

Appeal No. 21-4098

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IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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

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

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**AMICUS REPLY BRIEF**

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Michael W. Holditch  
Frances C. Bassett  
Patterson Earnhart Real Bird & Wilson LLP  
1900 Plaza Drive  
Louisville, CO 80027  
(303) 926-5292  
mholditch@nativelawgroup.com  
fbassett@nativelawgroup.com

*Attorneys for Amicus Curiae Ute Indian Tribe of the Uintah and Ouray  
Reservation*

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## INTRODUCTION

Amicus Curiae the Ute Indian Tribe of the Uintah and Ouray Reservation (“Tribe”) filed its Amicus Brief in support of the Appellants on February 4, 2022. In its Amicus Brief, the Tribe supplied the Court with historical facts and law supporting the Appellants’ position that the lower court committed reversible error in ruling that the Bureau of Reclamation’s (Reclamation) execution and implementation of the Green River Block Exchange Contract was not arbitrary and capricious. Specifically, the Tribe addressed the legal fallacy that underlies Reclamation’s decision to invoke the Upper Colorado River Basin’s interstate water-apportionment framework as an independent and sufficient legal basis for recognizing the State of Utah as the legal owner of vested and transferrable property rights to the water that is the subject of the Green River Block Exchange Contract. The Tribe asserts that this erroneous legal premise substantiates and reinforces the Appellants’ position that Reclamation violated the Administrative Procedure Act (“APA”) and the National Environmental Policy Act (“NEPA”), especially in light of Reclamation’s complete failure to acknowledge the Tribe’s vested, present perfected water rights that are also derive from the Colorado River and its tributaries.

In their Response Brief filed on May 26, 2022, the State of Utah, *et al.* (State Intervenors-Appellees) responded directly and substantively to issues raised by the Tribe in its Amicus Brief. In doing so, the State Intervenors-Appellees have misrepresented the Tribe’s arguments, incorrectly stating to the Court that the Tribe

is asserting (i) that the water rights at issue in the Green River Block Exchange Contract have been forfeited under Utah State law, and (ii) that there is an insufficient quantity of water in the Colorado River to satisfy both the Tribe's senior-priority water rights and the Green River Block Exchange Contract. These misrepresentations obscure the pertinent issues the Tribe raised in its Amicus Brief, thus warranting the present Reply Brief.

### ARGUMENT

In its Amicus Brief, the Tribe explained that water rights under a prior-appropriation system are established through appropriation and beneficial use. Thus, Reclamation cannot treat an unquantified and unperfected apportionment of water from the Colorado River Basin as a transferrable property right by simply attributing these waters to the State of Utah's apportionment of Colorado River water under the Upper Colorado River Basin Compact. Tribe Br. at 14-16. Stated differently, the Upper Colorado River Compact does not independently create transferrable property rights. Rather, the Compact merely apportions the available Colorado River water among the upper basin states. It is this interstate apportionment that *quantifies* the total water that is available to each state and its state residents to appropriate and apply to beneficial use. And it is the latter activity—individual water users' appropriation and application to beneficial use—that is the legal mechanism by which vested and transferrable water rights are established. To illustrate this point, the Tribe cited to the State of Utah's own statutory scheme under which water rights

are legally perfected through appropriation and use. Tribe Br. at 14.

The State Intervenor-Appellees have taken the Tribe's citation to Utah state law and run with it, falsely asserting that the Tribe is arguing that state law does not allow unperfected water rights to be transferred and that the water rights at issue have been or are subject to forfeiture under state law. Intervenor-Appellees' Br. at 37-38. This is an inaccurate characterization of the Tribe's arguments because it suggests the Tribe acknowledges that there is a state water "right" that is being forborne under the Green River Block Exchange Contract in the first place. Significantly, however, nowhere in the Tribe's Amicus Brief does the Tribe characterize the water made subject to forbearance under the Green River Block Exchange Contract as a water "right." That is because the defining source of law for the State of Utah's claim to this water is the Upper Colorado River Basin Compact, and that Compact, as explained above, does not establish transferrable water "rights."

In addition, the State Intervenor-Appellees inaccurately recite the Tribe's position on the significance of Reclamation's failure to account for the Tribe's presented perfected *Winters* reserved water rights in conducting its environmental review under NEPA. The State Intervenor-Appellees mischaracterize the issue raised by the Tribe, stating:

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.

Intervenors-Appellees' Br. at 38.

However, nowhere in its Amicus Brief does the Tribe state that there is an insufficient quantity of water to satisfy both the Tribe's reserved water rights and the Green River Block Exchange Contract. Rather, the Tribe explains in its Amicus Brief that Reclamation cannot set a precedent of contracting for the use or disposition of apportioned Colorado River water unless and until Reclamation knows, and takes into account, the applicable restrictions and limitations on the State of Utah's apportionment. Under Supreme Court precedent, the Tribe's vested, senior-priority water rights that are carved out of the State of Utah's Colorado River apportionment (as a consequence of the state's failure to include Indian water rights in the Upper Colorado River Basin Compact), yet Reclamation failed to acknowledge this issue in its environmental review. Tribe Br. at 7-8, 16-17. Thus, the salient issue raised by the Tribe in its Amicus Brief is not the quantity of water in the Colorado River system, but rather, whether Reclamation's environmental review accurately acknowledged, and sufficiently considered, the environmental impact of its action upon the Tribe's vested water rights—Tribal property rights that are implicated and affected by a contract encumbering the State of Utah's apportionment of Colorado River water.

## CONCLUSION

Among other relevant issues raised by the Tribe in its February 4, 2022, Amicus Brief, the Tribe has supplied factual and legal support for the Appellants' position that Reclamation's NEPA review of the Green River Block Exchange was deficient because it was based on a conjectural state property right to water. In support of the Appellants' position, the Tribe has asserted in its Amicus Brief that Reclamation overlooked both the applicable system of prior-appropriation for establishing state water rights and the need to account for Tribe's presently perfected property rights to water contained within the State of Utah's apportionment under the 1948 Upper Colorado River Basin Compact, both of which contravene Reclamation's assumption that an apportionment of Colorado River water is tantamount to a transferrable property right.

Respectfully submitted July 8, 2022

*s/ Michael W. Holditch*

Michael W. Holditch  
Frances C. Bassett  
Patterson Earnhart Real Bird & Wilson LLP  
1900 Plaza Drive  
Louisville, CO 80027  
mholditch@nativelawgroup.com  
fbassett@nativelawgroup.com  
(303) 926-5292

*Attorneys for Amicus Curiae  
Ute Indian Tribe of the Uintah and Ouray Reservation*

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 1,097 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2016 in 14 point font size and Times New Roman.

*s/ Michael W. Holditch*

Michael W. Holditch

Frances C. Bassett

Patterson Earnhart Real Bird & Wilson LLP

1900 Plaza Drive

Louisville, CO 80027

mholditch@nativelawgroup.com

fbassett@nativelawgroup.com

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*Attorneys for Amicus Curiae*

*Ute Indian Tribe of the Uintah and Ouray Reservation*