

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

FILED

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In the Matter of:)
Basin Electric Power Cooperative) Docket No. 07-2801
Dry Fork Station,)
Air Permit CT - 4631)

Jim Ruby, Executive Secretary
Environmental Quality Council

**REPLY TO PROTESTANTS' OPPOSITION TO THE PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW
(Claims II and III (IGCC/Supercritical); VII (PM_{2.5}); and VIII (SO₂ Increment))**

The Wyoming Department of Environmental Quality Air Quality Division (DEQ/AQD) by and through the Office of the Attorney General, and Basin Electric Power Cooperative, Inc. (Basin Electric) through its counsel, Holland & Hart LLP, respectfully submit the following REPLY TO PROTESTANTS' OPPOSITION TO THE PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW in the above-captioned permit appeal. The following addresses and corrects inaccuracies in Protestants' Opposition to DEQ and Basin Electric's PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

At the outset, DEQ and Basin Electric note that many of the objections raised by Protestants improperly attempt to limit the basis for Council's decisions in granting DEQ and Basin Electric's motions for summary judgment to only those points articulated by the Council during its public deliberations. According to the Department of Environmental Quality's Rules of Practice and Procedure, Chapter 2, Section 12, "the Council shall make a written decision and order in all cases, which decision shall contain findings of fact and conclusions of law based exclusively on the record and include the vote on the decision." Thus, the record in this matter contains far more than just the points articulated by the Council during its deliberations after its review of the record and the parties' submissions on their motions for summary judgment. The record includes all motions, exhibits, briefs, responses, replies, and arguments, as well as the Council's deliberations. The Council's decisions and orders on the issues are based on this record, and its Findings of Facts and Conclusions of Law should not be artificially limited to only those statements made by the Council during its deliberations. Otherwise, the extensive briefing and record accompanying the motions, reviewed and relied on by the Council before its deliberations, is rendered meaningless and not a part of the record.

DEQ and Basin Electric specifically reply as follows to Protestants' comments to the Proposed Findings of Fact and Conclusions of Law proposed on October 17, 2008:

I. PROTESTANTS' OPPOSITION TO CLAIMS II AND III: IGCC AND SUPERCRITICAL TECHNOLOGIES

1. Proposed Findings of Fact and Conclusions should not be limited to the BACT definition: As discussed above, Protestants argue that the proposed findings of fact cover issues

that were not resolved by the Council or part of its justification for granting DEQ's and Basin Electric's motions for summary judgment. Protestants cite selected portions of the hearing transcript and attempt to improperly limit the basis of the Council's ruling to "the definition of BACT and a legal conclusion that the only source considered in the BACT analysis is the source proposed by the applicant." *See* Protestants' Opposition at 1, ¶ 1. However, neither the scope of DEQ and Basin Electric's motions for summary judgment nor the Council's deliberations were limited to this issue alone. Even the limited part of the hearing transcript reflecting the Council's discussion after the motion to grant summary judgment was argued alluded to reasons beyond the narrow scope argued by Protestants. *See e.g.*, Transcript at 89-90 (Mr. Flitner stating, I'm going to vote yes on it for **almost all the same reasons** that Mr. Coverdale expressed.") (emphasis added); *Id.* (Mr. Morris stating "I support the motion. Tom brought up **most of them.**") (emphasis added). Mr. Coverdale's comments on the motion, on which the Protestants rely heavily, also include the statement that "I don't think that DEQ, under BACT definition, can tell somebody submitting a proposal that, no, you can't use your proposed technology. You need to use some totally different technology that may not be as reliable, may not work at high altitude." *See* Transcript at 88. This directly pertains to the language that Protestants seek to delete from the findings of fact. Mr. Coverdale was saying that a permittee is not required to redefine its proposed source, especially where a totally different technology might not fulfill the purpose of the project. Additionally, the Council's extensive questioning and discussion on this issue which preceded its limited discussion on the motion itself included extensive consideration of issues of redefinition of the source versus production processes, and Protestants' argument that any technology that uses coal to generate electricity does not redefine the proposed source in this case.

