IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE HOPI TRIBE, et al., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and GINA MCCARTHY, Administrator, U.S. Environmental Protection Agency Respondents, And SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, et. al., Respondent-Intervenors.	Case No. 14-73100 Consolidated Case Nos. 14-73055, 14-73101, and 14-73102

BRIEF OF VINCENT HARRIS YAZZIE

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Dated March 16, 2015

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Basis for Jurisdiction

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This Court has jurisdiction to hear this appeal pursuant to section 307(b)(1) of the Clean Air Act ("CAA"), 42 U.S.C. § 7607(b)(1), and Rule 15(a) of the Federal

Rules of Appellate Procedure. Through this action, Vincent Harris Yazzie petitions the Court for review of the final rule of Respondents EPA and Gina McCarthy, Administrator of EPA, entitled "Approval of Air Quality Implementation Plans; Navajo Nation; Regional Haze Requirements for Navajo Generating Station; Final Rule" published at 79 Fed. Reg. 46,514 to 79 Fed. Reg. 46,555 on Friday, August 8, 2014. This Court has jurisdiction to review this "locally or regionally applicable" regulation under the CAA. 42 U.S.C. § 7607(b)(1). Because the Final Rule applies only to the Navajo Nation, this Court is "the United States Court of Appeals for the appropriate circuit" and thus has jurisdiction. Id.

The CAA requires any petition for review be filed within 60 days of publication in the Federal Register. Vincent Harris Yazzie filed a timely petition for review on October 7, 2014. Conservation group, Navajo

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Conservation group and the Hopi Tribe also filed petitions to review these regulations, and these petitions were consolidated with Vincent Harris Yazzie's petition. EPA's Final Rule unlawfully assumes the Navajo Nation qualifies for Tribal Authority Rule (TAR) and flexible rulemaking from Arizona Public Service Company v. U.S. E.P.A, 526 F. 3d 1116 a case on air quality versus protection of Class 1 areas. Four Corners Power Plant (FCPP) coal has high ash content while Navajo Generating Station (NGS) coal has low ash which does not justify discretionary implementation. I visit Grand Canyon National Park (GCNP), Bryce Canyon National Park (BCNP), Mesa Verde National Park (MVNP), and Petrified Forest National Park (PFNP) for recreation and for the crisp clean air free of haze. Petitioner has an $80 Federal Recreational Annual Pass, No. 141 040069 which expires December, 2015 which entitles me to free entrance to GCNP, BCNP, MVNP and PFNP which are Federal Class One areas. The haze from NGS ruins the view from viewpoints at GCNP and BCNP. This is my standing.

STATEMENT OF ISSUES

1. Whether the EPA misapplied the ruling from Arizona Public Service Company v. U.S. E.P.A, 526 F. 3d 1116 on NGS which has

low ash while FCPP has high ash.

2. Whether the EPA misapplied the ruling from Arizona Public Service Company v. U.S. E.P.A, 526 F. 3d 1116 on NGS where a high ash content at FCPP resulted in EPA discretion of air quality standards versus expensive selective catalytic converters (SCR) and financially distress respondent stakeholders can create EPA discretion of Regional Haze in Class one areas.

REPRODUCTION OF RELEVANT STATUORY PROVISIONS

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The relevant provisions of the CAA, and its implementing regulations, are

reproduced in the Tribal Conservation Organization's Statutory Addendum.

STATEMENT OF THE CASE

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This appeal seeks reversal of U.S. EPA's Final Rule adopting a proposal

from a self-selected private advisory group as an "alternative" to compliance with EPA's mandatory legal obligations under the CAA – specifically obligations to reduce, *within applicable deadlines,* tens of thousands of tons of harmful, smog inducing, visibility impairing NOx emissions expelled annually from NGS, one of the four largest NOx

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polluters in the United States.[1] Bowing to political pressure from its sister agency and majority owner of NGS, the U.S. Bureau of Reclamation ("Reclamation"), EPA's Final Rule provides no concrete deadline, commitment, or clear roadmap of how NOx reductions at NGS will be accomplished. Instead, EPA's Final Rule unlawfully prolongs clean up of air emissions from NGS over

the "life of the plant" being another 30 years.

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[1] Pursuant to Federal Rule of Appellant Procedure 28(i) and having conferred with Tribal Conservation Organization Case No. 14-73101, the Vincent Harris Yazzie hereby join in the Conservation Organizations' Opening Brief and to the extent their brief covers matters and arguments not addressed herein.

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Now over four decades old, NGS is the largest, oldest, and dirtiest coal-fired power plant west of the Mississippi River, and the eighth largest coal-fired power generating station in the U.S. Proposed Rule, 78 Fed. Reg. 8273 (February 5,

2013). Unlike any other coal-fired power plant across the nation, the U.S. government is the *majority owner* of NGS. 79 Fed. Reg. at 46514. Emissions from NGS are known to cause significant visibility impairment in as many as eleven national parks and wilderness areas, including the iconic Grand Canyon

National Park, which is only a mere 20 miles away from the facility.[2] 78 Fed. Reg.

at 8285-87.

NGS is one of only three coal burning power plants located on Native American tribal lands. NGS emissions are impair my view at the GCNP and BCNP. On a clear day I can see 60 miles. On a bad day, I can barely see the North Rim of the Grand Canyon from the South Rim

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[2] Correcting visibility impairment at Grand Canyon National Park was

a central impetus for creation of the CAA's visibility program. *See e.g.* 42 U.S.C. § 7492(f).

[3] The Tribal Conservation Organizations have standing to bring this appeal by satisfying the following three Article III requirements: (1) a legally cognizable injury that is (2) "fairly … trace[able] to the challenged action of the defendant

The CAA mandates that natural visibility conditions be restored in our country's national parks and wilderness areas (also referred to as "Class I" areas).

42 U.S.C. § 7491(a)(1). Specifically, the CAA's visibility-protection provisions require EPA to prepare an implementation plan to eliminate human-caused

regional haze from these otherwise pristine landscapes and restore natural visibility conditions by 2064. *See* 42 U.S.C. § 7491(b); Regional Haze Regulations, 64 Fed. Reg. 35714, 35732 (July 1, 1999). The plan must eliminate human-caused haze pollution, in part, by imposing the Best Available Retrofit Technology ("BART") pollution controls (and pollution emission limitations which reflect such technology) on some of the oldest, most polluting stationary sources in the U.S., such as NGS. 42 U.S.C. §§ 7491(b)(2)(A), (g)(2). Importantly, BART air pollution controls must be installed "as expeditiously as practicable", which Congress defined as meaning "in no event later than five years after the date of approval of a plan." *Id.* § 7491(g)(4).

In February 2013, EPA issued a proposed BART rule for NGS that largely complied with the CAA regional haze requirements in

significantly reducing regional haze from NGS by the statutory deadline. *See* 78 Fed. Reg. at 8274. Specifically, EPA's Proposed Rule imposed a NOx emission rate of .055 pounds per million British Thermal Units ("lbs/MMBtu") and required installation of conventional state-of-the-industry pollution controls, called selective catalytic reduction ("SCR"), on all three generating 750MW units at NGS within the five- year time frame mandated by Congress. *Id.* at 8288-93; *accord* 40 C.F.R. § 49.5513(j)(3)(i)–(4)(i).

Rather than finalizing this Proposed Rule, however, EPA in July 2014 adopted a "BART alternative" proposal advanced by its sister agency, the U.S. Bureau of Reclamation. An "invitation only" private advisory group created Reclamation's BART alternative, to the exclusion of the Navajo Nation public, Tribal Conservation Organizations, and the neighboring Hopi tribal government. 79 Fed. Reg. at 46516. EPA's Final Rule, adopting Reclamation's "BART alternative", fails to comply with the statutory and regulatory deadlines for achieving the necessary emission reductions at NGS. EPA's Final Rule essentially creates a double standard for the U.S. government. By not requiring NOx emission reductions at NGS within the mandatory

statutory and regulation deadlines, EPA's

Final Rule carves out an illegal, unjust, and unprecedented exemption to the CAA. This NGS BART exemption conflicts with EPA's previous rules mandating compliance with regional haze deadlines at most other privately-owned coal plants in the western United States.[4]

EPA's Final Rule is also unlawful, arbitrary, and capricious because the

agency failed to prove by "the clear weight of evidence" that its BART alternative "achieves greater reasonable progress [i.e., visibility improvement] than would be achieved through the installation and operation of BART…" as required by EPA's own the regional haze implementing regulations at 40 C.F.R. §51.308(e)(2)(i)(E). Finally, EPA's Final Rule is also unlawful, arbitrary and capricious because it

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[4] *See* Montana FIP, 77 Fed. Reg. 57864, 57916 (September 18, 2012); Wyoming
FIP, 79 Fed. Reg. 5032, 5221 (January 30, 2014); Arizona FIP, 77 Fed. Reg.
72512, 72578 (December 5, 2012); Four Corners Power Plant FIP, 77 Fed. Reg.
51620, 51648 (August 24, 2012).!

improperly relies on the "tribal authority rule" as the basis for ignoring the regional haze emission reduction deadlines and requirements.

