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*Chairman*

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March 01, 2010

Jarod Blumenfeld, Administrator  
USEPA Region IX  
75 Hawthorne St.  
San Francisco, CA 94105

RE: The Hopi Tribe's Comments on the Environmental Protection Agency's Advanced Notice of Proposed Rulemaking Regarding Best Available Retrofit Technology for Nitrogen Oxide Emissions at the Navajo Generating Station Docket Number EPA-R09-OAR-2009-0598.

Dear Administrator Blumenfeld:

Enclosed are the Hopi Tribe's comments on the above referenced Proposed EPA Rulemaking regarding the Navajo Generating Station. The Hopi Tribe appreciates the opportunity to comment and express its views and recommendation on this extremely important issue.

The Hopi Tribes comments are divided into three parts: Part I is a general overview of the Hopi Tribe and its economic relationship to the Navajo Generating Station (NGS) together with a summary of the Tribe's view and recommendations concerning the ANPR; Part II discusses the Trust Responsibility of the United States –including its administrative agencies - to the Hopi Tribe in the context of coal as a Hopi trust asset and the backbone of the Hopi economy and the responsibility of the United States to protect that asset and economy for the benefit of the Hopi Tribe and its people; and Part III, which sets out the economic analysis prepared for the Hopi Tribe by ICF International (ICF) demonstrating the likelihood of a shutdown of the Navajo Generating Station through a combination of a stringent EPA SCR BART determination for NGS in concert with other looming environmental regulatory actions impacting the plant. Parts 1 and 2 of our comments are set out in one PDF document and Part 3 is set out in a separate PDF document, both of which are attached.

The Hopi Tribe's comments are being submitted via e-mail in PDF format. A hardcopy will follow in the mail.

Best Regards:

A handwritten signature in black ink, appearing to read "Leroy Shingoitewa", written over a horizontal line.

Leroy Shingoitewa  
Chairman, Hopi Tribal Council

**The Hopi Tribe's Comments on the Environmental Protection Agency's Advanced Notice of Proposed Rulemaking Regarding Best Available Retrofit Technology for Nitrogen Oxide Emissions at the Navajo Generating Station**

**Docket Number EPA-R09-OAR-2009-0598**

**March 1, 2010**

**Introduction**

On August 28, 2009, the Environmental Protection Agency (EPA) published an Advanced Notice of Proposed Rulemaking (ANPR) on Assessment of Anticipated Visibility Improvements at Surrounding Class I Areas and Cost Effectiveness of Best Available Retrofit Technology (BART) for Four Corners Power Plant and Navajo Generating Station. The Hopi Tribe submits these comments to state its views concerning the ANPR and the impact of an EPA BART decision that forces the premature closure of the Navajo Generating Station.

These comments are divided into three parts: Part I is a general overview of the Hopi Tribe and its economic relationship to the Navajo Generating Station (NGS) together with a summary of the Tribe's view and recommendations concerning the ANPR; Part II discusses the Trust Responsibility of the United States –including its administrative agencies - to the Hopi Tribe in the context of coal as a Hopi trust asset and the backbone of the Hopi economy and the responsibility of the United States to protect that asset and economy for the benefit of the Hopi Tribe and its people; and Part III, which sets out the economic analysis prepared for the Hopi Tribe by ICF International (ICF) demonstrating the likelihood of a shutdown of the Navajo Generating Station through a combination of a stringent EPA SCR BART determination for NGS in concert with other looming environmental regulatory actions impacting the plant.

## Part I – General Overview and Summary of Hopi Tribe’s Views and Recommendations

### The Economic Costs of an EPA SCR BART Requirement for NGS Coupled with the Minimal Visibility Improvement achieved Through SCR and the Attendant Devastating Harm to the Hopi Economy of an NGS Shutdown Weigh Overwhelmingly Against an EPA SCR Requirement for NGS

The Hopi Tribe’s comments are made against the backdrop of EPA’s pending BART analysis concerning possible retrofits at NGS intended to address visibility issues in class I air areas, including the Grand Canyon. EPA is considering two options that lay at extreme opposite ends of the costs spectrum. Stringent EPA controls would require the retrofit of very expensive Selective Catalytic Reduction Controls (SCR) in addition to the less costly but almost equally effective Low NO<sub>x</sub> Burners (LNB)/Separated Over-Fired Air (SOFA) combustion modifications already being installed at NGS. As shown in the ICF analysis set out in Part III of these comments (with reference to the Salt River Project (SRP) analysis previously submitted to EPA as part of the pending NGS BART analysis), SCR controls are 15.8 times more costly in terms of capital costs compared to LNB/SOFA<sup>1</sup>. The incremental \$/ton of NO<sub>x</sub> removed costs of SCR including annualized capital and O&M are 13.3 times higher than LNB/SOFA.<sup>2</sup> This already high \$/ton cost assumes a 20 year NGS lifetime which the ICF analysis shows may be too long, and hence, the expected \$/ton costs may be much higher. NGS is already in the process of installing LNB/SOFA NO<sub>x</sub> controls<sup>3</sup>. These NO<sub>x</sub> controls are expected to be on line in stages from 2009 to 2011. These controls are also referred to as Low NO<sub>x</sub> Burners (LNB + SOFA).

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<sup>1</sup> Source – Revised BART Analysis for the Navajo Generating Station Units 1-3, prepared for Salt River Project Navajo Generating Station, Tempe, Arizona by ENSR Corporation, January 2009, Document No: 05830-012-300. Pages ES-5 to ES-8.

<sup>2</sup> EPA did not estimate the incremental \$/ton NO<sub>x</sub> removed costs in its August 2009 ANPR in spite of its own recommendations to consider incremental as well as average costs in BART analyses. See Table 14, page 44322. Federal Register/Vol. 34, No. 116, August 28, 2009, Proposed Rules.

<sup>3</sup> Revised BART Analysis for the Navajo Generating Station Units 1-3, prepared for Salt River Project Navajo Generating Station, Tempe, Arizona by ENSR Corporation, January 2009, Document No: 05830-012-300.

The ICF analysis assumes that the incremental cost of the proposed SCR controls is \$663 million or \$295/kW (see Exhibit III-3). The source of this estimate is SRP<sup>4</sup>. In the SRP analysis, Option 1 (LNB+SOFA) costs \$42 million (capital cost) compared to Option 4 (LNB+SOFA + SCR) which costs \$705 million in capital cost. This is an incremental \$663 million in 2008 dollars (The document did not provide the year for the dollars. ICF assumes it is in 2008 dollars because of the date the revised BART analysis was released). The variable costs of SCR include ammonia which when injected into the flue gas in the presence of catalyst converts NO<sub>x</sub> to N<sub>2</sub>.

ICF has reviewed SRP's BART analysis in connection with preparing its analysis submitted as Part 3 of these comments.<sup>5</sup> Based on SRP's BART analysis, the incremental visibility improvement achieved by installing SCR in addition to LNB/SOFA is only 0.33 delta-deciview (DV) from Option 1 – LNB+SOFA only across 11 class I areas. Because only visibility improvements of greater than 1.0 DV are considered perceptible to the human eye, the small incremental visibility improvement achieved by installing SCR at NGS is not noticeable. This finding is contained in SRP's January 2009 Update of their BART Analysis of NGS (Exhibit II-1). On pages ES-5 to ES-8, the study analyzes the impact of installing LNB+SOFA (Option 1) and LNB+SOFA + SCR (Option 4). The Hopi Tribe and ICF agree with the SRP analysis though we did not analyze the visibility modeling underlying this conclusion<sup>6</sup>.

The fundamental problem with attempting to achieve greater visibility improvements in the subject Class I areas through an SCR requirement at NGS is the simple fact that visibility

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<sup>4</sup>Revised BART Analysis for the Navajo Generating Station Units 1-3, prepared for Salt River Project Navajo Generating Station, Tempe, Arizona by ENSR Corporation, January 2009, Document No: 05830-012-300. Page E-5, Table ES-1.

<sup>5</sup> Analysis of Economic Impacts on The Hopi Tribe and Navajo Nation of Stringent NO<sub>x</sub> BART Decision for the Navajo Generating Station, ICF International, March 1, 2010.

<sup>6</sup> SRP shows an improvement of 0.33 in deciviews from Option 1-LNB+SOFA by installing SCR at NGS and this change is not detectable by the human eye. NPS disagrees with the extent of the improvement. ICF did not analyze changes in light extinction.

impairment is primarily caused, not by NGS and other power plants, but instead originates from other haze and particulate sources such as automobile emissions that occur in Los Angeles and migrate to class I Areas, and more localized sources such as dust and smoke from forest fires and controlled burns. According to the SRP analysis, power plants contribute only a small fraction of the haze problem in the Grand Canyon and other Class I Areas. If this finding is accurate, the huge costs of EPA's NGS SCR proposal are not justified by the small incremental benefits achieved. This is especially true given the potential catastrophic economic outcome for the Hopi and Navajo Tribes and in light of the Trust responsibility of the United States to protect the Hopi Tribe and its assets from outright destruction or other harm. Even larger visibility improvements would not justify the economic devastation that would be imposed on the Hopi people and their homeland by an EPA SCR requirement at NGS.

