

1 GEORGE E. HAYS (Bar No. 119904)
 236 West Portal Avenue, #110
 2 San Francisco, CA 94127
 Telephone: (415) 566-5414
 3 Email: georgehays@mindspring.com

4 REED ZARS (Wyo. Bar 6-3224)
 Attorney at Law
 5 910 Kearney St.
 Laramie, WY 82070
 6 307-745-7979
 rzars@lariat.org
 7 *pro hac vice* application pending

8 Counsel for Plaintiffs

9 IN THE UNITED STATES DISTRICT COURT
 10 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 11 SAN FRANCISCO DIVISION

12 DINÉ CARE and NATIONAL PARKS
 CONSERVATION ASSOCIATION,

13 Plaintiffs,

14 v.

15 UNITED STATES ENVIRONMENTAL
 16 PROTECTION AGENCY and LISA P. JACKSON,
 in her official capacity as EPA Administrator,

17 Defendants,

18 SALT RIVER PROJECT AGRICULTURAL
 19 IMPROVEMENT & POWER DISTRICT,

20 Intervenor-Defendant.
 21

Case No. C 12-03987 JSW

SECOND AMENDED JOINT CASE
 MANAGEMENT STATEMENT
 & ~~PROPOSED~~ ORDER

22
 23 The parties to the above-entitled action jointly submit this JOINT CASE MANAGEMENT
 24 STATEMENT & PROPOSED ORDER pursuant to the Standing Order for All Judges of the
 25 Northern District of California dated July 1, 2011 and Civil Local Rule 16-9.

26 1. Jurisdiction & Service

27 Plaintiffs' complaint in this Clean Air Act Section 304(a) citizen suit, 42 U.S.C. §7604(a),
 28 seeks an order compelling EPA to promulgate federal air pollution control regulations for the

1 Navajo Generating Station (“NGS”), a coal-fired power plant located near Page, Arizona,
2 approximately 12 miles from the eastern edge of Grand Canyon National Park.

3 Plaintiffs assert that this Court has subject matter jurisdiction over this action pursuant to
4 42 U.S.C. §7604 and 28 U.S.C. §§1331 and 1361. No issues exist regarding personal
5 jurisdiction or venue, and no parties remain to be served.

6 2. Facts

7 Plaintiffs allege the following facts in their Complaint. Defendants and Intervenor-
8 Defendant do not join in the recitation of facts.

9 NGS is a 2,250 megawatt coal-fired power plant located on Navajo Nation tribal land
10 approximately 12 miles from the eastern edge of Grand Canyon National Park. NGS is the
11 largest coal-fired power plant on the Colorado Plateau, and the eighth largest in the country.
12 Although located on Navajo tribal land, NGS is owned and operated exclusively by non-tribal
13 utilities including Salt River Project Agricultural Improvement & Power District, Arizona Public
14 Service Company, Tucson Electric Power, Bureau of Reclamation, Los Angeles Department of
15 Water and Power and Nevada Energy. On an annual basis, NGS discharges into the air of the
16 Southwest over 34,000 tons of nitrogen oxides (NO_x), 1,900 tons of particulate matter (PM),
17 3,690 tons of sulfur dioxide (SO₂), and 20 million tons of carbon dioxide (CO₂).

18 In 1977, Congress amended the Clean Air Act to provide “Class I” protection to national
19 parks and wilderness areas. “Class I” status means, among other things, that existing visibility
20 impairment in mandatory Class I national parks and wilderness areas must be eliminated.
21 Visibility impairment is measured in deciviews. A 1.0 deciview reduction in visibility is
22 perceptible to the human eye. According to EPA’s 1999 regional haze regulations, “A single
23 source [of air pollution] that is responsible for a 1.0 deciview change or more should be
24 considered to ‘cause’ visibility impairment.” 40 C.F.R. Part 51, Subpart P, Appendix Y—
25 Guidelines for BART Determinations Under the Regional Haze Rule, Section III A. 1.

26 The National Park Service has determined through air dispersion modeling that air
27 pollution from NGS alone impairs visibility by over 39 cumulative deciviews across at least
28 eleven Class I national parks and wilderness areas in the Southwest, 39 times greater than EPA’s

1 threshold used to determine if a single source of pollution causes visibility impairment. Class I
2 areas impacted by emissions from NGS include Grand Canyon National Park (AZ), Capitol Reef
3 National Park (UT), Bryce Canyon National Park (UT), Arches National Park (UT),
4 Canyonlands National Park (UT), Mesa Verde National Park (CO), Petrified Forest National
5 Park (AZ), Sycamore Canyon Wilderness (AZ), Pine Mountain Wilderness (AZ), Mazatzal
6 Wilderness (AZ) and Zion National Park (UT).

