Appeal No. 21-4098

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY, et al., Plaintiffs-Appellants,
v.
U.S. DEPARTMENT OF THE INTERIOR, et al., Defendants-Appellees,
and
STATE OF UTAH and UTAH BOARD OF WATER RESOURCES, Defendants-Intervenors-Appellees,
and
WASHINGTON COUNTY WATER CONSERVANCY DISTRICT, Defendants-Intervenors-Appellees.

On Appeal from the United States District Court for the District of Utah
The Honorable David Barlow, Civil Action No. 2:19-cv-00636-DBB-CMR

AMICUS BRIEF OF THE UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION IN SUPPORT OF THE APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

For its disclosure under Rule 29(a)(4)(A) of the Federal Rules of Appellate Procedure, Amicus Curiae, the Ute Indian Tribe of the Uintah and Ouray Reservation ("Tribe"), states that it is a sovereign Indian tribe, that the Tribe has no parent corporation or other parent entity, and no publicly held corporations owns any stock in it.

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STATEMENT OF THE IDENTITY OF THE AMICUS CURIAE, ITS INTEREST IN THE CASE

Amicus Curiae is the Ute Indian Tribe of the Uintah and Ouray Reservation (hereinafter the "Tribe"), a federally recognized Indian tribe. The Tribe's reservation homeland is located in northeastern Utah. The Tribe is a sovereign tribal nation governed under its own laws and regulations pursuant to a federally approved Tribal Constitution and By Laws.

The Tribe is the beneficial owner of a substantial quantity of water rights appurtenant to its reservation lands, including reserved water rights in the Green River and its tributaries. The Tribe's water rights have priority dates of 1861 and 1882. Reliable access to water is essential to the Tribe's ability to maintain a permanent and viable homeland on its arid and sparce reservation homeland.

The Tribe is interested in the outcome of this case because implementation of the Green River Block Exchange Contract ("GRBE Contract"), the subject of the Appellants' legal challenge, will likely impair the Tribe's ability to access and develop its senior-priority water in the Green River and its tributaries. In addition, as discussed in the Appellants' Brief, the Ute Tribe has filed its own legal challenge to the GRBE Final EA and FONSI; however, the Tribe's NEPA challenge is part of a larger lawsuit involving the Tribe's water rights that is still pending before the District Court, *Ute Indian Tribe of the Uintah and Ouray Reservation v. United States*, U.S. District Court for the District of Utah, case number 2:21-cv-00573.

Because the Tenth Circuit ruling in this appeal is likely to have precedential effect on the Tribe's pending NEPA challenge, the Tribe has an obvious interest in informing the Tenth Circuit of the Tribe's objections to the GRBE Contract, as well as the Tribe's reasons for believing that the GRBE Contract constitutes a major federal action for the purposes of NEPA, *see* 42 U.S.C. § 4332(2)(C), that may have significant impacts on the environment, thereby requiring the preparation of an EIS (Environmental Impact Statement).

STATEMENT OF AUTHORITY TO FILE

The Tribe is authorized to file this Amicus Curiae Brief in support of the Appellants pursuant to Rule 29(2) of the Federal Rules of Appellate Procedures. All Parties have consented to the filing of this Amicus Brief.

STATEMENT PURSUANT TO RULE 29(a)(4)(E)

The Tribe certifies that (i) this Brief was not authored, in whole or in part, by a party or party's counsel; (ii) no party or party's counsel contributed money that was intended to fund preparing or submitting this Brief; and (iii) no person other than the Tribe contributed money that was intended to fund preparing or submitting this Brief.

INTRODUCTION

The National Environmental Policy Act ("NEPA") was enacted by Congress to implement a "national policy of fostering a productive and beneficial harmony between man and his environment; to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321. The NEPA was passed in recognition of the "profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances." 42 U.S.C. § 4331(a).

The NEPA requires a federal agency to prepare a "detailed statement" for all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). For any major federal action that could significantly affect the human environmental, this "detailed statement" must take the form of an Environmental Impact Statement ("EIS"). An EIS is mandatory, not discretionary, for any major federal action that will, or may, significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C). *Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1521 (10th Cir. 1992). An EIS "ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that

the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision." *Id* (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)).

