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IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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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

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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

ORAL ARGUMENT IS REQUESTED

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**OPENING BRIEF OF APPELLANTS  
CENTER FOR BIOLOGICAL DIVERSITY, et al.**

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## **CORPORATE DISCLOSURE STATEMENT**

Plaintiff-Appellants Center for Biological Diversity, Living Rivers, Colorado Riverkeeper, Utah Rivers Council, and Sierra Club certify that they have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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## RELATED PRIOR OR PENDING APPEALS

There are no prior or related appeals. However, *Ute Indian Tribe of the Uintah and Ouray Reservation v. U.S. Department of the Interior et al.*, Case 2:21-cv-00573-JNP-DAO (D. Utah), which was recently transferred from the U.S. District Court for the District of Columbia to the U.S. District Court for the District of Utah.<sup>1</sup> That case includes claims that challenge the same agency action by two of the Defendants here, the U.S. Department of the Interior and Bureau of Reclamation, under NEPA as well as on other legal bases,<sup>2</sup> and some claims in that case overlap with the claims at issue in this appeal.

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<sup>1</sup> See *Ute Indian Tribe of the Uintah and Ouray Reservation v. U.S. Department of the Interior et al.*, Case 2:21-cv-00573-JNP-DAO (D. Utah) ECF No. 114 at 23 (Memorandum Decision in D.C. Case No. 1:18-cv-00547-CJN; “[T]hese claims touch on the same agency action that is now pending on appeal in the Court of Appeals for the Tenth Circuit after consideration in the District of Utah,” citing this case).

<sup>2</sup> See *Ute Indian Tribe of the Uintah and Ouray Reservation v. U.S. Department of the Interior et al.*: Case 2:21-cv-00573-JNP-DAO (D. Utah) ECF No. 57 (Second Amended Complaint); see also *id.* No. 163-2 at 66-75 (proposed Third Amended and Supplemented Complaint).

## **GLOSSARY OF TERMS**

AFy – Acre-feet per year

APA - Administrative Procedure Act

Reclamation - U.S. Bureau of Reclamation

CEQ - Council on Environmental Quality

Storage Act - Colorado River Storage Project Act of 1956

Conservation Groups - Appellants Center for Biological Diversity, Living Rivers, Colorado Riverkeeper, Utah Rivers Council, and Sierra Club

Contract - Green River Block Exchange Contract

EA - Environmental Assessment

EIS - Environmental Impact Statement

FONSI - Finding of No Significant Impact

FWS - U.S. Fish and Wildlife Service

NEPA - National Environmental Policy Act

NPS - National Park Service

ROD - Record of Decision

## **JURISDICTIONAL STATEMENT**

The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this case challenges final agency action by federal agencies. This Court has jurisdiction under 28 U.S.C. § 1291.

The district court entered final judgment disposing of all claims on July 7, 2021. Dist. Ct. ECF No. 84. This appeal was timely filed on August 16, 2021, pursuant to Fed. R. App. P. 4.

## **ISSUES PRESENTED**

1. Whether U.S. Department of the Interior and Bureau of Reclamation (collectively “Reclamation”) violated the National Environmental Policy Act (“NEPA”) and the Administrative Procedure Act (“APA”) when they failed to take a “hard look” at:
  - a. the environmental impacts to hydrology and fish resources in analyzing the impacts of the proposed Green River Block Exchange Contract (“Contract”) in light of scientific studies and information in the record showing that warming temperatures in the Colorado River Basin will significantly reduce future water availability when compared to prior water reductions based on drought alone;
  - b. the environmental impacts that the timing and volume of new depletions the Contract will cause, especially in an area of the Green River known as “Reach 3;”

- c. the cumulative impacts of the Contract’s water depletions, when taken together with significant future upstream water depletions from the Green River;
2. Whether Reclamation violated NEPA and the APA when it included unused and unperfected water rights assigned to Utah as part of the existing baseline water use in the Green River and Colorado River in the “no action” alternative which provided the environmental baseline setting for analysis of impacts of the Contract in the final Environmental Assessment based on a mistaken assumption that the water at issue could be appropriated and diverted with or without the Contract;
3. Whether Reclamation violated NEPA and the APA when it failed to undertake an environmental impact statement (EIS) despite the existence of controversy about the Contract’s impacts in light of comments from its sister agencies at the Department of the Interior – the U.S. National Park Service and the U.S. Fish and Wildlife Service – and others about Reclamation’s faulty assumptions and flawed impacts analysis regarding future water availability in the river system and associated negative impacts to the system from warming temperatures and other factors.

## **STATEMENT OF THE CASE**

### **I. Legal Background**

Congress enacted NEPA, to “encourage productive and enjoyable harmony” between humans and their environment and to promote government efforts “which will prevent or eliminate damage to the environment.” 42 U.S.C. § 4321. *See also Ecology Ctr., Inc. v. United States Forest Serv.*, 451 F.3d 1183, 1185 (10th Cir. 2006) (quoting same). NEPA is recognized as the “centerpiece of environmental regulation in the United States.” *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 703 (10th Cir. 2009). NEPA requires all Federal agencies to take a “hard look” at the environmental impacts of their decisions before the decision is made. *See* 42 U.S.C. § 4332(C); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989). Conclusory statements regarding impacts without adequate discussion do not meet the required “hard look” under NEPA. *Davis v. Mineta*, 302 F.3d 1104, 1122-23 (10th Cir. 2002). The agency’s “hard look” analysis must utilize “public comment and the best available scientific information.” *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1171 (10th Cir. 1999) (citations omitted). The agency must carefully gather and consider relevant “detailed information concerning significant environmental impacts” and share that information with the public. *See Robertson*, 490 U.S. at 349; *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1277 (10th Cir. 2004). Environmental impacts include be direct, indirect, and cumulative effects of the action. 40 C.F.R. §§

1502.16, 1508.7, 1508.8; *see also Hillsdale Env'tl. Loss Prevention v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1166 (10th Cir. 2012).<sup>3</sup>

NEPA has two primary aims. First, it obligates federal agencies “to consider every significant aspect of the environmental impact of a proposed action.” *Utah Shared Access All. v. U.S. Forest Serv.*, 288 F.3d 1205, 1207 (10th Cir. 2002) (quoting *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 97 (1983)). Second, it “ensures that an agency will inform the public that it has considered environmental concerns in its decision-making process.” *Id.* “Simply by focusing the agency’s attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.” *Robertson*, 490 U.S. at 349.

Agencies must prepare a “detailed statement” for all “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2) (C). To determine whether a proposed action significantly affects the environment, requiring preparation of an environmental impact statement (“EIS”), an agency may first prepare an environmental assessment (“EA”). 40 C.F.R. § 1501.4(c). If the agency determines on the basis of the EA not to prepare an EIS, it must prepare a Finding of No Significant Impact (“FONSI”). *Id.* § 1501.4(e).

“An agency’s decision to issue a FONSI and not prepare an EIS is a factual determination which implicates agency expertise.” *Utah Shared Access Alliance v. U.S. Forest Serv.*, 288 F.3d 1205, 1213 (10th Cir. 2002) (quoting *Comm. to Preserve Boomer Lake Park v. Dep’t of Transp.*, 4 F.3d 1543, 1555 (10th Cir. 1993)); see *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1225- 26 (10th Cir. 2002) (“The initial decision as to the necessity of an EIS is the agency’s, not a reviewing court’s.”). Our review of this decision requires us to determine “whether the agency acted arbitrarily and capriciously in concluding that the proposed action will not have a significant effect on the human environment.” *Davis v. Mineta*, 302 F.3d 1104, 1112 (10th Cir. 2002) (internal quotation marks omitted). This review, therefore, “has a substantive component” in addition to the procedural determination of whether the agency considered the relevant factors. *Id.* Accordingly, if the appellants “can demonstrate substantively” that the agency’s conclusion “represents a ‘clear error of judgment,’ then that conclusion must be reversed.” *Id.*

*Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1274 (10th Cir. 2004).

If major federal action may significantly affect the quality of the human environment, the agency must prepare an EIS. 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1502.4, 1508.3. Whether a project has significant environmental impacts, thus triggering the need to produce an EIS, depends on its “context” (region, locality) and “intensity” or “severity of impact.” 40 C.F.R. § 1508.27. These intensity factors include: whether the action is related to other actions with individually insignificant but cumulatively significant impacts; the degree to which the effects are likely to be highly controversial; and the degree to which the possible environmental effects are highly uncertain or involve unique or unknown risks. 40 C.F.R. § 1508.27.

