

ORAL ARGUMENT NOT YET SCHEDULED**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

STATE OF NORTH DAKOTA

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

Case No. 15-1380
Lead Case No. 15-1363
(and consolidated cases)**PETITIONER STATE OF NORTH DAKOTA'S MOTION FOR STAY
OF EPA'S FINAL RULE**STATE OF NORTH DAKOTA
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INTRODUCTION

North Dakota filed a petition for review in this case to protect its several unique sovereign and fiscal interests. As a major energy producing state (from significant lignite coal, oil and natural gas, and wind resources), North Dakota has an unmistakable sovereign interest in regulating the generation and use of electrical energy. In fact, the North Dakota legislature has declared it to be an essential government function and public purpose to foster and encourage the wise use and development of North Dakota's vast lignite resources to maintain and enhance the economic and general welfare of North Dakota. North Dakota Century Code Ch. 54-17.5-01.

In an affront to North Dakota's sovereign interests, the U.S. Environmental Protection Agency ("EPA") recently promulgated a final regulation entitled "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units: Final Rule." 80 Fed. Reg. 64661 (October 23, 2015) (the "Final Rule"). The Final Rule assigns a particularly stringent compliance requirement for North Dakota because of North Dakota's development and use of its lignite resources. Specifically, the Final Rule requires North Dakota to reduce its carbon dioxide (CO₂) emission rate by 44.9%. In doing so, the Final Rule unlawfully exerts federal jurisdiction over North Dakota beyond the limits established by Congress under the Clean Air Act and the Federal Power Act.

North Dakota cannot stand by as its sovereign interests are undermined and its state budget is irreparably harmed by the annual loss of millions of dollars of unlawful regulatory burdens and lost energy production and coal severance taxes.

BACKGROUND

The Clean Air Act and Section 111(d)

The Clean Air Act “made the States and the Federal Government partners in the struggle against air pollution.” *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). As to stationary sources of emissions, the CAA contains several programs under which EPA sets standards, such as for the concentration of certain pollutants in ambient air, that are then implemented and administered by the states through State Implementation Plans (“SIPs”) prepared by the states. *See generally* 42 U.S.C. § 7410.

CAA § 111(d) is one such program that implements this cooperative approach for setting “standards of performance” for certain existing stationary sources of air pollutants. 42 U.S.C. § 7411(d)(1). It provides for EPA to direct the states to submit plans that “establish[] standards of performance for any existing source for any air pollutant” which would be subject to an EPA-prescribed standard if emitted by a new source and that “provide[] for the implementation and enforcement of such standards of performance.” *Id.* A “standard of performance” is defined as “a standard for emissions of air pollutants which reflects the degree of

emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) [EPA] determines has been adequately demonstrated.” 42 U.S.C. § 7411(a)(1). State plans, however, may also “take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.” 42 U.S.C. § 7411(d)(1)(B). Only in the event that a state “fails to submit a satisfactory plan,” or fails “to enforce the provisions of such plan,” may EPA step in and regulate itself by setting and enforcing standards. 42 U.S.C. § 7411(d)(2).

EPA’s Final Rule

Under the guise of imposing “standards of performance” on existing coal-fueled power plants under CAA § 111(d), the Final Rule requires North Dakota (on pain of a potential federal takeover of significant State authority) to submit a State Plan that fundamentally transforms North Dakota’s energy economy, in order to substantially reduce North Dakota’s usage of coal-fueled electricity. The Final Rule’s requirements for North Dakota are based on three “building blocks”:

(Block 1) increasing efficiency at coal-fueled power plants;

(Block 2) shifting statewide demand for coal-fueled power to natural gas generation; and

(Block 3) shifting statewide demand for coal-fueled power to renewable sources. 80 Fed. Reg. at 64,745. Only the first building block involves imposing emissions control measures on coal-fueled power plants. The remaining “blocks” require broad energy changes away from coal-fueled electricity. 80 Fed. Reg. at 64,745.

By September 6, 2016, North Dakota must submit an initial State Plan that contains: (1) “an identification of final plan approach or approaches under consideration, including a description of progress made”; (2) an acceptable explanation for why the State requires more time to submit a final plan; and (3) demonstration or description of opportunity for public comment on the initial submittal and meaningful engagement with stakeholders. 80 Fed. Reg. at 64,669. As EPA says, the requirements in the Final Rule are intended “to assure that states begin to address the urgent needs for reductions quickly.” 80 Fed. Reg. at 64,675. If North Dakota satisfies these EPA requirements, North Dakota will have until September 6, 2018 to submit a final Plan. 80 Fed. Reg. at 64, 669.

Final Rule Requirements Specific to North Dakota

The Final Rule requires North Dakota to reduce its carbon dioxide emission rate by 44.9%. Glatt Decl. ¶ 6. EPA projected the impacts of the Final Rule on power generation, capacity, emissions, and compliance costs using the Integrated Planning Model (“IPM”). Glatt Decl. ¶ 14 and Christmann Decl. ¶ 12.

EPA describes its IPM model analysis of the Final Rule as “illustrative” of the impacts of the Final Rule. *Regulatory Impact Analysis for the Clean Power Plan Final Rule*, page ES-3, et. al. In the RIA, EPA presented two scenarios designed to achieve compliance with the Final Rule: the “rate-based” illustrative plan and the “mass-based” illustrative plan. These scenarios are designed for each state to comply with the corresponding state limits (rate-based and mass-based) in the Final Rule. <http://www2.epa.gov/airmarkets/analysis-clean-power-plan>.

EPA did not run the IPM model for each year, but rather uses individual years to reflect the impacts on the power industry in multi-year periods, as stated by EPA in the model documentation:

Although IPM is capable of representing every individual year in an analysis time horizon, individual years are typically grouped into model run years to increase the speed of modeling. While the model makes decisions only for run years, information on non-run years can be captured by mapping run years to the individual years they represent.¹

Although not displayed in the RIA, the IPM model also calculated impacts for years prior to 2020 and after 2030. As noted, while EPA only presented the results for the model years 2020, 2025 and 2030 in the RIA, the supporting files available on EPA’s website all contain the IPM model results for the 7 model years shown above, including 2016 and 2018.

¹ EPA, “Documentation for EPA Base Case v.5.13 using the Integrated Planning Model”, November 2013, page 7-1. <http://www.epa.gov/airmarkets/documents/ipm/Documentation.pdf>

EPA's own analysis of the impact of the Final Rule shows that several coal-fueled power plants will close immediately in 2016 and 2018 due to the Final Rule.² While EPA did not reveal these immediate impacts in the RIA, EPA's IPM modeling results confirm that coal-fueled power plant capacity will be lower in 2016 due to the Final Rule. Those results are publicly available and can be found in tables provided on EPA's website.³ In addition, further information on the specific coal-fueled power plants which EPA projects will close early due to the Final Rule can be determined from additional IPM model documentation files, which are also available on EPA's website. Glatt Decl. ¶ 14. Several North Dakota power plants with dedicated coal mines are projected by EPA to close in the next few years due to compliance with the Final Rule.

A. EPA's Compliance Scenario Assumes North Dakota Power Plant Retirements In 2016

EPA projects the 427 MW Coyote Station to close in 2016 in its rate-based case. Christmann Decl. ¶ 12 and Glatt Decl. ¶ 14. The Coyote Station is the primary customer for the Beulah lignite mine owned by Westmoreland Coal and it will also have to close if the Coyote Station is closed in 2016. Bender Decl. ¶ 6.

² The IPM model was run for years 2016 and 2018, but not 2017. The run year 2016 is intended to be representative of 2017 also. EPA, IPM model run files, "Base Case DAT Replacement File.xlsx", "Rate-Based DAT.xlsx", and "Mass-Based DAT.xlsx", available at <http://www2.epa.gov/airmarkets/analysis-clean-power-plan>.

³ EPA, IPM model documentation and run files, system support resources, "Base Case SSR.xls", "Rate-Based SSR.xls", and "Mass-Based SSR.xls", Summary and Tables 1-16 tabs, available at <http://www.epa.gov/airmarkets/programs/ipm/cleanpowerplan.html>

The Beulah mine produced a total of 2,763,576 tons⁴ in 2014, of which 2,248,483 tons (81%) were burned at Coyote. *2014 Annual Emissions Inventory Report for the Coyote Station*. The closure of Coyote Station will force the layoff of all of the 154 employees⁵ at the mine.⁶ Christmann Decl. ¶ 12 and Glatt Decl. ¶ 14. The EPA scenario also includes the shutdown of Unit 1 at the R.M. Heskett Station in 2016. Christmann Decl. ¶ 12 and Glatt Decl. ¶ 14. This unit also consumed 120,991 tons of lignite from the Beulah Mine in 2014. *2014 Annual Emissions Inventory Report for the R.M Heskett Station*.

In addition, EPA projects the 250 MW Milton R. Young Station (MRYS) Unit 1 will close in EPA's 2016 base and rate-based Final Rule cases. Christmann Decl. ¶ 12 and Glatt Decl. ¶ 14. MRYS Unit 1 is supplied by the adjacent lignite Center. *Id.* MRYS Units 1 and 2 are the only customers for the Center mine and the mine will have to cut production if Unit 1 is closed in 2016. Christmann Decl. ¶ 12 and Glatt Decl. ¶ 14. Center mine produced a total of 3,975,634 tons⁷ in 2014, of which 1,545,190 tons (39%) were burned at MRYS Unit 1. *2014 Annual*

⁴ Ibid.

⁵ Ibid.

⁶ NACCO Industries has won a coal supply contract to replace Beulah mine at Coyote, so one could argue that Beulah will have to cut production anyway. However, then the impact of the closure of Coyote plant will fall on the new Coyote Creek mine, which is under construction and already has 52 employees building the mine, so the impact is similar. See Neumann Decl. ¶¶ 6-8 and Binder Decl. ¶ 6.

⁷ Mine Safety and Health Administration at <http://www.msha.gov/drs/drshome.htm>.

Emissions Inventory Report for M.R. Young Station. The closure of MRYS Unit 1 will force the layoff of 63 of its 162 employees.⁸

EPA also projects the closure of the Spiritwood Station in 2016. Christmann Decl. ¶ 12 and Glatt Decl. ¶ 14. In 2014, this plant combusted 91,017 tons of lignite from the Falkirk Mine. *Id.* 2014 Annual Emissions Inventory Report for the Spiritwood Station.

B. EPA's Compliance Scenario Assumes North Dakota Power Plant Retirements in 2018

EPA projects the 558 MW Coal Creek Station (CCS) Unit 1 in North Dakota will close in 2018 in EPA's rate-based case. Christmann Decl. ¶ 12 and Glatt Decl. ¶ 14. <http://www2.epa.gov/airmarkets/analysis-clean-power-plan>. CCS is supplied by the adjacent Falkirk lignite mine. Erickson Decl. ¶ 4. CCS Units 1 and 2 and the Spiritwood Station, which EPA also projects will close, are the only customers for the Falkirk mine and will have to cut production if Unit 1 is closed in 2018. Christmann Decl. ¶ 12 and Glatt Decl. ¶ 14. Falkirk mine produced a total of 7,985,648 tons⁹ in 2014, of which 3,407,090 tons (43%) were burned at CCS Unit 1. *Id.* 2014 Annual Emissions Inventory Report for the Coal Creek Station. The closure of CCS Unit 1 will force the layoff of 207 of its 482 employees.¹⁰

⁸ Ibid.

⁹ Mine Safety and Health Administration at <http://www.msha.gov/drs/drshome.htm>.

¹⁰ Ibid.

EPA also projects the closure of Unit 2 at the R.M. Heskett Station in 2018. Christmann Decl. ¶ 12 and Glatt Decl. ¶ 14. This unit combusted 396,712 tons of lignite from the Beulah Mine in 2014. *Id.* 2014 Annual Emissions Inventory Report for the RM. Heskett Station.

STANDARD FOR GRANTING A STAY

This Court considers four factors to determine whether a stay pending review is warranted: (1) the likelihood that the moving party will prevail on the merits; (2) the prospect of irreparable injury to the moving party if relief is withheld; (3) the possibility of substantial harm to other parties if relief is granted; and (4) the public interest. *Cuomo v. U.S. Nuclear Regulatory Commission*, 772 F.2d 972, 974 (D.C. Cir. 1985); *see also* D.C. Cir. Rule 18(a)(1). A stay is warranted here because halting the Final Rule, and its overreaching expansion of federal regulatory authority, will “preserve the relative position of the parties until a trial on the merits can be held.” *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

ARGUMENT

I. NORTH DAKOTA WILL SUFFER IRREPARABLE HARM IF THE FINAL RULE IS NOT STAYED.

North Dakota’s irreparable harm in this case rests on three independent bases: (1) the Final Rule deprives North Dakota of its sovereign authority, interests, and policies and deprivation of these interests during the pendency of this

action is irreparable; (2) North Dakota will suffer irreparable economic loss because the Final Rule will immediately harm the State's budget in the impending and future budget years; and (3) even if it is successful on the merits of its challenge to the Final Rule, North Dakota will not be able to recover economic damages from the federal government to compensate the State for the significant state resources immediately needed to implement the Final Rule.

First, the Final Rule runs roughshod over North Dakota's sovereign interests in administering its own comprehensive regulatory programs governing air quality and public utility regulation and energy generation and use within its borders. A federal agency's temporary infringement upon a state's sovereignty constitutes irreparable harm. *Kansas v. United States*, 249 F.3d 1213, 1227-28 (10th Cir. 2001). When a federal agency's decision places a state's "sovereign interests and public policies at stake, [the Court] deem[s] the harm the State stands to suffer as irreparable if deprived of those interests without first having a full and fair opportunity to be heard on the merits." *Id.* at 1227.

The North Dakota Department of Health (NDDH) is the agency charged with implementing and enforcing North Dakota's laws and regulations implementing North Dakota's Air Quality Control Act and the federal CAA. Glatt Decl. ¶ 3. Specifically, the NDDH oversees programs to implement New Source Performance Standards (NSPS) and the State's permitting programs for stationary

sources under Titles I and V of the CAA. *Id.* at 3; *see also United States v. Minnkota Power Coop., Inc.*, 831 F.Supp.2d 1109 (D. N.D. 2011).

Even if EPA has authority to issue CAA § 111(d) regulations governing CO₂ emissions from coal-fueled electric generating units, the Final Rule impermissibly intrudes on North Dakota's express authority under CAA § 111(d) to "establish" standards of performance. Under CAA § 111(d), EPA's authority is limited to adopting a "procedure" under which "each State shall submit to the Administrator a plan which (A) establishes standards of performance. . . ." The Final Rule usurps North Dakota's authority to "establish" performance standards by dictating what the standards must be. Glatt Decl. ¶¶ 6-9. Additionally, the Final Rule prevents North Dakota from, as provided in CAA § 111(d)(1)(B), considering "the remaining useful life of the existing source" to which a state-established performance standard applies. Glatt Decl. ¶ 9. The Final Rule will also interfere with North Dakota's significant and ongoing air quality improvement efforts. Helms Decl. ¶¶ 11-14.

