No. 14-73055

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE HOPI TRIBE, *A Federally Recognized Tribe*,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT DISTRICT, et al.,

Intervenors.

ON PETITION FOR REVIEW

BRIEF FOR FEDERAL RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

FEDERAL RULES OF APPELLATE PROCEDURE

CODE OF FEDERAL REGULATIONS

FEDERAL REGISTER

EXECUTIVE ORDERS

GLOSSARY

ADD	Petitioner's Statutory and Regulatory Addendum
ANPRM	Advance Notice of Proposed Rulemaking
APA	Administrative Procedure Act
BART	best available retrofit technology
CAA	Clean Air Act
CAP	Central Arizona Project
EPA	United States Environmental Protection Agency
ER	Petitioner's Excerpts of Record
FIP	Federal Implementation Plan
LADWP	Los Angeles Department of Water and Power
NGS	Navajo Generating Station
NOx	oxides of nitrogen
NPRM	Notice of Proposed Rulemaking
SIP	State Implementation Plan
SO2	sulfur dioxide
Suppl. ER	Respondents' Supplemental Excerpts of Record
TIP	Tribal Implementation Plan
TWG	Technical Work Group

STATEMENT OF JURISDICTION

The Petitioner, the Hopi Tribe (the "Tribe"), challenges a final action of the United States Environmental Protection Agency ("EPA")[1] promulgating a source-specific Federal Implementation Plan ("FIP") under the Clean Air Act ("CAA") for the Navajo Generating Station ("NGS" or "the plant") near Page, Arizona. This Court has jurisdiction over the petition under 42 U.S.C. § 7607(b)(1), which provides that the federal courts of appeals for the appropriate circuit shall have jurisdiction over any final action of the EPA Administrator under the CAA that is locally or regionally applicable and that the EPA Administrator has not determined to be of nationwide scope or effect. The petition was timely filed on October 2, 2014, within 60 days of August 8, 2014, the date the notice of EPA's final rule was published in the Federal Register. *See id*.

INTRODUCTION

NGS is the largest coal-fired power plant in the western United States. 78 Fed. Reg. 8,274, 8,275 (Feb. 5, 2013) (ER025).[2] It is located on the Navajo

[1] The caption on the cover of the Tribe's opening brief is incorrect because it describes the respondent as "The United States of America." However, in accordance with Fed. R. App. P. 15(a), the Tribe's petition named EPA as the respondent, and this Court correctly docketed the matter as *The Hopi Tribe v. U.S. EPA*.

[2] Documents in "ER" can be found in the Tribe's Excerpts of Record. Documents in "Suppl. ER" can be found in EPA's Supplemental Excerpts of Record.

Cont.

Nation's reservation and is the sole consumer of coal from the Kayenta Mine, located on Navajo and Hopi lands. *See id*.; *see also* ER208. Taxes and royalties from the Kayenta Mine and NGS are significant portions of those tribes' revenues. 78 Fed. Reg. at 8,275 (ER025). NGS supplies power to public utilities in Arizona, California, and Nevada. *Id*. As authorized by statute, nearly a quarter of the power NGS generates is allocated to the federal government and supplies most of the electricity used to run the pumps of the Central Arizona Project ("CAP"). *Id*. The CAP supplies over 20 percent of Arizona's water demands. *Id*. at 8,283 (ER033). The CAP is important to several Arizona tribes because approximately 40 percent of the water the CAP delivers each year is dedicated to Native American use under congressionally approved water-rights settlement agreements. *Id*.; *see also* ER209-10. As also authorized by statute, federal electricity generated by NGS in excess of what is needed to run the CAP is sold at market rates and the money is used to further support tribal water-rights settlement obligations and operate and maintain the CAP. 79 Fed. Reg. 46,514, 46,515 (Aug. 8, 2014) (ER064); ER210. As EPA observed, the "importance to tribes of continued operation of NGS and affordable water costs cannot be overemphasized." 78 Fed. Reg. at 8,278 (ER028).

Documents in "ADD" can be found in the Tribe's Statutory and Regulatory Addendum.

However, NGS's emissions of oxides of nitrogen ("NO_x") contribute to the visibility problems at some of the western United States' premier national parks and wilderness areas. *Id*. at 8,275, 8,279 (ER025, ER029). The Clean Air Act contains special provisions for addressing sources, like NGS, that contribute to regional haze at such parks and wilderness areas. Pursuant to these requirements, EPA proposed a rule that would have required NGS to install the Best Available Retrofit Technology ("BART") to lessen its impact on visibility. *See id*. at 8,274 (ER024). EPA also indicated it would consider, per its CAA regulations, alternative proposals for reducing NGS's impact on visibility, known as "better than BART" alternatives. *Id*. at 8,291 (ER041).

After EPA released its proposed rule, the owners of NGS and some of the other major stakeholders in the plant, including the Department of the Interior (collectively, the "Technical Work Group" or "TWG"), developed and submitted to EPA a "better than BART" alternative. *See* 78 Fed. Reg. 62,509 (Oct. 22, 2013) (ER047). EPA independently evaluated the submitted alternative to determine whether it met all applicable statutory and regulatory requirements and, with some minor modifications, issued a supplemental notice of proposed rulemaking consistent with the Technical Work Group's alternative. *See id*. After extensive consultation with tribes on both the original and supplemental proposals, a nearly year-long period for public comment, and five public hearings, EPA finalized a

Federal Implementation Plan adopting regulations that were generally consistent with the Technical Work Group's alternative, which, among other things, caps the plant's cumulative NO_x emissions and requires NGS to stop conventional coal-fired electricity generation by 2044. *See* 78 Fed. Reg. at 62,509 (ER047); 79 Fed. Reg. at 46,514-50 (ER063-99). *See also* Approval of Air Quality Implementation Plans; Navajo Nation; Regional Haze Requirements for Navajo Generating Station Final Rule Responses to Comments on Proposal and Supplemental Proposal ("Response to Comments") at 3-4 (Suppl. ER 60-61).

The Hopi Tribe petitioned for review of EPA's action because it is concerned that the required emission reductions will result in decreased purchases of coal from Kayenta Mine and water from the Tribe, which will in turn adversely affect the Tribe.

STATEMENT OF THE ISSUES

1. Whether EPA acted arbitrarily, capriciously, or contrary to law by adopting the final rule after consulting with the Hopi Tribe and fulfilling its notice-and-comment rulemaking obligations?
2. Whether EPA must apply the five statutory factors for determining the BART emission controls for haze reduction even when EPA adopts an implementation plan that does not set a BART limit but instead selects a "better than BART" alternative under 40 C.F.R. § 51.308(e)(2)?

PERTINENT STATUTES AND REGULATIONS

To the extent not provided in Petitioner's brief, pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. CAA Implementation Plans

The CAA controls air pollution through a system of shared federal, tribal, and state responsibility. *See Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). One such mechanism is a requirement that those governments create plans to implement, maintain, and enforce primary national ambient air-quality standards. 42 U.S.C. § 7410. These implementation plans are known as State Implementation Plans ("SIPs"), Tribal Implementation Plans ("TIPs"), or Federal Implementation Plans ("FIPs"), depending on whether they are prepared by a state, a tribe, or EPA, respectively.

States submit SIPs to EPA for approval, and EPA is required to review each submission to determine whether it "meets all of the applicable requirements of [the Act]." 42 U.S.C. § 7410(k)(3). If a State fails to submit a required SIP, if EPA finds that a SIP is incomplete, or if EPA disapproves a SIP in whole or in part, EPA must prepare a Federal Implementation Plan to take the place of, or fill the gaps in, the SIP. *Id*. §§ 7410(c)(1), 7602(y).

Tribes may, but are not required to, submit Tribal Implementation Plans to EPA for approval. If a tribe does not submit such a plan and no EPA-approved plan is in place, EPA has the authority to promulgate "such Federal implementation plan provisions as are necessary or appropriate to protect air quality." 40 C.F.R. §§ 49.3, 49.4, 49.11(a). EPA's authority to promulgate FIPs in tribal areas comes from the general authority provided in 42 U.S.C. § 7601(a), which authorizes the agency to prescribe such regulations as are necessary to carry out the CAA, and 42 U.S.C. § 7601(d)(4), which authorizes EPA to directly administer, by means to be determined at EPA's discretion, CAA provisions for which EPA has determined it is inappropriate or infeasible to treat tribes in the same manner as states.

