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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH**

CENTER FOR BIOLOGICAL DIVERSITY,
et al.,

Plaintiffs,

v.

U.S. DEPARTMENT OF THE INTERIOR,
et al.,

Defendants.

PLAINTIFFS' OPENING BRIEF

Case No. 2:19-cv-00636-DBB-CMR

Hon. David Barlow

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STATEMENT OF ISSUES

1. Did Defendants U.S Department of the Interior and Bureau of Reclamation (collectively “BOR”) fail to accurately describe the “no action” alternative, which provides the environmental setting or baseline from which to analyze impacts of the Green River Block Exchange Contract (“GRBE”) as required by the National Environmental Policy Act (“NEPA”)?
2. Did the BOR fail to take a hard look – as required by NEPA – at the impacts of the GRBE because it failed to accurately analyze the location of proposed withdrawals and return flows and, thus, failed to fully analyze the potential impacts of the GRBE on the river and its endangered fish and other resources?
3. Did the BOR fail to take a hard look at the impacts of the change in water use and water releases from Flaming Gorge Dam authorized under the GRBE on hydrology of the Green River and Colorado River and associated impacts to fish in light of likely more limited water availability in the future?
4. Did the BOR fail to take a hard look at the cumulative impacts to water availability and fish of the GRBE combined with other ongoing, planned, and reasonably foreseeable water development in the Green River and Colorado River system?
5. Was the BOR’s adoption of a Finding of No Significant Impact (“FONSI”) and failure to prepare an Environmental Impact Statement (“EIS”) arbitrary and capricious and, thus, in violation of the Administrative Procedure Act (“APA”) in light of potentially significant impacts to resources?

STATEMENT OF CASE

A. Procedural History

This case challenges a decision made by the BOR to enter into the GRBE without first undertaking adequate environmental review. ([Doc. # 20](#), Complaint, ¶ 1, (“Compl.”))¹ The

¹ Note that all references to the Complaint are to the Amended Complaint filed June 21, 2019.

GRBE facilitates new water extractions from the Green River of 58,957 acre-feet per year (US0000052), over a 50-year period and requires additional water to be released by the BOR from the Flaming Gorge Dam at a time when the BOR's own 2012 Basin Study shows that the water deficit in the Colorado River Basin will be expanding. *Id.* The Colorado River system including the Green River, a major tributary, is the most critical water resource in the region and is the subject of multiple interstate compacts, legislation, and agreements. (Compl. ¶¶ 46-57, 39-45)

In 2016, Utah's Department of Water Resources ("DWR") requested two contracts with the BOR which would obligate the BOR to release up to 156,890 acre-feet ("AF") of stored water per year from Flaming Gorge Dam into the Green River for future development and appropriation by water users in Utah – the Ultimate Phase Water. (Compl. ¶¶ 60-68) The request divided the water Utah seeks to develop between the GRBE for 72,641 AF and a Lake Powell Pipeline Contract for 84,249 AF. (*Id.* ¶ 67); US0000028.

Before executing the contract, the BOR as a federal agency, was required to comply with NEPA. In undertaking that obligation, on September 16, 2018, the BOR issued a draft Environmental Assessment ("EA") for public comment. (Compl. ¶ 73) Plaintiffs, other conservation groups, the Ute Tribe, the U.S. Fish and Wildlife Service, and the U.S. National Park Service submitted comments. (*Id.* ¶¶ 76, 79) In January 2019 the BOR issued the Final Environmental Assessment ("Final EA") (*id.* ¶ 100), and on February 13, 2019 signed and issued the FONSI (*id.* ¶ 101), US0000027. The BOR signed the GRBE on March 20, 2019. US0000001.

B. Background Regarding Colorado and Green Rivers and Water Availability

In December 2012, the BOR summarized the importance of the Colorado River:

Spanning parts of the seven states of Arizona, California, Colorado, New Mexico, Nevada, Utah, and Wyoming (Basin States), the Colorado River Basin (Basin) is one of the most critical sources of water in the West. The Colorado River and its

tributaries provide water to nearly 40 million people for municipal use, supply water to irrigate nearly 5.5 million acres of land, and is the lifeblood for at least 22 federally recognized tribes (tribes), 7 National Wildlife Refuges, 4 National Recreation Areas, and 11 National Parks. Hydropower facilities along the Colorado River provide more than 4,200 megawatts of electrical generating capacity, helping to meet the power needs of the West and offset the use of fossil fuels. The Colorado River is also vital to the United Mexican States (Mexico) to meet both agricultural and municipal water needs.

BOR, *Colorado River Basin Water Supply and Demand Study 3* (2012), US0001912 (“2012 Colorado Basin Study”).

In the Water Demand Assessment portion of its 2012 Colorado Basin Study, the BOR explained that the Colorado River system is over-allocated and future development and climate change would exacerbate this problem:

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

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

2012 Colorado Basin Study, US0002337-38 (Technical Report C – Water Demand Assessment C-1 through C-2). The 2012 Colorado Basin Study projected a median expected decrease in Colorado River flow of about nine percent (9%) by 2060. *Id.* at US0001916. In addition, according to the BOR, “[d]roughts lasting 5 or more years are projected to occur 50 percent of the time over the next 50 years.” *Id.* Moreover, the BOR found that, “[c]omparing the median of water supply projections against the median of the water demand projections..., the long-term

projected imbalance in future supply and demand is about 3.2 maf [million acre-feet] by 2060.” *Id.* at US0001918. Stated another way, “climate change may put water users and resources relying on the river at risk of prolonged water shortages in the future.” *Id.* at US0001935.

Unfortunately, the nine percent (9%) decrease in flow predicted by the Colorado Basin Study may be too low an estimate. As discussed in detail below, newer studies suggest a conservative estimate for flow decrease could be closer to 20%. *See* US0010507-521 (Udall & Overpeck 2017), US0010382-395 (McCabe et al. 2017); US0010417-434 (Xiao et al. 2018).

The Green River is a major tributary to the Colorado River. US0005026 (2000 *Flow and Temperature Recommendations for Endangered Fishes in the Green River Downstream of Flaming Gorge Dam* (“2000 Flow Recommendations” or “Muth et al. 2000”), map of Colorado River basin). For the purpose of managing flows to protect endangered fish and other river resources and values,

[t]he [Upper Colorado River Recovery Program] Flow Recommendations divide the Green River below [Flaming Gorge] Dam into three river reaches. Reach 1 begins directly below the dam and extends to the confluence with the Yampa River (65 river miles). Reach 2 begins at the Yampa River confluence and continues to the White River confluence (99 river miles). Reach 3 is between the White River and Colorado River confluences (246 river miles) (Muth et al. 2000).

US0000051 (Final EA). A map of the reaches shows the relative location of the Flaming Gorge Dam, major tributaries and the confluence with the mainstem of the Colorado River. US0005054 (map with reaches and USGS flow gauges).

Management of water flows in these reaches of the Green River at different times of year is critical to survival and recovery of the endangered fishes that are found in the river system. US0000041, US0000077-81. “Information on each endangered fish species was used to develop integrated flow and temperature recommendations for the Green River downstream of Flaming Gorge Dam. The goal of the recommendations is to provide the annual and seasonal flow and temperature patterns in the Green River that would enhance populations of the endangered

fishes.” US0005019 (2000 Flow Recommendations); US0000149 (table with flow and temperature recommendations).