The North Dakota Public Service Commission (Commission) is a state agency created by the North Dakota Constitution. N.D. Const. Art. 5, § 2. The authority of the Commission is set forth in the North Dakota Century Code. § 49-01, et seq. The North Dakota Transmission Authority was created by the North Dakota legislature and its purpose and authority are set forth in North Dakota

Century Code Chapter 17-05 et. seq. Hamman Decl. ¶¶ 4-6 North Dakota's authority over the intrastate generation and consumption of electricity is "one of the most important functions traditionally associated with the police powers of the States." *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). Congress recognized State authority in the Federal Power Act ("FPA"), which confines federal authority over electricity markets to "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce." 16 U.S.C. § 824(a); *see also id.* § 824(b)(1). The FPA and other federal energy statutes respect the States' "traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983); *cf.* 18 U.S.C. § 808(d)(2)(A). The Final Rule infringes upon North Dakota's sovereign authority over intrastate energy production and consumption. Christmann Decl. ¶¶ 16-17; Hamman Decl. ¶¶ 13-14.

Absent a stay, North Dakota will be irreparably injured by EPA's abrogation of North Dakota's cooperative-federalism rights under both the CAA and the FPA. *See New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (a State's interest "is infringed by the very fact that the state is prevented from engaging in" its regulatory process); *California State Bd. of Optometry v. FTC*,

No. 89-1190, 1989 U.S. App. LEXIS 16067, at *1 (D.C. Cir. Aug. 15, 2009)

(“[A]ny time a state is enjoined from effectuating statutes enacted by representatives of the people, it suffers ... irreparable injury.”)

Second, the Final Rule will have irreparable and far-reaching consequences on North Dakota’s economic interests in the form of substantially decreased revenues. Schmidt Decl. ¶¶ 13-14; Rauschenberger Decl. ¶¶ 11-12; Gaebe Decl. ¶ 13. While economic loss—on its own—does not ordinarily constitute irreparable harm because such losses may be later recovered through money damages, *Crowe & Dunley, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011), this rule does not apply to a state alleging economic harm because “such a stringent test could never be met.” *Oklahoma ex rel. Oklahoma Tax Com’n v. Int’l Registration Plan, Inc.*, 264 F. Supp. 2d 990, 996 (W.D. Okla. 2003). When a state alleges economic harm occasioned from the loss of tax income, the appropriate test is “whether the financial loss is temporary or not.” *Id.*

North Dakota generates significant revenue from taxes on coal conversion and coal severance. Rauschenberger Decl. ¶ 9. North Dakota also generates significant revenue from royalty and lease payments from coal on state lands. Gaebe Decl. ¶¶ 6-9. Over the last ten years, North Dakota has received more than \$250 million under the coal conversion tax and \$110 million under the coal

severance tax. Rauschenberger Decl. ¶ 9. In addition, the State also collects substantial royalties from coal extracted from state lands. Gaebe Decl. ¶ 9.

Like the court's finding in *Oklahoma Tax Commission*, North Dakota will suffer a unique economic harm because the tremendous losses of revenue from taxes will directly impact funding for the provision of "critical state services." 264 F. Supp. 2d at 997. The funds collected from taxes and royalties are distributed into funds which make financial distributions to school districts, public facilities and services, roads, and townships. Schmidt Decl. ¶ 8. These funds finance health districts, emergency management, human services, roads, schools, and law enforcement. Gaebe Decl. ¶ 10; Schmidt Decl. ¶ 8; Binder Decl. ¶ 10.

Third, North Dakota's economic harm is irreparable because significant expenditures now and reduced tax and royalty revenue cannot be recovered from EPA. North Dakota will needlessly expend substantial taxpayers' dollars to analyze and attempt to implement this complex and contradictory Final Rule, which is likely to be overturned by this Court. Substantial economic and human resources would be required to develop a Plan in an effort to implement the Final Rule. Glatt Decl. ¶¶ 13, 16-17 and Christmann Decl. ¶¶ 18-19. The threat of unrecoverable economic losses is sufficient to warrant the issuance of a stay. *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996). The Final Rule will also cause severe adverse economic and social impacts. Erickson Decl. ¶ 6; Binder

Decl. ¶ 10; Neumann Decl. ¶¶ 11-19. Because neither the CAA or APA affords North Dakota a mechanism for recovering economic damages caused by the Final Rule following a successful adjudication of the merits of North Dakota's claims, those damages are considered to be "irreparable." *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 770-71 (10th Cir. 2010) ("[i]mposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury").

II. NORTH DAKOTA IS LIKELY TO SUCCEED ON THE MERITS.

A. EPA cannot regulate existing sources under CAA § 111(d) because they are already regulated under CAA § 112.

By its own plain terms, CAA § 111(d) prohibits EPA from regulating under that section any existing source that is a member of a source category already regulated under CAA § 112 as a source of hazardous air pollutants. EPA issued its Mercury and Air Toxics Standards in 2012 for the express purpose of subjecting coal-fired electric generating units to hazardous air pollutant regulation under CAA § 112. EPA is therefore now barred from regulating the same electric generating units under CAA § 111(d) and the Final Rule.

B. EPA does not have authority to impose binding CO₂ emission reduction requirements in North Dakota.

1. North Dakota, Not EPA, Has the Authority Under CAA § 111(b) to "Establish" Standards of Performance.

CAA § 111(d) provides, in pertinent part, that EPA “shall prescribe regulations which shall establish a procedure similar to that provided by §7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant....” Under this language, EPA may not set emission reduction requirements for states. EPA may establish a procedure for states to submit plans containing state-established standards, and it may review those plans to determine if they are “satisfactory.” But EPA’s power to disapprove a state plan is limited and cannot be used, as set forth in the Final Rule, to dictate a minimum required level of emission reduction.

Under the Final Rule, whatever plan North Dakota submits, however, must ensure that emissions from the regulated source category must decline to the level of EPA’s specific requirements. *40 CFR 60.5855*. Thus, directly or indirectly, EPA is dictating the level of emission reduction North Dakota power plants must make, and it has determined that level by applying the BSER factors. As a result, EPA is promulgating performance standards within the meaning of CAA § 111(a). Under CAA § 111(d), however, Congress gave states, not EPA, authority to establish those standards.

2. The Final Rule Deprives North Dakota of Authority to Consider the Remaining Useful Lives of Regulated Sources.

Under CAA § 111(d)(1)(B), “[r]egulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.” EPA previously recognized this requirement in its general CAA § 111(d) regulations,¹¹ by providing that states may deviate from EPA-mandated guidelines for a specific facility based on, among other factors, “[u]nreasonable cost of control resulting from plant age.” The Final Rule fails to provide North Dakota with the authority and discretion it is entitled to under the CAA.

C. EPA Has No Authority To Apply BSER On A Statewide Basis.

The “system” that EPA has constructed—the “regularly interacting or interdependent group of items forming a unified whole”—is not a “system” of reducing emissions at coal-fueled power plants but in reality is a restructuring of North Dakota’s electric utility system. According to EPA, the “regularly interacting or interdependent group of items” in this system are EPA’s building blocks, which it calls “components” of this system. *80 Fed.Reg. 64720 and 64728*. But natural gas, renewable, and energy efficiency resources are obviously not components of coal-fueled power plants; they are components of a state electric

¹¹ 40 C.F.R. § 60.24(f).

utility system. Under CAA § 111, however, BSER is not the “best system” for operating a state’s utility system. Rather, it is the best system for reducing emissions from the source category being regulated.

As does the Final Rule, standards of performance cannot be established on an entire state-by-state basis; they must be established on a unit-by-unit basis. This is clear from CAA § 111(d), which provides for EPA to adopt regulations calling on states to submit plans establishing “standards of performance for *any existing source*.” Indeed, in an early NSPS case, this Court held that EPA could not combine into a single source multiple units at a single plant. As this Court stated, “[t]he regulations plainly indicate that EPA has attempted to change the basic unit to which the NSPSs apply from a single building, structure, facility, or installation (the unit prescribed in the statute) to a combination of such units. The agency has no authority to rewrite the statute in this fashion.” *See, ASARCO Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978).

D. The Final Rule violates the CAA and the APA because North Dakota was not afforded sufficient opportunity for Notice and Comment.

The APA requires EPA to publish a proposed rule including “the terms or substance of the proposed rule or a description of the subjects and issues involved” and afford “interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.” *See* 5 U.S.C. § 553(b)-

(c). Where a final rule adopted differs from the rule proposed, the final rule must be a “logical outgrowth of the rule proposed.” *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007). A final rule cannot stand unless reasonable parties “should have anticipated that [the] requirement” could be promulgated from the proposed rule. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).

The Final Rule imposes a four-fold increase in EPA-mandated CO₂ emission reduction requirements over the proposed rule for North Dakota. EPA improperly made numerous material changes to the Final Rule after the close of the public comment period that a reasonable person would not have anticipated based on the rule as proposed. *Id.* Glatt Decl. ¶¶ 19-20 and Christmann Decl. ¶ 24. Erickson Decl. ¶¶ 9-10.

III. THE BALANCE OF HARMS TIP IN FAVOR OF A STAY.

If the Final Rule is not stayed, North Dakota and its citizens will suffer significant harm. Granting a Stay will freeze the status quo. North Dakota will be forced to expend significant state resources to comply with the Rule even though it is likely to be invalidated. North Dakota would also incur the loss of significant state revenues associated with the use of coal for electric generation. Moreover, ratepayers in North Dakota would see their electricity bills increase as a result of the Final Rule.

IV. A STAY IS IN THE PUBLIC INTEREST.

The public interest favors granting a stay of the Final Rule. There is no public interest in subjecting North Dakota to the harms set forth herein. In contrast, staying the Final Rule will cause EPA no harm. *See e.g. Texas v. United States*, 2015 U.S. App. Lexis 8657, 74-75 (5th Cir. May 2015).

CONCLUSION

For the foregoing reasons, the State of North Dakota respectfully requests that this Court enter an order Staying the Final Rule.

DATED: October 29, 2015

Respectfully submitted,

STATE OF NORTH DAKOTA
WAYNE STENEHJEM
ATTORNEY GENERAL

/s/ Paul M. Seby

Paul M. Seby
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Counsel for Petitioner State of North Dakota

Certificate of Service

I hereby certify that on October 29, 2015, I electronically filed the foregoing **Petitioner State of North Dakota's Motion to Stay and For Expedited Review**, and accompanying addenda and attachments, with the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

By: /s/Paul M. Seby
Paul M. Seby
Special Assistant Attorney General
State of North Dakota
***Counsel for Petitioner State of North
Dakota***

Certificate of Compliance with Circuit Rule 18(a)

Pursuant to Circuit Rule 18(a)(1), I hereby certify that North Dakota applied to EPA for an immediate stay of the Rule. EPA informed some States that the agency would not be granting the relief requested. Pursuant to Circuit Rule 18(a)(2), I hereby certify that on October 29, 2015, counsel for the Respondent was informed by telephone of this Motion.

By: /s/Paul M. Seby
Paul M. Seby
Special Assistant Attorney General
State of North Dakota
***Counsel for Petitioner State of North
Dakota***

Certificate as to Parties, Ruling, and Related Cases

(a) Parties, Intervenors, and Amici

The following are petitioners in Case No. 15-1380 and consolidated cases:

State of Oklahoma

Oklahoma Department of Environmental Quality

State of West Virginia

State of Alabama

State of Arkansas

State of Colorado

State of Florida

State of Georgia

State of Indiana

State of Kansas

State of Louisiana

State of Missouri

State of Montana

State of Nebraska

State of New Jersey

State of Ohio

State of Oklahoma

State of South Carolina

State of South Dakota

State of Utah

State of Wisconsin

State of Wyoming

Commonwealth of Kentucky

Arizona Corporation Commission

State of Louisiana Department of Environmental Quality

State of North Carolina Department of Environmental Quality

Attorney General Bill Schuette on behalf of the People of Michigan

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths,

Forgers and Helpers, AFL-CIO

Murray Energy Corporation

National Mining Association

American Coalition for Clean Coal Electricity

Utility Air Regulatory Group

American Public Power Association

Alabama Power Company

Georgia Power Company

Gulf Power Company

Mississippi Power Company

CO2 Task Force of the Florida Electric Power Coordinating Group, Inc.

Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc.

Tri-State Generation and Transmission Association, Inc.

United Mine Workers of America

National Rural Electric Cooperative Association

Westar Energy, Inc.

NorthWestern Corporation, doing business as NorthWestern Energy

National Association of Home Builders

State of North Dakota

Chamber of Commerce of the United States of America

National Association of Manufacturers

American Fuel & Petrochemical Manufacturers

National Federation of Independent Business

American Chemistry Council

American Coke and Coal Chemicals Institute

American Foundry Society

American Forest & Paper Association

American Iron and Steel Institute

American Wood Council

Brick Industry Association

Electricity Consumers Resource Council

Lignite Energy Council

National Lime Association

National Oilseed Processors Association

Portland Cement Association

Association of American Railroads

Luminant Generation Company, LLC

Oak Grove Management Company, LLC

Big Brown Power Company, LLC

Sadow Power Company, LLC

Big Brown Lignite Company, LLC

Luminant Mining Company, LLC

Luminant Big Brown Mining Company, LLC

Respondents are the United States Environmental Protection Agency and Regina A. McCarthy, Administrator, United States Environmental Protection Agency.

Movant-Intervenors for Respondents are American Wind Energy Association, Advanced Energy Economy, American Lung Association, Center for Biological Diversity, Clean Air Council, Clean Wisconsin, Conservation Law

Foundation, Environmental Defense Fund, Natural Resources Defense Council, Ohio Environmental Council, and Sierra Club.

No amici curiae have entered appearances.

(b) Ruling Under Review

Under review is the EPA rule Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661 (Oct. 23, 2015). The Rule is attached to this motion as Attachment B.

(c) Related Cases

On June 9, 2015, this Court denied petitions challenging EPA's authority to issue the rule under review, holding that the petitions were premature because they were filed before the agency took final action. *In Re Murray Energy Corp.*, No. 14-1112; *West Virginia v. EPA*, No. 14-1146. *See* 788 F.3d 330 (D.C. Cir. 2015). On September 9, 2015, this Court denied several States' petition under the All Writs Act for a stay before publication of the Power Plan in the *Federal Register*. No. 15-1277, ECF No. 1572185.