2. Visibility Protection for National Parks and Wilderness Areas.

In 1977, Congress established a visibility protection program to prevent and remedy impaired visibility in certain national parks and wilderness areas across the country, defined in the CAA as "Class I" areas. 42 U.S.C. § 7491. Congress directed EPA to adopt regulations requiring SIPs to include "such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national [visibility] goal" of no anthropogenic impairment. *Id.* § 7491(b)(2). These measures include, but are not limited to, a requirement that certain existing sources built between 1962 and 1977

procure, install, and operate Best Available Retrofit Technology, or BART, to control visibility-impairing emissions. *Id.* § 7491(b)(2)(A).

BART is defined as "an emission limitation based on the degree of reduction achievable through the application of the best system of continuous emission reduction for each pollutant which is emitted by an existing stationary facility." 40 C.F.R. § 51.301. EPA determines BART on a case-by-case basis, using five factors. 42 U.S.C. § 7491(g)(2).[3] Sources must install and operate BART "as expeditiously as practicable," *id.* § 7491(b)(2)(A), which the CAA defines as no later than five years after EPA approves a SIP or issues a FIP, *id.* § 7491(g)(4).

In the 1990 Amendments to the CAA, Congress added another provision, 42 U.S.C. § 7492, with the goal of reducing regional haze—that is, visibility impairment caused by emissions from multiple sources and activities located across a broad geographic area. *See* 40 C.F.R. § 51.301. Regional haze is produced by emissions of fine particles (*e.g.*, sulfates, nitrates, and other particulate matter) and their precursors (*e.g.*, sulfur dioxide (SO_2), NO_x). Pursuant to Congress's direction, EPA in 1999 promulgated the Regional Haze Rule. 64 Fed. Reg. 35,714 (July 1, 1999) (codified at 40 C.F.R. §§ 51.308-.309).

[3] The five statutory factors are (1) the costs of compliance; (2) the energy and non-air 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 visibility improvement reasonably anticipated to result from the use of controls. 42 U.S.C. § 7491(g)(2).

The Regional Haze Rule requires states "to develop programs to assure reasonable progress toward meeting the national goal of preventing any future, and remedying any existing, impairment of visibility in mandatory Class I Federal areas which impairment results from manmade air pollution" 40 C.F.R. § 51.300(a). Under the rule, regional haze SIPs must include reasonable-progress goals, which are set by each state to provide for reasonable progress toward reaching natural visibility conditions within each Class I area, and a long-term strategy for meeting those goals. 40 C.F.R. § 51.308(d)(1), (3). Regional haze SIPs must also include emission limitations representing BART and schedules for compliance with BART. *Id.* § 51.308(e). However, instead of BART, a state "may opt to implement or require participation in an emissions trading program or other alternative measure." *Id.* § 51.308(e)(2). Such an alternative to BART must, among other things, result in "greater reasonable progress than would be achieved through the installation and operation of BART." *Id.* § 51.308(e)(2).

To determine whether an alternative achieves greater reasonable progress, a regional haze plan must compare the progress toward improving visibility under BART and under the alternative. *Id.* § 51.308(e)(2)(i)(C)-(D). There are three paths by which a plan may demonstrate greater reasonable progress. The first focuses on emissions: If the "distribution of emissions is not substantially different" under BART and the alternative, and the alternative "results in greater

emission reductions," then the alternative "may be deemed to achieve greater reasonable progress." *Id.* § 51.308(e)(3). The second focuses on visibility and provides that if air-quality dispersion modeling demonstrates that visibility does not decline in any Class I area and visibility improves overall, then the alternative achieves greater reasonable progress. *Id.* The third allows a showing of greater reasonable progress to be "otherwise based on the clear weight of evidence." *Id.* § 51.308(e)(2)(i)(E).

BART emissions limits for large coal-fired power plants such as NGS must be determined under guidelines issued by EPA in 2005 ("BART Guidelines"). 40 C.F.R. § 51.308(e)(1)(ii)(B); *see also* 70 Fed. Reg. 39,104 (July 6, 2005). These guidelines provide a detailed approach to considering the relevant factors that must be taken into account in a BART determination. The BART Guidelines also make clear that states or EPA may take into account the economic effects of controls on a source in determining BART and need not require the installation of controls that would affect the viability of continued operations at the source. 70 Fed. Reg. at 39,171. A number of sources have asked, however, that states or EPA take into account enforceable commitments to shut down units at a facility (or to cease burning coal), either to affect how the remaining useful life of the source is

taken into account in determining BART or as an element of an alternative to BART.[4]

B. Factual Background

NGS is owned by the Salt River Project, the Los Angeles Department of Water and Power ("LADWP"), Arizona Public Service, Nevada Power Company (now known as NV Energy), and Tucson Electric Power. 78 Fed. Reg. at 8,275 (ER025). Each NGS owner uses NGS power consistent with its individual electric-power needs, within the parameters of agreements among the owners. Although EPA stated that the U.S. Department of the Interior is also an owner of the plant (*id*.), in actuality, it is not an owner of the physical plant but rather is entitled to 24.3% of the power generated by NGS. *See* ER304.

Congress authorized federal participation in NGS in 1968 as an alternative to an additional dam in the Grand Canyon and to provide electrical power for the Central Arizona Project's pumps, which move water from the Colorado River to municipal and agricultural users and to several tribes as part of congressionally

[4] *See* 77 Fed. Reg. 51,620, 51,621 (Aug. 24, 2012) (BART alternative requiring shutdown of three of five units at Four Corners Power Plant); 79 Fed. Reg. 60,985 (Oct. 9, 2014) (BART determination requiring shutdown of two units of San Juan Generating Station by 2017); 76 Fed. Reg. 12,651 (Mar. 8, 2011) (BART determination requiring units at PGE Boardman to cease burning coal by 2020); 77 Fed. Reg. 72,742 (Dec. 6, 2012) (BART determination requiring two units at TransAlta Centralia Generation LLC to cease burning coal by 2020 and 2025, respectively); 80 Fed. Reg. 19,220 (Apr. 10, 2015) (BART alternative requiring conversion from coal to natural gas of two units at Apache Generating Station).

approved water-rights settlements. *See* 78 Fed. Reg. at 8,275 (ER025). Several Arizona tribes—including the Gila River Indian Community, the Ak-Chin Indian Community, the Tohono O'odham Nation, the San Carlos Apache Tribe, the White Mountain Apache Indian Tribe, the Fort McDowell Yavapai Nation, the Salt River Pima-Maricopa Indian Community, the Navajo Nation, the Yavapai-Apache Nation, the Hopi Tribe, the Pascua Yaqui Tribe, the Yavapai-Prescott Tribe, and the Tonto Apache Nation—have CAP water allocations or contracts. 79 Fed. Reg. at 46,515 (ER064). In exchange for allocations of CAP water at reduced cost and access to funds for developing water infrastructure, the tribes with water-rights settlement agreements have released their claims to other water in Arizona through congressionally approved settlement agreements. 78 Fed. Reg. at 62,510 (ER048).

By statute, after the federal share of NGS power is used to operate the CAP, excess federal power is sold at market rates and profits are deposited into a fund to support the tribal water-rights settlement agreements. Interior plays an important role in implementing these settlement agreements and managing the funds set aside for water infrastructure development for tribes. *Id*. at 62,510-11 (ER048-49).

The coal used by NGS is supplied by the Kayenta Mine, located on reservation lands of both the Navajo Nation and the Hopi Tribe. Taxes and royalties from NGS and the Kayenta Mine contribute significantly to the annual

revenues for both the Navajo Nation's and Hopi Tribe's governments. *Id*. at 62,511 (ER049).

NGS is located on the Navajo Nation's reservation, and the current lease with the Nation expires at the end of 2019. 78 Fed. Reg. at 8,278 (ER028). Two of the plant's owners, LADWP and NV Energy, must sell or retire their shares by the end of the current lease under renewable-energy laws in their respective states. *See id*.; 78 Fed. Reg. at 62,514 (ER052). An amendment to the lease has been negotiated and, if approved after environmental review, would extend its term to December 22, 2044, at which time the FIP being challenged here requires that conventional coal-fired generation of electricity must cease. *See* 79 Fed. Reg. at 46,532 (ER081); Response to Comments at 87-88 (Suppl. ER 65-66). The Navajo Nation may choose to purchase part of the facility in 2019, and has the option to continue coal-fired power generation after 2044, provided it meets whatever new-source pre-construction and other permitting requirements exist at that time. Response to Comments at 204 (Suppl. ER 68); *see also* 79 Fed. Reg. at 46,532 (ER081).

Emissions from NGS affect visibility at eleven Class I parks and wilderness areas, including the Grand Canyon. 78 Fed. Reg. at 8,287 Table 9 (ER037).

