Center for Biological Diversity v. U.S. Department of the Interior: The Tenth Circuit's Acceptance of Historical Data as a Proxy for Future Climate Change Impacts Threatens the Colorado River System, Western U.S. Indian Tribes, and the Values of NEPA

I. OVERVIEW

The Green River Basin is a major tributary of the Colorado River System, which supplies water to nearly 40 million people, irrigates nearly 5.5 million acres of land, and is "the lifeblood for at least twenty-two federally recognized tribes."[1] In 2016, the State of Utah proposed a contract to exchange its right to 72,641 acre-feet of the Green River and its tributaries for the right to divert equivalent amounts of water from the Flaming Gorge Reservoir's upstream releases.[2] The state claims that the

1. Ctr. for Biological Diversity v. U.S. Dep't of the Interior, 72 F.4th 1166, 1171-73 (10th Cir. 2023). The Colorado River System also supports approximately "7 National Wildlife Refuges, 4 National Recreation Areas, and 11 National Parks." *Id.*

2. *Id.* at 1176. Water use in the Colorado River is governed by multiple interstate compacts, legislation, and agreements. *Id.* at 1173. Under the compacts, Utah is entitled to twenty-three percent of the water "apportioned to and available for use" in the Upper Basin. *Id.* at 1174.

diversion will instigate natural flows in the lower reaches of the river basin, which will help meet requirements of the Endangered Species Act Program.[3]

Pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C § 4332(C), the Bureau of Reclamation ("Reclamation") conducted an Environmental Assessment (EA) to analyze potential impacts of the proposed exchange contract.[4] Reclamation issued a draft EA and held a meeting in Utah to allow for public commentary and input on the draft.[5] Reclamation provided responses to the comments in its final EA, released in January 2019.[6] The final EA included two action alternatives: the no-action alternative and the proposed-action alternative.[7] Reclamation concluded that the proposed action would have no significant impact on the human or natural environment, so there was no need to conduct an Environmental Impact Statement (EIS).[8] Thus, Reclamation signed the Green River Block exchange contract on March 20, 2019.[9]

The Center for Biological Diversity, the Sierra Club, and three other conservation groups ("Conservation Groups") sued Reclamation and the U.S. Department of the Interior (Interior) in the U.S. District Court for the District of Utah for violations of NEPA and the Administrative Procedure Act (APA).[10] Conservation Groups alleged that Reclamation's NEPA analysis was arbitrary and capricious because it failed to take a "hard look" at cumulative impacts of the proposed water exchange.[11] Accordingly, they petitioned for judicial review of the agency's decision.[12] The district court ruled for Reclamation, and the Conservation Groups appealed to the United States Circuit Court of Appeals for the Tenth Circuit.[13]

Affirming the district court's decision, the Tenth Circuit *held* that Reclamation's NEPA analysis was not arbitrary and capricious because it took a "hard look" at cumulative impacts and provided a reasoned explanation for why it decided an EIS was unnecessary. *Ctr. for*

3. *Id.* at 1176.
4. *Id.* at 1177.
5. *Id.* at 1176.
6. *Id.* at 1176-77.
7. *Id.* at 1177.
8. *Id.*
9. *Id.*
10. *Id.* at 1171-72.
11. *Id.* at 1172.
12. *Id.* at 1166.
13. *Id.*

Biological Diversity v. U.S. Dep't of the Interior, 72 F.4th 1166 (10th Cir. 2023).

II. BACKGROUND

A. National Environmental Policy Act (NEPA)

The National Environmental Policy Act (NEPA)[14] of 1969 is a significant tool in environmental law. NEPA does not require a specific result; it prescribes the necessary process that must precede agency action.[15] Specifically, federal agencies must take a "hard look" at the impacts of their actions through the use of public comment and the best available scientific information.[16] If agencies propose "major federal actions significantly affecting the quality of the human environment," they must prepare an EIS.[17] If the proposed federal action is not likely to "significantly affect the environment" or the significance is unclear, the agency may first prepare an EA.[18] If the EA indicates that the proposed action will not have significant effects, then the agency may decide not to prepare an EIS and shall prepare a finding of no significant impact (FONSI).[19] On the other hand, if the EA indicates that the action will have significant effects, then it must proceed with the EIS process.[20] The final EIS document shall "provide full and fair discussion of significant

14. 42 U.S.C. § 4321 et seq.

