

August 1, 2016

By Electronic Mail

Bureau of Land Management
Monticello Field Office
Attn: Daneros EA Comment
P.O. Box 7
Monticello, UT 84535

**Re: Comments on the Daneros Mine Plan Modification Environmental Assessment,
DOI-BLM-UT-Y020-2016-0001-EA**

I. Introduction

The Grand Canyon Trust, the Southern Utah Wilderness Alliance, National Parks Conservation Association, Greenaction for Health and Environmental Justice, Uranium Watch, and Living Rivers submit the following comments on the draft Environmental Assessment for the Daneros Mine Plan Modification (“Draft EA”) prepared by the Monticello Field Office of the Bureau of Land Management (BLM). The Draft EA analyzes the impacts of approving a proposed Mining Plan of Operations Modification (“Modification” or “Proposed Action”) for the Daneros uranium mine in response to an application by Energy Fuels Resources (USA) Inc. (“Energy Fuels”) to expand the mine.

We appreciate the effort BLM has made to prepare the Draft EA, but we believe its analysis of Energy Fuels’ proposal to significantly expand the Daneros uranium mine in the heart of Utah’s iconic red-rock country is highly inadequate. We urge BLM to prepare an environmental impact statement (EIS) addressing the issues we raise in these comments, to remedy defects in its compliance with the National Historic Preservation Act, and to reconsider its proposed recommendation to approve the mine expansion.

Thank you for the opportunity to comment.

II. The Draft EA does not comply with the National Environmental Policy Act.

A. The statement of purpose and need in the Draft EA is inadequate.

In the Draft EA, BLM relies on incorrect and outdated information to justify its statement of purpose and need. BLM then uses its unsubstantiated statement of purpose and need to arbitrarily constrain the range of reasonable alternatives analyzed in detail. This error fundamentally distorts the analysis throughout the Draft EA.

Courts have recognized that “the defined purpose and need necessarily dictates the range of ‘reasonable’ alternatives” to be considered in analyzing proposed actions under the National Environmental Policy Act (NEPA). *City of Carmel-by-the-Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997) (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190,

196 (D.C. Cir. 1991)). And accordingly, it is impermissible to define a proposal’s “objectives in unreasonable narrow terms.” *Id.*

1. *BLM relied on inaccurate information and unsupported assumptions.*

The purpose-and-need statement in the Draft EA, at its essence, asserts that the Daneros mine expansion is needed because it “would provide a domestic source of uranium that would help fuel nuclear power plants in the United States, and therefore would help meet the BLM’s broad policy objectives.” Draft EA at 4. *See also id.* at 5 (observing that “[t]here is a growing regional and national demand for a continuous, reliable energy supply and a need to reduce U.S. dependence on foreign energy supplies”). The main policy objective that BLM cites is to “[c]ontinue to meet local and national energy and other public mineral needs to the extent possible,” a statement taken from the Monticello Field Office Resource Management Plan (“RMP”). *See* Draft EA at 5, Section 1.5. But the claim that the Daneros mine expansion will serve local and domestic energy needs is dubious for several reasons.

First, some of the data on which the Draft EA relies to support that assertion is out of date. Contrary to the statement in the Draft EA, only 4 reactors (at 2 sites) are under construction and there are only 6 proposed reactors under review.¹

Second, the Draft EA provides no discussion or analysis of whether the uranium produced at the Daneros Mine will actually supply uranium to the domestic market, thereby reducing reliance on foreign uranium. In the past, Energy Fuels has supplied uranium to South Korea and other international customers, in addition to the customers in the United States.² The market for uranium produced by the Daneros Mine is global, not domestic. And the Draft EA contains no information, such as a discussion of Energy Fuels’ long-term supply contracts, to support the notion that the company is likely to sell uranium from the Daneros Mine to nuclear-energy suppliers in the United States rather than foreign customers.

Third, the mine expansion will not help meet local energy needs because Utah neither consumes nor produces nuclear power.³ Indeed, the Daneros mine expansion and the mill that will process ore from the mine—the White Mesa Mill near Blanding, Utah—will consume local energy without providing any energy to Utah.

The purpose-and-need statement is fundamentally flawed because of these erroneous assertions and should be revised to address them.

¹ U.S. Energy Information Administration (U.S. EIA), Electric Power Monthly, July 2016, Table 6.5 (<http://www.eia.gov/electricity/monthly/pdf/epm.pdf>); U.S. Nuclear Regulatory Commission (U.S. NRC), new reactor map: <http://www.nrc.gov/reactors/new-reactors/col/new-reactor-map.html>.

