No. 21-4098

In the United States Court of Appeals for the Tenth Circuit

CENTER FOR BIOLOGICAL DIVERSITY, et al.,
Plaintiffs-Appellants,

v.

U.S. DEPARTMENT OF THE INTERIOR, et al.,
Defendants-Appellees,

and

STATE OF UTAH, et al.,
Defendants-Intervenors-Appellees.

On appeal from U.S. District Court, District of Utah,
Honorable David Barlow, No. 2:19-cv-00636-DBB-CMR

Response Brief of State of Utah Intervenors-Appellees

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Oral Argument Requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

PRIOR OR RELATED APPEALS

There are no prior or related appeals for purposes of 10th Circuit Rule 28.2(C)(3). There is a district court case pending between the Ute Indian Tribe and the Department of the Interior and the Utah Board of Water Resources, among others. *Ute Indian Tribe of the Uintah and Ouray Reservation v. United States*, 2.21-cv-00573-JNP-DAO (D. Utah). The claims in that case "touch on the same agency action" that is now pending before this Court. *Ute Indian Tribe of the Uintah and Ouray Reservation v. United States Dep't of Interior*, Case No. 2.21-cv-00573-JNP-DAO (D. Utah), Memorandum Decision, ECF No. 114, at 23 (decision district court case pending in District Court for the U.S. District of Columbia before being transferred to the District of Utah).

GLOSSARY

AF	Acre Feet
APA	Administrative Procedures Act
The Application	Application to Appropriate No. A30414 filed by Reclamation with Utah State Engineer in 1958
Assignment Agreement	The 1996 Agreement between the Utah Board of Water Resources and the Bureau of Reclamation assigning an interest in Water Right No 41-3479 (A30414d) to the Utah Board of Water Resources
Assigned Water Right	Water right assigned to Utah Board of Water Resources by the Assignment Agreement for the diversion of 447,500 AF of water
Change Application	An application seeking approval of the Utah State Engineer to make changes to an existing Utah water right
Compact	Collectively, the 1922 Colorado River Compact and the 1948 Upper Colorado River Basin Compact
Compact Entitlement	The water apportioned to Utah under the 1922 Colorado River Compact and the 1948 Upper Colorado River Basin Compact
CRSP	Colorado River Storage Project
EA	Environmental Assessment
Exchange Agreement	The Contract for Exchange of Water Green River Block between the Bureau of Reclamation and the Utah Board of Water Resources, dated March 20, 2019
FONSI	Finding of No Significant Impact

Green River Block	A portion of the Assigned Water Right that amounts to 72,641 AF of diversion
NEPA	National Environmental Policy Act
Project Water	CRSP water released from Flaming Gorge
Reclamation	The United States Bureau of Reclamation
State Engineer	The Utah State Engineer, who is also the head of Utah's Division of Water Rights

INTRODUCTION

Appellants' (the Conservation Groups') and Amicus Curiae the Ute Indian Tribe's (Tribe's) arguments regarding the National Environmental Policy Act (NEPA) and the Administrative Procedures Act (APA) are grounded on a fundamental misunderstanding of Utah water law and its operation in the context of the challenged Green River Block Exchange Agreement (Exchange Agreement). The Exchange Agreement does not entail a new appropriation of water in the Green River or its tributaries, nor does it dictate or alter how much of Utah's water Utah can put to use. The Exchange Agreement only limits the source of diversions that may be used to develop Utah's existing water right and provides monetary compensation to the federal government.

The agreed upon limitation in the development of potential sources of diversion serves two important and needed objectives. First, it provides the State with a more stable source of water for its previously appropriated water right that is not subject to the seasonal fluctuations of the natural river flows. Second, leaving natural high flows of water in the Green River and its tributaries enables the United States Bureau of Reclamation (Reclamation) to meet its requirements to

maintain the conditions necessary for the preservation and propagation of the endangered fish species in the reaches below the Flaming Gorge dam.

Because the Exchange Agreement only limits the potential sources of diversion that Utah may use and does not increase Utah's previously appropriated right to withdraw water from the Green River and its tributaries, the Environmental Assessment (EA) performed by Reclamation correctly determined there are no significant impacts on the environment. Accordingly, and as determined by the lower court, the Conservation Groups' and the Tribe's NEPA-based challenges to the Exchange Agreement must fail. This Court should affirm the district court's decision.

JOINDER WITH FEDERAL APPELLEES

The State of Utah and Utah Board of Water Resources (collectively, Utah or the State) joins and adopts the entire brief of the Federal Appellees to the extent it is not inconsistent with anything in this brief. The State thus does not include its own Jurisdictional Statement or Statement of the Issues. It also joins the Federal Appellees' Statement of the Case, Summary of Argument, and

Argument. But Utah adds its own details and arguments to those sections to reflect its particular interests.

STATEMENT OF THE CASE

Utah adopts the Federal Appellees' Statement of the Case. But Utah's water law informs—and invalidates—the Conservation Groups' and the Tribe's argument that the Exchange Agreement was a new appropriation of water. So Utah adds this explanation about the appropriation and the use of the water at issue.

I. The Colorado River Compact

Utah has been apportioned water in the Colorado River System through the Colorado River Compact of 1922, 70 Cong. Rec. 325 (1928); 46 Stat. 3000 (1929), and the Upper Colorado River Basin Compact of 1948, Pub. L. No. 81-37, 63 Stat. 31 (1949), (collectively, the Compact). The Compact apportions to Utah the consumptive use of 23% per annum of the water supply available to the Upper Basin States. Pub. L. No. 81-37, 63 Stat. 31, 33. That water is known as Utah's Compact Entitlement.

