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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

County of Mohave, et al., Plaintiffs, v. United States Bureau of Reclamation, et al., Defendants.	No. CV-22-08246-PCT-MTL **BRIEF OF AMICUS CURIAE STATE OF ARIZONA IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** (Hon. Michael T. Liburdi)

STATEMENT OF INTEREST

The State of Arizona respectfully submits this amicus brief to address the narrow question of whether the United States Bureau of Reclamation ("Reclamation") adequately

considered the precedent set by this water transfer, which would be the first of its kind, in its Environmental Assessment ("EA"). It did not. Precisely because this first-of-its-kind transfer could have substantial precedential effect, this case presents questions of public importance to the State of Arizona. The State has read the relevant pleadings, and submits this brief to express its position that an Environmental Impact Statement ("EIS") must be conducted when an action, such as the transfer at issue here, could establish a precedent for future actions with potentially significant effects on Arizona communities.

Arizona faces a water crisis on multiple fronts. The Colorado River is over-allocated, "meaning that the total volume of water users are entitled to on paper each year nearly always exceeds the physical amount of water the system produces. Over two decades of drought have compounded the problem."[1] In 2021, the federal government declared the first-ever Tier 1 shortage for Colorado River operations.[2] Arizona's Colorado River water allocation was cut by 512,000 acre-feet. "Water levels continued to decline, and in 2023 Arizona's Colorado River water was cut by 592,000 acre-feet under Tier 2a shortage conditions."[3] In August of 2023, Reclamation "projected that Lake Mead would rise to 1,069 feet by January 2024, taking Arizona back into Tier 1 shortage in 2024. However, the Colorado River system remains significantly over-allocated. Water levels will likely decline again next year unless another winter of high snowpack occurs."[4] As a result, Lake Mead's release in 2023 is projected to be the lowest in 30 years.

At the same time, recent groundwater models have demonstrated that the Phoenix Active Management Area faces a 4% shortfall in groundwater supplies over the next 100

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[1] https://storymaps.arcgis.com/stories/a1a782ce054d4ad28a0d7d0845e6c03d (last visited Sep. 19, 2023).

[2] https://new.azwater.gov/sites/default/files/media/ADWR-CAP-FactSheet-CoRiverShortage-081321.pdf

[3] *Supra* note 1.

[4] *Id*.

years.[5] This means there is not currently enough groundwater to meet projected growth in some areas. Cities and towns are going to have to diversify their "water portfolios"—a term now in regular use— as Queen Creek has done here, to support future water needs. The water entitlement transfer at issue in this case must be viewed in light of this unprecedented water crisis.

It is undisputed that the transfer at issue here is the first transfer of a mainstream Colorado River water entitlement from an "on-river" community to an "off-river" community. It has been widely reported that Greenstone, the water-focused investment firm behind this transfer, has purchased close to 9,000 acres of farmland in rural Arizona in recent years.[6] Other investment firms have followed suit and purchased agricultural land across Arizona, along with the appurtenant water rights.[7]

Greenstone's stated objective is to "deliver or sell" water to "public and private end users."[8] Similarly situated firms surely share this intent. Common sense dictates that a reasonable likelihood exists that some entitlement holders plan to sell and transfer their water rights to off-river water users if permitted to do so. Indeed, it is difficult to imagine why this particular transaction would be *sui generis* given the need for water across Arizona and the financial success of this project for Greenstone.[9] Any future transfers would need Reclamation's approval and would be subject to the same environmental review process as the current transfer.

It appears inescapable then, that the transfer being proposed here will set a precedent for future agency deliberations regarding similar entitlement transfers from on-

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[5] https://www.azcentral.com/story/news/local/arizona-environment/2023/06/01/new-arizona-groundwater-model-shows-shortfall-state-will-halt-growth/70279189007/ (last visited Sep. 18, 2023)

[6] https://www.azcentral.com/story/news/local/arizona-environment/2021/11/25/investors-buying-up-arizona-farmland-valuable-water-rights/8655703002/ (last visited Sep. 15, 2023)

[7] *Id*.