By: /s/Paul M. Seby
Paul M. Seby
Special Assistant Attorney General
State of North Dakota
***Counsel for Petitioner State of North
Dakota***

ORAL ARGUMENT NOT YET SCHEDULED**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

STATE OF NORTH DAKOTA

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

Case No. 15-1380
Lead Case No. 15-1363
(and consolidated cases)**PETITIONER STATE OF NORTH DAKOTA'S MOTION FOR STAY
OF EPA'S FINAL RULE****Addendum
Part I of II**STATE OF NORTH DAKOTA
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Dakota***

ATTACHMENT A

DECLARATIONS

ORAL ARGUMENT NOT YET SCHEDULED**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

STATE OF NORTH DAKOTA

Petitioner,

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UNITED STATES ENVIRONMENTAL
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maiolson@nd.gov***Counsel for Petitioner State of North
Dakota***

ATTACHMENT B

FEDERAL REGISTER CLEAN POWER PLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

STATE OF NORTH DAKOTA

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

**DECLARATION OF
L. DAVID GLATT**

Case No. 15-1380

I, L. David Glatt, state and declare as follows:

1. My name is L. David Glatt. I am over 21 years of age and am fully competent and duly authorized to make this Declaration. The facts contained in this Declaration are based on my personal knowledge and are true and correct.

2. I am employed as the Chief of the Environmental Health Section (“EHS”) North Dakota Department of Health (“NDDH”). I have been employed by the NDDH since 1983, and have continuously served as the Chief of the EHS since 2004.

3. The State of North Dakota, through the North Dakota Department of Health (“NDDH”), implements and enforces the State’s various environmental regulatory programs, including state and federal air quality programs involving the regulation of stationary sources of air pollution. I am responsible for enforcing North Dakota’s air quality regulations and those that also implement the federal

Clean Air Act (“CAA”) involving programs for statutory sources under Titles I and V of the CAA – including CAA § 111(d).

4. North Dakota has for decades been aggressive in achieving the first stated purpose of the CAA: “to protect and enhance the quality of the Nations’ air resources so as to protect the public health and welfare and the productive capacity of its population.” CAA 110(b)(1), 42 U.S.C. § 741(b)(1).

5. I am familiar with the Final Rule promulgated by the U.S. and the Environmental Protection Agency (“EPA”) (“Final Rule”) entitled “Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electronic Generating Units” 80 Fed Reg. 64,662 (Oct. 23, 2015).

6. EPA’s Final Rule establishes very stringent requirements for North Dakota to dramatically reduce carbon dioxide emissions from existing coal-fueled power plants in North Dakota. Specifically, EPA’s Final Rule requires an emission rate of 1,305 lb/MWh, which is 45% below North Dakota’s 2012 baseline emission rate of 2,368 lb/MWh. The Final Rule provides North Dakota with an alternative to EPA’s emission rate approach, where EPA prescribes a mass emissions limit of 20,883,232 tons. EPA’s mass emissions compliance alternative requires a 37% reduction from the 2012 baseline of 33,370,886 tons.

7. Under the Final Rule, North Dakota must “choose” between two plan types—emission rate- or mass-based, to satisfy EPA’s aggressive emission targets. In a rate-based State Plan, North Dakota must require affected power plants to satisfy an average amount of carbon dioxide per unit of power produced. The required target would be impossible for any existing North Dakota coal-fired

power plant to meet and continue operating for at least several reasons as follows:

1) the improvement of the current facility heat rate efficiencies through the implementation of available technologies and utilization of engineering best practices can only achieve, at best, 1 to 2 percent improvement in the heat rate, which would have minimal impact on the emission rates; 2) carbon dioxide capture technology has not been fully developed and is not available industry wide at a cost effective rate; 3) the availability of emission credits to continue facility operation is uncertain and may be cost prohibitive; and 4) there is insufficient time to plan and obtain necessary permits and regulatory approval and implement the reduced carbon emission plan that would comply with the established rule target dates. In a mass-based State Plan, North Dakota must cap the amount of carbon dioxide emissions that the whole sector of affected power plants can emit per year. This type of Plan must include some combination of enforceable emission limitations on power plants, and may include additional policy programs such as increasing renewable energy and tightening energy efficiency standards, and emissions trading. There are several issues and burdens associated with this approach, the least of which do not address anticipated load growth on top of compliance with the Final Rule, the large amount of renewable energy needed to be planned and implemented within the required time frame and the unknown impact of anticipated increased cost and reliability concerns of electricity distribution.

8. The Final Rule requires North Dakota to address not only the emitting sources but also goes outside the boundary of a stationary source and incorporates

non-emitting sources (e.g. wind and solar generation) and re-dispatching power to lower emitting units. In an effort to comply with the Final Rule, North Dakota would have to significantly increase the MW's produced by non-emitting sources (i.e. wind). It is roughly estimated that 3,300 wind towers and associated transmission lines must be constructed the next couple of years, with the associated credits staying in North Dakota. This monumental task would only minimally meet the required emission reduction goal in the state and would not address the anticipated load growth. Due to the fractured nature of the electric generation and transmission industry in the North Dakota, where no less than 5 separate companies distributing electricity to customers in up to 9 states with assets located in different states, a comprehensive and effective state plan will require coordination of all existing facilities and assets.

9. The Final Rule prevents the NDDH from exercising the authority and discretion entrusted to it, on behalf of North Dakota by CAA § 111(d), including taking into consideration the “remaining useful life of existing sources.”

10. The Final Rule requires North Dakota to take into account reliability of the electrical system when developing North Dakota's plans which has never occurred with any other air pollution control rule. The re-dispatch of power, protecting the reliability of the electrical system and accounting for wind or solar generation have never before been requirements for the NDDH when implementing an EPA rule. These are requirements that exceed the existing statutory authority and discretion of the NDDH.

11. With regard to the September 2016 deadline contained in the Final Rule for submittal of a North Dakota State Plan, the NDDH will be required (1) to identify North Dakota's State Plans that are "under consideration," (2) provide an "appropriate explanation" for any additional time the NDDH or State of North Dakota will need, and (3) describe how the NDDH and North Dakota has provided for "meaningful engagement" with the public leading up to the submission. 80 Fed. Reg. at 64,856. Satisfying these three steps for the September 2016 deadline requires significant *immediate* effort and expenditures by the NDDH. This will require, among other things, identifying the amount of natural gas and renewable capacity that can be developed; understanding the timeframe on which such new capacity could be developed consistent with the public's ability to obtain reliable, affordable energy; engaging in intrastate communications with public utilities commissions; engaging in interstate outreach to other States possibly interested in multistate options; holding meetings with the public and industry; and, determining what implementing legislation could plausibly be adopted by the North Dakota legislature that meets every two years. The NDDH must also assess what measures are needed to obtain credits under the Clean Energy Incentive Plan, because the 2016 submission must include a statement of intent if North Dakota wishes to participate.

12. The Final Rule also requires the NDDH to submit an "update" to EPA by September 2017, describing the type of approach it will take in the final plan submittal and to draft legislation or regulation for this approach." 80 Fed. Reg. at 64, 859.

13. As to the September 2018 date set forth in the Final Rule for final State Plan submittals to EPA, that deadline also requires immediate expenditures by the NDDH. The immediate expenditures include staff time to review and interpret the new rule, public outreach and communication, modeling to determine anticipated cost and reliability impacts and evaluation of how the Clean Power Plan will impact and potentially postpone proposed new energy development in the state.

14. The NDDH has evaluated the Final Rule and determined that EPA evaluated the effects of the Final Rule using its Integrated Planning Model (IPM). In this analysis, EPA projected that six units of coal-fired generation (totaling more than 1,300 MW) in North Dakota would retire by 2020. This included the two units of the R.M. Heskett Station, M.R. Young Station Unit 1, Coyote Station, Spiritwood Station and one unit of the Coal Creek Station. In 2014, these units produced 9,672,068 megawatt-hours of electricity or 27% of the total generation in North Dakota. Based on the Annual Emissions Inventory Reports that were submitted to the NDDH for the facilities, the units consumed nearly 8 million tons of lignite in 2014. The R.M. Heskett Station combusted 517,703 tons, the M.R. Young Station Unit 1 - 1,545,188 tons, Coyote Station - 2,248,483 tons, Spiritwood Station - 91,017 tons and Coal Creek Station Unit 1 - 3,407,090 tons. This includes 2.77 million tons from the Beulah Mine, 1.55 million tons from the Center Mine and 3.53 million tons from the Falkirk Mine. Based on EPA's scenario, the Beulah Mine would shut down and production from the Center Mine

reduced by approximately 40%. Production at the Falkirk Mine would be reduced by approximately 50%.

15. Although EPA indicates this is just one possible approach North Dakota may take to comply with the Final Rule, it is unfortunately a realistic approach given the compliance requirements imposed on North Dakota by the Final Rule. Because North Dakota must reduce its emission rate by 45%, approximately each megawatt of North Dakota coal-based generation must be matched with a megawatt of zero carbon emitting generation in order to achieve compliance with the Final Rule. Energy efficiency improvements at North Dakota power plants are expected to only produce a 1-2% increase in efficiency. Since there are no demand side energy efficiency programs (formerly Building Block 4) in North Dakota, the benefit from demand side energy efficiency is expected to be minimal. Compliance can only be accomplished by retiring coal plants, greatly curtailing the use of the affected units or purchasing emission rate credits (ERC) or allowances. If coal generation is not curtailed, the affected utilities will have to purchase ERCs or mass allowances. At this time, the number of ERCs or allowances available is unknown because the trading program has not even been developed. This also makes the cost of the ERCs and allowances unknown. EPA has estimated the cost to reduce carbon dioxide emissions at \$30 per ton. 80 Fed. Reg. at 64,749. The cost to North Dakota utilities (ultimately North Dakota and other ratepayers) for reducing emissions could be \$375 million per year. Based on 2013 data, this would increase the cost of electricity generation by coal-fired units in North Dakota by as much as 58%. With an expanding economy, growing

population and a large load growth predicted for western North Dakota because of oil and gas development, this makes planning extremely difficult and pushes utilities toward coal-fired plant closures. If plant closures occur, there is insufficient time to plan, design and construct new generation and transmission systems before the initial compliance date of 2022.

16. Developing a North Dakota plan that complies with the Final Rule represents an unprecedented challenge for both the NDDH and the utilities that operate the affected power plants within North Dakota. I expect that development of the plan will require a minimum of 4 full time employees for the three years from September 2015 to September 2018. The plan development effort is expected to cost the NDDH an estimated \$2.1 million. North Dakota's Legislature meets every two years and concluded its last session earlier this year. EPA's Final Rule was made public and signed after the end of the North Dakota 2015 legislative session. The North Dakota legislature was not aware of these expenses and did not include resources for the NDDH to address them.

17. The NDDH's expenditure of human and fiscal resources will immediately redirect the NDDH from serving its full regulatory mission, as directed by the North Dakota legislature, causing further irreparable harm. Designing North Dakota's Plan will also take time away from the NDDH's obligation to regulate and protect North Dakota's natural resources.

18. The NDDH submitted extensive written comments on EPA's proposed rules. The concerns North Dakota expressed have been greatly compounded by EPA's Final Rule, which imposed dramatically more stringent

compliance requirements on North Dakota. Remarkably, EPA's Final Rule imposes a four-fold increase in EPA-mandated emission reduction requirements for North Dakota over those EPA initially proposed. The Final Rule requires North Dakota to reduce its carbon dioxide emission rate by 44.9% or 420% more than the Proposed Rule.

19. The Final Rule contains numerous significant, material elements of central relevance to the outcome of the Final Rule that EPA did not identify in the Proposed Rule. As such, the NDDH and the public were not provided with any opportunity to comment on these new and wholly unexpected provisions. Further, the NDDH nor members of the public could not have reasonably anticipated these changes and they are not a "logical outgrowth" of the Proposed Rule. The NDDH would have commented on these issues had EPA identified them. EPA can only address these unacceptable circumstances by providing the NDDH and the public with a new and meaningful notice and comment period.

20. Below are some aspects of the Final Rule for which EPA did not properly give notice in the proposal:

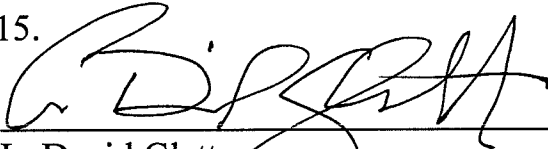
- (a) EPA issued voluminous highly technical data and support documents essential to a thorough evaluation of the Proposed Rule as late as October and November 2014, just days before EPA's close of the public comment period. These documents covered fundamental aspects of the Proposed Rule, ranging from building block methodology, the calculation of state-specific goals, emission reduction compliance trajectories, and the translation of emission rate-based goals to mass-based equivalents. This left insufficient time for the NDDH to meaningfully study, evaluate, and comment on the Proposed Rule.
- (b) EPA failed to identify in the Proposed Rule all of the potential changes it intended to make to allowances and compliance credits and its intention to undermine existing state Renewable Portfolio Standards programs with its ill-defined Emission Reduction Credit (ERC) program and the mass-based and rate-based trading programs.

EPA's decision to include in the Final Rule provisions that disallow credit for a significant portion of North Dakota's existing renewable energy is not a logical outgrowth of the Proposed Rule and could not be anticipated.

- (c) EPA did not identify in the Proposed Rule that renewable energy facilities constructed before 2013 would not receive compliance credits during compliance years. Nor did EPA identify that those facilities constructed before 2018 would be denied extra compliance credit from 2020-2021 under the Clean Energy Incentive Program (CEIP) because the CEIP does not credit any facilities built before the final State plan submittal, which is due on or about September 6, 2018.
- (d) EPA revised its "Building Blocks" methodology without giving the public an opportunity to comment on the material changes. The Rule's Building Blocks are the foundation of the performance standards, yet the NDDH did not have an opportunity to comment on the new assumptions for heat-rate improvements for coal plants, dispatch rates for natural gas plants, and expansion of renewable generation.
- (e) The Final Rule provides an adjustment to the baseline fossil fuel-fired generation for several states due to high hydroelectric generation in 2012. These states include South Dakota, Minnesota and Montana which all border on North Dakota. In 2012, hydroelectric generation in North Dakota was 128% of normal. However, EPA denied North Dakota an adjustment to its fossil generation based on arbitrary criteria including 1) generation had to be greater than 10 percent of total generation, 2) there had to be an increase of greater than 5 percent hydro generation relative to the 1990-2012 average generation, and 3) there had to be a greater than 5 percent adjustment to the state's fossil fuel generation (*CO₂ Emission Performance Rate and Goal Computation Technical Support Document for the CPP Final Rule*; p.28). The NDDH had no chance to provide comment on these criteria and the adjustments that were made.
- (f) In addition, EPA applied the Building Blocks to affected sources in a new manner. The performance standards in the Final Rule were developed by applying the Building Blocks to three regional interconnection systems. This novel approach was not contemplated by EPA in the proposed rule. In sum, the Building Blocks and the manner in which they were applied are indisputably of central relevance to the Final Rule.

