Center for Biological Diversity v. *Department of Interior*, No. 21-4098

ROSSMAN, J., concurring in part, dissenting in part, and dissenting in the judgment

This case asks us to review whether a federal agency complied with the National Environmental Policy Act (NEPA). Several Conservation Groups contend the Bureau of Reclamation (Reclamation) did not fulfill its obligations under NEPA when it approved the Green River Block Exchange Contract (Contract), which permits the State of Utah to deplete water below the Flaming Gorge Dam.

The majority rejects all the Conservation Groups' appellate arguments, holding Reclamation complied with NEPA. I agree with most of the majority opinion, including that "Reclamation's no-action alternative used an appropriate environmental baseline to analyze the potential impacts of the contract." Maj. Op. at 11. I also agree Reclamation took a "hard look" at the impacts of water depletions in Reach 3 and appropriately considered the cumulative impacts of the Contract. But while the majority is certain an Environmental Impact Statement (EIS) was not warranted, I remain unpersuaded on the record before us.

I diverge from my colleagues on the narrow, but important, issue of whether Reclamation satisfied its duty under NEPA to take a "hard look" at the effects of climate warming on future water availability in the Green River.

As the Conservation Groups persuasively explain, Reclamation failed to address relevant scientific data—identified in public comment during the decision-making process—projecting climate warming will leave the Colorado River system far drier in the future than it has been in the last century.

The majority excuses Reclamation's deficient analysis as to future water availability by emphasizing Reclamation's assessment was only focused on "changing the point of diversion of water that Utah was already using." *Id.* at 19. Even assuming Reclamation's focus was so limited, the law does not excuse agencies from NEPA's procedural requirements. Our circumscribed role under the Administrative Procedure Act (APA) is to ensure compliance with NEPA; we may not, as the majority does, perform the agency's obligations ourselves. I would instruct the district court "to remand to the agency for additional investigation [and] explanation." *Fla. Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985). Because I cannot join my colleagues in affirming, I respectfully dissent as to Part II.B.1 and in the disposition. I concur in all other aspects of the majority opinion.

I.

NEPA requires federal agencies "to consider every significant aspect of the environmental impact of a proposed action." *Utah Shared Access All.* v. *U.S. Forest Serv.*, 288 F.3d 1205, 1207 (10th Cir. 2002) (quoting *Balt. Gas & Elec. Co.* v. *Nat. Res. Def. Council*, 462 U.S. 87, 97 (1983)). The statute

directs "federal agencies to prepare a detailed statement of the environmental impact for 'major Federal actions significantly affecting the quality of the human environment.'" *Id.* (quoting 42 U.S.C. § 4332(C)). In doing so, NEPA "ensures that an agency will inform the public that it has considered environmental concerns in its decision-making process." *Id.*

"NEPA itself does not mandate particular results, but simply prescribes the necessary process." *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). As part of that process, agencies must "take a 'hard look' at the impacts of a proposed action." *Wyoming* v. *U.S. Dep't of Agric.*, 661 F.3d 1209, 1263 (10th Cir. 2011) (citation omitted); *see also Balt. Gas & Elec.*, 462 U.S. at 100 ("Congress intended that the 'hard look' be incorporated as part of the agency's process of deciding whether to pursue a particular federal action.").

While the parameters of the "hard look" standard have not been defined with granular precision, the aim of the requirement is clear: an agency must identify and evaluate "the adverse environmental effects of the proposed action." *Robertson*, 490 U.S. at 350. This includes "utilizing public comment and the best available scientific information." *Colo. Env't Coal.* v. *Dombeck*, 185 F.3d 1162, 1171 (10th Cir. 1999).

In promulgating regulations explaining how agencies must comply with NEPA, the Council on Environmental Quality (CEQ) instructs

> NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.

40 C.F.R. § 1500.1(b) (2019).[1]

An agency that fails to "adequately consider[] and disclose[] the environmental impact of its actions" has not satisfied the "hard look" standard. *Utah Shared Access All.*, 288 F.3d at 1208 (citation omitted). An agency that fails to "articulate with reasonable clarity its reasons for decision," *Greater Bos. Television Corp.* v. *F.C.C.*, 444 F.2d 841, 851 (D.C. Cir. 1970), or offer a "reasoned evaluation of the available information" has not fulfilled its duty to take a "hard look," *Utah Shared Access All.*, 288 F.3d at 1213.