² Energy Fuels Inc. press release (December 17, 2013): <http://www.marketwired.com/press-release/energy-fuels-enters-into-strategic-relationship-agreement-with-kepco-tsx-efr-1863376.htm>

³ U.S. EIA, State Profile and Energy Estimates, Utah: <http://www.eia.gov/state/?sid=UT#tabs-1> and <http://www.eia.gov/state/?sid=UT#tabs-3>.

2. *BLM failed to analyze the economics of the proposed mine expansion.*

The Draft EA relies on the erroneous premise that mining economics are irrelevant to the analysis, asserting that “[i]t is outside the scope of analysis of the proposed action and inconsistent with BLM policy to conduct a market analysis as a condition for responding to the proposal.” Draft EA, Table 1, Comment 49. However, the economics of mining, milling, and marketing uranium from the proposed mine expansion will critically influence the extent of the mine expansion’s impacts on the environment.

For example, the Draft EA acknowledges that the price of concentrated uranium, known as yellowcake or U_3O_8 (its chemical formula), will have a direct bearing on the amount of low-grade ore and waste rock that will remain on public lands when mining ceases. EA at 13-14. The Draft EA confirms that “[l]ow-grade ore (ore-bearing rock that could be economical to process in the future) would be managed in the proposed stockpile areas.” Draft EA at 14. In places, the Draft EA assumes “an average Daneros ore grade of 0.30 percent U_3O_8 ” to estimate the intensity of impacts. *See e.g.* EA at 79. Yet, there is no discussion of the price-dependent, ore cut-off grade that Energy Fuels is likely to use to determine how much ore to ship to the White Mesa Mill to be processed and how much ore to leave stockpiled as waste. And indefinitely stockpiling low-grade ores may impact water quality and present health risks associated with exposure to radionuclides that are released from ore stockpiles. EA at 65, 75-76. Thus, the mining and milling economics are critical for evaluating the significance of impacts from mining and milling wastes.

BLM accordingly should revise the statement of purpose and need in the Draft EA, and the analysis in the balance of the EA that flows from it, to address the economics of mining and milling uranium from the proposed mine expansion.

3. *The purpose-and-need statement arbitrarily precludes reasonable alternatives.*

An agency may not “define a project so narrowly that it forecloses a reasonable consideration of alternatives” or turns the analysis into “a foreordained formality.” *Fuel Safe Washington v. Fed. Energy Regulatory Comm’n*, 389 F.3d 1313, 1324 (10th Cir. 2004) (quoting *Davis v. Mineta*, 302 F.3d 1104, 1119 (10th Cir. 2002)); *Citizens’ Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1030 (10th Cir. 2002); *City of Bridgeton v. FAA*, 212 F.3d 448, 458 (8th Cir. 2000) (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991), *cert. denied* 502 U.S. 994 (1991)); citing *Simmons v. U.S. Army Corps of Eng’rs*, 120 F.3d 664, 666 (7th Cir. 1997)).

The Draft EA considered only two alternatives in detail, the proposed action and a no-action alternative. BLM declined to analyze in detail any alternatives that would include BLM-imposed mitigation measures. Draft EA at 33. And the agency wholly failed to consider any alternative authorizing production of ore from the proposed mine expansion for a period shorter than 20 years. Yet BLM’s initial approval for the Daneros mine demonstrates that a shorter authorized production period is a reasonable alternative. That approval authorized the mine to operate for only 7 years, Draft EA at 2, and the Draft EA wholly fails to explain why a similar timeframe is not a reasonable alternative in analyzing the proposed mine expansion. Draft EA, Appendix A (2011 EA analysis).

It appears that BLM defined the proposed project to involve a 20-year approval because that is the length of authorization that Energy Fuels sought in its application. Draft EA at 3. Yet by narrowly defining the term of the approval under consideration, BLM failed to analyze alternatives that would involve a shorter term.

By relying on its flawed statement of purpose and need, BLM has unreasonably restricted the range of alternatives analyzed in the Draft EA, contrary to NEPA's mandates. As a result, BLM should revisit its analysis of alternatives, and at the very least, should analyze in detail an alternative that would impose additional mitigation measures to offset the mine expansion's impacts and an alternative that would authorize mining for a period comparable to BLM's initial 7-year authorization for the Daneros Mine.

B. BLM failed to take a “hard look” at the impacts of the Modification.

NEPA “is our basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). It is a procedural statute that requires federal agencies to pause before committing resources to a project and consider the likely environmental impacts of the preferred course of action. *See* 42 U.S.C. § 4331(b) (congressional declaration of national environmental policy); *U.S. Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 756-57, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004); *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989); *New Mexico ex rel. Richardson*, 565 F.3d at 703; *Forest Guardians v. U.S. Forest Serv.*, 495 F.3d 1162, 1172 (10th Cir. 2007). The requirements of the statute have been augmented by regulations issued by the Council on Environmental Quality (“CEQ”), to which courts give substantial deference. *Marsh*, 490 U.S. at 372, 109 S.Ct. 1851; *New Mexico ex rel. Richardson*, 565 F.3d at 703.