The Hopi Tribe believes that the SRP and ICF analysis demonstrate that LNB/SOFA rather than SCR should be the BART choice for NGS. The total economic costs of SCR, inclusive of capital costs of \$705 million for LNB/SOFA plus SCR, together with variable costs that could push total SCR costs to well over one-billion dollars, coupled with the huge economic cost to the Hopi and Navajo tribes resulting from a premature and unnecessary shutdown of NGS are simply too great to justify the slight incremental visibility improvement to be achieved through an SCR requirement.<sup>7</sup> Almost all of the expected Class I visibility improvement that can reasonably be achieved through the NGS BART process will be achieved through installation of LNB/SOFA at NGS. In addition to achieving most of the desired visibility improvements, the LNB/SOFA option has the added advantage of not causing the collapse of the Hopi economy through shutdown of NGS. For these reasons, the Hopi Tribe recommends that EPA require the

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<sup>7</sup> Not included in these costs are the costs of potential releases of the ammonia used in the SCR during transportation and storage. LNB and SOFA does not use ammonia. Ammonia is an acutely hazardous substance. Ammonia will be delivered via truck. Ammonia slip and associated secondary particulate matter was not considered by EPA.

NGS owners to install LNB/SOFA as the NGS BART requirement and not require an SCR technology install on the plant.

### **I.1 The Hopi Tribe's Economic Relationship to NGS**

The Hopi Tribe supplies coal and water needed to operate the Navajo Generating Station (“NGS”). In return, the Hopi Tribe receives compensation used to fund essential Hopi social and governmental services. Decisions regarding the future disposition of NGS will have direct and dramatic financial and cultural consequences on the Hopi Tribe. The Hopi Tribe has a tremendous stake in the outcome of the current NGS BART proceedings. It is fair to say that few, if any, future decisions relating to the Hopi Tribe will have as great an impact as this one.

By way of background, under coal leases with Peabody Western Coal Company (“Peabody”), coal jointly owned by the Hopi Tribe and Navajo Nation is mined at the Black Mesa Mine complex. This coal fuels NGS. The coal mined at Black Mesa is transported to NGS at Page, Arizona by means of a single purpose dedicated rail line.

The Hopi Tribe has provided coal to NGS for 36 years. The Tribe’s long relationship with NGS extends back even earlier as the planning for the plant was based on the expectation that Hopi and Navajo coal would be used. While the Tribe has not been a formal partner in the ownership and operation of the plant, there is no question that the Tribe’s economic security is fundamentally tied to the ongoing operation of the plant. The Tribe rightly views the mine and power plant as a single economic complex, with Hopi coal being an important component in the overall success of the complex.

Eighty-eight percent (88%) of the annual Hopi tribal budget is dependent upon NGS derived revenues, which fact directly impacts every aspect of Hopi life, including the education of Hopi young people, health and social service programs, infrastructure, and many other essential Tribal programs. To say that NGS is important to the Tribe would be an understatement: it is an essential and vital element of the tribe's current and future economy.

The Hopi Reservation is isolated and rural, lying almost 90 miles in any direction from the closest non-Indian communities and economic centers. In addition, the Hopi Reservation is entirely surrounded by the larger Navajo Nation, and has restricted access to economic opportunities available in the surrounding communities. These restrictions have and will continue to impose significant impacts on the job market and the local Hopi economy. The Hopi Tribe has no realistic option for replacing revenues derived from NGS. In contrast to most non-Indian communities in Arizona, the Hopi live in an extremely remote area far off the mainstream of the Arizona economy. The Tribe is located far from existing population centers, isolating the Hopi people from employment opportunities. The Hopi Tribe has no on-site industrial development and, other than coal, the Hopi resource base is extremely limited. Limited tourism and crafts industries cannot sustain the Hopi population base. Current unemployment is at least 50%. The Hopi have chosen not to follow the path of other tribes which have built large gaming institutions to help secure their economic stability; instead, the Hopi people have twice directly rejected gaming since it is antithetical to our culture and religious beliefs. All of these factors illustrate how critical it is to preserve our long standing economic relationship with NGS.

All of the coal requirements of NGS are obtained from the Black Mesa mine complex, located in northeastern Arizona, approximately 125 miles northeast of the City of Flagstaff. There are two separate, but adjacent mines on Black Mesa, the Black Mesa Mine and the Kayenta Mine.

The two mines cover approximately 62,750 acres of Hopi and Navajo Tribal lands. NGS obtains its coal from the Kayenta Mine. All of NGS' coal requirements come from the Black Mesa Complex. Since the shutdown of the Mohave Generating Station (MGS) at end of 2005 NGS has been the sole customer of the Hopi/Navajo coal from Black Mesa. Coal from the Kayenta Mine has been delivered to NGS since 1974.

The Hopi Tribe and Navajo Nation jointly own the mineral rights to the coal that is located on Black Mesa and within the Hopi 1882 reservation. The coal is mined under coal mining leases with Peabody, which operates both the Black Mesa Mine and Kayenta Mine. The coal is mined under three coal leases. One lease, commonly referred to as the Northern Lease, covers coal belonging solely to the Navajo Nation. Two other leases – one with the Hopi Tribe and the other with the Navajo Nation – referred to as the Southern or joint-use leases, relate to coal reserves jointly owned by the Hopi and Navajo. The Hopi Tribe and Navajo Nation receive royalty payments under the leases.

The Hopi Tribe derives almost all of its revenues directly or indirectly from coal mining activities. In 2009, the Hopi Tribe's coal-based revenues were \$14 million, representing approximately 88 percent of the Tribe's total annual governmental budget. These revenues support essential Hopi governmental services on the Hopi Reservation and are both a direct and indirect source of government and private sector jobs for members of the Hopi Tribe.

The Hopi Tribe is a federally recognized Indian Tribe, having sovereign authority to manage its internal affairs and to govern itself and its people. The Hopi Tribe is responsible for delivering essential governmental services within the boundaries of its Reservation homeland, which was established in 1882 and is approximately 1.6 million acres in area. These

governmental services include health, education, law enforcement, social services, water, sewer, road infrastructure, economic development, housing, elderly services, youth services, natural resource protection, land and water management, legislative and administrative functions, and the entire range of services that are typically provided by Indian Tribes and local governments to their citizens. The Hopi's governmental operational and capital improvement programs are almost totally dependent on royalties and revenues derived from these natural resources. In addition, the Tribe is responsible for insuring that the social and cultural integrity of the Hopi Tribe continues to provide a safe-haven for future generations of Hopi people.

The Hopi Tribe can only meet these responsibilities if the Hopi reservation is developed as an economically viable homeland where the Hopi people can raise their children, earn a living, and practice their culture and religion against the backdrop of economic development, opportunities for individual development, economic stability, and a good quality of life and standard of living. These goals can only be realized if adequate financial resources are available to provide the investment capital needed to realize fully the potential of the human and natural resources of the Hopi Tribe.

Unlike most state and municipal governments, the Hopi Tribe has little or no tax base from which to produce governmental revenues. Income taxes assessed on the reservation are paid exclusively to the United States. The lands of the Hopi Tribe are held in trust by the United States for the benefit of the Tribe and its members, and in the absence of business development offer little opportunity for property taxation. Taxes on local sales and other transactions are deemed inappropriate because of the dire financial circumstances of most of the Hopi people. Therefore, the cost of delivering essential governmental services must be paid from other revenue sources. Other sources of Hopi Tribal revenue include earnings on investments,

revenues derived from a number of tribally owned small businesses and various small business governmental license fees.

According to Hopi Tribal enrollment data, the Hopi Tribe has a total membership of approximately 12,500 people. The 2000 U.S. census reports that approximately 7,000 Hopi live on the Hopi Reservation. The Hopi have lived in their villages on Black Mesa since prehistoric times. One of the 12 Hopi villages, Oraibi, is referred to by anthropologists as the oldest continuously inhabited settlement in North America, dating to at least 1100 A.D. The Hopi Reservation is entirely surrounded by the larger Navajo Nation and has restricted access to the economic opportunities available in the surrounding communities as well as in the state and national communities.

Many Hopi still live as their ancestors did, planting and harvesting small crops of corn, beans, and squash, and participating in ancient rituals and ceremonies intended to bring peace and prosperity to the Hopi and to the world community in general. Much of the reservation is used for cattle grazing, producing additional supplemental food and income for Hopi family subsistence.

On-reservation Indians, including the Hopi, remain the poorest ethnic group in the nation and suffer from some of the most acute poverty-related socio-economic maladies. Members of the Hopi Tribe (as well as the Navajo Nation) have endured a quality of life far lower than that of non-Tribal citizens of the United States. Employment, income, and poverty statistics clearly demonstrate that the Hopi are experiencing living conditions considerably worse than the rest of the nation.

In 2009, the unemployment rates for the Hopi were approximately 4.4 to 4.9 times those of the U.S. and Arizona. While the unemployment rate in the U.S. and Arizona was 9.3 and 8.5 percent<sup>8</sup>, respectively, Hopi unemployment was over 50 percent. Of those who are employed, our statistics show that approximately 45.2 percent earn wages below the poverty level in 2008 according to national poverty guidelines<sup>9</sup>.