The Bureau of Reclamation's approval and execution of the GRBE Contract is precisely the type of major federal action that evokes the intended protections of the NEPA. Amid a troubling and untenable period of decreasing water supply in the Colorado River, resulting both from man-made climate change and increasing water demand due to human population growth in the West, the Bureau of Reclamation ("Bureau") has instituted an agreement with the State of Utah that likely will exacerbate the man-made environmental impacts by allowing further depletions of water in the Upper Colorado River Basin and by encumbering unperfected Colorado River Water in perpetuity. In the face of a 110-year trend of decreasing natural flow in the Colorado River system—a trend that will likely become more precipitous as the impacts of climate change worsen—the Bureau drew the indefensible conclusion that all NEPA requirements were addressed in its the Environmental Assessment (EA) and that no Environmental Impact Statement was required.

The Bureau's NEPA deficiencies are perhaps most thoroughly illustrated in the GRBE Contract's potential impacts to the water rights and sovereign interests of the Ute Indian Tribe.

The Tribe's Uintah and Ouray Reservation ("Reservation") is the second-largest Indian reservation in the United States by area, encompassing approximately 4,000,000 acres of harsh and arid terrain that is wholly dependent on reliable and consistent access to water to be agriculturally productive. The present-day Uintah and Ouray Indian Reservation was originally two separate reservations. The first reservation, the Uintah Valley Reservation, was established by Executive Order on October 3, 1861, confirmed by Congress in the Act of May 5, 1864, § 2, 13 Stat. 63, and encompasses 2,039,040 acres in the Uinta Basin of Utah. The second reservation, the Uncompahgre Reservation, was established pursuant to the Act of June 15, 1880 (ch. 223, 21 Stat. 1999), and the Executive Order of January 5, 1882, and it encompasses approximately 2,000,000 acres. The present-day Uintah and Ouray Reservation is located in the Green River Basin in the northeast corner of Utah at the foot of the Uinta Mountains, on an arid and sparsely settled plateau. The Reservation lies within the drainage of the Colorado River Basin, and a number of streams flows through the Reservation. The Duchesne River and its tributaries, Rock Creek, Lake Fork River, Yellowstone River, Uinta River, and Whiterocks River all pass south from the Uinta Mountains through the western part of the Reservation and into the Green River. The Green River and its tributaries, including the White River, flow through the eastern part of the Reservation and then on south to the mainstem of the Colorado River.

In its 1908 seminal decision in *Winters v. United States*, 207 U.S. 564 (1908), the United States Supreme Court ruled that when the United States establishes an Indian reservation, it reserves water rights of sufficient quantity to meet the reservation's purpose of becoming a permanent and sustainable homeland for the Indians. In *Winters*, the Court enjoined non-Indian water users from constructing dams and reservoirs that would prevent water from the Milk River and its tributaries from flowing to the Fort Belknap Reservation. The Court rejected the non-Indians respondents' contention that the Indians of the Fort Belknap Reservation were not entitled to water from the Milk River because the congressionally ratified agreement establishing the Fort Belknap Reservation contained no express reservation of water for the Indians, and any Indian claim to waters in the Milk River and its tributaries had been ceded by implication. *Winters* at 576. The Supreme Court rejected this argument, ruling that adopting the non-Indians' "conflicting implication" was untenable and wholly inconsistent with the purpose of the reservation:

> We realize that there is a conflict of implications, but that which makes for the retention of the waters is of greater force than that which makes for their cession. The Indians had command of the lands and the waters, command of all their beneficial use, whether kept for hunting, and grazing roving herds of stock or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?

Id.

In 1922, the states of the Colorado River Basin signed the 1922 Colorado River Compact, which allocated Colorado River water between the Upper Colorado River Basin states (Wyoming, Utah, Colorado, and New Mexico) and the Lower Colorado River Basin states (Nevada, Arizona, and California). In 1948, the four Upper Basin states entered into the 1948 Upper Colorado River Basin Compact, which apportioned the Upper Basin's share of Colorado River water among each of the four Upper Basin states. In spite of the 1908 *Winters* ruling confirming that Indian tribes possess reserved water rights in the Colorado River Basin, the states of the Colorado River Basin left the numerous Indian tribes within the Upper Basin states out of the Colorado River Compacts entirely. Instead, the states included a catch-all provision for perfected water rights in existence at the time of the execution of the 1922 Compact. Article VIII of the 1922 Compact states that "[p]resent perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact." The U.S. Supreme Court interpreted this language, as applied to Indian water rights, in its landmark 1963 opinion in *Arizona v. California,* 373 U.S. 546 (1963). The Court found that *Winters* reserved water rights qualified as "present perfected water rights" as such term is used in the Article VIII of the Colorado River Compact:

> The Court in *Winters* concluded that the Government, when it created that Indian Reservation, intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless. *Winters* has been followed by this Court as recently as

> 1939 in *United States v. Powers*, 305 U.S. 527, 59 S.Ct. 344, 83 L.Ed. 330. We follow it now and agree that the United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created. This means, as the Master held, that these water rights, having vested before the [Boulder Canyon Project] Act became effective on June 25, 1929, are 'present perfected rights' and as such are entitled to priority under the Act.

Id.

This finding confirmed critical legal attributes of *Winters* reserved water rights that remain the defining characteristics of *Winters* reserved water rights today. First, in finding that *Winters* reserved water rights are property rights that "vested" upon the creation of the reservation, the Supreme Court confirmed that Indian tribes have a vested property right in their water without the need to prove that their waters are being put to beneficial use. This marks a critical distinction between *Winters* reserved water rights and water rights that fall under the state-based system of prior appropriation that is prevalent in the West. Second, by finding that *Winters* reserved water rights are "present perfected" water rights, the Supreme Court in *Arizona v. California* confirmed that *Winters* reserved water rights are not, and cannot be, limited in any way by the apportionment of water agreed to by the Colorado River Basin states under the 1922 or 1948 Compacts. Instead, *Winters* reserved water rights exist separate from and independent of the states' apportionments.

As part of its *Arizona v. California* opinion, the Supreme Court also issued a critical finding concerning the quantity of water reserved to Indians under the

Winters doctrine. The Court found that the quantity of a Tribe's *Winters* reserved water right must be determined based on the quantity of practicably irrigable acreage on the reservation, as opposed to a projection of the reasonably foreseeable needs of the residing Indians:

> We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations. [Petitioner] Arizona, on the other hand, contends that the quantity of water reserved should be measured by the Indians' 'reasonably foreseeable needs,' which, in fact, means by the number of Indians. How many Indians there will be and what their future needs will be can only be guessed. We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage.

Id. at 600-01.

The Supreme Court's rulings in *Arizona v. California* marked a watershed moment in federal jurisprudence over *Winters* reserved water rights and remains, along with the *Winters* opinion itself, one of the defining sources of law for Indian water rights in the Colorado River Basin.

Applying the "practicably irrigable acreage" quantification standard that was adopted by the Supreme Court in *Arizona v. California*, the Ute Indian Tribe has *Winters* reserved water rights appurtenant to 129,331 acres of land within the boundaries of the Uintah and Ouray Reservation. Effective irrigation for crop cultivation in this region requires approximately 4.0 acre-feet of water per acre

annually. Thus, applying this 4.0-acre-foot water duty, the Tribe has *Winters* reserved water right to 549,685-acre feet per year from the Green River and several of its tributaries, including the White River, the Duchesne River, the Uinta River and the Lakefork River.

In conducting its assessment of environmental impacts of the GRBE Contract, the Bureau of Reclamation inexplicably and summarily dispensed with any meaningful consideration or discussion of the GRBE Contract's likely impacts upon the Ute Tribe's senior priority water rights. First and most egregiously, the Bureau failed altogether to acknowledge and address the fact that the Tribe is *presently* the beneficial owner of vested property rights to water in the Green River and its tributaries and *has been* since 1861 (for water rights appurtenant to the Uintah Valley portion of the Reservation), and 1882 (for water rights appurtenant to the Uncompahgre portion of the Reservation). Instead, the Bureau grossly mischaracterized the legal character of the Tribe's *Winters* reserved water rights, describing the Tribe's waters as *future* water rights that will vest only upon the execution of a compact between the Tribe, the State of Utah, and the Federal Government. *See* Final EA, Section 3.13.2, p. 65.[1] Having thus failed altogether to

[1] Pursuant to Rule 201 of the Federal Rules of Evidence, the Tribe asks the Court to take judicial notice of the Final EA and FONSI, which posted on the website for the United States Bureau of Reclamation, (*see Zimomra v. Alamo Rent-A-Car, Inc.*, 111 F.3d 1495, 1504 (10th Cir. 1997) ("Where, as here, a party requests a court to take

acknowledge and address the senior-priority tribal water rights currently in existence, the Bureau necessarily failed to provide an adequate assessment of potential impacts to the availability of tribal water amid a 110-year trend of decreasing water supply caused by climate change and population growth.