In 2005, the USFWS issued a biological opinion for operation of the Flaming Gorge dam based on compliance with the flow and temperature recommendations in each of the 3 reaches to protect listed fish between Flaming Gorge Dam and Lake Powell. US0010142, US0010147-150. The biological opinion requires that specific targets be met depending on the hydrological conditions and season and allows for adaptive management based on research and monitoring to address uncertainties. *See* US0010151-152 (Table 1); US0010157. In short, the release of water from Flaming Gorge dam is a highly regulated as part of a system designed to meet the seasonal flow and temperature needs of endangered fish in each of the three reaches and the existing upper basin water depletions, while still meeting the upper basin’s commitments to provide water to the lower basin.² The GRBE would increase diversions and consumptive use or water “depletions” along the Green River and those changes in hydrology would affect the status quo.

C. Important Factual Issues Identified During the NEPA Process

The comments on the draft EA raised a variety of issues including that the BOR: used a misleading baseline or “no action” alternative; did not properly address future water availability in the Green and Colorado River systems in its analysis; and did not properly identify or analyze all relevant impacts, including cumulative impacts.

1. No Action Alternative and Baseline Assumptions

Plaintiffs’ comments explained that the BOR had used an improper baseline or environmental setting for the analysis by assuming that the water at issue would be used under the “no action” alternative even though the vast majority of the water that Utah claimed would be “exchanged” was not currently being used, had never been previously used, and therefore the

² Unfortunately, the requirements have already proven to be insufficient and one of the fish (humpback chub) has been “functionally extirpated” from part of Reach 2 even with the existing measures in place. US0000956 (Whirlpool Canyon).

water rights had not been perfected. *See, e.g.*, US0000178-181, US0000202-213, US0000228-230.³ Thus, if the GRBE is implemented, the result would be the appropriation of new water from the Green and Colorado River system. *Id.*

2. Identification and Analysis of Hydrology Impacts in Light of Future Water Availability

In comments, Plaintiffs and others pointed out that the conclusions provided in the Draft EA regarding water availability and impacts to water flows were at odds with both the BOR's 2012 Colorado Basin Study and newer studies regarding future water availability in the Colorado River basin:

[T]he BOR is effectively ignoring its own stark projections contained within the Bureau's 2012 *Colorado River Basin Water Supply and Demand Study* as well as projections by Udall and Overpeck in their 2016 study titled *The twenty-first century Colorado River hot drought and implications for the future*. According to Udall and Overpeck, the Colorado River's flow will likely decrease by 20-30% by mid-century.

US0000179 (Comments from Plaintiff Utah Rivers Council). Comments from Plaintiffs Living Rivers, Colorado Riverkeeper, Center for Biological Diversity, Sierra Club also noted the draft EA's inconsistency with the BOR's own 2012 Colorado Basin Study, which (as noted above) found a median expected decrease of about 9% in Colorado River flows by 2060, as well as with newer scientific studies estimating those reductions could be as much as 20% by mid-century.

US0000222-24 (citing Udall & Overpeck 2017, Xiao et al. 2018).

The U.S. Fish & Wildlife Service ("FWS") (an agency within Defendant Interior) comments raised the following question:

Reclamation's modeling is based on the 1906 through 2015 hydrologic record, with no consideration of hydrologic changes or trends associated with warming temperatures. Is it realistic to assume that upper Colorado River basin hydrology

³ BOR admits that there has been "a long standing disagreement" about the "water right" associated with the GRBE. US0000091. BOR, however, erroneously claims these disagreements are resolved by the GRBE. *Id.*

in the future will look like that of the past, given recent research suggesting otherwise (e.g., USBR 2012; Udall & Overpeck 2017, McCabe et al. 2017; Xiao et al. 2018)?

US0000198 (Letter from Brian Caruso, Chief, Division of Water Resources, FWS Region 6 to BOR, Provo Area Office (Nov. 1, 2018) (“FWS Comment Letter”). The four citations provided in the FWS Comment Letter are the 2012 Colorado Basin Study and the following three research articles:

- B. Udall & J. Overpeck, *The twenty-first century Colorado River hot drought and implications for the future*, Water Resource Research (2017). US0010507-521 (“Udall & Overpeck 2017”).
- Gregory McCabe, David Wolock, Gregory Pederson, Connie Woodhouse, and Stephanie McAfee, *Evidence that recent warming is reducing Upper Colorado River flows*, 21 Earth Interactions Paper #10 (2017). US0010382-395 (“McCabe et al. 2017”).
- M. Xiao, B. Udall & D. Lettenmaier, *On the Causes of Declining Colorado River Streamflows*, Water Resources Research (2018). US0010417-434 (“Xiao et al. 2018”).

The reason the FWS reminded the BOR of these four documents in the FWS Comment Letter was that the science strongly suggested it was not “realistic to assume that upper Colorado River basin hydrology in the future will look like that of the past.” FWS Comment Letter at US0000198.⁴ Indeed, the three research articles the FWS cites are definitive on that point.

⁴ Multiple other commenters raised similar concerns. *See, e.g.*, U.S. Dept. of Interior, National Park Service at US0000255 (“One very important concern we have regarding the hydrology modeling is the lack of evaluation under a drier scenario. After 19 years of drought in this system, there is growing consensus among partners and among scientific studies that the future ‘new normal’ may be warmer and drier years on average. We note that the Bureau of Reclamation and the basin states are regularly evaluating effects under a drier subset of hydrology runs for other Colorado River water projects and we would recommend that this be conducted for this project as well. These warmer and drier scenario runs would be important to ensuring that the hydrology does indeed fall within the range of the FG ROD under likely future scenarios.”); Utah Division of Wildlife Resources (an agency of Intervenor State of Utah) comments at US0000190-193 (raising concerns about the dry-year modeling and noting, “it is unclear how this model accounts for future climate change and lack of inflow given that a clear indication from a variety of climate models indicates that more precipitation will come in the form of rain, and not snowpack equivalent,” US0000190; and explaining, “[a]lthough only -100

According to Udall & Overpeck 2017, [r]ecently published estimates of Colorado River flow sensitivity to temperature combined with a large number of recent climate model-based temperature projections indicate that continued business-as-usual warming will drive temperature-induced declines in river flow, conservatively --20% by midcentury and --35% by end-century, with support for losses exceeding --30% at midcentury and --55% at end-century.” US0010507. Xiao et al. 2018 finds that, “the pervasive warming has reduced snowpacks and enhanced evapotranspiration over the last 100 years; over half (53%) of the long-term decreasing runoff trend is associated with the general warming.” US0010417. That article further points out, “higher temperatures have played a large role in the [2000-2014] post-Millennium Drought.” *Id.* Similarly, McCabe et al. 2017 find that

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

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

In the Final EA the BOR responded to the FWS comments and the citation to new studies by stating:

See Technical Appendix for further discussion and description of scenarios and alternatives analyzed. The hydrologic analysis included 110 years of historic

cfs in estimated losses [are projected in the EA,] under the proposed action it cannot be said that this will have no effect on these fish species: any loss of water will have an impact as their life cycles highly depend on annual hydrology for numerous reasons discussed in the previous pages. The same goes for nonnative fish interactions; several species would benefit from even minor losses,” US0000193); American Rivers Comments at US0000265-267; Western Resource Advocates Comments at US0000234 (citing Udall & Overpeck); Conserve Southwest Utah Comments at US0000208-209 (citing Udall & Overpeck and Xiao); Ute Indian Tribe Comments at US0000240-242.

hydrology. A drought response section has been added to the Technical Appendix to further address concerns regarding potential impacts from future drought scenarios.