The median income earned by employed Hopi and Navajo people is approximately one-half of that earned by their non-tribal counterparts<sup>10</sup>. Median household income on the Hopi Reservation was about \$28, 600 per year in 2008<sup>11</sup>.

But these bleak figures do not convey fully the dire living conditions found in reservation communities. According to the 2000 U.S. Census, more than 44 percent of Hopi families with children under 18 years of age were living below the national poverty level. The figure rises to more than 50 percent below the poverty level for families with children below the age of 5 years old. A 1997 report by the U.S. Department of Health and Human Services found that over 63 percent of Hopi reservation households earned an income that was below the HHS poverty level.

Hopi household infrastructure is also lacking. There is a stark disparity in the basic physical comforts nearly all Americans take for granted, such as a complete kitchen, flush toilets, running water and a telephone. According to the 2000 U.S. Census, almost 40 percent of Hopi homes lack complete plumbing facilities, and more than 35 percent lack complete kitchen facilities. In contrast, in the United States generally, only 1.2 percent of homes lack complete plumbing facilities and only 1.3 percent lack complete kitchen facilities. In the State of Arizona,

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<sup>8</sup> Bureau of labor Statistics

<sup>9</sup> <http://www.city-data.com/city/Hopi-Arizona.html#ixzz0f3IWAA3c>

<sup>10</sup> U.S. Census Bureau, 2008 American Community Survey.

<sup>11</sup> <http://www.city-data.com/city/Hopi-Arizona.html#ixzz0f3IWAA3c>

less than 2 percent of all homes lack complete plumbing and kitchen facilities. Moreover, according to the Tribal Census Project in 1997, approximately 78 percent of owner-occupied housing units within the categories of “low income” and “very low income” have serious structural deficiencies.

Living conditions on the Hopi reservation are also graphically illustrated in statistics relating to water consumption. Hopi per capita use of water – the amount of water used for all household, municipal, commercial and industrial development calculated on a per-person basis – lags far behind local non-Indian communities. For example, Hopi per-capita water use averages 10-35 gallons per-capita per day (gpcpd) while local non-Indian communities bordering the Hopi reservation, such as Flagstaff, Winslow and Holbrook average between 120-160 gpcpd. In Phoenix, the average use is between 220-240 gpcpd, and in some Phoenix communities as high as 1000 gpcpd. Many Hopi still must haul their daily water supply in barrels in the back of their pick-up truck from community wells.

According to a report<sup>12</sup> published by Arizona State University, approximately 71.4 percent of Hopi people fortunate enough to have a job are employed in the public sector, of which the Hopi Tribal government is the primary employer – paying wages derived from NGS coal revenues. Federal and state jobs in the local hospital and school system make up the bulk of remaining jobs. The non agriculture private sector accounts for 24.7 percent of the employment. The major employers on the reservation are the Hopi Tribe, employing about 475 people, and the United States government, employing an additional 400 at the local Indian Health Service Facility, and the Bureau of Indian Affairs school system.

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<sup>12</sup>*Economy Of Hopi Reservation*, Center for Competitiveness and Prosperity Research, L. William Seidman Research Institute, W. P. Carey School of Business, Arizona State University, Tempe, Arizona in January 2008.

There is no industrial development on the reservation except the mining operation of Peabody. Aside from government employment with the Tribe and Federal government, Hopi people have only limited employment opportunities in a very scant private sector consisting of a few retail and service jobs and the cottage production of arts and crafts for sale in the tourist industry. The potential for developing additional industrial and service jobs, and thus an expanding economy, is hampered by a serious lack of basic infrastructure – water, sewer, roads, electric distribution – and the isolated nature of the Hopi reservation. The Tribe is located in all directions about 90 miles from regional highway and rail transportation corridors and non-Indian population centers. Such circumstances make it difficult to attract outside business and investment interest.

The Hopi Reservation is largely characterized by colorful rocks and sand, sparse plant growth and a complete lack of perennially flowing streams. These ingredients have been woven together by nature into a landscape that is pleasing to the eye and dear to the Hopi, but largely unproductive in terms of economic returns. The reservation's single most important natural resource is its large deposits of high-BTU, low-sulfur bituminous coal. The coal deposits are located throughout much of the reservation and estimates by the United States Geological Survey indicate that as much as 22-billion tons of coal reserves may lie within the reservation. Much of these reserves probably cannot be economically mined due to their depth and the constraints of current coal mining technology.

The markets for Hopi coal have historically been two power plants – NGS and the now de-commissioned Mohave Generating Station (MGS) at Laughlin, Nevada. As previously mentioned, NGS coal is mined from the Kayenta Mine and transported to NGS via a single-

purpose dedicated rail line. The NGS power plant buys all of the annual production of the Kayenta mine, approximately 8 million tons.

While additional markets for Hopi coal theoretically exist, those markets cannot be developed in the absence of an economically viable means of transporting the coal off-reservation. The next best solution is reservation based energy production via a mine-mouth power plant complex. However, this alternative is currently constrained by insufficient water resources.

As previously mentioned, coal payments relating to NGS operations in 2009 amounted to approximately \$14 million. This constitutes approximately 88 percent of the Hopi Tribal budget of approximately \$16 million annually. If NGS continues to operate as a coal-fired plant in the future, we anticipate more coal will be mined from areas jointly owned by the Hopi and Navajo and our share of royalty revenues will increase.

## **I.2 The Economic Impacts of a Regulatory Forced Closure of NGS**

The cessation of operation at NGS would have a catastrophic effect on the Hopi Tribe's economy in the following ways:

**Curtailment of critical social programs.** The enormous reduction in the Tribe's budget would force elimination or significant reduction in funding for critical programs that many take for granted, including education, elderly and youth service programs, and even law enforcement.

**Lost Employment.** We estimate that we would also be required to lay off 400 Hopi government employees, virtually all of whom support a large extended family. A relatively

small number of Hopi who work at the Kayenta Mine would also be laid off. The loss of these jobs would almost certainly send these families spiraling deeply into poverty and onto the welfare rolls.

**Indirect Economic Losses Related to Lost NGS Revenues.** The direct loss of Hopi Tribal revenues and lay-offs of government personnel will have a ripple effect in the local Hopi economy. The revenues received from coal mined for NGS are reinvested in the Hopi economy through the goods and services provided by the Hopi Tribal government in the course of carrying out its governmental responsibilities. The revenues, paid out as salaries, capital improvements, and deliverables, constitute the backbone of the local Hopi economy. They support Hopi families and extended family members as they work to provide food, housing, clothing and education to individual family members. Loss of NGS-related revenues would severely handicap these Hopi families in achieving a satisfactory basic standard of living.

**Loss and retardation of critical capital and infrastructure programs.** Critical capital and infrastructure programs which the Hopi would otherwise be able to undertake, and which could accelerate in the future due to the expected increase in coal royalty revenues as more jointly owned coal is mined to operate NGS, could not be pursued. Without NGS revenues, the Tribe will be forced to curtail its development activities in the following critical areas:

- Transportation infrastructure;
- Water/sewer infrastructure;
- Electricity delivery infrastructure;
- Utility authority and low cost electricity;
- Telecommunications infrastructure;

- Renewable energy development; and
- Additional coal resource development.

These essential, basic infrastructure programs offer the prospect of meaningful economic development and economic diversification for the Hopi people. In a very real sense, NGS revenues constitute the development capital the Hopi Tribe must depend on to ultimately produce a sustainable Hopi economy. Without that development capital, all of the Tribe's economic development plans will necessarily be curtailed. Loss of NGS revenues will constitute a significant step backward for the Tribe by reducing the level of goods and services produced by the Tribe as well as curtailing the ability to improve the human resources and infrastructure that are essential to building a stable Hopi economy.

There are no readily available jobs for laid-off employees. These layoffs would, in turn, trigger additional layoffs as the repercussions of the lack of such a substantial revenue stream rippled through the Hopi (and Navajo) economies. Many would be forced to leave the reservation and their extended families in search of work. It is doubtful that replacement funding for affected social programs would be available from any source. The federal government currently provides some funding for such programs, but growing federal deficits, the cost of the Iraqi and Afghanistan wars, and the cost of existing federal programs leaves little hope that Hopi budget shortfalls could be made up by supplements from the federal budget. Given the constraints on economic development on the Hopi reservation, as outlined above, it would be extremely difficult to replace NGS derived Tribal revenues, either in the short term or in the foreseeable future.

The cessation of operations at the Navajo Generating Station would have catastrophic effects on the tribe's economy. For better or worse, the Hopi's economic and social survival is currently dependent on continued operation of the Navajo Generating Station.

## **Part II - The Trust Responsibility of the United States to the Hopi Tribe**

The fiduciary responsibilities of the United States require the Environmental Protection Agency (EPA) to regulate pollution control equipment at the Navajo Generating Station (NGS) in a manner that avoids impairing the rights of and utilization of resources belonging to the federally recognized Indian tribes that own the coal supplied to NGS – the Hopi Tribe and Navajo Nation. The strict fiduciary obligations the United States owes to Indian tribes unquestionably attach to all federal executive agencies, including EPA, as the Ninth Circuit specifically has held. *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981). Unless Congress has expressly directed otherwise, federal agencies – including EPA – must observe “the most exacting fiduciary standards” – including the fundamental duty of loyalty – in its actions affecting the lands and resources of Indian tribes that are the beneficiaries of federal trust responsibility. That duty of loyalty requires that EPA as trustee order its own activities to avoid harm to rights and resources of the Indian tribal trust beneficiaries. The overriding reason for this rule is to protect tribes as self-governing entities from federal actions that would undermine their autonomy and efforts to attain economic self-sufficiency – both of which are protected by the historic federal trust responsibility as elaborated by court decisions as well as embedded in modern federal Indian policy as established by both Congress and the Federal Executive.

