

No. 21-4098

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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, *et al.*,  
*Defendants-Intervenors-Appellees*.

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Appeal from the U.S. District Court for the District of Utah  
No. 2:19-cv-00636-DBB (Hon. David Barlow)

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**ANSWERING BRIEF FOR THE FEDERAL APPELLEES**

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TODD KIM  
*Assistant Attorney General*

JENNIFER A. NAJJAR  
BRIAN C. TOTH  
JOHN EMAD ARBAB  
*Attorneys*

Environment and Natural Resources Division  
U.S. Department of Justice  
Post Office Box 7415  
Washington, D.C. 20044  
(202) 514-4046  
john.arbab@usdoj.gov

Of Counsel:  
SUSANNAH THOMAS  
*Attorney*  
Office of the Solicitor  
U.S. Department of the Interior

**Oral argument is requested.**

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**PRIOR OR RELATED APPEALS**

There are no prior or related appeals for purposes of 10th Cir. Rule 28.2(C)(3).

## GLOSSARY

AF	acre-feet
APA	Administrative Procedure Act
Assignment Agreement	Assignment of water right (No. 41-3479/A30414d) from United States of America to the State of Utah (Mar. 12, 1996)
Assignment Water	Water right assigned to State of Utah by Assignment Agreement
Compact Authority	State of Utah's authority to appropriate water under the 1922 and 1948 Compacts
CRSPA	Colorado River Storage Project Act of 1956
CUP	Central Utah Project
EA	environmental assessment
EIS	environmental impact statement
ESA	Endangered Species Act
Exchange Contract	Contract for exchange of water, Green River Block, between the United States of America and the State of Utah (Mar. 20, 2019)
FONSI	finding of no significant impact
kAF	thousand acre-feet
NEPA	National Environmental Policy Act
Reclamation	United States Bureau of Reclamation
ROD	record of decision
1922 Compact	Colorado River Compact of 1922
1948 Compact	Upper Colorado River Basin Compact of 1948

## INTRODUCTION

In 2019, the U.S. Bureau of Reclamation (“Reclamation”), an agency within the U.S. Department of the Interior, entered into the Green River Block Water Exchange Contract (“Exchange Contract”) with the State of Utah. The Exchange Contract provides Utah with flexibility in obtaining water to which it is entitled under two interstate compacts, while also ensuring that adequate flows are maintained in the Green River below Flaming Gorge Dam (operated by Reclamation) to support fish protected by the Endangered Species Act (“ESA”).

Before entering into the Exchange Contract, to comply with the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, Reclamation prepared a thorough, 260-page environmental assessment (“EA”) and issued a finding of no significant impact (“FONSI”). In the EA, Reclamation determined that entering into and implementing the Exchange Contract will not have significant environmental impacts and that preparation of a full environmental impact statement (“EIS”) was therefore not required.

Conservation Groups<sup>1</sup> challenged Reclamation’s NEPA compliance in the district court under the “arbitrary and capricious” standard of the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2)(A). After carefully reviewing the

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<sup>1</sup> Conservation Groups are Plaintiffs-Appellants Center for Biological Diversity, Living Rivers, Colorado Riverkeeper, Utah Rivers Council, and Sierra Club. Brief ix.

administrative record, the district court entered judgment in favor of Reclamation. That judgment is correct and should be affirmed.

### **STATEMENT OF JURISDICTION**

(A) The district court had federal-question jurisdiction over the case, 28 U.S.C. § 1331, because Conservation Groups’ claims arise under NEPA, 42 U.S.C. § 4321 *et seq.* and the APA, 5 U.S.C. § 701 *et seq.* App. Vol. I at 15-60.

(B) This Court has jurisdiction under 28 U.S.C. § 1291 because the district court entered a final judgment on July 7, 2021. App. Vol. I at 148.

(C) Conservation Groups timely filed their notice of appeal on August 16, 2021 (*i.e.*, within 60 days of the district court’s entry of final judgment). App. Vol. I at 149-150; *see* Fed. R. App. P. 4(a)(1)(B).

(D) The appeal is from a final judgment that disposes of all parties’ claims.

### **STATEMENT OF THE ISSUES**

1. Whether Reclamation’s EA took the required “hard look” at the potential environmental impacts of the Exchange Contract and reasonably concluded that an EIS is not necessary, specifically with respect to hydrological impacts, cumulative impacts, the environmental baseline, and public controversy.

2. Whether, if the Court addresses remedy, Conservation Groups are entitled to an order vacating the Exchange Contract.

## PERTINENT STATUTES AND REGULATIONS

Except for those in the Addendum following this brief, all pertinent statutes and regulations are in the Addendum following Conservation Groups' opening brief.

### STATEMENT OF THE CASE

#### A. Legal Background

##### 1. National Environmental Policy Act

NEPA seeks to ensure that federal agencies consider the environmental impacts of proposed major federal actions. 42 U.S.C. § 4332(2)(C); *Winter v. NRDC, Inc.*, 555 U.S. 7, 15-16 (2008). The statute does not mandate substantive results, “but simply prescribes the necessary process.” *WildEarth Guardians v. U.S. Fish & Wildlife Serv.*, 784 F.3d 677, 690 (10th Cir. 2015) (internal quotation marks omitted); accord *New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683, 704 (10th Cir. 2009); *Utah Env't'l Congress v. Russell*, 518 F.3d 817, 821 (10th Cir. 2008) (“NEPA dictates the process by which federal agencies must examine environmental impacts, but does not impose substantive limits on agency conduct.”) (citation omitted). In the end, NEPA “merely prohibits uninformed—rather than unwise—agency action.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989).

NEPA requires agencies to take a “hard look” at the environmental consequences of a proposed federal action. *Id.* at 350; *Biodiversity Conservation*

*Alliance v. Jiron*, 762 F.3d 1036, 1086 (10th Cir. 2014). The depth of analysis that NEPA requires varies according to the proposed action’s effects. *See, e.g.*, 40 C.F.R. § 1502.2(b) (2019) (agencies shall discuss impacts “in proportion to their significance”).<sup>2</sup> NEPA requires an EIS only for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). To determine whether a proposed action will have significant effects, an agency may prepare an EA—a “concise” document that “[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS].” 40 C.F.R. § 1501.4; *id.* § 1508.9(a).

If based on its EA the agency finds that the proposed action will not significantly affect the quality of the human environment, it may issue a FONSI rather than prepare an EIS. *Id.* § 1501.4(e). A FONSI “briefly present[s] the reasons why an action . . . will not have a significant effect on the human environment.” *Id.* § 1508.13.

“An agency’s decision to issue a FONSI and not prepare an EIS is a factual determination which implicates agency expertise.” *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1274 (10th Cir. 2004) (cleaned up). The EA

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<sup>2</sup> The Council on Environmental Quality updated the NEPA regulations in 2020 (*see* 85 Fed. Reg. 43,304 (July 16, 2020)), and recently amended certain of the regulations (*see* 87 Fed. Reg. 23,453 (Apr. 20, 2022)). This brief cites the prior regulations in effect when Reclamation prepared the EA here at issue, as found in the 2019 edition of the Code of Federal Regulations.



“need not conform to all the requirements of an EIS, [but] it must be sufficient to establish the reasonableness of the decision not to prepare an EIS.” *California Trout v. FERC*, 572 F.3d 1003, 1016 (9th Cir. 2009).

## 2. Interstate Compacts

The Exchange Contract addresses, in part, water that the State of Utah is entitled to develop under two interstate compacts. First, as authorized by Congress, the federal government and the seven Colorado River Basin States—Wyoming, Colorado, Utah, New Mexico, Arizona, Nevada, and California—negotiated the Colorado River Compact of 1922 (“1922 Compact”). *See* 70 Cong. Rec. 324 (1928); 46 Stat. 3000 (1929). The 1922 Compact divided the Colorado River drainage within the United States into two basins and apportioned 7.5 million acre-feet to each basin “in perpetuity.” 70 Cong. Rec. 325.

Second, the Upper Colorado River Basin Compact of 1948 (“1948 Compact”) was negotiated by Arizona, Colorado, New Mexico, Utah, and Wyoming “to determine the rights and obligations of each signatory State respecting the uses and deliveries of the water of the Upper Basin of the Colorado River.” Pub. L. No. 81-37, 63 Stat. 31, 31 (1949). Like the 1922 Compact, the 1948 Compact apportioned the consumptive use of water in the Upper Colorado River System “in perpetuity.” *Id.* at 32 (Article III(a)).

Under the 1948 Compact, Utah is entitled to 23 percent per annum of the water apportioned to and available for use in the Upper Basin under the 1922 Compact (and remaining after providing a fixed quantity of 50,000 acre-feet per year to Arizona). *Id.* at 33. The 1948 Compact states:

The provisions of this Compact shall not apply to or interfere with the right or power of any signatory State to regulate within its boundaries the appropriation, use and control of water, the consumptive use of which is apportioned and available to such State by this Compact.

