

Consolidated Case Nos. 14-73100, 14-73101, 14-73102

**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

**VINCENT HARRIS YAZZIE, ET AL.,**

Petitioners,

v.

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,**

Respondents.

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**On Petition for Review of Final Action by the United States  
Environmental Protection Agency**

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**PETITIONER VINCENT HARRIS YAZZIE REPLY BRIEF**

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IN THE MATTER OF THE APPLICATION OF SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, IN CONFORMANCE WITH THE REQUIREMENTS OF ARIZONA REVISED STATUTES, SECTIONS 40-360, et seq., FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AUTHORIZING THE PRICE ROAD CORRIDOR PROJECT, NON-GILA RIVER INDIAN COMMUNITY PORTION LOCATED IN THE CITY OF CHANDLER, ARIZONA OR WITHIN MARICOPA COUNTY. APPLICANT'S REQUEST TO REMOVE ITS APPLICATION FOR APPROVAL OF A CEC FROM THE OPEN MEETING AGENDA, MAY 08, 2015, DOCKET NO. L-00000B-15-0059-00170, CASE NO. 170, BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF THE APPLICATION OF SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, IN CONFORMANCE WITH THE REQUIREMENTS OF ARIZONA REVISED STATUTES, SECTIONS 40-360, et seq., FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AUTHORIZING THE PRICE ROAD CORRIDOR PROJECT, NON-GILA RIVER INDIAN COMMUNITY PORTION LOCATED IN THE CITY OF CHANDLER, ARIZONA OR WITHIN MARICOPA COUNTY. ARIZONA COMMUNITIES UNITED REQUEST FOR APPROVAL WITH MODIFICATION, MAY 08, 2015, DOCKET NO. L-00000B-15-0059-00170, CASE NO. 170, BEFORE THE ARIZONA CORPORATION COMMISSION.

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## SUMMARY OF ARGUMENT

Navajo Generating Station (NGS) is a 2,250 Megawatt (MW) bituminous coal burning power plant located at 36 54' 12 N, 111 23' 25 " W which is owned by U.S. Bureau of Reclamation (24.3%), Salt River Project (21.7%), Los Angeles Department of Water and Power (21.2%), Arizona Public Service (14.0%), Nevada Energy (11.3%), and Tucson Electric Power (7.5) with Salt River Project (SRP) as the operator. NGS sits on Navajo Trust Land which is leased from the Navajo Nation via Lease agreement and a 323 Federal grant. The lease agreement and 323 Federal Grant restrict Navajo Nation regulation over NGS with some exceptions mainly employment matters, in-kind transmission line waiver and lease payments.

The Gila River Indian Community (GRIC) had prior rights to the Gila River system which local water companies utilized for their benefit without asking the GRIC which includes SRP. GRIC trades their traditional water for Central Arizona Project (CAP) water via the Gila River Water Settlement of 2004 or Final Execution Version, October 21, 2005, *Amended and Restated Gila River Indian Community Water Rights Settlement Agreement*, but has to pay for the cost of pumping the CAP water to their lands. NGS via Bureau of Reclamation (BOR) pumps water to GRIC lands. The cost of the electricity for

the pumps is dependent on pollution control equipment (BART and TWG), price of the coal, and financing cost.

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 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.

BART has a five year time window to implement strict SCR NO<sub>x</sub> equipment whereas TWG implements a more gradual reduction in NO<sub>x</sub> via shutting down of one unit followed by SCR installation. The gradual reduction in NO<sub>x</sub> over time is reflects the Superstition Vista Planning Project which wants to add another 8 million people to the State of Arizona on the eastern edge of Metro Phoenix for the 21<sup>st</sup> Century.

Tribal Authority Rule (TAR) allows EPA discretion on Indian lands. 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). Nor does it invalidate any other substantive requirement of the regional haze program. TAR allows for the gradual reduction in NO<sub>x</sub> over time including capital expenditure cost. Recently, the GRIC blocked an SRP transmission line for Superstitions Vista and future SRP rate payers at Superstition Vista will not pay for TWG.

The late Alexander Wilson, Utah International and BHP Executive at the Navajo Mine in a transcript says the coal burned at Four Corners Power Plant is

Bituminous coal which is counter to Alan Papp, Arizona Public Service (APS) statements that they thought the coal was always sub-bituminous as was told by BHP. The contradicting statement constitutes major fraud against the United States, 18 USC 1031 and Conspiracy to Commit Offense or to Defraud United States, 18 USC 371 in the BART proceedings for the Four Corners Power Plant. These criminal acts cast serious doubts on what APS testimony to the EPA and *Arizona Public Service v. EPA*, 562 F.3d 1116 (10th Cir. 2009).

