

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SIERRA CLUB	)	
	)	
Plaintiff,	)	
	)	Case No.07-cv-1860-EGS
v.	)	
	)	
UNITED STATES DEPARTMENT OF	)	<b>FIRST AMENDED</b>
AGRICULTURE, RURAL UTILITIES SERVICE;	)	<b>COMPLAINT FOR</b>
EDWARD T. SCHAFER, in his official capacity as	)	<b>DECLARATORY AND</b>
Secretary of Agriculture; JAMES M. ANDREW, in his	)	<b>INJUNCTIVE RELIEF</b>
official capacity as Administrator, Rural Utilities Service,	)	
United States Department of Agriculture,	)	
	)	
Defendants,	)	
	)	
and	)	
	)	
SUNFLOWER ELECTRIC POWER CORPORATION,	)	
	)	
Intervenor-Defendant.	)	
	)	

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**INTRODUCTION**

1. Plaintiff, Sierra Club, challenges Defendant United States Department of Agriculture, Rural Utility Service’s (“RUS”), approval of a massive coal-fired power plant expansion project in Western Kansas without first complying with the National Environmental Policy Act, 42 U.S.C. §§ 4321 – 4370f (“NEPA”).

2. The project includes construction of up to three new 700 Megawatt (“MW”) coal-fired electric-generating units at Sunflower Electric Power Corporation’s (“Sunflower”) existing 360 MW coal-fired power plant in Holcomb, Kansas known as Holcomb Station. (“Holcomb Expansion Project” or “Project”). It would be one of the nation’s largest new sources of greenhouse gas emissions. If all three units are built, they would emit an estimated 14 million tons of carbon dioxide into the air each year. The new units will also emit other pollutants,

including fine particulate matter, sulfur dioxide and nitrogen oxides, all of which the U.S. Environmental Protection Agency has concluded can cause significant adverse effects on human health and the environment. The global warming impacts of the proposed Project are so significant that the Project has drawn the objections of the Attorneys General of California, Connecticut, Delaware, Maine, New York, Rhode Island, Vermont and Wisconsin.

3 Despite the Project's significant effects on human health and the environment and the significant public controversy this project has generated both within and outside of Kansas, RUS failed to conduct any environmental analysis under NEPA before participating in and approving a number of business agreements that are needed for the Project to be constructed and operated.

4. The United States Department of Agriculture, initially through the Rural Electrification Administration ("REA"), and, subsequently through RUS, has, since around the time of organization of Sunflower's predecessor in the 1950s, provided financing for Sunflower's electric-generation and transmission facilities. In providing such financing, the United States acquired extensive control over Sunflower's business, including the right to approve any extensions or additions to Sunflower's electric-generation and transmission facilities.

5. RUS's approval of the Project without first preparing an environmental impact statement or otherwise analyzing the Project's environmental impacts and alternatives to the Project, including clean energy alternatives, violated NEPA.

**JURISDICTION AND VENUE**

6. This Court has jurisdiction over this action under 28 U.S.C. § 1331 and 5 U.S.C. §§ 701-706.

7. Venue is proper in the District Court for the District of Columbia pursuant to 28 U.S.C. § 1391(e) because Defendant RUS resides in the District, and a substantial part of the events or omissions giving rise to the claim occurred in the District.

**PARTIES**

8. Plaintiff, Sierra Club, is the nation's oldest grassroots environmental organization. The Sierra Club files this lawsuit on behalf of itself and its members. The Sierra Club has more than 750,000 members nationwide, including approximately 4,675 members in Kansas. It is dedicated to the protection and preservation of the natural and human environment. One of the Sierra Club's main priorities, both nationwide and in Kansas, is to address the urgent problems of global warming, air pollution and our dependence on dirty, nonrenewable energy sources such as coal. The Sierra Club and its members have long-standing interest and expertise in these issues.

9. The Sierra Club has been actively involved in the permitting process for the Holcomb Expansion Project, and in promoting clean, efficient, economically beneficial alternatives to the Project. The Sierra Club's Kansas Chapter has distributed tens of thousands of copies of informational documents regarding energy conservation and the benefits of wind power. The Sierra Club filed extensive comments on proposed air and solid waste permits required for the Project, and dozens of its members testified at state-sponsored hearings on the draft permits. After the Kansas Department of Health and Environment issued a solid waste permit and issued an initial denial of an air permit required for the Project, Sierra Club appealed

the solid waste permit to a Kansas state court, and moved to intervene in administrative and judicial proceedings on the air permit denial initiated by Sunflower. Sierra Club also participated in efforts to prevent the Kansas legislature from effectively overturning the permit denial.

10. Sierra Club members live and work in communities, including Garden City, the closest community of significant size to the Holcomb site, and on farms throughout Western Kansas, and will be adversely impacted by pollution from the Holcomb Expansion Project. They include senior citizens, people with asthma, and other individuals who are especially vulnerable to harm from exposure to very fine particulate matter (PM 2.5), sulfur dioxide, nitrogen oxides and other harmful air pollutants that will be emitted by the Project's new coal-fired electric-generating units. Sierra Club members, including farmers who live in Western Kansas and elsewhere, will be adversely affected by drought and extreme weather events that are expected to increase due to global warming, to which the Project's massive carbon dioxide emissions will make a significant contribution. RUS's approval of the Holcomb Expansion Project injures the interests of the Sierra Club and its members in breathing clean air, curbing greenhouse gas emissions that cause global warming, and protecting their water supplies.

11. Sierra Club members in Western Kansas will also be adversely affected by the impacts that the Project will have on development of clean energy alternatives, including wind power, in Western Kansas. The project will flood the market with coal-generated electric power, substantially impairing opportunities to meet electrical demand with clean energy alternatives, including wind power, which Western Kansas is especially well-suited to develop. The Project will thereby substantially diminish the opportunity for Sierra Club members in Western Kansas

to receive the greater environmental and economic benefits that would result from development of clean energy alternatives, including wind.

12. The RUS's failure to prepare an environmental impact statement or otherwise comply with NEPA causes procedural injury to Sierra Club and its members by depriving them the protection of NEPA analyses and procedures required to ensure that environmental impacts of, alternatives to, and mitigation measures for the Project are carefully evaluated and considered prior to Project approval.