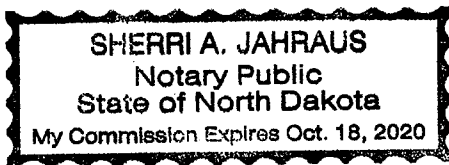
Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 29, 2015.



L. David Glatt

The foregoing Declaration of L. David Glatt was subscribed and sworn
before me by L. David Glatt on October 29, 2015.



Witness my hand and official seal.



Notary Public

My commission expires: 10/18/2020

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**IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA**

STATE OF NORTH DAKOTA

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

**DECLARATION OF
JESSICA J. BINDER**

Case No. 15-1380

I, Jessica J. Binder, state and declare as follows:

1. My name is Jessica J. Binder. I am over 21 years of age and am fully competent and duly authorized to make this Declaration. The facts contained in this Declaration are based on my personal knowledge and are true and correct.

2. I am the duly elected State's Attorney for the County of Mercer in the State of North Dakota, and have the authority of the Mercer County Board of Commissioners to make this declaration pursuant to the unanimous approval by the Board at the special meeting held on October 29, 2015.

3. In my current position, I am familiar with the Final Rule promulgated by the U.S. Environmental Protection Agency ("EPA") entitled Carbon Pollution

Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units. 80 Fed. Reg. 64662 (October 23, 2015).

4. Historically North Dakota generally has been a farming community, which was also the case for Mercer County specifically. That began to change statewide, however, in the late 1970s and early 1980s when the farm economy dwindled. While many rural counties struggled as their residents left to seek employment in urban areas, Mercer County began to boom. The reason is simple: coal. Coal allowed Mercer County to grow while watching other rural counties disintegrate. While other rural county communities became ghost towns, communities within Mercer County grew. Mercer County benefitted from significant tax contributions by the coal facilities while many other rural county governments struggled to operate. The average income for residents in Mercer County surpassed the average income for other rural counties and the communities within thrived. Indeed, the median household income in Mercer County continues to exceed that of the average median household income in North Dakota.

According to information from the United States Census Bureau the median household income in Mercer County for 2009-2013 was \$66,534.00 while the statewide median household income was \$53,741.00. Additionally, the percentage of people falling below the poverty line in Mercer County is lower than the statewide average with Mercer County having only 7.3% people below the poverty

line compared to the State's 11.9% number. Coal is central to the way of life in Mercer County, and has been for decades.

5. The way of life in Mercer County is now threatened by the EPA's Final Rule. Initially, the EPA proposed an 11% reduction in carbon dioxide emissions from existing power plants within North Dakota. However, when the Final Rule was released in August of this year, the plan called for a 45% reduction. Such a dramatic increase without basis demonstrates the arbitrary and capricious manner in which the EPA proceeded in this regard. The Final Rule is legally vulnerable on other grounds, and is appropriately subject to court scrutiny. Mercer County, although in support of the North Dakota Attorney General in seeking legal review of the Final Rule, is most concerned with the effects on Mercer County and its residents in the interim. Included in the model the EPA used to assess the Final Rule is the assumption to close specific plants by 2018, including a plant within Mercer County. Should the Final Rule be implemented in a manner consistent with the EPA's assumption, Mercer County will suffer irreparable harm which could not be rectified if the challenge by North Dakota is successful years later.

6. For decades, in addition to two coal mines and one gasification plant, Mercer County has been home to three coal-fired generating facilities, all of which provide significant employment opportunities for local residents:

- (A) Coyote Station, a 425 megawatt power plant that has been in operation since 1981, employs approximately 80 people. Coyote Station is a landmark in Beulah, resting on the south hills overlooking the valley in which Beulah is situated. Recently, Coyote Station has entered into a contract with the North American Coal Corporation to supply coal through 2040 resulting in the opening of the first new coal mine in North Dakota in over three decades. When it begins full operations in 2016, the Coyote Creek Coal Mine will employ over 120 employees. A shutdown of Coyote Station, or even a reduction in operations, will directly and negatively impact Coyote Creek Coal Mine and those who are employed there, as well as Mercer County as a community.
- (B) Antelope Valley Station (“AVS”) is a 900 megawatt plant in operation since 1984. AVS currently employs over 200 people at its facility north of Beulah in Mercer County. AVS is a “mine-mouth” facility as it is located adjacent to Coteau Property Company’s Freedom Mine, which provides coal directly to the plant.

- (C) Great Plains Synfuels Plant has operated adjacent to AVS since 1984, and is the only commercial-scale coal gasification plant in the United States that manufactures natural gas and other byproducts. Great Plains Synfuels Plant currently employs over 750 people at its facility north of Beulah in Mercer County.
- (D) Leland Olds Station is located near the City of Stanton, the county seat of Mercer County. The station is a 669 megawatt plant that has been in operation since 1966, but expanded operations in 1975 with the addition of a second unit. Leland Olds currently employs 175 regular employees and has over 100 contract employees at its facility in Mercer County.
- (E) Coteau Property Company's Freedom Mine, which provides coal directly to AVS, also supplies coal to the Great Plains Synfuels Plant and to the Leland Olds Station. Accordingly then, as is the case for Coyote Station and Coyote Creek Coal Mine, any reductions in the operations of AVS, the Great Fuels Synfuels Plant and/or the Leland Olds Station will directly affect the employees of Coteau and indirectly affect Mercer County. Currently there are approximately 500 people employed with the Coteau mining operations in Mercer County.

(F) The Stanton Station of Great River Energy is a 188 megawatt facility located near Stanton in Mercer County. The facility has been in operations since 1966. The facility employs approximately 65 employees at the facility.

7. In the late 1970s and early 1980s, many people relocated to Mercer County to work in the mining and power sectors. Many of those people never left and have significantly contributed to the community of Mercer County ever since. They have raised families in Mercer County and established significant ties to the area. Extended family members have moved to the area as well, and the blending together of families in Mercer County has added to the enjoyable lifestyle and cemented the commitment of many to the area. Additionally, many families who would not have been financially able to maintain farming and ranching operations and who may have left the area were in fact able to continue those operations by supplemental income from the coal industry. Now, some 30-plus years later, Mercer County has watched as employment in the power and mining sector has become multi-generational, much like the historical farming and ranching operations have been in Mercer County and some of which have been able to continue to be due to the supplemental income provided by the coal industry.

8. The contributions to Mercer County by those in the various coal-related entities are immeasurable. Small businesses and local medical facilities

have grown while serving the thriving community. The employees and their families fulfill civic roles through local governing bodies. They volunteer for local fire and ambulance services. Their children fill the schools. In fact, at the recent Annual Meeting of the Coal Conversion Counties, it was reported that 54% of the children in the Beulah Public School located in the City of Beulah in Mercer County have a direct connection to the coal industry. The loss of jobs and the resultant loss of dedicated residents in Mercer County would work to irreparably harm not only the way of life in Mercer County, but would most definitely send shockwaves through many large, extended families forced to separate. It should be noted that this is not merely the case for plants within Mercer County, but also for the potential of closures in Oliver and McLean Counties as well. Many residents of each county commute to work at the coal facilities in adjacent counties. The mutual and connected lifestyle of this tri-county area known as “Coal Country” would cease to exist as life-long residents, such as myself, have come to know it. Such a loss is irreparable and immeasurable.

9. Of course the residents of Mercer County wish to live in a safe environment. To that end, residents have directly benefitted from the advancements in technology implemented at each coal facility during their decades of operation, which has improved dramatically. The following are a few examples

at each plant, but is by no means an exhaustive list of all steps taken at each facility:

- (A) AVS is a zero-discharge facility as it relates to water, which means water only leaves the facility through evaporation.
- (B) Carbon dioxide has been captured at the Great Plains Synfuels Plant since 2000 and routed by pipeline to customers in Canada for use in oil operations.
- (C) At the Leland Olds Station a scrubber system was implemented in 2013 to remove sulfur dioxide emissions.
- (D) Coyote Station recently installed technology to reduce mercury emissions by over 50%, and has an outage planned in 2016 to install technology to reduce nitrogen oxides by approximately 50%.

Since the inception of each facility, the residents of Mercer County have benefitted from the continued development of technology, and expect to continue to benefit from the continued research and implementation of further advancements.


10. The tax revenues derived from the coal mining and power sectors contribute greatly to the continued development of Mercer County. In 2014, out of the \$4.2 million in revenue for the general fund, approximately \$1.5 million came

from the coal conversion tax and nearly \$1.8 million came from the coal severance tax, leaving less than \$1 million from non-coal sources. Certainly the loss of families to the area would further reduce revenue for Mercer County, as recoverable property tax amounts would decrease, although the full extent of that loss cannot be calculated at this time. An inability to calculate the loss, both directly and indirectly, is the crux of the concern over the viability of Mercer County in the event of closures of any of its coal facilities, as the potential for complete decimation of the way of life for longtime residents within Mercer County exists.

11. Given the irreparable and immeasurable harm Mercer County will suffer if implementation of the EPA's Final Rule proceeds, Mercer County prays the Final Rule be stayed until disposition of the underlying legal challenge by North Dakota.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 29th 2015.



Jessica J. Binder (ND #06122)
Mercer County State's Attorney
P.O. Box 39
Stanton, ND 58545
(701) 745-3518
jjbinder@nd.gov

On this 29th day of October, 2015, before me personally appeared Jessica J. Binder, known to me to be the person described in the within and foregoing instrument and acknowledged to me that she executed the same.

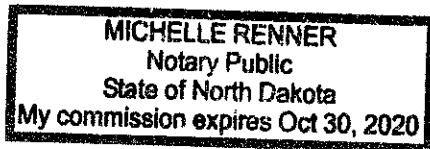
Michelle Renner

Notary Public

Mercer County, North Dakota

My Commission Expires: _____

(S E A L)



**IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA**

STATE OF NORTH DAKOTA

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

**DECLARATION OF JOHN
D. NEUMANN**

Case No. 15-1380

I, John D. Neumann, state and declare as follows:

1. My name is John D. Neumann, and I am the Vice President, General Counsel and Secretary of The North American Coal Corporation (“NACoal”).
2. NACoal, a subsidiary of NACCO Industries, Inc., mines and markets lignite and bituminous coal primarily as fuel for power generation and provides selected value-added mining services for other natural resources companies. Its corporate headquarters is located in Plano, Texas near Dallas. NACoal operates surface mines in North Dakota, Mississippi, Texas, and Louisiana.
3. NACoal is one of the United States’ largest miners of lignite coal and among the largest coal producers in the country, producing approximately 29.3 million tons of lignite in 2014.

4. Because lignite has a higher moisture content and a lower heat content than other types of coal, and therefore cannot be transported long distances in a cost-effective manner, most lignite is sold to power plants adjacent or near to the producing mine. If a power plant served by a lignite mine closes, I am not aware of any reasonably viable new market opportunities for the lignite coal.

5. I am familiar with the Final Rule promulgated by the U.S. Environmental Agency (“EPA”) entitled: “Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units” 80 Fed. Reg. 64662 (Oct. 23, 2015).

6. EPA’s Final Rule will cause immediate, irreparable injury to NACoal, its workers, and the North Dakota communities in which it mines coal in two ways.

a. First, according to EPA’s IPM Model accompanying the Final Rule, the Final Rule will cause the retirement of the North Dakota electric generating station to which our Coyote Creek Mine in North Dakota sells all of its coal production. This will cause the mine to close, cause a layoff of the mine’s workforce, and it will lead to more than \$150 million in stranded investment at the mine, all of which will likely be passed through to North Dakota electric ratepayers and small municipalities.

b. Second, according to EPA's IPM Model accompanying the Final Rule, the Final Rule will cause the retirement of one of the electric generating units to which our Falkirk Mine in North Dakota sells coal, which in turn will cut mine production by more than 40 percent and cause a layoff of about 40 percent of the mine's work force. In any event, the rule will force NACoal to forego a major equipment purchase in excess of \$50 million at the mine. NACoal believes that all of these injuries are preventable if the Court stays and ultimately overturns the rule.

7. Through a wholly-owned subsidiary, Coyote Creek Mining Company, L.L.C. ("CCMC"), NACoal is developing the Coyote Creek Mine in Mercer County, North Dakota, about 70 miles northwest of Bismarck. The Coyote Creek Mine will begin making lignite deliveries to the Coyote Station, a 427 megawatt power plant, in 2016.

8. Based on the EPA's IPM Model accompanying the Final Rule, Coyote Station will close in 2016 or 2017 unless the Final Rule is stayed. The purpose of the Coyote Creek Mine is to support, and to provide a fuel source for, Coyote Station. Thus, if the power plant closes, Coyote Creek Mine would close as well. If that were to happen, the 90-person mine workforce would be laid off, CCMC would go out of business, and the local community and the State of North

Dakota would be deprived of the valuable related benefits and taxes and royalties described below in paragraph 16.

9. To fund the development and construction of the Coyote Creek Mine, CCMC obtained \$130 million in fixed-rate third-party financing from an institutional lender and an additional \$115 million credit facility from a four bank group.

10. CCMC, to date, has spent approximately \$70 million drawn down from the institutional lender. Between now and the end of 2016, as development of the Mine progresses, CCMC plans to expend an additional \$60 million in institutional lender money.

11. Closure of the Coyote Creek Mine in 2016 or 2017 would cause the entire institutional lender loan to accelerate and become due. Moreover, the acceleration will give rise to a \$22 million “make whole” payment to the institutional lender. Due to the cost-plus nature of the contract under which CCMC will supply fuel to the Coyote Station, CCMC’s obligations to the institutional lender are passed through to the public utilities that jointly own Coyote Station-Otter Tail Power Company, Northern Municipal Power Agency, Montana-Dakota Utilities Company, and NorthWestern Corporation. In the end, the utilities, and more specifically their ratepayers and members, would have to pay AIG the money borrowed from AIG if the Final Rule is not stayed. In return, the ratepayers and

members to whom the costs of the Coyote Station are passed on will not have received the benefit of the low-cost power that otherwise would be delivered by Coyote Station. Their stranded investment in the Coyote Creek Mine will be lost.

12. NACoal, through its wholly-owned subsidiary, The Falkirk Mining Company (“Falkirk”), operates the Falkirk Mine near Underwood, North Dakota, about 50 miles north of Bismarck. The Falkirk Mine annually produces between 7 million and 9 million tons of lignite for the Coal Creek Station, a two-unit 1100 megawatt power plant owned by Great River Energy.

13. EPA’s IPM Model that accompanied the Final Rule projects that the Final Rule will cause the Coal Creek Station unit 1 to close in 2018. In 2014, the Falkirk Mine produced 7,985,648 tons of lignite, 43% of which (or 3,408,268 tons) was burned in unit 1.