> For the reasons stated herein, this Court must reverse and remand or vacate

EPA's Final Rule.

STATEMENT OF FACTS

I. THE REGIONAL HAZE PROGRAM

The United States is home to some of the most iconic national parks and scenic areas in the world – places of grandeur and natural wonder such as the

Grand Canyon National Park. By impairing the ability to see long distances, color, and natural geologic formations, air pollution in the form of regional haze dramatically dampens and diminishes use and enjoyment of these incredibly beautiful and world-renowned landscapes. 78 Fed. Reg. at 8277. Regional haze,

or visibility impairment, is mostly caused by emissions of Nitrogen Oxide ("NOx"), sulfur dioxide ("SO_2"), and particulate matter ("PM"). When these pollutants enter the atmosphere, they scatter and absorb light, which causes impairment in visibility. 64 Fed. Reg. at 35715. The burning of coal at power plants, such as NGS,

emits these same pollutants in massive quantities.

In an effort to ameliorate the blight of regional haze and pollutants affecting these national treasures, Congress declared "as a national goal the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas"[5] to natural conditions by 2064. 42 U.S.C. § 7491(a). Under the CAA, Congress charged EPA with the task of eliminating visibility impairment in Class I areas. *Id.* Subsequently, EPA promulgated regional haze regulations to implement the program. *Id.*; *accord* 40 C.F.R. §§ 51.308–309.

The Regional Haze Program requires states to develop implementation plans to improve visibility in mandatory Federal Class I areas. If a State does not submit a state implementation plan ("SIP"), the CAA requires EPA to establish a Federal Implementation Plan ("FIP") for that jurisdiction. 42 U.S.C. § 7410(c)(1)(A).

When promulgating a FIP, the EPA must determine which major stationary sources, such as power plants, contribute to visibility impairment, and then determine the "best available retrofit technology" ("BART") for reducing

emissions at certain sources, such as NGS. *Id.* § 7491(b)(2)(A). When conducting a BART analysis, the EPA must take into consideration five factors: (1) costs of compliance; (2) the energy and nonair quality environmental impacts of compliance; (3) any existing pollution control technology in use at the source; (4) the remaining useful life of the source; and (5) the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology. *Id.* § 7491(g)(2). Most importantly, Congress requires installation of

[5] "Class I" is the highest and most protective air quality designation under federal law. When an area is designated as Class I, "very little deterioration and hence very little development is allowed…" *Nance v. EPA*, 645 F.2d 701, 704 (9th Cir. 1981). It essentially equates to natural air quality conditions. In 1977 and thereafter, Congress designated 156 National Parks and wilderness areas as "mandatory Federal Class I areas", including the Class I areas impacted by NGS' emissions. 42 U.S.C. § 7491(a)(2); *accord* 40 C.F.R. § 81.

BART as expeditiously as practicable, "*but in no event later than five years after the date of approval of a plan revision*." *Id.* § 7491(g)(4) (emphasis added).[6]

Similarly, Congress granted EPA the authority to treat eligible

Indian tribes in the same manner as states and directed the agency to promulgate rules specifying which provisions of the CAA should apply to tribes. *See id.* § 7601(d). Pursuant to this authority, EPA promulgated the Tribal Authority Rule ("TAR") relating to implementation of CAA programs in Indian Country. *See* Tribal Authority Rule, 63 Fed. Reg. 7254 (Feb. 12, 1998) (codified at 40 C.F.R. § 49.11).

Under TAR, tribes may develop Tribal Implementation Plans ("TIP") similar to SIPs developed by states to administer CAA requirements on tribal lands. *Id.* However, when a tribe fails to submit a TIP, or when EPA disapproves a TIP, the agency has the authority to promulgate "such federal implementation plan provisions as are necessary or appropriate to protect air quality", consistent with the CAA regional haze requirements. 40 C.F.R. § 49.11(a). Importantly, TAR does *not* modify Congressional or regulatory deadlines for achieving emission reduction under the BART program. *Id.*; *compare* 42 U.S.C. § 7491(g).

[6] In this case, EPA's Final Rule for NGS has an effective date of October 7, 2014. *See* 79 Fed. Reg. 46514. Thus, under BART *all* NOx emissions reductions at NGS should occur no later than October 7, 2019. For reasons discussed and challenged herein, EPA ignored this and other regional haze deadlines.

Nor does it invalidate any other substantive requirement of the regional haze program.

EPA has promulgated regulations allowing adoption of a "BART alternative" under very limited circumstances. EPA's BART alternative regulations impose "[a] requirement[7] that all necessary emission reductions take place during the period of the first long-term strategy for regional haze." 40 C.F.R. §51.308(e)(2)(iii). By law, the first regional haze plans were due to EPA by December 17, 2007.[8] The first planning period began on January 1, 2008 and ends on December 31, 2017[9] (with the first planning period reports due by July 31, 2018). 40 C.F.R. §§ 51.308(b), 51.308(f). To summarize, Congress has imposed a five-year statutory deadline for achieving BART emission reductions (in this case by October 7, 2019) and EPA has established a regulatory deadline of December

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[7] These BART alternative regulations also impose a requirement that EPA show "by the clear weight of evidence" that its BART alternative "achieves greater reasonable progress (i.e. better visibility benefits)

than would be achieved through the installation and operation of BART" during the first regional haze planning period ending December 31, 2017. 40 C.F.R. § 51.309(e)(2)(i)(E).

[8] EPA's Final Rule for NGS was not issued until July 2014 – nearly seven years after its self-imposed deadline for the first regional haze plan. 79 Fed. Reg. 46514.

[9] Thus, the regulatory deadline for achieving emission reductions under the BART alternative rule is December 31, 2017—nearly two years *earlier* than is required under the statutory deadline of October 7, 2019.

31, 2017 for achieving emission reductions under BART alternative programs for

any implementation plan.

Finally, Congress authorized only a single statutory exemption to its mandatory BART requirements. 42 U.S.C. § 7491(c). Thus, EPA may only exempt a source from the BART requirements and deadlines if "such source does not or will not, by itself or in combination with other sources, emit any air pollutant which may reasonable be anticipated to cause or contribute to a significant impairment of visibility in any mandatory class I Federal area." *Id.* EPA's Final Rule makes not attempt to invoke Congress' statutory BART exemption. Nor could it, since NGS has devastating visibility impacts on eleven Class I areas

including Grand Canyon National Park a mere 20 miles away. 78 Fed. Reg. 8287 (Table 9).

II. THE NAVAJO GENERATING STATION

NGS is one the largest and dirtiest coal-fired power plants west of the Mississippi River. Located on the Navajo Nation in Page, Arizona, NGS is comprised of three 750 MW units, totaling 2,250 MW. 78 Fed. Reg. at 8274-75. The U.S. government, through the U.S. Bureau of Reclamation, is the majority owner of NGS.[10] *Id.* NGS is the only coal-fired power plant in the entire United States where the federal government is the majority owner. The remaining owners of NGS are a mixture of private and municipal utilities: Salt River Project, Los Angeles Department of Water and Power, Arizona Public Service, Nevada Power Company, and Tucson Electric Power. *Id.* While the Navajo Nation leases land to the owners of NGS, the Tribe has no ownership interest in NGS, nor does any other tribal government or entity. *Id.*

Burning coal at NGS provides power to the Central Arizona Project, which delivers water into the State of Arizona. But this coal burning comes with environmental consequences – NGS is the fourth

largest source of NOx emissions in the country. 74 Fed. Reg. 44313, 44315 (August 28, 2009). NOx emissions from NGS can cause serious health problems and even death for the people living in the communities surrounding it. 64 Fed. Reg. at 35715

[10] The ownership interests in NGS are as follows: U.S. Bureau of Reclamation (24.3%); Salt River Project (21.7%); Los Angeles Department of Water and Power (21.2%); Arizona Public Service (14%); Nevada Power Company (11.3%); Tucson Electric Power (7.5%). 79 Fed. Reg. at 46,514.

adult chronic obstructive pulmonary disease, cardiovascular problems attributable to NGS air emissions).

Further, NOx emissions from NGS cause regional haze and contribute to visibility impairment in over 11 national parks[11] and wilderness areas surrounding the facility. 78 Fed. Reg. at 8279. For this reason, NGS "is thus *subject to BART*." *Id.* at 8277 (emphasis added).