The Council considered all of the arguments regarding IGCC and supercritical technology, including redefinition and redesign of the source, in addition to considering whether BACT is applied to the source as proposed by the permit applicant. The language that Protestants would delete bears directly on these issues, as discussed and considered by the Council, including the purpose of the facility, the need for reliable baseload power, and whether any existing IGCC plant has demonstrated an ability to meet that purpose and provide high reliability, all of which are relevant to whether alternative technologies for generating electricity were required to be considered in the BACT analysis. Protestants' attempt to base the Council's findings of fact and conclusions of law solely on an extremely narrow slice of the record and the hearing in this case does not reflect the breadth of the Council's considered judgment and review of the entire record.

The Council diligently considered and took into account the full record in making its decision on this issue. *See* Transcript at 73. ("CHAIRMAN SEARLE: Thank you, Ms. Baumer, Mr. Day, it seemed to me, when I was reading through my bale of paper, it seemed like you had a few words in there about the fact that your client did consider IGCC, at least as some level?" MR. DAY: Yes.") The Council reviewed the entire record before them prior to granting the motions for summary judgment and therefore, the ruling should not be limited to only those reasons articulated by the Council during its brief discussion on the motion itself. Such a narrow approach would fail to recognize that the Council took its duties very seriously and based its decision on the entire record. Therefore, any suggested revisions by Protestants to unfairly limit the scope of the order granting DEQ and Basin Electric's Motions for Summary Judgment should be rejected.

Specifically, Protestants take issue with findings of fact paragraphs 4, 6, 8, and 9 and ask that they be eliminated in their entirety. However, these statements are relevant, as discussed above, and undisputed, as noted below:

¶ 4. *See* Protestants' Motion for Summary Judgment (Statement of Undisputed Facts) at pg. 5, ¶ 2 ("Basin will use Powder River Basin coal from the adjacent Dry Fork Mine to generate electricity"); Protestants' Response to Basin Electric's Annex at ¶ 4 ("Protestants do not dispute this paragraph [of Basin Electric's Annex] to the extent that it suggests what Basin Electric believes"[about the need for 90 to 95% availability]); *Id.* at ¶ 5 ("Protestants also do not dispute that Powder River Basin is located in northeast Wyoming, is one of the world's largest sub-bituminous coal reserves, and that Powder River Basin coal is known for its low sulfur content"); *Id.* at ¶¶ 9, 10 (not disputing Basin Electric's reliability and operation availability numbers for existing and new generation IGCC plants); *Id.* at ¶ 11 (not disputing Basin Electric's "motivation for the project"). Protestants do not dispute that Dry Fork was to be a baseload facility with availability of at least 90% and a capacity factor of at least 85%, nor have they disputed that IGCC and supercritical technologies were considered by Basin Electric for this project.

¶ 6. *See* Schlichtemeier Aff. ¶¶ 27, 29, 30 and Ex. P, R, S (DEQ file memorandum documenting AQD phone conversation requesting Basin Electric explain its technology selection and Basin Electric's responses). Protestants do not dispute this request for information from DEQ to Basin Electric.

¶ 8. With the exception that the reference to "four" IGCC plants should be changed to "five", the remainder of this proposed finding is undisputed and should remain unchanged. *See* Protestants' Response to Basin Electric's Annex at ¶ 9 ("Protestants do not dispute that these [coal-based IGCC] plants have not achieved reliable performance of 90 to 95% operational capacity"); *see also* DEQ Ex. 8 (Protestants' Response to DEQ's Discovery Request) at pg. 11:

INTERROGATORY NO. 19: Identify each and every Integrated Gasification Combined Cycle ("IGCC") power generating unit in the United States that is currently or has ever operated at an elevation of 4250 feet or more above mean sea level using only subbituminous coal from the Powder River Basin.

ANSWER: Protestants are not aware of any.

¶ 9. *See* Protestants' Response to Basin Electric's Annex at ¶ 3 ("Protestants do not dispute this paragraph to the extent that it suggests what Basin Electric determined"); *Id.* at ¶ 4 ("Protestants do not dispute this paragraph to the extent it suggests what Basin Electric believes").

Protestants also take issue with specific phrases contained in other paragraphs in DEQ and Basin Electric's Proposed Findings of Fact:

¶ 5. Protestants request the deletion of the second sentence of ¶ 5. However, this sentence contains uncontested statements of fact which support the conclusion that subcritical technology, unlike IGCC, does fulfill the purpose and key criteria for this project. *See* Protestants' Response to Basin Electric's Annex at ¶ 4.