14. Closure of unit 1 would lead to the layoff of a similar percent of the Falkirk Mine workforce, or in other words 207 of its 482 employees.

15. A layoff at Falkirk Mine will be acute on numerous levels. According to an economic report prepared by North Dakota State University, a true and correct copy of which is attached, the “lignite energy industry (coal production and conversion) provides average wages higher than almost all other industries in North Dakota.” For the two hundred plus employees that stand to lose their jobs if

Coal Creek unit 1 closes, their lives, and their families' lives, will be drastically impacted.

16. Also, a shutdown would have a substantial impact across several counties and cities in North Dakota. Like all mining companies, Falkirk pays a coal severance tax of 37.5 cents on each ton of lignite mined. In 2014, Falkirk paid \$3,104,886 in coal severance taxes. If production declines by 43%, Falkirk would pay 43% less in severance taxes. In 2014 dollars, that amounts to a \$1,335,100 decline in tax payments. Under North Dakota law, 30% of revenue from the 37.5 cent tax is used to fund a Constitutional Trust Fund administered by the Board of University and School Lands. The other 70% is shared among the coal producing counties in the State, which is further apportioned as follows: 40% to the county general fund; 30% to the cities within the county, and 30% to the school districts. Absent a stay of the Final Rule, according to EPA's IPM Model, Coal Creek unit 1 will shut-down in 2018, which in turn will impact education, law enforcement, and social services throughout the State.

17. Even if EPA's IMP Model is wrong and unit 1 of the Coal Creek Station does not close in 2018, the Final Rule is still creating an immediate impact on the operation of the mine to the detriment of the local community. At the Falkirk Mine, decisions regarding large capital expenditures must be made years in advance due to the amount of time it takes to finance, acquire, transport, assemble

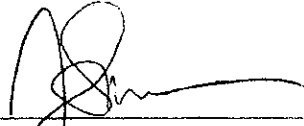
and test equipment. Until the Final Rule was announced, Great River Energy and Falkirk had intended to acquire, at a cost in excess of \$50 million, a used dragline excavator in 2016 or 2017. Dragline excavators are the largest pieces of earthmoving equipment in the world and are commonly used in surface mining to remove overburden.

18. Due to their enormous size and complexity, it takes years for a used dragline to become operational at a new location. Because of its size, the dragline must be disassembled for transport (by rail and truck) to its new location. The parts and equipment constituting the dragline are transported in dozens of modular units to the new location. Upon arrival, the equipment is refurbished, re-assembled, erected, and tested. This work is done by private contractors, including truckers, welders, electricians, mechanical and electrical engineers, and software programmers.

19. Because of this extensive and time-consuming process, Falkirk and Great River Energy did not plan on the dragline becoming operational until around 2020 or 2021. But because of the Final Rule, plans to purchase the used dragline for the Falkirk Mine have been postponed, which in turn delays the benefits this \$50-plus million transaction would create, including more efficient mining and the, at least, delayed benefits to the private contractors and their employees who would work on the dragline project.

Pursuant to 28 U.S.C. § 1746, I, John D. Neumann, declare under penalty of perjury that the foregoing is true and correct.

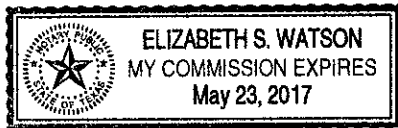
Executed on October 26, 2015.



John D. Neumann

The foregoing John D. Neumann Affidavit was subscribed and sworn before me by John D. Neumann on October 26, 2015.

Witness my hand and official seal.


Notary Public

My commission expires: May 23, 2017

8173353_1

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA**

STATE OF NORTH DAKOTA

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

**DECLARATION OF
KELLY SCHMIDT**

Case No. 15-1380

I, Kelly Schmidt, state and declare as follows:

1. My name is Kelly Schmidt. I am over 21 years of age and am fully competent and duly authorized to make this Affidavit. The facts contained in this Affidavit are based on my personal knowledge and are true and correct.

2. I am employed by the Office of North Dakota State Treasurer ("Office of State Treasurer") as the State Treasurer. I have been employed by the State since January 1, 2005, and have continuously served as the State Treasurer since elected in November, 2004.

3. The Office of North Dakota State Treasurer is a State agency established under Article V, section 2 of the North Dakota State Constitution. It is responsible for overseeing the investment of the State's general funds, special funds, and several trust funds. The Office of State Treasurer disburses money

collected by the State to political subdivisions pursuant to a variety of State programs.

4. In my current position, I am responsible for overseeing disbursements by the State to its subdivisions, including those related to power generation and coal mining.

5. In my current position, I am familiar with the above-captioned litigation brought by the State of North Dakota and the State's Motion to Stay the Final Rule.

6. Unless a stay is granted, the Final Rule would impair or impede North Dakota's ability to protect its financial interests in electrical power generation and coal mining to provide disbursements from State accounts to its local governments and subdivisions.

7. North Dakota generates revenue from taxes related to coal severance and coal conversion. N.D. Cent. Code Ann. §§ 57-60-02; 57-61-01. These taxes are collected by The Office of State Tax Commissioner and deposited into State accounts. The Office of State Treasurer is responsible for disbursing portions of these moneys from the State accounts to its local governments and subdivisions as well as several State funds that benefit communities impacted by coal mining.

8. The Office of State Treasurer makes disbursements to the Coal Development Trust Fund (the "Fund"), a permanent trust established by State law

pursuant to the North Dakota State Constitution. N.D. Const. art. X, § 21; N.D. Cent. Code Ann. § 57-62-02. Thirty percent of revenue generated by the coal severance tax is deposited into this Fund. The Board of University and School Lands holds this Fund in trust and administers it for loans to counties, cities, and school districts that have been impacted by coal mining, and for general loans to school districts. N.D. Cent. Code Ann. §§ 57-62-02, 15.1-36-03. The remaining seventy percent of revenue is distributed directly to the counties from which the coal was severed.

9. The balance of the Coal Development Trust Fund as of March 31, 2015 was \$67,727,000. Over each of the past five fiscal years, the State has transferred \$3.0M - \$3.4M annually into the Coal Development Trust Fund. During the same period, the Office of State Treasurer has disbursed \$6.5M - \$7.5M annually from coal severance revenues to the political subdivisions impacted by the coal development.

10. The Office of State Treasurer also allocates and distributes revenues generated by the coal conversion tax. Pursuant to N.D. Cent. Code Ann. § 57-60-14, eighty-five percent of revenues generated are allocated to the State general fund and the remaining fifteen percent distributed to the political subdivisions impacted. Over each of the past five fiscal years, the Office of State Treasurer has allocated \$19M - \$23M annually from coal conversion revenues into the State

general fund. During the same period, the Office of State Treasurer has disbursed \$4M - \$5.5M annually to the political subdivisions impacted by the coal conversion activities.

11. EPA's own assessment of the Final Rule assumes that it will result in approximately 677MWs of electrical generation being retired in North Dakota by 2016 and that an additional 558MW of electrical generation would retire by 2018. EPA's Integrated Planning Model Files - Base Case CapacityRetrofits.xlsx, Rate-Based CapacityRetrofits.xlsx and Mass-Based CapacityRetrofits.xlsx.

<http://www2.epa.gov/airmarkets/analysis-clean-power-plan>. These EPA assumptions are part of the overall CO₂ reductions North Dakota must set forth in a State plan submittal required by the Final Rule. North Dakota's initial plan must be submitted to EPA by September 6, 2016. While EPA says the Final Rule provides North Dakota with flexibility to make its own choices as to the sources of the mandated emission reductions, such significant CO₂ emission reductions can only come in North Dakota from other lignite-fueled electric generating units.

12. North Dakota and the electric utilities and lignite mines operating in North Dakota must make substantial near-term reductions in North Dakota.

13. The shutdown of these EPA-assumed plants due to the Final Rule would reduce coal production in North Dakota by nearly eight million tons per year. This will cause a significant decline in production at some mines, perhaps

closing of other mines, and job losses. Coal severance taxes and coal conversion taxes will be reduced. Because of the loss of jobs not only at the mines but at the generation facilities also, sales and income taxes would also be reduced.

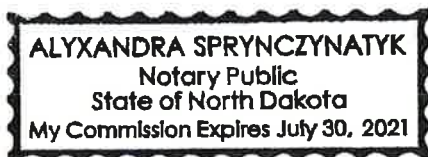
14. Based on these circumstances, North Dakota will suffer immediate and unrecoverable substantial losses of tax revenues as a result of the mandates imposed on North Dakota by the Final Rule.

15. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 15, 2015.


Kelly Schmidt

The foregoing Affidavit of Kelly Schmidt was subscribed and sworn before me by Kelly Schmidt on October 15, 2015.



Witness my hand and official seal.


Notary Public

My commission expires: 6-30-21

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA**

STATE OF NORTH DAKOTA

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

**DECLARATION OF
Ladd Erickson**
Case No. 15-1380

I, Ladd R. Erickson, state and declare as follows:

1. My name is Ladd R. Erickson. I am over 21 years of age and am fully competent and duly authorized to make this Declaration. The facts contained in this Declaration are based on my personal knowledge and are true and correct.

2. I am employed as the McLean County State's Attorney. I have been employed by McLean County, North Dakota, since first being elected to my position in January, 2003, and have continuously served as the McLean County State's Attorney since that time.

3. As McLean County State's Attorney, I manage and direct all responsibilities of enforcing the laws of the State of North Dakota in McLean County, and I am the legal advisor for the McLean County Board of County Commissioners. On October 6, 2015, the McLean County Commission unanimously approved my submittal of this Declaration on behalf of McLean County.

4. McLean County is a rural agricultural county located in south central North Dakota. The Falkirk Coal Mine, owned by the North American Coal Corporation, and the Coal

Creek Electric Generating Station, owned by Great River Energy (GRE), operate in a conjoined area of McLean County near Underwood, North Dakota.

5. As the legal advisor for the McLean County Board of Commissioners, I am familiar with the Final Rule adopted by the United States Environmental Protection Agency (EPA), entitled “Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units: Final Rule.” 80 Fed. Reg. 64661 (Oct. 23, 2015) (The Final Rule) Unless a stay is granted, the Final Rule will cause significant and irreparable harm in and to McLean County.

6. Farm economics in the 1980s forced the consolidation of farmland into the hands of fewer large farms across North Dakota. Schools and businesses closed as farm families moved off the land to urban centers. Many rural towns either became a shadow of their former self, or simply ghost towns. This rural depression largely bypassed McLean County for one reason: the Falkirk Mine and Coal Creek Station power plant.

7. When coal mining began in McLean County in the late 1970s it created a vibrant local economy. Numerous businesses throughout the county thrived by having the stability of local energy production. In the decades since coal mining and power generation began in McLean County, miners and power plant workers have become fully woven into the very fabric of McLean County’s civil society. Coal energy production employees can be found sitting as our town mayors and city commissioners, our school and township board members, our volunteer firemen and ambulance responders, among other positions of civic responsibility.

8. A sudden EPA imposed collapse of Coal Creek Station’s and Falkirk Mine’s economic viability as a result of the Final Rule not only directly damages the power plant and mine, it sends shock waves through all McLean County communities and their governing boards.

If EPA's Final Rule is later found to be unlawful, the injury to McLean County cannot be undone. People will have lost jobs and moved on. The electrical grid access to sell power from Coal Creek Station will have changed, and businesses dependent on local coal energy production employees for customers may have to close. Simply, the impacts to McLean County would be broad and deep and not repairable for years, if they could be fixed at all.

9. When the EPA initially proposed their new coal-fired carbon dioxide emission regulations in 2014, North Dakota was required to reduce carbon emissions from coal-fired power plants by 11%. Without explanation or soliciting comments from North Dakota as to the EPA's new methodology, the Final Rule requires North Dakota to make an approximate 45% reduction in carbon dioxide emissions. Different states were given wholly different sets of federal carbon dioxide reduction benchmarks by the new EPA regulations.

10. The problem with the EPA finalizing its Rule without giving proper notice of its massive change to North Dakota's requirements under the Rule is that there are real people, with real families, that live and work in McLean County, North Dakota, who are significantly harmed.

11. Instead of being regulatory targets, Coal Creek Station and the Falkirk Mine should be recognized by the EPA as an example to others in how to produce energy with environmental soundness and sensibility. The examples of this are many:

a. At both Falkirk Mine and Coal Creek Station, hundreds of millions of dollars have been invested in environmental controls and first of a kind clean coal technologies. For example, starting in 1997 GRE, at Coal Creek Station, began researching a cutting edge coal drying system that uses excess heat from the power plant to dry coal before it is burned. Ultimately, the investment in this research resulted in the patented "DryFining" technology that has now been in operation at Coal Creek Station since 2009. DryFining reduces the moisture

content of lignite coal from 38% to 29%, which increases the heat value by nearly 1,000 BTU. This process has reduced carbon dioxide emissions at the plant, and has achieved reductions of 40% for mercury and sulfur dioxide, as well as 20% reduction in nitrogen oxide. Given that more than half of the coal reserves worldwide are considered low-rank, DryFinishing can serve as a vital technology to reduce emissions from coal-fired power plants around the world.

In addition, the development of DryFinishing technology assisted GRE with opening its Spiritwood Station in 2014. The Spiritwood Station is a 99-megawatt combined heat and power plant located 100 miles southeast of Coal Creek Station in Stutsman County, North Dakota. Thanks to DryFinishing, coal is viably mined at the Falkirk Mine, dried at Coal Creek Station to remove pollutants and simultaneously increase the coal's heat value, and then it is shipped by rail to the Spiritwood Station. What is puzzling, to the point of capriciousness, is Spiritwood Station is the Country's most modern environmentally advanced coal-fired power plant, with nearly double the efficiency of other lignite coal plants. Yet, the EPA's Final Rule may also challenge the Spiritwood Station's economic viability with the EPA's 45% reduction in carbon dioxide emission benchmark for North Dakota.

b. No greater example of the arbitrariness in the Final Rule can be found than in the EPA's failure to account for the dramatic carbon footprint reductions realized at both Coal Creek and Spiritwood Stations through the advanced technologies of using excess heat from these power plants to create ethanol, and in Spiritwood Station's case, malt from raw barley.

Federal policy, transcending multiple presidents from both political parties, has been to increase ethanol production as a renewable zero or low carbon fuel. Congress has subsidized this effort, and fuel standards have been set requiring ethanol/gasoline mixtures to encourage the use of ethanol. Ethanol policies historically had one big limiting factor – it took the burning of fossil

fuels to create the heat that was needed in the ethanol stills - and arguably more energy was used in making ethanol than was realized in the end product when traditional distillery methods were used.