13. The RUS's failure to prepare an environmental impact statement or otherwise analyze the Project's environmental impacts and alternatives to the Project also deprives the Sierra Club and its members of the opportunity to participate in the development of such environmental analysis and alternatives, and thereby influence decision-making related to the Project, and further deprives Sierra Club and its members of information about the Project that they would likely use in their advocacy and public education efforts.

14. The injuries to the Sierra Club and its members resulting from the unlawful and arbitrary actions complained of herein would be redressed by an award of the relief sought in this case.

15. Defendant RUS is a federal agency within the United States Department of Agriculture. The Department of Agriculture established RUS in 1994, in accordance with Congress' mandate set forth in the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, 7 U.S.C. § 6942(a) ("Reorganization Act").

16. The Reorganization Act charged RUS with carrying out, among other things, an electric loan program under the Rural Electrification Act of 1936, 7 U.S.C. §§ 901 *et seq.* Under Section 902(a) of the Rural Electrification Act, RUS is authorized to make loans for the

purpose of furnishing and improving electric service in rural areas, and for the purpose of assisting electric borrowers to implement demand side management, energy conservation programs, and on-grid and off-grid renewable energy systems.” 7 U.S.C. § 902(a). Section 904 of the Rural Electrification Act authorizes RUS to make loans for rural electrification to corporations organized for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for furnishing and improving of electric service to rural areas, including by assisting borrowers to implement demand side management, energy conservation programs, and on-grid and off-grid renewable energy systems.

17. Prior to the Reorganization Act, the Rural Electrification Administration (“REA”), an entity created by executive order in 1935 and subsequently made a federal agency within the United States Department of Agriculture by the Rural Electrification Act, was authorized to administer the electric loan program under the Rural Electrification Act.

18. Defendant Edward T. Schafer is the U.S. Secretary of Agriculture and in that capacity has final responsibility for actions taken by RUS. Mr. Schafer is sued in his official capacity.

19. Defendant James M. Andrew is the Administrator of RUS and in that capacity has management responsibility for actions of RUS, including the agency’s compliance with NEPA. Mr. Andrew is sued in his official capacity.

20. Sunflower Electric Power Corporation (“Sunflower”) moved to intervene as a defendant in this case on April 25, 2008. On May 9, 2008 the Court granted Sunflower’s motion to intervene.

21. Intervenor-Defendant Sunflower is an electric generation and transmission corporation. It provides electric power to six electric cooperatives in Western Kansas.

22. The predecessor to Sunflower Electric Power Corporation was organized as Sunflower Electric Cooperative, Inc., in 1957, and subsequently changed its name, first to Sunflower Electric Power Corporation, and later to Sunflower Electric Holdings, Inc. (“Old Sunflower”).

### **STATUTORY AND REGULATORY BACKGROUND**

23. Congress enacted NEPA to “promote efforts which will prevent or eliminate damage to the environment.” 42 U.S.C. § 4321.

24. To fulfill this goal, NEPA requires federal agencies to analyze the environmental impacts of a particular action before proceeding with that action. *Id.* § 4332(2)(C). In addition, federal agencies must notify the public of their proposed projects and allow the public to comment on the fully-disclosed environmental impacts of those projects. 40 C.F.R. § 1501.2.

25. The cornerstone of NEPA is the environmental impact statement (“EIS”). An EIS is required for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4.

26. “Major federal action” includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. 40 C.F.R. § 1508.18.

27. Federal actions include “new and continuing activities, including projects . . . entirely or partly financed, assisted, conducted, regulated or approved by federal agencies.” 40 C.F.R. § 1508.18(a). Federal actions requiring an EIS often occur when a federal agency “[a]pprov[es] . . . specific projects, such as construction or management activities located in a defined geographic area.” 40 C.F.R. § 1508.18(b).

28. In an EIS, the federal agency must (1) explore all reasonable alternatives to an action, 42 U.S.C. § 4332(2)(C), 40 C.F.R. § 1502.14, (2) identify and disclose to the public all

impacts of the proposed action and each reasonable alternative, including direct, indirect and cumulative impacts, 42 U.S.C. § 4332(2)(c), 40 C.F.R. §§ 1502.16, 1508.7 – 1508.8, and (3) consider possible mitigation measures to reduce such impacts to the environment, 40 C.F.R. § 1502.14(f).

29. The goals of an EIS are to “provide a full and fair discussion of significant environmental impacts” associated with a federal decision and to “inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R. § 1502.1.

30. A federal agency must prepare a draft EIS and must request comments on the draft EIS from relevant federal agencies, interested state, local and tribal governments, the public and other interested parties. 40 C.F.R. § 1503.1. The federal agency must assess and consider any comments in preparing the final EIS. 40 C.F.R. § 1503.4(a).

31. Council on Environmental Quality Regulations (“CEQ”) require each federal agency “as necessary” to adopt procedures to “supplement” the CEQ Regulations. 40 C.F.R. § 1507.3(a). Such procedures must “confine themselves to implementing procedures.” Id. Such procedures must comply with the CEQ Regulations except where compliance would be inconsistent with statutory requirements. Id. § 1507.3(a), (b).

32. RUS policies and procedures for implementing NEPA and the CEQ Regulations provide that an EIS will normally be required for proposed actions involving new electric generating facilities of more than 50 MW. 7 C.F.R. § 1794.25.

33. RUS policies and procedures for implementing NEPA and the CEQ Regulations provide that “[u]nder certain circumstances, such as when the project does not qualify for a

categorical exclusion,” environmental review requirements “may apply to applications for lien accommodations, subordinations, and releases.” 7 C.F.R. § 1717.850(d).

34. RUS policies and procedures for implementing NEPA and the CEQ Regulations purport to exclude “[a]pprovals provided by RUS pursuant to loan contracts and security instruments” from the definition of “actions” for purposes of those policies and procedures, and state that such policies and procedures do not apply to such approvals. 7 C.F.R. § 1794.3.