Before undertaking any “major Federal action[]” that may “significantly affect[] the quality of the human environment,” NEPA requires federal agencies to: (1) consider and evaluate all environmental impacts of their decisions, and (2) disclose and provide an opportunity for the public to comment on such environmental impacts. 40 C.F.R. §§ 1501.2, 1502.5; *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). This requires agencies to take a “hard look” at the environmental consequences of their proposed actions. *Citizens' Comm. to Save Our Canyons*, 513 F.3d at 1179 (10th Cir. 2008). This examination “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.” *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1263-64 (10th Cir. 2011). NEPA ensures that an “agency will not act on incomplete information only to regret its decision after it is too late to correct.” *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 371 (1990).

The Draft EA does not fulfill NEPA's “hard look” requirement. BLM did not adequately analyze the environmental consequences of the proposed mining plan modification; the degree to which it will affect public and environmental health or safety; whether the proposed modification is related to other actions with cumulatively significant impacts; the degree to which the proposed modification adversely effects endangered and threatened species under the Endangered Species Act of 1973; and whether the proposed modification threatens a violation of federal, state, or local law or requirements imposed for the protection of the environment; *See* 40

C.F.R. § 1508.27(b), 40 C.F.R. §1508.25. Moreover, as discussed below in Sections E & F, the proposed modification implicates several intensity factors, which means that the impacts are “significant” and an EIS must be prepared. And having failed to take a hard look at the mine expansion’s impacts, BLM’s proposal to issue a finding of no significant impact (FONSI) is arbitrary and capricious.

1. BLM failed to take a hard look at the impact of prolonged standby periods.

The EA fails to take a hard look at the impacts of long standby periods that are likely to occur at the Daneros Mine. These impacts weigh against approving the Daneros Mine expansion, may require preparation of an EIS, and at minimum, must be addressed through mitigation measures to protect public and environmental health.

The EA recognizes that “temporary closure” of the mine may occur, as it has in the past, due to market conditions. EA at 23. Historically, for uranium mines on the Colorado Plateau, and the Daneros Mine in particular, it is often operation that is temporary, not closure. Indeed, for at least the last decade, the operating pattern for uranium mines in southeast Utah has been typified by periods of “temporary closure” that are at least as long as periods of operation.

The Daneros Mine, for example, operated from 2009 to 2012,⁴ and has been on standby ever since. It is not known when it will reopen. Other uranium mines in Utah closed in 2009 and 2013, with no immediate prospect that operations will recommence. The Rim Mine operated only 10 of the last 32 years; the Pandora Mine and La Sal Mine Complex both operated for 13 of the past 32 years; uranium mines on the Department of Energy leases in southwest Colorado follow the same trends; and uranium mines in the Grand Canyon region have also been put on standby for decades.

It is reasonably foreseeable, at the very least, that the Daneros Mine will be placed into standby for long periods, as much as a decade or more. It is accordingly incumbent on BLM to analyze the impacts that may result and adopt mitigation measures to minimize those impacts, if it does not reject the mining plan modification altogether. The conditions often encountered at standby mines include unlocked buildings, abandoned waste rock, erosion, collapsed mine portals, theft of equipment, uncontrolled storm water runoff, accumulation of trash and old equipment, livestock, dilapidated fencing and signage (and accordingly, unwitting hikers), and radiologically contaminated soils from ore pads, waste rock piles, and mine-water treatment operations that are dispersed offsite. BLM should analyze the direct, indirect, and cumulative impacts of these and other conditions that are reasonably foreseeable if the Daneros Mine is put on standby for long periods.

If those impacts are significant, BLM must prepare an EIS. And if BLM nonetheless proposes to approve the mining plan modification despite these impacts, it should impose enforceable mitigation measures to minimize these impacts and prevent a repetition of the associated problems that have occurred at standby mines in the past. The commenting parties applaud the BLM for stating that “[a]ppropriate measures would be taken to control toxic or

⁴ Mine Safety and Health Administration, Mine Data Retrieval System.
<http://arlweb.msha.gov/drs/drshome.htm>

deleterious materials in the event of short-term temporary closure of mining operations.” Draft EA at 24. However, BLM must clarify what these “appropriate measures” will be and allow the public to comment on their adequacy. Additionally, we reinforce that BLM is obligated to conduct timely inspections and five-year reviews of standby mines.