The Ute Tribe properly alerted the Bureau to the Tribe's concerns in the Tribe's comments on the Draft EA. Appx. Vol. II at 292-95. Yet, the Bureau ignored the Tribe's comments and concerns.

The environmental conditions under which this major water depletion contract, the GRBE, was executed are alone enough to require the Bureau to undertake an EIS. However, the Bureau's outright failure to acknowledge and consider the Contract's impacts to senior-priority tribal reserved water rights in the Green River and tributaries illustrates the immense scope and severity of the Bureau's NEPA deficiencies.

The Tenth Circuit should ask: was such an inexplicable failure deliberate and intentional, or simply grossly inept and irresponsible? The Ute Tribe believes the failure was deliberate and purposeful. Bear in mind, the Bureau of Reclamation is

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judicial notice of adjudicative facts and supplies the court with the necessary information, Rule 201(d) requires the court to comply with the request."): https://www.usbr.gov/uc/envdocs/ea/20190100-GreenRiverBlockWaterExchangeContract-FinalEAandFONSI-508-PAO.pdf (last visited on 2/4/2022).

not a disinterested party; rather, the United States, through the Bureau, is a signatory to the GRBE Contract and receives monetary compensation pursuant to its terms. Therefore, the Bureau was at all times operating with a vested interest in the GRBE Contract and with an over-arching purpose of insuring that the Contract was executed. And the only way for the Bureau to expeditiously green light the GRBE Contract was for the Bureau to ignore the Contract's likely impacts on the Tribe's senior priority water rights.

ARGUMENT

A. The Court Should Rule in the Appellants' Favor Because the Bureau of Reclamation Violated NEPA and the APA by Basing its NEPA Analysis on a False Presumption that the State of Utah has an Alienable Property Right it is Unperfected Apportionment of Colorado River Water

The Bureau of Reclamation based its NEPA analysis and resulting execution of the GRBE Contract on a false premise that the State of Utah can freely alienate, transfer, and encumber unperfected water from the State's apportionment of Colorado River water under the 1948 Colorado River Compact. From this faulty legal foundation, the Bureau's EA adopts a no-action alternative that falsely assumes the water to be "forborn" by the State of Utah under the GRBE Contract is water that already is a vested property right; consequently, the EA reasons, implementation of the GRBE contract will not result in any new depletions of Colorado River water. And because the no-action alternative constitutes the "baseline for measuring the effects of the proposed action," *Biodiversity Conservation All. v. U.S. Forest Serv.*,

765 F.3d 1264, 1269 (10th Cir. 2014), the Bureau of Reclamation's misleading and legally deficient no-action alternative constitutes a violation of the NEPA and grounds to vacate and set aside the Bureau's action in executing the GRBE Contract as arbitrary, capricious, an abuse of discretion, and not in accordance with the law.

As its name suggests, the GRBE Contract is, at its core, an agreement to "exchange" water rights between the State of Utah and the United States. Section 6 of the GRBE Contract, aptly titled "Exchange of Water", sets out the basic terms of this purported exchange:

> For this exchange, the Board will forbear the depletion of a portion of the Green River and tributary flows to which it is entitled, and instead allow that portion of the Compact Entitlement Water rights to contribute to meeting the ESA Recovery Program Requirements in Reaches 1 and 2. This will assist Reclamation in meeting its obligation under the 2006 ROD. In exchange, the Board is authorized to deplete an equal amount of Project Water from releases from the FG Unit throughout the year as water is needed for the Assigned Water Right. On an annual basis, the direct flows that will be left in the river and used to meet ESA requirements will equal the FG project releases used for depletion by the Board under the Assigned Water Right.