C. Procedural Background

In August 2009, EPA issued an Advance Notice of Proposed Rulemaking ("ANPRM") to gather information for creating FIPs for NGS and another coal-fired plant on the Navajo Reservation that is not at issue here. 74 Fed. Reg. 44,313, 44,314-15 (Aug. 28, 2009) (ER002-3). Thereafter, EPA consulted with tribes, including the Hopi Tribe, and other NGS stakeholders regarding NO_x control at NGS. The Hopi, along with others, expressed concern that a technology that EPA would eventually propose as the BART standard would, along with other factors, result in NGS's closure rather than the installation of control technology. 79 Fed. Reg. at 46,546 (ER095); ER185-87; ER193; *see also* ER208. In February 2013, EPA issued a Notice of Proposed Rulemaking ("NPRM"), proposing a BART determination that would have required NGS to reduce its NO_x emissions by 80 percent within five years after the effective date of a final rulemaking. 78 Fed. Reg. at 8,288 (ER038).

EPA also proposed its own alternative to BART that would have extended the deadline for achieving NO_x emission reductions to 2023. *Id*. at 8,288-89 (ER038-39). In addition, EPA described two potential alternatives for extending the compliance schedule beyond 2023 and solicited comments on these potential alternatives. *Id.* at 8,290 (ER040). These alternatives would not result in greater NO_x emissions reductions than BART, but EPA stated that they would be

potentially approvable if "the owners of NGS achieve additional emission reductions to bridge the deficit in NO_x emission reductions." *Id.* EPA considered the alternative it proposed, and those on which it requested comment, to establish a framework for comparing BART to potential "better than BART" alternatives for NGS.

In response to EPA's Notice of Proposed Rulemaking, a group of NGS stakeholders known as the Technical Work Group formed to evaluate alternatives to BART. The Technical Work Group was composed of the Salt River Project (on behalf of itself and the other co-owners of the facilities), the Department of the Interior, the Navajo Nation, the Central Arizona Water Conservation District (which operates the CAP), the Gila River Indian Community (the tribe receiving the largest allocation of CAP water), and two environmental organizations (the Environmental Defense Fund and Western Resource Advocates). *See* 78 Fed. Reg. at 62,510, 62,512 (ER047-48, ER050); *see also* ER329 (describing Central Arizona Water Conservation District), ER333-34 (defining NGS Participants as the owners of the NGS). The Technical Work Group did not include EPA and EPA participated in none of the TWG's substantive discussions or negotiations. 79 Fed. Reg. at 46,543 (ER92); 78 Fed. Reg. at 62,512 (ER050).

In July 2013, the participants in the Technical Work Group entered into an agreement related to the NGS (the "TWG Agreement"). ER301-68. The TWG

Agreement suggested a cap on NO_x emissions from 2009 through 2044, along with different operating scenarios to comply with that cap based on the potential final ownership outcomes related to LADWP, NV Energy, and the Navajo Nation at the end of the first lease term in 2019. *See* 78 Fed. Reg. at 62,513-14 (ER051-52). The different operating scenarios would result in substantial ongoing reductions in NO_x emissions beginning in 2019 and 2030. *Id*. at 62,514, 62,516-17 Table 3 (ER052, ER054-55). Specifically, most operating scenarios require NGS to close one generating unit in 2019 or reduce production at all three units by an equivalent amount. The Technical Work Group's proposal to close one unit "was possible because of the planned divestment of LADWP and NV Energy from NGS by 2019." 79 Fed. Reg. at 46,544 (ER093); *see also* Response to Comments at 227 (Suppl. ER 84). The TWG proposal did, however, include options for all three units to remain in service with installation of emissions-control technologies if different future ownership and divestiture scenarios allowed for defraying these costs. ER340-41. The Salt River Project, operator and part-owner of NGS, expressed concern that NGS could close entirely after 2019 if the BART emissions-control technologies were required because there were too many uncertainties with post-2019 operations to justify the capital expenses. Jan. 6, 2014 letter from Kelly J. Barr, Salt River Project, to The Honorable Jared Blumenfeld, Regional Administrator, at 2 (Suppl. ER 25); *see also* Jan. 6, 2014,

letter from Mark Mansfield, Vice President, Generation, Tucson Electric Power Company, to Anita Lee, Region 9, at 4 (Suppl. ER 17).

The TWG Agreement included several other provisions, many of which were aimed at helping tribes that could be negatively impacted by the changes at NGS. For example, Interior committed to furthering alternative-energy projects to benefit the Hopi Tribe, the Navajo Nation, and the other tribes with rights to CAP water. ER309-12; *see also* ER328 (defining "Affected Tribe"). The Salt River Project also agreed to contribute $5 million to a fund to benefit tribes near NGS or the Kayenta Mine, including the Hopi Tribe. ER312-13. The group submitted the TWG Agreement to EPA. *See* ER301-68. The BART alternative was contained in Appendix B to the TWG Agreement. ER337-42.

EPA evaluated the NO_x cap in the BART alternative submitted by the Technical Work Group and generally agreed that the alternative contained in the TWG Agreement, with some minor modifications, complied with the regulatory requirements by providing greater emission reductions over the 2009-2044 timeframe and was consistent with EPA's proposed framework for comparing BART with a "better than BART" alternative. *See* 78 Fed. Reg. at 62,514 (ER052). EPA drafted a regulation that was generally consistent with the alternative, published a supplemental proposal in October 2013, and accepted comments on both proposals through January 6, 2014. 78 Fed. Reg. at 62,509

(ER047); *see also* 78 Fed. Reg. 58,987 (Sept. 25, 2013) (extending comment period on original proposal). EPA received over 77,000 comments on the proposals. Response to Comments at 1-2 (Suppl. ER 58-59). EPA prepared a detailed response to comments and published its final rule in August 2014, in which EPA finalized the supplemental proposal as a "better than BART" alternative. *See* 79 Fed. Reg. at 46,518 (ER067). EPA's final rule did not incorporate or rely on any of the other provisions of the TWG Agreement because EPA was not a member of the Technical Work Group or a signatory to the TWG Agreement and the additional measures were beyond EPA's authority for the proposed action. *Id*. at 46,542 (ER091); Response to Comments at 221 (Suppl. ER 81).

Four petitions for review were filed and consolidated: *The Hopi Tribe v. EPA*, No. 14-73055; *Yazzie v. EPA*, No. 14-73100; *To' Nizhoni Ani, et al. v. EPA*, No. 14-73101, and *National Parks Conservation Ass'n, et al. v. EPA*, No. 14-73102. On March 16, 2015, petitioners in Nos. 14-73100, 14-73101, and 14-73102 filed their merits briefs, and briefing in those consolidated cases is completed. On March 27, 2015, this Court severed and stayed briefing on the petition filed by the Hopi Tribe, No. 14-73055, to allow time for further discussions among officials of the Tribe and the federal government on an agreement which, if finalized, would result in dismissal of the Tribe's petition. After several extensions, this Court

reinstated the briefing schedule and ordered that the Tribe file its opening brief on October 16, 2015.

SUMMARY OF ARGUMENT

The Hopi Tribe raises three contentions in its opening brief to argue that EPA's promulgation of the final rule was arbitrary, capricious, or contrary to law. None has merit.

The Tribe's first two arguments are based on an assertion that the federal government has a common-law trust obligation to Indian tribes, including a duty to consult with them. The Tribe alleges the "United States" has violated that duty in this case. However, the Hopi Tribe does not dispute that EPA engaged in extensive government-to-government consultation with the Tribe and that EPA fulfilled its notice-and-comment rulemaking responsibilities under the Clean Air Act. The Supreme Court and this Court have consistently held that Congress, not common-law notions, defines the trust relationship between the federal government and tribes and that fulfilling treaty, statutory, and regulatory requirements is sufficient.

The Tribe fails to address—let alone distinguish—these controlling cases. The Tribe also fails to identify any treaty, statutory, or regulatory duty requiring EPA or Interior to take additional actions, including additional consultation, in promulgating the final rule or with respect to Interior's participation in the

Technical Work Group. The lack of any such duty is fatal to the Tribe's first two claims. The Tribe is also incorrect that an Executive Order or agency policy statements regarding the government-to-government tribal-consultation process imposed any enforceable duty to consult under this Court's case law.