¶ 7. Protestants request the deletion of the first sentence of ¶ 7. However, during the hearing, the Council specifically questioned Basin Electric regarding its technology selection including discussions and information Basin Electric provided to DEQ. *See* Transcript at 73-75. The information provided directly supports the Council's conclusion that IGCC and supercritical technology would redefine and redesign the subcritical technology proposed by Basin Electric, and therefore were not required to be considered in the BACT analysis.

¶ 15. Protestants request the deletion of a portion of the second sentence of ¶ 15. However, this portion should be retained for the same reasons as ¶ 7.

2. Protestants claim that DEQ's reference to the *Neil Simpson Unit #2* permit appeal is erroneous because the "decision is not mentioned in DEQ's response to comments." *See* Protestants' Opposition at 2, ¶ 2. Although Protestants are correct that DEQ's response to comments did not cite *Neil Simpson*, that case is EQC precedent and was cited in both DEQ and Basin Electric's briefs. Therefore, it should not be deleted from Findings of Fact ¶ 16.

3. Protestants request that facts contained within Conclusion of Law ¶ 20 be removed because it is a statement of fact. DEQ and Basin Electric believe that this is a proper conclusion of law based on the facts in the record. *See* Protestants Response to Basin Electric's Annex at ¶ 8 (supercritical differences) and ¶ 12 (IGCC differences).

4. Protestants take issue with Conclusions of Law ¶¶ 21 and 22. Protestants claim that DEQ and Basin Electric "mischaracterize Protestants' legal positions, [and] the Council's Order is not the appropriate place to articulate Protestants' arguments." *See* Protestants Opposition at 2, ¶ 4. Protestants have offered no alternate language, and the summary fairly characterizes Protestants' arguments in their motion for summary judgment. In any event, the Council should not allow Protestants to remove any reference to their rejected legal arguments from the Council's Order.

II. PROTESTANTS' OPPOSITION TO CLAIM VIII: SO₂ INCREMENT

Protestants take issue with a number of DEQ and Basin's Proposed Finding of Fact but have no opposition to any proposed Conclusions of Law.

1. Protestants seek to add the phrase "[i]n the context of the motions before the Council," to Finding of Fact ¶ 3 that there is no dispute with the way that the modeling was conducted. *See* Protestants' Opposition at 1. This is the first time this issue has been raised. Protestants' made no effort to make this clarification in the past, and provide no indication of any context in which they would object to the modeling. Therefore, this proposed revision should be rejected now. Furthermore, Mr. Zars, counsel for the Protestants, acknowledged that the modeling had been conducted properly. *See* Transcript at pg. 146. ("MR. BOAL: There's no

allegation that I know of that the modeling was done improperly. Is that correct? MR. ZARS: That's right.")

2. DEQ and Basin Electric do not take issue with the revised order of sentences in ¶ 4.

3. DEQ and Basin Electric do not take issue with substituting the word "required" for "requested" in ¶ 6.

4. DEQ and Basin Electric disagree with Protestants' suggested revision in ¶ 7. Protestants ask the Council to remove language regarding the comparison to Colstrip emissions because they believe it is irrelevant. Colstrip's emissions and impacts were not irrelevant during the hearing. The subject of Colstrip was a well-discussed topic during the hearing and should not be removed from the Order. Certainly it was relevant to the discussion by the Council. See Transcript at 182. (Mr. Flitner: "And you add that to the possibility of the NCIR and Colstrip to some degree holding Wyoming hostage to any development that may or may not occur, I'm really uncomfortable with that."). Moreover, Colstrip's major impact on modeled increment exceedances in the Northern Cheyenne Indian Reservation (NCIR) is an important part of Robert Pearson's expert report cited by Basin Electric in its summary judgment briefing, as well as a material fact listed in DEQ's Annex of facts, ¶ 9, that was undisputed by Protestants. The fact of Colstrip's predominant impact on the NCIR reinforces that DEQ's position that Dry Fork's *de minimis* impact should not control issuance of the permit.

Furthermore, Protestants' suggested revisions to the language describing the "conservative assumptions rather than actual emissions" should also be rejected because that is also a factual statement. The use of maximum allowable emissions is naturally a more conservative approach to modeling than the use of actual emissions because the maximum allowable emissions are greater than what actually leaves the source. There could be no better proof of this proposition than the results of modeling Colstrip actual emissions showing no increment exceedances at the NCIR.