15. Wild Watershed v. Hurlocker, 961 F.3d 1119, 1122 (10th Cir. 2020).

16. 42 U.S.C. § 4332(2)(C).

17. *Id.* Major federal actions are defined as "action(s) that the agency carrying out such action determines is subject to substantial Federal control and responsibility." 42 U.S.C. § 4336(e)(10).

18. 40 C.F.R. § 1501.5. An environmental assessment shall:

> (1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact; and (2) Briefly discuss the purpose and need for the proposed action, alternatives as required by section 102(2)(E) of NEPA, and the environmental impacts of the proposed action and alternatives and include a listing of agencies and persons consulted.

40 C.F.R. §1501.5(c).

19. 40 C.F.R. § 1501.6. The finding of no significant impact shall include "the environmental assessment or incorporate it by reference and shall note any other environmental documents related to it." 40 C.F.R. § 1501.6(b); *see* 40 C.F.R. §1501.9 (f)(3). The FONSI should also state, "the authority for any mitigation that the agency has adopted and any applicable monitoring or enforcement provisions." 40 C.F.R. §1501.6(c).

20. 42 U.S.C. § 4332(2)(C); *see* 40 C.F.R. §1508.27(b) (describing the requirements and process for environmental impact statements). Agencies must consider ten factors in determining whether an EIS is needed, including: proposed action's effects on public health; unique characteristics of the geographic area; the uncertainty of potential effects; and the degree of controversy surrounding the effects on the human environment. 40 C.F.R. §1508.27(b).

impacts and shall inform decision makers and the public of reasonable alternatives that would avoid or minimize adverse impacts or enhance the quality of the human environment."[21]

B. Administrative Procedure Act (APA)

Administrative agencies are executive governmental bodies given significant authority and discretion by Congress to regulate specific fields within their expertise.[22] Despite agencies' broad discretion, they are not immune from judicial review.[23] The Administrative Procedure Act (APA) grants courts the power to review the legality of agency decisions;[24] however, the scope of this power often varies in light of the level of recognition the agency receives on a specific topic.[25] For example, an agency receives significantly strong deference where the challenged decisions involve technical or scientific matters within the agency's area of expertise.[26] When a court reviews a lower court's decision on an APA case, the standard of review is *de novo*, and it therefore owes no deference to the lower court's decision.[27] Under the APA, courts "shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[28] An agency action is arbitrary and capricious

> if the agency . . . 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 [if the decision] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[29]

It is the reviewing court's duty to ascertain whether the agency examined the relevant data and articulated an explanation for its action that provides a "rational connection between the facts found and the choice made."[30] In

21. 40 C.F.R. §1502.1.

22. *See generally* GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 5 (9th ed. 2022).

23. Sarah T. French, Judicial Review of The Administrative Record in NEPA Litigation, 81 CALIF. L. REV. 929, 930 (1993).

24. 5 U.S.C. § 702.

25. French, *supra* note 23.

26. Morris v. U.S. Nuclear Reg. Comm'n, 598 F.3d 677, 691 (10th Cir. 2010).

27. N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv., 248 F.3d 1277, 1281 (10th Cir. 2001).

28. 5 U.S.C. § 706 (2)(A).

29. Motor Vehicle Mfrs. Ass'n of U.S. Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (citations omitted).

30. Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962) (citations omitted).

reviewing the agency's explanation, the court must conduct a thorough review of the administrative record.[31] To uphold an agency's reasoning, the record must clearly disclose the "grounds upon which the agency acted."[32] Thus, the reviewing court may not attempt to fill in the gaps and provide its own justification for the agency's actions based on arguments made by the agency's counsel.[33]

III. COURT'S DECISION

In the noted case, the Tenth Circuit affirmed the district court's finding that Reclamation and Interior did not violate NEPA, for it (1) took a "hard look" at the environmental impacts of its proposed actions; (2) used an appropriate environmental baseline in its no-action alternative assessment; and (3) properly reasoned that an EIS was not necessary.[34] The court used the *de novo* standard of review.[35] Thus, the court owed no deference to the district court's decision[36] in reviewing the grounds on which the Conservation Groups argued Reclamation failed to satisfy these NEPA requirements.[37]