The Compact gives Utah the right to "regulate within its boundaries the appropriation, use and control" of its Compact Entitlement water. *Id.* at 41 (Art. XV(b)). This generally means Utah

can appropriate its Compact Entitlement Water to water users without federal approval.

II. Utah Water Law

Utah is an arid state and its water resources are finite and valuable. Utah Code § 73-1-21(1)(a). That reality drives Utah water law. For that reason, Utah seeks to ensure that its Compact Entitlement water is used beneficially. *Id.* § 73-1-21(1)(b)(xiv). It does this by appropriating rights to water through the State Engineer. *See id.* § 73-2-1(3).

A water user requests a water right by filing an application with the State Engineer. *Id.* § 73-3-2. After accepting any protests and holding either a formal or informal adjudicative proceeding, *id.* § 73-3-5, -7, -8, the State Engineer grants the appropriation application if certain statutory criteria have been satisfied. *Id.* § 73-3-8(1). Once granted, a user has an appropriated right.

Following the appropriation, the new owner of the water right may use the water subject to the terms of the State Engineer's approval. *Id.* § 73-3-10(3)(b). Upon doing so, the water rights owner files a proof of use that documents, among other things, the amount of water

actually used. *Id.* § 73-3-16(2), (3). After accepting that proof, the State Engineer issues a certificate of beneficial use documenting the water right. *See id.* § 73-3-17(1). A water right that has completed this process is considered a perfected water right. *See id.*

The State Engineer assigns each appropriated right a priority date. *Id.* §§ 73-3-1(5); 73-3-17(1)(f). The owner of a right has prior rights as to all later applicants under the doctrine "first in time is first in rights." *Id.* § 73-3-1(5)(a). An appropriator is "entitled to the appropriator's whole supply before any subsequent appropriator has any right." *Id.* § 73-3-21.1.

Only the State Engineer can make changes to a water right after its appropriation. *Id.* §§ 73-3-3, -8. If a water user needs, for example, a different point of diversion or use, the user must file a change application with the State Engineer. *Id.* § 73-3-3(4). If granted, that change modifies the existing right and is not considered a new appropriation. *See id.* § 73-3-3(3), (6). Even after a change is approved, the appropriation retains its original priority date. *Id.*

III. The Assigned Water Right

The water right underlying the Exchange Agreement is an appropriated Utah water right. More than sixty years ago, Reclamation filed an Application to Appropriate, numbered A30414, (the Application) with the Utah State Engineer asking to appropriate unallocated water from the Green River. Fed. Sup. App. Vol. I at 25; Int. Supp. App. at 31. Reclamation filed the Application because it intended to use that water for storage in the Flaming Gorge Reservoir and for the development of the Ultimate Phase of the Central Utah Project. Fed. App. Br. at 10; Fed. Supp. App. Vol. I at 25, 30.

The Utah State Engineer approved Reclamation's Application, *see* Fed. Supp. App. Vol. I at 30-31, giving it a 1958 priority date against all later filed Utah water rights from the Green River, *see id.* at 285 (noting 1958 priority date); Int. Supp. App. at 31.

Almost forty years later, in 1996, Reclamation assigned a portion—447,500 AF—of that water right to Utah's Board of Water Resources. Fed. Supp. App. Vol. I at 25, 31. The assigned portion of Reclamation's original appropriation was identified in the records of the Utah Division of Water Rights as Water Right No. 41-3479 (A30414d)

("Assigned Water Right").[1] Aplt. App. Vol. I at 153, 154. Except as modified by any change applications under Utah Code sections 73-3-3 and -8, the Assigned Water Right retained all the rights and obligations associated with the original Application approved by the State Engineer, including the right to divert water from the Green River for beneficial use in Utah and the 1958 priority date. *See* Memorandum Decision, In the Matter of Segregation Application Number 41-3479 (A30414d), *https://www.waterrights.utah.gov/asp_apps/DOCDB/DocImageToPDF.asp?file=/docSys/v820/a820/A82002JF.TIF*.[2]

[1] When a portion of the approved Application was assigned to the State of Utah by Reclamation, the Utah Division of Water Rights (which is led by the State Engineer) designated that right Water Right No. 41-3479 with a corresponding sub-application number of A30414d. *See* Aplt. App. Vol. I at 153, 154.

[2] The memorandum decision is not included in the administrative record. But it is available on the State Engineer's website. This Court can take judicial notice of the memorandum decision for purposes of this appeal. *United States v. Burch*, 169 F.3d 666, 667 (10th Cir. 1999) (recognizing court can take judicial notice of facts not reasonably subject to dispute because it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned" (quoting Fed. R. Evid. 201(b))).

This case is only concerned with a portion of the Assigned Water Right, specifically the 72,641 AF known as the Green River Block. That portion of the Assigned Water Right was given that name because it was "expected that this water would be predominately developed along the Green River and its tributaries between [Flaming Gorge] and Lake Powell." Fed. Supp. App. Vol. I at 31.

After the 1996 Assignment, Utah entered into agreements with Utah water users to beneficially use portions of the Green River Block. *See* Fed. Supp. App. Vol. I at 31. These types of agreements are identified in the Exchange Agreement as third party contracts. Aplt. App. Vol. I at 155.

Utah has entered into such third party contracts with users or potential users for the Assigned Water Right. Some of those water users have since perfected 13,684 AF of water from the Green River Block. *See* Fed. Supp. App. Vol. I at 31.

