

The Coal War Rages On
By: Samuel M. Johnson

While North Dakota and Minnesota enjoy many cultural similarities and are generally amicable neighbors, the fight over clean and renewable energy—particularly the burning of lignite coal—is increasingly becoming a source of friction between the two states. *See generally* Patrick Zomer, *The Carbon Border War: Minnesota, North Dakota, and the Dormant Commerce Clause*, 8 U. St. Thomas. L.J. 60 (2010). North Dakota has one of the country's largest reserves of lignite coal, a younger form of coal than bituminous and anthracite coal which, because it has not completely transformed from peat to a mature coal, has a higher sulfur content and, thus, is a greater polluter than other types of coal. Since it is inefficient to transport lignite coal long distances, it is commonly burned close to the mine, usually as a source of fuel to generate electricity.

North Dakota's lignite industry employs close to 4,000 people and generates significant revenues for the state, but at a significant environmental cost. *See* Lignite (accessed Dec. 28, 2012), *available at* <http://www.energynd.com/resources/lignite/>. This environmental cost has led to the two neighboring states clashing over energy policy and the use of clean renewable energy in the future. Minnesota has one of the most aggressive renewable energy policies in the nation, with a legislative goal of twenty-five percent renewable energy by 2025. Minn. Stat. § 216B.1691 (2010). In contrast, North Dakota is enjoying a significant economic boon at the expense of pursuing a clean energy policy. North Dakota has a strong economic interest in its utilities selling electricity, produced by the burning of lignite coal, to northern Minnesota.

In 2007, the Minnesota legislature passed the Next Generation Energy Act (NGEA) Minn. Stat. Chap. 216H (2010). The NGEA seeks to establish energy and environmental standards aimed at reducing carbon dioxide emissions. *Id.* One of the ways the NGEA achieves this goal is by preventing the importation of out-of-state electricity which would “contribute to statewide power sector carbon dioxide emissions.” Minn. Stat. § 216H.03 (2010). Additionally, Minnesota utilities are not permitted to “enter into a new long-term power purchase agreement that would increase statewide power sector carbon dioxide emissions.” *Id.* The statute significantly limits the ability of Minnesota utilities seeking to buy electricity from western North Dakota lignite coal fields. *See North Dakota Sues Minnesota Over Coal Power Restrictions* (Nov. 2, 2011), *available at* http://bismarcktribune.com/news/state-and-regional/article_36b43602-056d-11e1-9af3-001cc4c002e0.html.

North Dakota eventually responded to the passage of the NGEA by suing Minnesota in an attempt to have the statute declared invalid. *North Dakota v. Swanson*, No. 11-3232, 2012 WL 4479246, at *2 (D. Minn. Sept. 30, 2012). On November 2, 2011, North Dakota sued the Commissioners of the PUC, the Commissioner of the Minnesota Department of Commerce, and the Minnesota Attorney General, each in their individual capacities. *Id.* North Dakota asserts that the NGEA violates the Commerce Clause, the Privileges and Immunities Clause, and the Due Process Clause of the U.S. Constitution and that the Clean Air Act and the Federal Power Act preempts the NGEA under the Supremacy Clause. *Id.*

In September 2012, the Federal District Court for the District of Minnesota ruled on Minnesota’s motion to dismiss and summary judgment motions. The court, in a very thorough analysis, granted Minnesota’s summary judgment motions that asserted the NGEA violates the Privileges and Immunities Clause and the Due Process Clause. *Id.* at *20. The court denied

Minnesota's motions on the remaining issues, allowing the case to proceed to trial, stating that North Dakota had pled sufficient factual allegations to withstand Minnesota's motions. *Id.* See also David Shaffer, N.D. Can Press On With lawsuit Over Coal-Generated Electricity, Star Tribune (Oct. 1, 2012), available at <http://www.startribune.com/business/172134481.html?refer=y>. While this is a win for North Dakota, it remains to be seen how the case will play out in the coming year.

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