While NEPA prescribes what agencies must do, the APA governs how courts review agency action. *See Utah Shared Access All.* v. *Carpenter*, 463 F.3d 1125, 1134 (10th Cir. 2006) (NEPA does not provide a private right of action so "judicial review provisions of the APA govern."). The APA instructs courts to "set aside agency action, findings, and conclusions" that are

[1] Although CEQ promulgated new regulations in 2020, we apply the earlier regulations because Reclamation's actions were all completed prior to the effective date of the new regulations, and because the agency applied the prior regulations. *See* 40 C.F.R. § 1506.13 (2020). As such, any citation to CEQ regulations is to those in effect before September 14, 2020.

"arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). As the majority correctly acknowledges, our duty as an appellate court reviewing NEPA compliance is to "ascertain whether the [agency] examined the relevant data and articulated a rational connection between the facts found and the decision made." Maj. Op. at 12 (quoting *Colo. Wild, Heartwood* v. *U.S. Forest Serv.*, 435 F.3d 1204, 1220 (10th Cir. 2006)). In conducting this assessment, "the reviewing court must determine whether the agency considered all relevant factors and whether there has been a clear error of judgment." *Id.* (quoting *Citizens' Comm. to Save Our Canyons* v. *Krueger*, 513 F.3d 1169, 1176 (10th Cir. 2008)); *see also Diné Citizens Against Ruining Our Env't* v. *Haaland*, 59 F.4th 1016, 1034 (10th Cir. 2023) ("[W]e 'determine simply whether the challenged method had a rational basis and took into consideration the relevant factors.'" (citation omitted)).

When "the challenged decisions involve technical or scientific matters within the agency's area of expertise," our deference to the agency is "especially strong." *Morris* v. *U.S. Nuclear Regul. Comm'n*, 598 F.3d 677, 691 (10th Cir. 2010) (citation omitted). But deference is not unlimited. *Defs. of Wildlife* v. *Babbitt*, 958 F. Supp. 670, 679 (D.D.C. 1997). Deference to the agency "may be rebutted if its decisions, even though based on scientific expertise, are not reasoned." *Id.* "[C]ourts should not automatically

defer . . . without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision . . . .” *Marsh* v. *Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989). When an agency does “not provide any reasoning or analysis for its conclusion” then “there is nothing” to which the court can defer. *WildEarth Guardians* v. *U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1238 (10th Cir. 2017). “A contrary approach would not simply render judicial review generally meaningless, but would be contrary to the demand that courts ensure that agency decisions are founded on a reasoned evaluation of the relevant factors.” *Marsh*, 490 U.S. at 378 (internal quotation marks omitted).

When an agency does not articulate “a rational connection between the facts found and the choice made,” *Balt. Gas & Elec.*, 462 U.S. at 105, the court “may not supply a reasoned basis for the agency’s action that the agency itself has not given,” *Motor Vehicle Mfrs. Ass’n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) [hereinafter *State Farm*]. It is not the job of the reviewing court to “attempt itself to make up for . . . deficiencies” in the agency’s explanation. *State Farm*, 463 U.S. at 43. “[T]he grounds upon which the agency acted must be clearly disclosed in, and sustained by, the record” and “[a]fter-the-fact rationalization by counsel in briefs or argument will not cure noncompliance by the agency with these principles.” *Olenhouse* v. *Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994).

Ensuring agencies offer reasoned explanations for their course of action "promotes results in the public interest by requiring the agency to focus on the values served by its decision[s]." *Greater Bos. Television Corp.*, 444 F.2d at 852. It also enables "the public to repose confidence in the process as well as the judgments of its decision-makers." *Id.* As I will explain, the application of these well-settled principles compels reversal.

II.

After publishing a draft Environmental Assessment (Draft EA) in 2018 and accepting public comment, Reclamation issued a Final Environmental Assessment (Final EA) in 2019. Shortly thereafter, the agency issued a Finding of No Significant Impact (FONSI) and signed the Green River Block Exchange Contract with Utah. The Conservation Groups unsuccessfully challenged the agency's decision in federal district court, contending Reclamation failed in its mandate under NEPA to adequately analyze the Contract's environmental impacts.

At issue here, the Conservation Groups claimed Reclamation did not "address relevant scientific data and studies projecting that climate warming in the future will leave the Colorado River system far drier than it has been in the last century," Aplt. Opening Br. at 25-26, and "ignored agency and public comment" raising concerns with its hydrology data and

modeling, *id.* at 28-30. The Conservation Groups identified three specific problems with Reclamation's Final EA.