Normally when a BART source is located on tribal lands, the tribal government has the option of regulating the regional haze emissions of the source by submitting a tribal implementation plan ("TIP"). 40 C.F.R. §49.11(a). However, during the initial lease negotiations for NGS, the Navajo Nation voluntarily contracted away its right to promulgate a TIP for NGS by waiving its right to regulate the facility. *Salt River Project Agric. Improvement & Power Dist. v. Lee*, 672 F.3d 1176, 1178 n.1 (9th Cir. 2012) ("The Tribe covenants that … it will not directly or indirectly regulate or attempt to regulate … the . . . operation of [NGS]"). As a result, the Navajo Nation never submitted a TIP to EPA to regulate regional haze emissions from

NGS. For these reasons, EPA had no option but to promulgate a regional haze FIP for NGS. 40 C.F.R. §49.11(a).

[11] NGS is located less than 20 miles northeast of the iconic Grand Canyon National Park, which has been singled out by Congress to receive special protection under the Clean Air Act's visibility protection provisions. 42 U.S.C. § 7492(f).

III. EPA's REGIONAL HAZE FIP FOR NGS

In February 2013, EPA issued a proposed BART determination for NGS. 78 Fed. Reg. 8273. EPA's proposed BART determination required the installation of conventional state-of-the industry NOx pollution controls, called selective catalytic reduction ("SCR") technology on all three units at NGS. 78 Fed. Reg. at 8288, 8293; *accord* 40 C.F.R. § 49.5513(j)(3)(i)–(4)(i). EPA's proposed rule also required that NGS meet a NOx BART emission limit of .055 lbs/MMBtu within 5 years. *Id.* EPA's Proposed Rule largely complied with the emission reduction deadlines and other aspects of the regional haze program.

EPA's Proposed Rule for NGS was also consistent with many other BART determinations made by EPA across the western U.S. requiring installation of SCR within the mandated five-year time period.[12]

After the publication of EPA's Proposed Rule, a self-selected "by invitation only" advisory group calling itself the Technical Work Group ("TWG") submitted an agreement to EPA on July 26, 2013 proposing an alternative to EPA's proposed BART determination. 79 Fed. Reg. at

46516. The TWG was largely composed of

[12] 79 Fed. Reg. 5047, 5049-51 (Jan. 30, 2014) (requiring SCR at Laramie River 1, 2, & 3, Dave Johnston 3, Naughton 3, and Wyodak coal plants in Wyoming); 77 Fed. Reg. 72514-15 (Dec. 5, 2012) (requiring SCR at the Apache 2, Apache 3, Cholla 2, Cholla 3, Cholla 4, Coronado 1, and Coronado 2 coal plants in Arizona); and, 77 Fed. Reg. 51648 (Four Corners Power Plant).

the owners and operators of NGS. Specifically, the U.S. government as majority owner (acting through Reclamation) and the Salt River Project, as operator of NGS who acted on its own behalf and other non-federal owners, participated in the TWG. The Gila River Indian Community, Navajo Nation, Central Arizona Water Conservation District, Environmental Defense Fund, and Western Resource Advocates also participated in the TWG.[13] *Id.*

> In October 2013, EPA issued a supplemental proposed rule proposing to

adopt Reclamation's BART alternative in lieu of finalizing its proposed BART determination. 78 Fed. Reg. 62,509 (October 22, 2013). Reclamation's BART alternative does not require installation of SCR on any NGS unit within either of the required regional haze emission reduction deadlines. 79 Fed. Reg. at 46552-

54. Instead, Reclamation's BART alternative would allow NGS to reduce NOx emissions over the "life of the plant" without a concrete deadline, commitment, or clear roadmap of how or when NOx reductions would be achieved or enforced. *Id.* Further, Reclamation's BART alternative contains numerous contingencies and

"off-ramps," including whether the Navajo Nation purchases future potentially

13 Meanwhile, Petitioner Hopi Tribe (Consolidated Case No. 14-73055), an obvious "NGS stakeholder" because the Kayenta Coal Mine is located on its land and supplies coal to NGS, was not invited to participate in the TWG. 78 Fed. Reg. at 62,512. Likewise, despite being actively involved in NGS, Petitioner Tribal Conservation Organizations were not invited to participate in the TWG either.

Vincent Harris Yazzie did not hear of TWG until after the NGS lease agreement was approved by the Navajo Nation Council. A complete surprise for me.

available ownership shares of NGS. *Id.* Under Reclamation's BART Alternative, at least one contingency would completely avoid the requirement to install SCR on any of the NGS units. *Id.*

On August 8, 2014, EPA issued its Final Rule proposing "to finalize requirements consistent with the TWG Agreement, as a 'better than BART' Alternative..." 79 Fed. Reg. at 46547. In essence, EPA abandoned the straight- forward and conventional BART determination in its initial Proposed Rule and instead adopted a convoluted and unprecedented "BART alternative" as advocated by its sister agency, the Bureau of Reclamation.

Before describing EPA's highly convoluted, unprecedented, and ultimately unenforceable Final Rule, some background is helpful. First, current NGS owners Los Angeles Department of Water and Power ("LADWP") and NV Energy ("NVE") have publicly stated[14] that they will be divesting their entire megawatt

[14] "Under California law … electric utilities [are not] allowed to import

power into the state that exceeds a fossil fuel emissions cap." Joseph Ramallo, *LADWP Announces Negotiations to Sell and Divest from Navajo Generating Station and Board Approves Contract to Enable LADWP to Completely Transition Out of Coal from Intermountain Power Plant by 2025*, LADWP NEWS (March 19, 2013, 10:11 AM), http://www.ladwpnews.com/go/doc/1475/1727379/LADWP-Takes-Historic- Action-Toward-Clean-Energy-Future-for-Los-Angeles.

shares of NGS in the near future.[15] The Navajo Nation has expressed an interest in purchasing some percentage of any shares of NGS that become available.[16]

With this background, EPA's Final Rule contains two BART sub- alternatives ("Sub-Alternative A" and "Sub-Alternative B"). 79 Fed. Reg. at 46552-54. Which BART sub-alternative will be selected for NGS is based entirely on *future* NGS ownership interests that are currently unknown.

> For Sub-Alternative A to be chosen, one of the following events must occur:

1) LADWP and NVE both exit the NGS partnership without selling their NGS share to any other party (i.e. retire shares); or 2) LADWP or NVE sell their interest to another existing partner; or (3) if either one retires shares and the other sells to

[15] NV Energy is divesting from NGS after "Nevada lawmakers approved a plan for that state's primary utility to move away from coal-fired power plants and replace that electricity, most likely with natural-

gas burning plants and some renewable
energy like solar". Ryan Randazzo, *Nevada Move Threatens Navajo Power Plant*, THE ARIZONA REPUBLIC (June 4, 2013) http://archive.azcentral.com/business/consumer/articles/20130604nevada-move- threatens-navajo-power-plant.html.

[16] In approving a lease extension for NGS on April 29, 2013, the Navajo Nation gave itself an "opportunity to become partial owners of [NGS] . . . [and fill] the ownership gap left by L.A. and Nevada utilities." Emily Guerin, *Navajos Double- Down on Coal*, HIGH COUNTRY NEWS (May 6, 2013) http://www.hcn.org/blogs/goat/navajos-double-down-on-coal.

an existing partner.[17] *Id.* For Sub-Alternative B to apply, LADWP and NVE must sell their interest to a third party, or not exit NGS. 79 Fed. Reg. 46518.

If Sub-Alternative A applies to NGS, owners may choose between three convoluted options for compliance with BART. *Id.* Under the first option, NGS must cease coal generation at one of the three NGS units by January 1, 2020 if the Navajo Nation does not purchase ownership share by December 31, 2019. *Id.* Under the second option, if the Navajo Nation elects to purchase any ownership shares, NGS owners would be allowed to increase generating capacity at two of the remaining units and only cease coal generation at one unit by January 1, 2020.[18]

[17] The second option would actually result in less visibility benefit than the first option because the benefit of elimination of emissions from an entire unit (750 MW) would be reduced by the increase in generation capacity at the other two units. Under the third option, if the Navajo Nation also elects to purchase any of ownership shares, NGS would decrease generation capacity at one unit by the

[17] This date fails to comply with the statutory deadline for achieving emission reductions under BART (October 7, 2019) and is also beyond the regulatory deadline for achieving emission reductions under a BART alternative (January 1, 2018).

[18] Likewise, the second option also fails to comply with the statutory and regulatory deadlines.

megawatt share of LADWP + NVE, but minus any megawatt share purchased by the Navajo Nation. Simple right? Now onto Sub-Alternative B.

Sub-Alternative B essentially imposes two "NOx caps" on NGS – one cap running from 2009-2029 and the second cap running from 2009-2044. *Id.* Under Sub-Alternative B, NGS must achieve NOx emission reductions equivalent to a one-unit shutdown during the time period from January 1, 2020 to January 1, 2030.[19] *Id.* Further, emission reductions under either Alternative B scenario would not have to occur during either of the regional haze emission reduction deadlines. 79 Fed. Reg. at 46552; *accord* 40 C.F.R. § 49.5513(j)(2)(i)-(ii).