*Id.* at 41 (Article XV(b)). Thus, under the 1922 and 1948 Compacts (collectively, “Compact Authority”), Utah generally has the right to “regulate ... the appropriation, use and control of water” and does not require further federal authorization to do so.<sup>3</sup>

## **B. Factual Background**

### **1. Summary of Exchange Contract**

The Exchange Contract was executed in March 2019 by Reclamation and the State of Utah. App. Vol. I at 152-171. As described more fully below, in the Exchange Contract, Utah agreed to “forbear” the depletion (*i.e.*, consumptive use) of a specified amount of water from the Green River and its tributaries to which Utah

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<sup>3</sup> Congress approved the 1922 Compact effective upon its approval by California and at least five of the other signatory states. 43 U.S.C. § 617l(a). By 1944, all seven signatory states had approved that compact. Congress consented to the 1948 Compact in 1949 after it was ratified by the legislatures of the five signatory states. 63 Stat. 31, 31.

is entitled under its Compact Authority. App. Vol. I at 156, App. Vol. II at 178. In exchange, Utah is authorized to deplete (*i.e.*, consumptively use) an equal amount of water from the Green River, as released by Reclamation from Flaming Gorge Dam. *Id.* Utah’s forbearance assists Reclamation in meeting its obligations under the ESA in Reaches 1 and 2 of the Green River by allowing natural flows to enter or remain in the river. Had Utah not agreed to this forbearance, Reclamation would have needed to release additional water from Flaming Gorge Reservoir to meet its ESA commitments through Reach 2. *Id.* There are four endangered species of fish in Reaches 1 and 2: Colorado pikeminnow, razorback sucker, bonytail, and humpback chub. Fed. Supp. App. Vol. I at 63 (Table 3-2), 71. Utah’s forbearance helps these endangered species by providing Reclamation more flexibility in maintaining water flow and temperatures that benefit the endangered fish. App. Vol. I at 156, App. Vol. II at 178.

**a. The Flaming Gorge Unit and the history of the water rights underlying the Exchange Contract**

The Colorado River Storage Project Act of 1956 (“CRSPA”), Pub. L. No. 84-485, 70 Stat. 105, authorized the construction of facilities, in part, to regulate the flow of the Colorado River, which would make it possible for the Colorado River Upper Basin States,<sup>4</sup> including Utah, to use their apportionments of water under the

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<sup>4</sup> The Colorado River Upper Basin includes those areas of Arizona, Colorado, New Mexico, Utah, and Wyoming “from which waters naturally drain into the Colorado

1922 and 1948 Compacts. 70 Stat. 105-106; *see* App. Vol. I at 152. Under CRSPA, Congress authorized several water-development projects, including the Flaming Gorge Unit and the Central Utah Project (“CUP”), both of which are discussed immediately below. 70 Stat. 106; *see* App. Vol. I at 152-153.

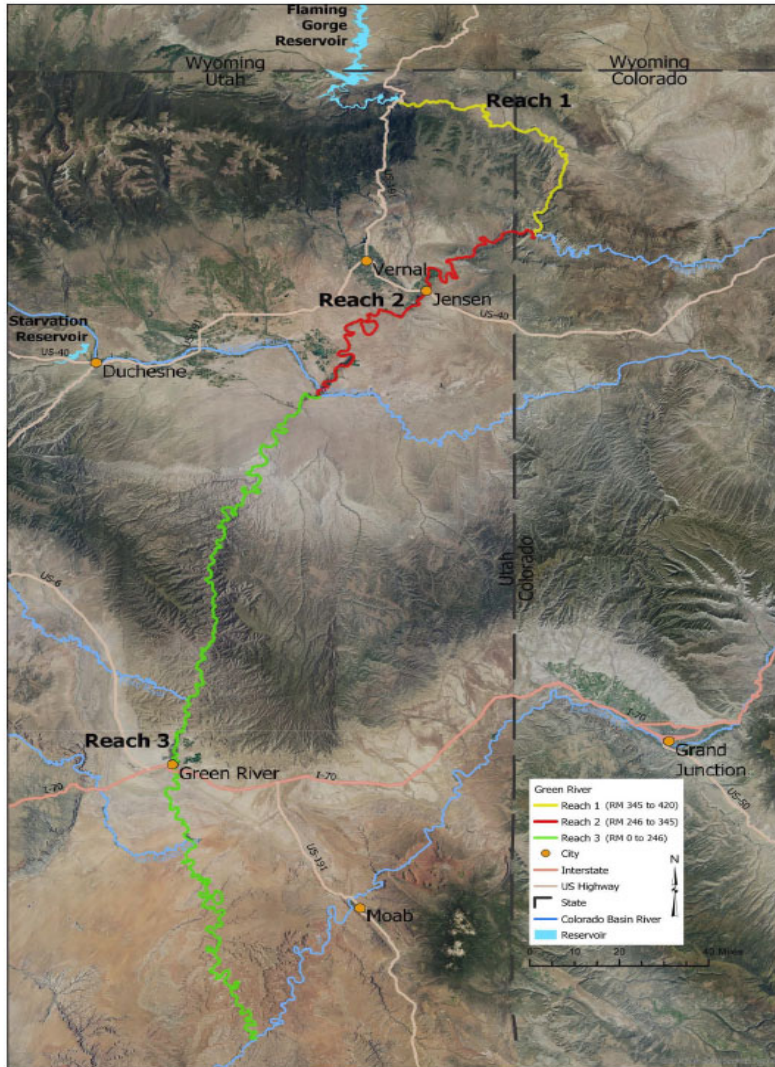
**b. Flaming Gorge Unit**

In 1958, Reclamation filed an application to appropriate under Utah state law 3.96 million acre-feet (“AF”) of water from the Green River for storage in Flaming Gorge Reservoir for CRSPA purposes. App. Vol. II at 181. The Reservoir is part of the Flaming Gorge Unit, which also includes Flaming Gorge Dam. App. Vol. I at 152, App. Vol. II at 181. The dam is located on the upper main-stem of the Green River in northeastern Utah. *Id.* The dam creates the Reservoir, which straddles the Utah-Wyoming border. *Id.*

Below Flaming Gorge Dam, the Green River is divided into three contiguous reaches. App. Vol. II at 188. Reach 1 begins directly below the dam and extends to the confluence with the Yampa River (65 river miles). *Id.* Reach 2 begins at the Yampa River confluence and continues to the White River confluence (99 river miles). *Id.* Reach 3 is between the White River and Colorado River confluences (246 river miles). *Id.* The reaches are depicted on the following map:

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River System above Lee Ferry[, Arizona].” 1922 Compact (Art. II(f)), 70 Cong. Rec. 325.



Fed. Supp. App. Vol. II at 283.

Reclamation operates the Flaming Gorge Dam according to a 2006 Record of Decision (“ROD”), for which Reclamation prepared an EIS. App. Vol. II at 182, Fed. Supp. App. Vol. II at 318-327. Pursuant to the ESA, the Flaming Gorge ROD/EIS sets forth flow and temperature requirements to support certain endangered fish species (Colorado pikeminnow, razorback sucker, bonytail, and humpback chub) in the Green River downstream of the Flaming Gorge Unit. App.

Vol. II at 182, 185, 238. Under the Flaming Gorge ROD/EIS, Reclamation manages releases of water from behind the Dam to meet ESA requirements in Reaches 1 and 2 of the Green River for these endangered species. App. Vol. I at 154, App. Vol. II at 206; *see also* App. Vol. II at 238 (detailing the flow and temperature requirements). For example, during “moderately dry” hydrologic conditions, Reclamation is to maintain in Reach 1 a spring peak flow of greater than or equal to 4,600 cubic feet per second, and a water temperature of 64 degrees Fahrenheit for 3-5 weeks from June to March 1. App. Vol. II at 238.

**c. Central Utah Project and the Assignment Water**

The CUP was authorized under CRSPA to be a multi-phased water development project. App. Vol. I at 153, App. Vol. II at 184-185. Because of the size and complexity of the CUP, Reclamation divided it into an “Initial Phase” and an “Ultimate Phase.” App. Vol. II at 185. The CUP is relevant here because the water rights addressed in the Exchange Contract were initially appropriated by Reclamation for consumptive use (*e.g.*, for irrigation and domestic use) in the Ultimate Phase. App. Vol. I at 153, App. Vol. II at 185. The Ultimate Phase, however, was never completed because Congress de-authorized further expenditures on the undeveloped portions of the Ultimate Phase in 1992. *Id.*; *see* Central Utah Project Completion Act, Pub. L. No. 102-575, § 501(a)(3), 106 Stat. 4600, 4650-51 (1992).

After Congress defunded the Ultimate Phase, portions of the remaining Ultimate Phase water rights were reallocated. App. Vol. II at 186. An undeveloped water right of 447,500 AF/year remained with the United States. *Id.* Subsequently, in a March 1996 agreement (“Assignment Agreement”), Reclamation assigned the United States’ undeveloped water right to Utah (“Assignment Water”). App. Vol. I at 153, App. Vol. II at 186; *see also* App. Vol. I at 163 (Assignment Agreement).

The Assignment Agreement states that “[u]pon release from Flaming Gorge Reservoir, said water right can be developed, diverted and perfected by the State of Utah as permitted by law.” App. Vol. I at 163. The Assignment Agreement requires Utah to enter into a water service contract with the United States if Utah “stores water in or benefits directly from [CRSP] Facilities,” including Flaming Gorge Reservoir. *Id.*

**d. Exchange Contract Purpose and Terms**

In January 2016, Reclamation received a letter from Utah requesting two contracts for the use of Utah’s Assignment Water from Flaming Gorge Reservoir. App. Vol. II at 182, 187; Fed. Supp. App. Vol. II at 284-285. The contracting parties divided the Assignment Water into two separate blocks: the Green River Block and the Lake Powell Pipeline Project Block (the latter is not at issue here). App. Vol. I

at 153-154, App. Vol. II at 182. The Green River Block allocated 72,641 AF/year for use by Utah. *Id.*

The Exchange Contract concerns the Green River Block portion of the Assignment Water. The purpose of the Exchange Contract is to facilitate a release of 72,641 AF/year of water from Flaming Gorge Reservoir (equivalent to the Green River Block portion of the Assignment Water) in exchange for Utah's agreement not to deplete an equal amount of high springtime flows from the Green River and its tributaries under Utah's Compact Authority—thereby allowing Reclamation to continue meeting its ESA commitments in Reaches 1 and 2 of the Green River while providing Utah a reliable water supply for development of its Assignment Water. App. Vol. I at 155-157; App. Vol. II at 182, 187; Fed. Supp. App. Vol. I at 35.