5. DEQ and Basin Electric disagree that ¶ 8 is an "editorial and irrelevant presentation of facts" and assert that it contains factual information that was an issue that the Council addressed in their deliberations at the hearing. See Transcript at 182. (Mr. Flitner: "And you add that to the possibility of the NCIR and Colstrip to some degree holding Wyoming hostage to any development that may or may not occur, I'm really uncomfortable with that."). Protestants never disputed that modeling of Colstrip maximum allowable emissions are both hypothetical and conservative (compared to actual emissions as noted above). Worst-case modeling results are inherently hypothetical and conservative because they are not grounded in actual empirical observations or based on actual data.

6. Protestants request that the Council change language in ¶¶ 9 and 10 to include the phrase "modeled increment violations" rather than "occasions." DEQ and Basin Electric disagree – the term "occasions" refers back to paragraph 7 which first introduced the "47 possible SO2 increment exceedances." The term "occasion" refers to each of the 47 possible exceedances modeled using hypothetical maximum allowable emissions and therefore should remain and not be mischaracterized as "violations." However, if the Council does not agree, we

would suggest that the phrase be changed instead to “modeled increment exceedences.” *See* Rairigh Aff., ¶ 40. (DEQ analysis of modeled exceedences for Dry Fork).

Protestants offer additional revisions to ¶ 10 which should also be rejected. DEQ and Basin Electric would agree to leave out the word “vanishingly” but believe that the rest of the sentence is a factual statement that accurately describes the results of Basin Electric’s modeling. DEQ and Basin would also object to the inclusion of the statement “by DEQ for the first time in this case to excuse increment.” As will be discussed below, DEQ has used the Class I significant impact levels (SILs) prior to the Dry Fork permit application. *See* Schlichtemeier Aff, Ex. V, WyGen 2 Decision pgs. 17 – 20. DEQ and Basin Electric also object to the words “excuse the increment violation” as a misstatement of the Council’s decision and DEQ and Basin Electric’s arguments for summary judgment. As was fully briefed and discussed, the use of SILs does not “excuse” a violation – SILs were used to determine that Dry Fork did not cause or contribute to any conservatively modeled exceedance. Finally, the information in ¶ 10 provides more accurate detail than Protestants’ proposed revision, and Protestants do not claim this information is inaccurate.

7. DEQ and Basin also disagree with Protestants’ suggested revisions ¶¶ 11, 12, 13, and 14. DEQ believes that the reference to Colstrip and the DEQ Administrator’s decision regarding modeling results from Dry Fork is important to the Council’s decision to grant DEQ and Basin Electric’s motions for summary judgment.

¶ 11. This is not an “editorial presentation of the facts.” Protestants improperly seek to remove clarity and detail in the record of factual matters that support the Council’s decision and conclusions of law.

¶ 12. As discussed above for ¶ 7, the emissions from Colstrip and its impact on the Dry Fork modeling were relevant to the briefing and arguments and relevant to the Council and ¶ 12 should remain in the findings of facts.

¶ 13. This is not a “legal statement” as suggested by Protestants and is entirely factual. DEQ did make the determination that the cumulative modeling results were legally insignificant. *See* Rairigh Aff., ¶ 40. (DEQ analysis of modeled exceedences for Dry Fork).

¶ 14. This is not a “legal statement” as suggested by Protestants and is entirely factual. DEQ did apply the Class I SIL to the modeling to determine that the Dry Fork impacts were not significant. *See* Rairigh Aff., ¶ 23, ¶ 40. (DEQ analysis of modeled exceedences for Dry Fork).

8. Protestants request that the Council modify ¶ 15 to be consistent with the statement of DEQ attorney Mr. Luke Esch at the September 30, 2008 hearing that “we have not used this SILs in this way in Wyoming before.” This statement was made in error by Mr. Esch after a discussion with Mr. Chad Schlichtemeier of DEQ. Mr. Schlichtemeier had a phone conversation with Mr. Ken Rairigh, one of the DEQ modelers for the Dry Fork permit. During this telephone conversation, there was a misunderstanding between Mr. Schlichtemeier and Mr. Rairigh in that Mr. Schlichtemeier understood Mr. Rairigh to state that the SILs had not been used prior to the Dry Fork permit application. This was merely a miscommunication then

conveyed to Mr. Esch. Evidence in the record prior to the statement by Mr. Esch shows that DEQ has used SILs in the way used by DEQ in the Dry Fork permit process and as stated by Mr. Esch on September 29, 2008. Therefore, ¶ 15, as submitted, properly includes the reference to Ex. V, WyGen 2 Decision pp. 17-20, which describes how DEQ used Class I SILs in the same way DEQ used them for the Dry Fork permit application. *See* Schlichtemeier Aff, Ex. V.