In each instance, the beneficiary of the third party agreement obtained, or will obtain, a segregated portion of the existing Assigned Water Right. *See* Aplt. App. Vol. I at 154, 155, 159 (discussing third party agreements for "beneficial use" of Assigned Water Right). That

right, in turn, is a segregated portion of the original Application secured by Reclamation in 1958. *See* Aplt. App. Vol. I at 163. So both the segregated rights associated with the third party contracts and the Assigned Water Right have all of the existing rights and obligations as Reclamation did under its original Application, including the 1958 priority date. To use the water in a different manner, the third party contract beneficiary who owns the segregated right must file a Change Application with Utah's State Engineer. Utah Code §§ 73-3-3 and -8. Those Change Applications, however, will not create a new water right under Utah law. They will instead only modify the conditions under which a portion of the original 1958 right may be used. *Cf.* Utah Code § 73-3-3(3), (6) (permitting change applications to be filed on an "existing right" and noting change applications do not change priority date of the water right); *see also* Aplt. App. Vol. I at 154 (defining Assigned Water Right to include "change applications which have or will be filed based on A30414d or its segregated portions.").

IV. The Exchange Agreement

More than twenty years after Utah received the Assigned Water Right, Utah and Reclamation entered into the Exchange Agreement.

Under that contract, Utah agreed to "forbear" depleting up to 72,641 AF[3] of the "Green River and tributary flows to which it is entitled" under the Compact, instead allowing that portion of water remain in the tributaries. Aplt. App. Vol. I at 154, 156, 157. In exchange, the parties agreed Utah could deplete an equal amount of water from the releases of water from Flaming Gorge for the development of the Green River Block. Aplt. App. Vol. I at 156-57. Utah agreed to pay Reclamation a yearly fee as compensation under the Exchange Agreement. Aplt. App. Vol. I at 157.

Utah and Reclamation both benefitted from this exchange. The Exchange Agreement meant that Utah received a more "reliable water supply for development of the 1996 Assignment" that is less susceptible to shortages during drought than the tributary flows. Fed. Supp. App. Vol. I at 17-18, 26, 36, 37. In turn, Reclamation could use the water that Utah will allow to remain in natural, tributary flows to help Reclamation meet its Endangered Species Act Recovery Program

[3] The Exchange Agreement recognized that the previously developed 13,684 AF would not be available for exchange until a change application is filed on those rights. Aplt. App. Vol. I at 157.

requirements below the dam, specifically in reaches 1 and 2. Fed. Supp. App. Vol. I at 17-18.

Apart from the exchange of potential diversion points, the Exchange Agreement did not "alter . . . the Assigned Water Right's priority date, points of diversion or delivery, nature or places of use, operations, or any other conditions not specifically mentioned" in the Exchange Agreement. *See* Aplt. App. Vol. I at 155.

Utah's use of the Assigned Water Right is still governed by and limited to the Application the State Engineer approved in 1958 and any subsequently approved change applications. *See* Aplt. App. Vol. I at 155-56 (requiring Board to ensure necessary change applications are filed prior to exercise of the exchange of the Assigned Water Right for Project Water); Fed. Supp. App. Vol. I at 274 (stating expectation that change applications will be filed to modify the Green River Block).

SUMMARY OF ARGUMENT

Neither the Conservation Groups nor the Tribe have met their burden to show that Reclamation acted arbitrarily and capriciously when it prepared its EA and issued its Findings of No Significant Impact (FONSI).

The Conservation Groups' challenge turns on its argument that the Exchange Agreement functioned as a new appropriation of water to the State of Utah. Their argument is contrary to the facts and the law.

Long before Utah entered into the Exchange Agreement, the approved Application and the Assigned Water Right established Utah's right to divert and use water from the Green River. The Exchange Agreement did not result in the appropriation of additional water. Utah merely agreed that when it developed the Assigned Water Right, it would do so using water from Reclamation's normal releases from Flaming Gorge Reservoir and, in exchange, would leave the same amount of water in the natural water flows that are critical to fish habitat. In other words, it merely limited the source of diversions when Utah develops the rest of the Green River Block of the Assigned Water Right.

Despite that, the Conservation Groups argue Reclamation should have treated the proposed Exchange Agreement as a new diversion of water and compared it to a "no action" scenario when Utah could not divert water from the Green River. But none of the Conservation Groups' arguments show Reclamation acted arbitrarily. They have not

shown that Reclamation incorrectly suggested that Utah had already developed its water. They also have not shown that Utah could not have developed its water in the absence of the Exchange Agreement. Contrary to the Conservation Groups' assertions, Reclamation appropriately recognized that Utah already had developed portions of its water rights, and would continue to do so, even in the absence of the Exchange Agreement. It appropriately used that as the status quo in the no action alternative. That is all NEPA requires.

The Tribe has filed an amicus brief to support the Conservation Groups. The Tribe's argument also assumes that the Exchange Agreement constitutes a new appropriation and, therefore, fails for the same reasons. Based on this assumption, the Tribe's primary argument is that the EA ignores the alleged priority of their water rights. The Tribe's arguments about its rights exceed the scope of the arguments made by the parties to this litigation. This Court should thus not address them, particularly when the Tribe is a party to its own litigation in which it has raised NEPA challenges to the Exchange Agreement.

ARGUMENT

The Federal Appellees have thoroughly responded to the Conservation Groups' challenges to the EA and FONSI. Utah does not intend to duplicate those arguments, and it urges this Court to affirm for the same reasons. But Utah has a unique interest in the Conservation Groups' mistaken arguments that the Exchange Agreement constitutes a new appropriation of water. Aplt. Br. at 42-45. Utah also wishes to briefly address the amicus curiae brief filed by the Tribe because of ongoing litigation involving the Tribe and Utah about the water subject to those rights.