1. **Origins and purposes of trust responsibility doctrine.** The “undisputed existence of a general trust relationship between the United States and the Indian People,” *United*

*States v. Mitchell*, 463 U.S. 206, 225 (1983), is well established in law.<sup>2</sup> The United States Supreme Court first formulated the trust responsibility doctrine nearly 170 years ago in the two Cherokee cases, both of which involved the question of whether Georgia state statutes were applicable to persons residing on lands secured to the Cherokee Tribe by federal treaties. In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), the Court held that it lacked original jurisdiction over a suit filed by the Tribe to enjoin enforcement of the state statutes because the Tribe was not a “foreign state” within the meaning of that term in Article III of the Constitution. In *Cherokee Nation*, Chief Justice John Marshall described the Federal-Indian relationship as “perhaps unlike that of any other two people in existence” and “marked by peculiar and cardinal distinctions which exist nowhere else.” *Id.* at 16. The Court agreed with the Tribe’s contention that it was a “state” in the sense of being “a distinct political society . . . capable of managing its own affairs with governing itself.” *Id.* But it held that tribes were not “foreign states,” but rather were subject to the protection of the United States and might “more correctly, perhaps, be

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<sup>2</sup> *E.g.*, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Fellows v. Blacksmith*, 60 U.S. (19 How) 366 (1857); *United States v. Kagama*, 118 U.S. 375 (1886); *Choctaw Nation v. United States*, 119 U.S. 1, 28 (1886); *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 295 (1890); *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 305 (1902); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564 (1903); *Tiger v. Western Investment Co.*, 221 U.S. 286 (1911); *Heckman v. United States*, 224 U.S. 413 (1912); *Choate v. Trapp*, 224 U.S. 665, 675 (1912); *United States v. Sandoval*, 231 U.S. 28, 45-46 (1913); *United States v. Pelican*, 232 U.S. 442 (1914); *United States v. Nice*, 241 U.S. 591 (1916); *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919); *United States v. Payne*, 264 U.S. 446, 448 (1924); *United States v. Candelaria*, 271 U.S. 432 (1926); *United States v. Creek Nation*, 295 U.S. 103 (1935); *Shoshone Tribe v. United States*, 299 U.S. 476 (1937); *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339 (1941); *Tulee v. State of Washington*, 315 U.S. 681 (1942); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942); *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 47 (1946); *United States v. Mason*, 411 U.S. 391 (1973); *Morton v. Ruiz*, 415 U.S. 199, 236 (1974); *Morton v. Mancari*, 417 U.S. 535, 552-55 (1974); *United States v. Sioux Nation*, 448 U.S. 371, 408 (1980); *Nevada v. United States*, 463 U.S. 110, 142 (1983); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985).

dominated domestic dependent nations.” *Id.* at 17. Chief Justice Marshall concluded that “their relation to the United States resembles that of a ward to his guardian.” *Id.*

In the second Cherokee case a year later, *Worcester v. Georgia*,<sup>13</sup> the Court invalidated the Georgia statutes because the treaties with the Cherokees and the Federal Trade and Intercourse Acts<sup>14</sup> protected tribal communities as “having territorial boundaries, within which their authority [of self-government] is exclusive. . . .”<sup>15</sup> In *Worcester*, Chief Justice Marshall meticulously analyzed the treaties with the Cherokee and emphasized that their right “to all the lands within those [territorial] boundaries . . . is not only acknowledged but guaranteed by the United States.”<sup>16</sup> The trusteeship reflected in *Cherokee Nation* was implied from this guarantee, for there was no express language in any treaties specifically recognizing a trust relationship.<sup>17</sup>

The specific holding of the Cherokee cases was that federal power over Indian affairs was exclusive vis-a-vis the states. In modern legal parlance, state power was “preempted.” Chief Justice Marshall concluded that the framers of the Constitution intended Indian affairs to be exclusively the province of the federal government by contrasting the constitutional provisions dealing with Indians with comparable ones in the Articles of Confederation it replaced.<sup>18</sup>

The implications of the Court’s analysis in *Worcester* went well beyond the holding that the state statutes were “repugnant” under the Constitution. It established that tribes’ status as sovereign entities, “distinct political societies,” was protected by federal law – from state

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<sup>13</sup> 31 U.S. (6 Pet.) 515 (1832).

<sup>14</sup> Act of July 22, 1790, 1 Stat. 137, 139; Act of May 19, 1796, §12, 1 Stat. 469, 472; Act of March 3, 1799, § 2, 1 Stat. 743, 746; Act of March 30, 1802, § 12, 2 Stat. 139, 143, *codified* at 25 U.S.C. § 177.

<sup>15</sup> 31 U.S. at 557.

<sup>16</sup> *Id.*

<sup>17</sup> The Court also based its analysis on the Trade and Intercourse Acts. These Acts protected Indian land occupancy - as providing an additional source for the immunity of the Cherokee lands from state jurisdiction and implicitly an additional basis for the trust relationship itself.

<sup>18</sup> *Worcester*, 31 U.S. at 559.

legislative control, as *Worcester* specifically held, but also more broadly from the exclusive federal power over Indian affairs established under the Constitution. While the Court in *Cherokee Nation* denominated tribes as “dependent” nations vis-à-vis the federal government, that conception reflected the relationship established by the treaties that extended the protection of the United States over the tribes which were in fact within its national territory, and thus were sovereign entities protected by the United States, rather than “foreign” states. Chief Justice Marshall’s analysis of the treaties with the Cherokee also established a federal-tribal relationship that protects tribes’ self-governing status from federal as well as state interference.<sup>19</sup>

Addressing specific provisions in the Cherokee treaties, the Court construed them as “explicitly recognizing the national character of the Cherokees and their right of self-government . . . [and] assuming the duty of protection, and of course, pledging the faith of the United States for that protection.” *Id.* at 556.

To summarize, the Court in *Cherokee Nation* analogized the trust relationship to a guardianship.<sup>20</sup> Recognizing that the United States has, under the Constitution, broad power over Indian affairs sufficiently extensive to make the tribes comparatively vulnerable to the exercise of that power, this guardian-ward construct also protects tribes from the perils to their self-governing status to which that extensive federal constitutional power potentially subjects them.

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<sup>19</sup> Chief Justice Marshall in *Worcester* recurrently emphasized that Britain and the United States had never attempted under the treaties or otherwise to govern tribes’ internal affairs. The Court in *Worcester* first considered the actions of the British with the Tribes prior to the Revolution, concluding that:

“certain it is that our history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers . . . . The King . . . never intruded into the interior of their affairs, or interfered with their self-government, so far as respected themselves only.”

*Worcester*, 31 U.S. at 547.

Turning to the treaties between the United States and Indian tribes, Chief Justice Marshall concluded that the United States had also adhered uniformly to the same general policy. *Id.* at 549-556.

<sup>20</sup> 30 U.S. at 17.

2. **Modern cases require United States executive agencies and officers to observe the most exacting fiduciary standards in taking actions that adversely impact tribes, their lands and resources.** Several modern Supreme Court cases have held that the trust responsibility imposes legal duties on federal executive agencies separate and apart from any express provisions of a treaty, statute, executive order or regulation. In *Lane v. Pueblo of Santa Rosa*,<sup>21</sup> the Supreme Court enjoined the Secretary of the Interior from disposing of tribal lands under the general public land laws. That action, the Court observed, “would not be an exercise of guardianship, but an act of confiscation.”<sup>22</sup> The tribal lands in *Lane* were not protected by any treaty, and there was no claim that the Secretary’s proposed disposition of them violated any treaty or statute. Shortly after *Lane*, in *Cramer v. United States*,<sup>23</sup> the Court voided a federal land patent that had conveyed – 19 years previously – lands occupied by Indians to a railway. The Indians’ occupancy of the lands was not protected by any treaty, executive order or statute, but the Court placed heavy emphasis on the trust responsibility and national federal Indian policy embedded in it protecting Indian resources as a basis for relief.<sup>24</sup> This responsibility meant that the officials involved had no statutory authority to convey the lands.<sup>25</sup>

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<sup>21</sup> 249 U.S. 110 (1919).

<sup>22</sup> *Id.* at 113.

<sup>23</sup> 261 U.S. 219 (1923).

<sup>24</sup> The Court observed “unquestionably it has been the policy of the federal government from the beginning to respect the Indian right of occupancy . . . .” 261 U.S. at 227 (citations omitted). The Court further noted, “[t]o hold that . . . they acquired no possessory rights to which the government would accord protection would be contrary to the whole spirit of the traditional American policy toward these dependent wards of the nation.” *Id.* at 228.