9. DEQ and Basin Electric disagree that ¶ 18 be removed because it is a “legal statement.” EPA did propose SILs for Class I areas in 1996 and Protestants’ own expert witness made the statement that Protestants want removed from the record. DEQ’s Annex of material facts recites that Protestants’ expert witness was not aware of any permitting agency which does not use Class I SILs in the permitting process (DEQ Annex at ¶ 17), and that material fact was undisputed by Protestants.

10. Protestants request that ¶ 19 be removed because “there does not appear to be any support in the record for the proposition stated in paragraph 19.” *See* Protestants’ Opposition at 4. Protestants apparently failed to locate the language from Mr. Flitner regarding the impact of Colstrip on Wyoming development. *See* Transcript at 182. (“And you add that to the possibility of the NCIR and Colstrip to some degree holding Wyoming hostage to any development that may or may not occur, I’m really uncomfortable with that.”) Moreover, the factual consequences of Protestants’ ‘zero impact’ argument were briefed and argued at the hearing. If Dry Fork has a non-zero impact and for that reason were to be denied a permit as requested by Protestants, it follows logically that other future sources also could have a non-zero impact and therefore be denied a permit if Protestants’ non-zero test were to apply.

III. PROTESTANTS’ OPPOSITION TO CLAIM VII: PM_{2.5}

1. Protestants argue the Council’s order should be limited to the surrogate policy and Wyoming’s attainment status. *See* Protestants’ Opposition at 1, ¶ 1. Protestants believe that the Council’s order should be limited to these issues. DEQ and Basin Electric disagree with most of Protestants’ objections with regard to the findings of fact ¶¶ 9, 15, 16, 21, 22 and 25. These paragraphs include undisputed facts and directly relate to the surrogate policy and Wyoming’s attainment status for PM_{2.5}. To address Protestants’ concerns, DEQ and Basin Electric provide the following additional record citations or alternate language if appropriate:

¶ 9. This is an undisputed fact. *See* Protestants Motion for Summary Judgment (Statement of Undisputed Facts) at pg. 6, ¶ 11 (“PM₁₀ is particulate matter with a diameter less than or equal to 10 micrometers, and PM_{2.5} is particulate matter with [a] diameter of less than 2.5 micrometers.”).

¶ 15. DEQ and Basin Electric agree to remove this proposed finding of fact.

¶ 16. DEQ and Basin Electric agree to reword this proposed finding of fact so that it reads as follows: EPA is “undertaking laboratory studies in collaboration with several stakeholders to characterize the artifact formation and other uncertainties associated with conducting Method 202, and to identify procedures to be used in applying methods to minimize uncertainties.” 72 Fed. Reg. 20586, 20653 (April 25, 2007). EPA also “plan[s] to perform additional validation

testing of CTM-039 . . . Within 18 months we intend to propose, if necessary, modifications to Method 202 or similar methodologies suitable for measuring condensable PM_{2.5}.” *Id.*

¶ 21. This paragraph contains undisputed facts. In addition to Protestants’ own expert’s statements (*see* Sahu Depo at pgs 283-285), Protestants also stated as an undisputed fact: “Protestants do not dispute that the PPS bags with PTFE will control PM_{2.5}.” Protestants’ Response to Basin’s Annex at ¶ 22. This paragraph does not assert that the fabric filter discussed is BACT for PM_{2.5}, which Protestants may dispute. It merely states that, consistent with Protestants’ expert’s testimony, it will control PM_{2.5} emissions, which Protestants have not disputed.

¶ 22. DEQ and Basin Electric agree this statement should be clarified to reference the averaging period, so the second sentence would read: “The emission limits for NO_x and SO₂ set by DEQ in Basin Electric’s permit, are among the most stringent imposed in the country based on a 12 month rolling average.” The facts cited in this paragraph are otherwise undisputed. The permit on its face contains BACT limits for the PM_{2.5} precursors NO_x and SO₂, Protestants have admitted in their interrogatory answers that they know of no lower NO_x limits in the country, and they have offered no evidence to rebut the fact that both NO_x and SO₂ limits at Dry Fork are among the most stringent in the country.