2. *BLM failed to take a hard look at the impacts of milling ore at the White Mesa Mill.*

BLM failed to take a hard look at the indirect impacts and cumulative effects of milling ore from the Daneros mine expansion at the White Mesa uranium mill. BLM erred by tiering to non-NEPA documents; failing to review information relevant to the environmental impacts of the White Mesa Mill; relying on unsupported assumptions about the Mill’s operating capacity; failing to adequately analyze transportation issues; and failing to acknowledge or analyze the Daneros mine expansion and White Mesa Mill as connected actions.

a. *Non-NEPA documents cannot satisfy BLM’s NEPA obligations.*

When evaluating the indirect impacts of milling operations, the Draft EA repeatedly tiers to state-issued permits and a state public-participation summary prepared for a state-issued milling license amendment. *See* Draft EA at 61–62, 68–69, 78–79. But federal courts have held that federal agencies may not rely on these sorts of state permits and reports to satisfy NEPA:

BLM argues that the off-site impacts need not be evaluated because the Goldstrike [mill] facility operates pursuant to a state permit under the Clean Air Act. This argument also is without merit. A non-NEPA document—let alone one prepared and adopted by a state government—cannot satisfy a federal agency’s obligations under NEPA.

S. Fork Band Council of W. Shoshone v. U.S. Dep’t of Interior, 588 F.3d 718, 726 (9th Cir. 2009) (citing *Klamath-Siskiyou Wildlands Center v. BLM*, 387 F.3d 989, 998 (9th Cir.2004)).

NEPA is primarily a disclosure statute. State permitting primarily functions to ensure that facilities will not cause violations of state and federal standards. And, as would be expected given these different underlying goals, the requirements for state permits and NEPA documents are usually quite different. For example, the state processes that led to the state permits and public-participation summary to which the Draft EA tiers, unlike NEPA, do not mandate the consideration of all reasonable alternatives or require the consideration of mitigation measures.

The Draft EA flouts this precedent, for example, by relying on state permits in lieu of performing any independent analysis of the indirect effects of milling on groundwater. The Draft EA observes that there are 73 groundwater monitoring wells at the mill as part of the state regulatory framework, but provides no specific information in the EA about whether or how those monitoring wells protect groundwater quality. Draft EA at 68. Rather, the Draft EA contains nothing but generalities about groundwater in the area around the mill.

In sum, the state regulatory framework is not a substitute for NEPA, and the existence of state-issued permits does not excuse BLM from analyzing the indirect effects of milling on air quality, water quality, and human health.

b. BLM failed to consider relevant information in its analysis of milling impacts.

BLM's analysis of the indirect impacts of milling Daneros ore at the White Mesa Mill is inadequate because it fails to consider (1) the Mill's recent and ongoing violation of radon air-quality standards; and (2) evidence of groundwater contamination at the Mill.

As discussed below in Section F, the impacts of both the Daneros Mine and the indirect impacts at the White Mesa Mill meet NEPA's significance threshold. As a result, where information that is "essential to making a reasoned choice among alternatives" is lacking, CEQ regulations require BLM to obtain that information unless the costs are exorbitant. 40 C.F.R. § 1502.22; *see also Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1244 n.5, 1249 (9th Cir. 1984) ("Section 1502.22 clearly contemplates original research if necessary;" "[a]s long as the information is ... 'significant,' or 'essential,' it must be provided when the costs are not exorbitant"); *Montgomery v. Ellis*, 364 F.Supp. 517, 528 (N.D. Ala. 1973) ("NEPA requires each agency to undertake the research needed adequately to expose environmental harms and, hence, to appraise available alternatives.").

Moreover, in evaluating whether the impacts of a proposed action are significant, CEQ regulations instruct BLM to consider "[w]hether the action threatens a violation of federal, state, or local law or requirements imposed for the protection of the environment." 40 C.F.R. § 1508.27; *see also* 40 C.F.R. § 1501.2(d). Because the White Mesa Mill has violated federal radon emissions standards, the impacts of the Daneros mine expansion—which may well exacerbate ongoing violations or cause additional violations by the mill—should be deemed significant and analyzed in an EIS.⁵

Courts have set aside NEPA analysis where agencies failed to disclose that information was unavailable or failed to obtain the necessary information. *See, e.g., Lands Council v. Powell*, 395 F.3d 1019, 1031-32 (9th Cir. 2005) (agency failure to disclose relevant shortcomings in model used for analysis violated NEPA); *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549-50 (8th Cir. 2003) (pursuant to 40 C.F.R. § 1502.22, agency was required to evaluate potential air quality impacts associated with increased availability and utilization of coal).

