardians, and Deseret.

However, even with the Plant's pollution and its disproportionate impact on the Tribe and our members, we are concerned that the Agreement and the Permit be done right, rather than quickly. Under the new Permit, the Plant will be allowed to operate for decades. This Permit must be carefully constructed to significantly reduce the Plant's pollution and address the Plant's historic violations of the CAA and its environmental justice impacts.

As discussed at our meeting with EPA officials in Washington, D.C. on November 6, 2015, the Tribe expects to consult with EPA once all of the comments on the Agreement have been received. This consultation should result in a Permit for the Plant that will provide needed and long-lasting protections for our Reservation's air resources. Thank you again for your ongoing efforts to work closely with the Tribe on this issue.

Sincerely,

Shaun Chapoose, Chairman
Ute Tribal Business Committee



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**Comments of the Ute Indian Tribe on the Environmental Protection Agency's
Proposed Settlement Agreement for the Operation of the Bonanza Power Plant within
the Uintah and Ouray Indian Reservation**

Docket ID No. EPA-HQ-OGC-2015-0678

November 24, 2015

I. Introduction

The Business Committee of the Ute Indian Tribe of the Uintah and Ouray Reservation (Tribe) appreciates the opportunity to provide the following comments to the United States Environmental Protection Agency (EPA) regarding the proposed settlement agreement on the Settlement Agreement proposed in Appeal Nos. CAA 15-01; CAA 15-02 (Agreement).

The Business Committee generally supports and agrees with the objective of the Agreement. For over 15 years, the Bonanza Power Plant (Plant), owned and operated by Deseret Power Electric Cooperative (Desert Power), has been operating on land within the Tribe's Uintah and Ouray Reservation in Utah in violation of the Clean Air Act (CAA). It appears that through the Agreement, the Tribe will finally see Deseret Power curtail the pollution that spews from the Plant's smokestack onto our Reservation, into our backyards and lungs. Finally, Deseret Power will be forced to install the technologies it should have installed had it received the appropriate Prevention of Significant Deterioration construction permit in 2001. For this reason, the Tribe generally supports the proposed settlement agreement by and between EPA Region 8, the Sierra Club, WildEarth Guardians, and Deseret Power.

However, the Agreement should require Deseret Power to install these pollution control technologies by 2016. After waiting fifteen years, this deadline is not unreasonable and is justified given the Plant's environmental justice impacts. Moreover, such a requirement is anticipated in the Agreement itself. Installing these pollution control technologies in the next year will require EPA's Region 8 to issue a final Minor NSR Permit before December 31, 2015.

The Tribe has a unique and significant interest in the Plant's compliance due to the facility's location within the Reservation and its physical proximity to our members. As previously expressed in our comments of June 3, 2014, EPA must require the Plant to comply with all

applicable federal air permitting regimes and regulations for coal fired power plants. This is the law, and there is no good reason why the law was not followed in this case. The Plant poses a past and ongoing threat to the health and welfare of Tribal members. Through the Agreement, the Tribe asks that EPA remove any opportunity for Deseret Power to delay installation of pollution control technologies beyond 2016. The Agreement should also include mitigation measures for the Plant's past impacts on the Tribe and our members.

II. Deseret Power Should Install the Pollution Control Limits in 2016, not 2018

The Tribe supports the requirement that Deseret Power submit an application to EPA Region 8 for a Minor NSR Permit for the Bonanza Plant (Application) pursuant to 40 C.F.R. part 49. However, we have concerns about some of the requested permit terms. We ask that EPA Region 8 ensure that Deseret Power install and operate low NOx burners and overfire air technology (LNB/OFA) no later than June 30, 2016, regardless of whether Region 8 issues a final Minor NSR Permit before December 31, 2015. Ensuring the prompt installation of LNB/OFA, will nearly halve NOx emissions from the Plant, bringing to no greater than 5,700 tons per year. If the Tribe is to support the Agreement, then EPA must assure the Tribe that the December 31, 2015 deadline is realistic.