### **FACTUAL BACKGROUND**

#### **RUS’ Loans to and Control Over Sunflower’s Predecessor**

35. Around the time that Old Sunflower was organized, the United States provided its first loan to Old Sunflower under the Rural Electrification Act.

36. Over the years, the United States provided a number of direct loans and loan guarantees to Old Sunflower pursuant to the Rural Electrification Act, first through REA, and subsequently through RUS.

37. Some of the loans guaranteed by the United States, through REA, were made by the Federal Financing Bank, a government corporation created by Congress that is under the supervision of the U.S. Department of Treasury.

38. In connection with such loans and loan guarantees, Old Sunflower and the United States, first through REA and later through RUS, executed loan documents, including loan agreements and mortgages.

39. The loan documents, including mortgages, provided the United States a security interest Old Sunflower’s assets.

40. The Rural Electrification Act, regulations promulgated by REA and RUS under the Rural Electrification Act, and loan documents, including loan agreements and mortgages,

provided the United States, first through REA and later through RUS, extensive control over Old Sunflower's business.

41. Mortgages executed and delivered by Old Sunflower to the United States include the following:

a. Mortgage dated as of June 5, 1958, which was filed for record with the Registrar of Deeds, Finney County, Kansas on March 20, 1970;

b. Supplemental Mortgage dated as of March 2, 1970, which was filed for record with the Registrar of Deeds, Finney County, Kansas on March 20, 1970;

c. Supplemental Mortgage, dated on or about May 24, 1974, which was filed for record with the Registrar of Deeds, Finney County, Kansas on May 28, 1974;

d. Mortgage and Security Agreement dated as of February 9, 1976, which was filed for record with the Registrar of Deeds, Finney County, Kansas on March 26, 1976;

e. Supplemental Mortgage dated as of July 7, 1976, which was filed for record with the Registrar of Deeds, Finney County, Kansas on July 7, 1976;

f. Supplemental Mortgage dated as of January 10, 1978, which was filed for record with the Registrar of Deeds, Finney County, Kansas on January 13, 1978;

g. Supplemental Mortgage dated as of November 3, 1980, which was filed for record with the Registrar of Deeds, Finney County, Kansas on November 4, 1980;

h. Supplemental Mortgage and Security Agreement, dated as of November 1, 1984, which was filed for record with the Registrar of Deeds, Finney County, Kansas on March 21, 1985; and

i. Consolidated Mortgage, Security Agreement and Financing Statement, dated as of May 5, 1988, which was filed for record with the Registrar of Deeds, Finney County, Kansas on May 5, 1988 (“1988 Mortgage”).

42. Holcomb Station is Sunflower’s primary resource for supplying electric power to the six electric cooperatives it supplies. Holcomb Station includes a 360 MW coal-fired electric-generating unit (“Holcomb 1”).

43. Old Sunflower commenced site preparation for Holcomb Station in May 1980, and the plant became operational on August 16, 1983. The total cost of plant construction was approximately \$ 465 million.

44. The United States provided Old Sunflower construction financing for Holcomb Station.

45. In 1980, the United States through REA, provided Old Sunflower a loan in the original principal amount of \$ 539,438,000 funded by the Federal Financing Bank and guaranteed by REA, and a separate loan in the original principal amount of \$ 3,585,000 funded by REA. Old Sunflower used these loans to construct Holcomb Station.

46. The United States, through REA, approved the design of Holcomb Station.

47. On information and belief, the United States, through REA, approved the construction of Holcomb Station.

48. Old Sunflower experienced financial difficulties over the years. These financial difficulties are attributable in substantial part to Old Sunflower’s overbuilding of unnecessary infrastructure with direct and guaranteed government loans.

49. These financial difficulties caused Old Sunflower to be unable to satisfy its obligations to its creditors, including the United States, and led to major restructuring of Old Sunflower's debt to the United States, first during the 1987-1988 period, and again in late 2002.

50. On or about June 30, 1987, Old Sunflower and creditors of Old Sunflower, including the United States, acting through the Administrator of REA, entered into a Debt, Restructure, Override Agreement and Amended and Restated Credit Agreement ("DRA").

51. The DRA, other loan documents, including the 1988 Mortgage, the REA Act, and RUS regulations imposed a number of restrictions on Old Sunflower.

52. Restrictions imposed on old Sunflower by the DRA included limitations on its capital expenditures, borrowing, and creation of liens against its property without approval of a majority of its creditors, including the United States.

53. The 1988 Mortgage states that Old Sunflower shall not without the prior written consent of the United States:

- a. construct, make, lease, purchase or otherwise acquire any extensions or additions to its electric generation and transmission system, or enter into any contract therefore;
- b. enter into any contract for the operation or maintenance of all or any part of its property;
- c. enter into any contract for the purchase of electric power or energy;
- d. enter into any contract for the sale for resale or for the sale to the ultimate consumer of electric power and energy in excess of 1,000 kilowatts;
- e. enter into any contract for any transmission, interconnection or pooling arrangements; or
- f. enter into any contract for the use by others of any of its property.

54. The DRA and the 1988 Mortgage require Old Sunflower to comply with any and all directives which the Administrator of REA may deem necessary to comply with the requirements of the National Environmental Policy Act of 1969 or any and all other federal or state laws, regulations, Executive Orders of the President and Memoranda of the Secretary of Agriculture implementing environmental protection.

55. Section 907 of the Rural Electrification Act, 7 U.S.C. § 907, prohibits any borrower of funds under Section 904 of the Act, without the approval of the Secretary of Agriculture, from selling or disposing of its property, rights, or franchises, acquired under the provisions of the Act, until any loan from the Rural Electrification Administration, including all interest and charges shall have been repaid.