The Tribe's final argument fails because it attempts to impose on EPA statutory and regulatory requirements that simply do not apply to the final agency action under review. The Tribe incorrectly assumes that EPA must consider the "energy and non-air quality environmental impacts of compliance" whenever EPA promulgates a regional haze implementation plan; but neither that nor any other of the BART factors under the Clean Air Act or 40 C.F.R. § 51.308(e)(1) applies when EPA adopts, as it did here, an alternative emission limit under 40 C.F.R. § 51.308(e)(2), a regulatory provision the Tribe does not even address.

STANDARD OF REVIEW

The Federal Implementation Plan challenged in this case is subject to judicial review under the standards of the Administrative Procedure Act ("APA"), which provides that the Court may set aside any action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see Ariz. Pub. Serv. Co. v. EPA*, 562 F.3d 1116, 1122 n.4 (10th Cir. 2009) ("*APS II*") (finding that a FIP issued by EPA under 42 U.S.C.

§ 7601 is reviewable under the APA rather than under the similar standards set forth in the CAA, 42 U.S.C. § 7607(d)).

Under the APA's narrow standard of review, agency action may be held unlawful only if "the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc) (internal quotation marks and citations omitted). Similarly, this Court cannot impose "procedural requirements not explicitly enumerated in the pertinent statutes" and cannot enforce its "own notion of which procedures are 'best' or most likely to further some vague, undefined public good.'" *Id*. at 993 (internal quotation marks and alterations omitted).

Questions of statutory interpretation are governed by the two-step test set forth in *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-45 (1984). If the statute is clear, the court "'appl[ies] its plain meaning' and the inquiry ends." *APS II*, 562 F.3d at 1123 (citation omitted). If, however, the statute is silent or ambiguous, the court "defer[s] to the authorized agency and 'appl[ies] the agency's construction so long as it is a reasonable interpretation of the statute.'" *Id.* (citation omitted). *See generally NRDC v. EPA*, 779 F.3d 1119, 1126 (9th Cir. 2015).

"An agency is entitled to even greater deference when it acts pursuant to an interpretation of regulations promulgated by the agency itself." *Culbertson v. USDA*, 69 F.3d 465, 467 (10th Cir. 1995); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). A court should give "controlling weight" to EPA's interpretation of its own regulation, "unless it is plainly erroneous or inconsistent with the regulation." *United States v. Larionoff*, 431 U.S. 864, 872 (1977) (citation omitted); *accord Gonzales v. Oregon*, 546 U.S. 243, 256 (2006).

ARGUMENT

I. EPA engaged in substantial government-to-government consultation and fulfilled all CAA requirements during the rulemaking process.

The first two argument sections of the Tribe's opening brief lump EPA's and Interior's actions together and allege that the "United States" violated a trust duty to the Tribe and a duty to consult with the Tribe. Br. 35-52. The Tribe seems to be alleging primarily that Interior violated trust and consultation duties to the Tribe in negotiating the TWG Agreement and that EPA's rulemaking should be set aside as arbitrary, capricious, or contrary to law because the rulemaking adopted the BART alternative that was consistent with the TWG Agreement. The Tribe does not challenge EPA's compliance with CAA and regulatory rulemaking procedures; and indeed, EPA fully complied with all such requirements. Consistent with EPA and other federal policies, EPA also conducted extensive government-to-government

consultations with the Hopi Tribe (as well as other tribes) during the rulemaking process. The Tribe's allegations regarding Interior's conduct will be addressed in the next section.

EPA engaged in numerous consultations with tribes at each stage of the rulemaking process. 79 Fed Reg. at 46,546-47 (ER095-96). With respect to the Hopi Tribe, EPA notified the Tribe of the publication of the Advance Notice of Proposed Rulemaking (ER369), and EPA met or had telephone calls with representatives of the Hopi Tribe multiple times at the ANPRM stage (ER375-77), as well as after the Technical Work Group submitted its alternative proposal and after EPA published the supplemental proposed rule (*e.g.*, Memo to Docket, Sept. 13, 2013 (Suppl. ER 7)). EPA invited the Hopi Tribe to eight group consultation sessions in Arizona where tribes had the option to request individual sessions as well. *See* 79 Fed. Reg. at 46,546 (ER095); *see also, e.g.*, Aug 17, 2012, letter from Jared Blumenfeld, USEPA Region IX, to The Honorable Leroy Shingoitewa, Chairman of the Hopi Tribal Council (Suppl. ER 3); Memo to Docket, Mar. 21, 2013 at 1-2 (Suppl. ER 4-5); Memo to Docket, Apr. 29, 2013 at 1 (Suppl. ER 6); Memo to Docket, Dec. 9, 2013 at 2-3 (Suppl. ER 9-10). EPA conducted one of the five public hearings on the supplemental proposed rule on the Hopi Reservation, in Kykotsmovi, Arizona. *See* 78 Fed. Reg. at 62,509 (ER047). The Tribe also provided comment letters at each stage (*see* Suppl. ER 1 (March 1, 2010 letter

from Leroy Shingoitewa, Chairman, Hopi Tribal Council, to Jarod Blumenfeld, USEPA Region IX, at 1); ER244-48 (NPRM, response to proposed BART alternative); ER260-64 (supplemental proposed rule). The Tribe twice requested additional time to comment on the proceedings, and EPA exercised its discretion both times to allow late comments by the Hopi Tribe. *See* 79 Fed. Reg. at 46,546-47 (ER095-96); Dec. 24, 2013 letter from Jared Blumenfeld, USEPA Region IX, to The Honorable Herman G. Honanie, Chairman of the Hopi Tribe (Suppl. ER 13); ER269-70; Feb. 6, 2014 letter from Jared Blumenfeld, USEPA Region IX, to The Honorable Herman G. Honanie, Chairman of the Hopi Tribe (Suppl. ER 49). These extensive government-to-government consultations between EPA and the Hopi Tribe were conducted at each appropriate stage of EPA's rulemaking process—which itself was fully compliant with all CAA and regulatory procedural requirements—and were plainly consistent with relevant EPA and federal consultation policies. *See Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998) (absent specific requirements imposed by law, agency's general trust responsibility to tribes "is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes"); *see also Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006) (same).[5]

[5] While the Tribe asserts that "[s]imply following the CAA and its implementing

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In fact, the Tribe does not allege that EPA should have engaged in additional consultation with respect to the final rule (other than by lumping EPA's and Interior's actions together to describe how, in the Tribe's view, the "United States arrived at the final rule," Br. 45-48). While the Tribe cites Executive Order 13,175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67,249 (Nov. 6, 2000) (Br. 25, 28, 29, 51), and EPA's Policy on Consultation and Coordination with Indian Tribes (May 4, 2011) (Br. 25, 30, 31, 41, 51), it similarly does not argue that EPA failed to follow any procedure in those documents as part of the rulemaking process. Regardless, neither document is legally enforceable as explained *infra* at 37-38. As demonstrated in the preamble to its final rule, EPA also expressly considered application of the Executive Order, explained that the Executive Order defines "'policies that have tribal implications'" as "regulations or other actions that have substantial direct effects on one or more Indian tribes" and concluded that the rule will have "tribal implications and may have substantial indirect effects on tribes, but will not impose substantial direct compliance costs on Indian tribal governments" and that the "rule is appropriate under the CAA because NGS is a facility that is subject to

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regulations may not be enough to meet the 'most exacting fiduciary standards' required of the United States in its relationship with Indian Tribes" (Br. 33), the case the Tribe cites, *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942), does not hold that following statutory and regulatory procedures is insufficient.

BART." 79 Fed. Reg. at 46,546 (ER095); *see also* Response to Comments at 239 (Suppl. ER 89). The Tribe does not challenge these conclusions.

For all these reasons, the record clearly demonstrates that EPA took its relationship with the Tribe seriously and engaged in extensive government-to-government consultation with the Tribe during the rulemaking process. EPA's consultation with the Tribe provides no basis for setting aside the final rule.

II. There are no additional common-law trust or consultation duties imposed on EPA or Interior.

The Tribe does not assert that EPA failed to comply with any trust or consultation duty imposed by the CAA, but rather claims that *Interior* violated common-law trust and consultation duties in negotiating the TWG Agreement and that EPA's promulgation of the final rule was arbitrary, capricious, or contrary to law because it adopted regulations that were generally consistent with the TWG Agreement's proposed BART alternative.