⁵ Additionally, in a recent U.S. SEC filing, Energy Fuels stated, "From 2010 through 2012 Denison and the Company extracted approximately 123,000 tons of mineralized material from the Daneros Project at an average grade of 0.288% U₃O₈ containing about 708,000 pounds of U₃O₈." Energy Fuels, 2015 10-K financial report, submitted to the U.S. Securities and Exchange Commission (U.S. SEC), at 93 available at <http://www.energyfuels.com/wp-content/uploads/2016/04/Energy-Fuels-10-K-FY2015.pdf>. But in the Draft EA, BLM states "[t]he 2011 MPO approval includes the following, 'Production of up to 100,000 tons of uranium ore during a seven-year period of operation....'" Draft EA at 2. The Daneros Mine appears to have exceeded the production numbers approved under the 2011 EA. Based on this information, it seems that that Energy Fuels violated of their permit from BLM, as well as radon emissions standards at the White Mesa Mill.

Here, the record does not indicate that BLM analyzed numerous reports about the environmental impacts of milling activities. The commenting parties note that BLM did analyze state issued permits, a state public participation response on a milling license renewal, and a U.S. Geological Survey report on fugitive dust. But the Draft EA overlooks many other reports and documents that bear on how the White Mesa Mill impacts air and water quality. In particular:

- BLM did not acknowledge or analyze the following reports of violations of radon emissions standards at the White Mesa Mill:
 - Utah DAQ Memorandum on Energy Fuels, NESHAP Part 61 Subpart W Annual Report (April 17, 2013) (“Status: In Violation. The 2013 annual report indicated that Cell #2 exceed the 20.00 pCi/m²-sec of radon-222 in June, 2012”) (attached as Exhibit 1)
 - Utah DAQ Memorandum on Energy Fuels, NESHAP Part 61 Subpart W Annual Report (April 3rd, 2014) (“Status: In Violation. The 2013 annual report indicated that Cell #2 exceeded the 20.00 pCi/m²-sec of radon-222”) (attached as Exhibit 2).
- BLM did not analyze the concerns raised by the Ute Mountain Ute Tribe and expert hydrologists that current milling operations are causing groundwater contamination beneath the White Mesa Mill site. Relevant reports that BLM should analyze include the following:
 - In the Matter of: Stipulation and Consent Order, Docket No. UGW12-04, Regarding Approval and Stipulations for the Energy Fuels Resources (USA) Inc. May 7, 2012 *Corrective Action Plan for Nitrate, White Mesa Mill Energy Fuels Resources (USA) Inc. White Mesa Mill* Docket No. UGW12-04, Ute Mountain Ute Tribe, Request for Agency Action, January 11, 2013, *available at* <http://www.deq.utah.gov/businesses/E/energyfuels/docs/2014/08Aug/exhibitAtoRAA/RequestforAgencyAction.pdf>;
 - Ute Mountain Ute Tribe (UMUT), *Comments on DUSA RML Renewal Re: Identification of Potential Tailings Cell Influence in Groundwater at White Mesa Mill*, (December 16, 2011) attached as Exhibit 3.
 - RRD International Corp., *Review of Containment and Closure Issues*
 - *Denison USA / White Mesa Uranium Mill* (December 1, 2011) attached as Exhibit 4.
 - Ute Mountain Ute Tribe, *Comments Regarding Denison Mines (USA) Corp., White Mesa Uranium Mill Corrective Action Plan*, UGW12-04 (August 17, 2012) *available at* <http://www.deq.utah.gov/businesses/E/energyfuels/docs/2014/08Aug/exhibitAtoRAA/SearchablePDFUMUTComments81712.pdf>.
 - Geo-Logic Associates, *Data Review and Evaluation of Groundwater Monitoring: White Mesa Uranium Mill, Blanding, Utah* (August 2015) attached as Exhibit 5.

Violations of the Clean Air Act's radon emission standards threaten public and environmental health. And contamination of groundwater underneath the White Mesa Mill site poses a threat to the long-term health and viability of nearby communities, including the White Mesa community of the Ute Mountain Ute tribe. It is incumbent on BLM to analyze these environmental impacts and expose any environmental harms of milling before determining whether to approve a mine expansion that may cause the White Mesa Mill to operate at an increased output rate or for a longer period of time.

- c. *BLM failed to properly analyze impacts of uranium transport to the White Mesa Mill and ore storage at the White Mesa Mill.*

BLM's analysis of ore-transportation and storage impacts is deficient in two main ways. First, BLM fails to acknowledge that the Mill accumulates uranium ore, often from one or two main sources, and then processes the ore in large quantities as part of its "campaign basis" business model. It is likely that the ore from the Daneros Mine will be stored at the Mill until a critical mass sufficient to justify a campaign accumulates.