“Controversy” in the NEPA context “does not necessarily denote public opposition to a proposed action, but a substantial dispute as to the size, nature, or effect of the action.” *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1229 (10th Cir. 2002). Federal courts have concluded that significant “controversy” exists to merit preparation of an EIS where the action agency receives critical comments concerning the project’s potential impacts from other agencies with relevant expertise or from Tribes and fails to provide a reasoned response. *Standing Rock Sioux Tribe v. United States Army Corps of Eng’rs*, 440 F. Supp. 3d 1, 13-17 (D.D.C. 2020) (holding agency failure to provide reasoned response to comments from agencies and a Tribe concerning the scope of impacts demonstrated sufficient controversy to require preparation of EIS), *aff’d* in relevant part by *Standing Rock Sioux Tribe v. United States Army Corps of Eng’rs*, 985 F.3d 1032 (D.C. Cir. 2021). *See also Semonite*, 916 F.3d at 1085 (finding agency violated NEPA by failing to prepare an EIS in light of “[r]epeated criticism from many agencies who serve as stewards of the exact resources at issue, not to mention consultants and organizations with on-point expertise”); 42 U.S.C. § 4332(2)(C) (requiring an agency to “consult with ... any Federal agency which has jurisdiction by law or special expertise” and to provide any resulting statements “to the public”).

An EA is not an adequate “substitute for an EIS” because “[a]n EIS helps [decision-makers] make their decision by describing and evaluating the project’s

likely effects on the environment[; in contrast,] the purpose of an EA is simply to help the agencies decide if an EIS is needed.” *Sierra Club v. Marsh*, 769 F.2d 868, 875 (1st Cir. 1985); *Ohio Valley Env. Coal. v. United States Army Corps. of Eng’rs*, 479 F. Supp. 2d 607, 626 (S.D.W.Va. 2007) (“an EA can never serve as a substitute for the preparation of an EIS if the proposed action could significantly affect the environment”).

Whether an EA or EIS is prepared, NEPA requires that agencies “study, develop and describe appropriate alternatives,” including a no action alternative. 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1508.9; 40 C.F.R. § 1508.14. “In general, NEPA analysis uses a no-action alternative as a baseline for measuring the effects of the proposed action.” *Biodiversity Conserv. All. v. USFS*, 765 F.3d 1264, 1269 (10th Cir. 2014) (citations omitted). Without the correct baseline, the effects analysis is unsupported. *See Half Moon Bay Fisherman’s Mktg. Ass’n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988) (“without establishing ... baseline conditions ... there is simply no way to determine what effect [an action] will have on the environment, and consequently, no way to comply with NEPA.”).

In an EA or EIS, an agency must analyze cumulative impacts from a project. 40 C.F.R. § 1502.16; *Davis v. Mineta*, 302 F.3d at 1125-26 (holding appellants likely to succeed on merits of claim that FONSI was improper because the EA failed to provide an adequate basis for the agency’s conclusion that project would have no significant cumulative impacts). “Cumulative impacts” result from the

“incremental impact of the action” on the environment “when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” 40 C.F.R. § 1508.7.

Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. *Id.* Cumulative impact analyses include private, state, and federal actions. *Id.* An agency is required to analyze the environmental consequences of “reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” *Colorado Env'tl. Coal. v. Dombeck*, 185 F.3d 1162, 1176 (10th Cir. 1999) (quoting 40 C.F.R. § 1508.7). Further, an agency’s “assessment of all ‘reasonably foreseeable’ impacts must occur at the earliest practicable point, and must take place before an ‘irretrievable commitment of resources’ is made.” *New Mexico ex rel. Richardson.*, 565 F.3d at 707 (holding cumulative impacts assessment was inadequate where environmental impacts of a planned gas field were reasonably foreseeable but not analyzed).

## **II. Factual Background**

### **A. The Genesis of Reclamation’s Discretionary Decision to Approve the Green River Block Exchange Contract**

The Colorado River system including the Green River, a major tributary, is the most critical water resource in the West. As Reclamation has recognized:

The Colorado River and its tributaries provide water to nearly 40 million people for municipal use, supply water to irrigate nearly 5.5 million acres of land, and is the lifeblood for at least 22 federally recognized tribes (tribes), 7 National Wildlife Refuges, 4 National Recreation Areas, and 11 National Parks.

Bureau of Reclamation, *Colorado River Basin Water Supply and Demand Study* at 3 (2012), US0001912 (“2012 Colorado Basin Study”); *see also* US0005026 (Muth et al. 2000; map of Colorado River basin).

The Colorado is subject of multiple interstate compacts, legislation, and agreements that govern water use and require, among other things, specific water commitments from the Upper Basin states to the Lower Basin states. *See, e.g.*, US00010598-10605 (explaining law of the river and apportionment); Boulder Canyon Project Act of 1928, 43 U.S.C. § 617 et seq., (implementing and codifying the 1922 Colorado River Compact between all basin states).

Pursuant to Congressional authorization, the federal government and the seven Colorado River Basin states negotiated the Colorado River Compact of 1922. *See* 70 Cong. Rec. 324 (1928), 46 Stat. 3000 (1929). This Compact divided the Colorado River drainage within the U.S. into two basins, Upper (generally, Colorado, New Mexico, Utah and Wyoming) and Lower (generally, Arizona, California and Nevada), apportioning 7.5 million acre-feet per year (AFy) to each. 70 Cong. Rec. at 325. Upper Basin States (including Utah) negotiated the Upper Colorado River Basin Compact of 1948 “to determine the rights and obligations of

each signatory State respecting the uses and deliveries of the water” of that basin. Pub. L. No. 81-37, 63 Stat. 31 (1949) (“1948 Compact”).

The Colorado River Storage Project Act of 1956 (“Storage Act”) authorized the construction of facilities, in part, to regulate Colorado River flows, which would allow Upper Basin States, including Utah, to use their apportionments of water under the 1922 and 1948 compacts. *See* 43 U.S.C. § 620. Under the Storage Act, Congress authorized several projects, including the Flaming Gorge Unit, and the Central Utah Project. US000001-2. In 1958, Reclamation filed an application to appropriate under Utah state law 3.96 million AFy from the Green River for storage in Flaming Gorge Reservoir for Storage Act purposes. US000036.

The Central Utah Project was authorized under the Storage Act to be a phased development project with multiple units in Utah. US000002. The water rights addressed in the Green River Block Exchange Contract (“Contract”) were initially appropriated by Reclamation and set aside for consumptive use in the “Ultimate Phase” of the Central Utah Project, which involved reservoir projects on the Green River in addition to Flaming Gorge. However, the Central Utah Project Completion Act de-funded the undeveloped portions of the Ultimate Phase. Pub. L. No. 102-575, 106 Stat. 4600 (1992). US000002.

After that de-funding, remaining Ultimate Phase water rights were reallocated, with a portion designated for certain federal contractors along the

Green River. US000042. Reclamation assigned to Utah remaining undeveloped Ultimate Phase water rights in the March 1996 “Assignment Agreement.” US000002, US000042. That Agreement required Utah to enter into a water service contract with Reclamation if Utah “stores water in or benefits directly from the [Storage Act] facilities,” including Flaming Gorge Reservoir. US000002. *See also* US0000161 (Assignment Agreement water can only be “developed, diverted and perfected” by Utah upon release of the water from the Flaming Gorge Dam pursuant to “a water service contract with the United States.”). Utah requested two contracts from Reclamation to make use of this “Assignment Water,” one for the Green River Block, the other for the Lake Powell Pipeline Project. US000002-3, US0000037.

The Contract at issue in this case seeks to facilitate development of previously undeveloped Green River Block of Assignment Water from Flaming Gorge Reservoir (to be released under “normal” dam operations). The Contract facilitates new water extractions from the Green River of 58,957 acre-feet per year. US0000052. Reclamation and Utah frame this as an “exchange” contract, with Reclamation releasing new Assignment Water below Flaming Gorge Dam for development “in exchange” for Utah agreeing *not* to develop additional diversions (such as high spring “accretion” flows from the Green River tributaries below the dam). *See* US000004-6. However, at the time of the Contract, *Utah could not make*

*use of the Green River Block assigned water absent Reclamation's discretionary approval* under the terms of the 1996 Assignment. US0000161.

