BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC

In re Deseret Generation and Transmission Co-operative Bonanza Power Plant	)	CAA Appeal No. 24-01
Permit # V-UO-000004-2019.00	)	

REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION

Pursuant to 40 CF.R. §124.19 and the Scheduling Order issued by the Environmental Appeals Board (the "EAB" or the "Board"), Appellant the Ute Indian Tribe (the "Tribe") hereby submits it Reply in Support of its Motion to Reconsider the Board's September 10, 2024, Order Denying Review.

A. <u>EAB Erred in Affording Unfettered Deference to EPA's Interpretation of Law in Light of *Loper Bright Enterprises v. Raimondo*</u>

In its Order Denying Review ("Denial"), the Board continues to confirm repeatedly that it will defer to EPA's decisions, including interpretation of the law. This unfettered deference is now a material error that must be reconsidered. In *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), the Supreme Court overturned the "*Chevron* Doctrine," under which the Court previously had determined that courts should defer to federal agency decision-making when a statute may be viewed as ambiguous.[1] Because Congress rarely provides unambiguous yes/no instructions to an Agency, that deference was overly broad and prejudicial to those who challenge

[1] *Chevron v. Natural Resources Defense Council, et al.*, 467 U.S. 837 (1984).

Agency decisions. The Supreme Court recognized in *Loper* that the *Chevron* Doctrine took judicial determination out of the hands of the courts and instead, gave that function to agency bureaucrats and often young, inexperienced advisors.

The law regarding deference to Agency discretion has dramatically changed since the Tribe challenged Deseret's Title V Permit renewal for the Bonanza Plant in January 2024. *Loper* is now the law of the land. Because the *Loper* decision was issued months before the EAB issued its Denial of the Tribe's Petition on Appeal, and a significant basis of the Denial was deference to EPA interpretation of law and science, the EAB must reconsider the Denial.

a. The *Loper* Decision Provides Relevant and Binding Legal Authority in the Present Matter

In an effort to avoid application of new law that diminishes the unfettered discretion of the United States Environmental Protection Agency ("EPA" or "the Agency"), EPA, in its Response to Petitioner's Motion for Reconsideration, urges the EAB to ignore the United States Supreme Court's June 2024 ruling in *Loper*.[2] EPA states that the Board should instead continue to improperly defer to EPA's discretionary judgment and interpretation of law, arguing that the "Supreme Court's decision in *Loper* does not govern decision-making by administrative tribunals like the Board."[3] Deseret likewise argues that "*Loper* does not apply to the Board's review of permitting decisions."[4] This is a misleading and overly narrow interpretation of *Loper*.

EPA's assertion that *Loper* "applies only to matters of statutory authority before federal courts" fails to account for the far-reaching legal findings and conclusions reached by the Supreme Court in rendering its opinion. *Loper* is as much about the inherent limitations of executive agency authority in the United States' system of government as it is about the power of the judiciary.

[2] *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024).
[3] EPA Response to Motion to Reconsider at 5 (Oct. 7, 2024) ("EPA Response").
[4] Deseret Response to Motion to Reconsider at 5 (Oct. 7, 2024) ("Deseret Response").

Indeed, the Supreme Court found the call of the *Chevron* Doctrine – to "set aside the traditional interpretive tools and defer to the agency if it had offered a permissible construction of the statute" – to be incompatible with the system of checks and balances that defines our government structure.[5] The Court further found that any interest in "uniformity for uniformity's sake" that may be served through application of the *Chevron* Doctrine is subordinate to the Federal Government's interest in "correct interpretation of the laws," illustrating the High Court's position that executive agencies are not equipped to correctly interpret federal law.[6]

The Board has been established as an "impartial appellate tribunal" through which an aggrieved party can meet the regulatory requirement to "exhaust its administrative remedies by first filing an appeal with the Board before a matter can be appealed to federal court."[7] Hence, to properly exhaust its administrative remedies, the Tribe has appealed to the Board, seeking a determination on whether the EPA's final agency action was "arbitrary, capricious, an abuse of discretion, and not otherwise in accordance with the law" per the applicable standard under the Administrative Procedures Act ("APA"). The underlying justifications concerning the appropriate level of scrutiny over agency decision-making should apply here. In fact, for the Board to apply a standard of deference that is no longer sanctioned by the Supreme Court would undermine the function of administrative exhaustion as a "quintessential claim-processing rule"[8] if different legal standards apply to the same claims in the administrative versus judicial tribunals.

b. EPA's Assertion that Petitioner Should Have Foreseen *Loper* and Objected to EPA Deference is Unavailing.