BLM erred by not analyzing the impact of ore stockpiles at the White Mesa Mill. Dust emissions from ore stockpiled at the White Mesa Mill have the potential to impact public and environmental health, particularly if ore is stockpiled for a long period of time. The length of time is important because dust emissions increase in dry weather (particularly when there is a failure to mitigate the emission of dust) and increase during periods of high winds such as the early spring in Southeastern Utah. A meaningful analysis of the impacts of uranium dust from stockpiled ore at the White Mesa Mill is particularly important because radon-222 attaches to small particles, such as dust, where it can be inhaled by persons living or working downwind and increase the risk of cancer. As such, analysis of the storage of Daneros ore falls within BLM's duty to analyze "the degree to which the proposed action affects public health or safety." 40 C.F.R. § 1508.27(b)(2).

Second, BLM did not adequately analyze the impacts of transportation of Daneros ore from the mine to the White Mesa Mill. BLM stated that a potential effect of the transportation of uranium ore from the Daneros Mine to the White Mesa Mill will be an increase in uranium dust from transport trucks. EA at 57, 63. However, BLM did not take the next step of analyzing the public health implications of this additional dispersal. If BLM did provide an analysis of the public health implications of the results modeled in Appendix G, we request that BLM provide this information in its comment response because it is not apparent from the record. Given that the Daneros Mine is located on major tourism highways in Southeastern Utah and in the vicinity of Natural Bridges National Monument, BLM should address any dust dispersal impacts or provide factual support for a conclusion that there are no public health impacts related to dust from uranium trucks. Moreover, it appears that BLM has relied on an analysis – namely, the U.S. Department of Energy 2007 Uranium Leasing Program Programmatic Environmental Impact Statement – that has been rejected by a federal court as inadequate. Draft EA at 95, C-11, (*citing* U.S. Department of Energy. 2007. Uranium Leasing Program Final Programmatic Environmental Assessment. Office of Legacy Management. DOE/EA-1535. July 2007). Rather than tiering to an analysis that has been found inadequate by a federal court, the BLM should conduct an independent analysis of the impacts of transportation. *See Colo. Envtl. Coal. v. Office*

of Legacy Mgmt., 819 F. Supp. 2d 1193, 1198 (D. Colo. 2011) *amended by Colo. Envtl. Coalition v. Office of Legacy Mgmt.*, 2012 U.S. Dist. LEXIS 24126 (D. Colo., Feb. 27, 2012).

The Draft EA also observes that the shipment of ore from the Daneros mine expansion might result in one to two additional highway accidents per year. EA at 77. Over the life of the mine, that is a total of twenty to forty additional highway accidents potentially involving uranium ore. Yet the Draft EA fails to analyze how those additional accidents will impact public and environmental health. BLM should address that inadequacy in a revised NEPA analysis. *See Davis v. Mineta*, 302 F.3d 1104, 1123 (10th Cir. 2002) (concluding adequate consideration of induced growth required “discussion or comparison of the local effects” of such growth; table outlining growth was insufficient).⁶

d. The White Mesa Mill and the Daneros mine expansion are connected actions.

The BLM failed to analyze the Daneros Mine and White Mesa Mill as connected actions. As the Draft EA admits, “[o]re produced from the Daneros Mine is shipped to the White Mesa Mill, located near Blanding, Utah, for processing.” EA at 2. It is undisputed that the White Mesa Mill is the only operating conventional uranium mill in the region, and in the United States. EA at 91 (“The White Mesa Mill is the only permitted uranium processing mill in the area and it is operating.”). Thus, without the White Mesa Mill, the Daneros mine would have nowhere to process the ore. Indeed, nothing in the EA indicates that the Daneros mine expansion would go forward if the ore could not be processed at the White Mesa Mill.

Based on these undisputed facts, the BLM is required to consider the Mill and the Daneros mine as connected actions in the same NEPA document. Actions or projects that are connected, cumulative or similar must be analyzed in a single NEPA document. 40 C.F.R. § 1508.25. Council on Environmental Quality (CEQ) regulations provide that actions are “connected” if they ... “(ii) [c]annot or will not proceed unless other actions are taken previously or simultaneously,” or “(iii) [a]re interdependent parts of a large action and depend on the larger action for their justification.” 40 C.F.R. § 1508.25(a)(1). The rationale for this rule is that “connected, cumulative, and similar actions must be considered together to prevent an agency from ‘dividing a project into multiple ‘actions,’ each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.” *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 894 (9th Cir. 2002).