A. Future Environmental Impacts to Hydrology and Fish Resources

First, the court focused on whether Reclamation's EA failed to take a hard look at the effects of climate warming on future water [38] availability in the Green River.[39] The Conservation Groups argued that Reclamation did not use the best available technology in assessing future hydrologic trends and did not adequately explain why it did not use the three recommended scientific studies that illustrated accelerating declines in future river volumes.[40] The court found that although Reclamation did not mention the three studies by name nor explicitly clarify its preference for backward-looking data as opposed to future-looking data, this

31. Ron Peterson Firearms, LLC v. Jones, 760 F.3d 1147, 1162 (10th Cir. 2014).
32. Olenhouse v. Commodity Credit Corp., 43 F.3d 1560, 1575 (10th Cir. 1994).
33. *State Farm*, 463 U.S. at 50.
34. Ctr. for Biological Diversity v. U.S. Dep't of the Interior, 72 F.4th 1166, 1177 (10th Cir. 2023).
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* Reclamation used data only from the "1906 through 2015 hydrologic record" for its modeling. *Id.* at 1190 (Rossman, J., concurring in part, dissenting in part, and dissenting in the judgment).
39. *Id.* at 1179.
40. *Id.*

information was easily discernable from the record.[41] In the record, Reclamation explained that the scales used in the studies, the entire Colorado River Basin and the entire Upper River Basin were disproportionate scales for measuring future impacts since the exchange contract did not cover the entire basin.[42] Additionally, the court determined that Reclamation adequately addressed warming concerns by assessing impacts in the "worst case scenario."[43]

Next, the court addressed the Conservation Groups' claim that Reclamation failed to sufficiently consider the impacts of new water depletions on fish resources in Reach 3, located at the confluence of the Colorado and White Rivers.[44] Through its full-depletion model, Reclamation illustrated that even in the worst-case scenario, the impact on endangered fish species in the Green River would be negligible and did not pose a significant threat to the habitat.[45] The full-depletion model depicted future water temperatures and flow rates in Reach 1 and 2, but not in Reach 3.[46] In its technical assumption, Reclamation explained that it would be redundant to include Reach 3 because it assumed that if adequate water temperature and flow rates were met in Reach 1 and 2, then they would subsequently be met in Reach 3.[47] The court determined that Reclamation's technical assumption was well-reasoned and adequately explained the exclusion of Reach 3.[48] Additionally, the court held that the agency's methodology was reasonable and entitled to deference.[49]

Lastly, the court assessed the Conservation Groups' claim that Reclamation did not adequately consider cumulative impacts because it ignored reasonably foreseeable water depletions from the Green and Colorado Rivers in the other Upper Basin States.[50] The court determined that Reclamation did not ignore all potential future depletions, it simply

41. *Id.* at 1180.

42. *Id.* at 1182.

43. *Id.* at 1180. Reclamation found the "worst-case scenario" was fifteen consecutive years of drought. Even in this scenario, it found that the "implementation of the exchange contract would still result in reservoir water levels above the required level." *Id.*

44. *Id.* at 1182 ("Maintaining specific water temperature and flow rates is critical for many of the endangered fishes in Reach 3.").

45. *Id.* at 1184.

46. *Id.* at 1183.

47. *Id.*

48. *Id.* at 1184.

49. *Id.* (citing Citizens' Comm. to Save our Canyons v. U.S. Forest Serv., 297 F.3d 1012, 1027 (10th Cir. 2002)).