<sup>25</sup> *See Cramer*, 261 U.S. at 232-35. Prior to *Cramer* and *Lane*, in a case involving a claim under a special jurisdictional statute authorizing an action to be brought in the Court of Claims, the Supreme Court held that the United States had acted “clearly in violation of the trust” by opening a reservation to settlement under the general land laws of the United States, and observed:

That the wrongful disposal was in obedience to directions given in two resolutions of Congress does not make it any the less a violation of the trust. The resolutions, unlike the legislation sustained in [*Cherokee Nation v. Hitchcock*] . . . were not adopted in the exercise of the administrative power of Congress over the property and affairs of

Similarly, in *United States v. Creek Nation*,<sup>26</sup> the Supreme Court affirmed a portion of a decision by the Court of Claims awarding the tribe money damages against the United States for lands which had been excluded from their reservation and sold to non-Indians pursuant to an incorrect federal survey of reservation boundaries. The Court bottomed its decision on the federal trust doctrine:

The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to *limitations inhering in such a guardianship* and to pertinent constitutional restrictions.<sup>27</sup>

While the Court in *Creek Nation* did not specify precisely what “limitations” do “inhere to such a guardianship,”<sup>28</sup> subsequent cases have defined the standard applicable to the United States, in its capacity as trustee for Indian trust funds and natural resources, by applying the common law standards that govern private trusts and trustees. The Supreme Court looked to

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dependent Indian wards, but were intended to assert . . . an unqualified power of disposal over the [Indian] lands as the absolute property of the government.

*United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498, 510-11 (1913) (citation omitted). An accounting to the ward, in the form of payment of monetary damages, was required. See also *Shoshone Tribe of Indians v. United States*, 299 U.S. 476 (1937); *Chippewa Indians of Minnesota v. United States*, 301 U.S. 358 (1937).

<sup>26</sup> 295 U.S. 103 (1935).

<sup>27</sup> 295 U.S. at 109-10 (emphasis added). Lower court decisions have similarly enforced fiduciary obligations against executive officials apart from any specific treaty or statutory limitations. *E.g.*, *Jicarilla Apache Tribe v. Supron Energy Corp.*, 782 F.2d 855, 857-59 (10th Cir. 1986) (*en banc*), *cert. denied*, 479 U.S. 970 (1986) (holding Secretary’s fiduciary duties in mineral lease administration exceed requirements in Department’s regulations); *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094, 1100-01 (8th Cir. 1989) (holding BIA and IHS have a trust responsibility to clean up hazardous open dumps on Indian reservation despite lack of specific statutory language in Resource Conservation and Recovery Act so stating). See also text accompanying notes 82-89, *infra*.

<sup>28</sup> *Creek Nation*, 295 U.S. at 109-10.

common law trust duties when it decided *Seminole Nation v. United States*.<sup>29</sup> The Court there held that the conduct of the United States, as trustee for the Indians should “be judged by the most exacting fiduciary standards. ‘Not honesty alone, but the punctilio of an honor the most sensitive.’”<sup>30</sup>

The Supreme Court has continued to rely on the common law of trusts to define the United States’ trust obligations to Indians in other modern cases to protect tribes and tribal resources from destructive federal actions that breach the trust responsibility. In *United States v. Shoshone Tribe of Indians*,<sup>31</sup> the Court explained that “[a]s transactions between a guardian and his wards are to be construed favorably to the latter, doubts, if there were any, as to ownership of lands, minerals, or timber would be resolved in favor of the tribe.” In *United States v. Mason*,<sup>32</sup> the Court relied on A. Scott, *Trusts* (3d Ed. 1967) for standards governing United States as trustee, stating that the Government’s duty is “to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property.” In *United States v. Mitchell (Mitchell II)*,<sup>33</sup> the Court looked to the *Restatement (Second) of Trusts*, §§ 205-212 (1959), to find that all common law elements of a trust relationship are present with regard to Government’s obligations to Indians.<sup>34</sup> And following common law trust principles, the Court in *Mitchell II* held the United States as trustee liable to the Indians in damages despite the United States’ sovereign immunity. More recently in *United States v. White Mountain Apache Tribe*,<sup>35</sup> the Court held that the United States was liable for damages for breach of its fiduciary duties to

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<sup>29</sup> 316 U.S. 286, 297 n.12 (1942).

<sup>30</sup> *Id.* at 297 & n.12 (quoting Chief Judge (later Mr. Justice) Cardozo in *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928)).

<sup>31</sup> 304 U.S. 111, 117 (1938).

<sup>32</sup> 412 U.S. 391, 398 (1973).

<sup>33</sup> 463 U.S. 206, 226 (1983).

<sup>34</sup> *Id.* at 226 (citing *Restatement (Second) of the Law of Trusts*, §§ 205-212 (1959); G. Bogert, *The Law of Trusts and Trustees*, § 862 (2d Ed. 1965); 3 A. Scott, *The Law of Trusts*, § 205 (3d Ed. 1967)).

<sup>35</sup> 537 U.S. 465 (2003).

maintain, protect and preserve the property of a historic former military post it both owned in trust for a tribe and had administrative control over.

3. **The trust responsibility of the United States applies to all federal agencies, including EPA.** There can be no question that the trust responsibility applies to all actions of all federal agencies in the Executive Branch impacting Indians. *E.g.*, *Nance v. EPA*, 645 F.2d 701, 711 (9<sup>th</sup> Cir. 1981); *Covelo Indian Community v. Federal Energy Regulatory Commission*, 895 F.2d 581, 586 (9<sup>th</sup> Cir. 1990) (“the same trust principles that govern private fiduciaries determine the scope of FERC’s obligations to the [Indian] Community”). As the Ninth Circuit held in *Covelo, supra*, federal agencies like EPA and FERC must strictly adhere to the ordinary duties of a private fiduciary when their actions impact Indian rights.<sup>4</sup>

4. **Lower federal courts have adhered to Supreme Court precedent and applied common law fiduciary standards in evaluating executive actions dealing with Indians.** In *Menominee Tribe of Indians v. United States*,<sup>36</sup> for example, the Court of Claims found it to be “settled doctrine that the United States, as regards its dealings with the property of the Indians, is a trustee,” citing *Seminole*, and testing the Government’s handling of the Indians’ funds “by the standards applicable to a trustee.”<sup>37</sup> In *Cheyenne-Arapaho Tribes of Indians of Oklahoma v. United States*,<sup>38</sup> for example, the Court of Claims looked to the *Restatement of Trusts* to define the United States’ duties concerning investment of Indian trust funds, and held that as trustee, the Government was obligated: to promptly place trust funds at interest, to

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<sup>4</sup> In *Covelo*, the FERC action – relicensing a hydroelectric project – was not enjoined because the Tribe’s fishing and water rights were enhanced, not diminished by the Project, and FERC reserved the right to impose a stricter flow regime on the Project if necessary to protect tribal rights. 895 F.2d at 586.

<sup>36</sup> 101 Ct. Cl. 10, 19-20 (1944).

<sup>37</sup> Accord, *Menominee Tribe of Indians v. United States*, 102 Ct. Cl. 555, 562 (1945) (same).

<sup>38</sup> 512 F.2d 1390, 1394 (Ct. Cl. 1975).

maximize trust income by prudent investment, and “to keep informed so that when a previously proper investment becomes improper, perhaps because of the opportunity for better (and equally safe) investment elsewhere, funds can be reinvested.”<sup>39</sup> Other cases have applied the same common law trust principles to the government’s administration of Indian trust land and natural resources. In *Coast Indian Community v. United States*,<sup>40</sup> the Court of Claims held that “[t]he United States, when acting as trustee for the property of its Indian wards, is held to the most exacting fiduciary standards,” and looked to A. Scott, *Trusts* (3d Ed. 1967) to define standards applicable to United States in leasing land for Indians. See also *Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. Board of Oil and Gas Conservation*, 792 F.2d 782, 794 (9<sup>th</sup> Cir. 1986) (applying “the same trust principles that govern the conduct of private fiduciaries” to Department’s authority over mineral royalties); *Coast Indian Community v. United States*, 213 Ct. Cl. 129, 550 F.2d 639 (1977). *Navajo Tribe v. United States*, 364 F.2d 320, 322-24 (Ct. Cl. 1966). In *Navajo Tribe*, for example, an oil company had leased tribal land for oil and gas purposes. Upon discovering helium-bearing noncombustible gas which it had no desire to produce, the company assigned the lease to the Federal Bureau of Mines. The Bureau then developed and produced the helium under the terms of the assigned federal lease instead of negotiating a new, more remunerative lease for the tribe. The Court of Claims held this to violate the trust responsibility, and analogized these facts to the case of a “fiduciary who learns

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<sup>39</sup> *Accord Manchester Band of Pomo Indians v. United States*, 363 F. Supp. 1238, 1245 (N.D. Cal. 1973) (finding “[i]t is well established that conduct of the Government as a trustee is measured by the same standards applicable to private trustees” and relying on the *Restatement (Second) of Trusts* to hold that the United States as trustee is, *inter alia*, “under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary,” to account to the beneficiary for any profit arising out of the administration of the trust, and “to use reasonable care and skill to make the trust property productive”).

<sup>40</sup> 550 F.2d 639, 652, 653 n.43 (Ct. Cl. 1977).

of an opportunity, prevents the beneficiary from getting it, and seizes it for himself.” *Id.*, 364 F.2d at 324.