I. Reclamation correctly recognized that the Exchange Agreement is not a new appropriation of water and did not cause a significant environmental impact.

The Conservation Groups argue that Reclamation acted arbitrarily and capriciously under NEPA because it failed to treat the Exchange Agreement as a new appropriation of water. Aplt. Br. at 42-45. They are mistaken. The Exchange Agreement was not a new appropriation because Utah has long held the right to use and develop the Green River Block of water. Reclamation thus properly considered a no action alternative in which Utah could have developed that water even in the absence of the Exchange Agreement.

A. The Exchange Agreement did not give Utah any new water.

The Exchange Agreement did not create a new diversion from the Green River or appropriate new water to Utah. All the Exchange Agreement did was contractually limit the potential source of diversion (natural flow to released water) that Utah could use to fulfill the Green River Block of the Assigned Water Right when Utah arranges to develop it.

1. Utah's ownership of the relevant water right predates the Exchange Agreement.

Utah's water right to divert and use water from the Green River was established decades before the Exchange Agreement. Utah has had that right with respect to the Green River Block since 1996 when Reclamation transferred it to Utah, along with the rest of the Assigned Water Right. That 1996 Assignment Agreement gave Utah the right to "develop[], divert[], and perfect[] [the assigned] water right" upon the water's "release from Flaming Gorge Reservoir." Aplt. App. Vol. I at 163. Reclamation did not retain any ownership over the Assigned Water Right or any ability to control how Utah developed the right. The Assignment only required that the Assigned Right be developed, diverted, and perfected "as permitted by law." *Id.*

While Utah has owned the Assigned Water Right since 1996, the right to divert water from the Green River attached to that right has existed for much longer. Recall that Reclamation segregated the Assigned Water Right from its original 1958 appropriation of Green River water. The water right Reclamation segregated retained all the original characteristics of Reclamation's initial water right because none of those characteristics can be changed absent approval of a change application by Utah's State Engineer. *See* Utah Code § 73-3-3, -8. So when Reclamation transferred the Assigned Water Right, it transferred both the 1958 priority date and the right to divert water from the Green River. That means since 1996, Utah has owned a 1958 water right that gives it the right to divert water from the Green River.

As the owner of the Assigned Water Right, Utah can further segregate that right. It does that by transferring portions of the Assigned Water Right to users who will develop and perfect such rights by filing any necessary change applications and completing Utah's perfection process by filing a proof of beneficial use. *See* Utah Code § 73-3-16(3). Utah has, in fact, already segregated and entered into agreements for 13,684 AF of the Green River Block water. It transferred

those segregated portions before the Exchange Agreement, undermining the Conservation Groups' argument that Utah could not perfect the water without the Exchange Agreement. *See* Fed. Supp. App. Vol. I at 79; Aplt. App. Vol. I at 157.

To be sure, Utah has not yet developed the remaining 58,957 AF of the Green River Block portion of the Assigned Water Right. But that does not mean Utah has any less ownership over the Assigned Water Right, nor that Utah cannot put the Assigned Water Right to use by entering into additional third party contracts with water users. As the EA explained, Utah can develop those rights under the Assignment. Fed. Supp. App. Vol. I at 36. Indeed, it is the only party who has any authority to do so.

As the district court and the EA recognized, Utah planned to continue developing the water as it is entitled to do under the Assigned Water Right it has owned since 1996. Aplt. App. Vol. I at 153; Fed. Supp. App. Vol. I at 32; Mem. Dec. at 8-9. Although the Exchange Agreement provided an advantageous way for Utah to develop that water, *see* Fed. Supp. App. Vol. I at 17-18, 26, 36, 37, it did not give

Utah any new water. Utah already had all of the rights it needed to use and develop the Assigned Water Right.

2. The Exchange Agreement only contractually limited the source of diversions of water Utah could use.

The Exchange Agreement did not add any water or uses of water to Utah's Assigned Water Right. Under the Exchange Agreement, Utah agreed to forbear its right to deplete up to 72,641 AF of the natural flows of the Green River and its tributaries—as permitted by the Assigned Water Right and the Compact Entitlement—in exchange for "an equal amount of . . . [w]ater from releases" from Flaming Gorge "throughout the year." Aplt. App. Vol. I at 156. Those provisions merely limit the sources of diversions of water that may be used when Utah enters into third party contracts with water users who will develop and perfect the remaining rights.[4] But that change did not give Utah any new water rights, nor lead to the use of additional water.

Before the Exchange Agreement, Utah could take the Green River Block water from the "direct," "accretion," or "natural" flows of the

[4] The Exchange Agreement acknowledged that 13,684 had already been perfected and would not be available to exchange until a change application on that right is filed. Aplt. App. at 157.

Green River and its tributaries. Fed. Supp. App. Vol. I at 17-18, 26, 36-37, 57, 70, 76, 77. Those terms are used somewhat interchangeably. They refer to water that enters the Green River and its tributaries below the Flaming Gorge dam but that is not directly released from the Colorado River Storage Project (CRSP) facilities, such as Flaming Gorge, to supply water rights. Fed. Supp. App. Vol. I at 80; *see also id.* at 41 ("Natural flow is the observed flow adjusted for the effects of diversions and the operation of reservoirs upstream . . ."); *id.* at 70 (recognizing Utah would remain "free to develop their assigned water right using accretion flows"); Fed. Def. Opp. Br. (ECF 77), at 6 n.3 (defining accretion flows as "the inflows that accrue in the Green River below flaming Gorge Dam"). Those natural flows are most accessible during the high spring runoff and are reduced during late summer, meaning that water is most available in the spring. Fed. Supp. App. Vol. I at 35, 36.