As Appellants argue in their Opening Brief, the so-called "forbearance" of water that is contemplated in the Agreement is a fiction, intended to paint a misleading picture of future water depletions that cannot accurately be characterized as anything more than sheer conjecture:

> The Final EA asserts that "[i]f the water exchange contract is implemented, the State would *forebear* the depletion of a portion of the Green River and tributary flows to which it is entitled under Article XV (b) of the Upper Colorado River Basin Compact." Appx. Vol. II at 178

> (emphasis added). The use of the term "forebear" implies that Utah would discontinue a current water depletion. That is not the case: most of the water rights to be "exchanged" via the Contract have *never* been put to use and the Contract's purpose is to enable Utah to make *new* appropriations of Green River water.

Op. Br. at 43.

The Appellants correctly point out that the State of Utah is "forbearing" nothing more than potential future depletions, not a perfected water right, so the Bureau's representation that water depletions under the action alternative and the no-action alternative is indefensible. For the State, the Contract's alleged "forbearance" of Colorado River water depletion is essentially the equivalent of a lease, a sale, or other encumbrance of water. The State purports to deprive itself of its use of a property right to water in exchange for consideration of value. Black's Legal Dictionary defines "forbearance" as "[t]he act of refraining from enforcing a right, obligation, or debt." It stands to reason that the "right, obligation, or debt," in this case an alleged property right to unperfected water, predicates the act of forbearing such right, obligation, or debt. Black's Law Dictionary 16(C) (11 ed. 2019).

Water rights under Utah state law are based on a system of prior appropriation. "Utah, along with the majority of western states, follows the appropriation doctrine: First in time, first in right for beneficial use is the basis of the acquisition of water rights." *Estate of Steed through Kazan v. New Escalante Irrigation Company*,

846 P.2d 1223, 1224 (Utah 1992). A state water right does not vest unless and until the water is being put to actual beneficial use, and a vested water rights are subject to forfeiture if the beneficial use ceases. In *Delta Canal Company v. Frank Vincent Family Ranch LC*, 420 P.3d 1052, 1060 (Utah 2013), the Utah Supreme Court found that "forfeiture and partial forfeiture are inherent in the very concept of beneficial use." These basic state water law principals were considered axiomatic in Utah as far back as 1924, as articulated by the Utah Supreme Court in *U.S. v. Caldwell*:

> ...the doctrine that a prior appropriator of water does not acquire title thereto but merely obtains the right to the use of a specific quantity of water from a certain stream upon condition that the water shall be used for a beneficial purpose as that term is understood and applied in this arid region has so often been passed on and upheld by this and other courts that it has become elementary, and the citation of authorities would be a mere work of supererogation.

64 Utah 490 (Utah 1924).

These principles of prior appropriation have now been codified under Utah law. Utah Code Ann., Section 73-3-1 provides that an "appropriation [of water] may be made only for a useful and beneficial purpose," and that "[b]etween appropriators, the one first in time is first in rights." Utah Code Ann., Section 73-1-4 states that a water right is subject to forfeiture upon seven consecutive years of non-use.

As the foregoing reflects, the appropriative system for establishing a property right to water under Utah state law is well-established. There is nothing in the 1922 Colorado River Compact, nor the 1948 Upper Colorado River Basin Compact, that

serves to separately establish state property rights in unperfected water simply by virtue of apportioning Colorado River water among the Upper and Lower basins and their respective states. Quite to the contrary, Article III(b) of the 1948 Upper Basin Colorado River Compact specifically provides that the apportionment of water to the respective Upper Basin states is subject to beneficial use, stating as follows:

> The apportionment made to the respective States by paragraph (a) of this Article is based upon, and shall be applied in conformity with, the following principles and each of them:
>
> (1) The apportionment is of any and all man-made depletions;
> (2) *Beneficial use is the basis, the measure and the limit of the right to use;*
> (3) No State shall exceed its apportioned use in any water year when the effect of such excess use, as determined by the Commission, is to deprive another signatory State of its apportioned use during that water year.

(emphasis added).