Because the proposed expansion of the Daneros mine would not happen if the resulting ore could not be processed at the White Mesa Mill, they are connected actions that must be evaluated together. “[E]ven though an action could conceivably occur without the previous or simultaneous occurrence of another action, if it would not occur without such action it is a ‘connected action’ and must be considered within the same NEPA document as the underlying

⁶ The flaws contained in BLM’s analysis of the indirect effects of transportation accidents and dispersal of dust are also present in its cumulative impacts analysis of transportation accidents and dispersal of dust.

action.” *Dine Citizens Against Ruining Our Env’t v. Klein*, 747 F. Supp. 2d 1234, 1254 (D. Colo. 2010). Thus, because the Mine is dependent on the Mill to operate, they are connected actions.

True enough, the White Mesa Mill gets ore from sources other than the Daneros mine, but just because the Mill may operate without the mine does not mean that they are not connected actions. As a separate NEPA duty from the requirement to review the cumulative impacts from the Mill, the BLM was required to review the impacts from both projects in one NEPA document.

3. *BLM failed to take a hard look at impacts to threatened and endangered species.*

The Draft EA concludes, without analysis, that “[c]onsultation with the U.S. Fish and Wildlife Service is not required since there are no known threatened or endangered species and associated habitat within or near the proposed Project Area and listed species would not be affected by the Proposed Action.” Draft EA at 100. And BLM’s decision not to analyze in detail how the proposed mine expansion would impact threatened and endangered species improperly relied on outdated and inadequate species surveys.

After consultation with BLM, SWCA conducted a site survey of threatened, endangered or candidate species in May of 2008 and again in 2012 to determine if the species identified by BLM are potentially located in the PPA. The results of the survey indicated there are no federally listed or BLM special status plant species within the PPA [proposed project area] (MPOM, Appendix L).

Draft EA at C-6. Limiting the scope of the analysis to the project footprint and relying on outdated surveys renders BLM’s decision not to engage in consultation improper. Importantly, several additional species have been listed since the 2008 and 2012 surveys, including the yellow-billed cuckoo (79 Fed. Reg. 59,991) and Gunnison sage grouse (79 Fed. Reg. 69,191). The EA has no information about whether and how the proposed mine expansion may affect these species. See <http://ecos.fws.gov/ecp0/reports/species-listed-by-state-report?state=UT&status=listed>

Section 7(a)(2) of the Endangered Species Act (ESA) imposes both procedural and substantive duties on federal agencies. Procedurally, federal agencies must consult with the U.S. Fish and Wildlife Service (FWS) to “insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species ... determined ... to be critical” 16 U.S.C. § 1536(a)(2) (“section 7 consultation”). The fundamental purpose of consultation is to facilitate informed agency decision-making in order to ensure that the continued existence of endangered and threatened species is not jeopardized and their critical habitat is not adversely modified.

The consultation mandate is triggered when there is an “agency action” that “may affect” a listed species or designated critical habitat. 50 C.F.R. § 402.14(a). This is a low threshold: ‘Any possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the formal consultation requirement’ 51 Fed. Reg. 19,926, 19,949 (June 3, 1986)

(final rule) (emphasis added); *see also California ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1018-19 (9th Cir. 2009) (citing 51 Fed. Reg. 19,926 and stating that the threshold for triggering the consultation duty is relatively low); *Nat'l Wildlife Fed'n v. Fed. Emergency Mgmt. Agency*, 345 F. Supp. 2d 1151, 1174-75 (W.D. Wash. 2004) (stating that the threshold for formal consultation is low). And the "action area" that must be assessed means "**all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.**" 50 C.F.R. § 402.02 (emphasis added).

BLM erred by analyzing only the footprint of the proposed mine expansion and no other areas that may directly or indirectly be affected by the expansion, and by failing to account for species listings that post-date the species surveys BLM conducted. BLM's decision not to engage in Section 7 consultation under the ESA was flawed, and its analysis in the Draft EA was inadequate. BLM accordingly should revisit its consultation decision and revise its NEPA analysis.

4. *BLM failed to take a hard look at impacts to water resources.*

BLM's analysis in the Draft EA of impacts to water resources is deficient. In several portions of the document, the BLM relies on unsupported assumptions or discussions that lack the necessary level of analysis to comply with NEPA.