**B. Flows in the Colorado and Green Rivers Are Shrinking, in Part Due to Climate Change Induced Warming.**

When the Contract was proposed, scientific studies projected that the Colorado River's future would be far drier than its past. In 2012, Reclamation evaluated the state of Colorado River system, concluded that it was already over-allocated, and that future development and climate change would exacerbate this problem:

It is widely known that the Colorado River, based on the inflows observed over the last century, is over-allocated and supply and demand imbalances are likely to occur in the future. Up to this point, this imbalance has been managed, and demands have largely been met as a result of the considerable amount of reservoir storage capacity in the system, the fact that the Upper Basin States are still developing into their apportionments, and efforts the Basin States have made to reduce their demand for Colorado River water.

Concerns regarding the reliability of the Colorado River system to meet future needs are even more apparent today. The Basin States include some of the fastest growing urban and industrial areas in the United States. At the same time, the effects of climate change and variability on the Basin water supply has been the focus of many scientific studies which project a decline in the future yield of the Colorado River. Increasing demand, coupled with decreasing supplies, will certainly exacerbate imbalances throughout the Basin.

2012 Colorado Basin Study, US0002337-38 (Technical Report C -- Water Demand Assessment). Reclamation's 2012 study projected a median expected decrease in Colorado River flow of about nine percent (9%) by 2060. *Id.* at US0001916. In

addition, according to the Reclamation, “[d]roughts lasting 5 or more years are projected to occur 50 percent of the time over the next 50 years.” *Id.* Reclamation explained, “climate change may put water users and resources relying on the river at risk of prolonged water shortages in the future.” *Id.* at US0001935.

More recent studies conclude that the nine percent (9%) decrease by 2060 in flow Reclamation predicted in 2012 was too low. By 2018, scientists suggested a conservative estimate for flow decrease could be closer to 20% due to increased warming, and the agency was aware of those predictions. *See* US0010507-521 (Udall & Overpeck 2017), US0010382-395 (McCabe et al. 2017); US0010417-434 (Xiao et al. 2018).

Recent events show even the “conservative estimate” of 20% decrease in flows was too optimistic. On August 16, 2021, Reclamation announced the first ever Level 1 Shortage Condition with Upper Basin spring runoff flows into Lake Powell having dropped to 26% of normal and both Lake Mead and Lake Powell at historic lows. Reclamation Press Release, “Reclamation announces 2022 operating conditions for Lake Powell and Lake Mead; Historic Drought Impacting Entire

Colorado River Basin.”<sup>4</sup> Although 2021 was the first time a shortage was declared, Reclamation’s own modeling for the Colorado River showed a shortage was likely when the Contract was being evaluated in 2018 and was signed.<sup>5</sup>

**C. Reduced Flows in the Upper Colorado River Basin Threaten Imperiled Fish.**

Predicted shortfalls in Colorado River Basin water are likely to impact consumptive uses for agriculture, industrial, and municipal uses, as well as endangered fish that inhabit the Colorado and Green Rivers. For purposes of managing imperiled fish, U.S. Fish and Wildlife Service (“FWS”) divides the Green River below the Flaming Gorge Dam in northern Utah into three river “reaches”:

Reach 1 begins directly below the dam and extends to the confluence with the Yampa River (65 river miles). Reach 2 begins at the Yampa River confluence and continues to the White River confluence (99 river miles). Reach 3 is between the White River and Colorado River confluences (246 river miles) (Muth et al. 2000).

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<sup>4</sup> Appendix at [REDACTED] (from <https://www.usbr.gov/newsroom/#/news-release/3950>). This court may take judicial notice under Fed. R. Evid. 201 of documents not contained in the administrative record. *See, e.g., Sierra Club v. EPA*, 964 F.3d 882, 893 n.9 (10th Cir. 2020) (taking judicial notice of document published on agency website.). An appellate court may take judicial notice of a fact for the first time even when the fact was not brought to the trial court’s attention. *Mills v. Denver Tramway Corp.*, 155 F.2d 808, 812 (10th Cir. 1946) (noting appellate court’s discretion to judicially notice a fact).

<sup>5</sup> *See* US00000180 (Reclamation’s “most recent modeling released in August of 2018 indicates there is a 90% chance the Colorado River at Lake Mead will fall below 1,075 feet in elevation by December 2019, which will trigger a Tier 1 shortage.”).

US0000051 (Final EA).<sup>6</sup>

Management of water flows in these reaches of the Green River at different times of year is critical to survival and recovery of the endangered fishes that are found in the river system. US0000041, US0000077-81.

Information on each endangered fish species was used [by FWS] to develop integrated flow and temperature recommendations for the Green River downstream of Flaming Gorge Dam. The goal of the recommendations is to provide the annual and seasonal flow and temperature patterns in the Green River that would enhance populations of the endangered fishes.

US0005019 (Muth et al. 2000); US0000149 (table with flow and temperature recommendations).

In 2005, FWS issued a biological opinion pursuant to the Endangered Species Act for operation of the Flaming Gorge Dam based on compliance with the flow and temperature recommendations in each of the three reaches to protect listed fish between Flaming Gorge Dam and Lake Powell. US0010142, US0010147-150. The biological opinion, which still applies to management of the river system today, requires that specific flow and temperature targets be met depending on the hydrological conditions and season, and allows for adaptive management based on research and monitoring to address uncertainties. *See* US0010151-152 (Table 1); US0010157.

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<sup>6</sup> A map of the reaches shows the relative location of the Flaming Gorge Dam, major tributaries and the confluence with the mainstem of the Colorado River. US0005054 (Muth et al. 2000, map with reaches and USGS flow gauges)

The release of water from Flaming Gorge Dam is highly regulated as a critical part of a system designed to meet the seasonal flow and temperature needs of endangered fish in each of the three reaches and the existing Upper Basin water depletions, while still meeting the Upper Basin’s commitments to provide water to the Lower Basin. As noted above, the Contract allows for new diversions and consumptive use— entirely new water “depletions” — along the Green River in Utah which will increase overall depletions from the river, causing changes in hydrology that will affect water availability for other uses, including instream flows needed for endangered fish.

**D. Reclamation’s NEPA Review Process for the Contract**

Reclamation circulated a draft EA in September 2018 to disclose the Contract’s environmental impacts. US0000784; US0000779. Reclamation’s NEPA analysis and FONSI rely in part on analysis in the 2006 Flaming Gorge Final EIS for the Flaming Gorge Record of Decision (“ROD”) which controls dam operations. The Draft EA for the Contract relied on the Flaming Gorge Final EIS to “provide[] the basis of comparative analysis to determine the impacts related solely to execution of the water exchange contract.” US000037. The Draft EA concluded that the Contract would have no significant impacts, stating: “in all scenarios, hydrology under the Proposed Action falls within the analysis in the [Flaming Gorge Final EIS] and the operational parameters established in the [Flaming Gorge] ROD.” US000031.

Differences between the No Action and Proposed Action were so negligible as to be discounted in almost all measures. Small differences were predicted during the months of July-September during drier hydrologic conditions, which occur approximately 30 percent of the time. Individual analyses conducted for each of the other 14 resources were largely based on the hydrologic modeling. A no effect or similar determination was made for each resource.

US000030.

Agency and public comments during the NEPA process raised serious concerns regarding the Draft EA's short-comings including its failure in its hydrology analysis to adequately address scientific information about declining water availability in the Green and Colorado River systems due to increased temperatures and drying. Reclamation's sister agencies at the Interior Department – FWS and the National Park Service (“NPS”) – questioned and criticized the Draft EA's reliance on only past hydrological data to estimate the combined impacts of future drought on the Colorado and Green Rivers and the depletions approved by the Contract. The FWS noted:

Reclamation's modeling is based on the 1906 through 2015 hydrologic record, with no consideration of hydrologic changes or trends associated with warming temperatures. Is it realistic to assume that upper Colorado River basin hydrology in the future will look like that of the past, given recent research suggesting otherwise (e.g., USBR 2012; Udall & Overpeck 2017, McCabe et al. 2017; Xiao et al. 2018)?