That all changed at Coal Creek Station in 2006. Through large investments and risk to GRE, the Blue Flint Ethanol Plant was built alongside the power plant. This venture turned out to be a huge economic and environmental success story. Currently, excess heat from Coal Creek Station is piped into the Blue Flint facility where it is used to convert corn into ethanol. A local corn market for area farmers was created by this innovation and it has eliminated the costs and carbon dioxide releases that would be incurred by shipping millions of bushels of corn to far off markets. The Blue Flint facility produces 65 million gallons of ethanol each year utilizing steam from Coal Creek Station. That equates to a carbon dioxide emission reduction from gasoline of over 200,000 tons annually. In addition, after the corn is processed into ethanol at Blue Flint, the leftover “mash” or “distillers’ grains” are used by area ranchers to feed livestock – again reducing carbon dioxide emissions that would otherwise occur if ranchers had to grow or ship in feed separately.

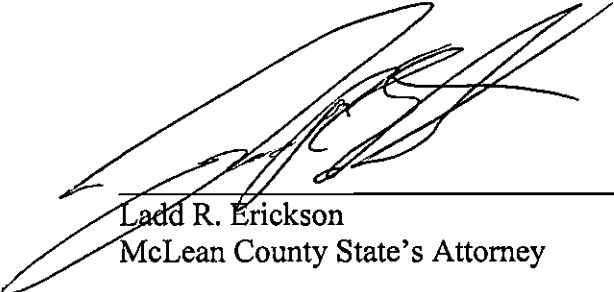
The question is begged: If for decades, Congress and our executive branch, including the EPA, has seen fit to promote carbon dioxide emission reductions through expanded ethanol use, provided extensive fuel standard regulations and massive taxpayer investments to support this federal policy, why then isn’t Coal Creek and Spiritwood Stations given carbon credits in the EPA’s Final Rule for the millions of gallons of ethanol these plants produce and put into our nation’s fuel supply? But for GRE’s investments and innovations in this area, excess heat from Coal Creek and Spiritwood Stations would just be dissipated into the air instead of being used to create a local corn market and a carbon friendly fuel. It is arbitrary for the EPA to target North

Dakota with draconian emission standards, while at the same time fail to credit Coal Creek and Spiritwood Stations for the substantial carbon dioxide reductions brought about by ethanol production through the use of excess power plant heat. In addition, prior to the Spiritwood Station opening last year, Cargill had to burn fossil fuels to make their barley malt product at Spiritwood. Now they use excess heat from the new Spiritwood Station power plant to make their malt, thus eliminating the former carbon dioxide emissions Cargill's malting process had without, again, any consideration being given for that in the new EPA carbon dioxide regulations.

c. GRE has also been at the forefront of creating "FlexCrete" from fly ash going back two decades. FlexCrete is a strong fiber-reinforced aerated concrete made from burnt coal, commonly called "fly ash." GRE sells approximately 400,000 tons of fly ash each year for this purpose. FlexCrete is made of 70% fly ash and has numerous advantages over traditional concrete. Without FlexCrete, Portland cement would have to be used as a substitute, increasing greenhouse gas emissions from mining that product, as opposed to GRE making a productive use out of what was formerly a waste product.

12. The dramatic job losses at Coal Creek Station and the Falkirk Mine brought on by the Final Rule, if implemented as written and scheduled, transcend beyond those two companies to McLean County as a whole. Other local businesses depend on having coal energy production nearby, as do local McLean County governing boards and schools. It is for these reasons that the McLean County Commission requests that the Final Rule be stayed until the courts can determine their constitutional and statutory legitimacy.

Executed on October 28th, 2015.




Ladd R. Erickson
McLean County State's Attorney

The foregoing Affidavit of Ladd R. Erickson was subscribed and sworn before me by
Ladd R. Erickson on October 28, 2015.

Witness my hand and official seal.

MARCELLA ALBERS
Notary Public
State of North Dakota
My commission expires Sep 8, 2021



Notary Public

My commission expires:

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA**

STATE OF NORTH DAKOTA

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

**DECLARATION OF
LANCE D. GAEBE**

Case No. 15-1380

I, Lance D. Gaebe, state and declare as follows:

1. My name is Lance D. Gaebe. I am over 21 years of age and am fully competent and duly authorized to make this Declaration. The facts contained in this Declaration are based on my personal knowledge and are true and correct.
2. I am employed as the Commissioner of University and School Lands and in this capacity oversee the North Dakota Department of Trust Lands (“DTL”). I have been employed by the State of North Dakota since 2000, and have continuously served as the Commissioner of University and School Lands since August 2010.
3. As Commissioner, I direct all responsibilities of the DTL which include overseeing trust assets – including 700,000 surface acres and 1.8 million mineral acres managed to provide revenue to North Dakota’s primary schools and other public institutions. Additionally, the DTL administers North Dakota’s permanent

educational trust funds and assets under the control of the Board of University and School Lands as set forth in Article IX of the North Dakota Constitution.

4. The surface and mineral acreage in the trust assets include tracts across North Dakota, all acquired through the Enabling Act of 1889 in which the Federal Government granted North Dakota two sections of land in every township, sections 16 and 36, to be held in trust for the “support of the common schools” and public education, Enabling Act of 1889 – 25 U.S. Statutes at Large, c 180 p 676. § 10. This federal grant of land initially totaled more than 2.5 million acres.

5. Under sections 12, 14, 16 and 17 of the Enabling Act of 1889, Congress provided further land grants to the State of North Dakota for the support of colleges, universities, the state capitol and other institutions. These original grants totaled 668,000 acres which established twelve permanent trusts, as identified in the North Dakota Constitution, Article IX sections 12 and 13.

6. Under state law, coal deposits within land managed for the Common Schools Trust Fund and other permanent trusts may be leased for a royalty upon the coal actually produced. North Dakota Constitution, Article IX Sections 5, 6, & 8 and North Dakota Century Code Chapter 15-05. Included within my official responsibilities is management of 8,447 acres currently leased for the production of lignite coal. These leases contain provisions for payment to the trusts of a one-time

bonus; an annual per acre rent payment; and a royalty payment per ton of coal produced.

7. The royalty rate in the longstanding leases is \$0.85 to \$0.88 per ton of coal currently being produced. Existing leases for future lignite production include a royalty ranging from \$0.29 to \$.035 per ton for coal produced, some with a 3% annual escalator.

8. I am responsible for the collection of rents and royalties from coal production on:

a. 1,342 acres leased to BNI which provides coal from the Center Mine to the Milton R. Young Station;

b. 6,066 acres leased to North American Coal Royalty Company including:

i. 1,778 acres in the Falkirk Mine, which produces lignite for Great River Energy's Coal Creek Station and the Spiritwood Station;

ii. 1,776 acres in the Freedom Mine, which supplies lignite to Basin Electric Cooperative's Antelope Valley Station, the Dakota Gasification Company, and the Leland Olds Station

iii. 1,880 acres within the Coyote Creek Mine, which will soon deliver coal to the Coyote Station,

iv. 632 acres with the Otter Creek Mining Company

anticipated to produce soon; and

c. 1,039 acres leased to Dakota Westmoreland which operates the Beulah Mine, which currently serves the Coyote Station as well as the R.M. Heskett Plant.

9. As of October 16, \$ 2,066,309 of royalty and rental revenue from the production of coal was collected in calendar year 2015 for the benefit of the Common Schools Trust Fund and other permanent funds which support North Dakota institutions. In 2013 the trust funds received \$3,758,522 of royalty and rental income; and in 2014, \$3,787,924 of royalty and rental revenue and an additional \$363,994 of bonus income was collected to benefit public education and North Dakota institutions.

10. The largest beneficiary of the permanent trusts is North Dakota's Common Schools Trust Fund, which benefits K-12 education. The Common Schools Trust Fund will distribute \$103,067,000 to public schools in fiscal year 2016. That will account for an estimated \$973 per student. The other 12 permanent trusts will distribute a total of \$6,480,000 during fiscal year 2016 to institutional beneficiaries.

11. In my current position, I am familiar with the Final Rule promulgated by Environmental Protection Agency ("EPA") entitled: Final Rule: Carbon Pollution

Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units.

12. The EPA's own assessment of the Final Rule assumes that approximately 677MWs of electrical generation is retired in North Dakota by 2016 and that an additional 558MW retires by 2018. These assumptions are part of the EPA required CO₂ emission reductions the State must show in a SIP submittal to the EPA in September, 2016. The EPA claims the State has flexibility in its choices; however, those significant CO₂ emissions reductions required by the Final Rule can only come from other lignite-fueled power plants in North Dakota. Thus, if North Dakota does not commit to implementing the EPA's specific assumptions, then North Dakota will simply have to make functionally equivalent CO₂ emission reductions from some other North Dakota lignite-fueled power plants.

13. The Final Rule will require a dramatic reduction in coal mining, however without knowing which mine or mines will be immediately affected by closure or reduced production, it is difficult to quantify the financial impact to the permanent trusts. However, since the Common Schools Trust and the other permanent funds own mineral acreage in all of North Dakota's lignite mines, a reduction in the production of coal will have an immediate and long-term detrimental financial impact due to the collection of substantially less royalties, bonus and rental

income. This in turn will impact North Dakota's support for public schools and state institutions across the state.

14. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

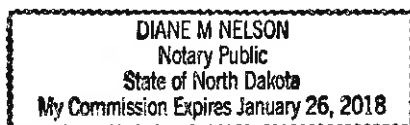
Executed on October 26, 2015.



Lance D. Gaebe

The foregoing Declaration of Lance D. Gaebe was subscribed and sworn before me by Lance D. Gaebe on October 26, 2015.

Witness my hand and official seal.



Notary Public

My commission expires:

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA**

STATE OF NORTH DAKOTA

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

**DECLARATION OF
LYNN D. HELMS**

Case No. 15-1380

I, Lynn D. Helms, state and declare as follows:

1. My name is Lynn D. Helms. I am over 21 years of age and am fully competent and duly authorized to make this Declaration. The facts contained in this Declaration are based on my personal knowledge and are true and correct.

2. I am employed as the Director of the North Dakota Industrial Commission ("NDIC") Department of Mineral Resources ("DMR"). I have been employed by the NDIC since July 20, 1998, and have continuously served as the Director of DMR since July 1, 2005.

3. The DMR's Oil and Gas Division administers North Dakota's oil and gas regulations found at N.D. Admin. Code Chapter 43-02-03.

4. As Director of the DMR, I manage and direct all responsibilities of the Oil and Gas Division and the DMR Geological Survey. These responsibilities include gathering pipeline, oil and gas spill reporting, and well site construction regulatory

programs. These responsibilities also include regulation of the drilling, production and plugging of wells; the restoration of drilling and production sites; the perforating and chemical treatment of wells, including hydraulic fracturing; the spacing of wells; operations to increase ultimate recovery and prevent waste, such as cycling of gas; the maintenance of pressure; and the introduction of gas, water, or other substances into producing formations; disposal of saltwater and oil field wastes through the North Dakota Underground Injection Control Program; restricting and reducing the flaring of natural gas associated with crude oil production; construction of oil, water, and natural gas underground gathering pipelines; and many other operations related to the production of oil or gas and protection of the State of North Dakota's economic interests.

5. In my current position, I am familiar with the Final Rule promulgated by the U.S. Environmental Protection Agency ("EPA") ("Final Rule") entitled "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electrical Generating Units" 80 Fed Reg. 64, 662 (Oct. 23, 2015).

6. The North Dakota Department of Health has evaluated the Final Rule and determined that EPA evaluated the effects of the Final Rule using its Integrated Planning Model (IPM). In this analysis, EPA projected that six units of coal-fired generation (totaling more than 1,300 MW) in North Dakota would retire by 2020. This included the two units of the R.M. Heskett Station, M.R. Young Station Unit 1, Coyote Station, Spiritwood Station and one unit of the Coal Creek Station. In 2014,

these units produced 9,672,068 megawatt-hours of electricity or 27% of the total generation in North Dakota. As such, in the very near term significant reductions will have to be made in North Dakota, therefore the EPA Rule will cause immediate real or threatened harms to the State.

7. The State of North Dakota is ranked second in the United States for the production of oil and gas. North Dakota produces approximately 400 million barrels of oil per year and 465 billion cubic feet of natural gas per year. The North Dakota legislature has established the safe and efficient production of oil and gas as a state priority:

It is hereby declared to be in the public interest to foster, to encourage, and to promote the development, production, and utilization of natural resources of oil and gas in the state in such a manner as will prevent waste; to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas be had and that the correlative rights of all owners be fully protected; and to encourage and to authorize cycling, recycling, pressure maintenance, and secondary recovery operations in order that the greatest possible economic recovery of oil and gas be obtained within the state to the end that the landowners, the royalty owners, the producers, and the general public realize and enjoy the greatest possible good from these vital natural resources.

N.D. Cent.Code § 38-08-01.

8. North Dakota has for decades been aggressive in achieving the first stated purpose of the Clean Air Act (CAA): “to protect and enhance the quality of the Nations’ air resources so as to protect the public health and welfare and the productive capacity of its population.” CAA 110(b)(1), 42 U.S.C. § 741(b)(1).

9. The Final Rule establishes requirements that adversely impact North Dakota’s sovereign rights, interests, and the regulatory regime the NDIC has developed to meet these interests. As currently scheduled, implementation of the Final Rule will have immediate, adverse impact on the NDIC and the DMR as well as the entities subject to the state’s jurisdiction.

10. Several North Dakota laws and regulations that successfully govern aspects of oil and gas production and exploration will be adversely impacted by the Final Rule. By altering the jurisdiction and state regulatory regime, the Final Rule will nullify the proven state regulatory program and thereby harm the State’s sovereign interest in planning and developing the use of the oil and gas resources within its jurisdiction. In addition, entities within the State of North Dakota will be denied the benefits of the States’ regulation, which is one key factor in many entities’ decision of whether to operate in North Dakota.

11. The Final Rule will disrupt several state laws and regulations established to protect the health and welfare of state citizens, the State’s environment, and the fiscal and infrastructure plans of the State of North Dakota to reduce natural gas flaring by developing the necessary gathering and processing infrastructure.

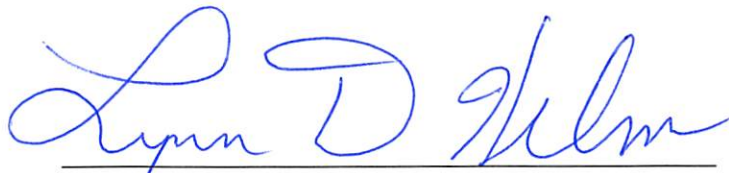
12. Widespread flaring of natural gas has been a long-term, pervasive problem for oil and gas operators in North Dakota due to the limited but growing infrastructure that enables capture, sale, and processing of this valuable commodity.