7 3. Legal Issues

8 The citizen suit provision of the Clean Air Act, Section 304(a)(2), 42 U.S.C. §7604(a)(2),
9 provides that citizens may commence a civil action against the Administrator of EPA “where
10 there is alleged a failure of the Administrator to perform any act or duty under this chapter which
11 is not discretionary with the Administrator.” Furthermore, “[t]he district courts of the United
12 States shall have jurisdiction to compel (consistent with paragraph (2) of this subsection) agency
13 action unreasonably delayed” *Id.*, Section 304(a), 42 U.S.C. §7604(a).

14 The visibility protection provision of the Clean Air Act at 42 U.S.C. §7491(b)(2)(A)
15 requires EPA to issue regulations that include a requirement for certain major sources of air
16 pollution that cause or contribute to visibility impairment in any mandatory Class I national park
17 or wilderness area, such as NGS, to “procure, install, and operate, as expeditiously as practicable
18 (and maintain thereafter) the best available retrofit technology, as determined by the State (or the
19 Administrator in the case of a plan promulgated under section 7410(c) of this title) for
20 controlling emissions from such source for the purpose of eliminating or reducing any such
21 impairment.” As a result of this Congressional mandate, EPA promulgated regional haze
22 regulations at 40 C.F.R. §51.308(e)(1)(ii), which requires that best available retrofit technology
23 (“BART”) be established for each “BART-eligible” source that emits “any air pollutant which
24 may reasonably be anticipated to cause or contribute to any impairment of visibility in any
25 mandatory Class I Federal area.”

26 NGS is located on tribal lands. As a result, EPA’s visibility protection obligations with
27 respect to this facility are set forth in Clean Air Action Section 301, 42 U.S.C. §7601, and in
28 EPA’s tribal authority rule. Pursuant to the tribal authority provision of the Clean Air Act,

1 Section 301(d)(4), 42 U.S.C. §7601(d)(4): “In any case in which the Administrator determines
2 that the treatment of Indian tribes as identical to States is inappropriate or administratively
3 infeasible, the Administrator may provide, by regulation, other means by which the
4 Administrator will directly administer such provisions so as to achieve the appropriate purpose.”

5 In 1998, EPA issued its Clean Air Act tribal authority rule pursuant to 42 U.S.C.
6 §7601(d)(4), 63 Fed. Reg. 7254, 7271 (February 12, 1998). According to the tribal authority rule
7 at 40 C.F.R. §49.11, the EPA Administrator “[s]hall promulgate without unreasonable delay such
8 Federal implementation plan provisions as are necessary or appropriate to protect air quality,
9 consistent with the provisions of sections 304(a) and 301(d)(4), if a tribe does not submit a tribal
10 implementation plan [TIP] meeting the completeness criteria of 40 CFR part 51, appendix V, or
11 does not receive EPA approval of a submitted tribal implementation plan.” The Navajo Nation
12 has not submitted a regional haze TIP to EPA, and the Navajo Nation is under no deadline to do
13 so.

14 Plaintiffs allege that on July 22, 2007, EPA provided written notification to the operator
15 of NGS that a regional haze BART analysis was required because the facility was BART-eligible
16 and was also subject-to-BART for specific pollutants. Plaintiffs further allege that EPA’s above-
17 referenced 2007 notification constituted a finding by the agency that it was both necessary and
18 appropriate to promulgate BART determinations for NGS without unreasonable delay pursuant
19 to 40 C.F.R. §49.11. Plaintiffs further allege that EPA’s failure to promulgate a final BART
20 determination for NGS without unreasonable delay constitutes a failure to perform acts or duties
21 that are not discretionary with the Administrator within the meaning of 42 U.S.C. §7604(a)(2).

22 Defendants and Intervenor-Defendant contend that EPA has not unreasonably delayed
23 promulgating a final BART determination for NGS, and Defendants contend that EPA has been
24 diligently working on promulgating a comprehensive and thorough BART determination for
25 NGS.

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1 4. Motions

2 The parties propose to resolve this case at summary judgment. The parties seek to
3 reserve June 21, 2013 for a hearing on their cross-motions for summary judgment. Plaintiffs will
4 not make a motion for discovery, and the parties ask that the April 19, 2013 hearing date for that
5 motion be vacated. The parties also ask that the further Case Management Conference set for
6 May 24, 2013 also be vacated.

7 5. Amendment of Pleadings

8 The parties have no plans to move to amend the pleadings.

9 6. Evidence Preservation

10 For this type of case, Plaintiffs and Intervenor-Defendant have no documentary evidence
11 that would be subject to this concern.