The proximity of the comment deadline to the cutoff date for EPA Region 8 to issue the permit gives the Tribe serious concern. The Agreement provides that should EPA Region 8 fail to issue final Minor NSR Permit on or before December 31, 2015, Deseret Power will get another free pass and have until 2018 to install the LNB/OFA at the Plant. If it takes EPA through the end of December to finalize the proposed settlement agreement, then it seems increasingly unlikely that EPA Region 8 can meet this December 31, 2015 deadline. The Tribe understands that EPA was attempting to have Deseret Power install the new pollution controls in the spring during a previously scheduled outage. As the enforcement agency that owes a trust obligation to the Tribe and our members, we expect EPA Region 8 to ensure that the timeline under the proposed agreement is realistic.

EPA should approve a settlement agreement that respects the wishes of the Tribe. Given that the Plant is the largest individual NOx producer in the Basin and pollution control technologies should have been installed in 2001, immediate NOx reductions can protect the Tribe from enduring avoidable wintertime ozone episodes. The sooner the Plant installs the LNB/OFA and operates at a lower heat input rate, the better the Reservation's air quality will be. Should the Plant install and operate the LNB/OFA by June 30, 2016, then the 0.28lbs/MMBTU heat input limit for NOx from Unit 1 will take effect the following year. Because this heat input limit will reduce coal consumption in year 2017-2018, the Tribe sees this as a great opportunity for Deseret Power to begin its coal consumption cap in 2018 rather than 2020.

The Tribe supports the lifetime limit on coal consumption at the Plant. Each year, the Plant burns around two million tons of coal without the Tribe's permission and on the Reservation. By forcing the Plant to limit its coal consumption earlier, Deseret Power must make the Plant more

efficient or face closing the facility. Either scenario will provide cleaner and healthier air for tribal members to breathe.

Despite the many benefits, the Agreement does not make up for past violations of the Clean Air Act. Since 2000, NOx emissions have increased between 365 and 1,124 tons per year. The Plant currently operates with no add-on controls for NOx and has the potential to emit 9,228 tons of NOx on an annual basis. Had Deseret Power obtained the appropriate PSD Permit, pollution control technologies would have reduced NOx emissions by 40%. Such a reduction in NOx emissions would have had an incredible impact on cleaning the air quality on the Reservation. Through the Agreement, EPA has the opportunity to make up for erroneously issuing the 2001 PSD Permit. The Agreement should include stricter compliance deadlines, and if Deseret Power fails to meet these requirements, Deseret Power should lose the privilege to operate on and pollute the Reservation. In addition, Deseret Power should be required to undergo mitigation measures, such as tree planting, contributing to a fund to address health impacts on tribal members, and other actions to address its impacts on air quality in the Uintah Basin and our Reservation.

III. EPA Must Acknowledge its Environmental Justice Obligations to the Tribe

While the Agreement will ultimately promote cleaner air throughout the Uinta Basin, unique tribal interests have too often been neglected. Since the construction of the Plant, the Tribe suffered disproportionate human health and environmental harm as a result of coal pollution from the Plant. These effects were felt far too often in the lungs of tribal members and were magnified by Deseret Power's noncompliance with the CAA. While we understand that the parties negotiated the Agreement to provide for cleaner air and to reduce the impact of the Plant on climate change, we do not believe that either the Sierra Club or WildEarth Guardians negotiated with the unique interests of the Tribe in mind. Therefore, we are providing a brief overview of EPA's duty to prevent environmental injustices to populations such as the Tribe.

President Clinton issued Executive Order No. 12,898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, to address problems of environmental injustice in existing federal laws and regulations. The Executive Order states:

To the greatest extent practicable and permitted by law ... each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States

59 Fed. Reg. 7629.

Fair treatment means that no population should be forced to shoulder a disproportionate share of exposure to negative effects of pollution due to lack of political or economic strength. Yet, this is exactly what is happening to the Tribe. Members of the Tribe lived for decades in close proximity to the emissions from the Plant, which fueled the Reservation's growing air pollution

problems. Each year, the plant emits more than 3.5 million of tons of air pollution from a 600-foot smokestack, including approximately one third of the NO_x in the Uintah Basin. As you know, NO_x combines with Volatile Organic Compounds (“VOCs”) to form ozone. Recorded ground level ozone concentrations in the Uintah Basin are higher than those recorded in Los Angeles. Ground level ozone is a major health concern on the Reservation, triggering asthma attacks, scarring the lungs of children, sending tribal elders to the emergency room, and even causing premature death.