- Reclamation failed to address three scientific studies—raised in public comment to the agency—showing warming temperatures as the cause of future river flow declines much greater than declines in the past century.

- Reclamation did not account for reduced water flows projected by its own 2012 Basin Study.

- Reclamation's use of trace 63 modeling for projecting future hydrology was erroneous because trace 63 relies only on past drought scenarios.

A. The Three Scientific Studies

U.S. Fish and Wildlife Service (FWS) pointed to three scientific studies—Udall & Overpeck 2017, McCabe et al. 2017, and Xiao et al. 2018—in a comment submitted to the Draft EA. In the comment, FWS observed "Reclamation's modeling is based on the 1906 through 2015 hydrologic record, with no consideration of hydrologic changes or trends associated with warming temperatures." Supp. App. at 271. Citing the three studies, FWS queried whether "it [is] realistic to assume that upper Colorado River basin hydrology in the future will look like that of the past, given recent research suggesting otherwise." *Id.*

Reclamation responded to FWS that "[a] drought response section has been added to the Technical Appendix to further address concerns regarding

potential impacts from future drought scenarios." *Id.* Reclamation also explained "[t]he hydrologic analysis included 110 years of historic hydrology." *Id.* Turning to the Technical Appendix, however, there is no mention of the three studies referenced in the comment submitted by FWS. Rather, Reclamation added the following paragraph:

> Concerns over a changing climate have been prominent in environmental and water resources. The DNF hydrology set contains multiple period[s] of drought, including the decades of drought that occurred in the 1930s, 1950s, 1970s and 2000 up to 2015. In order to determine the impacts of continued drought, the trace with the lowest elevation has been isolated and its results have been included. Trace 63 begins with the initial conditions and then historic year 1979 is the first hydrologic year of that trace. This trace moves through the wet years in the 1980s, but ends with the drought in 2000-2015. It is the period of operations between 2000-2015 that have the greatest impact on elevation. The impact trends of implementing the exchange agreement are seen in the worst-case scenario. The illustrations in the drought trace 63 should be considered one representation of potential possibilities of future hydrology and it is statistically unlikely that trace 63 will happen.

App. at 211-12.

Reclamation's response did not satisfy NEPA for at least two reasons.

First, Reclamation fails to respond to the actual concern raised in the comment. The three studies cited in FWS's comment suggest a future climate scenario far warmer than what past data shows. FWS expressed concern with Reclamation's reliance on data only from the "1906 through 2015 hydrologic record" for its modeling. Supp. App. at 271. As the

Conservation Groups put it, FWS was concerned with how "the data Reclamation used is all backward-looking." Aplt. Opening Br. at 30. The majority concludes Reclamation adequately "addressed the comments with a reasoned explanation justifying the use of Direct Natural Flow (DNF) hydrology sets, such as trace 63, that contain multiple periods of drought." Maj. Op. at 17. The majority further contends that, "[w]hile Reclamation's response to FWS's comment could have been more robust, the record confirms that Reclamation adequately incorporated in its analysis the effects of a warming climate and the likelihood of changes in hydrology." *Id.* at 19. I respectfully disagree.

The main purpose of asking agencies to "utiliz[e] public comment," *Dombeck*, 185 F.3d at 1171, is to "use public input in assessing a decision's environmental impact," *California* v. *Block*, 690 F.2d 753, 771 (9th Cir. 1982). A key goal of NEPA is to "ensure[] that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Balt. Gas & Elec.*, 462 U.S. at 97; *Utah Shared Access All.*, 288 F.3d at 1207. Agency engagement with public comments supports this aim.

Reclamation never explains why the use of backward-looking data is appropriate under the circumstances to evaluate the adverse environmental effects of the proposed action. Absent any explanation from the agency as

to how looking at *past* data addresses the actual concern raised by FWS about predicted *future* warming conditions, I fail to see how Reclamation's response can be described as the "reasoned explanation" needed to satisfy the agency's duty under NEPA.