In the Exchange Contract, Utah agrees to forbear depletions it is entitled to under its Compact Authority, which allows natural flows below Flaming Gorge Reservoir in Reach 2 to remain in the Green River. App. Vol. I at 156; App. Vol. II at 178, 182. Had Utah not agreed to this forbearance, Reclamation would have needed to release additional CRSP water from Flaming Gorge Reservoir to meet its ESA commitments through Reach 2. *Id.* Utah's forbearance helps the four endangered species in Reaches 1 and 2—Colorado pikeminnow, razorback sucker, bonytail, and humpback chub (Fed. Supp. App. Vol. I at 63 (Table 3-2), 71)—by providing Reclamation more flexibility in maintaining water flow and temperatures



that benefit the endangered fish. App. Vol. I at 156, App. Vol. II at 178. In exchange for its forbearance, the Exchange Contract authorizes Utah to deplete an equal amount of Green River Block water instead, as released by Reclamation from Flaming Gorge Reservoir in accordance with Reclamation's operating procedures in the Flaming Gorge ROD/EIS. *Id.* Utah agreed not to call for releases from Flaming Gorge Reservoir, but rather, to use water only as released by Reclamation pursuant to the operating procedures deemed necessary to comply with the ESA. *Id.* The Exchange Contract is for a term of 50 years, and Utah will pay compensation to the United States for use of the Green River Block water. App. Vol. I at 156, 157.

In sum, the Exchange Contract provides Utah with additional flexibility in developing water to which it is entitled under its Compact Authority, while helping Reclamation continue to meet its commitments to maintain temperature and flow in the Green River that are necessary to comply with the ESA. App. Vol. I at 154, 156; App. Vol. II at 177; Fed. Supp. App. Vol. II at 330-378 (U.S. Fish & Wildlife Service biological opinion).

**2. Reclamation's environmental assessment and finding of no significant impact for the Exchange Contract.**

To help guide its decision whether to enter into the Exchange Contract, Reclamation prepared a draft EA in September 2018, held a public hearing on the draft EA, and invited and responded to public comment on the draft EA. App. Vol. II at 177. In January 2019, Reclamation released the final EA, which considered two

alternatives: the No Action Alternative and the Proposed Action Alternative. App. Vol. II at 177; Fed. Supp. App. Vol. I at 36-37. The EA analyzed the potential impacts of the Exchange Contract on 15 resources, including hydrology, fish and wildlife, threatened and endangered species, water rights, and cultural resources, among others. App. Vol. II at 179-180; Fed. Supp. App. Vol. I at 38-92.

To analyze potential hydrologic impacts, the EA used scientific modeling and found: “Differences between the No Action and Proposed Action were so negligible as to be discounted in almost all measures. Small differences were predicted during drier hydrologic conditions during the months of July-September, which occur approximately 30 percent of the time.” App. Vol. II at 179. The EA made a “no effect or similar determination” for each of the other resources analyzed. App. Vol. II at 179-180.

Based on the analysis in its EA, Reclamation issued a FONSI for the Exchange Contract, thereby concluding that an EIS was not required. App. Vol. II at 180 (citing 40 C.F.R. § 1508.27).

### **C. Proceedings Below**

Conservation Groups filed a complaint in district court under NEPA and the APA challenging Reclamation’s EA and FONSI for the Exchange Contract. App. Vol. I at 15-61. On July 7, 2021, the district court issued a decision rejecting Conservation Groups’ claims. App. Vol. I at 130-147. The court concluded that:

(1) Reclamation's No Action Alternative was not arbitrary and capricious; (2) Reclamation's analysis of hydrology impacts was not arbitrary and capricious; (3) Reclamation's analysis of climate impacts to hydrology and fish resources was not arbitrary and capricious; (4) Reclamation took a "hard look" at cumulative impacts; and (5) Reclamation reasonably determined that an EIS was not required. App. Vol. I at 135-147.

This appeal followed.

### **SUMMARY OF ARGUMENT**

1. Reclamation's EA took the required "hard look" at the potential environmental impacts of the Exchange Contract. Conservation Groups fail to demonstrate that Reclamation's decision to issue a FONSI represents a clear error of judgment.

A. Reclamation reasonably analyzed the Exchange Contract's impacts to hydrology in the context of future water availability. Among other things, Reclamation reasonably responded to studies cited in comments on the draft EA regarding future warming and drying trends due to climate change. Reclamation determined that the conclusions from those studies can be reasonably understood only in the context of their larger spatial scale vis-à-vis the comparatively far smaller geographic area of analysis for the Exchange Contract. Reclamation is entitled to substantial deference in defining the geographical scope of its hydrologic analysis.

Conservation Groups’ summary dismissal of “Trace 63”—Reclamation’s chosen method of modeling future hydrologic impacts of the Exchange Contract in view of climate change concerns—does not address Reclamation’s reasons for using that modeling and is particularly unfounded given Conservation Groups’ inability to even suggest a different scientifically valid method of modeling for this project-specific analysis.

B. Reclamation reasonably analyzed the hydrologic impacts of the Exchange Contract on the Green River. The Exchange Contract does not result in “new water depletions” from the Green River, as Conservation Groups contend. The contract facilitates a “new” depletion of water only in the limited sense that the location and timing of Utah’s depletions are different as compared to the location and timing of the depletions absent the contract. Conservation Groups largely ignore Reclamation’s hydrology modeling, which does not require the specificity of detail Conservation Groups seek in order to permit Reclamation to reasonably assess the potential hydrologic impacts of the Exchange Contract on the Green River, including Reach 3. Reclamation’s choice of methodology for this project-specific analysis is reasonable and entitled to deference.

C. Reclamation reasonably analyzed cumulative impacts of the Exchange Contract. Conservation Groups contend that Reclamation failed to take a “hard look” at cumulative impacts because Reclamation’s analysis included reasonably

foreseeable future depletions only in Utah and ignored such depletions in other Upper Basin states (Colorado, Wyoming, and New Mexico), but that contention is contrary to the record. Reclamation did not ignore any reasonably foreseeable future depletions in Colorado, Wyoming, and New Mexico; rather, Reclamation found that only certain future depletions in Utah meet its definition of a “reasonably foreseeable future depletion”—a definition not challenged by Conservation Groups. Reclamation’s cumulative impacts analysis is reasonable and entitled to deference.

D. Reclamation’s No Action Alternative used an appropriate environmental baseline to analyze the potential impacts of the Exchange Contract. Conservation Groups’ contention that Reclamation’s EA “failed to accurately identify the status quo (no diversion/depletion) in the no action alternative” is contrary to the record. Among other things, Reclamation identified a No Action Scenario in which Green River Block depletions were assumed to be zero for the entire model run, and depletion data for all other locations were held steady at 2018 levels. The No Action Scenario accurately describes the status quo: prior to the Exchange Contract, Reclamation assumed that none of the remaining 58,957 AF/year in the Green River Block is depleted, and Reclamation held steady at current 2018 (*i.e.*, pre-Exchange Contract) levels the depletions for all other locations by other water users. Conservation Groups fail to demonstrate that Reclamation selected an inappropriate environmental baseline in the EA.

E. Because Reclamation reasonably concluded that the Exchange Contract will not have a significant impact on the environment, an EIS was not required. Reclamation's decision not to prepare an EIS is further supported by the relevant NEPA regulations, which establish that significance under NEPA depends on the "context" and "intensity" of the environmental impacts. 40 C.F.R. § 1508.27. Conservation Groups do not specify which intensity factor or factors are triggered here in their view but suggest that one factor is relevant and requires an EIS: highly controversial effects of the Exchange Contract. *Id.* § 1508.27(b)(4). In attempting to establish such controversy, however, Conservation Groups largely just recycle their various unmeritorious arguments that the EA did not take a "hard look" at the potential environmental impacts of the Exchange Contract. Moreover, the presence of one or more intensity factors does not necessarily require the preparation of an EIS. Conservation Groups fail to demonstrate that Reclamation's decision not to prepare an EIS for the Exchange Contract represents a clear error of judgment.

2. Because Conservation Groups' challenges to Reclamation's EA and FONSI fail, this Court has no cause to address Conservation Groups' request to vacate the Exchange Contract. But should the Court address remedy, vacatur of the Exchange Contract is unwarranted. Even assuming *arguendo* that the Exchange Contract is a "final agency action" under the APA, Conservation Groups have not shown that they would be entitled to an order vacating it. The APA does not strip

courts of their equitable discretion over whether to vacate unlawful agency action; this Court has recognized that vacatur is an often appropriate form of injunctive relief—not a mandatory one. The widely-used equitable factors do not support vacatur of the Exchange Contract.

The judgment of the district court should be affirmed.

### **STANDARD OF REVIEW**

In an APA case, this Court reviews the district court’s judgment de novo, applying the same standard for review of the administrative action as the district court applied. *WildEarth Guardians v. Nat’l Park Service*, 703 F.3d 1178, 1182 (10th Cir. 2013).

Federal courts “review an agency’s compliance with NEPA pursuant to the APA.” *Cure Land, LLC v. U.S. Dep’t of Agriculture*, 833 F.3d 1223, 1230 (10th Cir. 2016). Under the APA standard, the reviewing court “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 law.”

