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	)	

MOTION FOR RECONSIDERATION

Pursuant to 40 C.F.R. §124.19, Appellant, the Ute Indian Tribe of the Uintah and Ouray Reservation (the "Tribe"), hereby submits its Motion to Reconsider the Environmental Appeals Board's ("EAB") September 10, 2024 Order Denying Review. In support hereof, the Tribe states as follows:

INTRODUCTION AND BACKGROUND

The long-standing history of the Bonanza Plant Title V Permit is discussed in detail in the Briefs submitted in this case. The Tribe has objected to health and environmental exposure and subsequent impacts from the Bonanza Power Plant since Deseret began construction in 1981. The Environmental Protection Agency ("EPA") has diminished or rejected most, if not all, of the Tribe's health and environmental concerns, as well as its demand that the EPA take into account its Environmental Justice Policy and federal Indian Trust responsibility. Most egregiously, as a result of the Agency's own inexplicable inaction, EPA allowed the Plant to operate for 14 years without a valid permit, causing significant air pollution and consequential health and environmental impacts and damage that has not been remediated to this date. Still incurring substantial and disproportionate environmental impacts from years of unabated and unmitigated

pollution, the Tribe has continuously requested that EPA work in collaboration with the Tribe to establish measures and controls tailored to promote and protect the well-being of the Tribe and the environmental sustainability of the Uintah and Ouray Reservation.

The EAB gave short shrift to the Tribe's objections and rejected every one of them. The EAB deferred to and adopted all of EPA's defenses wholesale, without exception. The EAB held that the EAB Appeal was not justified on "any grounds present."[1] EAB found that:

- The Tribe did not prove that the permit is inconsistent with Title V of the Clean Air Act.
- EPA "reasonably considered" the Tribe's comments, and adequately documented its exercise of discretion in rejecting them.[2]
- EPA had consulted several times with the Tribe over the course of many years. EPA responded in writing to the Tribe's objections, rejecting virtually all of them, which was all it needed to do to comply with law.
- EPA's long-standing policies on Environmental Justice and its Indian Policy (as well as the overarching federal Indian Policy), by its own statements are merely policies, and not enforceable. Therefore, EPA does not have a legal duty to comply with those policies.
- EPA cannot change permit conditions based on Environmental Justice considerations if the existing conditions comply with the law. Further, Environmental Justice

[1] *In Re Deseret Generation and Transmission Co-operative Bonanza Power Plant*, CAA Appeal No. 24-01, Order Denying Review (September 10, 2024), 11.
[2] *Id*, 14.

considerations do not have to consider emissions "beyond the scope of the permit action."[3]

- EPA's obligation to address Environmental Justice is sufficiently met merely by listening to the Tribe's concerns and providing public participation opportunities to the Tribe.[4] That was sufficient to comply with EPA's Environmental Justice Policy without taking any corrective action.
- The Tribe waived its right to raise concerns in the Appeal about dangerous levels of carbon dioxide ("CO^2") being emitted from the plant annually. While the Tribe previously raised concern in comments and other forums about "coal pollution" and "3.5 million tons of air pollution being released per year," that statement was not specific enough to alert EPA that CO^2 was of concern and should be addressed in the permit.
- EPA admitted that the Tribe may be disproportionally impacted by emissions from the Bonanza Plant. However, EPA took the position that a 2015 third-party settlement, from which the Tribe was excluded, resolved those issues.
- Based on the Supreme Court's 2023 decision in *Arizona v. Navajo Nation*,[5] a case involving water rights, there is no federal trust duty unless it is expressly identified in a law or Treaty. There is no law or Ute Treaty that creates an express trust duty toward the Tribe regarding environmental protection, thus no express Trust Duty exists in regard to the air pollution and the perpetual harm it is causing in this situation.

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[3] *Id*, 15.
[4] *Id*, 21.
[5] *Arizona v. Navajo Nation*, 599 U.S. 555 (2023).