US0000282 (response to comment number 59); US0000277 (same response to comment number 30 UDWR). However, neither the Revised Technical Appendix A to the Final EA (US0000114-149) nor the Final EA mention these studies regarding the limits on future water availability, and the “further discussion” promised above is nowhere to be found. No other changes were made in the EA or Technical Appendix A analysis that show any actual consideration by the BOR of impacts to resources due to reduced future water availability predicted in these studies (and the 2012 Colorado Basin Plan). Most important, the scant new EA language on this point fails to address comments from Plaintiffs, FWS and others that consideration of future reduced flows associated with warming temperatures is needed because the modeling used in the EA does *not* account for that trend.

Instead of addressing the studies provided by the FWS and others, the BOR’s Final EA and Appendix A continued to analyze “continued drought” based on droughts from the 1930s through 2015 and did not provide any analysis taking into account long-term trends for reduced water flows in the system that the 2012 Colorado Basin Study⁵ and newer studies show will be significant.

3. Hydrology Impacts of Projected Withdrawals Not Identified

Because both flow and temperature are important for fish survival, the amount, place, and time of year that any new water is diverted from the Green River may affect the endangered fishes in the reaches. However, this information is not disclosed or considered in the hydrology analysis that underlays the analysis of direct, indirect, and cumulative impacts to the endangered

⁵ There was no change in how Technical Appendix A considered the 2012 Basin study. *Compare, e.g.,* US0000859, *id.* n.1, (draft) *to* US0000115, *id.* n.1, (final); *compare* US0000861 *to* US0000117. The Final EA’s discussion of the Basin Plan also remained unchanged. *Compare* US0000051 (final) *to* US0000802 (draft, same); *compare* US0000053 (final) *to* US0000803 (draft, same).

fishes. The EA does not explain where the new water would be diverted from the Green River or where return flows would come back to the Green River.

The lack of clarity on this point in the EA was noted by the National Park Service: “Despite our best efforts to understand the rigorous hydrology modeling in the EA appendix, we still find a lack of clarity within the EA for where (or how much) water will be diverted from the Green River and where return flows might come back into the Green River. This makes it difficult to clearly understand which reaches might see more/less water.” US0000255; *see also* US0000186 (Utah Rivers Council); US0000190 (UDWR: “We would like to see specific details on which tributaries will be most affected under this scenario, because tributary impacts could influence native fish recruitment.”); US0000219-220 (Living Rivers et al.).

In response to the National Park Service, the BOR stated only: “Comments have been incorporated in the DEA and Hydrologic Modeling Technical Report.” US0000290. But the Final EA states only that the hydrological modeling assumes the water is diverted “directly below [Flaming Gorge] Dam” (US0000051) and does not analyze where the new water would actually be diverted or where return flows would come back into the Green River. In other words, the Final EA does not explain where the new water would be diverted pursuant to the GRBE, how much water would be diverted at each site, or where return flows would come back into the Green River.

4. *Hydrology Modeling for GRBE and “Full Depletion Scenario”*

The hydrology modeling used in the EA only models impacts at Reach 2 and did not include Reach 3. US0000119 (“This analysis looks at the impact of the [Green River Block] depletion scenario at Reach 2, according to the modeled information.”); US0001890 (“The [Green River Basin Model] does not have the capability of analyzing daily ROD flow targets in Reach 3 at the Green River at Green River, Utah.”). FWS comments suggested additional information was needed for Reach 3: “We suggest that Reclamation also provide modeling

results for Reach 3, including for the No Action, GRB, and Reasonably Foreseeable Depletion scenarios.” US0000199; *see also* US0000196; US0000255.⁶ In response, the BOR stated: “Reclamation’s commitments outlined in the FEIS and FGROD are limited to Reaches 1 and 2. Reclamation continues to meet its commitments under the FGROD” (US0000283), although the GRBE’s impacts affect Reach 3.

In its analysis of cumulative effects to hydrology (US0000056-58), the Final EA relies on a “Full Depletion Scenario” to evaluate cumulative effects based on an assumption that there would be no increased water depletions by any upper basin state except Utah. The Final EA explains this as follows: “Under the Full Depletion Scenario, all assumptions from the [Green River Block] Depletion Scenario are maintained, with the addition of reasonably foreseeable depletions held constant at 2060 levels with all other depletions held constant at 2018 depletion levels.” US0000052. Appendix A further explains that only Utah’s future depletions were modeled and “Colorado, New Mexico and Wyoming depletions were held constant at 2018 levels under all scenarios.” US0000117.

An additional 60,000 acre-feet of predicted future Utah depletions were also excluded from the cumulative impacts analysis: “The difference between total State of Utah depletions at 2060 levels and the Reasonably Foreseeable levels is 60 thousand acre-feet (kaf), which represents the depletions that do not meet the strict criteria to be included in the cumulative analysis.” *Id.* The “strict criteria” used to exclude this large amount of predicted removed water may be whether the predicted depletion, “has state legislation, or a tribal resolution or federal Indian water settlement, or a FONSI or ROD.” US0000051. Which specific projects the BOR excluded from the cumulative impacts analysis as part of the 60,000 figure is not presented.⁷

⁶“It is not completely clear . . . whether the State will commit to satisfying Flow Recommendations, or how potential shortfalls in meeting Reach 2 flow targets may affect Reach 3 flow targets.” US0000255 (National Park Service comments).

⁷ Plaintiffs and others pointed out that cumulative impacts should also include projects such as a

The only other explanation for these depletions being omitted is that, “[t]he additional depletions are also below Reach 2 and therefore not included in the geographical boundaries of this analysis,” US0000117. As noted above, the elimination of depletions below Reach 2 appears to be based on the limits of the modeling, which only modeled impacts at Reach 2 and did not include Reach 3. US0000119; US0001890.

In sum, the future depletions modeling relied on in the EA does not include: 1) additional anticipated increased water use by non-Utah upper basin states from 2018-2060; and 2) 60,000 acre-feet/year of anticipated Utah water depletions by 2060.

The 2007 FEIS and Interim Guidelines, and Biological Opinion (“2007 BiOp”) which the BOR relies on to show that endangered fishes will be protected, expected that “scheduled depletions” in all upper basin states (not only Utah) would continue to rise between 2008 and 2060. US0010681. In addition, the 2007 BiOp projections for depletions from Colorado, New Mexico, and Wyoming (the three states that the cumulative impacts analysis “held constant at 2018 levels”) have already turned out to be an underestimate (US0011352)⁸ – which suggests the projected depletions in the GRBE Final EA (which depend on the 2007 analysis) are also underestimates.

proposed “trans-basin diversion of 5,400 acre feet of water out of Gooseberry Creek.” US0000185-186. Because the Final EA does not explain which projects were included in its cumulative impacts analysis and which were excluded, it is impossible to determine whether specific reasonably foreseeable new depletions and diversions, such as the proposed Gooseberry Creek diversion, were analyzed.