EPA must explain to the Tribe how these concerns were raised and addressed in the settlement negotiations. To the extent that the Agreement does not yet address these past impacts, EPA should consult with the Tribe on how these impacts should be addressed. For example, the Agreement should include tree planting or contributions to a fund to address the health impacts on tribal members.

Under the federal trust responsibility, EPA is expected to meet exacting fiduciary standards in carrying out responsibilities affecting Indian tribes and treaty rights. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). EPA must protect the interests being threatened here, including the threat to the Tribe's homeland, sovereignty, economic integrity, and resources. *See, e.g., Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973). With each passing day that the Plant operates in noncompliance with the CAA, the Tribe's sovereignty, homeland, health, and economic opportunities will continue to be compromised.

Another way to redress such instances of environmental injustice done to the Ute Indian Tribe is for the parties to establish a trust fund to promote cleaner air for tribal members. Deseret Power should remain liable for violations of the Clean Air Act and the monetary value of any such fines or penalties should be used to benefit the Tribe. Until Deseret Power complies with the Clean Air Act, it should continue to be fined for each and every violation of the Act. Fines resulting from violations by Deseret Power should be used to fund the trust account created by this settlement agreement, which could then be used by the Tribe and its members for projects to mitigate the damage caused by Deseret Power to the air quality on the Uintah and Ouray Reservation. The funding for this settlement trust fund would dissipate upon Deseret Power's compliance with the Clean Air Act.

Such a trust fund is not without precedent. In fact, at least one trust fund has been created on behalf of the Ute Indian Tribe as a way to settle certain violations of the Clean Air Act by outside parties. The funds are used to assist in reducing emissions of air pollution, reducing deleterious impacts of air pollution on public health and the environment on the Uintah and Ouray Reservation, screening for air pollution, or educating tribal members about the deleterious impacts of air pollution on public health and the environment. If ever there were an opportunity to help members of the Ute Indian Tribe, there is no more deserving opportunity than the Agreement that is the subject of this comment. Yet there has been no discussion throughout the proposed settlement about ways to improve the lives of tribal members. A settlement trust fund is an appropriate component of the Agreement.

IV. Tribal Consultation

While the Plant's pollution of our Reservation homeland is an issue of the upmost importance, EPA should not rush to complete the Agreement and finalize an Operating Permit. It is more important that EPA issue the best Operating Permit possible rather than attempting to meet arbitrary deadlines, or even deadlines that are convenient to Deseret Power. Consultation with the Tribe on the Agreement, once all the comments are received, is necessary to develop an Operating Permit that will address the Plant's past and ongoing impacts on the Tribe.

As you know, EPA's May 4, 2011, "Policy on Consultation and Coordination with Indian Tribes." provides in Section V.B.1. that "regulations or rules" and "permits" are "normally appropriate for consultation" among a number of other EPA activities. In addition, EPA's commitment to consult on regulations and rules fulfills Executive Order No. 13175 on "Consultation and Coordination with Indian Tribal Governments" which requires that, "Each agency shall ... ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications."

While we understand the constraints of litigation, now that a permit is being developed based on the Agreement, EPA must consult with the Tribe on the details on the Operating Permit. There is nothing unusual about EPA's new Permit that would exempt them from EPA's consultation policy.

V. Conclusion

The Tribe generally supports the Agreement as it will lead to reduced air pollution on the Reservation by finally forcing Deseret Power to install the pollution control technologies that should have been installed in 2001. These pollution controls, however, should be installed as soon as possible. Accordingly, the Tribe supports a settlement agreement that ensures the installation of the LNB/OFA in 2016 and the commencement of a coal consumption cap in 2018. Any delays to these requirements are just another example of Deseret Power getting a free pass. The Tribe continues to maintain the position that EPA must hold Deseret Power accountable for its inexcusable history of repeated violations at the expense of the Ute Indian Tribe. Therefore, the Tribe supports the Agreement under the notion that EPA Region 8 is capable of issuing a final Minor NSR Permit to Deseret Power for the Plant before December 31, 2015.