5. **The trust responsibility includes a duty of loyalty binding federal agencies to avoid interference with tribal self-government and economic self-sufficiency.**

As *Navajo Tribe* exemplifies, the “most fundamental duty owed by the trustee to the beneficiaries of the trust is the duty of loyalty . . . to administer the trust solely in the interest of the beneficiaries.” *Pegram v. Herdrich*, 530 U.S. 211, 224 (2000) (quoting 2A Austin W. Scott & William F. Fratcher on Trusts § 170 at 311 (4<sup>th</sup> ed. 1987)). *Accord NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981); Restatement (Second) of Trusts § 170 (1959); George G. Bogert and George T. Bogert, *Law of Trusts and Trustees* § 543 at 217-19 (2d rev. ed. 1993).

This means that federal agencies must administer their own programs and activities in a manner that avoids adverse impacts on Indian rights and natural resources owned by tribes. In *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252 (D.D.C. 1972), for example, the court enjoined diversions of water for a federal reclamation project which adversely affected a downstream lake on an Indian reservation. Although the diversions violated no specific statute or treaty, the court held them in violation of the trust responsibility. The court held that the Secretary of the Interior – as trustee for the Indians – was obliged to discharge his potentially conflicting duty to administer reclamation statutes in a manner which does not interfere with Indian rights. The court restrained the diversions because the Secretary’s activities failed “to demonstrate an adequate recognition of his fiduciary duty to the Tribe.”

Federal executive agencies thus owe a duty of undivided loyalty to Indian tribes and must order their actions to avoid adverse impacts on tribes, unless Congress had clearly and plainly

directed otherwise, *Nevada v. United States*, 463 U.S. 110, 128, 142 (1983).<sup>5</sup> See also *United States v. Dion*, 476 U.S. 734, 738-39 (1986).

The reason for enforcement of these strict fiduciary duties, including the duty of loyalty, arises from the need to protect tribes as self-governing societies – as first articulated by Chief Justice Marshall in the *Cherokee* cases. Tribes like the Hopi and Navajo depend heavily for their autonomy and economic self-sufficiency on the utilization of natural resources of their reservations. At Hopi, for example, 88 percent of the Tribe’s total annual operating revenues come from the sale of coal the Tribe has leased to Peabody which is supplied to NGS. The Tribe’s provision of vital governmental services to its members on its reservation – for roads, healthcare, law enforcement, education, environmental protection, and the full range of typical local government services – depends entirely on maintaining this revenue stream. Without these revenues, the Tribe would become entirely dependent on the United States, losing its status as an economically self-sufficient distinct political society. The trust responsibility protects against such a result by actions of federal agencies where Congress has not expressly directed the action that impairs tribal resources.

**6. Strict adherence to the trust responsibility also accords with the Nation’s Indian policy as established by all Presidents and by Congress over the past four decades.** Adherence to the fiduciary obligations of the United States so as to protect tribes as independently functioning self-governing entities has also been the bipartisan policy of both the federal Executive and Congress for over four decades.

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<sup>5</sup> In *Nevada*, the Tribe had already recovered substantial damages from the United States on account of its divided loyalty, and so was provided a remedy for the unlawful breach of trust involved there. 463 U.S. at 135, n.14 and 144, n.16.

For the Executive Branch, the centerpiece of this policy was President Nixon's Message to Congress on Indian Affairs in 1970,<sup>41</sup> espousing an Indian policy favoring tribal self-determination. Two years earlier, in his Message to Congress on "Goals and Programs for the American Indian" on March 6, 1968, President Johnson had similarly "propose[d] a new goal for our Indian programs: A goal that ends the old debate about 'termination' of Indian programs and stresses self-determination; a goal that erases old attitudes of paternalism and promotes partnership self-help."<sup>42</sup>

President Nixon's comprehensive and thoughtful Message specifically recognized the federal trust responsibility to Indians as a legal obligation of the federal government:

Termination implies that the Federal government has taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people and that it can therefore discontinue this responsibility on a unilateral basis whenever it sees fit. But the unique status of Indian tribes does not rest on any premise such as this. The special relationship between Indians and the Federal government is the result of solemn obligations which have been entered into by the United States Government. Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations.

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The special relationship between the Indian tribes and the Federal government which arises from these agreements continues to carry immense moral and legal force. To terminate this relationship would be no more appropriate than to terminate the citizenship rights of any other American.<sup>43</sup>

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<sup>41</sup> Special Message to the Congress on Indian Affairs, 213 PUB. PAPERS (July 8, 1970).

<sup>42</sup> Special Message to the Congress on the Problems of the American Indian: "The Forgotten American," 113 PUB. PAPERS (March 6, 1968).

<sup>43</sup> *Id.*

President Nixon included in his Message specific proposals that Congress enacted requiring federal agencies to transfer administrative responsibility for federal services and programs to tribes at the tribes' options and spurring Indian economic development by providing federal loan guarantees, loan insurance and interest subsidies. These proposals were enacted by Congress in 1975 as the Indian Self-Determination and Educational Assistance Act,<sup>44</sup> and Indian Financing Act.<sup>45</sup>

In the Indian Self-Determination Act of 1975, Congress expressly declared:

“its commitment to the maintenance of the Federal Government’s unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian Self-Determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct and administration of those programs and services.”<sup>46</sup>

Subsequent Administrations have furthered and expanded the tribal self-determination policies of Presidents Johnson and Nixon in a bipartisan fashion. For example, President Reagan’s Message to Congress on January 24, 1983<sup>47</sup> continued the commitment of the Nation to strong government to government relations with tribes and to support of tribal self-government and economic self-sufficiency. President Clinton’s Executive Order 13175<sup>48</sup> recognized “the right of Indian tribes to self-government” and supported “tribal sovereignty and self-determination.” President George W. Bush issued Presidential Proclamation 7500 on November

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<sup>44</sup> 25 U.S.C. § 450, *et seq.* (2005)

<sup>45</sup> 25 U.S.C. § 1451, *et seq.* (2005)

<sup>46</sup> 25 U.S.C. § 450a(b); *see also* Tribal Self-Governance Amendments of 2000, 25 U.S.C. § 458 aaa note, § 3(c) (the Congressional policy “to ensure the continuation of the trust responsibility of the United States to Indian tribes and Indian individuals” underlies the Self-Governance program).

<sup>47</sup> 19 Weekly Cong. Press Doc 99 (1983). Statement on Indian Policy, PUB. PAPERS (Jan. 24, 1983).

<sup>48</sup> Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 6, 2000). *See also* President George H.W. Bush, Statement Reaffirming the Government-to-Government Relationship between the Federal Government and Indian Tribal Governments, 27 Weekly Comp. Pres. Doc 936 (June 14, 1991).

12, 2001 stating “we will protect and honor tribal sovereignty and help to stimulate economic development in reservation communities.”<sup>49</sup>

Congress has also uniformly furthered this policy of directing strict adherence to the trust responsibility. Numerous recent federal Indian statutes embrace the trust responsibility and link it the purpose of strengthened tribal self-government. For example, The Native American Business Development, Trade Promotion and Tourism Act of 2000,<sup>50</sup> states that:

Congress has carried out the responsibility of the United States for the protection and preservation of Indian tribes and the resources of Indian tribes through the endorsement of treaties, and the enactment of other laws . . . .

the United States has an obligation to guard and preserve the sovereignty of Indian tribes in order to foster strong tribal governments, Indian self-determination and economic self-sufficiency among Indian tribes.

In the American Indian Agricultural Resource Management Act, Congress found that “the United States has a trust responsibility to protect, conserve, utilize and manage Indian agricultural lands consistent with its fiduciary obligation and its unique relationship with Indian tribes”.<sup>51</sup> Similarly, in the National Indian Forest Resource Management Act, Congress found that “the United States has a trust responsibility toward Indian forest lands”.<sup>52</sup> The American Indian Trust Fund Management Reform Act, describes its purposes as “to ensure the implementation of all reforms necessary for the proper discharge of the Secretary’s trust responsibilities to Indian tribes and individual Indians” regarding trust fund management.<sup>53</sup>

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<sup>49</sup> Proclamation No. 7500, 66 Fed. Reg. 57641 (Nov. 12, 2001).

<sup>50</sup> 25 U.S.C. §§ 4301, *et seq.*

<sup>51</sup> 25 U.S.C. § 3701.

<sup>52</sup> 25 U.S.C. § 3101(2).

<sup>53</sup> 25 U.S.C. § 4041(3).

In a like manner, Congressional enactments concerning aspects of Indian affairs other than land and natural resources have been explicitly rooted in the trust responsibility. For example, the federal government's trust responsibility for Indian education was expressed by Congress in the No Child Left Behind Act of 2001,<sup>54</sup> amending the Indian Education Act (stating "[i]t is the policy of the United States to fulfill the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children."<sup>55</sup> The same is true with respect to statutes relating to the federal provision of health care for Indians,<sup>56</sup> and statutes dealing with social issues on Indian reservations. For example, the Indian Child Welfare Act of 1978,<sup>57</sup> recognized tribal courts' primary authority to control the adoption, custody and parental rights over Indian children. In that Act, Congress found

"that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;"<sup>58</sup>

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<sup>54</sup> Pub. L. No. 107-110, 115 Stat. 1425, § 701 (2002).