- In a water-rights case brought by the Ute Tribe against the United States, the federal District Court of Utah did not find any "general trust duty" of the United States to protect the Ute Tribe from lost and unenforced water rights. The EAB adopts EPA's argument that this lack of trust duty is applicable to health and environmental exposure and damage from air pollution at the Bonanza Plant as well. [6] The EAB stated that EPA satisfies its general trust responsibility merely by complying with its responsibilities under the Clean Air Act[7] without addressing any needs of the Tribe.
- There is no environmental harm from air pollution from the Bonanza Plant because EPA adopted and relied on the conclusions of an 11-year old state of Utah study ("the 2013 Utah Study") that postured that the smoke stack emitting multiple hazardous air emissions at the Bonanza Plant was high enough above the ground that an air inversion prevented those emissions from causing health or environmental exposure or risk to those on the ground. The EAB, solely relying on EPA's conclusory determination, dismissed any concern that rapidly increasing climate change may affect these conditions in the future, or that EPA never did its own analysis, confirmatory study, or update to validate the 2013 Utah Study.
- EPA's failure to timely notify the Tribe of a hazardous waste investigation and findings of violations concerning contamination of land and water at the Bonanza Plant caused by coal combustion residue (from air emissions generated by burning coal at the Plant) was irrelevant to the Clean Air Act Permitting process.

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[6] Citing *Ute Indian Tribe of the Uintah & Ouray Rsrv. V. United States Dep't of Interior*, No. 2:21-CV-00573-JNP-DAO, 2023 WL 6276594, at *1 (D. Utah Sept 26, 2023).
[7] *Ibid,* p. 2.

ARGUMENT

In accordance with 40 C.F.R. § 124.19, Motions for Reconsideration must identify matters claimed to have been erroneously decided and the nature of the alleged errors. EAB's Denial of Review was clearly erroneous in four major areas, thus requiring EAB to reconsider its Denial of Review of the Tribe's Appeal.

1. EAB Failed to Properly Apply the Supreme Court *Loper* Decision

In June 2024, the United States Supreme Court handed down a decision in *Loper Bright Enterprises v. Raimondo.*[8] *Loper* overturned the Court's 1984 ruling in *Chevron v. Natural Resources Defense Council* ("*Chevron*").[9] The Court in *Chevron* held that where a statute is potentially ambiguous, courts should defer to federal agency expertise in interpreting the statutes that they administer, so long as the agency's interpretation was "reasonable." *Chevron* was frequently applied to environmental statutes, as most environmental laws are based on science for which there are often differences of scientific opinion between the government, regulated industries, and affected parties. *Loper* overturned the principle of "Chevron Deference" that yielded legal interpretation of ambiguous provisions of law to the expertise of federal agencies. *Loper* requires that a reviewing court hear the scientific evidence and decide on its own whether EPA's interpretation of the law and science is correct.

While the EAB has previously been deferential to EPA decision-making,[10] that practice can no longer stand. According to the EAB's own Practice Manual, "The EAB will grant a motion

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[8] 144 S.Ct. 2244 (2024).

[9] *Chevron v. Natural Resources Defense Council Inc.,* 467 U.S. 837 (1984).

[10] See *Pepperell Assoc. v. EPA*, 246 F.3d 15, 22 (1st Cir. 2001) ("To the extent that the EAB's decision reflects a gloss on its interpretation of the governing EPA regulations, a reviewing court must also afford those policy judgments substantial deference, deferring to them unless they are arbitrary, capricious, or otherwise 'plainly' impermissible.") Cited in "Environmental Appeals Board Practice Manual" June 2012, 6.

for reconsideration to correct an obvious error, a mistake of law or fact, **or a change in the applicable law**."[11] [Emphasis added.] The law has clearly and significantly changed.

The EAB erroneously turns a blind eye to the *Loper* ruling. The EAB made no reference to any consideration of *Loper* in its September decision and made no effort to independently evaluate EPA's technical determinations and interpretation of the law. The *Loper* decision was issued in June, 2024, months before the EAB Denial of Review was issued. The EAB had sufficient time to incorporate the *Loper* decision into its opinion, but completely ignored it, thus clearly erroneously misstating the law, impermissibly deferring to EPA's decisions, and failing to provide an independent review of EPA's cursory conclusions against the Tribe.

Utah has no environmental regulatory jurisdiction over the Bonanza Plant and its location in Indian Country. The EAB's wholesale adoption of EPA's determination that there was no health or environmental impact to human health or the environment relying solely on the 2013 Utah Study, is clearly erroneous, contrary to *Loper*.