The Tribe attempts to treat the entire federal government as a single entity for purposes of evaluating its claims (e.g., Br. 47-48), but cites no authority applying such an approach.[6] Rather, a challenge to a federal agency action must be filed in accordance with applicable judicial review requirements. For example,

[6] The Tribe's quotation (Br. 47-48) from Justice Breyer's concurrence in *Clinton v. Jones*, 520 U.S. 681, 712 (1997), a case about whether a sitting President may be sued in a private capacity, is taken out of context.

here, the petition for review must "name the agency as a respondent" and "specify the order or part thereof to be reviewed." Fed. R. App. P. 15(a)(2)(B), (C). The Tribe's petition challenges only a final action of EPA under the CAA, which is subject to the requirements and limitations of the CAA judicial review provision, 42 U.S.C. § 7607(b)(1). *See* Petition For Review (Suppl. ER 92). The Tribe has not separately petitioned for review of any action of Interior or otherwise identified any jurisdictional basis for any such review to occur in this Court as part of its challenge to EPA's CAA final rule. Nonetheless, because the Tribe contends that alleged deficiencies in Interior's process taint EPA's final rule, EPA will address the Tribe's allegations regarding Interior's involvement with the Technical Work Group.

The Tribe identifies no specific trust duty or duty to consult that applied to Interior's participation in the Technical Work Group that is grounded in a treaty, statute or regulation. Therefore its claims must fail. To the extent the Tribe is relying on an Executive Order and agency policies to support its allegations, none imposes enforceable trust or consultation duties.

There is "'undisputed[ly] . . . a general trust relationship between the United States and the Indian people,'" but that trust relationship "is defined and governed by statutes rather than the common law." *United States v. Jicarilla Apache Nation*, __ U.S. __, 131 S. Ct. 2313, 2323-24 (2011). "Congress has expressed this policy

in a series of statutes that have defined and redefined the trust relationship between the United States and the Indian tribes." *Id*. at 2324. Congress may "style its relations with the Indians a 'trust' without assuming all the fiduciary duties of a private trustee, creating a trust relationship that is 'limited' or 'bare' compared to the trust relationship between private parties at common law." *Id*. (quoting *United States v. Mitchell*, 445 U.S. 535, 542 (1980)). When a tribe "cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, . . . neither the Government's control over [tribal assets] nor common law trust principles matter." *Id*. at 2325 (internal quotation marks and citations omitted, alterations in the original). As this Court has similarly explained, while "the United States does owe a general trust responsibility to Indian tribes, unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." *Morongo Band of Mission Indians*, 161 F.3d at 574; *see also Gros Ventre Tribe*, 469 F.3d at 810.

The Tribe's opening brief fails to address this controlling authority and also fails to identify any "specific, applicable, trust-creating statute or regulation that the Government violated." *Jicarilla Apache Nation*, 131 S. Ct. at 2324. Accordingly, the Tribe's claims alleging that Interior violated a trust duty or a duty

to consult—which likewise is grounded in the general trust duty the Tribe is asserting, not in any statute or regulation—must be denied.

A. The United States did not violate any trust duty owed to the Hopi Tribe.

The Hopi Tribe alleges that the United States violated trust duties to the Tribe in two ways: (1) the Tribe claims that the final rule will harm the Tribe's economic interests by reducing NGS's capacity and therefore reducing purchases of coal and water from the Tribe and (2) it claims that the TWG Agreement provides certain benefits to some tribes, but not to the Hopi Tribe. Br. 48-52. Neither allegation has merit.

EPA acknowledged that the final rule based on the TWG Agreement "includes closure of one unit at NGS or equivalent curtailment of operation, [which] may change the royalties and other payments related to coal and water that are paid to the Hopi Tribe."[7] 79 Fed. Reg. at 46,541 (ER090). However, the Tribe points to no statutory or regulatory duty requiring EPA or Interior to act in a trustee capacity with respect to (1) promulgating the final rule, (2) taking actions that might affect the Tribe's sale of resources to NGS, or (3) ensuring the Tribe benefits identically to other tribes in agreements like the TWG Agreement. Here, the Tribe

[7] If the California or Nevada utility owners sell their shares to a third party or do not divest their shares, the rule requires installation of BART technology or compliance with the emissions cap in another way. *See* 78 Fed. Reg. at 62,516-17 (ER054-55).

"seek[s] to impose a duty, not found in any treaty or statute, to manage non-tribal property [the NGS and the resources Interior agreed to make available to tribes through the TWG Agreement] for the benefit of the [Hopi Tribe]." *Gros Ventre Tribe*, 469 F.3d at 811. But absent a specific duty imposed by law, the government complies with its general trust duty to tribes by following the applicable statutes and regulations; and there is no dispute that the government has done so here. *Id*. at 812; *see also Jicarilla Apache Nation*, 131 S. Ct. at 2323-25. The Tribe makes no argument that either EPA or Interior violated any applicable statute or regulation with respect to the alleged trust duties. The petition should be denied on this basis alone.

The only authorities the Tribe points to in support of a trust duty are the general descriptions of broad trust obligations in *Seminole Nation v. United States*, 316 U.S. 286 (1942), and *Nance v. EPA*, 645 F.2d 701 (9th Cir. 1981). Br. 48, 52. However, both of these cases predate the Supreme Court's firm explanation that any trust duty between the United States and Indian tribes must be defined in "a specific, applicable, trust-creating statute or regulation," *Jicarilla Apache Nation*, 131 S. Ct. at 2325, and this Court's similar holding that trust duties "must be expressly set forth in statutes or treaties," *Gros Ventre Tribe*, 469 F.3d at 813; *see also id*. at 810-11; *Morongo Band of Mission Indians*, 161 F.3d at 574. Regardless, *Seminole Nation* involved claims for monies owed under "various

treaties, agreements, and acts of Congress" and were brought under a statute allowing "equitable claims." 316 U.S. at 288, 298. Thus, *Seminole Nation* is consistent with *Jicarilla Apache Nation*, *Gros Ventre Tribe*, and *Morongo Band of Mission Indians*. And as this Court explained when discussing *Nance*, the "procedures provided by" the applicable statutes and regulations "were sufficient to fulfill the EPA's fiduciary responsibility." *Morongo Band of Mission Indians*, 161 F.3d at 574 (citing *Nance*, 645 F.2d at 711). Regardless, the Supreme Court's *Jicarilla Apache Nation* decision provides the controlling principles applicable to trust claims such as those alleged by the Hopi Tribe. Remarkably, the Tribe's brief fails to even mention that controlling authority.

Although the Tribe's trust claims are thus legally insufficient, it is also worth noting that the Tribe is incorrect that the additional provisions of the TWG Agreement designed to benefit tribes (and on which EPA's final rule does not rely) contain "*no protection*" for the Hopi Tribe "to offset the compromised coal revenues or to mitigate the significant adverse economic impact." Br. 49-50 (emphasis in original). Rather, in the Agreement, Interior commits to furthering the development of energy projects with lower emissions "to benefit Affected Tribes." ER309, ER333. The Agreement defines "Affected Tribe" as "*the Hopi Tribe*, the Navajo Nation," and any Arizona tribe with an allocation of CAP water. ER328 (emphasis added). Moreover, Interior committed to work with "the Navajo

Nation *and Hopi Tribe*, upon request, to identify, prioritize and further economic development projects" on those Tribes' reservations "to help supplement and replace their reliance on NGS and coal." ER310 (emphasis added). The Hopi Tribe is also eligible, along with other tribes, for the $5 million contributed by the Salt River Project to a fund to benefit local tribes. ER312-13.

Additionally, the TWG Alternative did not foreclose full NGS operation after 2019 if divestitures do not proceed as anticipated or ownership conditions warrant in the future. *See* ER340-41. In such a circumstance, the Hopi Tribe would receive the coal revenues associated with full-capacity operation.[8]

Finally, the Hopi Tribe asserts that it could have negotiated additional favorable terms had it been a member of the Technical Work Group (Br. 49), but

[8] More broadly, the assumption underlying the Tribe's brief that a rule requiring BART would have allowed NGS to continue operating at its current capacity indefinitely does not account for the possibility that post-2019 uncertainties regarding NGS operations, including the required divestitures by LADWP and NV Energy (see *supra* at 13, 16), might have led the remaining owners not to make the capital investments needed to meet the BART standards, forcing NGS to close after 2019. *See* Jan. 6, 2014 letter from Kelly J. Barr, Salt River Project, to The Honorable Jared Blumenfeld, Regional Administrator, at 2[letter], 9-10[main text] (Suppl. ER 25, 41-42); Jan. 6, 2014, letter from Mark Mansfield, Vice President, Generation, Tucson Electric Power Company, to Anita Lee, Region 9, at 4 (Suppl. ER 17). While EPA's economic analysis acknowledged those uncertainties (other than NV Energy's divestiture, which was not known until after completion of the economic analysis), EPA lacked sufficient information to factor those uncertainties into its economic analysis and concluded only that the cost of the BART technology "will not cause the cost of electricity generation to exceed the wholesale market cost of electricity." ER131.

there is no guarantee that would have been the case; and in any event, there was no statutory or regulatory duty to include the Tribe as part of the group. *See supra* at 26-30. More important, the beneficial TWG Agreement actions are collateral to the Agreement's emission-reduction commitments and thus were not relied upon by EPA in its final rule. 79 Fed. Reg. at 46,542 (ER091). EPA explained that it was "not a signatory to the TWG Agreement and did not participate in the TWG Stakeholder group," and that the other parts of the TWG Agreement "are outside the scope of our authority for this action." *Id.*; *see also id*. at 46,543 (ER092) (TWG Agreement provisions beyond the scope of BART "are not part of EPA's rulemaking in this action"). Therefore, the additional TWG Agreement provisions can provide no basis for invalidating the final rule.