50. *Id.*

excluded those which were too indefinite to include in the EA.[51] Thus, since the Conservation Groups did not point to specific evidence in the record indicating otherwise, the court concluded that Reclamation reasonably considered cumulative impacts, and it did so in good faith.[52]

B. No-Action Alternative

The court also considered whether Reclamation's no-action alternative model violated NEPA.[53] The Conservation Groups objected to the EA's description of the contract as a mere shift of existing depletions to a new location, for this implied that Utah would discontinue a current depletion when in fact, most of the water rights to be exchanged had never been put to use.[54] The Conservation Groups also argued that Reclamation's EA made the erroneous assumption that the same amount of water would be diverted from Green River regardless of whether the contract was signed (proposed-action alternative) or not (no-action alternative).[55] The court concluded that this was neither arbitrary nor capricious because given the state's development of Green River Block water rights in the last twenty years, "it [wa]s not unreasonable that the State could develop a significant portion of the remaining Green River water in the next 40 years" even if the contract was not signed.[56]

C. Water Rights Controversy Between Utah and the Ute Indian Tribe

In addition to their argument that the use of historical data does not preclude the need to conduct an EIS, the Conservation Groups contended that a FONSI was inaccurate because the nature and effect of the contract is highly controversial.[57] They emphasized that the exchange of water rights will likely conflict and damage the Ute Indian Tribe's (the Tribe) reserved water rights.[58] Meanwhile, Reclamation's NEPA analysis did not address the potential negative impact to the Tribe's reserved water

51. *Id.*
52. *Id.* at 1185.
53. *Id.* at 1186-87 (10th Cir. 2023) ("The record confirms Reclamation ran its no-action scenario with Green River Block depletions held constant at zero for the entire model run . . ."). NEPA typically uses a no-action alternative as a baseline for "measuring the effect of the proposed action." *Id.* at 1185.
54. *Id.* at 1186.
55. *Id.*
56. *Id.* at 1187.
57. *Id.* at 1187-88.
58. *Id.* at 1189.

rights.[59] Although the court recognized that there may be a controversy, it explained that the presence of controversy is not dispositive because it is only one of ten factors to weigh in the decision to conduct an EIS.[60] The court determined that the relevant analysis is the "degree to which the exchange contract affects the highly controversial factor."[61] Applying this analysis, the court decided that the conflict of rights between Utah and the Ute Indian Tribe is not a material controversy because the exchange contract will not affect it to a high enough degree and the Tribe's water entitlement will be resolved when it exercises its senior rights.[62]

Additionally, the court highlighted that the Tribe's concerns over its water rights are to be addressed in pending separate litigation against Interior, which includes claims against Reclamation for violation of NEPA.[63] The court determined that is the proper forum for the Tribe's disputes.[64] Thus, the court concluded that Reclamation properly weighed the relevant factors for determining whether an EIS is necessary and that its FONSI was neither arbitrary nor capricious.[65]

D. Concurrence in Part: Not Convinced that Reclamation Took a "Hard Look" at Climate Change Impacts on Future Water Availability

Justice Rossman concurred with the majority opinion in part and dissented in part.[66] She agreed with the majority that "Reclamation's no-action alternative used an appropriate environmental baseline to analyze the potential impacts of the contract."[67] She also agreed that Reclamation took a "hard look" at the cumulative impacts, such as water depletion, in Reach 3.[68] However, she disagreed with the majority's conclusion that an EIS was not necessary, for she was not convinced that Reclamation took the required "hard look" at the effects of climate warming on future water availability in the Green River.[69]

59. *Id.*
60. *Id.* at 1188-89.
61. *Id.* at 1189 (citing Hillsdale Env't Loss Prevention v. U.S. Army Corps of Eng'rs, 702 F.3d 1156, 1180 (10th Cir. 2012)).
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 1190.
66. *Id.* at 1190 (Rossman, J., concurring in part, dissenting in part, and dissenting from the judgment).
67. *Id.*
68. *Id.*
69. *Id.*

Justice Rossman gave the following reasons for her dissatisfaction with Reclamation's efforts to assess future climate impacts in the Green River.[70] First, Reclamation failed to respond to the *actual* concern raised in the comment, where the U.S. Fishing and Wildlife Services (FWS) explained its discontent with Reclamation's reliance solely on backward-looking data to assess future effects of a warming climate and potential hydrological changes.[71] Specifically, Reclamation failed to explain why the three scientific studies cited by FWS are irrelevant[72] and why models based solely on past drought cycles appropriately measure future drought cycles.[73] Further, Rossman articulated the agency's failure to address its own 2012 Basin Study that indicated "that water in the Colorado River system will be scarcer due to warming temperatures than it had been in the prior century."[74] Thus, Rossman could not see how Reclamation satisfied its NEPA duty to provide a "reasoned explanation" for using historical data to measure future warming conditions.[75]