Second, Reclamation fails to explain why the three scientific studies cited by FWS are irrelevant to assessing the environmental impacts of the project.[2] It is not our job to dictate the specific evidence an agency must rely on, but "an agency must 'examine[] the relevant data and articulate[] a rational connection between the facts found and the decision made.'" *New Mexico ex rel. Richardson* v. *Bureau of Land Mgmt.*, 565 F.3d 683, 713 (10th Cir. 2009) [hereinafter *Richardson*] (citation omitted). NEPA also directs agencies conducting an environmental review "to consider and respond to the comments of other agencies." *Custer Cnty. Action Ass'n* v. *Garvey*, 256 F.3d 1024, 1038 (10th Cir. 2001). NEPA does not require consensus among stakeholders, but "a reviewing court 'may properly be skeptical as to

[2] Nothing in the record suggests this data is irrelevant to evaluating the environmental impacts of the Contract. Indeed, the parties, the district court, and the majority do not contend otherwise. Thus, the appropriate inquiry must be whether Reclamation provided the necessary explanation to support its decision in light of the evidence before it, including the scientific studies advanced by FWS. *See Marsh*, 490 U.S. at 385 ("It is also clear that, regardless of its eventual assessment of the significance of this information, the Corps had a duty to take a hard look at the proffered evidence.").

whether an [agency's] conclusions have a substantial basis in fact if the responsible agency has apparently ignored the conflicting views of other agencies having pertinent expertise.'" *Davis* v. *Mineta*, 302 F.3d 1104, 1123 (10th Cir. 2002) (citation omitted), *abrogated on other grounds by Diné Citizens Against Ruining Our Env't* v. *Jewell*, 839 F.3d 1276 (10th Cir. 2016).

Here, the administrative record confirms FWS—an agency with pertinent expertise in threatened and endangered animal species in the Colorado River Basin—raised a concern during the review process about warming temperatures affecting future Colorado River basin hydrology and specifically focused Reclamation's attention on the science to support it. NEPA does not command Reclamation to agree with FWS, but the agency needed to at least acknowledge the scientific data provided and offer a "reasoned evaluation of the available information." *Utah Shared Access All.*, 288 F.3d at 1213.

The scientific studies in the record show future water availability will be fundamentally different than past water availability. As the Conservation Groups persuasively argue, Reclamation, without even acknowledging the existence of this evidence, "bas[ed] its analysis of the Contract's depletions on the unsupported assumption that future water supply will mirror past water supply." Aplt. Opening Br. at 31. Contrary to

what NEPA requires, Reclamation's assessment of the environmental consequences of the Contract relies on a premise contradicted by the information before it *without explanation*. "Though we do not sit in judgment of the correctness of such evidence, where it points uniformly in the opposite direction from the agency's determination, we cannot defer to that determination." *Richardson*, 565 F.3d at 715 (emphasis omitted).

The majority acknowledges "[t]he technical appendix does not mention FWS's three studies by name nor does it explicitly state that it prefers backward-looking data to forward-looking data" but finds "that path is reasonably discernable from the record." Maj. Op. at 19. I cannot see any path, let alone a "reasonably discernable" one. While we may "uphold a decision of less than ideal clarity," *State Farm*, 463 U.S. at 43 (citation omitted), this principle does not excuse an agency's obligation to "cogently explain why it has exercised its discretion in a given manner," *id.* at 48. Here, there is *no* explanation for Reclamation's preference for backward-looking data over forward-looking data. "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States* v. *Chicago, M., St. P. & P.R. Co.*, 294 U.S. 499, 511 (1935). Reclamation's failure to acknowledge the three studies or contend with the data presented in them means the agency has not fulfilled its duty to

"supply a reasoned basis" for its actions. *State Farm*, 463 U.S. at 43 (citation omitted).

The majority also says we cannot "fault Reclamation's choice of the best science, in its prerogative, to meet the chosen scale of analysis." Maj. Op. at 21. This framing distracts from the real problem. The question is not whether Reclamation *chose* the best science but rather whether it *explained* how an evaluation of the scientific evidence in the record supports its choice. Our "concern is for elucidation of basis, not for restriction of [the agency's] latitude." *Env't Def. Fund, Inc.* v. *EPA*, 465 F.2d 528, 541 (D.C. Cir. 1972). The agency's choice must account fully for the evidence before it. *See Richardson*, 565 F.3d at 714 ("[T]he State asks us to ensure that BLM's conclusion was based on the requisite 'hard look' *at the evidence before it*.") (emphasis added). An agency's choice of the best science could fall within the realm of deference; choice without explanation violates NEPA.

B. 2012 Basin Study

The Conservation Groups next argue Reclamation's reliance on past data to predict future water availability ignores the impacts of future drought—the subject of the agency's own 2012 Colorado Basin Study. The 2012 Study was designed "to define current and future imbalances in water supply and demand in the Basin and the adjacent areas of the Basin States that receive Colorado River water over the next 50 years (through 2060)."