After the Exchange Agreement, however, Utah will forgo the development of up to 72,641 AF of those high spring, natural flows in the Green River and its tributaries allowing that water to benefit fish habitats. Aplt. App. Vol. I at 156. When Utah develops its right, it will

instead take an equal amount of water in the main stem of the Green River directly from the releases of the Flaming Gorge dam. Those releases are considered CRSP, or Project, Water. Aplt. App. Vol. I at 155, 156.

But that exchange does not give Utah the right to use any more water than it could have used before the Exchange Agreement. In any given year, the "direct flows that [Utah will leave] in the river . . . will equal the FG project water releases used for depletion" by Utah under the Assignment. Aplt. App. Vol. I at 156. In a comment to the EA, Reclamation explained that this requires Utah to "annually show" there is sufficient Compact Entitlement water that would have been allocated to the Green River Block that Utah can leave in the natural and tributary flows in exchange for the water in the releases. Fed. Supp. App. Vol. I at 273, 274. If there is not enough water for Utah to leave in the tributary flows, the amount Utah can take from the releases would be reduced. *Cf.* Fed. Supp. App. Vol. I at 273 (noting exchange of water is on a "one to one" basis).

The Exchange Agreement thus did not result in new or additional diversions of water or give Utah water rights it did not previously have.

It merely limited the source of diversion of the water available for Utah to use to develop the Green River Block. Utah will leave up to 72,641 AF of the natural flows of the Green River intact in exchange for taking that same amount of water from the regulated flows Reclamation releases from Flaming Gorge. Apart from that modification, the Exchange Agreement did "not alter, modify, or amend the Assigned Water Right's priority date, points of diversion or delivery, nature of or places of use, operations, or any other conditions" of the Assigned Water Right. Aplt. App. Vol. I at 155.

Both parties had good reasons for modifying the source of the potential diversions of water under the Assigned Water Right. Fed. Supp. App. Vol. I at 37. The Exchange Agreement gave Utah a more regular and timely water supply for development of its Assigned Water Right. Fed. Supp. App. Vol. I at 17-18, 26, 36, 37. In turn, Reclamation could use the forborne natural flows of the Green River to meet its Endangered Species Act Recovery Program requirements below the dam, specifically in reaches 1 and 2. Fed. Supp. App. Vol. I at 17-18. The Agreement also means Reclamation will receive annual

compensation from Utah. Aplt. App. 156, 158; Fed Supp. App. Vol. I at 36-37.

At bottom, the Exchange Agreement merely changed the source of water Utah will use to fulfill the Green River Block portion of its existing Assigned Water Right (once it develops it) in order to protect natural flows in the Green River and provide monetary compensation to Reclamation. Such a modification does not amount to an appropriation of new water, just as a Utah change application modifying a diversion point would not result in a new appropriation. The EA thus correctly concluded that the Exchange Agreement was not a new appropriation or depletion of water. "Utah's allowable use" of Colorado River water—including Green River water—instead "remains the same" as it has been since 1996 when Utah acquired the Assigned Water Right. Fed. Supp. App. Vol. I at 273.

B. Reclamation used an appropriate no action alternative.

Although Utah has owned the Assigned Water Right since 1996, and has a priority date of 1958 for that Right, Fed. Supp. App. Vol. I at 25, 285, the Conservation Groups argue that Reclamation's EA should have treated the Exchange Agreement as a new use of water. Aplt. Br.

at 42, 45. They first complain Reclamation failed to take the hard look required by NEPA because the EA inaccurately suggested Utah would discontinue a current use of water. Aplt. Br. at 43. Next, they argue the Exchange Agreement creates a new diversion because Utah needed federal approval to develop its Assigned Water Right and because Utah's district court brief supports their assertion. Aplt. Br. at 43-44. And, finally, they argue that Reclamation used an incorrect baseline because it did not exclude Utah's unperfected rights. Aplt. Br. at 44-45. None of those arguments satisfies the Conservation Groups' burden to show Reclamation acted arbitrarily and capriciously when it prepared its EA and made a finding of no significant impact. *See Wildearth Guardians v. U.S. Fish and Wildlife Serv.*, 784 F.3d 677, 691 (10th Cir. 2015) (noting appellants challenging agency action have burden of proof).

1. The EA did not improperly suggest Utah would discontinue a current use of water.

The Conservation Groups assert that Reclamation erred by suggesting that Utah would discontinue a current water use because the EA said Utah "would forbear the depletion of a portion of the Green River and tributary flows to which it is entitled" under the Compact.

Aplt. Br. at 43 (citing Aplt. App. Vol. II at 178). Without analysis, the Conservation Groups argue the term "forbear" implies that Utah would discontinue a current water depletion. *Id.*

The Conservation Groups' reading of the term "forbear" is untenable. Read in context, the term does not suggest the discontinuation of a current use. Rather, the EA (and the Exchange Agreement) acknowledged that Utah would forebear doing something "to which it is entitled." Fed. Supp. App. Vol. I at 18. 36; Aplt. App. Vol. I at 156. The use of that phrase with "forebear" suggests that Utah was forbearing an entitlement, i.e. a right to prospectively take natural tributary water, and not a current use. That is entirely consistent with the definition of "forebear" cited by the Tribe. Amicus Curiae Br. at 14 (defining forbearance as "[t]he act of refraining from enforcing a right, obligation, or debt" (citing Black's Law Dictionary 16(C) (11 ed. 2019))). And Utah had such an entitlement to develop its water by appropriating portions of the Assigned Water Right or the Compact Entitlement to water users who would deplete those flows. *See supra* at 15-17.