<sup>55</sup> See also Tribally Controlled School Grants Act of 1988, 25 U.S.C. § 2501 *et seq.*, see § 2502(b) (expressing "the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy for education which will deter further perpetuation of Federal bureaucratic domination of programs"); Higher Education Tribal Grant Authorization Act, 25 U.S.C. § 3302(7) (BIA program for postsecondary education grants: "these services are part of the Federal Government's continuing trust responsibility to provide education services to American Indian and Alaska Natives").

<sup>56</sup> Indian Alcohol and Substance Abuse Prevention and Treatment Act, 25 U.S.C. § 2401(1) and (2), (finding that "the Federal Government has a historical relationship and unique legal and moral responsibility to Indian tribes and their members,"), Indian Health Care Improvement Act, 25 U.S.C. § 1601(a), ("Federal health services to maintain and improve the health of Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people"); ("it is the policy of this Nation, in fulfillment of its special responsibilities and legal obligation to the American Indian people, to assure the highest possible health status for Indians and urban Indians and to provide all resources necessary to effect that policy.") *Id.* § 1602(a).

<sup>57</sup> 25 U.S.C. § 1901, *et seq.*

<sup>58</sup> *Id.* § 1901(2), (3).

In the Indian Child Protection and Family Violence Act of 1990,<sup>59</sup> which provides federal funding and assistance to tribes dealing with these problems, Congress found that “the United States has a direct interest, as trustee, in protecting Indian children.”<sup>60</sup> In the Native American Housing Assistance and Self-Determination Act Congress found that:

“there exists a unique relationship between the Government of the United States and the governments of Indian tribes and a unique federal responsibility to Indian people;

the Constitution of the United States invests the Congress with plenary power over the field of Indian affairs, and through treaties, statutes, and historical relations with Indian tribes, the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indian people;

the Congress, through treaties, statutes and the general course of dealings with Indian tribes, has assumed a trust responsibility for the protection and preservation of Indian tribes and for working with tribes and their members to improve their housing conditions and socioeconomic status so that they are able to take greater responsibility for their own economic condition.<sup>61</sup>

#### **7. Summary of EPA’s Trust Responsibility in the Matter of the BART**

**Determination for NGS.** In its decision concerning the appropriate pollution control equipment at NGS, the EPA must act in a manner that accords with the United States’ fiduciary obligations to protect the functioning of the Navajo Nation and Hopi Tribe as politically autonomous self-governing entities exercising economic self-sufficiency. Those were the purposes of the historic trust responsibility expounded nearly two centuries ago by Chief Justice Marshall in the landmark Cherokee decisions. And they remain the cornerstone purposes of the trust

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<sup>59</sup> 25 U.S.C. §§ 3201, *et seq.*

<sup>60</sup> *Id.* § 3201(a)(1)(F).

<sup>61</sup> 25 U.S.C. § 4101(2)-(4).

responsibility as enshrined in Presidential Messages and congressional enactments over the past four decades.

The Hopi Tribe is particularly dependent on revenues the Tribe receives from the sale of its coal for power production at NGS. The Hopi coal resource is sufficiently distant from rail transportation links that it cannot be sold to another buyer. If NGS shuts down, the Hopi Tribe will lose \$14 million per year in public revenues, 88 percent of its annual governmental budget. The Tribe has no other substantial private source of revenues.

In its August 28, 2009 Advanced Notice of Proposed Rule Making published in the Federal Register Volume 74 No. 166 Proposed Rules<sup>62</sup>, EPA provided notice that it is considering imposing a Best Available Retrofit Technology (BART) requirement on the NGS. EPA is specifically considering whether to require that NGS retrofit Selective Catalytic Reduction (SCR) technology on the plant to decrease emissions of NO<sub>x</sub>. NGS is voluntarily installing Low NO<sub>x</sub> Burners to decrease NO<sub>x</sub> emissions and these controls are due on line in 2011. The EPA-proposed SCR system has capital costs 15.8 times those of the Low NO<sub>x</sub> Burners, and would cost approximately \$705,000,000 in real 2008 dollars, and more in as expended nominal dollars. SCR costs are also 13.3 times higher on an incremental dollar per ton NO<sub>x</sub> removed basis than LNB/SOFA.<sup>63</sup> This \$/ton calculation uses EPA's assumption of a 20 year remaining life for NGS. If the expected lifetime is shorter as ICF's analysis indicates, the \$/ton cost increases exponentially.

In the ANPR, EPA cites the Tribal Authority Rule (TAR) as its basis for the review of BART for the NGS because the plant is located on the Navajo Reservation. EPA also asserts

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<sup>62</sup> Page 44313-44334 i.e. 21 pages

<sup>63</sup> SRP, Comments on Advanced Notice of Proposed Rulemaking, October 2009, page 5. EPA did not estimate incremental \$/ton in spite of its own recommendations that these costs be calculated in BART analysis.

that TAR is based on the 1990 Clean Air Act Amendments.<sup>64</sup> There is no claim that Congress explicitly eliminated the legal requirement that EPA, as part of the federal government, act as a fiduciary or trustee for the Tribes involved. Thus, EPA is required to weigh its obligations to the Tribes as Trustee, along with the other obligations it has with respect to air quality.

In spite of this Trustee responsibility, there has been no mention by EPA in the Federal Register of the devastating impacts of its decision on the Hopi and Navajo Tribes.. There is discussion concerning impacts to the utilities and other owners of the plant, and there is discussion of the impacts on rate payers. In contrast, with respect to EPA's Trustee relationship and responsibility to the Tribes, there is no evidence that any consideration whatsoever was given to this relationship and the impacts of an SCR decision on the Hopi and Navajo Tribes. The Tribes are not mentioned at all much less their historic and unique role vis-a-vis NGS and their reliance on coal resource held in Trust by the United States as the backbone of their respective economies. There is no mention that exercise of EPA's Authority could devastate the Hopi and Navajo economies, force thousands of individuals and their families onto the unemployment rolls and severely undercut the ability of the Tribes to maintain their homelands. Such a failure on the part of EPA constitutes an abuse of discretion at least, and a callous disregard of the federal Trust responsibility at worst. Hopi and Navajo are the only Tribes other than Crow producing coal held in Trust by the US.

Assuming arguendo, that EPA does not have an obligation as a Trustee to the Tribes that must be balanced relative to its need to protect air quality, EPA does not even meet any minimal obligation vis a vis its own standards. EPA asserts that under TAR it has authority to determine whether regulations are "necessary and appropriate" to protect air quality. Furthermore, in making the specific decision, it considers the five following items: (1) costs of compliance, (2)

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<sup>64</sup> Page 44315 Federal Registrar

the energy and non-air quality environmental impacts of compliance, (3) any pollution control equipment in use or in existence at the source, (4) the remaining useful life of the source, and (5) the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology.

With respect to the first item, the costs of compliance, there is no mention by EPA of the costs to the Hopi Tribe of the regulations in terms of the threat to the plants viability and the direct loss of critically needed tribal operating revenue. EPA also fails to calculate the incremental \$/ton NO<sub>x</sub> removed cost relative to LNB/SOFA which when calculated is 13.3 times higher than the LNB/SOFA cost. With respect to the second item, the energy impacts of compliance, there is no mention by EPA that the energy resources used at NGS are owned by the Hopi Tribe much less that they are held in Trust by the United States for the economic benefit of the Tribe. With respect to the remaining useful life, there is no discussion by EPA of the threats that EPA's proposed SCR action poses to the useful life of the plant or other threats greatly exacerbated by the SCR requirement. This is in spite of the fact that the incremental \$/ton cost of SCR increases exponentially as the expected lifetime shortens to less than the assumed 20 years. Lastly, when taking into account the huge economic risks imposed on the Hopi and Navajo by the proposed SCR decision, the cost of the SCR controls appear to greatly exceed the highly minimal visibility benefit that would be achieved over and above LNB/SOFA only.

**PART 3- The ICF Economic Analysis of Impacts on Hopi and Navajo of a Stringent NO<sub>x</sub> BART Decision for Navajo Generating Station**

In light of EPA's failure to consider the impacts on the Hopi and Navajo Tribes at all, and EPA's failure to properly consider its own five TAR criteria, the Hopi Tribe hired a highly reputable consulting firm, ICF International to conduct a study of the economic impacts to the

Hopi Tribe of an EPA SCR BART decision for NGS. This study is attached hereto and constitutes Part 3 of the Hopi Comments on the NGS BART ANPR.