US0000198 (FWS Comment letter) (emphasis added).<sup>7</sup> FWS also reminded Reclamation that the science strongly suggested it was not “realistic to assume that upper Colorado River basin hydrology in the future will look like that of the past.” *Id.*

The NPS, which manages environmental resources along over 58 miles of the Green River and over 40 miles of the Yampa River (a major tributary to the Green) in Utah and Colorado as the rivers travel through Dinosaur National Monument, commented that Reclamation had failed to use modeling for Contract impacts that captures warmer and drier scenarios, although Reclamation had used such modeling for other projects:

One very important concern we have regarding the hydrology modeling is the lack of evaluation under a drier scenario. After 19 years of drought in this system, there is growing consensus among partners and among scientific studies that the future ‘new normal’ may be warmer and drier years on average. We note that the Bureau of Reclamation and the basin states are regularly evaluating effects under a drier subset of hydrology runs for other Colorado River water projects and we would recommend that this be conducted for this project as well. These warmer and drier scenario runs would be

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<sup>7</sup> The citations provided in the FWS Comment Letter are to Reclamation’s 2012 Colorado Basin Study (US0001904 *et seq.*) and three research articles: B. Udall & J. Overpeck, The twenty-first century Colorado River hot drought and implications for the future, *Water Resource Research* (2017). US0010507-521 (“Udall & Overpeck 2017”); Gregory McCabe, David Wolock, Gregory Pederson, Connie Woodhouse, and Stephanie McAfee, Evidence that recent warming is reducing Upper Colorado River flows, *21 Earth Interactions Paper #10* (2017). US0010382-395 (“McCabe et al. 2017”); and M. Xiao, B. Udall & D. Lettenmaier, On the Causes of Declining Colorado River Streamflows, *Water Resources Research* (2018). US0010417-434 (“Xiao et al. 2018”).

important to ensuring that the hydrology does indeed fall within the range of the [Flaming Gorge] ROD under likely future scenarios.

US0000255 (emphasis added).

The Conservation Groups raised the same issue:

[Reclamation] is still ignoring the significant reductions in Green and Colorado River flows that are expected to occur as a function of climate change and warmer air temperatures. [Reclamation's] EA for the GRB contract does not consider the impacts on the river as a function of climate change and warmer air temperatures. We find this baffling because [Reclamation] is effectively ignoring its own stark projections contained within the Bureau's 2012 *Colorado River Basin Water Supply and Demand Study* as well as projections by Udall and Overpeck in their 2016 study titled *The twenty-first century Colorado River hot drought and implications for the future*. According to Udall and Overpeck, the Colorado River's flow will likely decrease by 20-30% by mid-century.

US0000179 (Comments from Utah Rivers Council). The Conservation Groups also noted the Draft EA's inconsistency with the Reclamation's own 2012 Colorado Basin Study, which (as noted above) found a median expected decrease of about 9% in Colorado River flows by 2060, as well as with newer scientific studies estimating those reductions could be as much as 20% by mid-century due to increased temperatures in the basin. US0000222-24 (citing Udall & Overpeck 2017, Xiao et al. 2018). Comments from the Ute Indian Tribe; (US0000240-242) and the Utah Division of Wildlife Resources raised similar concerns.

US0000190-193.

In addition, commenters raised concerns that the Draft EA: used a misleading baseline or “no action” alternative that incorrectly assumed the GRBE contract was mandatory because the agency failed to recognize that the Contract would result in new diversions and depletions from the Green River (*see* US0000178-181, US0000202-213, US0000228-230); did not identify and analyze detailed information about where new water depletions would occur under the Contract (*see* US0000186, US0000190, US0000199, US0000196, US0000219-220, US0000255); and did not properly identify or analyze cumulative impacts (*see* US0000185-186).

The Final EA was substantially similar to the Draft EA. *See infra* at \_\_\_\_.

### **III. Procedural Background**

In January 2019, Reclamation issued its Final Environmental Assessment (“Final EA”) (US0000024), and on February 13, 2019 signed and issued the Finding of No Significant Impact (“FONSI”). US0000027. Reclamation signed the Green River Block Exchange Contract on March 20, 2019. US0000001. The Contract covers a 50-year period and requires additional water to be released by Reclamation from the Flaming Gorge Dam to facilitate entirely new water extractions from the Green River of 58,957 acre-feet per year. (US0000052.)

On March 21, 2019, Appellant Conservation Groups filed this action challenging the agency’s decision to enter into the Contract based on inadequate NEPA review. Dist. Ct. ECF No. 1 (Complaint), No. 20 (FAC).) The District

Court's Memorandum Decision and Order Denying Plaintiffs' Requested Relief was issued on July 7, 2021 and judgement was issued the same day. Addendum at \_\_\_\_\_ Dist. Ct. ECF Nos. 83, 84. The Conservation Groups filed this appeal on August 16, 2021.

## **SUMMARY OF THE ARGUMENT**

This case is about a contract between the Department of the Interior and Utah that will settle, in Reclamation's own words, "a long standing disagreement" and allow Utah to appropriate additional water from the oversubscribed Colorado River system that includes the Green River. US0000029. The Contract will, for the first time, allow the State of Utah to withdraw an additional 58,957 acre-feet of water per year from the Green River, thus opening the door to increased water depletions from a river system that is facing its lowest level and worst crisis since the signing of the 1922 Colorado River Compact due to over-allocation and global warming from climate change.

Reclamation entered into the Contract without taking the hard look that NEPA requires at the impacts of water depletion the Contract allows, in light of declining future water availability due to warming in the Basin. Reclamation thus failed to assess the Contract's potentially damaging impacts to endangered fish, riparian areas and other environmental resources.

Reclamation ignored not only the environmental crisis in the river systems when taking its actions, it also ignored the questions and criticisms of its own sister

expert agencies at Interior, the NPS and FWS, both of which sought corrections to flawed assumptions in Reclamation's EA. Reclamation also rejected the same tangible warnings and concerns from the Ute Indian Tribe, which possesses unperfected water rights in this river system, and numerous environmental advocacy organizations.

The administrative record of Reclamation's final action is replete with evidence that the water Contract and accompanying environmental analysis under NEPA was arbitrary and capricious. In sum, Defendants stuck their head in the sand, rather than take the "hard look" that NEPA requires, at a time when water is literally vanishing from these depleted river systems. As such, the decision to enter into the Contract, as well as the EA, must be set aside.

### **STANDARD OF REVIEW**

Because NEPA does not provide for private causes of action, courts review Reclamation's compliance with NEPA under the APA. 5 U.S.C. § 706; *Utah Shared Access Alliance v. Carpenter*, 463 F.3d 1125, 1134 (10th Cir. 2006), *cert. denied* 550 U.S. 904 (2007). This Court's "review of the lower court's decision in an APA case is de novo," and "owe[s] no deference to the district court's decision." *N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277, 1281 (10th Cir. 2001) (citations omitted).

Under the APA, courts "shall ... hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion,

or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A). An action is arbitrary and capricious,

if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

*Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). It is the duty of the reviewing court to “ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made. In reviewing the agency’s explanation, the reviewing court must determine whether the agency considered all relevant factors and whether there has been a clear error of judgment.” *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994) (citing *State Farm*, 463 U.S. at 43). This includes a “thorough, probing, and in-depth review” of the administrative record. *Wyoming v. United States*, 279 F.3d 1214, 1238 (10th Cir. 2002).

This same standard of review applies to the agency’s determination of whether or not an EIS is needed to evaluate significant effects on the environment and its adoption of a Finding of No Significant Impact (“FONSI”). *Greater Yellowstone Coal.*, 359 F.3d at 1274 quoting *Davis v. Mineta*, 302 F.3d at 1112 (review of the decision not to prepare an EIS requires the court to determine “whether the agency acted arbitrarily and capriciously in concluding that the proposed action will not have a significant effect on the human environment”).