What's more, the EA plainly disclosed that Utah has not already put all of the water to use. It stated that the Exchange Agreement means the State "may" deplete up to 72,641 AF annually of direct flows and that, "at present, 13,684 acre-feet of the 72,641 acre-feet has been developed." Fed. Supp. App. Vol. I at 18. It again mentioned that Utah had developed some of the water between 1996 and 2000, *id.* at 25, and then included a chart showing that only 13,684 AF had been developed, *id.* at 31-32. There was nothing misleading about that.

The EA correctly recognized that Utah was forbearing its *right* to deplete up to 72,641 AF feet of water from natural flows of the Green River and its tributaries upon developing the Assigned Water Right, and not a current use. As the district court found, the phrase in the EA containing the term forebear is "a conditional statement setting forth a future action: If the [Exchange Agreement] is implemented, the State would not deplete flows to which it is entitled." Aplt. Add. at 7. The Conservation Groups have not shown that conclusion was wrong.

2. The Conservation Groups have not shown that Utah needed the Exchange Agreement to develop the remaining Green River Block right.

The Conservation Groups also argue Reclamation should have treated the Exchange Agreement as a new diversion because, according to them, Utah needed federal approval to perfect the Assigned Water Right. They are mistaken.

The Conservation Groups' brief asserts that Utah could only perfect water from "accretion and tributary flows" upon an agreement with Reclamation. Aplt. Br. at 43. This argument suggests that Utah perfects its water rights by entering into a contract with the federal government. But that's not how Utah perfects water rights. Utah water rights are perfected when water users who hold an appropriated water right prove to the State Engineer that those rights have been put to use. *See supra* at 4-5. The federal government has nothing to do with it.

Utah also does not need any federal approval to appropriate water from the "accretion and tributary flows" to water users who would perfect those rights. The only source the Conservation Groups cite for this assertion is the 1996 Assignment. That agreement says Utah will enter into a water service contract only if Utah "stores water in or

benefits directly from the Colorado River Storage Project Facilities," such as Flaming Gorge. Aplt. App. Vol. I at 153. But water in the accretion and tributary flows occur naturally, so those flows are not CRSP water released from the Flaming Gorge dam. *See supra* at 18-19. The Assignment provision referencing a "service contract" neither applies to the accretion and tributary flows, nor requires Utah to obtain federal approval prior to developing them.

To the extent the Conservation Groups are arguing Utah needed federal approval to use any portion of the Assigned Water Right, they have also failed their burden to prove that. The Conservation Groups suggest Utah could not use the Assigned Water Right "[a]bsent an agreement with Reclamation to release water from Flaming Gorge." Aplt. Br. at 43. The Assignment, however, says nothing about Utah being required to request specific releases of water from the dam to use the Assigned Water Right.

The Conservation Groups also suggest, incorrectly, that the Exchange Agreement constituted a new appropriation of water because, "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." Aplt. Br. at 12 (appellant's emphasis removed). Even assuming there are circumstances under which Utah has to enter into a "water service agreement" before using any of the Assigned Water Right, there is nothing in the Assignment that indicates that the service agreement gives the federal government "discretion" to deny Utah's ability to use its water rights, as the Conservation Groups claim. To the contrary, the Assignment's statement that Utah can use the Assigned Water Right "as permitted by law" suggests the federal government did not have discretion to deny potential lawful uses or diversions. Aplt. App. Vol. I at 153. The Conservation Groups made a similar argument about Reclamation's discretion at the district court, but the court rejected their argument because they failed to direct the court to any authority that would have given Reclamation discretion to deny or limit Utah's use of the Green River water. Aplt. Add. at 008. They have the same problem before this Court.

The question, then, is not whether Utah could or would have arranged for the perfection of its Assigned Water Right without federal approval. The question examined by the EA was how Utah's future

development of up to 72,641 AF of water with the Exchange Agreement would compare to the future development of that same amount of water without that Agreement. And that is what the EA answered. The Conservation Groups have not shown that assessment was arbitrary or capricious.

3. Utah's district court brief does not prove the Conservation Groups' case.

The Conservation Groups attempt to supplement their argument by accusing Utah of admitting that the Assigned Water Right could not have been developed without the Exchange Agreement "either as tributary flows in the Green River or under the 1996 Assignment." Aplt. Bt. at 43. They quote the following language from the State's district court brief:

> 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[5]-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.

Aplt. Br. 43-44 (citing Utah's Opp. Memo., ECF No. 80, at 5-6) (emphasis added by appellants).

Contrary to Conservation Groups' allegation, that quote does not prove that Utah could not have developed its Assigned Water Right absent the Exchange Agreement. Utah's use of "[1996] Assignment" in the initial sentence and of "the Assignment" in the second italicized sentence of the quote were drafting mistakes. In both instances, Utah should have referred to the Exchange Agreement instead. The restriction on diversions from the tributaries only appears in the Exchange Agreement. Aplt. App. at 156. Likewise, it is only the

[5] There was a typo in this figure in the State's district court brief. It should read "447,500-acre feet of depletion." As noted in the district court brief, that is the equivalent of 158,890 AF of diversion. Diversion is the amount of water initially removed from a source, while depletion is the amount consumed and therefore not returned to the system as return flow. Int. Supp. App. at 19.