Suffice it to say that EPA's Final Rule is unlike any other BART determination, BART alternative, or regional haze rule in the country. Why? Because the Federal government, working to minimize impact to its self-serving and pecuniary interests, exempted itself from the regional haze emission reduction deadlines and requirements.

In support of EPA's dramatic deviation from its initial Proposed

Rule requiring SCR installation within five-years, the agency cites and relies almost exclusively on 42 U.S.C. §7601(d)(4) of the CAA and 40 C.F.R. §49.11(a) of the

[19] Alternative B could delay emission reductions until 2030, thus missing the statutory and regulatory emission reduction regional haze deadlines by over 10 years. 79 Fed. Reg. at 46518-19.

TAR. 79 Fed. Reg. at 46517. EPA does not invoke the Congressional statutory exemption to BART found in Section 169A of the CAA. Little other legal authority beyond the TAR is relied upon or provided by the agency.

This appeal followed.

STANDARD OF REVIEW

! EPA's Final Rule involves the "promulgation . . . of an implementation plan

by the Administrator under section 7410(c)." 42 U.S.C. § 7607(d)(1)(B). As such, the CAA provides that this Court may reverse EPA's Final Rule if it is found to be "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right . . . ; (C) in excess of statutory jurisdiction, authority or limitations . . . or (D) without observance of procedure required by law. . . ." *Id.* § 7607(d)(1)(B)(9).

This is the same standard of review contained in the Administrative

Procedure Act ("APA"). *Small Refiner Lead Phase-Down Task Force v. EPA,* 705

F.2d 506, 519-20 (D.C. Cir. 1983). Under this standard of review, the

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Court must consider whether the Agency's decision "was based on a 'consideration of the relevant factors and whether there has been a clear error of judgment.'" *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.,* 419 U.S. 281, 285 (1974)

(citation omitted).

Further, an agency's interpretation of a statute it administers is normally reviewed by the Court under the framework established in *Chevron USA Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842-43 (1984). In determining whether to afford agency deference in interpretation of a statute, *Chevron* requires that this Court first consider "whether Congress has directly spoken to the precise question at issue", and if so, that is the end of the inquiry, and the Court must apply the plain terms of the statute. *Id.* Only if the Court finds that Congress has not spoken directly to the precise question at issue, does the Court determine whether the Agency "based [its interpretation] on a permissible construction of the statute." *Id.* at 843.

In the instant matter, EPA should not be accorded *Chevron* deference because the U.S. Government has a pecuniary interest in NGS. *Chevron* deference is inappropriate if "the agency has a self-serving or pecuniary interest in advancing a particular interpretation of a statute." *Amalgamated Sugar Co. LLC v. Vilsak*,
563 F.3d 822, 834 (9th Cir. 2009). In this case, the U.S. Government (of which EPA is a part) is the majority owner in NGS – the U.S. Department of Interior acting through its sub-agency the U.S.

Bureau of Reclamation owns almost 25 percent of NGS. 79 Fed. Reg. at 46,514.

In January of 2013, the Directors of EPA, the U.S. Department of Interior, and the U.S. Department of Energy released a signed joint statement recognizing the U.S. Government's ownership interest in NGS and affirmed the agencies' joint commitment in ensuring that NGS is "maintained into the future." *Joint Federal Agency Statement Regarding NGS* (January 4, 2013) (EPA-R09-OAR-2013-0009-0005)[20] ("[NGS] is significant to the United States because of its unique location and the critical roles that it plays in providing power and water…"). Thereafter, the three agency directors committed to "working together" to implement BART in such a manner as to ensure maintenance of NGS over the long term "while *minimizing negative impacts* on those who currently obtain significant benefits from NGS" (*i.e.* the U.S. government as majority owner). *Id*. (emphasis added). But the directors made *no* commitment to ensure compliance with Congress's mandated BART deadlines, or even follow its own regulatory deadlines. EPA's Final Rule makes clear that an extended compliance schedule for reducing NOx emissions is necessary because of "the federal

government's reliance on NGS to meet the requirements of water settlements" as well as to "provide time for the *collaborating* federal agencies [*i.e.* EPA, Interior and Energy] to explore options to

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[20] Refers to EPA's Docket for the Final Rule (Docket ID: EPA-R09-OAR-2013-
0009) found a www.regulations.gov.

avoid or *minimize* … seeking funding to cover expenses for the federal portion of pollution control at NGS." 79 Fed. Reg. at 46517 (emphasis added).

Because NGS is "significantly" important to the U.S. Government, EPA was persuaded to ultimately eschew the agency's CAA obligations in favor of "minimizing negative impacts" to U.S. Government interests. In sum, and while this Court's standard of review is governed by APA standards, the government's self-serving and pecuniary interests in NGS, as evidenced by the *Joint Federal Agency Statement Regarding NGS*, eliminate any agency deference EPA may have enjoyed in interpretation of the CAA and its implementing regulations.

SUMMARY OF ARGUMENT

EPA promulgated a Final Rule for NGS that does not comply with Congress's BART requirements or even its own BART alternative regulations. Since the U.S. Government is the majority owner of NGS, EPA tried to find a loophole from these requirements through the Tribal Authority Rule. But EPA's reliance on TAR is misplaced since the Navajo Nation waived its right to regulate NGS. EPA's Final Rule for

NGS should be found arbitrary, capricious, and an abuse of discretion. EPA's recognition of the need to "minimize negative impacts" on U.S. Government interests ultimately led the agency to issue a Final Rule in August of 2014, which prioritized U.S. government interests in maintaining NGS

into the future above the mandated CAA's regional haze emission reduction deadlines and obligations.

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EPA makes use of discretionary authority based upon physical properties of sub-bituminous coal with high ash content and uses in a situation to diminish RHR rules and for protecting water rates at the expense of clear air in Class 1 areas.

ARGUMENT

I. EPA's Final Rule Violates the CAA's Regional Haze Requirements.

EPA's Final Rule does not comply with the CAA's regional haze requirements for three reasons. First, EPA's Final Rule does not comply with any of the CAA's emission reduction deadlines.[21] Second, EPA failed to adequately demonstrate "by the clear weight of evidence" that its Final Rule will "achieve greater reasonable progress than would be achieved through the installation and operation of BART." Third, EPA's Final Rule is wholly inconsistent with agency

[21] There is no serious dispute that NGS is subject to the CAA's BART requirements. "When Congress enacted the visibility protection provisions of the CAA in 1977, it directed EPA to promulgate regulations that would require applicable implementation plans to include a determination of BART for certain major stationary sources that are "reasonably anticipated to cause or contribute to any impairment of visibility in any [Class 1 area]. 42 U.S.C. §§ 7491(b)(2)(A) & (g). A source is BART-eligible if it is a fossil fuel-fired

steam electric plant of more than 250 MMBtu/hr heat input or other listed industrial source that has the potential to emit 250 tons or more of any visibility-impairing pollutant that came into operation between 1962 and 1977. *Id.* NGS meets these criteria and is a BART-eligible source. A BART-eligible source with a predicted visibility impact of 0.5 deciviews (dv) or more in a Class I area 'contributes' to visibility impairment is subject to BART. *See* 70 Fed. Reg. 39,161 (July 6, 2005). NGS contributes to visibility impairment at 11 surrounding Class I areas in excess of this threshold and *is thus subject to BART*." 78 Fed. Reg. at 8277 (emphasis added).

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BART determinations for privately owned power generation facilities and is unlike any BART determination EPA has issued before.

For the reasons set forward herein, EPA's Final Rule is arbitrary, capricious and an abuse of discretion and should be vacated or reversed and remanded to the agency for further proceedings.

A. EPA's Final Rule violates the Regional Haze emission reduction deadlines.

Under the CAA, Congress requires that "each applicable implementation plan…contain such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal…" of natural visibility conditions. 42 U.S.C. § 7491(b)(2). Specifically, the Act requires BART sources to "install and operate, as expeditiously as practicable (and maintain thereafter) the best available retrofit technology, as determined by

… the State (or the Administrator [if a State does not submit a SIP])." *Id.* Avoiding statutory ambiguity, Congress defined as "expeditiously as practicable" to mean "*in no event later than five years after the date of approval of a plan revision*." *Id.* §§ 7491(b)(2)(A), (g)(4) (emphasis

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added); *accord* 70 Fed. Reg.

39161, 39172 (July 6, 2005) ("EPA BART Guidelines"). In this case, EPA issued its Final Rule with an effective date of October 7, 2014, so NGS was required to

comply with BART emission limits and schedules of compliance no later than

October 7, 2019. 79 Fed. Reg. at 46514.

EPA's regulations provide an alternative to Congress's 5-year BART deadline. Any BART alternative, however, still requires "all necessary emission reductions take place during the period of the first long term strategy for regional haze." 40 C.F.R. § 51.308(e)(2)(iii). The period of the first long term strategy for regional haze ends December 31, 2017. 40 C.F.R. §§ 51.308(b), 51.308(f).