Lastly, Justice Rossman noted that the majority failed to heed critical limitations of the APA's arbitrary and capricious standard.[76] Rossman argued that the majority accepted Reclamation's "proxy arguments" and offered rationale for the shortcomings in their explanations.[77] For example, she pointed out that the majority determined that although the agency did not name the three scientific studies in the EA, it adequately alluded to them.[78] She contended that the majority's reliance on its own interpretation of the EA violates the longstanding principle that courts "can only affirm agency action, if at all, on grounds articulated by the agency itself."[79] Justice Rossman concluded that she could not join the majority in affirming and would have instructed the district court to "remand to the agency for additional investigation [and] explanation."[80]

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70. *Id.*

71. *Id.*

72. *Id.* at 1194.

73. *Id.* at 1197.

74. *Id.* at 1196. Although the agency stated that the geographic scope was different than the focus of the Final EA, they did not "cogently explain" why this made the study inapplicable. *Id.*

75. *Id.* at 1190.

76. *Id.* at 1198.

77. *Id.*

78. *Id.*

79. *Id.* (citing Utahns for Better Transp. v. U.S. Dep't of Transp., 305 F.3d 1152, 1165 (10th Cir. 2002).

80. *Id.* at 1190.

IV. ANALYSIS

We live in an ever-changing climate where nature's resources are increasingly becoming more vulnerable.[81] Each year feels warmer than the last because of the Earth's increasing temperatures and changing ecosystems.[82] Earth's temperature is expected to reach 1.5 degrees Celsius above pre-industrial temperatures between 2030 and 2052 and continue to accelerate.[83] These rising temperatures lead to increased sea-level rise, flood risks, biodiversity loss, water depletion, human health risks, etc.[84] The noted case fails to consider how the Colorado River System will reflect these trends in the future and thus become more vulnerable to interventions than it was in the past.

The assumption that the future water supply will mirror past water supply without acknowledging existing evidence proving otherwise is troublesome and conflicts with the purpose of NEPA.[85] The U.S. Supreme Court recently examined the growing scarcity of water in the Colorado River basin:

> Much of the western United States is arid. Water has long been scarce, and the problem is getting worse. From 2000 through 2022, the region faced the driest 23-year period in more than a century and one of the driest periods of the last 1,200 years. And the situation is expected to grow more severe in future years. So even though the Navajo Reservation encompasses numerous water sources, and the tribe has the right to use needed water from those sources, the Navajos face the same water scarcity problem that many in the western United States face.[86]

This illustrates the importance of considering future conditions in the management of the Colorado River not only for Tribes but for all of the community residing in the Colorado River Basin.

Furthermore, the requirement for agencies to take a "hard look" at environmental impacts will be diminished by the majority court's interpretation of the "highly controversial" factor. The court relied on one

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81. MYLES ALLEN ET AL., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SUMMARY FOR POLICYMAKERS, *in* GLOBAL WARMING OF 15°C 7 (Valérie Masson-Delmotte et al. eds., 2018), https://www.ipcc.ch/sr15/chapter/spm/.

82. *Id.* at 4.

83. *Id.*

84. *Id.* at 5-9.

85. 40 C.F.R. § 1500.1(a) (explaining that the purpose of NEPA is "to use all practicable means and measures to foster and promote the general welfare, create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.").