¶ 25. This proposed finding of fact should remain because it was part of the basis for the Council’s decision and was briefed and argued. *See* Transcript at pgs. 203-204. Protestants do not dispute the results of modeling PM₁₀ impacts from Dry Fork, nor the results of nearby monitoring of PM_{2.5} which were taken from an EPA website. Because these facts indicate that the NAAQS from PM_{2.5} will be protected if Dry Fork is built, they reinforce that DEQ exercised reasonable judgment in deciding to continue its established practice of applying EPA’s PM₁₀ surrogate policy at Dry Fork.

Protestants also request revisions to finding of fact ¶ 20, and conclusions of law ¶¶ 12 and 20. DEQ and Basin Electric disagree.

¶ 20 findings of fact: *See* Protestants’ Response to Basin’s Annex at ¶ 18 (“Undisputed.”).

¶ 12 conclusions of law: Protestants’ concern does not appear to be over EPA’s rationale for continued use of the surrogate policy, but rather appears to be with the validity of EPA’s rules. As set forth in the briefs and arguments, such a challenge is under the jurisdiction of the D.C. Circuit Court of Appeals. Moreover, as explained below, except for the first sentence of ¶ 12, the remainder of conclusion of law ¶ 12 may be moved to findings of fact.

¶ 20 conclusions of law: This issue of law was argued at length in the briefs and at the hearing and should remain. *See* Transcript at pgs 201-204, 222.

2. Protestants also object to findings of fact ¶¶ 18 and 19 stating that these paragraphs contain conclusions of law. These paragraphs should remain because they are not conclusions of law, but are findings of fact about the conclusions DEQ made.

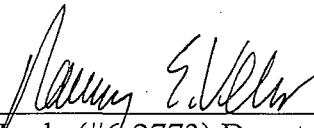
Protestants also object to the inclusion of factual statements in the proposed conclusions of law in regard to ¶¶ 6, 12, 13, 14, 15, 16, 17, and 18. DEQ and Basin Electric agree with part of Protestants' objection and agree that conclusions of law ¶¶ 6, 12 (except the first sentence), 13, 14, 15, 16 may be moved to the proposed findings of fact. Conclusions of law paragraphs 17 and 18 are conclusions of law and should remain as such. Conclusion of law ¶ 6 may be moved between original findings of fact ¶¶ 8 and 9. Conclusions of law ¶ 12 (except the first sentence) through ¶ 16 may be moved after original finding of fact ¶ 14.

3. DEQ and Basin Electric offer the following citations to address Protestants' objection that citations do not support findings of fact ¶¶ 4 and 7:


¶ 4: See Protestants Statement of Undisputed Facts at ¶ 20 referencing http://www.epa.gov/pmdesignations/2006standards/rec/letters/08_WY_EPAMOD.pdf (Aug. 18, 2008 EPA Letter to Governor Freudenthal stating in part, "this letter is to inform you that the Environmental Protection Agency (EPA) agrees that your entire State [Wyoming] is in attainment at this time."); see also DEQ Ex. 14 (same).

¶ 7: To address Protestants' concerns, DEQ and Basin Electric propose revising this finding to say: "Pursuant to this federal guidance, Wyoming has consistently followed this policy for over ten years, and all SIP-approved states continue to be authorized to apply it." See Schlichtemeier Aff. ¶ 48; 73 Fed. Reg. 28,321.

RESPECTFULLY SUBMITTED this 29th day of October, 2008.


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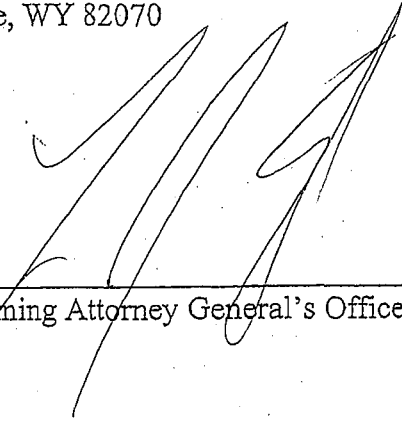
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail, postage prepaid, this the 27th day of October, 2008 to the following:

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