Expounding further upon this critical point, the fact that the Tribe has senior priority, present perfected water rights in the Green River and its tributaries proves that the Bureau of Reclamation cannot simply assume that unperfected water can be attributed to Utah's apportionment and deemed an alienable, transferrable property right. As the Supreme Court confirmed in *Arizona v. California*, 373 U.S. at 600-01, the Tribe's *Winters* reserved water rights are not only senior in priority to the State of Utah's apportionment of Colorado River water, but the Tribe's water rights are also "present perfected" water rights that vested upon the creation of the Uintah

Valley and Uncompahgre Reservations, respectively. Unlike state-based water rights, the Tribe's vested property interest in its *Winters* reserved water rights are *not* predicated on continuous beneficial use and are *not* considered abandoned if not put to beneficial use. *Arizona v. California*, 373 U.S. at 600. *See also United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956) ("Rights reserved by treaties…are not subject to appropriation under state law."); *State ex rel. Greely v. Confederated Salish & Kootenai Tribes*, 712 P.2d 754, 768 (Mont. 1985) ("Under current federal law, federal reserved water rights, like Indian reserved water rights, are immune from abandonment for nonuse."); see also Cohen's Handbook of Federal Indian Law § 19.03 (2017) ("Unlike appropriation rights, however, Indian water rights are not quantified by the amount actually and continuously diverted to a beneficial use. Instead, Indian water rights are quantified according to the purposes that those water rights are intended to fulfill.").

Because the Tribe has vested, senior-priority *Winters* reserved water rights in the Green River and its tributaries, the Bureau of Reclamation cannot legitimately treat the State of Utah's unperfected apportionment of water from the Colorado River system as an alienable property right, especially without first recognizing and carving out the Tribe's present perfected *Winters* reserved water rights from the State's apportionment. Accordingly, the Bureau's no action alternative – i.e., the Bureau's "baseline for measuring the effects of the proposed action" – subverts the

Bureau's NEPA analysis in a manner that is arbitrary, capricious, and abuse of discretion, and not in accordance with applicable law.

B. The Court Should Rule in the Appellants' Favor Because the Bureau of Reclamation Violated NEPA by Failing to Prepare a Full EIS based on the Significant Impacts to the Human Environment

Under NEPA, an agency must prepare an environmental impact statement ("EIS") in which the agency considers the environmental impacts of the proposed action and evaluates "alternatives to the proposed action," *id.* § 4332(2)(C)(iii), including the option of taking "no action," 40 C.F.R. § 1502.14(d). However, "[a]gencies need not prepare a full EIS ... if they initially prepare the less detailed environmental assessment ('EA') and, based on the EA, issue a finding of no significant impact ('FONSI'), concluding that the proposed action will not significantly affect the environment."

As the Appellants correctly assert in their Opening Brief, NEPA requires all Federal agencies to take a "hard look" at the environmental impacts of their decisions before the decision is made. Op. Br. at 3 (citing § 4332(2)(C); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989)). This Circuit has found that "documents prepared as part of NEPA's 'hard look' requirement not only must reflect the agency's thoughtful and probing reflection of the possible impacts associated with the proposed project, but also must provide a reviewing court with the necessary factual specificity to conduct its review." *Silverton Snowmobile Club*

v. U.S. Forest Service, 433 F.3d 772, 781 (10th Cir. 2006) (quoting *Committee to Preserve Boomer Lake Park v. Department of Transportation*, 4 F.3d 1543, 1553 (10th Cir. 1993).

In contravention of these legal standards, the Bureau of Reclamation's Final EA and FONSI are based on a selective application of scientific data and a shockingly superficial and perfunctory review of the Contract's potential environmental impacts, and the impacts to tribal water rights and water resources in particular. Therefore, in determining that a full EIS was not required, the Bureau has failed to engage in the requisite "hard look" at the potential environmental impacts of the GREB Contract.

First, in finding no significant environmental impacts that would require a full EIS, Defendants failed to take a "hard look" at the existing and future projected water supply and demands on the Colorado River, the Green River, and their tributaries. In its Draft EA, the Bureau based its hydrological modeling for future depletions from the Colorado River system on historical data from 1906-2015. However, in extrapolating from this historical data, the Bureau failed to adequately account for the 110-year trend of decreasing water supply, together with the exacerbating factor of climate change. Yet, notwithstanding comments from the Tribe and others pointing out this deficiency, the Bureau adopting the same hydrology modeling methodology in publishing its Final EA and FONSI.