5 U.S.C. § 706(2)(A). A decision is arbitrary and capricious if the agency:

- (1) entirely failed to consider an important aspect of the problem, (2) 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, (3) failed to base its decision on consideration of the relevant factors, or (4) made a clear error of judgment.

*WildEarth Guardians*, 703 F.3d at 1183. This standard is deferential—“[a] presumption of validity attaches to the agency action and the burden of proof rests with the parties who challenge such action.” *Hillsdale Env’t Loss Prevention, Inc. v. U.S. Army Corps of Engineers*, 702 F.3d 1156, 1165 (10th Cir. 2012). The court is not to “substitute its judgment for that of the agency as to the environmental consequences of its actions.” *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976). Instead, in evaluating an agency’s compliance with NEPA, the court only reviews the agency decision to ensure that the agency has “taken a ‘hard look’ at environmental consequences.” *Id.* Deference to the agency “is especially strong where the challenged decisions involve technical or scientific matters within the agency’s area of expertise.” *Morris v. U.S. Nuclear Reg. Comm’n*, 598 F.3d 677, 691 (10th Cir. 2010).

## ARGUMENT

### **I. Reclamation’s EA took the required “hard look” at the potential environmental impacts of the Exchange Contract.**

After completing an EA for the Exchange Contract, Reclamation issued a FONSI and therefore determined that preparation of an EIS was unnecessary. An agency’s decision not to prepare an EIS is improper only if the plaintiffs can demonstrate “that the [agency’s] conclusion of non-significant effect on the environment represents a ‘clear error of judgment.’” *WildEarth Guardians v. U.S. Fish & Wildlife Service*, 784 F.3d 677, 691 (10th Cir. 2015) (citation omitted).



Conservation Groups fail to demonstrate any such “clear error of judgment” by Reclamation. Rather, as demonstrated below, Reclamation’s EA took the requisite “hard look” at the impacts of the Exchange Contract and reasonably determined that they are not significant. NEPA requires nothing more.

**A. Reclamation reasonably analyzed the Exchange Contract’s impacts to hydrology in the context of future water availability.**

Summarizing Reclamation’s analysis of the hydrologic impacts of the Exchange Contract, the EA explained:

Hydrology was analyzed using observed hydrologic data from 1906-2015. *Model results were estimated for years 2018-2060.* See the Hydrologic Technical Appendix of the EA for the full hydrologic analysis. 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.

App. Vol. II at 179 (emphasis added). Notwithstanding Reclamation’s “so negligible as to be discounted” finding, however, Conservation Groups contend that Reclamation failed to take a “hard look” at the Exchange Contract’s impacts to hydrology because Reclamation “ignored relevant scientific information regarding diminished future water availability due to warming temperatures” of the atmosphere. Brief 25. That contention lacks merit.

*First*, Conservation Groups contend that Reclamation’s modeling for years 2018-2060 “conflict[s]” with Reclamation’s 2012 Colorado River Basin Study

(“2012 Study”), which was cited by commenters on the draft EA. According to Conservation Groups, Reclamation’s 2012 Study “show[s] future water availability in the Colorado River Basin is likely to be lower than in the prior century.” Brief 26; *see id.* at 12-13, 29.

However, responding to a comment submitted by one of Conservation Groups (Utah Rivers Council), Reclamation explained why its 2012 Study does not provide a scientifically sound basis for modeling the future hydrologic impacts of the Exchange Contract. Reclamation emphasized the difference between the geographical scale of analysis in its 2012 Study compared to that in the EA for the Exchange Contract: whereas the 2012 Study analyzed “the overall Colorado River Basin,” spanning a geographic area of seven states, the EA “provides a specific and detailed look at the impacts of signing a water exchange contract with the State of Utah.” Fed. Supp. App. Vol. I at 265. Thus, the conclusions from the 2012 Study can be reasonably understood only in the context of that larger spatial scale. Similarly, the EA notes the different modeling used by Reclamation in a “long-term basin-wide planning context” like the 2012 Study conducted over the area of seven states cannot be meaningfully compared to the modeling performed by Reclamation in the EA to “isolate[] the impact of diverting water out of the Green River” below Flaming Gorge Dam—a comparatively far smaller geographic area of analysis primarily within a single state. App. Vol. II at 204-205.

Moreover, even putting aside that the 2012 Study and the EA were conducted at vastly different geographic scales, there is no “conflict” (Brief 26) between the conclusions in the EA and in Reclamation’s 2012 Study; rather, the 2012 Study’s conclusions are more nuanced than Conservation Groups represent. For example, the 2012 Study made finer-grained findings about projected future precipitation levels:

Projected precipitation changes are relatively modest in 2025. However, by the 2055 and 2080 periods, precipitation decreases by up to 10 percent in much of Lower Basin. *In contrast, precipitation increases by up to 10 percent in the Upper Basin at higher elevation and toward the north (Green River Basin).*

Fed. Supp. App. Vol. II at 317 (2012 Study, Technical Report B—Water Supply Assessment) (emphasis added). *See* Fed. Supp. App. Vol. II at 314 (same Technical Report explaining that “[b]ecause the magnitude and variability of future water supply is uncertain, a set of future water supply scenarios were developed to explore that uncertainty, including the potential effects of future climate variability and climate change”).

In other words, Reclamation’s 2012 Study found that: (i) future precipitation is expected to vary within the Colorado River Basin depending on location (Upper Basin vs. Lower Basin); and (ii) future precipitation is expected to increase (not decrease) in the specific area of the Upper Basin relevant to the Exchange Contract, *i.e.*, the Green River Basin. There is no “conflict” (Brief 26) between those findings

and the EA here—and Conservation Groups do not contend otherwise. Moreover, those findings from the 2012 Study *support* Reclamation’s chosen method of analyzing the future hydrologic impacts of the Exchange Contract by using the historically based flow-modeling methodology described in more detail below to create a worst-case scenario as a surrogate for accounting for climate-change concerns. *See infra* at 26-28.

*Second*, Conservation Groups fault Reclamation for not responding to three additional studies cited by commenters on the draft EA, referred to as “Udall & Overpeck 2017,” “McCabe et al. 2017,” and “Xiao et al. 2018.” Brief 27-28; *see id.* at 14. While Reclamation did not address those additional studies by name, its response to Conservation Groups’ comments on the draft EA and the text of the EA itself (discussed above) explain why the additional studies do not provide a scientifically sound basis for modeling the future hydrologic impacts of the Exchange Contract. Like Reclamation’s 2012 Study, the cited additional studies analyze projections of future water availability at a much larger geographic scale—the entire Colorado River Basin or the entire Upper Basin<sup>5</sup>—than Reclamation

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<sup>5</sup> Udall & Overpeck 2017 addresses “future climate change impacts on the Colorado River” as a whole in both the Upper and Lower Basins. App. Vol. III at 397-400. The “focus” of McCabe et al. 2017 is the entire Upper Colorado River Basin, *i.e.*, “that portion of the Colorado River basin upstream of the stream gauge at Lees Ferry, [Arizona].” App. Vol. III at 366; *see* App. Vol. III at 367 (Figure 1) (showing Upper Colorado River Basin as located in Wyoming, Utah, Colorado, New Mexico, and Arizona). Like McCabe et al. 2017, Xiao et al. 2018 “mainly focus[es] on” the entire

determined is scientifically appropriate to evaluating the hydrologic impact of the Exchange Contract, *i.e.*, a portion of the Green River Basin. *Cf. Garland v. Ming Dai*, 141 S. Ct. 1669, 1679 (2021) (explaining that “a reviewing court must uphold even a decision of less than ideal clarity if the agency’s path may reasonably be discerned”) (internal quotation marks omitted). Moreover, the geographic boundaries of Reclamation’s analysis in the EA are drawn consistent with those of the Flaming Gorge ROD/EIS, namely, Reaches 1 and 2 of the Green River. Fed. Supp. App. Vol. II at 321. Ultimately, Reclamation is entitled to substantial deference in defining the geographical scope of its hydrologic analysis. *See Kleppe*, 427 U.S. at 414 (explaining that the “determination of the extent and effect of [cumulative impacts], *and particularly identification of the geographic area within which they may occur*, is a task assigned to the special competency of the appropriate agencies”) (emphasis added); *San Juan Citizens All. v. Stiles*, 654 F.3d 1038, 1057 (10th Cir. 2011) (“Setting the boundaries of the region to be analyzed involved technical and scientific judgments within the [agencies’] area of expertise, and their conclusion regarding which Class I sites to include in the analysis is one to which we defer.”).

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Upper Colorado River Basin, “defined as the drainage area above Lees Ferry, AZ.” App. Vol. III at 381-382.

*Third*, Conservation Groups contend that Reclamation’s chosen method of modeling future hydrologic impacts of the Exchange Contract for years 2018-2060—known as “Trace 63”—does “*not* account for the new warming and drying trends detailed in the studies” (*i.e.*, Udall & Overpeck 2017, McCabe et al. 2017, and Xiao et al. 2018). Brief 30. But that contention misses the mark because (as shown) it rests on the erroneous premise that Reclamation’s 2012 Study and the other cited studies apply to modeling the future hydrologic impacts *of the Exchange Contract*, as distinguished from modeling future hydrological conditions in much larger geographic areas like the entire Colorado River Basin or the Upper Basin thereof. Significantly, Conservation Groups do not suggest (much less demonstrate) how Reclamation could have used its 2012 Study, Udall & Overpeck 2017, McCabe et al. 2017, or Xiao et al. 2018 to model the future hydrological impacts of the Exchange Contract in a scientifically valid fashion.