## ARGUMENT<sup>8</sup>

### **I. Reclamation Failed to Take a Hard Look the Impacts of the Contract in Violation of NEPA**

#### **A. Reclamation Failed to Take A Hard Look at the Contract's Impacts to Hydrology in Light of Predicted Changes in Water Availability.**

##### ***1. Reclamation's EA ignored the effects of warming on future water availability in the Green River.***

Reclamation failed to take a hard look at the impacts to hydrology when it ignored relevant scientific information regarding diminished future water availability due to warming temperatures. Although Reclamation was required to carefully consider relevant “detailed information concerning significant environmental impacts” and share that information with the public, it failed to address relevant scientific data and studies projecting that climate warming in the future will leave the Colorado River system far drier than it has been in the last century, thus increasing the harm from the Contract’s water depletions and changes

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<sup>8</sup> Conservation Groups have Article III standing because they show: (1) an injury in fact that is (2) fairly traceable to the challenged action and is (3) likely to be redressed by judicial intervention. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). *See also Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 452 (10th Cir. 1996) (stating standard for establishing injury-in-fact from inadequate NEPA analysis). The conservation groups submitted standing declarations from members explaining their concrete interests in wildlife and river protection, and how Reclamation’s failure to comply with NEPA resulted in inadequate and unformed decision-making that threatens those interests. *See Appx. [REDACTED]* (Docket #76-1, 76-2, 76-3, 76-4). A favorable judicial decision may result in vacating the Contract, redressing the harms the groups face.

in flows. *See Robertson*, 490 U.S. at 349; *Greater Yellowstone Coal.*, 359 F.3d at 1277.

Specifically, Reclamation evaluated the impacts of the Contract on Green River flows using modeling that assumed droughts in coming decades would be no worse than those in prior decades – that is, that the future would look like the past. This assumption is fundamentally at odds with the recommendations of Reclamation’s sister agencies, with recent scientific studies, and with Reclamation’s prior predictions. Reclamation’s failure to use the best available science or to explain why it chose to ignore this data and analysis violates NEPA.

During the NEPA process, Reclamation’s sister agencies and others pointed to scientific studies demonstrating that due to climate induced warming, water availability in the Colorado River Basin in the future was likely to be significantly reduced, and droughts worse, even beyond earlier predictions that considered a changing climate. *See supra* [REDACTED]. The Draft EA’s conclusions regarding water availability and impacts to water flows conflicted with both Reclamation’s 2012 Colorado Basin Study and newer studies showing future water availability in the Colorado River Basin is likely to be lower than in the prior century.

The three scientific articles FWS, NPS, and others cited, represent the best available science, definitively identify warming temperatures as a driver of recent and future projected declines in river flow, and show that flow declines in future

years will be far greater than those of the past century. According to Udall & Overpeck 2017,

[r]ecently published estimates of Colorado River flow sensitivity to temperature combined with a large number of recent climate model-based temperature projections indicate that continued business-as-usual warming will drive temperature-induced declines in river flow, conservatively -20% by midcentury [2050] and -35% by end-century [2200], with support for losses exceeding -30% at midcentury and -55% at end-century.

US0010507. Xiao et al. 2018 found that, “the pervasive warming has reduced snowpacks and enhanced evapotranspiration over the last 100 years; over half (53%) of the long-term decreasing runoff trend is associated with the general warming.” US0010417.

Similarly, McCabe et al. 2017 found that

since the late 1980s, increases in temperature in the UCRB [Upper Colorado River Basin] have caused a substantial reduction in UCRB runoff efficiency (the ratio of streamflow to precipitation). These reductions in flow because of increasing temperatures are the largest documented temperature-related reductions since record keeping began.

US0010383. McCabe et al. concluded, “[i]t is expected that as warming continues, the negative effects of temperature on water-year UCRB streamflow will become more evident and problematic.” *Id.*

[I]f temperatures continue to increase, as projected by climate models (Udall and Overpeck 2017), there will be an increasing negative effect of temperature in driving larger-magnitude streamflow declines in the [Upper Colorado River Basin]. This result has implications for water supply variability in general, but it is particularly important to note

that the impacts of future drought will be exacerbated by this underlying warming. A twentieth century-type drought, such as the 1950s, occurring in the future will have greater impacts on water supply because of the elevated temperatures. Recognizing the potential for more persistent and severe droughts than those that have occurred during the instrumental period, or documented in paleoclimatic records (e.g., Woodhouse et al. 2006; Meko et al. 2007), adds to the importance of these findings. A shift to dry conditions associated with precipitation reductions caused by natural climatic variability in combination with increased temperatures likely will result in droughts of unprecedented severity.

US0010393 (emphasis added). Simply put, the future of the Colorado River System will *not* look like the past.

In response to this multitude of criticism and scientific data concerning the Draft EA, Reclamation essentially did nothing. Reclamation's Final EA responded to the FWS comments and the citation to the studies by stating:

See Technical Appendix for further discussion and description of scenarios and alternatives analyzed. The hydrologic analysis included 110 years of historic hydrology. A drought response section has been added to the Technical Appendix to further address concerns regarding potential impacts from future drought scenarios.

US0000282 (response to comment number 59); US0000277 (same response to comment number 30 UDWR). However, neither the Revised Technical Appendix A (US0000114-149) nor the Final EA itself mention these three studies regarding the limits on future water availability, and the promised "further discussion" is nowhere to be found. Reclamation's Final EA and Appendix A continued to analyze "continued drought" based only on earlier droughts US0000053. These

two documents also provided no analysis accounting for long-term trends of reduced water flows in the Green and Colorado River system that Reclamation's own 2012 Colorado Basin Study identified, and failed to address flow reductions due to warming that the three newer studies in the record showed would be significant.

Neither the Final EA nor its Technical Appendix A (US0000114-149), mentions these studies, and neither document responds to the studies' central finding: that water in the Colorado River system will be scarcer due to warming temperatures than it has been in the prior century.<sup>9</sup> Nor does the Final EA explain why it chose to use a model that fails to account for projections of lower future river flows due to warming.

Instead, the Final EA and Appendix A each contain a short new discussion briefly mentioning "concern over a changing climate" and asserting that Reclamation used the Colorado River Simulation System modeling based on "Trace 63" (a modeling period starting in 1969 and continuing through 2015) to take *continued* drought into account. US0000122-123 (Appendix A); US0000053

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<sup>9</sup> There was no change in how Technical Appendix A considered the 2012 Basin Study. *Compare, e.g.,* US0000859, *id.* n.1, (draft) *to* US0000115, *id.* n.1, (final); *compare* US0000861 *to* US0000117. The Final EA's discussion of the Basin Plan also remained unchanged. *Compare* US0000051 (final) *to* US0000802 (draft, same); *compare* US0000053 (final) *to* US0000803 (draft, same).

(Final EA, same).<sup>10</sup> This explanation fails to address the best available science and agency and federal agency, state, and Tribal comments because the data Reclamation used is all backward-looking (based on 1969-2015 data). The Final EA and Appendix A do *not* account for the new warming and drying trends detailed in the studies. Nor do the Final EA and Appendix A explain how using a model based on past drought can project the impacts of future drought that Reclamation's 2012 analysis and more recent scientific studies indicate will be far more severe than those over the last century.

Reclamation's analysis, without explanation, ignored relevant scientific studies regarding the impacts of increased warming on future water availability that bear directly on the likely impacts of the Contract, and ignored agency and public comment. Reclamation thus violated NEPA's "hard look" mandate that agencies "utilize[e] public comment and the best available scientific information." *Biodiversity Conservation All. v. Jiron*, 762 F.3d 1036, 1051 (10th Cir. 2014) (internal citations and quotations omitted).

Courts, including this one, have ruled that agencies violated NEPA when they ignored similarly important data and information. In *Richardson*, 565 F.3d at 713-16, this Court reviewed an EIS in which an agency concluded significant impacts would not occur based on unsupported assumptions, when the record

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<sup>10</sup> The Final EA also added references to "trace 63" in its discussion of the modeled hydrology. See US0000054, 55, 56. Compare US000054 (final) to US0000804 (draft).

contained contrary evidence. This Court held that the agency violated NEPA because it “failed to demonstrate that it examined the relevant data regarding the likely impact of development.” *Id.* at 715. Here, Reclamation has done likewise, basing its analysis of the Contract’s depletions on the unsupported assumption that future water supply will mirror past water supply, ignoring (without explanation) its own prior approach and record evidence to the contrary.

Further, courts will set aside a NEPA analysis where, as here, the agency ignores and effectively declines to respond to comments from federal and state agencies raising concerns about significant impacts. In *Utahns for Better Transp. v. U.S. Dep’t of Transp.*, 305 F.3d 1152, 1179-80 (10th Cir. 2002), this Court found that a Department of Transportation (“DOT”) EIS failed to properly account for impacts to wildlife where DOT did not address criticism from FWS and a state wildlife agency questioning the DOT’s assumptions. Here, Reclamation ignored concerns raised by FWS, NPS, the Ute Tribe, state agencies, and others about Reclamation’s failure to address studies demonstrating that the Contract’s water depletions would occur in a far warmer and drier future than Reclamation assumed in its EA, demonstrating, as in *Utahns*, that the agency failed to take the hard look NEPA mandates.