Exchange Agreement that "locks up" Utah's water rights in the mainstem of the river below Flaming Gorge dam. Int. Supp. App. at 21.

With this correction, the quoted paragraph does not mean that Utah needed the Exchange Agreement to develop its Assigned Water Right. Rather, the paragraph accurately describes the operative provisions of the Exchange Agreement that limit Utah's use of water to the releases in the main stem and compensate the federal government for incidental benefits related to the timing of water released from the dam.

Also, when read in context of the State's entire brief, the quoted paragraph is not the admission the Conservation Groups claim it is. Then, as now, the State clearly took the position Utah has long held the Assigned Water Right. *Id.* at 20-21. The State argued that the Exchange Agreement was not a "new appropriation" but rather "a restructuring of where and when this water is removed from and returned to the Green River." *Id.* at 22. That restructuring is precisely what Reclamation's EA analyzed. So Utah argued that the EA sufficiently addressed the effects of the Exchange Agreement and found

that there would be no significant impact. *Id.* Utah's argument has not changed.

4. The EA appropriately used the pre-Exchange Agreement status quo as its no action alternative.

Finally, the Conservation Groups have failed to show that Reclamation acted arbitrarily and capriciously because it did not use a "no diversion/depletion" alternative as the pre-Exchange Agreement baseline in the EA.

As an initial matter, the Conservation Groups' argument fails because Reclamation actually did consider a no action alternative in its hydrology analysis in which water use was measured at 2018 levels, meaning none of the unperfected water rights were used. See Fed. Br. at 32, 45.

But even if the EA had not included that analysis, the Conservation Groups have not shown Reclamation's chosen no action alternative violated NEPA. A no action alternative is meant to consider the "known impacts of maintaining the status quo" or present course of action. *Custer Cnty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1040 (10th Cir. 2001); *see also Biodiversity Conservation All. v. U.S. Forest Serv.*,

765 F.3d 1264, 1269 (10th Cir. 2014) ("The no action alternative may be thought in terms of continuing with the present course of action until that action is changed." (internal quotation marks omitted).

The nature of the no action alternative depends on the circumstance. *Cf. Forty Most Asked Questions Concerning CEQ's Nat'l Env't Policy Act Reguls.*, 46 FR 18026-01, 18027 (March 23, 1981) (giving examples of no action scenarios). If, for example, the proposed action involves updating current management plans, the "no action" alternative envisions the continuation of the existing regulations and programs. *Id.* It does not contemplate a scenario where the existing regulations and plans don't exist at all. Likewise, if the proposal is for new activity, the no action alternative assumes that the proposed activity would not take place. *Id.* And if a choice of "no action" would "result in predictable actions by others," those predictable consequences should be included in the no action analysis. *Id.*

Reclamation's no action alternative is consistent with that guidance. It considered that there would be no Exchange Agreement and Utah "would remain free to develop their" Assigned Water Right using natural flows "without the stability" of Flaming Gorge release

water. Fed. Supp. App. Vol. I at 17, 36. That scenario reflected a continuation of the pre-Exchange Agreement course because Utah already held the Assigned Water Right to divert and beneficially use Green River water. Without the Exchange Agreement, Utah would have remained free to develop the remaining Green River Block right. *Id.* at 36. And it could develop the rest of that right from sources other than the mainstem of the river below the dam.

The no action alternative also correctly recognized that Utah foreseeably would develop the remainder of its right. Utah, in fact, had already developed 13,684 AF of its Assignment rights, so it was "not unreasonable that the State could develop a significant portion of the remaining GRB WR water in the next 40 years." *Id.* at 265. Because Utah's development of the rest of its right was foreseeable, Reclamation's inclusion of that development in the no action alternative adhered to NEPA requirements.

Despite all that, the Conservation Groups argue that Reclamation should have used a baseline in which none of the remaining Green River Block water would be developed. Aplt. Br. at 44-45. But that argument doesn't address the nature of the proposed action. The action

was whether to enter an Exchange Agreement, not whether to appropriate or perfect new water.

Further, the Conservation Group's argument submits that Reclamation should have compared the proposed Exchange Agreement against a non-existent status quo. There is no status quo in which Utah did not have the Assigned Water Right and couldn't develop it at all. That scenario has not existed since before 1996 when Reclamation conveyed the Assigned Water Right to Utah.

The *Custer* case, cited by the Conservation Groups, supports Reclamations' no action alternative. There, the appellants argued that a no action alternative to a proposed new use of airspace should not have included low-level flights because the federal government had never properly reviewed or approved those flights. 256 F.3d at 1040. Based on the Federal Register cites above, this Court rejected that argument. It held that NEPA only required the government to consider the status quo before the proposed action—which in that case included both approved and allegedly unapproved activity—and how the proposed action would change that. But the Court rejected the environmental groups' attempt to use a current NEPA action to argue previous actions

concerning the low-level flights received insufficient environmental analysis. *Id.*

So too here. The no action alternative in this case properly compared the status quo where Utah already had the Assigned Water Right, and would continue to develop it, against a proposed action alternative in which Utah has the Assigned Water Right and develops it under the Exchange Agreement. The NEPA action was the Exchange Agreement. Neither NEPA nor *Custer* required the federal government to consider a non-existent status quo where Utah did not have or would not develop the right at all.