56. On information and belief, Old Sunflower is a borrower of funds under Section 904 of the Rural Electrification Act.

**RUS's Approval of Old Sunflower's 2002 Restructuring**

57. In late 2002 Old Sunflower underwent a major restructuring ("2002 Restructuring").

58. RUS participated in and approved the 2002 Restructuring. The Restructuring was implemented through a number of agreements, including the following agreements dated as of September 30, 2002 that RUS approved, executed, and participated in as a party:

- a. Agreement and Consent to Sunflower Restructuring ("2002 Restructuring Agreement");
- b. HCF Assignment Agreement, by and among Old Sunflower, HCF, and the United States;

- c. SEP Purchase and Sale Agreement, by and among Old Sunflower, SEP Corporation, and the United States; and
- d. Partial Release by the United States, National Rural Utilities Cooperative Finance Corp., and CoBank, ACB to Old Sunflower.
59. As part of the 2002 Restructuring, Old Sunflower changed its name to Sunflower Electric Holdings, Inc. (“SEHI”).
60. As part of the 2002 Restructuring, a new corporation, SEP Corporation was organized.
61. As part of the 2002 Restructuring, SEP Corporation executed and delivered new promissory notes to the United States. The parties agreed that payments on the new notes would be used to reduce the outstanding balance due on notes that had previously been executed and delivered by Old Sunflower to the United States under the DRA.
62. As part of the 2002 Restructuring, the debt service obligations of Old Sunflower and SEP Corporation to the United States increased.
63. As part of the 2002 Restructuring, most of the assets of Old Sunflower, including Holcomb 1, were transferred to SEP Corporation. Property transferred included property acquired by Old Sunflower under the Rural Electrification Act.
64. As part of the 2002 Restructuring, RUS released assets transferred from Old Sunflower to SEP Corporation from the lien of the 1988 Mortgage.
65. The 2002 Restructuring was designed to allow for the construction of one or more additional coal-fired electric-generating units at Holcomb Station.
66. As part of the 2002 Restructuring, a new limited liability company was created named Holcomb Common Facilities, LLC (“HCF”).

67. As part of the 2002 Restructuring, Old Sunflower transferred to HCF certain property, including property slated for use in connection with construction of a new coal-fired electric-generating unit at Holcomb Station known as Holcomb 2 (“Holcomb 2 Site”), and certain common facilities that would be used by Holcomb 1, Holcomb 2, and any additional new coal-fired electric-generating units built at Holcomb Station (“Common Facilities”). Property transferred included property acquired by Old Sunflower under the Rural Electrification Act.

68. As part of the 2002 Restructuring, the parties contemplated that the United States, acting through the Administrator of RUS, would in the future release assets transferred from Old Sunflower to HCF from the lien of the 1988 Mortgage.

69. Restrictions imposed by the DRA, including restrictions described in Paragraph 52, above, presented obstacles to development of additional generating capacity at Holcomb Station.

70. Old Sunflower requested RUS to approve the 2002 Restructuring in a November 19, 2002 letter. In the letter, Old Sunflower stated that the 2002 Restructuring will allow it to “[p]roceed with the development of additional generation,” and that development of “a second generating plant” at Holcomb Station “is impossible under the current DRA.”

71. As part of the 2002 Restructuring, the number of Sunflower’s and Old Sunflower’s creditors was reduced from approximately 26 to three-- RUS, the National Rural Utilities Cooperative Finance Corp., and Co-Bank. This enhanced RUS’s control over Sunflower’s and Old Sunflower’s business by allowing RUS to approve or disapprove actions such as expansion of generating capacity that previously required approval of two-thirds of Old Sunflower’s approximately 26 creditors, without involvement of numerous additional creditors.

72. In the November 19, 2002 letter, Sunflower stated that “an unexpected environmental regulatory requirement . . . will result in a default [to RUS] under current financing.”

73. As part of the 2002 Restructuring, HCF assigned to RUS payments to be made to HCF for use by Holcomb 2 of the Holcomb 2 Site and Common Facilities. (“Holcomb 2 Rent”). The Holcomb 2 Rent to be paid directly to RUS was set at \$ 3,711,690 or 74,2338% of the rent received by HCF if the rent exceeds \$ 5,000,000.

74. As part of the 2002 Restructuring, Old Sunflower assigned to RUS a security interest in the membership interests in and voting rights in HCF.

75. The new promissory notes executed and delivered by SEP to the United States as part of the 2002 Restructuring include a note known as the Holcomb 3 Promissory Note in the original principal amount of \$ 1,818,000. The note provides that it is to be repaid in full on the date that a third electric-generating unit is placed into commercial operation at Holcomb Station. The note provides that if the commercial operation date has not occurred by December 21, 2012, the note shall be cancelled and of no further force and effect.

**RUS’s Agreements With and Control Over Sunflower After the 2002 Restructuring**

76. Subsequent to the 2002 Restructuring, SEP Corporation changed its name to Sunflower Electric Power Corporation, effective March 24, 2003.

77. As part of and subsequent to the 2002 Restructuring, Sunflower (f/k/a SEP Corporation) entered into additional agreements with the United States, through RUS, and other creditors, including an RUS Loan Contract dated as of September 30, 2002. After the name change described in Paragraph 76, above, this loan contract was replaced with an Amended and Restated RUS Loan Contract dated as of June 1, 2003 (“2003 Loan Contract”).

78. In connection with such additional agreements, Sunflower executed and delivered additional loan documents to the United States, including the following mortgages:

a. Mortgage, Security Agreement, and Financing Statement dated September 30, 2002, which was filed for record with the Registrar of Deeds, Finney County, Kansas on November 25, 2002;

b. Amended and Restated Mortgage, Security Agreement, and Financing Statement, dated June 1, 2003, which was filed for record with the Registrar of Deeds, Finney County, Kansas on July 25, 2003;

c. Consolidated Mortgage, Security Agreement, and Financing Statement dated as of April 22, 2004, which was filed for record with the Registrar of Deeds, Finney County, Kansas on April 23, 2004 (“2004 Mortgage”); and

d. Supplement to Consolidated Mortgage, Security Agreement, and Financing Statement, dated as of July 26, 2007, which was filed for record with the Registrar of Deeds, Finney County, Kansas on August 22, 2007 (“2007 Mortgage Supplement”).

79. The mortgages executed and delivered to the United States by both Old Sunflower and Sunflower generally provide the United States a first lien on the respective corporation’s assets, including electric-generation and transmission facilities.

80. On information and belief, the 1988 Mortgage remains effective and continues to provide the United States a security interest in property involved in the Holcomb Expansion Project.

81. The 2004 Mortgage and 2007 Mortgage Supplement remain effective and continue to provide the United States a security interest in Holcomb 1 and in property involved in the Holcomb Expansion Project.