86. Arizona v. Navajo Nation, 599 U.S. 555, 561 (2023).

of its previous decisions[87] by stating, "controversy in the NEPA context does not necessarily denote public opposition to a proposed action, but a substantial dispute as to the size, nature, or effect of the action."[88] The court's determination that the "longstanding disagreement" between Reclamation and Utah regarding water availability and usage does not meet that standard contradicts the court's holding and reasoning in the precedent cited.[89] In the precedent case, the court found that the reallocation of water in the Middle Rio Grande to maintain critical habitat was controversial.[90] The court determined that the wide disparity in the estimates of water required and significant loss of farmland acreage associated with the contract indicated a substantial dispute as to its effects.[91] As a result, the designation would be felt by the local community of the Middle Rio Grande valley.[92] Notably, the proposed action would potentially cause flood protections to fail, which would danger the public health and safety of the area.[93] Meanwhile, in the Colorado River System, water scarcity is a perpetual issue for both Native American tribes and the general public.[94] Water scarcity is an issue of public health and safety because it limits access to water for drinking and basic hygiene practices, increases the threat of contracting diseases from failed sewage infrastructure and contamination, and generates socio-political conflict.[95] Thus, disputes over water availability and the potential impacts of the exchange contract on water scarcity mirror the disputes that the Tenth Circuit deemed substantial in past cases.[96]

Additionally, the majority court's determination that the controversy over water rights between Utah and the Ute Indian Tribe is not a "material controversy" is problematic.[97] First, Reclamation's argument that this dispute will resolve when the Tribe exercises its senior priority rights undercuts its exclusive reliance on historical data in its analysis. The

87. Ctr. for Biological Diversity v. U.S. Dep't of the Interior, 72 F.4th at 1190.

88. Middle Rio Grande Conservancy Dist. v. Norton, 294 F.3d 1220, 1229 (10th Cir. 2002).

89. *Ctr. for Biological Diversity*, 72 F.4th at 1190.

90. *Middle Rio Grande*, 294 F.3d at 1229.

91. *Id.*

92. *Id.*

93. *Id.* (citing 40 C.F.R. § 1508.27(b)(2), which requires determination of significance to consider how the proposed action will affect public health or safety).

94. *Navajo Nation*, 599 U.S. at 561.

95. UNICEF, Water Scarcity: Addressing the Growing Lack of Available Water to Meet Children's Needs, https://www.unicef.org/wash/water-scarcity (last visited Nov. 24, 2023).

96. *Middle Rio Grande*, 294 F.3d at 1229.

97. Ctr. for Biological Diversity v. U.S. Dep't of the Interior, 72 F.4th at 1189.

Tribe's right to use the water in the future indicates a need for the agency to apply forward-looking hydrological data, such as future water availability, to ensure that they are able to exercise that right.[98] The court failed to recognize this contradiction in Reclamation's reasoning. Second, the court's deferral of the Tribe's concerns to a separate pending lawsuit[99] does not provide justification for the agency's ignorance of those concerns, it just pushes them to a different forum. Unfortunately, this may even prejudice the tribe, for the noted decision will likely serve as precedent for its pending litigation.[100]

V. CONCLUSION

In *Ctr. for Biological Diversity v. U.S. Dep't of the Interior*, the Tenth Circuit upheld an agency's decision not to conduct an environmental impact statement, despite missing pieces of the agency's rationale in the administrative record.[101] This decision should have been remanded to provide for further agency explanation, especially for its use of backward-looking data and disregard for controversy surrounding the proposed action. The impacts of this decision may cause the NEPA process to lose some of its value, for agencies will be able to make potentially environmentally harmful decisions based on data from points in history where natural resources were more resilient than they are now and especially more resilient than they will be in the future as climate change continues to accelerate. This poses a threat to local residents along the Colorado River Basin, especially the numerous Native American Tribes—who depend on its water to sustain a permanent homeland for its members and self-sufficient economic growth—and other vulnerable communities disproportionally impacted by climate change around the world.[102]

Whitni Simpson*

98. Brief for the Ute Indian Tribe of the Uintah and Ouray Reservation as Amicus Curiae Supporting Appellants, *Ctr. for Biological Diversity*, 72 F.4th 1166 (10th Cir. 2023) (No. 21-4098), 2023 WL 5844116, at *8-9.

99. *Id.* at *1.

100. *Id.* at *1-2.

101. *Ctr. for Biological Diversity*, 72 F.4th 1166, 1177 (10th Cir. 2023).

102. *Id.* at *2.

* © 2024 Whitni Simpson, J.D. Candidate 2025, Tulane University Law School; B.S. Sustainability Science and Sociology 2022, Furman University. The author would like to thank Professor Mark Davis and the *Tulane Environmental Law Journal* editors for their guidance and support throughout the writing and editing process.