Therefore, under statutory and regulatory requirements, NGS is required to install BART by October 7, 2019, or alternatively, by December 31, 2017. EPA's Final Rule does not even come close to meeting these deadlines.

1. No sub-alternative under the TWG Alternative meets the regional haze deadlines.

The BART alternative adopted by EPA offers a "2009-2044 cap on NOx emissions from NGS over the life of the facility" and allows NGS owners to self- select from one of four possible "operating scenarios" to achieve that goal.[22] 79

Fed. Reg. 46518-19. Under Sub-Alternative A, two out of the four possible

[22] In making a BART determination, EPA may not rely on "operational standards," such as reducing net generating capacity or NOx caps, unless EPA specifically finds that "imposition of an emission standard [is] infeasible…" 40 C.F.R. §51.308(e)(1)(iii). EPA never made any finding that emission standards at NGS were infeasible. *See generally* 79 Fed. Reg. 46514.

operating scenarios require closure of one unit at NGS in 2019. *Id.* at 46519. But unit closure would not occur until December 31, 2019 – three months *beyond* the 5-year BART compliance deadline for NGS of October 7, 2019. *Id.* This not only violates Congress's five-year statutory BART deadline, this bypasses EPA's own BART alternative regulatory deadline of December 31, 2017 by two years. 42 U.S.C. §§ 7491(b)(2)(A), (g)(4); 40 C.F.R. §§ 51.308(b), 51.308(f). And this is the *earliest* possible BART compliance date for *any* of the operating scenarios offered to the owners of NGS. 79 Fed. Reg. at 46519, 46552; *accord* 40 C.F.R. §§ 49.5513(j)(3)(i)(A)(1)–(C)(1).

If the operators self-select scenario Sub-Alternative B, NGS is not obligated to meet *any* statutory or regulatory deadlines. Sub-Alternative B only requires NGS to "*[t]emporarily* cease operation if cumulative emissions before 2029 exceed [the] 2009-2029 NOx Cap." 79 Fed. Reg. at 46519 (emphasis added). Thereafter, NGS owners "may re-start operation after 2030 as long as cumulative emissions have not yet

exceeded the 2009-2044 NOx Cap."[23] 79 Fed. Reg. at

46518 n. 33, 46552; *accord* 40 C.F.R. § 49.5513(j)(3)(i)(D)(2). In other words, on

December 31, 2028, if NGS's NOx emissions do not exceed a certain number,

[23] The 2009-2029 NOx Cap is 416,865 tons of NOx emissions and the 2009-2044
NOx Cap is 494,899 tons of NOx emissions. 79 Fed. Reg. at 46538.

NGS is not required to close any units or install any SCR for the next 15 years, or

2044, when the facility is expected to retire.

In summary, no operating scenario under EPA's Final Rule complies with the regional haze emission reduction deadlines. EPA's Final Rule is not only wholly inconsistent[24] with its own regulatory deadlines, but also entirely defeats the purpose[25] of the CAA's national goal to remedy air pollution and return visibility to natural conditions. Accordingly, EPA's Final Rule should be found unlawful, arbitrary and capricious.

B. EPA failed to prove by the clear weight of evidence that its BART alternative achieves greater reasonable progress than would be achieved through the installation and operation of BART.

When EPA adopts a BART alternative, it must prove "by the clear weight of evidence" that its BART alternative "achieves greater reasonable progress than

would be achieved through the installation and operation of BART…". 40 C.F.R.

[24] EPA cannot claim *Chevron* deference when its interpretation is inconsistent with the regulation's language. *Christensen v. Harris*

Cnty., 529 U.S. 576, 588 (2000) (refusing deference where interpretation would "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation"). Additionally,
this Court may completely reverse an agency's interpretation of its own regulations when it is "plainly erroneous or inconsistent with the regulation." *Thomas*
Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (citation omitted).

25 *Chevron* deference is inapplicable when "the construction advanced by the agency is arguably inconsistent with Congressional intent." *Amalgamated Sugar Co. LLC v. Vilsak*, 563 F.3d 822, 834 (9th Cir. 2009). !

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§ 51.308(e)(2)(iii). In interpreting this language, EPA determined that "'weight of evidence' demonstrations attempt to make use of all available information and data

. . . in arriving at the soundest decision possible." 71 Fed. Reg 60,612, 60,622 (Oct. 13, 2006).

Here, EPA has not proved by the clear weight of evidence that its BART alternative will achieve greater reasonable progress than BART because EPA chose not to conduct visibility modeling for its BART alternative. Initially, EPA used established visibility computer modeling to calculate the visibility benefits of its Proposed Rule, which mostly complied with BART. 78 Fed. Reg. at 8274,

8285-87. Under the BART alternative, EPA instead "focused on a comparison of emissions reductions from BART and the TWG Alternative, rather than using visibility modeling." *Id.*; 79 Fed. Reg. at 46533. This is a huge problem[26] because EPA's BART alternative distributes emission reductions over time very differently than BART and most of the NOx reductions would not come until the end of 2009-2044 period, if at all. 79 Fed. Reg. at 46,519. This would result in

decades of obscured visibility at many of our country's most iconic national parks, including the Grand Canyon National Park. And the whole purpose of the BART program is

[26] This is especially troubling where, as here, EPA concedes visibility would improve much more quickly if NGS was required to install SCR within five years under BART. *Id.*

to achieve early emission reductions from BART sources within 5-years or promulgation of a BART determination before the end of the first regional haze planning period ending December 31, 2017.

By failing to perform visibility modeling to compare its BART alternative to its Proposed Rule, EPA has failed to make use of all available information and data to arrive at the soundest decision possible for NGS. And absent visibility

modeling, there is no way to determine whether EPA's Final Rule "achieves greater reasonable progress than would be achieved through installation and operation of BART" at NGS. As such, EPA has not provided the fundamental "better than BART" demonstration required by 40 C.F.R. § 51.308(E)(2)(i)(E). Thus, EPA's emission reduction analysis does not meet the letter or spirit of the regional haze requirements.

a. EPA's Final Rule Deviates From EPA's Previous BART Determinations.

EPA's Final Rule for NGS is unlike any other BART determination, BART alternative, or regional haze plan ever issued. An examination of other EPA BART determinations across the western

U.S. reveals that EPA's Final Rule for NGS deviates not only from the requirements of the Clean Air Act and regional haze regulations, but also from established EPA practice and precedent.

EPA is "entitled to considerably less deference" when its Final Rule is inconsistent with prior determinations. *INS v. Cardozo-Fonseca*, 480 U.S. 421,

446 n.30 (1987); *Watt v. Alaska*, 451 U.S. 259, 273 (1981); *See Gen. Electric Co. v. Gilbert*, 429 U.S. 125, 143 (1976). The inconsistency of EPA's Final Rule for NGS – where the U.S. government is a majority owner – in combination with EPA's BART determinations for other privately owned coal-fired power generation facilities renders EPA's Final Rule arbitrary, capricious, and an abuse of discretion.

1. EPA's previous BART determinations mandated five-year deadlines.

Each of EPA's previous BART determinations largely complied with

Section 169A of the CAA requiring installation and operation of BART controls in no event later than five years after EPA's final rule.[27] Only two years ago, EPA issued a FIP for the State of Montana requiring compliance "as expeditiously as practicable, but no later than … five years of the effective date of this rule." 77

Fed. Reg. 57864, 57916 (Sept. 18, 2012). Only last year, EPA issued a FIP for the

State of Wyoming setting emission limits "to be installed as expeditiously as

[27] Montana FIP, 77 Fed. Reg. 57864, 57916 (Sept. 18, 2012); Wyoming FIP, 79 Fed. Reg. 5032, 5221 (Jan. 30, 2014); Arizona FIP, 77 Fed. Reg. 72512, 72578 (Dec. 5, 2012); Four Corners Power Plant FIP, 77 Fed. Reg. 51620, 51648 (Aug. 24, 2012).

practicable, but in no event later than five years[28] after the effective date of this final notice." 79 Fed. Reg. 5032, 5055 (Jan. 30, 2014). For six power plants in the State of Arizona, EPA required the owners/operators to "comply with the NOx emissions limitations and other NOx-related requirements … no later than December 5, 2017 (within five years of EPA's final rule)." 77 Fed. Reg. 72512,

72578 (Dec. 5, 2012)

EPA issued a FIP for the Four Corners Power Plant and gave the owners two options. 77 Fed. Reg. 51620, 51648 (Aug. 24, 2012). The first option required NOx emission controls on one unit within *four* years of EPA's final rule, and NOx emission controls on the remaining four units to be installed within five years of EPA's final rule. *Id.* The second option required permanent closure of three units within *two* years of EPA's final rule, and installation of NOx controls on the remaining two units within five years of EPA's final rule. *Id.*

Like NGS, EPA gave the owners of Four Corners Power Plant a choice on which BART strategy to implement. These owners had *less than a year* to notify EPA of their decision. *Id.* at 51648. But NGS

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owners have until December 1,

2019 to notify EPA of which of the four operating scenarios they will select under

Reclamation's BART Alternative. *Compare* 79 Fed. Reg. 46,518. This is *more*

[28] Additionally, EPA imposed the requirement on Wyoming sources that BART be installed "in the first planning period, which ends in 2018." 79 Fed. Reg. at 5055.

than 5 years after the effective date for NGS – October 7, 2014. Thus, even NGS

owners' *decision* deadline violates the emission reduction deadlines established for the regional haze program. NGS has low ash content while FCPP has high ash content which required EPA discretion. EPA discretion not applicable for NGS.