82. The Rural Electrification Act, RUS regulations and loan documents, including loan contracts and mortgages, have provided the United States, through RUS, substantial control over the conduct of Sunflower's and Old Sunflower's business and the use of Sunflower's and Old Sunflower's property. On information and belief, loan documents that continue to provide RUS such control include, but are not necessarily limited to, the 1988 Mortgage, 2004 Mortgage, 2007 Mortgage Supplement and 2003 Loan Contract.

83. The Rural Electrification Act and loan documents prohibit Old Sunflower and Sunflower from undertaking numerous business activities, including the Holcomb Expansion Project, without the prior written approval of RUS.

84. The 2003 Loan Contract states that Sunflower will not without the prior written approval of RUS:

- a. Construct, make, lease, purchase or otherwise acquire any extensions or additions to its system or enter into any contract therefore; or
- b. Purchase, lease or otherwise acquire any parcel or parcels of land or enter into any contract therefore.

85. The 2003 Loan Contract states that Sunflower shall not without the prior written consent of RUS enter into contracts or arrangements for:

- a. the purchase or sale of electric power or energy;
- b. the supply and delivery of power, including exchange, transmission, interconnection, interchange, wheeling, or polling of electric power and energy;
- c. marketing of electric power or energy;
- d. options, futures, hedges or other financial or derivative products relating to electric power and energy; or

e. operation, maintenance or management of its property or electric system.

86. The 2003 Loan Contract prohibits Sunflower from entering into or permitting related parties to enter into any agreement or arrangements for the development of Holcomb 2 without the prior written approval of RUS. The 2003 Loan Contract states that any such RUS approval will be on such terms and conditions as RUS, in its sole discretion, may require.

87. The 2003 Loan Contract prohibits Sunflower from entering into any agreements or arrangements for development of any type of electric generating unit on the site of, in proximity to, or which will share common facilities with Holcomb 1 without the prior written approval of RUS. The 2003 Loan Contract states that any such RUS approval will be on such terms and conditions as RUS, in its sole discretion may require. The 2003 Loan Contract further states that RUS, in its sole discretion, may require an additional form of consideration at the time of any such approval.

88. The 2004 Mortgage states that Sunflower shall not without the prior written consent of RUS:

a. construct, make, lease, purchase or otherwise acquire any extensions or additions to its electric generation and transmission system, or enter into any contract therefore;

b. enter into any contract for the operation or maintenance of all or any part of its property;

c. enter into any contract for the purchase of electric power or energy;

d. enter into any contract for the sale for resale or sale to the ultimate consumer of electric power and energy;

e. enter into any contract for any transmission, interconnection or pooling arrangements; or

f. enter into any contract for the use by others of any of its property.

89. As set forth in Paragraph 53, above, the 1988 Mortgage sets forth approval requirements that are substantially similar to the approval requirement of the 2004 Mortgage.

90. Sunflower is a borrower of funds under Section 904 of the Rural Electrification Act, due to it being either a direct borrower or due to it effectively assuming obligations to repay loans made to Old Sunflower. Both Sunflower and Old Sunflower are subject to the prohibition on transfers of assets without the prior written consent of the Secretary of Agriculture as long as loans to the United States remain unpaid set forth in Section 907 of the Rural Electrification Act, 7 U.S.C. § 907.

91. On information and belief, loans from the REA or RUS to Sunflower and Old Sunflower have not been repaid within the meaning of 7 U.S.C. § 907.

92. Having received delivery of mortgages and other loan documents that provide it security interests in the assets of Sunflower and Old Sunflower, RUS, necessarily must approve any release or subordination of those security interests.

93. In addition to requirements that RUS pre-approve in writing actions undertaken by Sunflower and Old Sunflower, RUS regulations and loan documents, including but not necessarily limited to the 2003 Loan Contract, 1988 Mortgage, 2004 Mortgage and 2007 Mortgage Supplement, impose additional restrictions and requirements that provide RUS additional control over the conduct of Sunflower's and Old Sunflower's business. These restrictions and requirements remain in place until Sunflower and Old Sunflower fully repay all loans from the United States.

94. RUS regulations require borrowers to, among other things:

- a. make a diligent effort to extend electric service to unserved persons within their service area (7 C.F.R. § 1710.103(a));
- b. meet financial “coverage ratio requirements” and design and implement rates sufficient to meet those requirements (Id. § 1710.114);
- c. maintain an approved load forecast by periodically submitting a new load forecast to RUS for review and approval (Id. §§ 1710.202, 204);
- d. maintain long-range engineering plans identifying plant investments required over a period of 10 years or more (Id. § 1710.250(a));
- e. keep books, records and accounts in which full and true entries will be made of all of the borrower’s dealings, business and affairs in accordance with detailed prescribed accounting methods (Id. Part 1767);
- f. obtain RUS approval of rates that are not subject to regulation of a state regulatory authority (Id. § 1717.301(c));
- g. obtain RUS approval of certain investments (Id. §§ 1717.650 – 659); and
- h. enter into wholesale power contracts with their members to whom they supply power and assign the contracts to RUS as security for its loans, which contracts must provide for rates sufficient to ensure that the borrower’s debt to RUS will be repaid (Id. § 1717.301(a)).

95. The 1988 Mortgage and 2004 Mortgage provide, among other things:

- a. subject to contingencies beyond its reasonable control, mortgagor shall at all times keep its plant and properties in necessary continuous operating condition and use all reasonable diligence to furnish the customers served by it with an adequate supply of electric energy;

- b. Mortgagor shall not pay its directors any salaries for their services except as approved by the United States;
- c. Mortgagor shall not hire a general manager without the approval of the United States; and
- d. Mortgagor may not make certain types of investments without the approval of the United States.

96. The 2003 Loan Contract requires Sunflower, among other things, to:

- a. maintain books, records and accounts, prepare and use power requirements studies of its electric loads and future energy and capacity requirements, maintain and use up-to-date long range engineering plans and construction work plans in accordance with RUS regulations;

- b. deliver to RUS on no less than a bi-monthly basis a list of contracts and arrangements for the development of the first new coal-fired electric generating unit planned as part of the Holcomb Expansion Project (Holcomb 2); and

- c. periodically submit a proposed annual operating budget, a 12 month cash flow projection, and a proposed capital expenditures budget to RUS, including estimates for transmission generation and construction requirements on a project-by-project basis and any proposed long term borrowing requirements.