⁸ The 2007 BiOp projections for 2018 depletions in the three states were Colorado 2,603 thousand acre-feet/year (kafy), New Mexico 579 kafy, and Wyoming 531 kafy (with all of those states’ depletions rising through 2060). US0011352. According to the GRBE Final EA, actual 2018 depletions for those three states were higher than predicted: Colorado 2,833 kafy (230 kafy difference), New Mexico 594 kafy (15 kafy difference), and Wyoming 609 kafy (78 kafy difference). US0000118.

SUMMARY OF ARGUMENT

NEPA requires federal agencies to look before they leap. Specifically, NEPA requires agencies to take a “hard look” at the legal and factual issues involved in potential federal actions. The Administrative Procedure Act (“APA”) imposes additional duties: agencies must act in accordance with law and cannot be arbitrary and capricious while making decisions.

Here the BOR failed to take a “hard look” and acted in an arbitrary and capricious manner. By failing to establish the correct baseline for its analysis – that the GRBE would not be an exchange, rather it would be a new appropriation of water – the agency failed to analyze and describe the negative impacts these new water withdrawals would have upon the entire river system. The BOR analysis was also incomplete as it was not based on where water would actually be taken from and returned to the river under the GRBE. Furthermore, the BOR essentially ignored the science that demonstrates already scarce river water will become even more scarce with rising temperatures. In addition, the Final EA fails to explain key elements of the BOR’s cumulative impact analysis. To the extent that the Final EA does explain how the cumulative impacts analysis was conducted, it was based on faulty and arbitrary assumptions. Finally, the BOR violated NEPA and the APA by failing to prepare an EIS.

ARGUMENT

A. Standard of Review NEPA and the APA⁹

Plaintiffs allege that the BOR violated NEPA, [42 U.S.C. § 4331](#) *et seq.* Because NEPA does not provide an independent cause of action, the APA, [5 U.S.C. §§ 551](#) *et seq.*, provides jurisdiction and governs this Court’s review. *See, e.g., Utah Shared Access All. v. Carpenter*, [463 F.3d 1125, 1130-31, 1134 \(10th Cir. 2006\)](#). The APA requires a reviewing court to, “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” [5 U.S.C. § 706\(2\)\(A\)](#). An action is arbitrary and capricious,

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

[Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.](#), [463 U.S. 29, 43 \(1983\)](#).

Although the arbitrary and capricious standard of review is deferential, an agency must still conduct a “hard look” examination under NEPA that “must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made.” [N. M. ex rel. Richardson v. Bureau of Land Mgmt.](#), [565 F.3d 683, 718 \(10th Cir. 2009\)](#); [Sierra Club v. Hodel](#), [848 F.2d 1068, 1093 \(10th Cir. 1988\)](#) (agencies must perform hard look NEPA analysis “before committing themselves irretrievably to a given course of action so that the action can be shaped to account for environmental values”).

In *Richardson*, the Tenth Circuit held that:

⁹ Plaintiffs concurrently submit standing declarations that explain Plaintiffs’ interests in this matter and how Defendants’ failure to comply with the National Environmental Policy Act resulted in inadequate and uninformed decision-making that threatens those interests. Declarations of Taylor McKinnon, John Weisheit, Lauren Wood, and Zachary Frankel. (Attached as Exhibits 1-4).

BLM disregarded NEPA when it failed to conduct a thoroughgoing environmental analysis of its chosen land management alternative, failed to consider the reasonable alternative of closing the entire Otero Mesa to fluid mineral development, and failed to demonstrate that it examined the relevant data regarding the likely impact of development on the Aquifer. Each of these failures was more than a mere flyspeck and thwarted NEPA's purposes by preventing both BLM and the public from accessing the full scope of required environmental information. Despite granting the Agency the full measure of respect and deference warranted by the arbitrary and capricious standard of review, we must reverse.

[565 F.3d 715-16](#); *see also* [High Country Conserv. Advocates v. United States Forest Serv.](#), 52 F. Supp. 3d 1174, 1186 (D. Colo. 2014) (quoting [Or. Nat. Desert Ass'n v. Bureau of Land Mgmt.](#), 625 F.3d 1092, 1121 (9th Cir. 2010)) (the court cannot “defer to a void”).

The same standard of review applies to review of the adequacy of the agency’s NEPA analysis, as well as to the agency’s determination whether an EIS is needed to evaluate significant effects on the environment. [Greater Yellowstone Coal. v. Flowers](#), 359 F.3d 1257, 1274 (10th Cir. 2004) (quoting [Davis v. Mineta](#), 302 F.3d 1104, 1112 (10th Cir.2002)) (review of the decision not to prepare an EIS requires the court to determine, “whether the agency acted arbitrarily and capriciously in concluding that the proposed action will not have a significant effect on the human environment”).

If a court finds the agency failed to comply with its NEPA obligations, the proper remedy is to vacate and set aside the decision. [5 U.S.C. § 706\(2\)\(A\)](#). [Davis](#), 302 F.3d at 1115; [WildEarth Guardians v. Bernhardt](#), 423 F. Supp. 3d 1083, 1105 (D. Colo. 2019).

B. The BOR Failed to Take a “Hard Look” at the Effects of the Project as Required by NEPA

As noted above, NEPA requires that the BOR take a “hard look” at the environmental impacts of its decisions. *See* [42 U.S.C. § 4332\(C\)](#); [Robertson v. Methow Valley Citizens Council](#), 490 U.S. 332, 349-50 (1989).

1. The Choice of an Improper No Action Alternative Undermined the BOR's Analysis

NEPA requires that agencies “study, develop and describe appropriate alternatives,” including a no action alternative, whether an EA or EIS is prepared. [42 U.S.C. § 4332\(2\)\(E\)](#); [40 C.F.R. § 1508.9](#); [40 C.F.R. § 1508.14](#). The description of the no action alternative in the Final EA is faulty. The agency implies that the water depletions that are the subject of the “exchange” are being used now and that the GRBE would shift the depletions to a new location pursuant to the proposed action, when in fact the most of the water at issue has not previously been used. In fact, the “exchange” consists largely of unperfected water rights. (Compl. at ¶¶ 67, 99) Thus, the true effect of the exchange would be new withdrawals of water from the Green River. *Id.*

The Final EA states:

If the water exchange contract is implemented, the State would forebear the depletion of a portion of the Green River and tributary flows to which it is entitled under Article XV (b) of the Upper Colorado River Basin Compact which expressly recognizes each compacting state's rights and powers to regulate within its boundaries the appropriation, use, and control of water apportioned and available to the states by the Colorado River and Upper Colorado River Basin Compacts.

US0000029 (emphasis added). The use of the term “forebear” implies that a current use would be discontinued. As discussed above, that would not be the case: most of the water rights to be “exchanged” via the GRBE have never been put to use. This means the GRBE would lead to a new appropriation of water from the Green River, not the movement of currently exercised water rights from one location to another.