[8] https://greenstonerp.com/ (last visited Sep. 15, 2023)

[9] Queen Creek paid over $20 million for the entitlement transfer. https://www.azcentral.com/story/news/local/pinal/2023/07/21/queen-creek-pays-24-million-for-colorado-river-water-transfer/70435063007/ (last visited Sep. 18, 2023)

river to off-river communities. Reclamation has chosen to ignore this reality, however, and simply responds that any future transfers will be reviewed on a "case-by-case" basis. (EA Response to Comment 2-3; Doc. 65 at 24.) This cursory conclusion does not sufficiently address the precedential nature of this entitlement transfer. Thus, the Court should declare the EA inadequate, and require an EIS so that decisionmakers and Arizona communities can be fully informed of the environmental impacts of the proposed transfer.

ARGUMENT

I. Reclamation did not comply with NEPA's regulatory requirements.

The National Environmental Policy Act ("NEPA") requires an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). Reclamation conducted an EA to determine whether this entitlement transfer would "significantly affect the quality of the human environment," and found that an EIS was not required because there was no significant impact associated with the transfer.

The regulations implementing NEPA required Reclamation to consider two broad factors when determining whether the transfer at issue here would have a significant impact: context and intensity. *See* 40 C.F.R. § 1508.27 (2005); 42 U.S.C. § 4332(2)(C). The dispute in this case focuses on "intensity," which involves examination of ten factors, including "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)(6).

Given what is publicly known about the purchase of rural Arizona farmland by water-focused investment firms, future proposed transfers of Colorado River entitlements to "off-river" end users are likely, if not inevitable. Yet, because these transfers have not been specifically "proposed," Reclamation contends it need not acknowledge the impact that this decision will have on its evaluation of substantially similar transfers in the future. (Doc. 65 at 24-26.) Instead, while acknowledging that future proposed transfers are "possible," Reclamation wishes to review such transfers only "on a case-by-case basis." (EA Response to Comment 2-3; Doc. 65 at 24.)

The law does not require—or permit—such a formalistic analysis. Where, as here, significant and similar actions are exceedingly likely, Reclamation should not be permitted to bury its head in the sand. Given the unique "statutory and factual context" of the record here, Reclamation's failure to evaluate or even acknowledge the degree to which this transfer will establish a precedent for future actions was "too unreasonable [ ] for the law to permit it to stand." *Sierra Club v. Marsh*, 769 F.2d 868, 871 (1st Cir. 1985).

II. The precedent set by the action is the relevant consideration, not the precedent set by the EA.

Reclamation appears to argue that the transfer at issue here is not precedential because the EA itself does not create binding precedent. (Doc. 65 at 24, 26.) This is somewhat understandable given some of the language used by the Ninth Circuit in prior decisions. *See, e.g., In Def. of Animals, Dreamcatcher Wild Horse & Burro Sanctuary v. U.S. Dep't of Interior*, 751 F.3d 1054, 1071 (9th Cir. 2014) (stating that "EAs are usually highly specific to the project and the locale, thus creating no binding precedent"). And, to be sure, an EA will have some precedential effect, even if informally so. But the regulation itself instructs agencies to consider the degree to which "*the action* may establish a precedent for future actions." 40 C.F.R. § 1508.27(b)(6) (emphasis added). Thus, "[t]he question is not whether the EA is precedential, [ ] but whether the action being proposed would set a precedent." 2 Pub. Nat. Resources L. § 17:19 (2nd ed.).