[5] *Loper*, 144 S. Ct. at 2264.
[6] *Id*. at 2267.
[7] U.S. ENVIRONMENTAL PROTECTION AGENCY, GUIDE TO THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S ENVIRONMENTAL APPEALS BOARD at 2 (March 2023) (citing 40 C.F.R. §§ 22.27(d), 124.19(l)).
[8] *Santos-Zacaria v. Garland*, 598 U.S. 411, 417 (2023).

EPA argues that the EAB should not consider reviewing its prior policy and practice of deference to Agency determinations of law and the science behind that law because the Tribe did not object to that deference in its original filing of appeal of the Permit decision. The Board has repeatedly found that "reconsideration of a Final Decision is justified by an *intervening change in the controlling law,* new evidence, or the need to correct a clear error or prevent manifest injustice." The EPA even admits as much in its Response to the Tribe's Motion to Reconsider, stating that "a change in applicable law may provide a basis for reconsideration."[9] It defies logic that a movant must invoke non-existent law in its briefing as a prerequisite for seeking reconsideration on this basis, especially where, as here, the pertinent law revolves around the scope and depth of review of an agency action, rather than the agency decision-making process itself.

c. The Tribe has Alleged Error with the Requisite Specificity

Deseret asserts in its Response that the Tribe has failed to allege any specific error in the Board's Order tied to the Board's failure to consider and apply the revised standard for review of agency decision-making under *Loper*. This is patently false.

First, as the Tribe has plainly alleged, *Loper* established a legal standard governing review of federal agency decisions, applicable at the time the Board rendered its Denial. The failure to properly apply this standard alone constitutes a "mistake on a material point of law."[10]

Insofar as Deseret is arguing that the Tribe failed to point to each specific aspect of the Board's Order in which the Board would have reached a different conclusion had it applied the correct standard, such argument is unpersuasive. In effect, Deseret is arguing that the Tribe must prove that the Board's mistake in law would not constitute harmless error. Yet Deseret has pointed

[9] EPA Response at 3 (citing *In the Matter of Cypress Aviation, Inc*., 4 E.A.D. 390, 392 (EAB 1992)).
[10] *In re City of Taunton*, NPDES Appeal No. 15-08 at 1 (EAB June 16, 2016).

to no Board precedent or other legal authority supporting this proposition. The Board is within its authority to determine whether the agency afforded sufficient weight and consideration to the relevant factors in its decision-making and remand the matter back to the agency based on this determination.[11]

Moreover, the Tribe has in fact identified specific aspects of the Board's Order where blanket deference yielded erroneous conclusions. The Tribe asserts in its Motion, for instance, that the Board erred in deferring, without caveat, to EPA's conclusory and self-serving determination that it has satisfied the federal policy of environmental justice regardless of the well-documented environmental needs and priorities of the sovereign whose very lands and airspace are being impacted by the agency's decision.[12] The Tribe further asserts in its Motion that the Board improperly deferred to EPA's interpretation of Title V of the Clean Air Act, arguing that: "EAB can no longer rotely defer to EPA's interpretation of allegedly ambiguous statutes and regulations. As part of its mission to protect human health and the environment, EPA must take into account new information, science, and law to keep the Permit up to date and effective."[13] Therefore, even excepting, *arguendo*, Deseret's argument that the Board's application of an erroneous legal standard is not by itself a sufficient basis for reconsideration and remand, the Tribe has clearly shown where and how the Board's application of this erroneous legal standard has impacted the Board's conclusion on specific issues in dispute in this administrative appeal.

[11] *In re Desert Rock Energy Company, LLC*, 14 E.A.D. 484, 485 (EAB 2009)
[12] Motion to Reconsider at 9-10 (Sept. 20, 2024) ("Motion to Reconsider").
[13] *Id*. at 7.

B. The EAB's Analysis and Conclusions Concerning the Federal Trust Responsibility were Erroneous, And the Tribe Has Not Raised any "New Legal Theory" in Relation to the Federal Trust Responsibility.