2. EPA's previous BART determinations required SCR.

! EPA's BART determination for Arizona imposed Selective Catalytic

Reduction ("SCR") as BART for the Cholla coal-fired power plant units 2, 3, and

4, which impact visibility at the Grand Canyon National Park. 77 Fed. Reg 72514. In the case of Cholla, visibility modeling showed that operation of SCR at Cholla would result in a 1.06 deciview benefit at the Grand Canyon. 77 Fed. Reg. 42,833,

42,861 (July 20, 2012).

NGS units also impact visibility at the Grand Canyon, and visibility modeling conducted by EPA for the Proposed Rule demonstrated that SCR would result in a 5.4 deciview benefit – *almost 5 times better than at Cholla*. 78 Fed. Reg. at 8287. EPA's Proposed

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Rule for NGS also determined SCR was cost effective at all three units. 78 Fed. Reg. at 8281.

But somehow along the way, EPA arbitrarily rejected installation of SCR as BART. Under EPA's Final Rule, none of the three NGS units require installation of SCR, nor any NOx control technology at all (under Alternative B).

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3. EPA's previous BART determinations required short-term rate based NOx emission limits.

EPA's FIP for Montana set NOx emission limits at the two Colstrip Units and the JE Corette Unit at 0.15 lb/MMBtu and 0.35 lb/MMBtu. 77 Fed. Reg. at 57916. EPA also required a 0.07 lb/MMBtu emission limit at each unit at the Laramie River Station in Wyoming. 79 Fed. Reg. 5047. EPA issued a FIP for the State of Arizona and set the following emission limits: 0.070 lb/MMBtu for the Apache Generating Station; 0.055 lb/MMBtu for the Cholla Power Plant; and 0.065 lb/MMBtu for the Coronado Generating Station. 77 Fed. Reg. at 72578. One option under the Four Corners Power Plant FIP required a "plant-wide heat input-weighted emission limit of 0.011 lb/MMBtu on a rolling 30-calendar day average which represents an 80 percent reduction from current NOx emission rates." 77 Fed. Reg. 51620.

EPA's own Proposed Rule for NGS set a NOx emission limit of 0.055 lb/MMBtu. 78 Fed. Reg. at 8281. However, under Sub-Alternative B of EPA's Final Rule, no such emission limits are

established throughout the remaining life of NGS. Instead, NGS's only requirement is to meet a multiyear mass based "NOx Cap" by December 31, 2029 and December 31, 2044. 79 Fed. Reg. at 46553.

> In conclusion, EPA's Final Rule for NGS, where the U.S. government is a

majority owner, creates a double standard and is entirely inconsistent with other

agency BART determinations for private owners of coal-fired power generation facilities across the West. For this reason, EPA's Final Rule is arbitrary, capricious, and an abuse of discretion.

II. EPA's reliance on the Tribal Authority Rule ("TAR") is arbitrary and capricious.

The Tribal Authority Rule ("TAR") authorizes EPA to treat eligible Indian tribes in the same manner as States for purposes of regulating air quality within the boundaries of the reservation. In adopting its Final Rule, EPA relied almost *exclusively* on TAR as its legal authority to extend emission reductions beyond the statutory and regulatory compliance deadlines. 79 Fed. Reg. at 46517.

EPA incorrectly relied on TAR because the Navajo Nation contractually waived its right to regulate NGS in 1969 and therefore was *never* eligible for treatment as a state. However, even assuming *arguendo* the Navajo Nation was able to regulate NGS and that TAR is somehow applicable, EPA misapplied TAR when it ignored the plain language of the CAA and used TAR to extend regional haze emission reduction deadlines at NGS.

NGS has low ash content while FCPP has high ash content which required EPA discretion. EPA's Final Rule unlawfully assumes the Navajo Nation qualifies for Tribal Authority Rule (TAR) and flexible rulemaking from Arizona Public Service Company v. U.S. E.P.A, 526 F. 3d 1116 a case on air quality versus protection of Class 1 areas For the reasons set forward below, the agency's reliance on TAR to extend regional haze emission reduction deadlines is arbitrary, capricious and an abuse of discretion.

A. EPA incorrectly relied on TAR because the Navajo Nation was never eligible for "treatment as a state."

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EPA's reliance on TAR to adopt its Final Rule is arbitrary because the

Navajo Nation was never eligible for TAR under the plain language of the CAA

and the TAR regulations.

For air quality planning purposes, Congress granted EPA the authority to treat *eligible* Indian tribes in the same manner as states where appropriate, and directed EPA to promulgate rules specifying appropriate provisions of the CAA for application to tribes. *See* 42 U.S.C. § 7601(d). Pursuant to this authority, EPA promulgated the TAR relating to the implementation of CAA programs in Indian Country. *See* 63 Fed. Reg. at 7254 (codified at 40 C.F.R. § 49.11). Under TAR, EPA found it appropriate for tribes to develop Tribal Implementation Plans

("TIP"), similar to state implementation plans developed by states, to administer

CAA requirements on tribal lands. *Id.*

Under the CAA, an Indian tribe's treatment as a state for air quality planning purposes is *only* authorized if, among other things, "*the tribe is reasonably*

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expected to be capable…of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and all applicable regulations." 42 U.S.C. § 7601(d)(2) (emphasis added). Similarly, EPA has

determined that only "a tribe with (treatment as state) eligibility may develop its own …Tribal Implementation Plan."[29] .

Under TAR, when an *eligible* tribe fails to submit a TIP or when EPA disapproves a TIP, the agency has discretionary authority to promulgate "such federal implementation plan provisions as are necessary or appropriate to protect air quality" consistent with CAA sections 301(a) and 301(d)(4). 40 C.F.R. § 49.11(a) (emphasis added).

In this case, the Navajo Nation has never been eligible for treatment as a state under the CAA. NGS is located within the boundaries of the Navajo Nation, and thus is potentially subject to regulation by the Tribe under TAR. However, the Navajo Nation contracted away its right to regulate NGS in 1969, almost 50 years ago, when it leased the facility to the various NGS owners and operators. *Salt River Project Agric. Improvement & Power Dist. v. Lee*, 672 F.3d 1176, 1178 n.1 (9th Cir. 2012). Specifically, in leasing NGS, the Navajo Nation contracted that "it will not directly or indirectly regulate or

attempt to regulate the Lessees in the . . . operation of the Navajo Generation [sic] Station." *Id.*

> The Ninth Circuit has previously held that *identical language* in the lease for

Four Corners Power Plant indicated an "unmistakable waiver" by the Navajo

[29] U.S. EPA, Tribal Air: Basic Information, http://www.epa.gov/air/tribal/backgrnd.html (last visited Mar. 3, 2015).

Nation of its right to regulate the facility. *Arizona Pub. Serv. Co. v. Aspaas*, 77

F.3d 1128, 1130-35 (9th Cir. 1995).[30] Furthermore, this Court recently allowed the

Salt River Project, one of the Intervenors in the present matter, to proceed in its suit for injunctive relief vis-à-vis NGS regulation. *Salt River Project Agric. Improvement & Power Dist.*, 672 F.3d at 1177. The Court remanded the case back to the district court, which ordered that the Navajo Nation "may not regulate . . .

the operation of NGS." *See Salt River Project Agric. Improvement & Power Dist. v. Lee*, No. CV-08-08028-PCT-JAT, 2013 WL 321884, at *26 (D. Ariz. Jan. 28,

2013).

Because the Tribe expressly waived its regulatory authority in the NGS lease back in 1969, the Navajo Nation could *never* have issued or received approval for a TIP for NGS, was *never* eligible for treatment as a state under the CAA, and was *never* in a position to carry out the functions of the regional haze program vis-à-vis NGS. For this reason, and because treatment as a state was *never* an option for the Navajo

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Nation, TAR is wholly inapplicable and it was error for EPA to rely on it as a legal basis adoption of its BART alternative.