App. at 323. In the 2012 Study, Reclamation projected "a strong continued warming throughout the Basin" and stated, "it is tenuous to assert that the past record is predictive of future conditions." Supp. App. at 316.

A comment from the Utah Rivers Council advised Reclamation "[t]he EA ignores agency-documented risks from expected water supply shortage declarations." *Id.* at 265. Reclamation replied:

> The 2012 Basin Study report analysis specifically detailed the overall Colorado River Basin. This EA provides a specific and detailed look at the impacts of signing a water exchange contract with the State of Utah, as required under NEPA, and pur[su]ant to water rights held by the State of Utah under the 1922 Compact.

Id. Again, I fail to see how Reclamation responded to the *actual* concern raised.

The 2012 Study shows "that water in the Colorado River system will be scarcer due to warming temperatures than it has been in the prior century." Aplt. Opening Br. at 29; *see also* App. at 326. Yet, Reclamation does not deal with this information and persists in relying only on past data. Importantly, Reclamation does not explain how the geographic scope of the 2012 Study—the *overall* Colorado River basin—would be irrelevant to addressing the environmental impact of the Contract, which covers a smaller section of the Colorado river system within the larger Colorado River Basin. There might be a reason—counterintuitive though it seems—

why the larger geographic scope of the 2012 Study makes it irrelevant to the assessment at issue here, but the agency has not provided one.[3]

The majority contends "[c]omments attempting to expand the scope of Reclamation's EA were not germane" to "analyzing the exchange contract's impacts on a discrete part of the Green River." Maj. Op. at 21. This observation is not especially responsive to the Conservation Groups' argument, when correctly understood. The Conservation Groups were not trying to expand the geographic scope of Reclamation's assessment. They argue Reclamation failed to address the *findings* from the 2012 Study when evaluating the environmental impacts of the Contract. And, what's more, Reclamation failed to "cogently explain" why the difference in geographic scope between the 2012 Study and the focus of the Final EA rendered the 2012 Study inapplicable.

[3] Perhaps what Reclamation meant was the 2012 Study was irrelevant to the assessment of the environmental consequences of the Contract. However, explanation, not speculation, satisfies NEPA. Courts may "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *State Farm*, 463 U.S. at 43 (citation omitted). But when "we are left to spell out, to argue, to choose between conflicting inferences," as here, the agency's path is not reasonably discernable. *Chicago, M.*, 294 U.S. at 510-11. Under these circumstances, I cannot agree Reclamation complied with the "hard look" required by NEPA.

C. Trace 63

Last, the Conservation Groups contend Reclamation failed to address concerns raised in public comment about *future* drought conditions. Along with the FWS's previously referenced comment, the National Park Service (NPS) also expressed "concern . . . regarding the hydrology modeling['s] . . . lack of evaluation under a drier scenario." Supp. App. at 279. NPS pointed to a "growing consensus among partners and among scientific studies that the future 'new normal' may be warmer and drier years on average." *Id.* Likewise, the Utah Division of Wildlife Resources (UDWR) stated "it is unclear how this model accounts for future climate change and lack of inflow." *Id.* at 266.

Reclamation responded to these comments with modeling using past drought data in the Final EA. The agency specifically referenced the trace 63 model—which measures the 2000-2015 drought and models the "worst-case scenario" for impacts of future water availability. *See* App. at 190. Again, the Conservation Groups argue Reclamation failed to "explain how using a model based on past drought can project impacts of future drought that Reclamation's 2012 analysis and more recent scientific studies indicate will be far more severe than those over the last century." Aplt. Opening Br. at 30. I agree with the Conservation Groups.

To comply with NEPA and demonstrate a "rational connection between the facts found and the choice made," *State Farm*, 463 U.S. at 43 (citation omitted), Reclamation needed to explain *why* reliance on only historic data was justified under the circumstances. Instead, Reclamation avoided the issue by using historical data as a proxy for future hydrology *without explanation.*

The majority says trace 63 "was an appropriate modeling data set, or surrogate, to capture any unanticipated effects of water shortages and climate-change concerns." Maj. Op. at 17. Respectfully, the record suggests otherwise. The studies in the record indicate future water availability will look nothing like past water availability. Yet trace 63 uses only historic data. As the Conservation Groups correctly observe, it is not clear on this record how "modeling based on past drought cycles alone" could offer "a meaningful 'surrogate' to predict future water availability." Reply Br. at 13.