In its comments to the Draft EA dated November 2, 2018, the Tribe cited the Bureau of Reclamation's own Colorado River natural flow data at Lee's Ferry, data which shows that the Colorado River's water supply at Lee's Ferry has decreased by an average of 34,000 acre-feet/per year over the past 110 years. Appellants' Appx.Vol. II at 118-20. In its comments, the Tribe also cited to the Bureau of Reclamation's own Colorado River Water Supply and Demand Report, published in 2012, which predicts that average annual future flows in the Colorado River will be 7.5% less than historic flows by 2025, 10.9% less than historic flows by 2055, and 12.4% less than historic flows by 2080. *Id*. As the Tribe also emphasized in its comments in the administrative record, the Bureau failed to follow and apply its own abundant scientific data in its hydrological modeling, an inexplicable omission that can only be described as an improper circumvention of NEPA protocols and procedures.

The Tribe was not alone in pointing out the Bureau's deficient and selective hydrology modeling, the same modeling that ultimately laid the foundation for the Bureau's FONSI. The Bureau of Reclamation's sister agency, the U.S. Fish and Wildlife Service—the federal agency vested with authority over endangered plant and animal species—questioned the Bureau's failure to consider declining water supplies as a matter of concern in its comments on the Draft GRBE EA:

> Reclamation's modeling is based on the 1906 through 2015 hydrologic record, with no consideration of hydrologic changes or tends associated

> with warming temperatures. Is it realistic to assume that the upper Colorado River basin hydrology in the future will look like that of the past, given recent research suggesting otherwise?

Appellants' Appx. Vol. II at 256 (internal citations omitted).

Even though the administrative record is replete with well-supported objections to the Bureau of Reclamation's insufficient application of scientific data and failure to apply foreseeable water depletions due to a warming climate, the Bureau adopted the same incomplete and self-serving hydrological modeling in its EA and FONSI, singularly tailored to minimize the Bureau's burdens under NEPA rather than ensuring compliance with the statute and its implementing regulations.

Furthermore, as a consequence of the Bureau's failure to acknowledge that the Ute Indian Tribe has present perfected water rights in the Green River and its tributaries, the Bureau clearly failed to take a "hard look" at the potential impacts to the environment of the Uintah and Ouray Indian Reservation in relation to the Tribe's senior-priority, present perfected *Winters* Reserved Water Rights to the natural flow of the Green River and its tributaries. The Bureau acknowledges in the Final EA and FONSI that the Bureau's own Indian Trust Asset ("ITA") policy requires that "[a]ll impacts to ITAs, even those considered nonsignificant, must be discussed in the trust analysis in NEPA compliance documents and appropriate compensation or mitigation must be implemented." Final EA § 3.3.13. But then the Bureau proceeded to shirk its own policy for what is required for a full

environmental review under NEPA.

The Bureau's assessment of impacts to the Tribe's *Winters* reserved water rights is limited to its dismissive assertion that, due to the senior priority of the Tribe's *Winters* Reserved Water Rights, "[t]he Proposed Action would not affect senior water rights, including the Ute Tribe's 1860 and 1861 priority date water rights." This conclusory statement once again reflects a fundamental misunderstanding of the legal attributes of the Tribe's *Winters* reserved water rights. Because the Tribe's *Winters* reserved water rights are fully vested property rights, the Tribe is not required to make a "call" on water in order to invoke its rights. Thus, the salient question is not whether the GRBE Contract will impact the Tribe's legal right to use its senior-priority water rights, but whether the new depletions contemplated in the GRBE Contract will or could impact the Tribe's property right to this integral resource. Further, even if Defendants' entirely speculative and conclusory statement were true, Defendants' tautology seems to consider only the Tribe's 1860-61 Uintah Valley Reservation Water Rights. The Final EA fails altogether to consider—much less address—the potential impacts of the GRBE contract upon the Tribe's 1882 Uncompahgre Reservation Reserved Water Rights—water rights that are sourced *directly* from the Green River. Defendants thus failed to identify relevant areas of environmental concern.

In failing to acknowledge the Tribe's fully vested *Winters* Reserved Water

Rights in the Green River and its tributaries, Defendants failed property to identify impacts upon the full availability of these waters as a relevant area of environmental concern.