2. EAB Adoption of EPA's Restrictive View of Permit Conditions Contradicts Federal Regulation

The EAB's deference to EPA's determination, based on EPA's construction of a provision in 40 C.F.R. § 71.6(a), of which EPA concluded that it can only include in Title V permits conditions that were previously in the Permit and expressly enumerated in regulations and cannot look at additional requirements to ensure protection of human health and the environment, is clearly erroneous, and contrary to the EPA's duty to protect human health and the environment. EAB can no longer rotely defer to EPA's interpretation of allegedly ambiguous statutes and

[11] *Id*, at 23, citing *In re Capozzi, Inc., RCRA (3008) Appeal No. 02-01*, at 3 (EAB Oct. 16, 2003) (Order Denying Motion for Reconsideration).

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. Further, EAB adopted EPA's adoption of the 2013 Utah Study that the Permit would not affect vegetation or wildlife because the Permit "does not authorize new construction that would introduce new impacts," and the stack height "are not expected to have a local effect, ignoring the actual impact the stack emissions have caused."[12]

EAB's reliance on the 2013 Utah Study is egregiously erroneous: (1) The study is outdated; (2) It was adopted wholesale by EPA without any EPA confirmation of results; (3) The state of Utah has no jurisdiction over Indian Country; and (4) The 2013 Utah Study fails to take into account the rapidly worsening effects of climate change (the rate of which could not have been accurately predicted over a decade ago) other than an unsubstantiated statement that climate change is not expected to impact the study.

Contrary to EPA's position that it cannot add to the Title V Permit requirements pursuant to 40 C.F.R. § 71.6, notably despite EPA acknowledging in its Response Brief that it has "some discretion,"[13] Title V does not expressly prohibit consideration of other relevant factors. Section 71.6 simply states that:

> "Each permit. . .shall include the following elements:
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> (1) Emissions limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance. . ."[14]

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[12] *Id*, 28.
[13] "*EPA Region 8's Response to Petition for Review*," CAA Appeal No. 24-01, March 22, 2024, 3.
[14] 40 C.F.R. 71.6(a)(1).

While Part 71 lists elements that need to be included in a Permit, it does not expressly limit permit requirements and conditions to those listed in Part 71. To the contrary, Part 71 notes that "The permit may be modified, revoked, reopened, and reissued, or terminated for cause."[15]

EPA's interpretation of these provisions to posture that (a) the renewal can only include compliance conditions that existed in the original Permit; and that (b) it cannot modify the permit to reflect new science, new law, or major policy developments, is extreme, unsupported by the statute, and contrary to EAB's mission to address important policy issues.[16] The Tribe asserts that the regulations *allow,* if not *require*, EPA to incorporate new information and information omitted from the original Permit but critical to ensure protection of human health and the environment. *Loper* requires that the reviewing court arrive at its own interpretation of the law and the science behind the law, rather than blindly deferring to EPA's interpretation. The EAB's failure to do so is clearly erroneous and must be reconsidered in light of *Loper*. *Loper* requires that the reviewing court independently hear the scientific evidence and make its own decision on how that impacts the law. This determination is likely to be inconsistent with, or contrary to, EPA's erroneous conclusions.

EAB adopted, without further inquiry, EPA's position that groundwater contamination that was the subject of the multiple RCRA inspection violations was not associated with Permit conditions, despite the fact that the groundwater contamination ***was caused almost exclusively by air emissions from the stack as by-products of coal burning*** that provided the fuel for the Bonanza Power Plant, and thus clearly integral to the Permit and its purpose of protecting human health and

[15] 40 C.F.R. 71.6(a)(6)(iii).
[16] EAB Practice Manual, *supra*, 42.

the environment from hazardous air pollution. The air emissions were the direct cause of the surface and groundwater contamination (thus further refuting the 2013 Utah Study).

3. EAB Erroneously Adopted EPA's Position Nullifying Federal Environmental Justice Policies

EAB's concurrence with EPA's position that its Environmental Justice Policy is satisfied solely by listening to the Tribe's concerns, without taking action to address those concerns, is clearly erroneous and inconsistent with EPA's (and the United States') mission to protect public health and the environment. It eviscerates the Policy, rendering it meaningless.