13. In order to address these serious problems, the North Dakota legislature enacted laws requiring that flaring of gas produced with crude oil cease and pipeline infrastructure for transportation of oil, natural gas, and produced water is built. The gas capture rules adopted by the NDIC to enforce gas flaring reduction will require the gas gathering and processing industry to install additional gas gathering and processing infrastructure over the next five to eight years that will require an estimated 300 MW of new electrical generation. N.D. Cent. Code § 38-08-06.4 and NDIC order 24665. The Final Rule will directly impact the planned expansion of gas capture infrastructure and the associated requirement for 300 MW additional electrical load by instead requiring the retirement of 1,300 MW of existing electrical generating capacity. This will in turn impact operators' ability to comply with North Dakota's flaring reduction laws and regulations. The loss of electrical power for new gas gathering and processing between 2016 and 2020 will result in a cumulative increase in the flaring and the permanent loss of 956 billion cubic feet of natural gas, \$107 million in gross production tax revenue for the State of North Dakota, and \$570 million in royalty income to mineral owners.

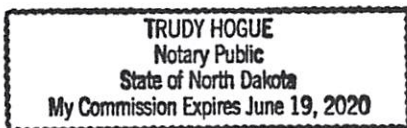
14. In sum, the Final Rule will interfere with and disrupt North Dakota's governance of the oil and gas resources within its borders. Especially for activities associated with oil and gas production, the Final Rule will adversely affect laws and regulations that are vital to the overall health and welfare of the State of North Dakota and its citizens.

15. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 29, 2015.


Lynn D. Helms

The foregoing Declaration of Lynn D. Helms was subscribed and sworn before me by Lynn D. Helms on October 29 2015.



Witness my hand and official seal.

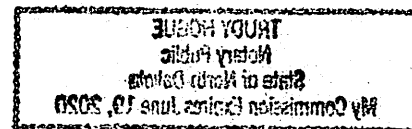

Notary Public

My commission expires: 6/19/2020
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**IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA**

STATE OF NORTH DAKOTA

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

**DECLARATION OF
RANDEL D. CHRISTMANN**

Case No. 15-1380

I, Randel D. Christmann, state and declare as follows:

1. My name is Randel D. Christmann. I am over 21 years of age and am fully competent and duly authorized to make this Declaration. The facts contained in this Declaration are based on my personal knowledge and are true and correct.

2. I am an elected Commissioner on the North Dakota Public Service Commission (“Commission”). I have held my office as a Commissioner since January 1, 2013.

3. The Commission is a state agency established by the North Dakota Constitution. N.D. Const. Art. 5, § 2. The authority of the Commission is set forth in the North Dakota Century Code. Ch. 49-01 et seq., Titles 60 and 64 and Chapters 24-01, 24-09, 38-14.1, 38-14.2, 38-18, and 51-05.1. The Commission has general jurisdiction over “[e]lectric utilities engaged in the generation and

distribution of light, heat, or power.” § 49-02-01. The Commission supervises public utilities with the power to “originate, establish, modify, adjust, promulgate, and enforce tariffs, rates, joint rates, and charges of all public utilities.” § 49-02-03. The Commission shall determine the value of property of every public utility “for the purpose of ascertaining just and reasonable rates and charges of public utilities.” § 49-06-01. The Commission “may approve, reject, or modify a tariff filed under section 49-05-06, which provides for an adjustment of rates to recover jurisdictional capital costs and associated operating expenses incurred by a public utility to comply with federal environmental mandates on existing electricity generating stations,” including the federal Clean Air Act (CAA). § 49-05-04.2.

4. The Commission has a statutory duty to ensure that North Dakotans receive a reliable supply of electricity at just and reasonable rates. Additionally, the Commission is responsible for determining whether to authorize generation and transmission infrastructure in North Dakota that is needed by jurisdictional utilities to provide reliable electric service to customers and is otherwise consistent with North Dakota law. North Dakota Century Code Chapter 49-03.

5. In my current position, I am familiar with the Final Rule promulgated by the U.S. Environmental Protection Agency (“EPA”) (“Final Rule”) entitled Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units. 80 Fed. Reg. 64662 (October 23, 2015).

6. This Declaration has been reviewed by the other two members of the North Dakota Public Service Commission, Commission Chairman Julie Fedorchak and Commissioner Brian Kalk. The Commission held a public meeting on October 23, 2015 and voted to unanimously endorse the content and filing of this Declaration as the official position of the North Dakota Public Service Commission.

7. EPA's requirements in the Final Rule for North Dakota, which are second only to Montana in stringency on a percentage basis, require a 45% reduction in North Dakota's statewide average carbon dioxide (CO₂) emission rate by 2030. However, interim steps have been established by EPA in the Final Rule that require a rate of 1,671 lb/MWh for the 2022-2024 time period, 1,500 lb/MWh for the 2025-2027 period and 1,380 lb/MWh for the 2028-2029 period.

8. EPA's Final Rule requires an emission rate of 1,305 lb/MWh, which is 45% below North Dakota's 2012 baseline emission rate of 2,368 lb/MWh. The Final Rule provides North Dakota with an alternative to EPA's emission rate approach, where EPA prescribes a mass emissions limit of 20,883,232 tons may be implemented. EPA's mass emissions compliance alternative requires a 37% reduction from the 2012 baseline of 33,370,886 tons.

9. EPA's Final Rule requires North Dakota to address not only the emitting sources (coal-fueled power plants) but also extends beyond the boundary

of a stationary source and incorporates non-emitting sources (e.g. wind and solar generation) and redispatching power to lower emitting units. EPA's Final Rule also requires North Dakota to take into account reliability of the electrical system when developing North Dakota's plans, which has never occurred with any other air pollution control rule. The redispatch of power, protecting the reliability of the electrical system, and accounting for wind or solar generation have never before been federal compliance requirements when implementing an EPA rule.

10. Under the Final Rule, North Dakota must choose between two plan types—rate-based or mass-based, to satisfy EPA's aggressive emission targets. In a rate-based State Plan, North Dakota must require affected power plants to satisfy an average amount of carbon dioxide emissions per unit of power produced. The required target would be impossible for any existing North Dakota coal-fired power plant to meet and continue operating, unless that plant purchased emission credits from its "clean" competitors or greatly reduced its coal generation and replaced it with new renewable generation. In a mass-based State Plan, North Dakota must cap the amount of carbon dioxide emissions that the whole sector of affected power plants can emit per year. This type of Plan must include an enforceable emission limitation on power plants and may include additional policy programs, such as increasing renewable energy, tightening energy efficiency standards, and emissions trading.

11. At its core, the Final Rule represents a complex effort aimed at forcing North Dakota (and the Commission) to engage in a significant shift in North Dakota's electrical generating capacity away from carbon-intensive electric generating units to less carbon-intensive sources and zero-carbon generation. Such an extreme mandate adversely impacts North Dakota citizens, businesses and government. It also threatens North Dakota's ability to continue to use lignite and other coals as a low cost electricity generation option, as a means to enable responsible development of the Bakken oil reserves that are critical to North Dakota's continued economic development, and as a necessary part of processing rather than flaring associated natural gas.

12. As part of EPA's rule development process, EPA evaluated the effects of the Final Rule using its Integrated Planning Model (IPM). In this analysis, EPA projected that six units of coal-fired generation (totaling more than 1,300 MW) in North Dakota would retire by 2020. This included the two units of the R.M. Heskett Station, M.R. Young Station Unit 1, Coyote Station, Spiritwood Station and one unit of the Coal Creek Station. In 2014, these units produced 9,672,068 megawatt-hours of electricity or 27% of the total generation in North Dakota. The units consumed nearly 8 million tons of lignite in 2014. This included 2.77 million tons from the Beulah Mine, 1.55 million tons from the Center Mine and 3.53 million tons from the Falkirk Mine. Based on EPA's scenario, the Beulah Mine

would shut down and production from the Center Mine would be reduced by approximately 40%. Production at the Falkirk Mine would be reduced by approximately 50%.

13. Although EPA indicates this is just one possible approach North Dakota may take to comply with the Final Rule, it is unfortunately a realistic scenario given the compliance requirements imposed on North Dakota by the Final Rule. Because North Dakota must reduce its emission rate by 45%, approximately each megawatt hour of North Dakota-based coal generation must be matched with a megawatt hour of zero carbon emitting generation in order to achieve compliance with the Final Rule. Energy efficiency improvements at North Dakota power plants are expected to only produce a 1%-2% increase in efficiency. Since there are no demand side energy efficiency programs (formerly Building Block 4) in North Dakota, the benefit from demand side energy efficiency is likely minimal.

14. Compliance with the Final Rule in North Dakota can only be accomplished by retiring coal plants, greatly curtailing their operations, adding prohibitively large amounts of renewable generation, or purchasing emission rate credits (ERC) or allowances. As such, North Dakota (and thus the Commission) has little actual flexibility to perform its statutory role. If coal generation is not curtailed in North Dakota, the affected utilities will have to purchase ERCs or mass allowances. At this time, the number of ERCs or allowances available is unknown

because the trading program has not been developed. This also makes the cost of the ERCs and allowances unknown. EPA has estimated the cost of compliance at \$30 per ton. The cost to North Dakota utilities (ultimately North Dakota and other ratepayers) for the purchase of ERCs could be nearly \$375 million per year. With an expanding economy and a large load growth predicted for western North Dakota because of oil and gas development, this makes planning extremely difficult and pushes utilities toward coal-fired plant closures. If plant closures occur, there is insufficient time to plan, design and construct new generation and transmission systems before the initial compliance date of 2022.

15. The shutdown or curtailment of coal-fired generation stations in North Dakota, the possible addition of 4,000-6,000 MW of wind generation, and the addition of backup generation for the wind generation will require a major redesign of the electrical generation and transmission system in North Dakota by 2018.

16. Absent a stay, the Final Rule will force North Dakota to make massive expenditures of time and resources designing State Plans. To participate in the design of any North Dakota plan, the Commission will need to conduct detailed interagency analyses and then consult with various stakeholders to determine what changes can plausibly be made to increase natural gas and renewable energy generation. This process will include an assessment of the forms of energy available to North Dakota, whether developing more new energy sources

is feasible, and what changes to North Dakota law would be required. In addition, because EPA's obligations in the Final Rule can be met through cooperative interstate regimes, North Dakota will need to engage in interstate consultation, determine the possible arrangements, and assess whether such arrangements are desirable to North Dakota.

17. Such Commission efforts associated with implementing EPA's requirements in the Final Rule represents an unprecedented preemption of the sovereign authority and discretion held by the Commission. *See* ¶¶ 4-5, above.

18. The Commission expects development of any North Dakota Plan will require multiple Commission staff employees for the three years from September 2015 to September 2018. The Plan development effort is expected to require the Commission to likely expend several million dollars from its existing budget resources for the current biennium. North Dakota's Legislature meets every two years and concluded its last session earlier this year. EPA's Final Rule was made public and signed after the end of the North Dakota 2015 legislative session. The legislature was not aware of these expenses and did not budget for them with respect to the Commission.

19. The Commission's substantial expenditure of human and fiscal resources associated with implementing the Final Rule will immediately distract

the Commission from serving its full regulatory mission, as directed by the North Dakota Legislature, causing further irreparable harm to the state and its citizens.

20. The Final Rule imposes a four-fold increase in EPA-mandated emission reduction requirements over EPA's proposed rule for North Dakota. The increased burden on North Dakota is larger than for any other state. North Dakota's goal in the proposed rule was 1,783 lb/megawatt-hour which required a 24.7% reduction from the 2012 baseline emission rate. The proposed rule allowed existing wind generation to be counted towards compliance, effectively making North Dakota's reduction requirement 10.7%. The Final Rule established a goal of 1,305 lb/megawatt-hour and does not allow existing wind energy to be counted towards compliance. The Final Rule requires North Dakota to reduce its carbon dioxide emission rate by 44.9% or 420% more than the proposed rule.

21. The Federal Power Act gives North Dakota exclusive authority to regulate our retail electricity market. In North Dakota, the Commission works with investor-owned utilities to determine the appropriate generation mix to meet forecasted load at the lowest reasonable cost. This ensures customers receive a reliable supply of electricity at just and reasonable rates. The Rule invades this authority and preempts the state from implementing its own renewable energy goals, and from maintaining sound management and cost control. Utilities are multi-jurisdictional organizations, susceptible to influences in each of their

operating areas. Utilities may choose the path of least resistance to appease the EPA and outside interest groups as long as they are assured full cost recovery. The “regulatory compact” is a long-standing principle that grants monopoly service to bring efficiency to capital intensive industries. However, this principle also requires clear regulatory oversight in place of competition to protect customers. The Commission ensures that utility companies do not necessarily take the easiest path at the expense of North Dakota Ratepayers. The Final Rule Plan strips the Commission of authority to do so.

22. The Final Rule raises significant electric reliability concerns. Seventy-eight percent of electricity sold in North Dakota comes from coal-fired generation facilities. We have very limited other baseload generation in the state. None of these facilities are currently scheduled for retirement, customers are still paying for them, and utilities have not begun the lengthy planning process involved with replacing these massive baseload power resources. More importantly, the impacts of retirements on reliability have not been modeled. The Final Rule places North Dakota in an untenable position to reengineer the state’s electrical system and account for impacts on the power grid’s reliability in a timeframe that is arbitrary and untested.

23. The Final Rule threatens to substantially raise rates in North Dakota. Although North Dakota has traditionally benefitted from low-cost electricity, the

Final Rule will cause significant rate increases. The cost to continue operating North Dakota plants at their current capacity would be \$375 million annually based on the \$30/ton cost used by the EPA. As an example, in a rate-based calculation, North Dakota would need to retire 770 megawatts of coal and replace it with 4,000-5,000 more megawatts of wind in order to meet our goal. This costs an estimated \$1.5-2.0 million per megawatt based on the cost of recent wind farm projects in North Dakota. In addition to new investment, North Dakota residents and businesses will be responsible for paying remaining costs for useful existing facilities forced to retire prematurely. The costs of the infrastructure needed to serve new generation including transmission lines and pipelines to fuel combined-cycle power plants, all of which are passed along to customers, have not been included in cost estimates.

24. The Final Rule contains numerous significant, material elements of central relevance to the outcome of the Final Rule that EPA did not identify in the Proposed Rule. As such, the Commission, State of North Dakota and the public were not provided with any opportunity to comment on these new and wholly unexpected provisions. The Commission did not (and could not have) reasonably anticipated these changes. Below is a list of some aspects of the Final Rule for which EPA did not properly give notice in the proposal:

- (a) EPA issued voluminous highly technical data and support documents essential to a thorough evaluation of the Proposed Rule as late as

October and November 2014, just days before EPA's close of the public comment period. These documents covered fundamental aspects of the Proposed Rule, ranging from building block methodology, the calculation of state-specific goals, emission reduction compliance trajectories, and the translation of emission rate-based goals to mass-based equivalents. This left insufficient time for North Dakota and the Commission to meaningfully study, evaluate, and comment on the Proposed Rule.