Even with respect to the limited problems that the Bureau did identify and address, the Bureau failed to make a convincing case that the impacts of the GRBE Contract will be *insignificant*. 40 C.F.R. § 1508.27. To the contrary, Defendants relied on inadequate water supply and demand modeling to support its FONSI, failing to account for a 110-year trend of decreasing water supply in the Colorado River Basin, together with more recent scientific studies that raise red flags with respect to future water supplies.

Because Defendants did not prepare an EIS or otherwise demonstrate that an EIS is not required by engaging in the requisite "hard look" at potential environmental impacts, the Bureau has failed to comply with NEPA. The Bureau's issuance of the FONSI in lieu of a full EIS is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" that must be "set aside" in accordance with the APA. 5 U.S.C. §§ 706(1), (2)(A).

C. The Court Should Rule in the Appellants' Favor Because the Bureau of Reclamation has a Conflict of Interest that Undermines the Objectivity and Integrity of its NEPA Analysis

In addition to State of Utah's covenant to "forbear" water to enable the Bureau's continued compliance with its 2006 ROD for Flaming Gorge, the Bureau

itself directly receives monetary compensation under the terms of the GRBE Contract. Section 8 of the Contract states:

> The Board agrees to make annual payments to the United States as compensation for the benefits received under this Contract. The annual payment is based on the annual contract rate multiplied by the number of acre-feet depleted each year. The initial annual contract rate is $19.00 per acre-foot (Contract Rate). The Contract Rate for each acre-foot of exchange water depleted will be adjusted every 5 years by applying the estimated historical average of Reclamation's Construction Cost Index (CCI) of 2.05% annually.

Because the Bureau receives direct, tangible and financial benefits per the plain language of the GRBE Contract, the Bureau has a patent conflict of interest that delegitimizes the entirety of the Bureau's NEPA analysis.

In determining whether a conflict of interest invalidates an analysis of environmental impacts under NEPA, the "ultimate question for the court…is whether the alleged breach compromised the objectivity and integrity of the NEPA process." *Associations Working for Aurora's Residential Environment v. Colorado Department of Transportation*, 153 F.3d 1122, 1129 (10th Cir. 1998). When the environmental analysis is performed by a contractor with an interest in the outcome of the environmental analysis, such a conflict can be cured if there is substantial oversight by an objective government agency. *Id*.; *Colorado Rail Passenger Association. v. Federal Transit Administration*, 843 F.Supp.2d 1150, 1163 (D. Colo. 2011). But, when, as here, it is the government agency itself that will materially benefit from the agency action being assessed, there is no objective oversight to

operate as a check-and-balance against the federal agency's conflict of interest. Therefore, the Bureau's direct financial interest in the GRBE Contract constitutes a *prima facie* conflict of interest that undermines the objectivity and integrity of its NEPA analysis, invalidating the Bureau's Final EA and FONSI.

CONCLUSION

The Bureau's execution of the GRBE Contract, in reliance upon its Final EA and FONSI, undercuts the very purpose for which the NEPA was enacted, that is to mitigate the "profound impact of man's activity on the interrelations of all components of the natural environment." Confronted with abundant scientific data on the decreasing water supply in the Colorado River—a crisis exacerbated by the man-made impacts of climate change—the Bureau was required by law to take a "hard look" at the potential environmental impacts of the GRBE Contract. Instead of taking a "hard look" at those impacts, the Bureau chose instead to "whistle past the graveyard"—to falsely represent the GRBE Contract as a non-issue - a negligible departure from the status quo. These severe deficiencies in the Bureau's environmental review are encapsulated in the Bureau's failure to properly recognize, consider, and address the Contract's potential impacts on the Ute Indian Tribe's vested, senior-priority *Winters* reserved water rights in the Green River and its tributaries. Based on the foregoing, the Ute Tribe urges the Court to grant the Appellants' request to (1) reverse and vacate the district court's decision; (2) declare

that Reclamation's decision to enter into the Contract violated NEPA; and (3) order the district court to vacate and set aside Reclamation's Contract approval and adoption of the EA and FONSI associated with that approval.

Respectfully submitted February 4, 2022.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,845 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2016 in 14 point font size and Times New Roman.

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