Similarly, in *Davis v. Mineta*, this Court reviewed an EA about which EPA disagreed with the Federal Highway Administration’s analysis of growth-inducing impacts of a highway project. 302 F.3d 1104 (10th Cir. 2002). The Court wrote:

While it is true that NEPA “requires agencies preparing environmental impact statements to consider and respond to the comments of other agencies, not to agree with them,” it is also true that a reviewing court “may properly be skeptical as to whether an EIS’s conclusions have a substantial basis in fact if the responsible agency has apparently ignored the conflicting views of other agencies having pertinent expertise.”

*Id.* at 1123 (citations omitted). Based largely on EPA’s criticism, the Court found the agency’s EA arbitrary and capricious. Here, FWS and NPS, agencies with expertise concerning the impacts of water on wildlife and natural resources, questioned Reclamation’s conclusions about the state of Green River flows which the Contract would impact, and Reclamation failed to respond or contradict those agencies’ comments. As in *Davis*, this Court should find the EA violated NEPA.

Because Reclamation failed to include or address relevant scientific information, and failed to respond to agencies and the public regarding the impacts of warming on future water availability in its assessment of the Contract’s impacts, the agency violated NEPA’s “hard look” mandate.

Moreover, because Reclamation “entirely failed to consider an important aspect of the problem” by refusing to update its draft analysis in light of relevant information regarding future water availability provided by agency and public commenters, its conclusions were arbitrary and capricious and should be set aside. *Utah Env’tl. Cong. v. Richmond*, 483 F.3d 1127, 1134 (10th Cir. 2007) (quoting *State Farm*, 463 U.S. at 43).

## **2. The EA Failed to Take the Required “Hard Look” at the Impacts**

***Resulting from Location, Timing, and Volume of New Depletions the Contract, Especially in Reach 3.***

Reclamation also failed to take a hard look at impacts of new water depletions from the Green River because it failed to identify the location and timing of depletions downstream of Flaming Gorge Dam, and particularly because it failed to address hydrological impacts in Reach 3. Reclamation acknowledged the centrality of the Contract's hydrological impacts to the agency's NEPA analysis, stating: "Hydrology of the Green River is the driver of effects to the other 14 resources." US0000030. However, the EA failed to identify and analyze the impacts of depletions and, therefore, failed to comply with NEPA's "hard look" mandate.

The Final EA failed to explain or predict where new water would be diverted from the Green River under the Contract or where return flows would come back to the Green River. Because both river flow and temperature are important for the survival of the endangered Colorado River Basin fish, the amount, place, and time of year that any new water is diverted from the Green River may affect the fishes in each of the three reaches.

The National Park Service noted the Draft EA's omission of this critical information:

Despite our best efforts to understand the rigorous hydrology modeling in the EA appendix, we still find a lack of clarity within the EA for where (or how much) water will be diverted from the Green River and where return flows might come back into the Green River.

This makes it difficult to clearly understand which reaches might see more/less water.

US0000255. The Utah Division of Wildlife Resources and Conservation Groups raised similar concerns. *See* US0000190 (Utah Division: “We would like to see specific details on which tributaries will be most affected under this scenario, because tributary impacts could influence native fish recruitment.”); US0000220 (Living Rivers et al.: “the users of this water are not defined, the locations of the withdrawals are not defined, the amount that the users would divert at such locations has not been defined”).

However, neither the Final EA nor the hydrology analysis that underlays the analysis of direct, indirect, and cumulative impacts to the endangered fishes contains any information about the amount, place or time of year for new diversions that would result from the Contract. The Final EA hydrological modeling instead arbitrarily “assumed that the [Contract] depletion location would occur directly below [Flaming Gorge] Dam during the agricultural growing season from July through the end of September.” US0000052. In other words, the Final EA’s analysis of the Contract’s impacts to hydrology fails to identify the actual location of diversions or return flows, instead relying on the unsupported assumption that all of them occur directly below the Flaming Gorge Dam.

In the Final EA, Reclamation responded only: “Comments have been incorporated in the DEA and Hydrologic Modeling Technical Report.”

US0000290. But the requested information is not incorporated; the Final EA stated only that the hydrological modeling assumes the water is diverted “directly below [Flaming Gorge] Dam” (US0000051), and failed to analyze where the new water would actually be diverted or where return flows would re-enter the Green River. Without this information, as the NPS noted, “it [is] difficult to clearly understand which reaches might see more/less water.” US0000255. Without information on the amount, timing and location of diversions and depletions, it is impossible to accurately account for impacts resulting from where and when diversions are made, the amount of depletion from each diversion, or where and when return flows occur along the Green River.

Because Reclamation failed to disclose this critical information, the Final EA did not, and could not, provide accurate information about impacts to water flow and temperature in specific reaches of the Green River. As a result, the Final EA did not, and could not, accurately determine what direct, indirect, and cumulative impacts the Contract would have on fish and other aquatic and related values. Reclamation’s failure to provide basic information or even projections about where and when depletions will occur is not a technical issue, it is a fundamental omission showing that Reclamation “entirely failed to consider an important aspect of the problem,” violating NEPA. *State Farm*, 463 U.S. at 43.

Reclamation also failed to take a hard look at impacts because it failed to specifically address impacts in Reach 3, a large stretch of the Green River which

begins approximately 160 miles downriver from Flaming Gorge Dam and continues another 240 miles to the confluence of the Colorado River. US0000051; US0005054 (map). NPS raised concerns regarding how flow recommendations and targets in Reach 3 would be met in comments on the Draft EA: “It is not completely clear ... whether the State will commit to satisfying Flow Recommendations, or how potential shortfalls in meeting Reach 2 flow targets may affect Reach 3 flow targets.” US0000255. FWS raised similar concerns: “we have concerns that this commitment for the State to ‘coordinate with’ the Program is weak, as it does not commit to making serious efforts to address shortfalls to endangered species flow targets.” US0000197. Maintaining specific hydrology and flows for many of the endangered fishes in Reach 3 is critical and the Flaming Gorge Dam operations approved in the Biological Opinion were intended to “approximate unregulated flow conditions more closely than” previous dam operations. US0010142 at US0010147-148, US0010151-152 (Table 1). FWS urged Reclamation to provide modeling for Reach 3: “We suggest that Reclamation also provide modeling results for Reach 3, including for the No Action, [the Contract as proposed], and Reasonably Foreseeable Depletion scenarios.” US0000199; *see also* US0000196.

In response to comments regarding flow recommendations and targets, the Final EA references only Reaches 1 and 2: “Reclamation’s commitments outlined in the FEIS and [Flaming Gorge] ROD are limited to Reaches 1 and 2.

Reclamation continues to meet its commitments under the [Flaming Gorge] ROD.” (US0000283). Even if accurate regarding the ROD, Reclamation’s commitments regarding current dam operations are separate from its NEPA obligations to analyze the effects of changes to operations under the *new* Contract and the impacts to flow in Reach 3.

Although Reclamation’s FONSI rests on the conclusion that the Contract would be consistent with existing Flaming Gorge Dam approvals (US000029-31), Reclamation failed to provide any analysis of direct, indirect or cumulative impacts to hydrology in Reach 3. The hydrology modeling in the Final EA relied on modeled impacts only through Reach 2 of the Green River and only made assumptions about the potential impacts to Reach 3 without modeling them. US0000119 (“This analysis looks at the impact of the [Contract] depletion scenario at Reach 2, according to the modeled information.”); US0000093 (“[u]nder the [Flaming Gorge Final EIS] and [Flaming Gorge] ROD, if Reclamation meets flow targets in Reaches 1 and 2, then it is assumed that targets for Reach 3 (White River confluence to the Colorado River) are met.” (emphasis added)). Nowhere does Reclamation explain why it could not have modeled the Contract’s hydrologic impacts to Reach 3; rather the Final EA only states that the chosen modeling ended at Reach 2 and was not capable of assessing Reach 3 impacts. *See* US0000119; US0001890 (“The [Green River Basin Model] does not have the capability of analyzing daily ROD flow targets in Reach 3 at the Green River at Green River,

Utah.”). Because the Contract will impact the amount of water available in Reach 3 in the future, and may affect hydrology and flow critical to fishes in Reach 3, Reclamation was required to identify and analyze those impacts in its NEPA review but did not.