**The key findings of the ICF analysis are:**

- **AN EPA DECISION REQUIRING SCR COULD RESULT IN NGS BEING SHUT DOWN AS EARLY AS 2015, AND HENCE, THE LIFETIME DOES NOT SUPPORT THE PROPOSED SCR CONTROLS** – A detailed, model based analysis of the discounted cash flow of NGS was conducted by ICF. It assumed EPA would be implementing: (1) a BART decision requiring SCR by 2015, (2) Waxman Markey or similar CO<sub>2</sub> controls (e.g., alternative legislation or administrative action by EPA under existing authority with similar impact) by 2012, and (3) stringent mercury MACT regulations by 2015. EPA is well aware of these actions but the EPA ANPR is silent on items 2 and 3 in spite of their being highly relevant to the consideration of the lifetime of NGS and NGS's ability to bear the costs of SCR. This is especially odd given the federal role in these areas. This detailed ICF analysis leads to the conclusion that NGS would likely retire rather than retrofit BART controls under some circumstances. Namely, if average natural gas prices were at or below \$5.6/MMBtu (2008\$, Henry Hub), the analysis shows that additional investment in NGS would not be economic and the plant could be retired. This natural gas price is below ICF's base case forecast, but is similar to current spot and futures prices for the next ten years and similar to prices over the last ten years. Hence, they are plausible price outcomes. The average natural gas price is a critical metric. This is because in place of NGS, the owners would rely primarily on natural gas generation as a

substitute for NGS power. The natural gas price the owners will ultimately use in their own internal analysis is not known. However, the breakeven natural gas price is low enough to create a significant risk to the plant's post-2015 viability. That is, NGS owners could conclude the plant's electricity cost savings relative to their next best alternative will be highly eroded by CO<sub>2</sub> and mercury controls, and hence, SCR retrofit costs are not justified. As a consequence, EPA should have considered shorter NGS remaining lifetimes than the assumed 20 year lifetime. Any shortening exponentially increases the average and incremental \$/ton NO<sub>x</sub> removed cost further reinforcing the conclusion that the SCR is cost prohibitive and not BART.

- **THE SHORT LEAD TIME MAY NOT ALLOW FOR THE RESOLUTION OF CONTRACTUAL ISSUES AND OTHER SPECIAL CIRCUMSTANCES JUST AS IT DID IN THE CASE OF THE RECENTLY CLOSED MOHAVE GENERATING STATION (MGS) PLANT –** A requirement that SCR be installed by 2015 may not allow for enough time to resolve contractual issues even if the owners would otherwise conclude that the plant would remain economic with a SCR requirement. For example, even if the owners were convinced that natural gas prices would be moderately above the breakeven level calculated by ICF, it may nonetheless conclude that it must change existing contracts to justify the risk. A short lead time may make this impossible. The proposed lead time of four to five years is less than that provided to MGS. MGS was the other buyer of Hopi coal and had a lead time of 6 years to meet its retrofit requirement. Unfortunately, MGS's longer lead time was not

enough to work out the issues among the many parties involved and MGS was shut down at the end of 2005. Thus, the Hopi Tribe has already experienced the impacts of regulations that are too inflexible regarding lead time. Both MGS and NGS shared a set of unusual arrangements related to the participation of the Tribes in the overall fuel and power complex. The Tribes involvement increases the time needed to accommodate contractual and other changes relative to power plants with less stakeholders. In the case of NGS, the issues to be resolved include: (1) the power plant lease agreement with Navajo which expires in 2019, (2) the coal supply agreement which expires in 2011, (3) the DOI water agreement which expires in 2014, and other items. There is no evidence that EPA gave consideration to the time needed to accommodate a decision and maintain a reasonable lifetime for the plant. The deep involvement of the Tribes in NGS's future is not mentioned in the EPA ANPR. In the event that EPA nonetheless proceeds on a SCR path, this failure to consider the impacts of Tribal involvement on the time needed to resolve these issues increases the risks.

- **THE SRP BART ANALYSIS CAPITAL COST ESTIMATE FOR INSTALLING SCR IS REASONABLE** – ICF's review of recent BART studies of SCR retrofit costs supports the accuracy of the SRP SCR cost estimate. As noted, the capital costs of SCR are 15.8 times higher than for alternative controls using LNB and SOFA. These higher capital costs cause the \$/ton NO<sub>x</sub> removed calculation which annualizes the capital costs over the plant lifetime to greatly exceed the costs of LNB/SOFA. The incremental cost on a \$/ton of NO<sub>x</sub> removed of SCR relative to LNB & SOFA is 13.3 times higher when 20 years is assumed.

SRP's analysis of incremental cost for SCR based on cost effectiveness calculations also reached the same conclusion.<sup>65</sup> The EPA failed to calculate this incremental cost in the ANPR even though it modified SRP emission estimates and failed to consider the potential for a shorter lifetime. In addition to much higher capital and \$/ton costs, SCR also raises issues about whether ammonia slip due to SCR could impair visibility via increased secondary particulates; EPA assumes not and SRP assumes it will occur.<sup>66</sup> Secondary particulate issues are not present with LNB and SOFA. Lastly, SCR creates risks associated with ammonia release during ammonia transportation and storage that do not exist with LNB and SOFA controls.

- **THE INCREMENTAL VISIBILITY IMPROVEMENT ACHIEVED BY INSTALLING SCR IS NOT NOTICEABLE, AND HENCE, THE REQUIREMENT IS NOT ECONOMICALLY OR PRACTICALLY JUSTIFIED** – Relying on the SRP analysis of visibility improvement due to SCR leads to the conclusion that the costs of SCR controls exceed any visibility benefit achieved, even without consideration of the impacts on the Hopi Tribe and Navajo Nation. The improvement in visibility across all 11 Class I areas<sup>67</sup> is not detectable except with specialized equipment with capability exceeding the human eye. The causes of visibility impairment stem largely from other sources

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<sup>65</sup> SRP Comments on BART ANPR, Docket No. EPA-R09-OAR-2009-0598. October 27, 2009.

<sup>66</sup> ICF did not review air modeling issues in detail.

<sup>67</sup> Visibility at Grand Canyon will actually be **worsened** if NGS installs SCR. Tables 5-2 on page 5-6 of the SRP BART analysis (Revised BART Analysis for the Navajo Generating Station Units 1-3, prepared for Salt River Project Navajo Generating Station, Tempe, Arizona by ENSR Corporation, January 2009, Document No: 05830-012-300) shows that the 8<sup>th</sup> highest average visibility over 3 years in Grand Canyon decreased by 0.9 delta-dv. But if measured over all 11 Class 1 areas there is an improvement in visibility of 0.22 delta-dv (See Table 5-1, page 5-4 of the SRP January 2009 BART analysis.

including automotive emissions in southern California, forest fires, controlled forest burns and dust from local dirt roads. Power plants like NGS are not the primary contributors to the visibility problem and it is not economic to pursue NGS BART controls. The cost benefit calculation becomes even more unfavorable when the costs of potential release during ammonia transportation and storage are added.

- **THE SHUT DOWN OF NGS WILL HAVE MASSIVE AND DEVASTATING ECONOMIC CONSEQUENCES ON THE HOPI AND NAVAJO TRIBES** – The Hopi and Navajo Tribes are among the poorest and most vulnerable populations in the United States and have already suffered enough from stringent and inflexible environmental regulations. The shut down of the Mohave Generating Station (MGS) has already imposed a highly disproportionate economic burden on the Tribes. The shut down of NGS, the sole remaining buyer of Hopi coal after environmental regulations shut down MGS five years ago, would devastate the Hopi Tribe and greatly harm the Navajo Nation. NGS accounts for 88 percent of the Hopi Tribe’s annual operating revenues, and hence, the retirement of NGS would be a huge blow to the economic viability of Hopi; the Hopi economy would collapse and the Tribe would effectively be shut down as a functioning government. Based on the legal analysis provided by the Hopi Tribe regarding the Trust obligations of the United States government, such an outcome is especially unjust and inequitable because the United States holds the coal of the Hopi Tribe and the Navajo Nation in trust for the development of these Tribes and the creation of viable homelands on their

reservations. An action that risks NGS shut down for marginal or zero visibility benefit violates the Trust Responsibility of the United States and is highly inimical to the goal of providing viable permanent homelands on their reservations. In spite of this, Hopi and Navajo costs and impacts are not even mentioned in EPA's ANPR. The ANPR appears to show no knowledge of the special circumstances at NGS related to the Hopi and Navajo economies. The ANPR only mentions the impacts on utility owners of NGS and their ratepayers. This omission is highly inappropriate: in doing so EPA in acting on behalf of the United States fails to fulfill the responsibility of holding these assets in Trust for the Tribes and otherwise protecting the tribal economies.

- **ICF CONCLUSION** - *In light of these conclusions, EPA's should not require NGS to install SCR. The risks violate the Trust obligations of the United States to the Hopi and Navajo by pursuing overly-expensive and marginal benefits at the risk of massive and devastating harm to its trust beneficiary. Even if EPA were not responsible to act as a trustee to the Tribes in this situation, there is not enough environmental benefit to justify the huge economic and social costs and harm to the Tribes. The costs, direct expenditures on the SCR and indirect cost impacts on the Hopi people and homeland, greatly exceed the value of the achieved visibility benefit.* [Emphasis Added] The risks are too great to the lifetime of the plant to impose marginally beneficial controls. EPA must balance its responsibilities in the NGS BART proceeding in favor of preserving the already fragile economies of the Hopi and Navajo. This can be achieved by EPA

by requiring LNB/SOFA as BART at NGS rather than requiring the hugely expensive and marginally beneficial SCR technology.

See The ICF Report attached as Part 3 of these comments for a full discussion of the economic impacts to the Hopi Tribe of an EPA SCR BART decision for NGS.