Although the precedent set by the EA and the precedent set by the proposed action are related concepts, the Ninth Circuit has ultimately recognized that the focus is on the precedent set by the proposed action itself. For instance, in *Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1163 (9th Cir. 1998), the Ninth Circuit found that the first new construction project on a historic site would not establish a precedent for purposes of what constitutes a sufficient EA. The Court reached this holding not because the EA itself failed to set a relevant precedent, but because the proposed project was "a unique, independent project" that did not "establish any precedent" where no other "similar or related projects are being contemplated." *Id.*

Similarly, in *City of Sausalito v. O'Neill*, 386 F.3d 1186 (9th Cir. 2004), the National Park Service conducted a full EIS regarding a large-scale project at Fort Baker. The Ninth Circuit determined that the agency had "taken the requisite 'hard look' at this [factor] and provide[d] the information necessary to make an 'informed decision' about the 'commercialization precedent' that may be established by the Fort Baker Plan." *Id.* at 1211–12. In conducting a sufficient analysis of the precedential nature of the action, the Park Service considered the action's "impact on regional community services and employment opportunities, including local hotels and expected visitor spending in the region." *Id.* at 1211. The EIS also analyzed the precedent set by the action in considering the increased demand for goods and services, increased visitation and tourism, business growth, infrastructure improvements, the need for traffic and transit services, and indirect population and housing growth. *Id.* at 1211. Again, the focus of the agency's analysis was not the precedential nature of the EIS, but of the project itself on the local community.

The purpose of 40 C.F.R. § 1508.27(b)(6) "is to avoid the thoughtless setting in motion of a chain of bureaucratic commitment that will become progressively harder to undo the longer it continues." *Presidio Golf Club*, 155 F.3d at 1162–63. An agency must consider the "obvious likelihood that future actions would build on" the outcome of the proposed action, and recognize that if an "issue is not properly assessed at the outset, it may never be." *Inst. for Fisheries Res. v. U.S. Food & Drug Admin.*, 499 F. Supp. 3d 657, 667 (N.D. Cal. 2020). The regulation simply recognizes the obvious—because future actions will naturally build on prior similar decisions, environmental impacts should be fully studied on the front-end before an agency approves precedent-setting action that is the first of its kind.

III. Reclamation failed to adequately consider the precedential nature of the proposed transfer.

These basic principles, which underlie the requirement that precedential effect be considered, are especially salient here given the subject matter of this dispute. All—including courts—have long recognized the supreme importance of an adequate water supply. *See, e.g.*, *City of Columbus v. Mercantile Tr. & Deposit Co. of Baltimore*, 218

U.S. 645, 661 (1910) (endorsing statement that: "Public considerations of the highest obligation require that the city and its inhabitants shall have a continuous water service adequate to the preservation of the public health and the public safety."). And in this historical moment of crisis, water supplies are being strained in unprecedented ways. For instance, in the Phoenix-metro area, water-intensive microchip companies and data centers are moving in. At the same time, "agriculture consumes more water than cities," and "thirsty cities increasingly look to farmers willing to fallow their fields and redirect water to urban centers."[10] Simply put, "[t]here's just not enough [water] for all the things we want to do."[11] Public officials and the public as a whole must make hard decisions about our water priorities. Those decisions deserve to be fully informed.

The current strain on municipal water supplies and the recent purchase of agricultural land and appurtenant water rights in on-river communities both imply a significant possibility that similar transfers of water entitlements will be proposed. Reclamation's determination that this transfer will not have a significant environmental impact on the region "represents a decision in principle" about future water transfers away from the on-river region. 40 C.F.R. § 1508.27(b)(6). *See Inst. for Fisheries Res.*, 499 F. Supp. 3d at 666–67 (finding that because there was a significant possibility other applicants would seek agency approval of similar actions based on findings about initial project, the action represented a decision in principle about a future consideration). When Reclamation is eventually confronted with these future transfers, it is difficult to imagine that there will be a "meaningful choice" about how to proceed. *See Sierra Club*, 769 F.2d at 879 (EA was insufficient when "pressure to develop" could be "irreversible" and would not offer "a meaningful choice about whether to proceed").

Reclamation asserts that it does not intend this decision to shape its future decisions. (Doc. 65 at 26.) But an agency action, even though limited in scope, can constitute a decision in principle about the potential future use of other similar resources.

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[10] https://www.washingtonpost.com/climate-environment/2023/06/04/water-shortage-arizona-california-utah-climate-change/ (last visited Sep. 19, 2023).