By failing to model hydrological impacts to Reach 3, Reclamation failed to take the “hard look” NEPA required, and “entirely failed to consider an important aspect of the problem,” in violation of NEPA. *State Farm*, 463 U.S. at 43.

***3. The agency failed to take a hard look at the cumulative impacts of multiple and significant water depletions from the Green and Colorado Rivers.***

Reclamation failed to provide a “hard look” at the cumulative impacts of the Contract by ignoring reasonably foreseeable future water depletions from the Green and Colorado Rivers. The EA’s modeling of cumulative effects to hydrology along the Green River and Colorado River below the Flaming Gorge Dam considered some future increased water use in Utah but ignored projected increased future water use in *other* Upper Basin states that will impact the same reaches affected by the Contract. In its analysis of cumulative effects to hydrology (US0000056-58), the Final EA relied on a “Full Depletion Scenario” to evaluate cumulative effects based on an assumption that *there would be no increased water depletions in the future by any Upper Basin state except Utah*. Some of Utah’s future depletions were modeled but “Colorado, New Mexico and Wyoming depletions were held constant at 2018 levels under all scenarios.” US0000117

(Final EA, Appendix A).

Under the Full Depletion Scenario, all assumptions from the [Green River Block] Depletion Scenario are maintained, with the addition of reasonably foreseeable depletions held constant at 2060 levels with all other depletions held constant at 2018 depletion levels.

US0000052 (Final EA). There is no other modeling of cumulative effects in the NEPA analysis in which any other Upper Basin states increase their water use from 2018 levels.

The assumptions regarding cumulative depletions are important because Reclamation asserts that, under the Contract, the agency's operations will remain consistent with its Endangered Species Act requirements and obligations under the FGROD. US0000037. However, FWS's modeling in 2007 demonstrated that FWS expected that "scheduled depletions" in all Upper Basin states (not only Utah) would *continue to rise* between 2008 and 2060. US0010681 (graph); US0011352 (chart). In addition, Upper Colorado River Commission 2007 projections relied on in the hydrological modeling (US0000052) for future depletions from Colorado, New Mexico, and Wyoming (the three states that the EA's cumulative impacts modeling "held constant at 2018 levels") were already known to be an

underestimate in 2018 (US0011352)<sup>11</sup> – which suggests the projected depletions in the Final EA (which depend on the 2007 analysis) are also underestimates.

Therefore, the Final EA’s cumulative impacts modeling (which depended on the 2007 *projections* of 2018 depletions, not the actual depletions)<sup>12</sup> also underestimated cumulative impacts on hydrology. Reclamation’s choice to ignore the FWS’s projection of a rise in depletions to the Green River from all other Upper Basin states in the cumulative analysis for the Contract is unexplained and undermines its reliance on the Recovery Program.

Reclamation stated that it used a “strict” definition of reasonably foreseeable future actions. US0000117; US0000051. However, Reclamation did not consistently apply this standard, and only analyzed foreseeable future depletions *in Utah*. US0000117-118. Reclamation’s cumulative impacts analysis holds all *other* Upper Basin states’ depletions constant at 2018 levels (US0000117), although the Final EA provides no information to show that there are no permitted water uses or other reasonably foreseeable new uses in other Upper Basin states that could lead

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<sup>11</sup> The *projections* for 2018 depletions in the three states were Colorado 2,603 thousand AFy, New Mexico 579 thousand AFy, and Wyoming 531 thousand AFy (with all of those states’ depletions rising through 2060). US0011352. According to the Final EA, *actual* 2018 depletions for those three states were nearly 9% higher than predicted: Colorado 2,833 thousand AFy (230 thousand AFy difference), New Mexico 594 thousand AFy (15 thousand AFy difference), and Wyoming 609 thousand AFy (78 thousand AFy difference). US0000118.

<sup>12</sup> US0000116 (“the 2018 depletions levels modeled are based upon the Upper Basin depletion schedules in [the Colorado River Simulation System] and not the observed (or computed) depletions”).

to increased depletions in the Green River from 2018 water use levels. By ignoring foreseeable future depletions in other Upper Basin states (Colorado, Wyoming, and New Mexico) that could significantly affect the Green and Colorado River flows and resources, Reclamation “entirely failed to consider an important aspect of the problem.” *State Farm*, 463 U.S. at 43 (1983).

As a result, Reclamation’s conclusory statements that no significant cumulative impacts would occur under the Contract are unsupported, contrary to evidence in the record, and do not meet the required “hard look” under NEPA. *Davis*, 302 F.3d at 1122-23 (citing *Laguna Greenbelt, Inc. v. United States Dep’t of Transp.*, 42 F.3d 517, 526 (9th Cir. 1994) (conclusory statements are “insufficient; the agency must provide an adequate discussion of [] impacts.”). Because the changes in hydrology due to the Contract may result in cumulatively significant impacts to hydrology, endangered fishes and other resources when analyzed together with reasonably foreseeable depletions from other Upper Basin states, and Reclamation failed to consider those cumulative impacts, it failed to take a “hard look” at the Contract’s impacts as required by NEPA.

**B. Reclamation’s Choice of an Improper No Action Alternative Violated NEPA.**

The Final EA’s description of the no action alternative is inaccurate and skews the EA’s entire analysis. The Final EA states that the Contract would only shift water depletions to a new location, when in fact the effect of the Contract

would be to “unlock” new withdrawals of water from the Green River.

Reclamation’s EA erroneously assumed that the same amount of water would be diverted from the Green River whether the Contract was signed (the proposed action alternative) or not (the no action alternative).

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.” US0000029 (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.

Absent an agreement with Reclamation to release water from Flaming Gorge Reservoir, Utah cannot develop water from accretion and tributary flows below the dam. The terms of 1996 Assignment state that the water rights at issue are “undeveloped and unperfected” and that the water can only be “developed, diverted and perfected” by Utah upon release of the water from the Flaming Gorge Dam pursuant to “a water service contract with the United States.” US0000161.

In briefing, the State of Utah agreed that the water subject to the Contract could *not* be developed without the Contract either as tributary flows in the Green River or under the 1996 Assignment.

As the State of Utah explained, the Contract is necessary because:

The [1996] Assignment conditioned the water right assignment to UBWR [Utah Board of Water Resources] on: 1) satisfying the water right through releases of water in Flaming Gorge Reservoir—effectively restricting the State from diverting and using an equivalent amount of water from Green River tributaries under its Upper Basin apportionment; 2) restricting diversions for that right to the main stem of the Green and Colorado Rivers; and 3) entering into a service contract establishing a fee payable to [Reclamation] for UBWR’s pro rata share of facility operation and maintenance costs associated with diverting water below Flaming Gorge Reservoir. The Assignment effectively locks up 158,890-acre feet of diversion (47,500-acre feet of depletion) of Utah’s Upper Basin apportionment in releases from Flaming Gorge Reservoir allowing that volume of water in Utah’s tributaries, particularly high spring flows, to reach the Green River without diminishment from future Utah storage projects (reservoirs) or direct diversions.

[Appendix . cite??]. (Dist. Ct. ECF No. 78 Utah Resp. Br. at 5-6 (emphasis added)). Conservation Groups also raised this issue in comments on the Draft EA because the “no action” alternative erroneously included the same amount of new water use as would be permitted under the Contract, even though the vast majority of the water that Utah claimed would be “exchanged” under the Contract was not currently used, had never been previously used, and that the water rights had not been perfected and could not be without the Contract. *See, e.g.*, US0000178-181, US0000202-213, US0000228-230. The no action alternative should have assessed the impacts only of depletions caused by the use of perfected water rights, and the EA should have disclosed that if the Contract were implemented, the result would

be the appropriation of *new, additional* water from the Green and Colorado River system. *Id.* The Final EA did not correct this error.

The Final EA did not acknowledge that the Contract would lead to the use of additional Green River water that had not previously been put to use (and, absent the Contract, is “locked up” in Utah’s words), and did not describe a “no action” alternative that accurately reflected likely future water use without the Contract to provide a baseline for the NEPA analysis. The Final EA thus answers the wrong questions. NEPA required Reclamation to disclose the impacts of diverting an additional 58,000+ acre-feet per year of new water from the Green River, as the Contract will allow. Instead, it disclosed the impacts of *moving* diversions from above the dam to just below the dam (looking at the effects of the “release” only).