To the extent the Tribe is alleging that the United States violated a duty to consult with the Tribe or to consider the final rule's economic impact on the Tribe (Br. 51-52), those allegations are addressed below.

B. Neither EPA nor Interior violated a duty to consult with the Hopi Tribe.

Most of the Tribe's brief is devoted to the assertion that the "United States" violated an alleged duty to consult with the Hopi Tribe. Ultimately, the Tribe's complaint is that it should have been included in the Technical Work Group and, because the Tribe was not included, EPA's adoption of a rule consistent with the proposed alternative in the TWG agreement was, in the Tribe's view, arbitrary,

capricious, and contrary to law. However, EPA acknowledged "that there are affected tribes and other stakeholders that were not invited to participate in the Technical Work Group" and explained that "EPA was not involved in the formation of the TWG and [was] not involved in any of the meetings or discussions of the TWG" other than to present information about the proposed rule at the TWG's initial meeting. 79 Fed. Reg. at 46,544 (ER092). EPA also explained that it "understands the importance of NGS to numerous tribes located in Arizona and the importance of our trust responsibility to Indian tribes affected by NGS" and that EPA "attempted to ensure that these tribes were consulted throughout the rulemaking process." *Id*. at 46,546 (ER095). EPA thus considered the problem identified by the Tribe and gave a rational explanation for its actions. Nothing more was required. *See Lands Council*, 537 F.3d at 987.

Nor was EPA's action contrary to law. The Tribe incorrectly contends that there is a legal "*duty to consult . . . grounded in common law* arising from the unique *trust relationship* between the United States and Indian Tribes." Br. 24 (emphases added). But as explained more fully *supra* at 26-30, the trust relationship, including whether and in what circumstances the government has a duty to consult with Indian tribes, is defined by treaties, statutes, and regulations, not the common law. *See, e.g.*, *Jicarilla Apache Nation*, 131 S. Ct. at 2323-24; *Morongo Band of Mission Indians*, 161 F.3d at 574. Like the Tribe's other

allegation that the United States violated a trust duty in enacting the final rule, the Tribe fails to identify any trust duty defined by treaty, statute, or regulation requiring that EPA or Interior engage in additional consultation with the Tribe about either the final rule or the TWG Agreement. The Tribe's consultation argument must fail on this basis alone.

Moreover, for the reasons explained below, none of the executive actions, internal EPA and Interior consultation policy statements, or cases cited by the Tribe demonstrate that either agency was required to engage in additional consultation with the Tribe.

1. Executive Order 13,175 and related presidential memoranda created no legally enforceable duty to engage in additional consultation with the Hopi Tribe.

The Tribe refers to Executive Order 13,175, "Consultation and Coordination with Indian Tribal Governments," 65 Fed. Reg. 67,249 (Apr. 29, 1994), and a related presidential memorandum regarding consultation, Br. 27-29, 39, but neither document created any enforceable right to additional consultation. Compliance with executive orders may be judicially reviewable only if (1) the order does not expressly disclaim the creation of a private right of action, (2) the order is based upon statutory authority, and (3) there is a legal standard or "law to apply" by which the agency's action may be judged. *See City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1166-67 (9th Cir. 1997). The failure to meet *any*

of these criteria is fatal to a claim based on an executive order, and Executive Order 13,175 meets none of them. First, the Order expressly states that it does not provide any right or benefit that is enforceable at law or in equity against the federal government. ADD033 (Executive Order 13,175 not intended to create "any right, benefit, or trust responsibility . . . enforceable . . . by a party against the United States [or] its agencies"); *see also* ADD035 (Presidential Memorandum of Nov. 5, 2009 on Tribal Consultation, 74 Fed. Reg. 57,881 (Nov. 9, 2009), "not intended to . . . create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities"). Language disclaiming the intent to create enforceable rights precludes judicial review. *See City of Carmel-by-the-Sea*, 123 F.3d at 1166; *see also Morongo Band of Mission Indians*, 161 F.3d at 575 (another executive order with similar language creates no right to judicial review); *Michigan v. Thomas*, 805 F.2d 176, 187 (6th Cir. 1986), cited with approval in *Cal-Almond, Inc. v. U.S. Dep't of Agric.*, 14 F.3d 429, 445 (9th Cir. 1993). This factor alone is dispositive. *See Thomas*, 805 F.2d at 187.

Second, Executive Order 13,175 does not have a specific statutory foundation. The Order does not cite any statutes as its basis, referring instead to the President's authority under "the Constitution and the laws of the United States." ADD030. Because the Executive Order does not purport to be based on

specific statutory authority, it cannot create enforceable rights. *City of Carmel-by-the-Sea*, 123 F.3d at 1166; *see also Indep. Meat Packers Ass'n v. Butz*, 526 F.2d 228, 234-35 (8th Cir. 1975) (order lacked force and effect of law because it did not cite specific authority other than the "Constitution and laws of the United States"); *cf.* Exec. Order No. 11,988, 42 Fed. Reg. 26,951 (May 25, 1977), and Exec. Order No. 11,990, 42 Fed. Reg. 26,961 (May 25, 1977) (executive orders at issue in *City-of-Carmel-by-the-Sea*, promulgated "in furtherance of NEPA").

Finally, there is no law to apply regarding whether an agency has conformed to the policy and administrative goals articulated. *City of Carmel-by-the-Sea*, 123 F.3d at 1166 (enforceable executive order must provide an objective legal standard or "law to apply" by which the agency's action may be judged); *see also City of Albuquerque v. U.S. Dep't of the Interior*, 379 F.3d 901, 914 (10th Cir. 2004). The absence of any objective standards also confirms that the Executive Order does not establish any specific trust duty. *See United States v. Mitchell*, 463 U.S. 206, 224 (1983) (statutes and regulations "define the contours of the United States' fiduciary responsibilities"); *United States v.* Navajo Nation, 537 U.S. 488, 506 (2003) (emphasizing "specific rights-creating or duty-imposing statutory or regulatory prescriptions"); *Gros Ventre Tribe*, 469 F.3d at 812 (treaty provisions did not establish trust duty where government's agreement to protect tribes against depredations was "an obligation for which we have no way of measuring whether

the government is in compliance unless we look to other generally applicable statutes or regulations"). The Executive Order thus does not provide a basis for a specific, enforceable trust duty to consult with the Tribe.

2. Neither the agencies' written policies regarding consultation nor the Joint Federal Agency Statement Regarding Navajo Generating Station created a legally enforceable duty for the agencies to engage in additional consultation.

The Tribe also refers to EPA's and Interior's policies on consultation and the Joint Federal Agency Statement on NGS. Br. 29-31; *see also* ADD036-59; ER227-29. However, none of these documents created a legally enforceable right to additional consultation. For documents like these to have the force of law, they

> must (1) prescribe substantive rules—not interpretative rules, general statements of policy or rules of agency organization, procedure or practice—and, (2) conform to certain procedural requirements. To satisfy the first requirement the rule must be legislative in nature, affecting individual rights and obligations; to satisfy the second, it must have been promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress.

United States v. Fifty-Three (53) Eclectus Parrots, 685 F.2d 1131, 1136 (9th Cir. 1982) (internal quotation marks and citations omitted); *see also River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1071-72 (9th Cir. 2010); *W. Radio Servs. Co. v. Espy*, 79 F.3d 896, 901-02 (9th Cir. 1996).