**RUS's Approval of the Holcomb Expansion Project**

97. Sunflower is moving forward to implement the Holcomb Expansion Project, which includes up to three new coal-fired electric-generating units, which are sometimes referred to as Holcomb 2, Holcomb 3 and Holcomb 4, and sometimes referred to as "SF-2" or the "Eastern Unit," "TS-1" and TS-2."

98. The Holcomb Expansion Project also includes the expansion of an existing landfill that would allow for disposal of coal combustion wastes from the new coal-fired electric-generating units.

99. The coal combustion wastes are to be disposed of in an unlined landfill above the Ogallala aquifer.

100. The Ogallala aquifer is the region's primary source of water for drinking and other purposes.

101. Electric power from the new coal-fired electric generating units is to be transmitted to customers by a number of transmission lines, including the proposed Eastern Plains Transmission Project.

102. Sunflower is moving forward to implement plans for the Holcomb Expansion Project in collaboration with Tri-State Generation & Transmission Association, Inc. ("Tri-State"), Golden Spread Generation & Transmission Association, Inc. ("Golden Spread"), and Midwest Energy, Inc. ("Midwest Energy").

103. Tri-State is an electric generation and transmission corporation that provides electric power to 44 electric cooperatives located in Colorado, New Mexico, Wyoming and Nebraska.

104. Golden Spread is an electric generation and transmission corporation that provides electric power to 16 electric cooperatives located in Oklahoma and Texas.

105. Midwest Energy is an electric and natural gas utility with operations in Western and Central Kansas.

106. One of the proposed new coal-fired electric-generating units, sometimes referred to as “SF-2” or the “Eastern Unit,” would be owned by Sunflower, Golden Spread, and Midwest Energy, and, on information and belief, one or more additional investors.

107. The other two proposed new coal-fired electric-generating units, sometimes referred to as TS-1 and TS-2, would be owned by Tri-State.

108. Sunflower would operate all of the new units.

109. Tri-State intends to transmit power from the expanded Holcomb Station via the proposed Eastern Plains Transmission Project to Colorado, where connection would be made to Tri-State’s existing electric transmission and generating facilities.

110. On or about August 10, 2005, Sunflower, Old Sunflower, HCF and Tri-State entered into a Memorandum of Agreement that purports to set forth in general terms the parties’ agreement concerning Tri-State’s purchase of an option on the development rights for TS-1 and TS-2.

111. In a November 9, 2005 letter, RUS approved Sunflower’s execution of the Memorandum of Agreement. In the letter, RUS stated that in consideration of the approval it was requiring Sunflower to agree that certain funds would be escrowed until RUS provides future document approvals and RUS and Sunflower agree on the amount of additional consideration due to RUS for Holcomb Site Development.

112. On or about September 12, 2006, Sunflower requested the consent of RUS to proceed with execution of a number of agreements that are required for construction of the Holcomb Expansion Project, including:

a. A Purchase Option and Development Agreement by and among Sunflower, SEHI, Holcomb 2, LLC, HCF, and Tri-State (“Purchase Option and Development Agreement”);

- b. A TS1 Site Lease Agreement by and between HCF and Tri-State;
- c. A TS2 Site Lease Agreement by and between HCF and Tri-State;
- d. An Access Easement Agreement by and among HCF, Sunflower, SEHI, and Tri-State;
- e. An Indemnity Agreement by and between Sunflower and Tri-State;
- f. A Cost Sharing Agreement by and between Sunflower and Tri-State;
- g. A letter of intent between Sunflower and Golden Spread; and
- h. A letter of intent between Sunflower and Midwest Energy.

113. The Purchase Option and Development Agreement conveys to Tri-State an option to develop, build and own two pulverized coal-fired electric generating units, TS-1 and TS-2, as part of the Holcomb Expansion Project.

114. The TS1 Site and TS2 Site Lease Agreements lease to Tri-State and convey to Tri-State an option to purchase the sites on which Tri-State proposes to build its coal-fired electric-generating units, TS-1 and TS-2.

115. The Access Easement Agreement grants Tri-State an access easement over property owned by HCF, Sunflower and SEHI, for use in accessing the properties that are the subject of the TS1 Site and TS-2 Site Lease Agreements.

116. The Indemnity Agreement sets forth terms under which Sunflower agrees to indemnify and hold Tri-State harmless from loss due to breach of identified representations or obligations.

117. The Cost Sharing Agreement sets forth terms by which Sunflower and Tri-State agreed to share responsibility for certain third-party costs.

118. The Letter of Intent between Sunflower and Golden Spread sets forth the parties' mutual understanding regarding Golden Spread's purchase of a 57.17% interest in the development, construction and operation of the Eastern Unit.

119. The Letter of Intent between Sunflower and Midwest Energy sets forth the parties' mutual understanding regarding Midwest Energy's purchase of a 10.71% interest in the development, construction and operation of the Eastern Unit.

120. On or about September 12, 2006, Sunflower also requested RUS's agreement to enter into a Subordination, Non-Disturbance and Attornment Agreement with Tri-State and other Sunflower lenders. This agreement prevents RUS's security interest from attaching to improvements made by Tri-State and provides that if RUS forecloses its security interest, Tri-State's interests in developing TS-1 and TS-2 would not be affected as long as Tri-State is not in default.

121. In a November 8, 2006 letter, RUS advised Sunflower that its was approving, subject to certain conditions, Sunflower's request for consent to enter into the letters of intent with Golden Spread and Midwest Energy, the Purchase Option and Development Agreement, TS1 Site and TS2 Site Lease Agreements, Access Easement Agreement, Subordination, Non-Disturbance and Attornment Agreement, Indemnity Agreement and Cost Sharing Agreement. In the letter RUS also advised Sunflower of its approval of the form of certain additional agreements, including a Construction and Management Agreement, Common Facilities Agreement, Common Facilities Operation and Maintenance Agreement, Rail Services Coordination Agreement, and Site Preparation and Coordination Agreement. The letter stated that the consents were subject to certain conditions, including escrow of funds Sunflower

receives in connection with the Project until RUS and Sunflower agree on the amount of additional consideration due to RUS for the Holcomb Expansion Project.