In fact, Utah has no “right” to any additional water from the Green River system absent federal approval by the Department of the Interior. In addition to NEPA, the Boulder Canyon Project Act (“BCPA”) of 1928, [43 U.S.C. § 617](#) *et seq.*, which implemented and codified the 1922 Colorado River Compact (“Compact”) between all the basin states, has to guide the BOR's actions. As the Supreme Court has made clear, “it is the [BCPA] and the [Interior] Secretary's

contracts [under Section 5 of that Act], not the law of prior appropriation, that control the apportionment of water among the States.” [Arizona v. California, 373 U.S. 546, 586 \(1963\)](#).¹⁰ Therefore, the BOR possesses discretionary authority to deny or limit Utah’s use of Green River water, which is unquestionably a part of the Colorado River system under the BCPA.¹¹ These legal realities are not addressed in the Final EA.

What this means for the NEPA analysis is that the Final EA answers the wrong questions. Instead of looking at the impacts of moving diversions from one place to another, the Final EA should have analyzed the impacts of completely new diversions on the Green River. In NEPA terms, the Final EA uses the wrong baseline for its analysis. Without the correct baseline, all the analysis is unusable. In [Half Moon Bay Fisherman’s Mktg. Ass’n v. Carlucci, 857 F.2d 505, 510 \(9th Cir. 1988\)](#), the Ninth Circuit states that “without establishing . . . baseline conditions . . . there is simply no way to determine what effect [an action] will have on the environment, and consequently, no way to comply with NEPA.” See also [Biodiversity Conserv. All. v. USFS, 765 F.3d 1264, 1269 \(10th Cir. 2014\)](#) (citations omitted) (“In general, NEPA analysis uses a no-action alternative as a baseline for measuring the effects of the proposed action.”).

¹⁰ Further, the Supreme Court explained that the Interior Secretary has great discretion under the BCPA: “We have held that the Secretary is vested with considerable control over the apportionment of Colorado River waters. And neither the [BCPA] nor the water contracts require the use of any particular formula for apportioning shortages. While the Secretary must follow the standards set out in the Act, he nevertheless is free to choose among the recognized methods of apportionment or to devise reasonable methods of his own. This choice, as we see it, is primarily his, not the Master’s, or even ours. And the Secretary may or may not conclude that a *pro rata* division is the best solution.” [Arizona v. California, 373 U.S. at 593](#). See also BCPA Section 13(b), [43 U.S.C. § 6171\(b\)](#) (“The rights of the United States in or to waters of the Colorado River and its tributaries howsoever claimed or acquired, as well as the rights of those claiming under the United States, shall be subject to and controlled by said Colorado River compact”).

¹¹ See Compact, Article II (a) (“The term ‘Colorado River System’ means that portion of the Colorado River and its tributaries within the United States of America.”); [43 U.S.C. § 6171\(a\)](#) (approving the Colorado River compact).

Analyzing the wrong no action alternative (and, thus, the wrong baseline conditions) undermined BOR's ability to take the hard look required by NEPA.

2. *The BOR's Failure to Identify the Location of Proposed Withdrawals and Return Flows, and to Analyze Hydrological Impacts in Reach 3 was Arbitrary and Capricious*

A central task of the NEPA analysis was the identification and analysis of impacts of the GRBE on river hydrology. As the BOR stated: "Hydrology of the Green River is the driver of effects to the other 14 resources." US0000030. Unfortunately, the EA fails to provide the needed identification and analysis and, therefore, fails to comply with NEPA.

As described above, the Final EA fails to explain where the "exchanged" water would be diverted from the Green River or where return flows would come back to the Green River. Without this information, as the National Park Service noted, "it [is] difficult to clearly understand which reaches might see more/less water." US0000255. Without this information it is impossible to accurately account for impacts resulting from where and when diversions are made, the amount of depletion from each diversion, or where and when return flows occur along the Green River.

Instead of providing the needed information, the Final EA hydrological modeling arbitrarily "assumed that the [Green River Block] depletion location would occur directly below [Flaming Gorge] Dam during the agricultural growing season from July through the end of September." US0000052. Thus, the Final EA assumes all of the diversions and all of the return flows occur directly below the Flaming Gorge dam, which is a) not possible and b) not accurate.

Because the BOR failed to explain where and when water would actually be diverted along the Green River pursuant to the exchange, in what amounts, and where return flows would come back into the Green River, the Final EA did not provide accurate information about flow and temperature in the river. Flow and temperature information is necessary to determine what impact the GRBE would have on hydrology, endangered fishes and other resources. The result:

the NEPA analysis failed to determine what direct, indirect, and cumulative impacts the GRBE would have on fish and other aquatic and related values.

Although the hydrological analysis appears complex, BOR's failure to provide basic information about where and when depletions will occur is not a technical issue – it is a fundamental omission showing that BOR “entirely failed to consider an important aspect of the problem,” in violation of NEPA. *State Farm*, [463 U.S. at 43](#).

Similarly, although the BOR's FONSI rests on the conclusion that the GRBE would be consistent with existing Flaming Gorge Dam approvals,¹² the BOR failed to provide any analysis of direct, indirect or cumulative impacts to hydrology in Reach 3 where maintaining specific hydrology and flows for many of the endangered fishes is critical. US0010142 (FG BiOp), US0010147-148, US0010151-152 (Table 1). Nowhere does BOR state that an analysis of impacts to hydrology in Reach 3 could not have been provided, rather the Final EA only states that the chosen modeling ended at Reach 2 and was not capable of assessing Reach 3 impacts. US0000119 (“This analysis looks at the impact of the GRB depletion scenario at Reach 2, according to the modeled information.”); US0001890 (“The GRM does not have the capability of analyzing daily ROD flow targets in Reach 3 at the Green River at Green River, Utah.”). In response to comments seeking additional hydrological information about impacts to Reach 3, the BOR averred that “Reclamation's commitments outlined in the FEIS and FGROD are limited to Reaches 1 and 2. Reclamation continues to meet its commitments under the FGROD.” US0000283. But even if true regarding the BOR's commitments, that is irrelevant to the needed NEPA analysis. Because the GRBE may affect hydrology in Reach 3, the EA was required to

¹² US000029 (“The State and Reclamation acknowledge that the implementation of the exchange would remain subject to Reclamation's Section 7 ESA Recovery Program requirements and obligations under the FGROD.”); US000030-31 (admitting there could be up to 300 cfs difference in dry years but, concluding that “in all scenarios, hydrology under the Proposed Action falls within the analysis in the FGFEIS and the operational parameters established in the FGROD.”).

identify and analyze those impacts. On this basis as well, the BOR “entirely failed to consider an important aspect of the problem,” in violation of NEPA. [State Farm, 463 U.S. at 43.](#)

3. *The BOR’s Analysis of Climate Impacts to Hydrology and Fish Resources was Arbitrary and Capricious*

The BOR failed to take a hard look at the impacts to hydrology when it failed to take into account relevant scientific information regarding future water availability. The NEPA regulations explain that “[a]ccurate scientific analysis” is “essential to implementing NEPA.” [40 C.F.R. § 1500.1\(b\)](#). The agency’s hard look analysis must utilize “public comment and the best available scientific information.” [Colo. Envtl. Coal. v. Dombeck, 185 F.3d 1162, 1171-72 \(10th Cir. 1999\)](#) (citations omitted). Thus, the BOR was required to carefully consider relevant “detailed information concerning significant environmental impacts” and share that information with the public. See [Robertson, 490 U.S. at 349](#); [Flowers, 359 F.3d at 1277](#) (holding that in the NEPA process the agency must gather “information sufficient to permit a reasoned choice of alternatives as far as environmental aspects are concerned”).