As the Tribe asserts in its Motion to Reconsider, the Board erred in its analysis of the trust responsibility, relying on a federal common law standard that applies to a Federal Court's threshold determination of whether a tribal claimant has stated an independent cause of action for breach of trust, a standard which is inapplicable to the present matter.

This is not a "new legal theory" as the EPA asserts. The position of the Tribe from the outset of this administrative appeal has been that the agency was required to consider and account for its fiduciary relationship to the Tribe in rendering an agency decision that may directly and substantially impact the environment and air quality on the Tribe's reservation.[14] EPA's position seems to be that the Tribe's effort to distinguish its citation to reliance on the Federal trust responsibility in this administrative appeal constitutes a "new legal theory" simply because the Tribe is correcting the Board's erroneous application of a specific standard that does not apply in this case. This is meritless and turns the basic purpose of allowing parties to seek reconsideration on its head. If correcting the Board's legal analysis constitutes a "new legal theory," then the entire reconsideration process is rendered meaningless and a waste of federal resources.

The distinction between what the Board – and now the EPA – are calling a "conventional trust relationship" and the "general trust responsibility" marks the difference between whether the Federal Government, through statutes and regulations, has creates a specific duty that is judicially enforceable against the United States in the form of a breach of trust claim.[15] It does not, as EPA suggests, serve to nullify the obligation of the United States to as a trustee in rendering decisions

[14] *E.g.,* Petitioner' Brief at 13 ("The Agency must render decisions directly impacting Tribal air quality and, by extension, the health and welfare of the Tribal member communities, in accordance with its trust responsibility.")
[15] *United States v. Mitchell*, 463 U.S. 206, 224-25 (1983).

that directly impacted its tribal beneficiaries. While EPA makes a conclusory assertion that the cases cited by the Tribe on this issue are inapposite, each of the cases cited support and reinforce this precise legal framework. In *Woods Petroleum Corporation v. U.S. Department of the Interior*, 18 F.3d 854, 859 (10th Cir. 1994), the Tenth Circuit found that the United States was a "fiduciary" to Indian lessors and must therefore "represent their best interests." While the Tenth Circuit ultimately found that other commercial considerations factor into an agency's decision that may impact Indian lessors, neither the United States' role as "fiduciary" nor its obligation to "represent the[] best interests" of the Indian lessors was predicated on the "conventional trust" versus "general trust" dichotomy proffered by the Board. Similarly, in *Cheyenne-Arapaho Tribes of Oklahoma v. United States*,[16] the Tenth Circuit found that the "United States' function as a trustee over Indian lands necessarily limits the Secretary's discretion to approve communitization agreements," despite the fact that the governing statutes and regulations did not reference the trust relationship between the United States and its tribal and Indian beneficiaries. In the recent Eighth Circuit opinion in *Mandan, Hidatsa, and Arikara Nation v. U.S. Department of Interior*,[17] also cited by the Tribe in its Motion, the Eighth Circuit found that the "trust responsibility of the federal government includes protecting tribal sovereignty." Once again, this finding was based on the facets of the trust responsibility of the United States and not prefaced on the "conventional" versus "general" dichotomy.

CONCLUSION

EPA repeatedly and disingenuously accuses the Tribe of "attempting to relitigate" the grounds for its appeal of the Permit reissuance. The Tribe is properly and forthrightly asserting that the Board made material mistakes of law and policy by summarily rejecting the Tribe's

[16] 966 F.2d 583, 588 (10th Cir. 1992).
[17] 95 F.4th 573, 582 (8th Cir. 2024).

allegations. The Tribe is not seeking to relitigate claims. Rather, the Tribe is asking for the Board to reconsider its Order summarily denying review of the Tribe's Petition and uphold its function as an impartial review tribunal in accordance with applicable standards governing deference to the agency decision-making process and the federal trust responsibility. Accordingly, and based on the foregoing, the Tribe respectfully reiterates its request that the Board reconsider its Order Denying Review.

Submitted on this 17th day of October 2024.

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STATEMENT OF COMPLIANCE

Pursuant to 40 C.F.R. § 124.19(f)(5), the undersigned hereby certifies that the foregoing Pleading does not exceed 7,000 words.

/s/ Michael Holditch
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing pleading were filed electronically with the Environmental Appeals Board's E-filing system, and were served on the following persons, this day of 17th day of October 2024, by U.S. mail.

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