The policy statements here meet neither requirement. They do not prescribe substantive rules that affect individual rights or obligations, but rather contain

statements of general policy and recommended agency procedure and practice with respect to consulting with tribes. ADD036, ADD052-53. Neither policy statement purports to have been promulgated pursuant to specific statutory authority, nor were they promulgated under the APA's rulemaking provisions. Indeed, Interior's policy statement expressly says it "is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the Department or any person." ADD049. Thus, the policy statements cannot form the basis for imposing additional consultation obligations on the agencies or for setting aside the final rule.[9]

Similarly, the Tribe cites a Joint Federal Agency Statement regarding the NGS. ER227-29. The Statement expressly notes that EPA, various Department of the Interior agencies, and the Department of Energy have certain roles relating to the NGS or the mine, and it explains that the "Joint Statement does not alter these authorities and responsibilities." ER227. The Joint Statement also speaks in terms

[9] The Tribe's contention that the agencies' policy statements require sufficient information to be disclosed before conducting consultation (Br. 40-41) is beside the point. In any event, the Tribe does not articulate what additional information it needed other than to say it "never was able to obtain full access to the information necessary to engage in complete consultation" (Br. 41) and to state that it sought information from the Bureau of Reclamation, an agency of the Department of the Interior, using the Freedom of Information Act ("FOIA"), but Reclamation withheld some information pursuant to exemptions in FOIA (Br. 18-19 n.5 (citing ER294-300)). The Tribe does not show that such action is illegal; and in any event, it has not brought a challenge under FOIA against Reclamation.

of "goals" and actions the agencies "intend to take to further those goals." ER227-28. Nowhere does the Joint Statement purport to prescribe substantive rules, nor was it promulgated in accordance with notice-and-comment procedures. It cannot, therefore, establish any legally enforceable rights or duties.

3. None of the cases cited by the Tribe demonstrates the existence of any enforceable duty to engage in additional consultation here.

The Tribe cites none of the controlling authority discussed above regarding federal-agency trust obligations and government-to-government consultation with Indian tribes. The cases cited by the Tribe also identify no common-law based duty to consult here and are distinguishable from the controlling precedent in this Circuit on one or more grounds: (1) they are district court decisions or decisions from other circuits that are not binding on this Court, (2) they involve treaty- or statute-based rights to consultation, or (3) they do not discuss a duty to consult at all. *See* Br. 23-48. For example, the cases cited for the proposition that "consultation is a 'procedural right guaranteed by federal law and [agency] policy'" are district court decisions and, more important, involve a treaty- or statute-based right, neither of which exists here. Br. 24 (quoting *Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp. 2d 774, 781, 783 (D.S.D. 2006) (statutory consultation obligation), and citing *Klamath Tribes v. United States*, No. 96-381-HA, 1996 WL 924509, at *8 (D. Or. Oct. 2, 1996) (preliminary injunction decision

noting that agency must consult on timber sales that may affect resources to which tribe has treaty-based rights to hunt, fish, and trap)). Other cited cases likewise involve a statutory consultation duty[10] or treaty rights triggering a consultation duty.[11] At least one case does not discuss a consultation or trust duty at all.[12]

The Tribe also cites *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 713 (8th Cir. 1979), and some of its progeny.[13] Br. 23, 25-26. But in *Oglala Sioux*

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[10] *Confederated Tribes & Bands of the Yakama Nation v. U.S. Fish & Wildlife Serv.*, No. 1:14-CV-3052-TOR, 2015 WL 1276811, at *9 (E.D. Wash. Mar. 20, 2015) (cited at Br. 24, 42, National Historic Preservation Act); *Cal. Wilderness Coalition v. U.S. Dep't of Energy*, 631 F.3d 1072, 1087 (9th Cir. 2011) (cited at Br. 27, 40, 42, 44, Energy Policy Act required consultation with states).

[11] *Confederated Tribes & Bands of Yakama Nation v. U.S. Dep't of Agric.*, No. CV-10-3050-EFS, 2010 WL 3434091, at *4 (E.D. Wash. Aug. 30, 2010) (cited at Br. 26, finding at preliminary injunction stage serious questions about whether consultation was required by the "Yakama Treaty of 1855 and federal Indian trust common law," but without providing an explanation or reasoning for why or how such common-law concepts should be integrated into the analysis); *Okanogan Highlands All. v. Williams*, No. CIV. 97-806-JE, 1999 WL 1029106, at *16, *18 (D. Or. Jan. 12 1999) (cited at Br. 26, finding NEPA procedures sufficient); *Nez Perce Tribe v. U.S. Forest Serv.*, No. 3:13-CV-348-BLW, 2013 WL 5212317, at *6 (D. Idaho Sept. 12, 2013) (cited at Br 28, noting a potential statutory right to consultation under the National Forest Management Act because of the wording of the Forest Plan).

[12] *EEOC v. Karuk Tribe Housing Auth.*, 260 F.3d 1071, 1082 (9th Cir. 2001) (cited at Br. 33 for the proposition that legal doctrines often must be viewed from a "different perspective" with respect to Indians, but discussing only whether federal employment-related statute applied to tribe).

[13] *Mescalero Apache Tribe v. Rhoades*, 804 F. Supp. 251, 259, 261-62 (D.N.M. 1992) (also relying on Indian Self-Determination Act creating an expectation of consultation); *Yankton Sioux Tribe*, 442 F. Supp. 2d at 783-84; *Winnebago Tribe of Neb. v. Babbitt*, 915 F. Supp. 157, 167-68 (D.S.D. 1996); *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395, 399-402 (D.S.D. 1995).

Tribe, the Eighth Circuit noted that the government did not argue that the particular consultation guidelines at issue were not binding, *id*. at 718, and the Hopi Tribe fails to mention that this Court has already distinguished *Oglala Sioux Tribe* on that basis. *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097, 1103 (9th Cir. 1986).

4. EPA was not part of the Technical Work Group and did not participate in its activities.

The Hopi Tribe is incorrect that "EPA was complicit in the United States' participation in the TWG." Br. 48. EPA explained in the final rule that it "was not part of the TWG" nor did it "participate in any of the substantive discussions and negotiations of the TWG." 79 Fed. Reg. at 46,543 (ER092). While two EPA representatives "attended the beginning of the first meeting of the TWG," they did so "only to present a summary of EPA's February 5, 2013 Proposed Rule," which "was generally the same presentation EPA provided to other stakeholders." *Id*.; *see also* ER243. EPA had only two other interactions with the Technical Work Group: (1) the Group's formal submission of the TWG Agreement and (2) approximately a week earlier, when representatives of some members of the TWG presented EPA with a PowerPoint explaining that the group intended to submit a BART alternative soon. ER243. The other two meetings cited in the Tribe's brief were with other individual tribes that were members of the TWG (and not the TWG itself), and they took place *after* the TWG Agreement was signed and submitted to EPA in July 2013. Br. 48 (citing ER249 (meeting with Gila River

Indian Community on August 22, 2013) and ER250 (meeting with Navajo Nation on August 28, 2013)). EPA also consulted with the Hopi Tribe in this period after the TWG Agreement was submitted and before EPA published its proposed rule. Memo to Docket, Sept. 13, 2013 (Suppl. ER 7). EPA's function in this matter was to fulfill CAA and regulatory requirements relating to the regional haze program and the control of relevant air emissions. *See* Response to Comments at 221 (Suppl. ER 81). But as explained above, EPA was not a member of, and did not participate in, the Technical Work Group. Although the government vigorously disputes that any activity of the TWG violated any duty owed to the Hopi Tribe, EPA certainly cannot be found to have participated, or been "complicit," in any such alleged violation.

III. EPA did not violate the BART provisions in the Clean Air Act or in EPA's implementing regulations.

The Tribe's final argument, that EPA failed to consider the factors that EPA or a State must use when determining BART,[14] misreads the law and misunderstands what EPA did. Consistent with EPA's Regional Haze regulations, EPA did not adopt an emission limitation based on BART, but rather adopted an

[14] While the BART Guidelines do allow for consideration of whether proposed BART controls would lead to the closure of a facility and in some cases whether controls would have significant economic impacts, neither the Clean Air Act nor EPA's regulations require such an analysis as part of the BART determination process. 70 Fed. Reg. at 39,169, 39,171.

emission limitation that is an alternative to BART. EPA evaluated the emissions limit that would represent BART for NO_x, but did so solely to establish the benchmark to use in comparing the proposed alternative to BART. Instead of adopting BART, EPA's final rule promulgated an alternative to BART that will achieve greater reasonable progress toward attaining natural visibility conditions, as required by 42 U.S.C. § 7491(b)(2). Because EPA adopted an emission limitation based on an *alternative* to BART, as it is expressly permitted to do by its regulations, it was not required to consider any of the BART factors.