This Court has stated:

In requiring consideration of a no-action alternative, the Council on Environmental Quality intended that agencies compare the potential impacts of the proposed major federal action to the known impacts of maintaining the status quo. In other words, the current level of activity is used as a benchmark.

*Custer Cty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1040 (10th Cir. 2001) (citations omitted). Because the Final EA failed to accurately identify the status quo (no diversion/depletion) in the no action alternative, Reclamation’s NEPA review used the wrong baseline for its analysis from the start. Without the correct baseline, the effects analysis – the comparison of the no action with the action alternative(s) – cannot comply with NEPA. *See Half Moon Bay Fisherman’s Mktg. Ass’n v.* 857

F.2d at 510. Because Reclamation used an inaccurate baseline in its NEPA review, Reclamation also failed to take the “hard look” at impacts NEPA required .

**C. Reclamation’s Decision Not to Prepare an EIS in Light of Agency Comments Demonstrating a Controversy Regarding Significant Impacts Violated NEPA**

The record demonstrates that NPS and FWS, agencies responsible for, and with expertise concerning, resources that the Contract would impact, expressed significant concerns about the assumptions and analysis of the Draft EA that go directly to the extent and significance of the Contract’s impacts. NPS, FWS, and the Utah Division of Wildlife Resources questioned and criticized the Draft EA’s reliance on past hydrological data to estimate the combined impacts of *future* drought on the Colorado and Green Rivers; FWS raised unanswered concerns about Reclamation’s failure to disclose impacts to Reach 3. *See supra* \_\_-\_\_; \_\_-

\_\_\_. The Final EA failed to respond to or resolve the concerns the agencies raised.

The nature and effect of the Contract, which would result in new depletions from the Green River by Utah, is controversial and significant for many reasons. In addition to concerns raised by the NPS and FWS, many commenters objected to

the EA's mischaracterization of the nature of Contract.<sup>13</sup> Reclamation's own 2012 study and more recent scientific studies raise significant unaddressed question about the availability of water in the system to be appropriated in the future for any of the unperfected and unused water rights Utah is seeking to "exchange" for diversions below Flaming Gorge Dam. *See supra* \_\_\_\_ Equally problematic, Reclamation ignored concerns expressed by the Ute Indian Tribe that the "exchange" and the NEPA analysis failed to address potentially damaging impacts to the Tribe's reserved water rights.<sup>14</sup>

Further, Reclamation did not articulate a rational response to its two sister agencies, the Ute Indian Tribe, or other commenters about the potential effects of this water "exchange," violating NEPA's hard look mandate. *See supra* \_\_\_\_\_. *See Encino Motorcars, LLC v. Navarro*, 590 U.S. 211, 221 (2016) ("One of the basic

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<sup>13</sup> Objections to Defendants' characterization of current water rights were voiced strongly by the Ute Indian Tribe and others. *See, e.g.*, Comments by Ute Indian Tribe US0000238 ("The State's existing water right is a junior natural flow water right that is unreliable, especially during the latter part of the summer months."); US0000203, 208 (Conserve Southwest Utah et al. stating: "We suspect the amount of water that Utah wants to exchange for the endangered fishes is not actually available in the high water spring runoff of the Green River tributaries." "GRB's water rights are junior to senior right holders and will be in jeopardy of being shut off as water supplies decline").

<sup>14</sup> Furthermore, the Ute Indian Tribe states that Defendants failed to recognize the Tribe's reserved water rights, held in trust by Defendant Secretary of the Interior, for the benefit of the Tribe as a trust asset of the Tribe. For that reason and others, "the Tribe requests that an Environmental Impact Statement ('EIS') be conducted." US0000237, US0000245.

procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions.”).

Reclamation admits the water rights issues at stake are controversial: “This contract is needed to *resolve a long standing disagreement* between Reclamation and the State [of Utah] regarding the use of the water right assigned in 1996.” US000091 (emphasis added). This is precisely the type of disagreement, based on outstanding questions of water availability and usage, that necessitates a full environmental impact statement. “Indeed, Congress created the EIS process to provide robust information in situations precisely like this one, where, following an environmental assessment, the scope of a project’s impacts remains both uncertain and controversial.” *Semonite* at 1088-89. *See also Middle Rio Grande Conservancy Dist.*, 294 F.3d at 1229 (upholding lower court order requiring agency to prepare an EIS due in part to controversy concerning the impacts of water management). On these facts, Reclamation’s decision to prepare merely an EA and issue a FONSI violated NEPA.

At the very least, and as discussed *supra* at \_\_\_, Reclamation’s dismissal of these tangible and express concerns by governmental agencies, Indian nations, and countless private commenters means the Final EA is arbitrary and capricious, and demonstrates that Reclamation failed to take the hard look NEPA requires.

### **THE COURT SHOULD VACATE THE CONTRACT.**

This Court should vacate the Contract if it finds that Reclamation violated

NEPA. Vacatur is the presumptive remedy under the APA, and is appropriate here because it supports NEPA's goal of ensuring that Reclamation acts only after it fully discloses and analyzes the potential impacts of a range of reasonable alternatives.

Under the APA, courts “*shall* ... hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious ... or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A) (emphasis added); *see also Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187-88 (10th Cir. 1999) (recognizing that as used in § 706 of the APA, “[s]hall’ means shall”). The Supreme Court has stated that “[t]he [APA] requires federal courts to set aside federal agency action that is ‘not in accordance with law.’” *Fed. Commc’ns Comm’n v. NextWave Pers. Commc’ns Inc.*, 537 U.S. 293, 300 (2003); *Overton Park*, 401 U.S. at 413-14 (noting “[i]n all cases agency action must be set aside if the action” violated the APA’s arbitrary and capricious standard).

This Court has taken several different steps when reversing a district court decision and finding a violation of NEPA, including:

“(1) reversed and remanded without instructions, (2) reversed and remanded with instructions to vacate, and (3) vacated agency decisions.” The typical remedy for an EIS in violation of NEPA is remand to the district court with instructions to vacate the agency action. *See, e.g., Diné Citizens Against Ruining Our Env’t v. Bernhardt*, 923 F.3d 831, 859 (10th Cir. 2019).

*High Country Conservation Advocates v. United States Forest Serv.*, 951 F.3d

1217, 1228 (10th Cir. 2020) (citation omitted). There is no reason for the Court here to depart from the “typical remedy” of ordering the Contract’s vacatur.

Here, vacatur will serve NEPA’s purpose of ensuring that Reclamation takes the required “hard look” at available alternatives *before* making a decision, *see* 40 C.F.R. §§ 1500.1(b); *Robertson*, 490 U.S. at 349, increasing the chance that the agency could act on the information to limit harm to imperiled fish and downstream water users. The nature of the NEPA violations here is significant. Reclamation’s assumption that the Contract will have no impacts in terms of the amount or location of water diverted, the agency’s decision to ignore the best available science on the future reduced water availability in the Green and Colorado Rivers due to warming, the agency’s failure to address legitimate concerns raised by its sister agencies, the Ute Tribe, and Utah’s wildlife agency, and its failure to prepare an EIS in light of these contrary agency comments, are serious errors of law that poison the entirety of the EA. Because it would serve NEPA’s fundamental purpose, this Court should vacate the Contract.

## **CONCLUSION**

For the foregoing reasons, Conservation Groups respectfully request that this Court: (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.

## STATEMENT REGARDING ORAL ARGUMENT

Conservation Groups believe that oral argument would be beneficial because this case involves significant issues regarding NEPA.

Respectfully submitted, January           , 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 XXX 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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## CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

- (1) all required privacy redactions have been made per 10th Cir. R. 25.5;
- (2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;
- (3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Emsisoft Business Security, version 2021.9.0.11176, last updated September 21, 2021, and according to the program are free of viruses.

Date: January [REDACTED], 2022

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## CERTIFICATE OF SERVICE

I certify that on January [REDACTED], 2022, I electronically filed the foregoing OPENING BRIEF OF APPELLANTS CENTER FOR BIOLOGICAL DIVERSITY, et al., with attached Addendum, using the court's CM/ECF system, which will send notification of this filing to:

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