## **ARGUMENT**

### **I. GRIC votes down transmission line**

On May 7, 2015 GRIC voted down a transmission line to a future 21<sup>st</sup> Century metropolis located east of Chandler, Arizona. See Appendix 1 IN THE MATTER OF THE APPLICATION OF SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, IN CONFORMANCE WITH THE REQUIREMENTS OF ARIZONA REVISED STATUTES, SECTIONS 40-360, et seq., FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AUTHORIZING THE PRICE ROAD CORRIDOR PROJECT, NON-GILA RIVER INDIAN COMMUNITY PORTION LOCATED IN THE CITY OF CHANDLER, ARIZONA OR WITHIN MARICOPA COUNTY. APPLICANT'S REQUEST TO REMOVE

ITS APPLICATION FOR APPROVAL OF A CEC FROM THE OPEN MEETING AGENDA, MAY 08, 2015, DOCKET NO. L-00000B-15-0059-00170, CASE NO. 170, BEFORE THE ARIZONA CORPORATION COMMISSION.

<http://images.edocket.azcc.gov/docketpdf/0000162023.pdf>

This future metropolis would consume 1.1 GW of power. High tension power lines would obstruct the views of the people near the new power lines. The new power lines would also enable the GRIC to have a solar plant which is also part of TWG. SRP also played one community against another creating mistrust of SRP. Residents want the power line buried. See Appendix 2 for IN THE MATTER OF THE APPLICATION OF SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, IN CONFORMANCE WITH THE REQUIREMENTS OF ARIZONA REVISED STATUTES, SECTIONS 40-360, et seq., FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AUTHORIZING THE PRICE ROAD CORRIDOR PROJECT, NON-GILA RIVER INDIAN COMMUNITY PORTION LOCATED IN THE CITY OF CHANDLER, ARIZONA OR WITHIN MARICOPA COUNTY. ARIZONA COMMUNITIES UNITED REQUEST FOR APPROVAL WITH MODIFICATION, MAY 08, 2015, DOCKET NO. L-00000B-15-0059-00170, CASE NO. 170, BEFORE THE

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SRP needs the power from NGS to power Superstitions Vista another planned city east of Chandler.

<http://www.superstition-vistas.org/studyarea/>

There is no solar plant for GRIC as SRP withdrew its application. There are no future customers to pay for the cost of the SCR's later.

**II. Alexander M. Wilson confirms Coal Rank as Bituminous**

The late Alexander Wilson, Utah International and BHP Executive at the Navajo Mine in a transcript says the coal burned at Four Corners Power Plant is Bituminous coal which is counter to Alan Papp, Arizona Public Service (APS) statements that they thought the coal was always sub-bituminous as was told by BHP. The contradicting statement constitutes major fraud against the United States, 18 USC 1031 and Conspiracy to Commit Offense or to Defraud United States, 18 USC 371 in the BART proceedings for the Four Corners Power Plant. Appendix 3 is BANC MSS 2001/108, Leading a changing Utah construction and mining company: oral history transcript: Utah International, GE-Utah, BHP-Utah, 1954-1987/ Alexander M. Wilson. See page 85, where Mr. Wilson says the coal at the Navajo Mine is Bituminous. This is in contrast to the

Determination of Four Corners Coal Ranking, March 11, 2008, by Alan Papp.

It has long been assumed that the coal burned at Four Corners is subbituminous. Only recently, with coal classification affecting emissions standards, have we made a serious effort to determine the true classification of coal from the Navajo Min. Previously, it made little difference what name the coal went by. We just accepted BHP's statement that the coal was subbituminous. When we tried to verify that in light of the new mercury and NOx BART rules, we discovered that Navajo Mine coal was actually predominantly bituminous, only occasionally slipping into the subbituminous category. Further investigation uncovered the fact that BHP had been wrongly applying the ASTM formula. They had been entering data as decimal fraction, when ASTM intended it to be entered as whole percentage numbers (for example 22.3% ash should be entered as 22.3, not 0.223).

These criminal acts cast serious doubts on the APS testimony that was given to the EPA in *Arizona Public Service v. EPA*, 562 F.3d 1116 (10th Cir. 2009).

## CONCLUSION

GRIC has sunk TWG by not allowing a power line through there community for Superstition Vista and there solar plant. The criminal acts in the Four Corners Power Plant BART proceedings cast serious prejudice on *Arizona Public Service v. EPA*, 562 F.3d 1116 (10th Cir. 2009).

In adopting Reclamation's secretly devised regional haze plan for 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 foregoing reasons, EPA's Final Rule for NGS should be vacated, or reversed and remanded. Dated June 12, 2015.

Respectfully submitted,

By: /s/Vincent Harris Yazzie

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## **CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 1,879 words, as counted by a word processing system, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman type style.

By: /s/Vincent Harris Yazzie

**CERTIFICATE OF SERVICE**

I hereby certify that on June 12, 2015, I filed the foregoing Petitioner VINCENT HARRIS YAZZIE Reply Brief via the Court's CM/ECF system, which will electronically serve all counsel of record.

By: /s/ Vincent Harris Yazzie