The majority acknowledges our duty is to conduct "a 'thorough, probing, in-depth review' of the administrative record." Maj. Op. at 13 (quoting *Ron Peterson Firearms, LLC* v. *Jones*, 760 F.3d 1147, 1162 (10th Cir. 2014)). We do not "depart from [our] proper function when [we] undertake[] a study of the record, hopefully perceptive, even as to evidence on technical and specialized matters" because doing so "enables [us] to penetrate to the underlying decisions of the agency, to satisfy [ourselves]

that the agency has exercised a reasoned discretion . . . ." *Greater Bos. Television Corp.*, 444 F.2d at 850. Thus, absent any explanation from Reclamation as to how past data can serve as a surrogate for future drought scenarios, the record here does not permit the conclusion drawn by the majority about trace 63. When the judgment of an agency appears unsupported in the record and is unaccompanied by a rational explanation, "we cannot defer to that determination." *Richardson*, 565 F.3d at 715.

III.

Review of agency action under the APA's arbitrary and capricious standard is "highly deferential," but "our inquiry must 'be searching and careful.'" *Ecology Ctr., Inc.* v. *U.S. Forest Serv.*, 451 F.3d 1183, 1188 (10th Cir. 2006) (citation omitted). The majority correctly articulates the standard of review but fails to heed a critical limitation: we do not consider "[a]fter-the-fact rationalization by counsel in briefs or argument" in lieu of reasoned decision-making by the agency during the decision-making process. *Olenhouse*, 42 F.3d at 1575. "It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *State Farm*, 463 U.S. at 50. And if an agency's reasoning is inadequate,

"[t]he reviewing court should not attempt itself to make up for such deficiencies." *Id.* at 43.

Rather than abide these limits, the majority endorses Reclamation's evaluation of the environmental impacts of the Contract by impermissibly accepting as proxy arguments made by the agency in litigation. The majority also offers its own rationale to compensate for Reclamation's explanatory shortcomings. Courts may not satisfy the obligations the agency left unfulfilled during the decision-making process.

In addressing the three scientific studies identified in the FWS's comment, the majority says it is "satisfied with Reclamation's rationale that those studies' geographic scales . . . were not appropriate to evaluate the more limited hydrologic impact of the exchange contract." Maj. Op. at 22. Nowhere in the Final EA does Reclamation even mention the three studies, much less provide the rationale now supplied by the majority to explain why they could be disregarded.

Reclamation's response to FWS's comment similarly makes no mention of the geographic scope of the studies, nor does the added paragraph addressing "concerns over a changing climate" reference a difference in geographic scale. As far as I can tell, the only source for the majority's invocation of geographic scale, as it applies to the three studies, is Reclamation's appellate brief, where the agency argues "the cited

additional studies analyze projections of future water availability at a much larger geographic scale . . . than Reclamation determined is scientifically appropriate . . . .” Aplee. Br. at 24-25.

The majority further contends “Reclamation’s focus on the relevant geographic scale for the analysis of the exchange contract was also reasonably discernable in its decision to use trace 63 and its own models and simulations.” Maj. Op. at 19. Though the majority acknowledges “Reclamation only explicitly made [the geographic scope] argument in response to a comment” about the 2012 Study, my colleagues conclude NEPA is satisfied because “the refrain of geographic scale resonates throughout Reclamation’s record.” *Id.* at 19-20. This is insufficient. The “hard look” standard is not unyielding but demands more than what courts can glean from the record’s ambiance.

“[I]t is the agency’s responsibility, not this Court’s, to explain its decision.” *State Farm*, 463 U.S. at 57. But the majority relies on arguments made in litigation or discerns support from a record devoid of agency explanation. Doing so violates the longstanding principle that “[w]e can only affirm agency action, if at all, on grounds articulated by the agency itself.” *Utahns for Better Transp.* v. *U.S. Dep’t of Transp.*, 305 F.3d 1152, 1165 (10th Cir. 2002), *modified on reh’g*, 319 F.3d 1207 (10th Cir. 2003).

IV.

Reclamation failed to take a "hard look" at the evidence before it showing future water availability may not resemble the past. In doing so, the agency failed to assess all significant environmental effects of the Contract, as required under NEPA. Without such a complete assessment, we cannot yet determine whether an EIS is required. Therefore, I respectfully dissent from Part II.B.1 of the majority opinion and would reverse and remand to the district court with instructions to remand to the agency.