Conservation Groups summarily dismiss Trace 63—Reclamation’s chosen method of modeling future hydrologic impacts of the Exchange Contract—as “backward-looking (based on 1969-2015 data).” Brief 30; *see* Amicus Brief of Ute Indian Tribe 19. That perfunctory criticism does not address Reclamation’s reasons for using Trace 63 and is particularly unfounded given Conservation Groups’ inability to even suggest a different scientifically valid method of modeling the future hydrologic impacts of the Exchange Contract.

Far from doing “essentially . . . nothing” (Brief 28) to address comments on the draft EA, Reclamation used Trace 63 precisely to address “[c]oncerns over a changing climate,” which “have been prominent in environmental and water resources.” App. Vol. II at 211. To oversimplify somewhat, Trace 63 is a sequence of historical natural flows in the Colorado River system beginning in 1969 and ending in 2015, a 46-year time horizon similar in length to the 42-year time horizon (2018-2060) over which Reclamation sought to model the future hydrologic impacts of the Exchange Contract. App. Vol. II at 207, 211-212.<sup>6</sup> Data on natural flow levels during the period covered by Trace 63 is derived from Reclamation’s long-term planning model, Colorado River Simulation System. App. Vol. II at 204, 211.

Reclamation explained that Trace 63 “moves through the wet years in the 1980s, but ends with the drought in 2000-2015.” App. Vol. II at 212. Reclamation found that “[i]t is the period of operations between 2000-2015 that ha[s] the greatest impact” on the water level (“elevation”) in Flaming Gorge Reservoir, *i.e.*, Trace 63 represents “the worst-case scenario.” *Id.* Reclamation found that “[t]he impact trends of implementing the exchange agreement are seen in the worst-case scenario.” *Id.* Yet even in the worst-case scenario, involving 15 consecutive years of drought, Reclamation found that, if the Exchange Contract were implemented, the water level

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<sup>6</sup> The EA states that Trace 63 begins in 1979. App. Vol. II at 190, 212. That is an inadvertent typographical error; the correct year is 1969.

in Flaming Gorge Reservoir would remain above the minimum level required by the Flaming Gorge EIS. App. Vol. II at 213-214 (Figure 2).

Reclamation further found that Trace 63 “should be considered one representation of potential possibilities of future hydrology and it is statistically unlikely that [T]race 63 will happen,” *i.e.*, in Reclamation’s technical judgment, it is unlikely that the future worst-case scenario will occur. App. Vol. II at 212. That prediction by Reclamation is buttressed by its finding, in its 2012 Study, that by 2055, precipitation “*increases* by up to 10 percent in the Upper Basin at higher elevation and toward the north (Green River Basin).” Fed. Supp. App. Vol. II at 317 (2012 Study, Technical Report B—Water Supply Assessment) (emphasis added).

On this record, Reclamation reasonably concluded that, by using actual observed historical data, Trace 63 modeling provides in effect an adequate surrogate for analyzing future hydrologic impacts of the Exchange Contract, including accounting for “[c]oncerns over a changing climate,” App. Vol. II at 211, during the relevant time-horizon (2018-2060). Consequently, the record here is distinguishable from those in the cases cited by Conservation Groups where the Court found that the agency’s analysis did not comply with NEPA. Brief 31-32. Unlike those cases,



Reclamation did not ignore relevant studies, evidence, or public comment in modeling the future hydrologic impacts of the Exchange Contract.<sup>7</sup>

In sum, on this record, Reclamation’s modeling of future hydrologic impacts of the Exchange Contract is entitled to deference. *San Juan Citizens All.*, 654 F.3d at 1057 (10th Cir. 2011) (explaining that “an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court may find contrary views more persuasive”) (quoting *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989)); *Utahns for Better Transp.*, 305 F.3d at 1163 (“So long as the record demonstrates that the agencies in question followed the NEPA procedures, which require agencies to take a ‘hard look’ at the environmental consequences of the proposed action, the court will not second-guess the wisdom of the ultimate decision.”).

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<sup>7</sup> See *New Mexico*, 565 F.3d at 715 (cited at Brief 31) (finding that “[t]he record is silent regarding the source of BLM’s determination that injection (and thus, contamination) is unlikely, and it does provide some support for a contrary conclusion”); *Utahns for Better Transp. v. U.S. Dep’t of Transp.*, 305 F.3d 1152, 1180 (10th Cir. 2002) (cited at Brief 31) (finding that the “[t]he record repeatedly and without contradiction indicates” that the EIS’s analysis of wildlife impacts only within 1000 feet of a proposed highway did not allow for consideration of impacts on migratory birds, and noting that other federal agencies had presented evidence that the 1000-foot limit was too narrow); *Davis v. Mineta*, 302 F.3d 1104, 1123 (10th Cir. 2002), *abrogated on other grounds by Dine Citizens Against Ruining Our Env’t v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016) (cited at Brief 32) (finding that EPA’s comment concerning induced-growth impacts of a proposed highway was “undeniably relevant” but “[i]t does not appear these concerns were ever adequately addressed in the EA”).

**B. Reclamation reasonably analyzed the hydrologic impacts of the Exchange Contract on the Green River.**

Conservation Groups contend that Reclamation “failed to take a hard look at the 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.” Brief 33. That contention lacks merit.

*First*, the Exchange Contract does not result in “new water depletions” (*id.*) from the Green River. Rather, as shown *supra* at 5-6, Utah has the right to appropriate water under its Compact Authority irrespective of the Exchange Contract. Under the Exchange Contract, Utah agreed to forbear its right to issue water rights up to 72,641 AF/year from the Green River and its tributaries to which it is entitled under its Compact Authority. In exchange, the Contract allows Utah to use an equal amount of Assignment Water as released by Reclamation from the Flaming Gorge Unit, in accordance with the Flaming Gorge ROD/EIS, as if Utah were using natural flows from the Green River and its tributaries under its Compact Authority. App. Vol. I at 156.

As such, on a net basis, no “new” water is depleted from the Green River under the Exchange Contract. The contract facilitates a “new” depletion of water only in the limited sense that the location and timing of Utah’s depletions are *different* as compared to the location and timing of the depletions absent the contract.

As the EA explains, the proposed water exchange contract “is for an existing water right” and “[n]o new water right would be acquired as part of the Proposed Action.” App. Vol. II at 180.

*Second*, Conservation Groups largely ignore Reclamation’s hydrology modeling, discussed above (pp. 21-28), which does not require the specificity of detail they seek in order to permit Reclamation to reasonably assess the impacts of the Exchange Contract. To be sure, as Conservation Groups note (Brief 34), in comments on the draft EA submitted by the National Park Service, that agency—while commending Reclamation’s hydrology modeling as “rigorous”—sought additional detail as to “where (or how much) water will be diverted from the Green River and where return flows might come back into the Green River.” App. Vol. II at 297.

Ultimately, however, Reclamation determined that such fine-grained modeling was unnecessary for reaching a reasoned conclusion based on the modeling that Reclamation performed that the most likely locations and times of diversion under the Exchange Contract would be within the scope of impacts already considered in the Flaming Gorge ROD/EIS. App. Vol. II at 204 (“These depletions and diversions were covered in the [Flaming Gorge EIS] and are being analyzed for the purpose of signing [the Exchange Contract].”). Reclamation modeled multiple scenarios, including the “GRB Depletion Scenario,” or the “Proposed Action.” App.

Vol. II at 189. That scenario models the hydrological impact of depleting the total amount of available water under the Exchange Contract (58,957 AF/year)<sup>8</sup> and applies an assumption that the location and timing of the depletion “would occur directly below FG [Flaming Gorge] Dam during the agricultural growing season from July through the end of September.” *Id.* Reclamation also modeled a “No Action Scenario,” in which “GRB depletions were assumed to be zero for the entire model run” and “[d]epletion data for all other locations were . . . held steady at 2018 levels.” *Id.*

Reclamation then found that “[t]he modeling shows impacts” of the GRB Depletion Scenario (*i.e.*, the “Proposed Action”) are “insignificant as compared against” the No Action Scenario. App. Vol. II at 191. Specifically, Reclamation found that “[t]he difference between the No Action [Scenario] and implementation of the Proposed Action results in a maximum 6 foot drop in the reservoir elevation,” *i.e.*, at most a 6 foot drop in the water level in Flaming Gorge Reservoir, which is

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<sup>8</sup> 58,957 AF/year is the amount of water available for exchange under the Contract because Utah previously developed 13,684 AF/year of the 72,641 AF/year allocated to it from the Green River Block by the Assignment Agreement. App. Vol. II at 186-187 (Table 1-1); *see supra* at 12. The difference between 72,641 AF/year and 13,684 AF/year is 58,957 AF/year. One acre-foot is about 326,000 gallons, or enough water to cover an acre of land, about the size of a football field, one foot deep. 58kAf is roughly the amount needed for 58,000 homes per year on small subdivision lots.

“within normal operating procedures analyzed in the [Flaming Gorge EIS] and implemented in the [Flaming Gorge] ROD.” *Id.*

Reclamation also modeled a third scenario, referred to as the “Full Depletion Scenario,” in which “all assumptions from the GRB 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.” App. Vol. II at 189. Reclamation explained that “[i]t is important to remember that this is *the worst case scenario*—water is assumed to be taken below FG [Flaming Gorge] Dam in the projected driest year.” App. Vol. II at 193 (emphasis added).