122. In a November 14, 2006 letter, Sunflower advised RUS that the conditions RUS placed on the consents prevent Sunflower from proceeding with the Holcomb Expansion Project.

123. Subsequently, RUS and Sunflower undertook to reach agreement on a “sharing of the gain” from the Holcomb Expansion Project.

124. In a letter dated April 16, 2007, RUS consented, subject to certain conditions, to Sunflower’s receipt of payments from Golden Spread and Midwest Energy under the letters of intent with those entities.

125. In a letter dated May 9, 2007, RUS provided Sunflower an approval concerning an agreement in principle between Sunflower and Tri-State concerning Tri-State’s participation in the Eastern Unit at a level of 100 MW. The approval granted Sunflower permission to receive funds from Tri-State subject to certain conditions.

126. On May 20, 2007, Sunflower updated and resubmitted its request for RUS consent to enter into agreements concerning TS-1 and TS-2.

127. On or about July 26, 2007, RUS provided Sunflower consents and approvals to undertake a number of actions and enter into a number of agreements required for construction of the Holcomb Expansion Project to proceed, including the Purchase Option and Development Agreement, TS1 Site and TS2 Site Lease Agreements, Access Easement Agreement, Subordination, Non-Disturbance and Attornment Agreements for TS1 and TS2, Indemnity Agreement, Cost Sharing Agreement, an amendment to an Amended and Restated Facilities Lease, Easement and Agency Agreement, a Construction Coordination and Management Agreement, Common Facilities Agreement, Common Facilities Operation and Maintenance

Agreement, Operation and Maintenance Agreements for TS1 and TS2, Rail Services Coordination Agreement, and Site Participation and Coordination Agreement.

128. RUS provided the consents and approvals in exchange for consideration that it received for the approvals “as a Package,” as described in three separate letters dated July 27, 2007.

129. Among other things, RUS, as consideration for the consents and approvals, accepted delivery of three new promissory notes executed by Sunflower, known as the Holcomb 2 Note, Holcomb 3-B Note, and Holcomb 4 Note.

130. The Holcomb 2 Note is in the original principal amount of \$ 52,000,002.00, and states that it is to be paid in full by Sunflower on the date that Holcomb 2 is placed into commercial operation. The Holcomb 2 note further provides that if such commercial operation date has not occurred by December 31, 2021, the note shall be cancelled and of no further force and effect.

131. The Holcomb 3-B Note is in the original principal amount of \$23,000,000.00, and states that it is to be paid in full by Sunflower on the date that Holcomb 3 is placed into commercial operation. The Holcomb 3-B note further provides that if such commercial operation date has not occurred by December 31, 2021, the note shall be cancelled and of no further force and effect.

132. The Holcomb 4 Note is in the original principal amount of \$ 16,000,000.00, and states that it is to be paid in full by Sunflower on the date that Holcomb 4 is placed into commercial operation. The Holcomb 4 Note further provides that if such commercial operation date has not occurred by December 31, 2021, the note shall be cancelled and of no further force and effect.

133. As consideration for its approval of various actions and agreements required for the Holcomb Expansion Project to proceed, RUS obtained Sunflower's agreement to deposit certain funds into an account known as the Holcomb Development Account. This agreement is described in one of the three July 27, 2007 letters. Sunflower agreed to deposit in the Holcomb Development Account funds that it receives from prospective participants in and owners of all or part of the Holcomb Expansion Project for payment and reimbursement of development expenses and development fees or similar payments for the right to own an interest in or otherwise participate in the Project. Sunflower may withdraw funds from the Holcomb Development Account only for purposes listed in the July 27, 2007 letter that have been approved by RUS, and only upon RUS's authorization of the release of funds.

134. The Holcomb Development Account was established and RUS has authorized a number of releases of funds from the account.

135. Assets transferred pursuant to agreements approved by RUS include property acquired under the provisions of the Rural Electrification Act.

136. On information and belief, RUS has consented to and approved numerous other agreements and actions of Old Sunflower and Sunflower during periods of time material to this complaint. Between January 10, 2005 and May 31, 2005, Sunflower submitted at least 8 separate approval requests to RUS.

137. In addition to approving the Project, the United States, through RUS, continues to participate in and retains continuing control over the Project. Among other things, the parties contemplate that RUS will provide lien releases and/or subordinations, and authorizations for releases of funds from the Holcomb Development Account in the future. Further, Sunflower is to operate all of the new coal-fired electric generating units, and RUS's extensive control over

Sunflower's business will remain in place at least until such time as all loans to the United States are repaid.

138. The United States has a financial interest in the construction and operation of the Project.

139. Both the United States and Sunflower have characterized the relationship between the United States and Sunflower as a partnership.

140. The United States, through RUS and REA, has provided assistance to the Holcomb Expansion Project by, among other things, providing releases and subordinations of its liens, allowing the Project to utilize the Common Facilities that were acquired with loans made or guaranteed by REA, and, on information and belief, restructuring Sunflower's loan obligations.

**RUS's Failure to Comply With NEPA**

141. RUS did not prepare an environmental impact statement or otherwise comply with NEPA before participating in and approving the 2002 Restructuring, providing consents and approvals, including the November 9, 2005, November 8, 2006, April 6, 2007, May 9, 2007, and July 26, 2007 consents and approvals described above, releasing and subordinating its security interests or agreeing to do so, and undertaking other action in furtherance of the Holcomb Expansion Project, all of which are required for construction of the Holcomb Expansion Project to proceed.

142. RUS failed to comply with NEPA, which requires, among other things, consideration of alternatives to a proposed project, despite the fact that the Rural Electrification Act authorizes RUS to provide financing for alternatives to coal plants, including demand-side management, energy conservation programs, and on and off-grid renewable energy systems,

143. The Holcomb Expansion Project will have significant effects on the quality of the human environment. The Holcomb Expansion Project is one of the most controversial issues facing Kansas.