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[30] The "non-regulation covenant" for the Four Corners Power Plant states "[t]he Tribe covenants that . . . it will not directly or indirectly regulate or attempt to regulate the Company or the construction, maintenance or operation of the power plant and transmission system by the Company . . ." *Id.*

In sum, and because the Navajo Nation was never eligible for treatment as a state, EPA's reliance on TAR to adopt its BART alternative for NGS is misplaced,

and otherwise arbitrary, capricious and an abuse of discretion.

B. Even assuming arguendo TAR is applicable, EPA misapplied TARwhen it used the rule to extend NOx emissions reduction deadlines.

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Even assuming *arguendo* that the Navajo Nation is somehow able to

regulate NGS and that TAR is therefore applicable, EPA misapplied TAR when it used the rule to ignore mandatory regional haze emission reduction deadlines.

In issuing its Final Rule, EPA relied exclusively upon CAA section 301(d)(4) and TAR to jump through a variety of regulatory hoops in an effort to extend compliance for emissions reductions well beyond the statutory and regulatory emission reduction deadlines thus minimizing the regulatory impact to U.S. government interests. 79 Fed. Reg. at 46517.

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EPA's justification for this extension is TAR and the agency's reliance on the phrase "provisions as are necessary or appropriate." 79 Fed. Reg. at 46518. Specifically, EPA interprets this phrase to mean that it may only be "necessary or appropriate" to promulgate a FIP of limited scope at NGS. *Id.* In so doing, EPA cites *Arizona Public Service v. EPA* as endorsing this interpretation and solidifying the proposition that "nothing in [TAR] requires EPA . . . to submit a plan meeting

the completeness of criteria of [40 C.F.R. § 51] Appendix V."[31] *Id.*; *see also*

Arizona Public Service v. EPA, 562 F.3d 1116, 1125 (10th Cir. 2009).

> EPA's reliance on *Arizona Public Service*, however, is misplaced. In

Arizona Public Service, New Mexico issued a SIP for the Four Corners Power

Plant despite the fact that the State had no jurisdiction over the facility because it is located on the Navajo Nation. *Id.* at 1120. The Tenth Circuit held that EPA's issuance of a FIP was "necessary or appropriate" to protect air quality on tribal lands, and the plan was satisfactory because it essentially codified the New Mexico plan – "previously studied, analyzed, and approved" – and was "but a stricter version" of New Mexico's SIP. *Id.* at 1126.

Unlike *Arizona Public Service*, EPA's NGS Final Rule is much less stringent than EPA's Proposed Rule. Also, unlike *Arizona Public Service* where the Tenth Circuit employed *Chevron* deference to EPA's interpretation of its own regulation, here, *Chevron* deference should not apply because the U.S. Government is the majority owner of NGS and for the other reasons stated *supra*.

In addition, EPA is incorrect in its assertion that it has the discretion to ignore or extend the regional haze emission reduction deadlines under TAR for the

[31] Appendix V sets forth the minimum criteria for determining whether a SIP, and by extension a TIP, submitted for consideration by EPA is an official submission for purposes of review under § 51.103.

following reasons: (1) EPA ignores the mandatory statutory and regulatory deadlines in the CAA and its own regulations; (2) EPA incorrectly relies on 40 C.F.R. § 51.308(e)(2)(iii) as the discretion to extend the timeframe for compliance; (3) the flexibility for alternatives to BART only pertains to plan submission deadlines, not to compliance deadlines; and (4) EPA's Final Rule fails to "achieve the appropriate purpose" of the CAA.

First, the CAA requires that stationary sources "procure, install, and operate BART controls as expeditiously as practicable, *but in no event later than five years* after the date of approval of a plan revision." 42 U.S.C. § 7491(b)(2)(A), (g)(4) (emphasis added); *accord* 40 C.F.R. § 51.308(e)(1)(iv). In no way whatsoever does this statutory language give EPA discretionary authority to completely ignore this five-year deadline for implementation of BART and extend its BART compliance over the "lifetime" of the plant.

Second, EPA believes it has discretion to extend emission reduction deadlines under 40 C.F.R. § 51.308(e)(2). This regulation sets out the requirements for BART alternative programs. *Id.* Nowhere in

the regulation's language, however, is EPA provided authorization to extend the BART alternative compliance deadline. In fact, all emissions reductions must "take place during the

period of the first long-term strategy for regional haze," which as discussed above, ends on December 31, 2017. *Id.*

Third, any flexibility EPA may enjoy under TAR applies to *submission* deadlines, not *compliance* deadlines. *See* 40 C.F.R. § 49.4(a), (d), (q). EPA makes this limitation clear in its BART Guidelines, which state, "Tribes are not subject to the deadlines for *submitting* visibility implementation plans and may use a modular approach to CAA implementation." 70 Fed. Reg. 39158 (emphasis added).[32]

Finally, EPA's Final Rule, promulgated under TAR, fails to "achieve the

appropriate" purpose of the CAA's regional haze program. 42 U.S.C. § 7601(d)(4). When EPA promulgates regulations on behalf of a tribe, it must do so as to "achieve the appropriate purpose of the relevant CAA requirement." *Id.* Congress declared a national goal to remedy any existing regional haze in class I areas, such as the 11 areas surrounding NGS and returning visibility to natural

conditions by 2064. *See* 42 U.S.C. § 7491(b); 64 Fed. Reg. at 35732. EPA's Final

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32 The TAR allows EPA to treat eligible Indian tribes in the same manner as states

"with respect to all provisions of the [CAA] and implementing regulations, except for those provisions [listed] in § 49.4 and the [EPA] regulations that implement those provisions." 40 CFR § 49.3. EPA recognized that tribes may, but are not required to administer air programs under the CAA, were in the early stages of developing air planning programs known as Tribal Implementation Plans (TIPs)

and would need additional time to develop air quality programs. 63 Fed. Reg. at

7254–65. Thus, EPA determined that it was not appropriate to treat tribes in the same manner as states for purposes of those provisions of the CAA imposing air program *submittal* deadlines. *See* 59 Fed. Reg. 43955, 43964–65 (Aug. 25 1994);

63 Fed. Reg. at 7264–65; 78 Fed. Reg. at 8276.

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Rule arbitrarily delays cleanup of visibility impairment from NGS until long after October 7, 2019--meaning Grand Canyon National Park won't achieve natural visibility conditions, if at all, until the year 2127 or *63 years after Congress' goal of the year 2064*. *See generally,* EPA's Proposed and Final Rules for Arizona, 77

Fed. Reg. at 42833; 77 Fed. Reg. 72511; 77 Fed. Reg. at 75714; 78 Fed. Reg.

46141 (July 30, 2013).

EPA's Final Rule unlawfully assumes the Navajo Nation qualifies for Tribal Authority Rule (TAR) and flexible rulemaking from Arizona Public Service Company v. U.S. E.P.A, 526 F. 3d 1116 a case on air quality versus protection of Class 1 area.

In sum, EPA misapplied TAR when it used the rule to attempt to ignore or extend regional haze emission reduction deadlines. EPA's reliance on TAR is arbitrary and capricious and the Court should vacate or reverse and remand the agency's Final Rule.

CONCLUSIO N

In adopting Reclamation's secretly devised regional haze plan for

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NGS, EPA capriciously allowed politics to trump science and the law. Instead of reducing visibility impacts from NGS, the federal government exempted itself from statutory and regulatory regional haze requirements, thus delaying visibility improvement at 11 national parks, including the one national park Congress singled out for immediate action — the Grand Canyon National Park. For the

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foregoing reasons, EPA's Final Rule for NGS should vacated, or reversed and remanded.

Respectfully submitted this 16th day of March 2015.

/s/ Vincent H. Yazzie

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CERTIFICATE OF COMPLIANCE

The undersigned certifies under Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1, that the attached opening brief is proportionally spaced, and has a type face of 14 points or more and, pursuant to the word-count feature of the word processing program used to prepare this brief,

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contains 13,714 words, inclusive of the matters that may be omitted under Rule

32(a)(7)(B)(iii).

Dated: March 16, 2015

/s/ Vincent H. Yazzie

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CERTIFICATE OF SERVICE

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STATUTORY ADDENDUM

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Statutes

Regulations

42 U.S.C. § 7491 – Visibility protection for Federal class I areas

(a) Impairment of visibility; list of areas; study and report

(2) Congress hereby declares as a national goal the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas which impairment results from mandmade air pollution.

(3) Not later than eighteen months after August 7, 1977, the Administrator shall complete a study and report to Congress on available methods for implementing the national goal set forth in paragraph (1). Such report shall include recommendations for —

(A) methods for identifying, characterizing, determining, quantifying, and measuring visibility impairment in Federal areas referred to in paragraph (1), and

(B) modeling techniques (or other methods) for determining the extent to which manmade air pollution may reasonably be anticipated to cause or contribute to such impairment, and

(C) methods for preventing and remedying such manmade air pollution and resulting visibility impairment.