The FWS, Plaintiffs and other commenters, pointed to important studies – Udall & Overpeck 2017, Xiao et al. 2018, and McCabe et al. 2017 – that show water availability in the Colorado River basin in the future is likely to be significantly curtailed. US0000198; US0000179; US0000222-24. As noted above, Udall & Overpeck 2017 predicts “temperature-induced declines in river flow, conservatively --20% by midcentury and --35% by end-century, with support for losses exceeding --30% at midcentury and --55% at end-century.” US0010507. Xiao et al. 2018 (US0010417), and McCabe et al. 2017 (US0010383), reach similar conclusions.

In the Final EA “response to comments” section, the BOR responded to the FWS and the citation to these new studies by stating: “A drought response section has been added to the Technical Appendix to further address concerns regarding potential impacts from future drought scenarios. US0000282; US0000277 (same). However, revised Technical Appendix A to the Final

EA (US0000114-149), does not mention these studies regarding future water availability, nor does the Final EA.

A new discussion in both the Final EA and Appendix A briefly mentions “concern over a changing climate” and asserts that the Colorado River Simulation System (“CRSS”) modeling based on “Trace 63” (a modeling period starting in 1969 and continuing through 2015¹³) was used by the BOR and takes continued drought into account. US0000122-123 (Appendix A); US0000053 (Final EA, same).¹⁴ No other changes were made in the EA or Technical Appendix A analysis that show any actual consideration by the BOR of impacts to resources due to the reduced future water availability predicted in the three studies (Udall & Overpeck 2017, Xiao et al. 2018, and McCabe et al. 2017) and in the 2012 Colorado Basin Plan.

The new language in the Final EA and Appendix A fails to address comments from Plaintiffs, the FWS and others that consideration of future reduced flows associated with warming temperatures is needed because modeling based on the CRSS for the 1906 to 2015 period (let alone using Trace 63 as the BOR did, which only includes 1969 through 2015) does *not* account for that trend. Instead of addressing the studies provided by the FWS and others, the BOR’s Final EA and Appendix A continued to analyze “continued drought” based only on droughts from 1930s through 2015 (US0000053), and did not provide any analysis taking into account long-term trends for reduced water flows in the system, which the 2012 Colorado Basin Study and the three newer studies show will be significant.

NEPA calls on federal agencies to use accurate data throughout the decision-making process. [40 C.F.R. §§ 1500.1\(c\), 1502.24](#). Similarly, the NEPA hard look requirement mandates

¹³ The statement regarding the use of Trace 63 actually states the time period it represents commences in 1979, which is a significant error: Trace 63 begins in 1969 – it is called Trace 63 because it starts in the 63rd year after 1906 (which is 1969); 1906 is the start of the data set used. (Compl. at ¶ 93; [Doc. #21](#), ¶ 93 (Answer))

¹⁴ The Final EA also added references to “trace 63” in its discussion of the modeled hydrology. See US0000054, 55, 56. Compare US000054 (final) to US0000804 (draft).

that the BOR “utilize[e] public comment and the best available scientific information.”

[*Biodiversity Conserv. All. v. Jiron*, 762 F.3d 1036, 1051 \(10th Cir. 2014\)](#) (internal citations and quotations omitted). “Because [the agency] failed to use the information it had at this stage to consider the impacts of the agency action on water quantity, [the agency] failed to meet its duty to take a hard look at the environmental impacts of the proposed action.” [*San Juan All. v. Bureau of Land Mgmt.*](#), 326 F. Supp. 3d 1227, 1254 (D.N.M. 2018). In [*Richardson*](#), 565 F.3d at 715-16, the Tenth Circuit held that the agency violated NEPA because it “failed to demonstrate that it examined the relevant data regarding the likely impact of development on the Aquifer.” So too here, the BOR did not address relevant scientific information provided by the public and the FWS regarding future water availability and, therefore, failed to demonstrate that it examined the relevant data regarding impacts to hydrology.

The BOR acted arbitrarily and capriciously because it “entirely failed to consider an important aspect of the problem” by refusing to update its draft analysis in light of relevant studies information regarding future water availability provided by agency and public commenters. [*Utah Envtl. Cong. v. Richmond*](#), 483 F.3d 1127, 1134 (10th Cir. 2007) (quoting [*State Farm*](#), 463 U.S. at 43). Just as in [*S. Utah Wilderness All. v. U.S. Dep’t of the Interior*](#), No. 2:13-cv-01060-EJF, 2016 U.S. Dist. LEXIS 140624, at *20 (D. Utah Oct. 3, 2016), here the court “cannot find the [agency] satisfied its obligation to take a hard look at new data.”

4. *The BOR’s Failure to Take a “Hard Look” at Cumulative Impacts, as Required by NEPA, was Arbitrary and Capricious*

In an EA or EIS, an agency must fully analyze all direct, indirect, and cumulative impacts from a project in its environmental analysis. [40 C.F.R. § 1502.16](#); [*Davis*](#), 302 F.3d at 1125-26 (holding FONSI was improper because the EA failed to provide an adequate basis for the agency’s conclusion that project would have no significant cumulative impacts). “Cumulative impacts” result from the “incremental impact of the action” on the environment “when added to

other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” [40 C.F.R. § 1508.7](#).

Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. *Id.* Cumulative impact analyses include private, state, and federal actions. *Id.* As the Tenth Circuit has pointed out, an agency is required to analyze the environmental consequences of “reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” [Dombeck, 185 F.3d at 1176](#). Further, an agency’s “assessment of all ‘reasonably foreseeable’ impacts must occur at the earliest practicable point, and must take place before an ‘irretrievable commitment of resources’ is made.” [Richardson, 565 F.3d at 707](#) (holding cumulative impacts assessment was inadequate where environmental impacts of a planned gas field were reasonably foreseeable but not analyzed).

An agency’s cumulative impacts analysis must take a “hard look” at the issues and cannot merely provide general statements and conclusions. [Citizens for a Healthy Cmty. v. Bureau of Land Mgmt., 377 F. Supp. 3d 1223, 1247 \(D. Colo. 2019\)](#) (finding agency “[f]ailed to comply with NEPA by not taking hard look at the cumulative impacts on mule deer and elk”); [San Juan Citizens, 326 F. Supp. 3d at 1248-49](#) (agency failed to adequately address cumulative impacts and did not comply with NEPA when it relied on “facile conclusion that this particular impact is minor”); [High Country Conserv., 52 F. Supp. 3d at 1197-98](#) (holding that “reasonably foreseeable effect[s] must be analyzed, even if the precise extent of the effect is less certain”); [Colo. Env'tl. Coal. v. Salazar, 875 F. Supp. 2d 1233, 1256 \(D. Colo. 2012\)](#) (agency “failed to take the requisite ‘hard look’ at the air quality effects from its decision, when accumulated with air quality effects from anticipated oil and gas development outside the Planning Area, which renders its decision arbitrary and capricious in violation of the APA”).