[11] *Id.*

See Native Ecosystems Council & All. for the Wild Rockies v. U.S. Forest Serv. ex rel. Davey, 866 F. Supp. 2d 1209, 1229–30 (D. Idaho 2012). In *Native Ecosystems Council*, the forest service issued a FONSI for a tree thinning project limited to a specific number of acres over a number of years. *Id.* at 1229. The agency argued that its decision was not precedential because there were no identified future actions. *Id.* The court nevertheless found that the information underlying the agency's decision and analysis had broader implications and represented a decision in principle about the future use of similarly-situated land for a similar purpose. *Id.* The fact that no other thinning projects had yet been specifically identified did not change the precedential nature of the findings. *Id.*

Reclamation's assertion that it will evaluate future transfers on a "case-by-case basis," (Doc. 65 at 25), is not a sufficient assessment of "the extent to which approving the current proposal could affect [its] future decisions." *Anglers of the Au Sable v. U.S. Forest Serv.*, 565 F. Supp. 2d 812, 832 (E.D. Mich. 2008). In *Anglers*, the Forest Service approved an exploratory well for potential oil and gas drilling. The agency acknowledged that development of other wells was likely if the proposed well was productive, but argued that "future wells have not been proposed and any future wells will require individual permit applications and environmental assessments." *Id.* at 831. The district court rejected these arguments, which mirror the argument made by Reclamation here. In doing so, the district court held that the agency failed to engage in sufficient analysis of the action's precedent because the agency had not "assessed the extent to which approving the current proposal could affect those future decisions." *Id.* at 832. The district court recognized that just as the Forest Service had referenced other approved wells in another forest to help justify its FONSI in that case, allowing the well at issue there "would almost certainly color the Forest Service's analysis of the environmental impact of these future wells." *Id.* Similarly, here, specific future water transfers have not been proposed and those transfers will require individual EAs, but that does not excuse Reclamation from its duty to analyze the extent to which approving the current transfer will affect its analysis of future entitlement transfers.

What's more, the methodology used and conclusions reached in Reclamation's EA are "easily replicated" and widely applicable to future transfers of Colorado River water entitlements, making the action here all the more precedential. *Hausrath v. United States Dep't of the Air Force*, 491 F. Supp. 3d 770, 803–04 (D. Idaho 2020). Considering the economy and geography in La Paz County, as well as the agricultural economy of the entire "on-river region," Reclamation determined that this transfer would have no significant impact. (EA at 29-35.) But in *Hausrath*, this kind of easily replicated conclusion was sufficient to satisfy the Court that the action was precedential in nature. In that case, the Court acknowledged that the agency's analysis would not be "binding" upon other similar programs proposed in other locations. *Id.* at 803. Nevertheless, given the metrics used, there would be no need to conduct "a rigorous, site specific analysis" in other locations and the conclusions reached in the EA at issue could be used as a template. *Id.* at 804. The same is true here—this EA can be used as a template for evaluating the environmental and economic impact of future transfers from the on-river region without more rigorous, site-specific analysis.

Reclamation's response is a simple refusal to recognize that future water transfers are likely. (Doc. 65 at 25.) But Reclamation cannot rely on its own willful ignorance of the factual context of this case to relieve it of its regulatory obligations. Moreover, as Reclamation recognized, each potential future water transfer will be evaluated in accordance with agency "policy and practice," which necessarily includes prior decisions on substantially similar proposals. (EA Response to Comment 2-3.) Thus, whether or not Reclamation chooses to acknowledge it, its decision in this case will impact its analysis of future proposed transfers.

CONCLUSION

Reclamation's failure to consider the precedential effect of the transfer in this case was not reasonable and did not constitute a "hard look" at the effects of this unprecedented proposal. Reclamation has willfully ignored the unique factual context of this case. The agency should not be permitted to avoid its obligation to consider the precedential nature of this transfer on its future decisions.

RESPECTFULLY SUBMITTED this 22nd day of September, 2023.

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