What's more, Utah has held the right to divert and beneficially use the natural flows in the Green River and its tributaries since 1996. If Utah's acquisition the Green River Block of the Assigned Water Right triggered NEPA, it did so way back then. That was the proper window of time for challenges to be raised to Utah's ownership and potential use of that water right. The Conservation Groups, however, cannot use this NEPA action involving the Exchange Agreement to challenge Utah's use of water under the decades old Assigned Water Right. *See Biodiversity Conservation All.*, 765 F.3d at 1269 (rejecting appellant's

NEPA challenge to agency's no-action alternative as an impermissible "back door challenge to past agency actions"); *Custer Cnty.*, 256 F.3d at 1040 (stating "[t]he time has passed to challenge past actions" on the grounds that they received insufficient environmental analysis).

In sum, Reclamation's EA correctly recognized that the Exchange Agreement did not appropriate any new water, and thus took an appropriate hard look at the effects of the Exchange Agreement. This Court should affirm.

II. The Ute Tribe's Arguments should be addressed in its pending district court litigation.

The Tribe's arguments do not support reversing the district court's decision. The Tribe's brief suggests Utah's forbearance is a fiction because the forborne water rights are not vested and thus cannot be treated as alienable, transferrable property rights. Tribe Br. 14-17. The Tribe appears to use "vested" interchangeably with "perfected." That does not support the Tribe's argument that Utah's unperfected rights are inalienable. Utah law, in fact, permits the transfer of unperfected rights. Utah Code § 73-3-18(5),(6). *See supra* at 6-9, 16-17.

The Tribe's veiled suggestion that Utah's unperfected water rights are somehow subject to forfeiture is similarly problematic. The Tribe's

only citation to support its suggestion of forfeiture is Utah Code section 73-1-4, which provides that a right that has been put to use may be subject to forfeiture, pending a judicial action, after seven consecutive years of nonuse. Utah Code § 73-1-4(2)(a). But no judicial forfeiture action has been commenced for any water right at issue here. Utah's forfeiture statutes also do not apply to unperfected rights. *Cf.* Utah Code §§ 73-3-10(3) (providing that a water user may beneficially use water as described in the approved application); 73-3-17(1), (6) (stating certificates issued once an appropriated is put to beneficial use become "prima facie evidence of the owner's right to use the water"); 73-1-4(2)(a) (stating that discontinuation of a beneficial use of the water right subjects it to forfeiture).

At its core, though, the Tribe's complaint seems to be that Reclamation should not have permitted the Exchange Agreement to move forward without further study because the Tribe's rights are better and more senior to Utah's under *Winters v. United States*, 207 U.S. 564 (1908), and because the Tribe is concerned there is not enough water to satisfy both rights. But the EA correctly explained that the Exchange Agreement does not amount to an increase in water use. *See supra* at 14-17. And the Exchange Agreement does not in any way alter the Tribe's or the State's water right priorities or change how any issues

about those respective rights would be addressed if there were a shortage.

In any event, the Tribe's arguments about priorities of water rights should not be addressed in this litigation. The Conservation Groups' brief complains in passing that the EA failed to heed to the Tribe's concerns. Aplt. Br. at 46-48. But the Conservation Groups do not develop any arguments about water priority issues between the State and the Tribe. The Tribe's arguments about its *Winters* rights, the priority of those rights, and potential water availability issues between Utah and the Tribe go beyond the issues briefed by Conservation Groups. This Court should not address them in this case. As a general rule, this Court does not address amicus issues raised only by an amicus absent exceptional circumstances. *See Sierra Club v. EPA*, 964 F.3d 882, 898 n.15 (10th Cir. 2020); *Tyler v. City of Manhattan*, 118 F.3d 1400, 1403-04 (10th Cir. 1997).

There are no exceptional circumstances here. To the contrary, the Tribe is a party to litigation it initiated where its claims can be heard. *See Ute Indian Tribe of the Uintah and Ouray Reservation v. U.S. Dep't of Interior et al.*, 2:21-cv-00573-JNP-DAO. In that matter, the Tribe has

brought its own NEPA challenge to the Exchange Agreement and raised its concerns about the Agreement's potential impact on its *Winters* rights and overall water availability. Case No. 2:22-cv-00573-NP-DAO, Second Amended Complaint, ECF 57, ¶¶ 307-345.[6] The Tribe's claims should be addressed in that matter, and should not be used to challenge the EA and FONSI in this case when the Tribe is not even a party.

CONCLUSION

Because the Exchange Agreement did not give Utah new water, and for the reasons discussed in the Federal Appellees' brief, this Court should affirm the district court's holding that Reclamation did not act arbitrarily and capriciously.

Respectfully submitted,

/s/ Erin T. Middleton
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[6] The Tribe's Second Amended Complaint was filed in the District Court for the District of Columbia, Case No. 1:18-cv-00547-CJN, but the claims at issue have now been transferred to the Utah district court. Case No. 2:21-cv-00573-JNP-DAO, Memorandum Opinion, ECF 114, at 23-27 (Mem. Dec. from District Court for District of Columbia transferring claims to Utah District Court).

STATEMENT OF ORAL ARGUMENT

The State Appellees believe that oral argument would be useful in this case due to the technical nature of the issues and the record.

CERTIFICATE OF COMPLIANCE WITH RULE 32A

1. This brief complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 7,915 words, excluding those parts of the brief exempted by the Rule.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook 14-point font.

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CERTIFICATE OF COMPLIANCE

Pursuant to Section II(J) of the Court's CM/ECF User's Manual, the undersigned certifies that:

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CERTIFICATE OF SERVICE

I certify that on May __, 2022, I electronically filed a copy of the foregoing brief using the Court's CM/ECF system, and all parties will be served through that system.

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