NEPA also requires that the agency provide relevant information to the public for

meaningful review. Courts have found cumulative impacts analysis inadequate where the agency failed to explain the basis for its choices or provide necessary information. [*S. Utah Wilderness All.*, 2016 U.S. Dist. LEXIS 140624 at *20](#) (holding agency was arbitrary and capricious when it failed to explain basis for choices in cumulative impacts analysis: “An environmental assessment must contain enough factual specificity to allow the Court to review the agency’s decision.”).

Here the BOR purports to use a “strict” definition of reasonably foreseeable future actions.¹⁵ As noted above, the BOR did not consistently apply this standard and only looked at future depletions in Utah – ignoring future depletions in other basin states (Colorado, Wyoming, and New Mexico) that could significantly affect the same resources and arbitrarily holding those depletions constant at 2018 levels. However, the Final EA provides no rationale or information to show that there are no permitted water uses in other upper basin states that could lead to increased depletions from the 2018 levels.

Further, the BOR failed to explain what projects it was including or excluding from the cumulative impacts analysis: the Final EA provides no list or other accounting of which future actions are included or excluded from the cumulative analysis. An additional 60,000 acre-foot/year of future Utah water depletions were expressly not included in the cumulative impacts analysis, US0000117, but the BOR provides no information about these specific proposals so that the public or the court could assess whether they met “the strict criteria to be included in the cumulative analysis” (*id.*).

The BOR’s alternate rationale, that these depletions were not analyzed because they would be “below reach 2” and, thus, not within the geographical boundaries of the analysis (US0000117), is apparently based on limits in the modeling used (which only models impacts at

¹⁵ US0000117 (“strict criteria” used in cumulative impacts analysis); US0000051 (“In this context, a reasonably foreseeable future depletion is one which has state legislation, or a tribal resolution or federal Indian water settlement, or a FONSI or ROD”).

Reach 2 and did not include Reach 3).¹⁶ The Final EA explains that – even though the BOR only modelled Reach 2 – the scope of analysis includes Reach 3: “Analysis in the EA includes impacts from depletions of water along the Green River, from [Flaming Gorge] Dam down to, but not including Lake Powell.” US0000046. Nowhere does the BOR state that additional analysis could not be provided for hydrologic impacts in Reach 3. The BOR should have looked at cumulative impacts to hydrology in Reach 3 and the Final EA provides no rationale for failing to do so.

Because the cumulative impacts analysis fails to provide sufficient information to discern what was included or excluded and why, it is inadequate as a matter of law. In addition, the exclusion of all future water depletions by other upper basin states from the analysis lacks foundation and their exclusion from analysis was arbitrary and capricious because the BOR “entirely failed to consider an important aspect of the problem.” [*State Farm*, 463 U.S. at 43](#).¹⁷

These conclusory statements without adequate discussion do not meet the required “hard look” under NEPA. [*Davis*, 302 F.3d at 1122-23](#) (citing [*Laguna Greenbelt, Inc. v. United States Dep't of Transp.*, 42 F.3d 517, 526 \(9th Cir. 1994\)](#) (conclusory statements are “insufficient; the agency must provide an adequate discussion of [] impacts.”)). Because the changes in hydrology due to the proposed project may result in cumulatively significant impacts to endangered fishes and other resources, the BOR’s FONSI is arbitrary and capricious and an EIS should have been prepared.

C. The BOR’s Decision Not to Prepare an EIS Violated NEPA

Agencies are required to prepare an EIS for major federal actions that may significantly affect the quality of the human environment. [42 U.S.C. § 4332\(2\)\(C\)](#); [40 C.F.R. §§ 1502.4](#),

¹⁶ US0000119 (“This analysis looks at the impact of the GRB depletion scenario at Reach 2, according to the modeled information.”); US0001890 (“The GRM does not have the capability of analyzing daily ROD flow targets in Reach 3 at the Green River at Green River, Utah.”).

¹⁷ The Final EA’s conclusion regarding cumulative impacts to fish, which is based on the same unexplained hydrology analysis, is likewise arbitrary and capricious.

[1508.3](#). On these facts, the BOR's decision to only prepare an EA violated NEPA.

In evaluating whether the impacts may be significant, and thereby require an EIS, the agency must consider whether, *inter alia*, the action is precedential, controversial, or potentially inconsistent with its mandates. [40 C.F.R. § 1508.27](#). An EA is not an adequate “substitute for an EIS” because “[a]n EIS helps [decision-makers] make their decision by describing and evaluating the project's likely effects on the environment[; in contrast,] the purpose of an EA is simply to help the agencies decide if an EIS is needed.” [Sierra Club v. Marsh, 769 F.2d 868, 875 \(1st Cir. 1985\)](#); [Ohio Valley Env. Coal. v. United States Army Corps. of Eng'rs, 479 F. Supp. 2d 607, 626 \(S.D.W.Va. 2007\)](#) (“an EA can never serve as a substitute for the preparation of an EIS if the proposed action could significantly affect the environment”).

1. Application of the CEQ Significance Factors Demonstrates that the BOR Should Have Prepared an EIS

In order to determine whether an EIS is necessary, an agency must consider the Council on Environmental Quality's (“CEQ”) “significance” factors, which include whether the action is precedential, highly controversial, or threatens to violate statutory mandates. [40 C.F.R. § 1508.27](#). The presence of any one “significance” factor requires that the agency prepare an EIS. [Nat'l Parks Conserv. Assn v. Semonite, 916 F.3d 1075, 1082 \(D.C. Cir. 2019\)](#) (“Implicating any one of the [CEQ significance] factors may be sufficient to require development of an EIS.”).

Whether a project has significant environmental impacts, thus triggering the need to produce an EIS, depends on its "context" (region, locality) and "intensity" ("severity of impact"). [40 C.F.R. § 1508.27](#). At least three of the CEQ intensity factors are triggered by this agency action:

- The degree to which the effects on the quality of the human environment are likely to be highly controversial;
- The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks;

- The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

[40 C.F.R. §§ 1508.27\(b\)\(4\), \(5\), \(6\), \(7\)](#). If any of these factors are met, the agency cannot rely on an EA, an EIS must be prepared. [Semonite, 916 F.3d at 1082](#).

a. An EIS is Required Because the Proposed Exchange is Highly Controversial, 40 C.F.R. § 1508.27(b)(4)

Under [40 C.F.R. § 1508.27\(b\)\(4\)](#), the term "controversial" refers to situations where "substantial dispute exists as to the size, nature, or effect of the major federal action." [Town of Cave Creek v. FAA, 325 F.3d 320, 331 \(D.C. Cir. 2003\)](#) (quoting [Found. for N. American Wild Sheep v. U.S. Dep't of Agric., 681 F.2d 1172, 1182 \(9th Cir. 1982\)](#)) (emphasis in original); accord [Middle Rio Grande Conservancy Dist. v. Norton, 294 F.3d 1220, 1229 \(10th Cir. 2002\)](#) (citing [Wetlands Action Network v. United States Army Corps of Eng'rs, 222 F.3d 1105, 1122 \(9th Cir. 2000\)](#)). The effect of taking an additional 58,000 acre/feet of water annually from the Flaming Gorge Reservoir is controversial because, substantial comments were received during the NEPA process questioning the validity of the rights Utah is seeking to "exchange" for diversions below Flaming Gorge Dam.¹⁸ Concerns were also expressed by the Ute Indian Tribe that the exchange and the NEPA analysis ignore the Tribe's reserved water rights.¹⁹

¹⁸ Objections to Defendants' characterization of current water rights were voiced strongly by many commenters. *See, e.g.*, Comments by Ute Indian Tribe US0000238 ("The State's existing water right is a junior natural flow water right that is unreliable, especially during the latter part of the summer months."); US0000203, 208 (Conserve Southwest Utah et al. stating: "We suspect the amount of water that Utah wants to exchange for the endangered fishes is not actually available in the high water spring runoff of the Green River tributaries." "GRB's water rights are junior to senior right holders and will be in jeopardy of being shut off as water supplies decline"); US0000181-183 (Utah Rivers Council); US0000188 (Dinosaur River Expeditions); US0000228-231 (Living Rivers); US0000267-68 (American Rivers).