- (b) EPA failed to identify in the Proposed Rule all of the potential changes it intended to make to allowances and compliance credits and its intention to undermine existing state Renewable Portfolio Standards programs with its ill-defined Emission Reduction Credit (ERC) program and the mass-based and rate-based trading programs. EPA's decision to include in the Final Rule provisions that disallow credit for a significant portion of North Dakota's existing renewable energy is not a logical outgrowth of the Proposed Rule and could not be anticipated.
- (c) EPA did not identify in the Proposed Rule that renewable energy facilities constructed before 2013 would not receive compliance credits during compliance years. Nor did EPA identify that those facilities constructed before 2018 would be denied extra compliance credit from 2020-2021 under the Clean Energy Incentive Program (CEIP) because the CEIP does not credit any facilities built before the final State Plan submittal, which is due on or about September 6, 2018.
- (d) EPA revised its "Building Blocks" methodology without giving the public an opportunity to comment on the material changes. The Rule's Building Blocks are the foundation of the performance standards, yet North Dakota did not have an opportunity to comment on the new assumptions for heat-rate improvements for coal plants, dispatch rates for natural gas plants, and expansion of renewable generation.
- (e) The final rule provides an adjustment to the baseline fossil fuel-fired generation for several states due to high hydroelectric generation in 2012. These states include South Dakota, Minnesota and Montana which all border on North Dakota. In 2012, hydroelectric generation in North Dakota was 128% of normal. However, EPA denied North

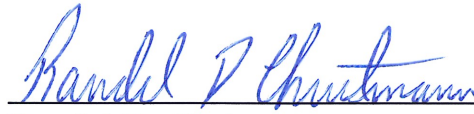
Dakota an adjustment to its fossil generation based on arbitrary criteria including 1) generation had to be greater than 10 percent of total generation, 2) there had to be an increase of greater than 5 percent hydro generation relative to the 1990-2012 average generation, and 3) there had to be a greater than 5 percent adjustment to the state's fossil fuel generation (*CO₂ Emission Performance Rate and Goal Computation Technical Support Document for the CPP Final Rule*; p.28). North Dakota and the Commission had no chance to provide comment on these criteria and the adjustments that were made.

- (f) In addition, EPA applied the Building Blocks to affected sources in a new manner. The performance standards in the Final Rule were developed by applying the Building Blocks to three regional interconnection systems. This novel approach was not contemplated by EPA in the proposed rule.

25. The mandates in the Final Rule frustrate the authority of the Commission and constrain its ability to serve the citizens of North Dakota, as required by the North Dakota state statute. Unless a stay is immediately granted, the Final Rule will impose significant and irreparable harm on the State of North Dakota and its citizens through direct and immediate financial means and a loss of sovereign authority – including that held by the Commission pursuant to the North Dakota Constitution, and state and federal laws.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 27, 2015.



Randel D. Christmann

Commissioner

North Dakota Public Service Commission

On this 27th day of October, 2015, before me personally appeared Randel D. Christmann, known to me to be the person described in the within and foregoing instrument and acknowledged to me that he executed the same.



Notary Public

(S E A L)



Burleigh County, North Dakota

My Commission Expires: Jan. 7, 2016

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA**

STATE OF NORTH DAKOTA

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

**DECLARATION OF RYAN
RAUSCHENBERGER**

Case No. 15-1380

I, Ryan Rauschenberger, state and declare as follows:

1. My name is Ryan Rauschenberger. I am over 21 years of age and am fully competent and duly authorized to make this Declaration. The facts contained in this Declaration are based on my personal knowledge and are true and correct.

2. I am Tax Commissioner for the State of North Dakota. I was elected to this position in November 2014 and have continuously served in that position since that date.

3. The Office of State Tax Commissioner (“Office”) is a North Dakota State agency responsible for collecting the revenue from many of the taxes required to be paid by law and necessary to fund the operation of state and local government. The Office’s primary goals include obtaining voluntary compliance with the tax laws of North Dakota by issuing rules, regulations, and guidelines and enforcing compliance by those who refuse to voluntarily submit taxes.

4. In my current position, I am responsible for overseeing North Dakota's tax collection and compliance efforts related to North Dakota's coal conversion tax and coal severance tax. Those responsibilities, which include the collection of taxes due, and administration of reports required from power generation facilities and coal mines in North Dakota, are set forth in the North Dakota Century Code. [N.D. Cent Code Chs. 57-60 and 57-61]

5. In my current position, I am familiar with the Final Rule promulgated by the U.S. Environmental Protection Agency "EPA") ("Final Rule") entitled Carbon Pollution Emission Guidelines for Existing Stationary Sources; Electric Generating Units.

6. North Dakota generates revenue from both a coal conversion tax and a coal severance tax. Unless a stay is granted, allowing EPA's Final Rule to remain in effect would impair or impede North Dakota's ability to protect its sovereign financial interests by diminishing the State's ability to collect substantial coal conversion and coal severance tax revenues.

7. North Dakota imposes the coal conversion facilities privilege tax on the operator of a coal conversion facility for the privilege of producing electricity or other products from coal conversion plants. [N.D. Cent Code Sec. 57-60-02]. A coal conversion facility is defined as (1) an electrical generating plant which has at least one unit with a generating capacity of 10,000 kilowatts or more of electricity,

(2) a plant other than an electrical generating plant which processes or converts coal and uses or is designed to use over 500,000 tons of coal per year, or (3) a coal beneficiation plant. [N. D. Cent. Code Sec. 57-60-01(4)]. The coal conversion tax is in lieu of property taxes on the electrical generating plant itself, while the land on which the electrical generating plant is located remains subject to property tax. The tax is paid monthly. Electrical generating plants are subject to two separate levies. One levy is .65 mill times 60% of installed capacity times the number of operating hours in the taxable period. [N. D. Cent. Code Sec. 57-60-02(2)]. The other levy is .25 mill per kWh of electricity produced for sale. Installed capacity means the rating shown on the nameplate assigned to the turbine of the power unit. [N. D. Cent. Code Sec. 57-60-02(3)].

8. North Dakota also imposes the coal severance tax on the act of removing coal from the earth. [N. D. Cent. Code Sec. 57-61-01]. The tax is in lieu of both the sales and use taxes on coal and the property tax on minerals in the earth. The coal severance tax applies to all coal severed for sale or industrial purposes, except: coal used for heating buildings in the state, coal used by the state or any political subdivision of the state, and coal used in agricultural commodity processing facilities or to produce steam used in agricultural processing facilities in North Dakota or adjacent states. [N. D. Cent. Code Sec. 57-61-01.1 and 57-61-01.4]. The tax is applied at a flat rate of 37 ½ cents per ton of coal severed. [N. D.

Cent. Code Sec. 57-61-01]. An additional 2-cent per ton tax is levied for a special fund known as the Lignite Research Fund, a statutorily created fund established to support research, development and marketing of lignite and products derived from lignite. [N. D. Cent. Code Sec. 57-61-01.5]. Payment of the tax is made monthly by the owner or operator of the coal mine.

9. Over the last ten fiscal years, North Dakota's coal conversion and severance tax have collectively generated the following amounts in North Dakota:

	<u>Coal Conversion</u>	<u>Coal Severance</u>
2015:	\$27,253,229	\$11,293,806
2014	\$24,937,582	\$11,233,707
2013:	\$24,905,909	\$10,986,898
2012:	\$25,430,529	\$11,001,918
2011:	\$23,118,634	\$11,254,271
2010:	\$26,154,150	\$11,506,451
2009:	\$29,543,292	\$12,096,832
2008:	\$27,461,267	\$11,585,819
2007:	\$28,930,510	\$11,969,504
2006:	\$27,784,633	\$12,014,618
2005:	\$26,264,860	\$11,458,156

10. EPA's own assessment of the Final Rule assumes that it will result in approximately 677MWs of electrical generation being retired in North Dakota by 2016 and that an additional 558MW of electrical generation would retire by 2018. EPA's Integrated Planning Model Files - Base Case CapacityRetrofits.xlsx, Rate-Based CapacityRetrofits.xlsx and Mass-Based CapacityRetrofits.xlsx. <http://www2.epa.gov/airmarkets/analysis-clean-power-plan>. These EPA assumptions are part of the overall CO₂ reductions North Dakota must set forth in an initial State plan submittal required by the Final Rule. North Dakota's initial plan must be submitted to EPA by September 6, 2016. While EPA suggests the Final Rule provides North Dakota with flexibility to make its own choices as to the sources of the mandated emission reductions, such significant CO₂ emission reductions can only come in North Dakota from other lignite-fueled electric generating units.

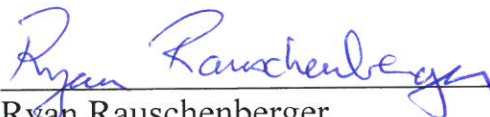
11. The Final Rule will adversely impact North Dakota by forcing utilities to prematurely retire existing coal-fueled generation in North Dakota that meets current electric power needs. The shutdown of the plants EPA's model assumes (or their functional equivalents) would substantially reduce coal production in North Dakota by nearly eight million tons per year. This will cause a significant decline in production at some mines, perhaps closing of other mines, and attendant job losses. Coal severance taxes and coal conversion taxes will be reduced.

Because of the loss of jobs not only at the mines but at the generation facilities also, sales and income taxes would also be reduced.

12. Based on these circumstances, North Dakota will suffer immediate and unrecoverable substantial losses of tax revenues as a result of the mandates imposed on North Dakota by the Final Rule.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 26, 2015.



Ryan Rauschenberger

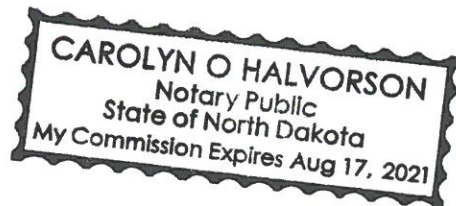
The foregoing Affidavit of Ryan Rauschenberger was subscribed and sworn before me by Ryan Rauschenberger on October 26, 2015.

Witness my hand and official seal.



Notary Public

My commission expires:



**IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA**

STATE OF NORTH DAKOTA

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

**DECLARATION OF
TYLER HAMMAN**

Case No. 15-1380

I, Tyler Hamman, state and declare as follows:

1. My name is Tyler Hamman. I am over 21 years of age and am fully competent and duly authorized to make this Declaration. The facts contained in this Declaration are based on my personal knowledge and are true and correct.
2. I am the Director of the North Dakota Transmission Authority (“Transmission Authority”). I have served in this position since July 2015.
3. In my current position, I am familiar with the Final Rule promulgated by the U.S. Environmental Protection Agency (“EPA”) entitled: Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units.
4. The Transmission Authority was established by the North Dakota Legislature in 2005 to facilitate the development of needed electrical transmission

infrastructure in North Dakota. Chapter 17-05 North Dakota Century Code.

Specifically, the Transmission Authority was established due to findings by the North Dakota Legislature that there is an increased regional demand for electricity from North Dakota's lignite and wind resources, and that further development and export of these North Dakota natural resources through transmission improvements would promote the public interest. 17-05-01 N.D.C.C. The Transmission Authority also assists in identifying and working to remedy electric transmission constraints in North Dakota by facilitating the upgrading and expansion of the region's electrical transmission grid. 17-05-04 N.D.C.C.

5. The Transmission Authority's mission involves planning and outreach, as well as being a builder of last resort, to ensure that the state's growing electrical transmission needs are being met. In the performance of its mission, the Transmission Authority works closely with electric utilities in North Dakota.

6. The State of North Dakota expects significant growth in electric load demand through 2030 and beyond¹. In particular, North Dakota is experiencing significant load growth in the western portion of the state due to the development of the Bakken oil reserves. A study commissioned by the Transmission Authority in 2012 estimated that due to oil and gas related activity in the Williston Basin alone, demand will reach 3,721 megawatts by 2032, compared to 1,209 MW in

¹ <http://www.nd.gov/ndic/ic-press/Power2012.pdf>

2012.² In response, the Transmission Authority commissioned the Williston Basin Oil and Gas Related Electrical Load Growth Forecast Study (“Study”) to project future electrical load growth in the 43-county Williston Basin area.

7. The Study forecast an expected electrical load growth for the next 20 years, from 2012 to 2032, in the study area which spans regions across North Dakota, South Dakota and Montana. Numbers and figures were calculated from a demand amount averaged between historically observed energy use values and maximum oilfield electrical load requirements, and represent the Study’s most likely (consensus) scenario. Energy use for prior years was provided by the utilities involved in the Study and was used to establish a 2011 baseline.

8. By the end of the study period in 2032, the 43 counties within the Williston Basin were projected to require 2,512 megawatts (MW) of additional electrical demand, related to oil and gas development, to accommodate population growth, new ancillary business development and additional wells.

9. The Study is being used by the State of North Dakota and the utilities to help inform planning and implementation of critical infrastructure needs and development in North Dakota, South Dakota and Montana.

10. At present, utilities that serve North Dakota’s Bakken oil field continue to forecast an anticipated increase in electric demand ranging from

² Id. Page 22.

approximately 2000 to 2600 MW. Transmission needs to meet this demand are in various stages of planning, permit approval, and construction.

11. In the Final Rule, the EPA assumes that a significant portion of existing coal-fired baseload power will be taken offline even before the interim goal of 2022. Considering that no baseload generation in North Dakota is currently slated for retirement before 2030, the EPA's assumption is at odds with the Transmission Authority's operating scenarios to retain existing capacity in addition to building additional generation and transmission, as well as North Dakota's interest in the benefits of increased export of the state's lignite and wind resources.

12. Should baseload power from any North Dakota existing coal-fired facilities be prematurely retired or curtailed as either a direct or indirect result of the Final Rule, the efforts of the Transmission Authority to address growing transmission needs will be substantially and adversely impacted. Such circumstances would nullify existing plans and cause modification of existing transmission investments at great and unforeseen expense. For example, the Transmission Authority and utilities will have to develop previously unneeded solutions to replace existing power generation, additional new generation, and the associated impacts on North Dakota's electrical grid.

13. Unless stayed, the Final Rule places the Transmission Authority and its partners in the utility industry in a position to plan, coordinate, and execute the retirement or curtailment of existing generation, and the buildout of new generation and transmission integration on a scale and timeline never anticipated or imagined before.

14. Unless stayed, the Final Rule will harm the Transmission Authority in its current and ongoing efforts to identify and address solutions to meet North Dakota's continued electric load growth.

15. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 23, 2015.


Tyler Hamman

The foregoing Declaration of Tyler Hamman was subscribed and sworn before me by Tyler Hamman on October 23rd, 2015.

Witness my hand and official seal.


Notary Public

My commission expires:

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