(b) Regulations

Regulations under subsection (a)(4) of this section shall –

(1) provide guidelines to the States, taking into account the recommendations under subsection (a)(3) of this section on appropriate techniques and methods for implementing this section (as provided in subparagraphs (A) through (C) of such subsection (a)(3)), and

(2) require each applicable implantation plan for a State in which any area listed by the Administrator under subsection (a)(2) of this section is located (or for a State the emissions from which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area) to contain such emission limits, schedules of compliance and

other measures as may be necessary to make reasonable progress toward meeting the national goal specified in subsection (a) of this section, including –

(A) except as otherwise provided pursuant to subsection (c) of this section, a requirement that each major stationary source which is in existence on August 7, 1977, but which has not been in operation for more than fifteen years as of such date, and which, as determined by the State (or the Administrator in the case of a plan promulgated under section 7410 (c) of this title) emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area, shall procure, install, and operate, as expeditiously as practicable (and maintain thereafter) the best available retrofit technology, as determined by the State (or the Administrator in the case of a plan promulgated under section 7410 (c) of this title) for controlling emissions from such source for the purpose of eliminating or reducing any such impairment, and

In the case of a fossil-fuel fired generating powerplant having a total generating capacity in excess of 750 megawatts, the emission limitations required under this paragraph shall be determined pursuant to guidelines, promulgated by the Administrator under paragraph (1).

(c) Exemptions

(1) The Administrator may, by rule, after notice and opportunity for public hearing, exempt any major stationary source from the requirement of subsection (b)(2)(A) of this section, upon his determination that such source does not or will not, by itself or

in combination with other sources, emit any air pollutant which may reasonably be anticipated to cause or contribute to a significant impairment of visibility in any mandatory class I Federal area.

(2) Paragraph (1) of this subsection shall not be applicable to any fossil-fuel fired power plant with total design capacity of 750 megawatts or more, unless the owner or operator of any such plant demonstrates to the satisfaction of the Administrator that such power plant is located at such distance from all areas listed by the Administrator under subsection

(a)(2) of this section that such power plant does not or will not, by itself or in combination with other sources, emit any air pollutant which may reasonably be anticipated to cause or contribute to significant impairment of visibility in any such area.

(3) An exemption under this subsection shall be effective only upon concurrence by the appropriate Federal land manager or managers with the Administrator's determination under this subsection.

(g) Definitions

For the purpose of this section –

(2) in determining best available retrofit technology the State (or the Administrator in determining emission limitations which reflect such technology) shall take into consideration the costs of compliance, the energy and nonair quality environmental impacts of compliance, any existing pollution control technology in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology;

(4) the term "as expeditiously as practicable" means as

expeditiously as practicable but in no event later than five years after the date of approval of a plan revision under this section (or the date of promulgation of such a plan revision in the case of action by the Administrator under section 7410 (c) of this title for purposes of this section);

42 U.S.C. § 7601 – Administration

(d) Tribal Authority

(1) Subject to the provisions of paragraph (2), the Administrator –

(A) is authorized to treat Indian tribes as States under this chapter, except for purposes of the requirement that makes available for application by each State no less than one-half of 1 percent of annual appropriations under section 7405 of this title; and

(B) may provide any such Indian tribe grant and contract assistance to carry out functions provided by this chapter.

(2) The Administrator shall promulgate regulations within 18 months after November 15, 1990, specifying those provisions of this chapter for which it is appropriate to treat Indian tribes as States. Such treatment shall be authorized only if—

(A) the Indian tribe has a governing body carrying out substantial governmental duties and powers;

(B) the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and

(C) the Indian tribe is reasonably expected to be capable, in the judgment of the Administrator, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of

this chapter and all applicable regulations.

(3) The Administrator may promulgate regulations which establish the elements of tribal implementation plans and procedures for approval or disapproval of tribal implementation plans and portions thereof.

(4) In any case in which the Administrator determines that the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible, the Administrator may provide, by regulation, other means by which the Administrator will directly administer such provisions so as to achieve the appropriate purpose.

42 U.S.C. § 7410 – State implementation plans for national primary and second ambient air quality standards

(d) Preparation and publication by Administrator of proposed regulations setting forth implementation plan; transportation regulations study and report; parking surcharge; suspension authority; plan implementation

(1) The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator—

(A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section, or

(B) disapproves a State implementation plan submission in whole or in part,

unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

40 CFR 51.308 – Regional haze program requirements

(e) ***Best Available Retrofit Technology (BART) requirements for regional haze visibility impairment.***

The State must submit an implementation plan containing emission limitations representing BART and schedules for compliance with BART for each BART- eligible source that may reasonably be anticipated to cause or contribute to any impairment of visibility in any mandatory Class I Federal area, unless the State demonstrates that an emissions trading program or other alternative will achieve greater reasonable progress toward natural visibility conditions.

(2) To address the requirements for BART, the State must submit an implementation plan containing the following plan elements and include documentation for all required analyses:

(i) A list of all BART-eligible sources within the State.

(ii) A determination of BART for each BART-eligible source in the State that emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any mandatory Class I Federal area. All such sources are subject to BART.

(A) The determination of BART must be based on an analysis of the best system of continuous emission control technology available and associated emission reductions achievable for each BART-eligible source that is subject to BART within the State. In this analysis, the State must take into consideration the technology available, the costs of compliance, the energy and nonair quality environmental impacts of compliance, any pollution control equipment in use at the source, the remaining useful life of the source, and the degree of improvement
in visibility which may reasonably be anticipated to result from the use of such technology.

(B) The determination of BART for fossil-fuel fired

power plants having a total generating capacity greater than 750 megawatts must be made pursuant to the guidelines in appendix Y of this part (Guidelines for BART Determinations Under the Regional Haze Rule).

(iii) If the State determines in establishing BART that technological or economic limitations on the applicability of measurement methodology to a particular source would make the imposition of an emission standard infeasible, it may instead prescribe a design, equipment, work practice, or other operational
standard, or combination thereof, to require the application of BART. Such standard, to the degree possible, is to set forth the emission reduction to be achieved by implementation of such design, equipment, work practice or operation, and must provide for compliance by means which achieve equivalent results.

(2) A State may opt to implement or require participation in an emissions trading program or other alternative measure rather than to require sources subject to BART to install, operate, and maintain BART. Such an emissions trading program or other alternative measure must achieve greater reasonable progress than would be achieved through the installation and operation of BART. For all such emission trading

programs or other alternative measures, the State must submit an implementation plan containing the following plan elements and include documentation for all required analyses:

(i) A demonstration that the emissions trading program or other alternative measure will achieve greater reasonable progress than would have resulted from the installation and operation of BART at all sources subject to BART in the State and covered by the alternative program.

(E) A determination under paragraph (e)(3) of this section or otherwise based on the clear weight of evidence that the trading program or other alternative measure achieves greater reasonable progress than would be achieved through the installation and operation of BART at the covered sources.

(iii) A requirement that all necessary emission reductions take place during the period of the first long-term strategy for regional haze. To meet this requirement, the State must provide a detailed description of the emissions trading program or other alternative measure, including schedules for implementation, the emission reductions required by the program, all necessary administrative and technical procedures for implementing the program, rules for accounting and monitoring emissions, and procedures for enforcement.

(3) A State which opts under 40 CFR 51.308(e)(2) to implement an emissions trading program or other alternative measure rather than to require sources subject

to BART to install, operate, and maintain BART may satisfy the final step of the demonstration required by that section as follows: If the distribution of emissions is not substantially different than under BART, and the alternative measure results in greater emission reductions, then the alternative measure may be deemed to achieve greater reasonable progress. If the distribution of emissions is

significantly different, the State must conduct dispersion modeling to determine differences in visibility between BART and the trading program for each impacted Class I area, for the worst and best 20 percent of days. The modeling would demonstrate "greater reasonable progress" if both of the following two criteria are met:

(i) Visibility does not decline in any Class I area, and

(ii) There is an overall improvement in visibility, determined by comparing the average differences between BART and the alternative over all affected Class I areas.

(f) ***Requirements for comprehensive periodic revisions of implementation plans for regional haze.***
Each State identified in § 51.300(b)(3) must revise and submit its regional haze implementation plan revision to EPA by July 31, 2018 and every ten years thereafter.

40 CFR § 49.11 – Actions under section 301(d)(4) authority

Notwithstanding any determination made on the basis of authorities granted the Administrator under any other provision of this section, the Administrator, pursuant to the discretionary authority explicitly granted to the Administrator under sections 301(a) and 301(d)(4):

(a) Shall promulgate without unreasonable delay such Federal implementation plan provisions as are necessary or appropriate to protect air quality, consistent with the provisions of sections 304(a) and 301(d)(4)[33], if a tribe does not submit a tribal implementation plan meeting the completeness criteria of 40 CFR part 51, appendix V, or does not receive EPA approval of a

submitted tribal implementation plan.

[33] Same as 42 U.S.C. § 7601(d)(4), found on ADD-5.

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