12 7. Disclosures

13 The parties agree that initial disclosures are not appropriate in this case. However,
14 Defendants have provided to Plaintiffs the documents that Defendants believe constitute the
15 administrative record for EPA's activities pertaining to the BART determination for NGS.

16 8. Discovery

17 None of the parties will seek discovery in this case.

18 9. Class Actions

19 This case is not a class action.

20 10. Related Cases

21 There are no cases related to this one in this district or before another court or
22 administrative body.

23 11. Relief

24 Plaintiffs seek a declaration that EPA's failure to promulgate a final BART determination
25 for NGS constitutes a failure to perform a nondiscretionary duty without unreasonable delay
26 within the meaning of Clean Air Act Section 304(a)(2), 42 U.S.C. §7604(a)(2), and the tribal
27 authority rule at 40 C.F.R. §49.11. Plaintiffs also seek an Order enjoining the Administrator
28 from continuing to violate the above-described nondiscretionary duties and an Order requiring

1 the Administrator to issue a final BART determination for NGS by a date certain. Plaintiffs also
 2 seek their reasonable costs of litigation, including attorneys' fees, pursuant to 42 U.S.C.
 3 §7604(d). Defendants and Intervenor-Defendant contend that EPA has not unreasonably delayed
 4 promulgating a final BART determination for NGS, but if the Court determines otherwise, EPA
 5 contends that the Court should order EPA to act within a reasonable time.

6 12. Settlement and ADR

7 The parties are continuing to explore settlement.

8 13. Consent to Magistrate Judge For All Purposes

9 The Defendants have declined.

10 14. Other References

11 The parties do not believe this case is suitable for reference to binding arbitration, a
 12 special master, or the Judicial Panel on Multidistrict Litigation.

13 15. Narrowing of Issues

14 No further narrowing is necessary.

15 16. Expedited Trial Procedure

16 The parties agree that this case should be resolved by motions for summary judgment.
 17 Nevertheless, to the extent all issues are not resolved at summary judgment a trial setting in the
 18 fall of 2013 is requested.

19 17. Scheduling

20 The parties propose the following schedule regarding cross motions for summary
 21 judgment:

22	March 1, 2013:	Plaintiffs' Motion for Summary Judgment (25 pages)
23	April 12, 2013:	Defendants and Intervenor-Defendant's Responses and
24		Cross-Motions for Summary Judgment (25 pages each)
25	May 10, 2013:	Plaintiffs' Combined Response and Reply (30 pages)
26	June 7, 2013:	Defendants and Intervenor-Defendant's Replies (15 pages each)
27	June 21, 2013:	Hearing at 9:00 a.m.

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1 18. Trial

2 The parties agree that a trial should not be necessary in this case. Nevertheless, to the
3 extent all issues are not resolved at summary judgment a trial setting in the fall of 2013 is
4 requested.

5 19. Disclosure of Non-party Interested Entities or Persons

6 The undersigned certify that the following listed persons, associations of persons, firms,
7 partnerships, corporations (including parent corporations) or other entities (i) have a financial
8 interest in the subject matter in controversy or in a party to the proceeding, or (ii) have a non-
9 financial interest in that subject matter or in a party that could be substantially affected by the
10 outcome of this proceeding: Diné CARE, National Parks Conservation Association, George E.
11 Hays, and Reed Zars. On January 10, 2013, Intervenor-Defendant filed its Certification of
12 Interested Entities or Persons.

13 20. Other

14 The parties do not know of other matters as may facilitate the just, speedy and
15 inexpensive disposition of this matter.

16 Counsel for Plaintiffs
17 DINÉ CARE and NATIONAL PARKS
18 CONSERVATION ASSOCIATION

19 By /s George E. Hays
George E. Hays
20 Reed Zars

21 DATED: January 31, 2013

22 Counsel for Defendants
23 ENVIRONMENTAL PROTECTION
AGENCY and LISA P. JACKSON

24 /s C. Scott Spear
C. Scott Spear

25 DATED: January 31, 2013
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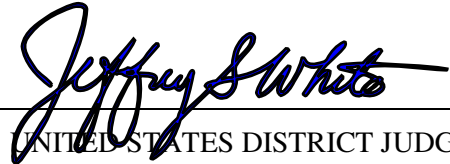
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CASE MANAGEMENT ORDER

The above SECOND AMENDED JOINT CASE MANAGEMENT STATEMENT & PROPOSED ORDER is approved as the Case Management Order for this case and all parties shall comply with its provisions. ~~[In addition, the Court makes the further orders stated below:]~~ The May 24, 2013 Case Management Conference is vacated.

IT IS SO ORDERED.

Dated: February 6, 2013


UNITED STATES DISTRICT JUDGE