EAB's determination that EPA, by merely listening to the Tribe's assertion of traditional ecological and cultural values, including the special status of elders in the community, met its obligation to take those factors into account in determining whether they impacted the Permit conditions, and concluding they did not, is clearly erroneous and inconsistent with EPA's own policies requiring integration of such values where possible. It is possible here.

EPA's view of Environmental Justice, *i.e.* that Environmental Justice can be "considered" at EPA's discretion, but cannot change substantive permit conditions, and EAB's wholesale adoption of that position, is clearly erroneous as it nullifies the intent of the federal government's Policy. That Policy was designed to ensure that disadvantaged communities are treated fairly, and that historic disproportionate and cumulative impacts historically imposed on disadvantaged communities are accounted for and rectified by modern environmental remedies.

EAB summarily rejects the Tribe's position that Environmental Justice should allow additional compensation, either through private funding or in-kind activities, to redress the disparate impacts and historic unequal treatment to disadvantaged communities that have borne the brunt of environmental damage. The Clean Air Act does not expressly prohibit compensation. The Board has clearly erroneously unilaterally "declined to review environmental justice concerns

that fall outside the scope of a permitting decision."[17] This unilateral decision is subject to de novo judicial review under *Loper* and cannot be afforded unbridled deference.

4. EAB Has Misapprehended the Federal Trust Responsibility and its Role in the Federal Decision-Making Process

The federal trust responsibility lies at the heart of the Tribe's challenge to the EPA's approval of the Title V Permit renewal. Yet, the EAB has summarily rejected the Tribe's invocation of the trust responsibility, relying on a U.S. District Court's 2023 ruling in an unrelated case, *Ute Indian Tribe v. Department of Interior*.[18] That case dealt with the United States' trust duties relating to the Tribe's water rights and related water infrastructure, having nothing to do with air quality and its lingering health impacts on the Tribal membership. Perhaps even more importantly, the standard applied by the Court in the cited opinion was the standard for determining if and when an alleged fiduciary duty is judicially enforceable against the United States as an independent cause of action for breach of trust. This court opinion did <u>*not*</u> set the standard for when the U.S. and its agencies are free to disregard its trust responsibility altogether when rendering final Agency decisions that impact tribes.

The federal trust responsibility exists beyond express statutorily conferred fiduciary duties establishing a stand-alone cause of action for breach of trust. To the contrary, federal courts, including the Tenth Circuit, have routinely considered the federal trust responsibility in their assessment of whether a final agency action was arbitrary and capricious, regardless of whether a

[17] *Id*, 29.
[18] *Ute Indian Tribe of the Uintah & Ouray Indian Rsrv. v. United States Dep't of Interior,* No. 2:21-CV-00573-JNP-DAO, 2023 WL 6276594, at *1 (D. Utah Sept. 26, 2023).

stand-alone cause of action for breach of trust has been established.[19] Accordingly, EAB's disregard for the federal trust responsibility constitutes clear error.

CONCLUSION

The EAB decision was clearly erroneous for the reasons stated above. The EAB must reconsider its Denial of Review and apply the *Loper* ruling that requires EAB to make an independent judgment about the issues raised in the Appeal. Under that standard, EAB must require EPA to address the Tribe's concerns, ensure that the Permit renewal addresses health and environmental risks, and independently assess EPA's scientific and legal arguments, giving due consideration to the federal trust responsibility and uphold the inherent sovereign authority of the Tribe to protect its membership. EAB must review this Appeal in accordance with a major change in law and with due consideration to pertinent federal laws and policies that remain in effect.

Respectfully submitted on this 20th day of September 2024.

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[19] *E.g., Woods Petroleum Corp. v. U.S. Department of Interior*, 18 F.3d 854 (10th Cir. 1994) ("As a fiduciary, the Secretary of course must represent the best interests of the Indian lessors."); *Cheyenne-Arapaho Tribes of Oklahoma v. U.S.*, 966 F.2d 583, 590-91 (10th Cir. 1992); *Kenai Oil and Gas, Inc. v. U.S. Department of Interior*, 671 F.2d 383, 386 (10th Cir. 1982); *Mandan Hidatsa & Arikara Nation v. U.S. Department of Interior*, 95 F.4th 573, 583 (8th Cir. 2024).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion for Reconsideration were filed electronically with the Environmental Appeals Board's E-filing system, and was served by U.S. mail on the following persons, this 20th day of September 2024.

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