Reclamation found that the Full Depletion Scenario “increases the maximum difference in elevation at FG Reservoir to 30 feet when compared to the No Action Alternative,” *i.e.*, a 30 foot drop in the water level in Flaming Gorge Reservoir, which is “still within the [Flaming Gorge EIS] range.” *Id.* See also App. Vol. II at 180 (Reclamation’s finding that “in all scenarios, hydrology under the Proposed Action falls within the analysis in the [Flaming Gorge EIS] and the operational parameters established in the [Flaming Gorge] ROD”).

Conservation Groups largely ignore Reclamation’s detailed modeling—apart from characterizing as “arbitrar[y]” (Brief 34) the agency’s decision (discussed above), in the GRB Depletion Scenario and the Full Depletion Scenario, to assume that the location and timing of the depletions “would occur directly below [Flaming

Gorge] Dam during the agricultural growing season from July through the end of September.” App. Vol. II at 189. But Conservation Groups do not explain the basis for their assertion that Reclamation’s assumption is arbitrary. Rather, that label appears to follow from their erroneous supposition that, to reasonably assess potential hydrological impacts of the Exchange Contract, Reclamation was required to perform modeling so fine-grained as to “identify the actual location of diversions [and] return flows.” Brief 35. As shown, that supposition is incorrect. Rather, the timing/location information sought by Conservation Groups is not essential to reasoned decision-making given the other modeling that Reclamation conducted and its conclusion that depletions under any of the modeled scenarios would be within the range in the Flaming Gorge ROD/EIS. *See supra*, pp. 31-33. *Cf.* 40 C.F.R. §1502.22(a) (for an EIS, incomplete or unavailable information must be included only if “essential to a reasoned choice among alternatives”). Reclamation also rationally sought to include in its modeling only those future depletions that are reasonably foreseeable, *i.e.*, those that “would occur at a particular time and place” (App. Vol. II at 237); but Reclamation could only speculate about the then-unknown location of specific points of diversion and return flows for would-be users of the Green River Block of water.

Reclamation’s assumption is not arbitrary for a further reason. The EA explained: “In this analysis, the State’s total depletions in the GRB Depletion and

No Action Scenarios differ by the volume of water being diverted below FG [Flaming Gorge] Dam. This modeling approach *isolates the impact* of diverting water out of the Green River under the GRB Depletion Scenario as compared against the No Action Scenario and Full Depletion Scenario.” App. Vol. II at 188 (emphasis added). Isolating the hydrological impact of diverting water under the GRB Depletion Scenario (the “Proposed Action”) so that it can be *meaningfully compared* to the hydrological impact of the No Action Scenario and Full Depletion Scenario reflects a reasonable approach to hydrology modeling. *See Pennaco Energy, Inc. v. U.S. Dep’t of the Interior*, 377 F.3d 1147, 1150 (10th Cir. 2004) (explaining that in an EIS, agencies are “to consider the environmental impact of the proposed action *and compare this impact with* that of alternatives to the proposed action,” including the no action alternative) (internal quotation marks omitted) (emphasis added); *cf.* 40 C.F.R. § 1502.2(a) (NEPA analysis should not be “encyclopedic”). Conservation Groups do not contend otherwise; rather, they ignore Reclamation’s reasoned explanation.

*Third*, Reclamation reasonably assessed the hydrological impacts of the Exchange Contract in Reach 3 of the Green River. Reclamation’s Hydrology Modeling Technical Report (Appendix A to the EA) explains:

The Flow Recommendations and [Flaming Gorge] ROD *limit Reclamation’s compliance responsibility to meeting flow targets at Reach 2 measured on the Green River at Jensen, Utah*. This analysis

looks at the impact of the GRB depletion scenario [*i.e.* the Proposed Action] *at Reach 2*, according to the modeled information.

App. Vol. II at 208 (emphasis added). *See* App. Vol. II at 206 (Reclamation explaining that depletions “below Reach 2” are “not included in the geographical boundaries of this analysis”).

Based on its modeling, Reclamation found that the Exchange Contract would have “minimal impacts on hydrology” in Reach 2 (App. Vol. II at 191) and accordingly that Reclamation “continues to meet its commitments under the [Flaming Gorge] ROD” regarding flow targets for Reaches 1 and 2. App. Vol. II at 301 (response to comment from U.S. Fish & Wildlife Service). Reclamation then explained that “[u]nder the [Flaming Gorge 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.” App. Vol. II at 202.

Conservation Groups do not question Reclamation’s conclusion that the Flow Recommendations and the Flaming Gorge ROD limit Reclamation’s compliance responsibility to meeting flow targets for Reach 2. Nor do they question Reclamation’s finding that the flow targets for Reaches 1 and 2 would continue to be met if the Exchange Contract were implemented.

Rather, Conservation Groups fault Reclamation for making “assumptions about the potential impacts to Reach 3 without modeling them.” Brief 37. However,



Conservation Groups do not attempt to demonstrate that Reclamation acted outside its discretion in applying a technical assumption that, if the Exchange Contract were implemented, flow targets would be met for Reach 3 because they would continue to be met for Reaches 1 and 2. This assumption is reasonable because Reclamation was concerned in the EA with determining whether implementing the Exchange Contract would take the agency outside the parameters of the Flaming Gorge ROD/EIS; but Reclamation could not have reasonably answered that question if it had used different assumptions (or used a different geographical scope) than the Flaming Gorge ROD/EIS did. *See Morris*, 598 F.3d at 691 (deference to the agency “is especially strong where the challenged decisions involve technical or scientific matters within the agency’s area of expertise”).

Reclamation’s assumption is supported by modeling Reclamation performed for Reaches 1 and 2. The EA found that the Full Depletion Scenario—*i.e.*, a worst-case scenario (*see supra* at 33)—“maintains approximately 250 cfs [cubic feet per second] lower flows for Flaming Gorge 80 percent of the time during the time of greatest potential impact (October-December).” Fed. Supp. App. Vol. I at 72. Even so, the EA found that the impact of the Full Depletion Scenario on the relevant endangered fish species (a concern of Conservation Groups, Brief 38) “*would be negligible* due to the minimum required flows and cold-water biology of the endangered fishes,” *i.e.*, Colorado pikeminnow, razorback sucker, bonytail, and

humpback chub. *Id.* (emphasis added); *see also* Fed. Supp. App. Vol. I at 63 (Table 3-2) (listing pertinent species of endangered fish).

The fact that even the reduced flow in Reaches 1 and 2 under the worst-case depletion scenario would have a negligible impact on endangered species of fish supports Reclamation’s assumption that flow targets for Reach 3 would be met under the Exchange Contract—which is, after all, far from a worst-case depletion scenario. Put another way, by modeling all of the Green River Block water as being depleted below Flaming Gorge Dam and not modeling any return flows, Reclamation’s worst-case scenario is essentially one in which the Green River Block water never makes it to the Green River and thus could not benefit the endangered fish in any of the three reaches. But nonetheless, the EA found that the impact of this scenario on the endangered fish “would be negligible.” Fed. Supp. App. Vol. I at 72. In fact, the EA found that “[t]he additional summer flows potentially created under the Proposed Action could provide *benefit* to the endangered fishes.” Fed. Supp. App. Vol. I at 71 (emphasis added).

Conservation Groups err in contending that Reclamation’s hydrology modeling ended at Reach 2 because its model was not capable of assessing impacts in Reach 3. Brief 38. Rather, as shown, Reclamation’s modeling ended at Reach 2 because of a geographical limit deriving from its compliance responsibility under the Flaming Gorge ROD, which is limited to meeting flow targets in Reach 2 at

Jensen, Utah. *See supra* at 35-36. The Exchange Contract states that the “Recovery Program parties,” which includes Utah and Reclamation (among others), are responsible for meeting ESA responsibilities in Reach 3. App. Vol. I at 154; *see* Fed. Supp. App. Vol. II at 329 (listing Recovery Program parties). Conservation Groups’ contention is based on a *draft* study concerning a *different* model from the one used by Reclamation for the Exchange Contract. Fed. Supp. App. Vol. II at 286-301. Conservation Groups do not acknowledge that the study they cite is only a draft. More importantly, the cited draft study concerns the Green River Basin Model, which is not the model Reclamation used here. For the Exchange Contract, Reclamation used its Colorado River Simulation System model. App. Vol. II at 204.

In sum, Reclamation reasonably assessed the potential environmental impacts of the Exchange Contract on the Green River, including Reach 3. Reclamation’s choice of methodology for this site-specific analysis was reasonable and entitled to deference. *Citizens’ Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1027 (10th Cir. 2002) (holding that the plaintiff’s attack on an agency decision to use “approximately equal value,” or an estimate failed because it “ignore[d] the general rule that courts defer to the expertise and discretion of the agency to determine proper testing methods”) (citation omitted); *Colo. Env’tl Coal. v. Dombeck*, 185 F.3d 1162, 1172 (10th Cir. 1999) (concluding that the appellants

failed to show how additional site-specific data is “‘essential’ to reasoned to reasoned decision making”).

**C. Reclamation reasonably analyzed cumulative impacts of the Exchange Contract.**

An EA must “include an analysis of the cumulative impacts of a project,” *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 895 (9th Cir. 2002), which are impacts that could “result[] from the incremental impact of the action when added to other past, present and reasonably foreseeable actions,” *NRDC v. U.S. Forest Serv.*, 421 F.3d 797, 814 (9th Cir. 2005) (internal quotation marks omitted); *see also* 40 C.F.R. § 1508.7 (defining cumulative impacts). “NEPA does not require an agency to consider the environmental effects that speculative or hypothetical projects might have on a proposed project.” *Sierra Club v. Lujan*, 949 F.2d 362, 368 (10th Cir. 1991). *See Wyoming v. U.S. Dep’t of Agric.*, 661 F.3d 1209, 1251–52 (10th Cir. 2011) (“[a]gencies only have a duty to discuss ... impacts that are reasonably foreseeable”) (quoting *Utahns for Better Transp.*, 305 F.3d at 1176)). “[C]umulative impacts that are too speculative or hypothetical to meaningfully contribute to NEPA’s goals of public disclosure and informed decisionmaking need not be considered.” *Citizens for a Healthy Cmty. v. U.S. Bureau of Land Mgmt.*, 377 F. Supp. 3d 1223, 1238 (D. Colo. 2019).