¹⁹ Furthermore, the Ute Indian Tribe states that Defendants fail to recognize the Tribe's reserved water rights, held in trust by Defendant Secretary of the Interior, for the benefit of the Tribe as a trust asset of the tribe. In sum, "the Tribe requests that an Environmental Impact Statement ('EIS') be conducted." US0000237, US0000245.

The BOR admits the issues are controversial: “This contract is needed to *resolve a long standing disagreement* between Reclamation and the State [of Utah] regarding the use of the water right assigned in 1996.” US000091 (section 3.3.8.2 “Water Rights” with “Proposed Action”) (emphasis added). This is precisely the type of disagreement that necessitates a full environmental impact statement: “Indeed, Congress created the EIS process to provide robust information in situations precisely like this one, where, following an environmental assessment, the scope of a project's impacts remains both uncertain and controversial.” *Semonite* at 1088-89.

b. An EIS is Required Because the Possible Effects on the Human Environment are Highly Uncertain and Involve Unique or Unknown Risks, 40 C.F.R. § 1508.27(b)(5)

Not only is the proposed exchange controversial, but – as discussed above – the Final EA demonstrates the potential impacts are still highly uncertain. First, the Final EA failed to determine the true effects of the project given that it mischaracterized it as an exchange, when, instead, the GRBE would be largely a new appropriation of water from the Flaming Gorge Reservoir. Second, because the Final EA fails to analyze where water would actually be removed and then returned to the Green River and failed to analyze hydrology impacts in Reach 3, its analysis of impacts on fish and aquatic ecosystems leaves great uncertainty.

c. An EIS is Required Because the Exchange Would Establish a Precedent for Future Actions with Significant Effects, 40 C.F.R. § 1508.27(b)(6)

As argued above, this exchange is essentially an effort by the State of Utah to convert unperfected paper water rights into wet water delivered below the Flaming Gorge Dam along the Green River. If this effort succeeds, it would establish a precedent (at a minimum) regarding the proposed Lake Powell Pipeline, another effort by Utah to transform paper water rights into wet ones. (Compl. at ¶¶ 61-66 (Lake Powell Pipeline water rights come from same source and have the same legal status as Green River Block Exchange rights); McKinnon Decl. ¶¶ 6, 10) Via its Lake Powell Pipeline project, Utah proposes to divert 84,249 acre-feet per year from the

Green/Colorado River system. (Compl. at ¶ 67) Thus, approving the GRBE would set a precedent regarding the unperfected rights that Utah also seeks to use for its proposed Lake Powell Pipeline.

In addition, once water is consumptively used in this system, it is not available for other purposes, including conservation. *See, e.g.*, US0000198 (FWS stating: “Clearly, Utah’s development of their apportioned water right . . . without replacement water from Flaming Gorge releases would affect the hydrology of the Green River.”) Furthermore, scarce Green and Colorado River water is needed to address the ongoing drought. US0000257 (“This contract is in direct conflict with the drought contingency planning efforts. Exchanging water in order to provide water for new developments, when we are trying to decrease water use, makes no sense.”).

2. *Because the Exchange Would Change the Environmental Status Quo, an EIS is Required*

An agency may not significantly change the environmental status quo without preparing an EIS. In [Pit River Tribe v. U.S. Forest Service, 469 F.3d 768, 784 \(9th Cir. 2006\)](#), for example, a federal agency was found to violate NEPA when it extended a geothermal energy lease without doing an environmental impact statement. In language analogous to this case, the court said:

Without the affirmative re-extension of the 1988 leases, [the applicant] would have retained no rights at all to the leased property and would not have been able to go forward with the Fourmile Hill Plant. The status quo before the 1998 extensions was that [the applicant] owned rights to produce geothermal steam valid through May 31, 1998, after which [the applicant] owned nothing. Instead of preserving the status quo, the lease extensions gave [the applicant] an extra five years to develop the land and the possibility of obtaining a future lease extension of up to forty years. *Id.* at 784.

[Id.](#), 469 F.3d at 784; accord [Dine Citizens v. Office of Surface Mining, 82 F. Supp. 3d 1201, 1214 \(D. Col. 2015\)](#) (“An EIS need not be prepared, nor ‘indirect effects’ be considered, when ‘the proposed action does not significantly alter the status quo.’” (citation omitted)); [Kootenai](#)

[*Tribe of Idaho v. Forest Service*, 313 F.3d 1094, 1115 \(9th Cir. 2002\)](#) (change in “environmental status quo” requires an EIS); [*Westlands Water Dist. v. USA*, 850 F. Supp. 1388, 1415 \(E.D. Cal 1994\)](#) (“a federal action is not ‘major’ for NEPA purposes where the agency activity does not change the status quo”).

Taking 58,957 acre-feet of new water from the Flaming Gorge Reservoir would be a significant change from the status quo, particularly when that reservoir water is being exchanged with a “paper right” that “is not connected to a verifiable water supply.” US0000202. Therefore, an EIS is required.²⁰

CONCLUSION

In light of the above, the Court should declare that the BOR has violated NEPA because it failed to: 1) accurately describe the no action alternative or baseline conditions for analysis; 2) identify or describe critical aspects of the proposed project; 3) take a hard look at the potentially significant impacts to hydrology and to endangered fishes taking into account future water availability and cumulative impacts; and 4) failed to prepare an EIS. The Court should set aside the BOR’s approval of the Final EA’s finding of no significant impact and void Defendants’ execution of the GRBE contract.

²⁰ Note also that the Final EA is over 200 pages. As CEQ policy guidance explains, “[a]gencies should avoid preparing lengthy EAs except in unusual cases, where a proposal is so complex that a concise document cannot meet the goals of [\[40 C.F.R.\] Section 1508.9](#) and where it is extremely difficult to determine whether the proposal could have significant environmental effects. In most cases, however, a lengthy EA indicates that an EIS is needed.” CEQ, *Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations*, [46 Fed. Reg. 18026 \(Mar. 23, 1981; amended 1986\)](#) (Question 36b).

DATED: June 30, 2020

Respectfully submitted,

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Certificate of Service

I hereby certify that on June 30, 2020, I filed the above pleading and its attachments with the Court's CMS/ECF system, which will send notice to each party.