The Clean Air Act provides the following definition of BART that identifies certain factors that must be taken into account in determining appropriate BART controls:

> [I]n 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.

42 U.S.C. § 7491(g)(2). EPA's regulation adopts the same definition. *See* 40 C.F.R. § 51.308(e)(1)(ii). However, EPA's regulation goes on to allow for an alternative to BART, providing the option 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.

Id. § 51.308(e)(2) (emphasis added). The sufficiency of such a BART alternative is not measured by the BART factors. It is measured, rather, by comparison with the progress toward improved visibility that would be achieved with BART. Thus, a BART alternative "must achieve greater reasonable progress than would be achieved through the installation and operation of BART." *Id.*

As required by the Regional Haze Rule, EPA explained why the BART alternative in the final rule achieves greater reasonable progress than would BART. Specifically, EPA demonstrated that the distribution of emissions under BART and under the alternative are not significantly different, and that the alternative would result in greater NO_x emission reductions than would BART. 79 Fed. Reg. at 46,534 (ER083). EPA also conducted additional visibility modeling and noted that after 2030, and especially after 2044, the BART alternative reduces the visibility impact on 11 Class I areas to a greater extent than would BART. Response to Comments at 212, 213 fig. 8 (Suppl. ER 76, 77). Thus, EPA found that the BART alternative for NO_x emissions adopted in the Federal Implementation Plan leads to greater emission reductions than BART, under the first prong of 40 C.F.R. § 51.308(e)(3). 79 Fed. Reg. at 46,534 (ER083).

The Tribe does not question, or even address, EPA's actual conclusions. Instead, the Tribe argues that the BART alternative is insufficient because it is not BART, *i.e.*, it does not meet one of the BART factors. This argument is circular:

If a BART alternative must meet all the requirements of BART, then it is no alternative at all. Put another way, the Tribe argues that the BART alternative is inconsistent with 40 C.F.R. § 51.308(e)(1), which governs BART determinations, but fails to even cite 40 C.F.R. § 51.308(e)(2) or 51.308(e)(3), which governs BART alternatives. *See, e.g.*, Br. 57.

The Tribe's argument fails because the BART factors, by their terms, only apply when EPA (or a State) promulgates BART, but this Federal Implementation Plan did not promulgate BART. *See* 79 Fed. Reg. at 46,514 (EPA is "finalizing an alternative to BART" and "EPA is not finalizing our proposed BART determination") (ER063). The Tribe thus makes the same error as did petitioners Yazzie and To' Nizhoni Ani in Nos. 14-73100 and 14-73101, when they argued that the Federal Implementation Plan violates a statutory deadline which, by its own terms, applies only to BART. Because the BART factors only apply to a BART determination, and because EPA's final rule did not promulgate BART, the Tribe's assertions concerning the BART factors are not relevant.

The Tribe does not argue that the BART-alternative provisions in 40 C.F.R. § 51.308(e)(2) are inconsistent with the Clean Air Act, nor could the Tribe mount such an attack at this late date. Under the Clean Air Act, an aggrieved party must ordinarily file a petition for review within 60 days of the date on which the EPA's action appears in the Federal Register. 42 U.S.C. § 7607(b)(1). This deadline is

jurisdictional. *See, e.g.*, *Utah v. EPA*, 750 F.3d 1182, 1184 (10th Cir. 2014); *Okla. Dep't of Envtl. Quality v. EPA*, 740 F.3d 185, 191 (D.C. Cir. 2014). The BART-alternative provisions in 40 C.F.R. § 51.308(e)(2) were adopted as part of the Regional Haze Rule in 1999, and amended in 2005 and in 2006, *see* 70 Fed. Reg. 39,104 (July 6, 2005) *and* 71 Fed. Reg. 60,612 (Oct. 13, 2006), so any challenge to their legality would be well out of time.

Furthermore, even if the Tribe were to make such an argument and the Court were to consider it, this Court has already upheld the use of "better than BART" alternatives as a permissible interpretation of the Clean Air Act's purpose and requirements. *See Cent. Ariz. Water Conservation Dist. v. EPA*, 990 F.2d 1531, 1543 (9th Cir. 1993) (upholding a FIP with a "better than BART" option for SO_2 emissions at NGS, prior to promulgation of the Regional Haze Rule's BART-alternative regulations in section 51.308); *see also Util. Air Regulatory Grp. v. EPA*, 471 F.3d 1333, 1340 (D.C. Cir. 2006) (considering the Clean Air Interstate Rule cap-and-trade program as a BART alternative under the Regional Haze Rule); *Ctr. for Energy & Econ. Dev. v. EPA*, 398 F.3d 653, 660 (D.C. Cir. 2005) (holding that if a BART alternative "would achieve greater progress than BART, then BART would not be 'necessary to make reasonable progress' [under 42 U.S.C. § 7491(b)(2)]").

Far from an "end-run around the BART factors" as the Tribe asserts, Br. 57, EPA correctly applied the standard in 40 C.F.R. § 51.308(e)(2) to evaluate the proposed NO_x emissions cap for NGS, and reasonably concluded that the proposed cap satisfies the regulatory standard as an alternative to BART.

CONCLUSION

The petition for review should be denied.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, undersigned counsel certifies that only three known, related cases are pending in this Court: *Yazzie v. EPA*, No. 14-73100; *To' Nizhoni Ani, et al. v. EPA*, No. 14-73101, and *National Parks Conservation Ass'n, et al. v. EPA*, No. 14-73102. Those cases challenge the same agency action and were consolidated with each other for briefing, which is now complete. On October 29, 2015, the Court ordered those cases and this case to be calendared as soon as practicable to the same panel.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this brief contains 11,782 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/ Daniel R. Dertke

STATUTORY AND REGULATORY ADDENDUM

Addendum Contents

Statutes

42 U.S.C. § 7491

§ 7491. Visibility protection for Federal class I areas

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

(1) 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 manmade air pollution.

(2) Not later than six months after August 7, 1977, the Secretary of the Interior in consultation with other Federal land managers shall review all mandatory class I Federal areas and identify those where visibility is an important value of the area. From time to time the Secretary of the Interior may revise such identifications. Not later than one year after August 7, 1977, the Administrator shall, after consultation with the Secretary of the Interior, promulgate a list of mandatory class I Federal areas in which he determines visibility is an important value.

(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.

Such report shall also identify the classes or categories of sources and the types of air pollutants which, alone or in conjunction with other sources or pollutants, may reasonably be anticipated to cause or contribute significantly to impairment of visibility.

(4) Not later than twenty-four months after August 7, 1977, and after notice and public hearing, the Administrator shall promulgate regulations to assure (A) reasonable progress toward meeting the national goal specified in paragraph (1), and (B) compliance with the requirements of this section.

(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 implementation 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

(B) a long-term (ten to fifteen years) strategy for making reasonable progress toward meeting the national goal specified in subsection (a) of this section.

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 powerplant 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 powerplant is located at such distance from all areas listed by the Administrator under subsection (a)(2) of this section that such powerplant 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.

(d) Consultations with appropriate Federal land managers

Before holding the public hearing on the proposed revision of an applicable implementation plan to meet the requirements of this section, the State (or the Administrator, in the case of a plan promulgated under section 7410(c) of this title) shall consult in person with the appropriate Federal land manager or managers and shall include a summary of the conclusions and recommendations of the Federal land managers in the notice to the public.

(e) Buffer zones

In promulgating regulations under this section, the Administrator shall not require the use of any automatic or uniform buffer zone or zones.

(f) Nondiscretionary duty

For purposes of section 7604(a)(2) of this title, the meeting of the national goal specified in subsection (a)(1) of this section by any specific date or dates shall not be considered a "nondiscretionary duty" of the Administrator.

(g) Definitions

For the purpose of this section--

(1) in determining reasonable progress there shall be taken into consideration the costs of compliance, the time necessary for compliance, and the energy and nonair quality environmental impacts of compliance, and the remaining useful life of any existing source subject to such requirements;

(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;

(3) the term "manmade air pollution" means air pollution which results directly or indirectly from human activities;

(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);

(5) the term "mandatory class I Federal areas" means Federal areas which may not be designated as other than class I under this part;

(6) the terms "visibility impairment" and "impairment of visibility" shall include reduction in visual range and atmospheric discoloration; and

(7) the term "major stationary source" means the following types of stationary sources with the potential to emit 250 tons or more of any pollutant: fossil-fuel fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than 250 million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding 300,000 barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 169A, as added Aug. 7, 1977, Pub.L. 95-95, Title I, § 128, 91 Stat. 742.)

9th Circuit Case Number(s) 14-73055

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