Respecting the Exchange Contract, Reclamation found that “[c]umulatively, there would not be a significant impact to hydrology based on the analysis performed

in this EA.” App. Vol. II at 193. Conservation Groups contend, however, that Reclamation failed to take a “hard look” at cumulative impacts because Reclamation’s analysis included reasonably foreseeable future depletions only in Utah and ignored such depletions in other Upper Basin states (Colorado, Wyoming, and New Mexico). Brief 39-42. That contention lacks merit. Reclamation did not ignore any reasonably foreseeable future depletions in Colorado, Wyoming, and New Mexico; rather, Reclamation found that only certain future depletions in Utah meet its definition of a “reasonably foreseeable future depletion”—a definition not challenged by Conservation Groups.

The EA explains that in the context of Reclamation’s hydrology modeling, “a reasonably foreseeable future depletion is one which has state legislation, or a tribal resolution or federal Indian water settlement, or a FONSI or ROD.” App. Vol. II at 188. The EA refers the reader to “the full technical hydrology report (Appendix A) for further discussion.” *Id.* Appendix A, in turn, explains that Reclamation’s modeling “adopts a rigorous definition of what reasonably foreseeable future depletions are *in the Upper Basin*,” App. Vol. II at 237 (emphasis added), *i.e.*, in Wyoming, Utah, Colorado, and New Mexico. This approach to modeling the alternatives “takes the strictest approach to defining what is included and excluded for the cumulative impacts analysis” that agencies must perform under 40 C.F.R. § 1508.7. *Id.*; *see also* App. Vol. II at 237 n.6 (quoting that regulation).

Applying that definition of “a reasonably foreseeable future depletion,” Appendix A identifies 12 such depletions, all of which are located in Utah, App. Vol. II 207 (Table 2, showing total depletion of 157.38 kAF/year at 2060 level for those depletions); *i.e.*, Reclamation found no future depletions that meet its definition in Wyoming, Colorado, and New Mexico. *Id.* That being so, Reclamation explained that its modeling assumes that depletions in those Upper Basin states “remained constant at the 2018 depletion levels currently in CRSS [Colorado River Simulation System].” App. Vol. II at 205.

As noted, Conservation Groups do not challenge Reclamation’s definition of “a reasonably foreseeable future depletion,” and they acknowledge that it is a “strict” definition. Brief 41. Rather, the crux of Conservation Groups’ complaint is that the EA “provides no information to show” that there are no reasonably foreseeable future depletions in Wyoming, Colorado, and New Mexico that meet Reclamation’s (unchallenged) definition. *Id.* But Reclamation is not required to prove a negative. Rather, a “presumption of validity attaches to the agency action[,] and the burden of proof rests with the appellants who challenge such action.” *WildEarth Guardians*, 703 F.3d at 1183 (quotation marks omitted). *See New Mexico*, 565 F.3d at 704; *Citizens’ Comm. to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1176 (10th Cir. 2008). Conservation Groups, however, do not cite anything in the administrative record demonstrating (or even suggesting) that Reclamation overlooked particular

future depletions in Wyoming, Colorado, or New Mexico that meet Reclamation’s (uncontested) definition of “a reasonably foreseeable future depletion.”

In sum, Reclamation’s cumulative impacts analysis for the Exchange Contract is reasonable and entitled to deference because the record demonstrates that, using its technical expertise, Reclamation made a “reasonable, good faith, objective presentation” of the cumulative impacts from reasonably foreseeable future depletions (as defined by Reclamation) “sufficient to foster public participation and informed decision making.” *Colo. Env’tl Coal.*, 185 F.3d at 1177. *See also Jiron*, 762 F.3d at 1060 (the Court’s “deferential review is especially strong where the challenged decisions involve technical or scientific matters within the agency’s area of expertise”) (citation and internal quotation marks omitted).

**D. Reclamation’s No Action Alternative used an appropriate environmental baseline to analyze the impacts of the Exchange Contract.**

“In general, NEPA analysis uses a no-action alternative as a baseline for measuring the effects of the proposed action.” *Biodiversity Conservation Alliance v. U.S. Forest Serv.*, 765 F.3d 1264, 1269 (10th Cir. 2014). “[I]n 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.” *Id.* (quoting *Custer Cnty. Action Ass’n v. Garvey*, 256 F.3d 1024 (10th Cir. 2001)).

Conservation Groups contend that Reclamation’s EA “failed to accurately identify the status quo (no diversion/depletion) in the no action alternative,” such that Reclamation’s NEPA review “used the wrong baseline for its analysis from the start.” Brief 45. That contention is contrary to the record.

*First*, Reclamation’s No Action Alternative accurately describes the status quo or “current level of activity.” *Biodiversity Conservation Alliance*, 765 F.3d at 1269. Prior to the Exchange Contract, Utah (through various third-party water users) had already developed 13,684 AF/year of the 72,641AF/year in the Green River Block of the Assignment Water. App. Vol. II at 186-187 and Table 1-1; *see supra* at 32 & n.8. As for the remaining 58,957 AF/year, the No Action Alternative correctly recognized that “[t]he State would remain free to develop their [sic] apportioned water right under the 1996 Assignment”—as Utah had already done respecting the 13,684 AF/year portion of the block. Fed. Supp. App. Vol. I at 36. Similarly, as Reclamation explained in response to a comment from one of Conservation Groups (Utah Rivers Council): “In the last 20 years over 13kAF of the GRB WR [water right] has been developed. It is not unreasonable that the State could develop a significant portion of the remaining GRB WR water in the next 40 years.” Fed. Supp. App. Vol. I at 265. Reclamation’s explanation that Utah would



remain free to develop its water right respecting the 58,957 AF/year portion of the Green River Block *going forward* is plainly not a statement by the agency—as Conservation Groups imply (Brief 44)—that Utah *had already done so* prior to the Exchange Contract.

*Second*, specifically with respect to hydrology, Reclamation identified a No Action Scenario. *See supra* at 32. In the No Action Scenario, “GRB depletions were *assumed to be zero* for the entire model run,” and “[d]epletion data for all other locations were . . . *held steady at 2018 levels.*” App. Vol. II at 189 (emphasis added). The No Action Scenario accurately describes the status quo or “current level of activity,” *Biodiversity Conservation Alliance*, 765 F.3d at 1269: prior to the Exchange Contract, Reclamation assumed that none of the remaining 58,957 AF/year in the Green River Block is depleted, and Reclamation “held steady” at current 2018 (*i.e.*, pre-Exchange Contract) levels the depletions for all other locations by other water users.

*Third*, Conservation Groups contend that Reclamation’s use of the term “forbear” in the EA’s description of the Proposed Action “implies that Utah would discontinue a current water depletion” if the Exchange Contract were implemented, which is “not the case” and shows that the No Action Alternative erroneously identified the status quo. Brief 43; *see* Amicus Brief 12-14. That contention,

however, is based on a misunderstanding of the EA's use of the term "forebear," as the district court correctly held.

The passage from the EA on which Conservation Groups rely states: "If 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." App. Vol. II at 178; *see supra* at 5-6. As the district court correctly concluded in rejecting Conservation Groups' gloss on this passage:

Plaintiffs' reading of the "forebear" statement to imply a current use is untenable. The statement is a conditional statement setting forth a future action: If the contract is implemented, the State would not deplete flows to which it is entitled. *The statement does not purport to describe the current water use situation.*

App. Vol. I at 136 (emphasis added); *see also id.* (district court's conclusion that Conservation Groups' "fundamental misunderstanding of the agency action at issue renders their arguments meritless").

In sum, Reclamation identified an appropriate No Action Alternative in the EA.

**E. Reclamation's determination that an EIS was not required is not a clear error of judgment.**

Because Reclamation reasonably concluded that the Exchange Contract will not have a significant impact on the environment, an EIS was not required. Reclamation's decision not to prepare an EIS is further supported by the relevant

NEPA regulations, which establish that significance under NEPA depends on the context and intensity of the environmental impacts. 40 C.F.R. § 1508.27. “Context” captures the notion that “[s]ignificance varies with the setting of the proposed action.” *Id.* § 1508.27(a). “[I]ntensity” refers to the severity of the impact. *Id.* § 1508.27(b). In evaluating intensity, the NEPA regulations identify ten criteria that agencies should consider. *Id.* The presence of any one factor or combination of factors does not necessarily trigger the preparation of an EIS; rather, the agency is to consider all ten factors. *Hillsdale*, 702 F.3d at 1181 (holding that agencies are to weigh the factors in determining whether an EIS is required). This Court has held that the decision not to prepare an EIS is improper only if the plaintiffs can demonstrate “that the [agency’s] conclusion of non-significant effect on the environment represents a ‘clear error of judgment.’” *WildEarth Guardians v. U.S. Fish & Wildlife Service*, 784 F.3d 677, 691 (10th Cir. 2015) (citation omitted). “An agency’s decision to issue a [finding of no significant impact] and not prepare an EIS is a factual determination which implicates agency expertise.” *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1274 (10th Cir. 2004).