144. The Project's new coal-fired electric-generating units will emit massive amounts of carbon dioxide, contributing to global warming and its devastating consequences, as well as harmful quantities of other air pollutants, including fine particulates, sulfur dioxide and nitrogen oxides, which adversely impact human health and the environment.

145. The Project's landfill expansion will likely result in the release of toxic metals to the Ogallala aquifer.

146. The Project will use water from the Ogallala aquifer, contributing to drawdown of the aquifer on which the economy and well-being of the area depend.

147. The Project's construction will foreclose opportunities to provide Western Kansas the development benefits of clean energy alternatives, including wind power.

**CLAIM FOR RELIEF**

148. The Sierra Club restates and incorporates by reference herein the allegations of Paragraphs 1 - 147, set forth above.

149. Actions undertaken by RUS, including RUS's participation in and approval of the 2002 Restructuring, and RUS's consents and approvals, including the November 9, 2005, November 8, 2006, April 6, 2007, May 9, 2007, and July 26, 2007 consents and approvals described above, RUS's release and subordination of its security interests or agreement to do so, and other actions by RUS and the United States in furtherance of the Holcomb Expansion Project, are major federal actions significantly affecting the quality of the human environment within the meaning of § 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C).

150. RUS undertook major federal action significantly affecting the quality of the human environment under 42 U.S.C. § 4332(2)(C) by making decisions that permit, facilitate or assist action by Sunflower and its business associates that may significantly affect the quality of the human environment.

151. RUS's control over Sunflower, its assistance to, participation in, and financial interest in the Holcomb Expansion Project are sufficient to render the Holcomb Expansion Project, including action of Sunflower in furtherance of the Project, major federal action significantly affecting the quality of the human environment under 42 U.S.C. § 4332(2)(C).

152. Action undertaken by RUS described in Paragraph 149 is final agency action within the meaning of the Administrative Procedure Act, 5 U.S.C. § 704.

153. Section 1794.3, 7 C.F.R., does not apply to exempt RUS's approvals, consents and other actions that are the subject of this Complaint from environmental review requirements under RUS's policies and procedures implementing NEPA and the CEQ Regulations, the CEQ Regulations, or NEPA. On its face, Section 1794.3, 7 C.F.R., purports to exempt certain RUS approvals only from RUS's implementing procedures that supplement the CEQ Regulations, and not from NEPA or the CEQ Regulations. Section 1794.3, 7 C.F.R., applies only to ministerial action and the approvals, consents and actions of RUS that are the subject of this Complaint were not ministerial. Further, the approvals, consents and actions that are the subject of this Complaint include, among other things, total overhaul of agreements governing the relationship between RUS and Old Sunflower, RUS's participation in agreements as a party, subordinations and lien releases, none of which are subject to 7 C.F.R. § 1794.3.

154. In the alternative, to the extent it would otherwise apply, 7 C.F.R. § 1794.3 cannot lawfully be applied to exempt RUS consents, approvals, and other actions that are the subject of

this case from the environmental review requirements of NEPA or the CEQ Regulations. Such application of the regulation would be contrary to the requirement of § 102(2)(C) of NEPA that all federal agencies prepare an environmental impact statement for major federal action significantly affecting the quality of the human environment, and the CEQ regulations implementing NEPA, including 40 C.F.R. §§ 1501.4 and 1508.18. Accordingly, 7 C.F.R. §1794.3 is unlawful as applied to the extent that it exempts RUS consents, approvals and other actions at issue in this case from the environmental review requirements of NEPA or the CEQ Regulations.

155. RUS has not prepared an environmental impact statement or other adequate environmental analysis in accordance with NEPA before undertaking major federal action as described herein. RUS's undertaking of such action without complying with NEPA is arbitrary and capricious, an abuse of discretion, not in accordance with law and without observance of law within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2). RUS's failure to comply with NEPA is also agency action unlawfully withheld or unreasonably delayed within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(1).

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in favor of Plaintiff and against all Defendants and provide the following relief:

1. Declare that Defendants RUS, Edward T. Schafer and James M. Andrew violated NEPA by undertaking the actions described above without preparing an EIS or otherwise conducting adequate environmental analysis, and declare that such actions are therefore void;

2. Order, through an injunction, Defendants RUS, Edward T. Schafer and James M. Andrew to rescind the approvals, consents and other actions in furtherance of the Holcomb Expansion Project as challenged herein;

3. Order, through an injunction, Defendants RUS, Edward T. Schafer and James M. Andrew to comply with NEPA by preparing an EIS or otherwise analyzing and disclosing to the public all environmental impacts of the Holcomb Expansion Project and all reasonable alternatives to the Project before undertaking any action in furtherance of the Project, including the approval of any agreement, the release or subordination of any security interest, or the release from the Holcomb Development Account of any funds required for construction of the Project to proceed;

4. Order that Sunflower is bound by the Judgment entered in this case, and further ordering Sunflower to refrain from undertaking action in furtherance of the Holcomb Expansion Project until Defendants RUS, Edward T. Schafer and James M. Andrew comply with NEPA by preparing an EIS or otherwise analyzing and disclosing to the public all environmental impacts of the Holcomb Expansion Project and all reasonable alternatives to the Project.

5. To the extent that the Court finds that 7 C.F.R. § 1794.3 applies to exempt consents or approvals that are the subject of this case from compliance with the environmental review requirements of NEPA and the CEQ Regulations, declare and order that 7 C.F.R. § 1794.3 is invalid as applied to such consents or approvals.

6. Award Plaintiff its costs and expenses, including reasonable attorneys' fees; and

7. Award Plaintiff such other and further relief as the Court deems just and proper.

Respectfully submitted,

/s/Nicholas F. Persampieri  
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SIERRA CLUB

**CERTIFICATE OF SERVICE**

I hereby certify that on September 8, 2008, I electronically filed the foregoing with the Clerk of the Court using the e-mail address “dcd\_cmecf@dcd.uscourts.gov”, and served on the parties via e-mail to the following email addresses:

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/s/ Nicholas F. Persampieri  
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