Conservation Groups do not acknowledge the foregoing principles, nor do they specify which intensity factor or factors are triggered here in their view. They suggest that one factor is relevant and requires an EIS: highly controversial effects of the Exchange Contract. Brief 46-48; 40 C.F.R. § 1508.27(b)(4) (“The degree to

which the effects on the quality of the human environment are likely to be highly controversial.”). That contention lacks merit.

This Court has held that “controversy” in the context of this factor “does not mean opposition to a project, but rather ‘a substantial dispute as to the size, nature, or effect of the action.’” *Hillsdale*, 702 F.3d at 1181 (quoting *Middle Rio Grande Conservancy District v. Norton*, 294 F.3d 1220, 1229 (10th Cir. 2002)). In attempting to establish such controversy, however, Conservation Groups largely just recycle their arguments that in the EA, Reclamation failed to respond to or resolve significant concerns raised in comments on the draft EA submitted by federal agencies and others. Brief 46-47 (referring back to earlier sections of Conservation Group’s brief). As previously shown *supra* at 21-46, none of these arguments establishes that Reclamation’s finding of no significant impact was a clear error of judgment.

Conservation Groups also contend that the “highly controversial” factor is triggered and requires an EIS because 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.” Brief 47. However, Reclamation responded to the Tribe’s comments on the draft EA. Fed. Supp. App. Vol. I at 276. The Tribe, amicus here, disagrees with Reclamation’s response and claims Reclamation violated NEPA in analyzing the impact of the

Exchange Contract on the Tribe's water rights. Amicus Brief 10-12, 16-17, 21-22. But the proper forum for resolving that NEPA claim is the Tribe's pending suit against the Interior Department in the Utah federal district court. *See* Conservation Groups' Brief viii; Amicus Brief 1-2.<sup>9</sup>

Finally, Conservation Groups contend that Reclamation "admits the water rights issues at stake are controversial." Brief 47. For that "admission," Conservation Groups cite the EA's statement that "[t]his contract is needed to resolve a longstanding disagreement between Reclamation and the State regarding use of the water right assigned in 1996." App. Vol. II at 201. But the mere fact that the Exchange Contract resolved a "longstanding disagreement" about the use of a water right does not establish that there must be "a substantial dispute as to the size, nature, or effect of the action" for purposes of 40 C.F.R. § 1508.27(b)(4). *Hillsdale*, 702 F.3d at 1181. This argument does not demonstrate that Reclamation's finding of no significant impact was a clear error of judgment.

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<sup>9</sup> Amicus also contends that, because Reclamation receives monetary compensation from Utah under the Exchange Contract, Reclamation "has a patent conflict of interest that delegitimizes the entirety of [Reclamation's] NEPA analysis." Amicus Brief 24. However, Conservation Groups do not make that argument, and this case does not present the exceptional circumstances where the Court should reach issues raised only by an amicus. *See, e.g., Sierra Club v. EPA*, 964 F.3d 882, 897 n.15 (10th Cir. 2020); *United States v. Bd. of Cnty. Comm'rs*, 843 F.3d 1208, 1215 (10th Cir. 2016). Again, the proper forum for resolving that NEPA claim is the Tribe's pending suit against the Interior Department in the Utah federal district court.

In sum, Reclamation was not required to prepare an EIS under the “highly controversial” factor in 40 C.F.R. § 1508.27(b)(4).

## **II. Conservation Groups are not entitled to an order vacating the Exchange Contract.**

For the foregoing reasons, all of Conservation Groups’ challenges to Reclamation’s EA and finding of no significant impact fail. Accordingly, this Court has no cause to consider what remedy would be appropriate if Conservation Groups’ challenges had merit. To the extent this Court does deem the question of remedy relevant, it can remand to the district court to choose a remedy in the first instance. *See, e.g., WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1239 (10th Cir. 2017). Should this Court deem the question of remedy relevant and decide to choose a remedy itself, Conservation Groups have not shown that they would be entitled to an order vacating the Exchange Contract. Brief 48-50.

Even assuming *arguendo* that the Exchange Contract is a “final agency action” subject to judicial review under the APA, 5 U.S.C. § 704, Conservation Groups have not shown that they would be entitled to an order vacating the Exchange Contract, should this Court deem the question of remedy relevant and decide to choose a remedy itself.

As many of this Court’s sister circuits have recognized, while the APA states that a reviewing court “shall . . . set aside” unlawful agency action, 5 U.S.C. § 706, whether to grant a petitioner’s request to vacate an agency action is controlled by

principles of equity. *E.g.*, *Natural Res. Def. Council v. EPA*, 808 F.3d 556, 584 (2d Cir. 2015); *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1289-91 (11th Cir. 2015); *Nat'l Org. of Veterans' Advocates v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1380 (Fed. Cir. 2001); *Central Me. Power Co. v. Fed. Energy Regulatory Comm'n*, 252 F.3d 34, 48 (1st Cir. 2001); *Central & Sw. Servs. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000); *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995); *Allied-Signal v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). That prevailing view is consistent with the statutory context in which Section 706 appears. *See* 5 U.S.C. § 702 (“[n]othing herein . . . affects . . . the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground”); *see also id.* § 703 (referring to “actions for declaratory judgment,” and thus demonstrating that remedies other than vacatur are available under the APA).

This Court has not held otherwise. To the contrary, it has described vacatur as “a common, and often appropriate form of injunctive relief”—not a mandatory one. *Dine Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831, 859 (10th Cir. 2019). And in practice, it has sometimes reversed agency decisions and remanded directly to the agency without specifying that agency action should be vacated. *E.g.*, *Nat'l Parks and Conservation Ass'n v. FAA*, 998 F.2d 1523, 1533-34 (10th Cir. 1993). Other times, it has left the decision of what relief to grant when

agency action is deemed unlawful to the district court, without compelling vacatur. *See, e.g., WildEarth Guardians*, 870 F.3d at 1239.

Equitable relief like vacatur “does not follow from success on the merits as a matter of course,” but instead is subject to a court’s “equitable discretion.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008). Under the widely used *Allied-Signal* test, the pertinent considerations are “the seriousness of the order’s deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.” 988 F.2d at 150-51. Under that test, “[v]acatur typically is inappropriate where it is ‘conceivable’ that the [agency] can, if given the opportunity, create a supportable rule.” *Prometheus Radio Proj. v. FCC*, 824 F.3d 33, 52 (3d Cir. 2016); *see also Allied-Signal*, 988 F.2d at 151.

Regarding the first *Allied-Signal* factor, it is at least “conceivable” Reclamation could reach the same result on remand. *Allied-Signal*, 988 F.2d at 151. If the Court were to find that Reclamation did not take the requisite “hard look” at one or more potential impacts of the Exchange Contract, it is at least conceivable that Reclamation could reissue a FONSI after reconsidering those issues on remand. Put another way, it is at least conceivable that on remand, Reclamation could cure any NEPA defect in the current EA without preparing an EIS.



Regarding the second factor, the benefits of keeping the Exchange Contract in place outweigh the costs. The contract furthers ESA goals, providing incremental conservation benefits for species of fish downstream from Flaming Gorge Dam whose risk of extinction is high. *See supra* at 7, 12-13, 38. This Court would be free to accord those benefits controlling weight, given that under the ESA “the balance has been struck in favor of affording endangered species the highest of priorities.” *Tennessee Valley Authy. v. Hill*, 437 U.S. 153, 194 (1978).

For these reasons, this Court should conclude that vacatur of the Exchange Contract is unwarranted, even assuming that the contract is final agency action, in the event that one or more of Conservation Groups’ NEPA challenges prevail.

### **CONCLUSION**

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

/s/ John Emad Arbab

TODD KIM

*Assistant Attorney General*

JENNIFER A. NAJJAR

BRIAN C. TOTH

JOHN EMAD ARBAB

*Attorneys*

Environment and Natural Resources Division

U.S. Department of Justice

Post Office Box 7415

Washington, D.C. 20044

(202) 514-4046

john.arbab@usdoj.gov

Of Counsel:

SUSANNAH THOMAS

*Attorney*

Office of the Solicitor

U.S. Department of the Interior

May 3, 2022

90-1-4-15681

**STATEMENT REGARDING ORAL ARGUMENT**

In view of the technical nature of the administrative record, the Federal Appellees believe that oral argument would be useful to the Court in this case.

## CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

1. All required privacy redactions have been made per 10th Cir. Rule 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, Microsoft Defender, version 1.363.1354.0, last updated May 3, 2022, and according to the program are free of viruses.

/s/ John E. Arbab

JOHN E. ARBAB

Attorney

Environment and Natural Resources Division

U.S. Department of Justice

Post Office Box 7415

Washington, D.C. 20044

(202) 514-4046

[john.arbab@usdoj.gov](mailto:john.arbab@usdoj.gov)

## CERTIFICATE OF COMPLIANCE

I hereby certify:

1. This document complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Rule 32(f), this document contains 12,364 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

/s/ John E. Arbab

JOHN E. ARBAB

Attorney

Environment and Natural Resources Division

U.S. Department of Justice

Post Office Box 7415

Washington, D.C. 20044

(202) 514-4046

[john.arbab@usdoj.gov](mailto:john.arbab@usdoj.gov)

**CERTIFICATE OF SERVICE**

I hereby certify that on May 3, 2022, I electronically filed the foregoing brief using the court's CM/ECF system, and all parties will be served through that system.

/s/ John E. Arbab

JOHN E. ARBAB

Attorney

Environment and Natural Resources Division

U.S. Department of Justice

Post Office Box 7415

Washington, D.C. 20044

(202) 514-4046

[john.arbab@usdoj.gov](mailto:john.arbab@usdoj.gov)