For instance, the Draft EA states that "[a]lthough an episodic stormwater discharge from areas of the mine containing acid-forming or deleterious materials would be possible during storm events that exceed the design storm, very large volumes of stormwater from other unaffected areas would be present during these events. This water would dilute any potential discharge from the detention ponds effectively mitigating adverse effects to surface water quality. In addition, no perennial or intermittent surface waterbodies are present in the vicinity of the Daneros mine, and any discharge that occurred during these infrequent, very large storm events would be discharged into ephemeral drainages, which do not contain aquatic ecological receptors that would be adversely affected." Draft EA at 65. BLM has provided no data or other support for these conclusions. The Draft EA has no analysis of the quantities of water necessary for the assumed dilution effect to occur. And the Draft EA sets out no information about the concentrations of contaminants likely to be present if acid-forming or deleterious materials are spilled during a storm event. Further, there is no support provided for the assumption that biological receptors are lacking.

The Draft EA states that "[i]f the monitoring program reveals impacts to the spring or well as a result of mining, including subsidence, Energy Fuels would work with the water right holder to determine appropriate mitigation and/or compensation. Based on analysis and mitigation, the Proposed Action is not expected to affect existing water rights as a result of water drawdown from the upper aquifer and diminution of water flows feeding the spring and well." Draft EA at 67. The Draft EA fails to provide the data necessary to make these determinations. Further, as discussed elsewhere in these comments, reliance on unreviewed and yet-to-be-developed mitigation as a basis to find a lack of significant impacts does not comply with NEPA.

With respect to water impacts from the White Mesa Mill, the source of recognized cumulative and connected impacts associated with the Daneros Mine, the Draft EA states, at 68:

The White Mesa Mill groundwater monitoring program includes 73 monitoring wells at the facility (Utah DRC, 2014). Samples are taken and analyzed for a large number of potential groundwater contaminants including heavy metals, nutrients, general chemistry analytes, radiologics, and volatile organic compounds (VOCs). Exceedances of standards found during monitoring programs are reported and then accessed in greater detail. If assessment determines there are potential impacts to groundwater from mill activities, then Energy Fuels works with DRC to design and implement mitigation or corrective actions. There are two circumstances where applicable groundwater standards, that are not associated with natural background, have been exceeded at the Mill. They are chloroform and nitrate contamination and neither of these circumstances appear to be related to discharges from milling activities. In both instances, corrective actions are currently being implemented under the direction of DRC.

While the Draft EA admits that water contamination has been detected at the White Mesa Mill, it relies on an undocumented assertion that the contamination “appears” to be unrelated to milling activities. This type of unsupported conclusion is not compliant with NEPA. Further, reliance on undetermined and unidentified mitigation for these exceedances of water quality standards is not allowable.

In its summary of the surface and groundwater impacts, the Draft EA asserts that “[f]ew potential surface water and groundwater impacts are anticipated because of the small scale of the Proposed Project, the physical setting, and the proposed mitigation measures. The surface water system is made up of ephemeral drainages, and the mitigation measures include implementing the drainage plan (MPOM – Attachment C) and SWPPP (MPOM – Attachment G).” Draft EA at 69. However, a review of the relevant attachments submitted by the company demonstrate that BLM has not conducted the required review of how effective these proposed mitigation measures will be.

5. *BLM failed to take a hard look at the cumulative impacts of adjacent state-land leases.*

NEPA requires the meaningful consideration of cumulative impacts in an EA. 40 C.F.R. § 1508.27(b)(7); 40 C.F.R. § 1508.25(a)(2), (c); *Utah Shared Access Alliance v. U.S. Forest Service*, 288 F.3d 1025, 1214 (10th Cir. 2002); *Davis v. Mineta*, 302 F.3d 1104, 1125 (10th Cir. 2002) (“The EA does not provide an adequate discussion of the cumulative impacts of the Project on the human environment.”). To meet NEPA requirements for scope, an EA must consider direct, indirect, and cumulative impacts, as well as connected and cumulative actions. 40 C.F.R. § 1508.25(a)(1) & (2), (c). As with all other aspects of NEPA, the analysis of cumulative effects must take place before BLM commits itself “irretrievably to a given course of action;” in this case, BLM must perform a meaningful cumulative effects analysis before it approves the proposed modification. *Pennanco Energy vs. US Department of Interior*, 377 F.3d 1147, 1159 (10th Cir. 2004).

Energy Fuels Inc.'s end of year 2015 10-K financial report, submitted to the U.S. Securities and Exchange Commission (U.S. SEC), found [here](#), includes additional information regarding cumulative impacts that the Draft EA fails to address. Specifically, in the portion on the Daneros Mine (pages 90-93), the company states:

We have also added a Utah State mineral lease of 640 acres in Section 32, T36S, R16E to the project which is not included in the technical report. The property now consists of 141 unpatented mining claims located on federal land administered by the BLM in San Juan County, Utah, plus the State lease totaling approximately 3,450 acres.

These additional mining operations are reasonably foreseeable and must be included in a review of the cumulative impacts from the Daneros Mine.

C. BLM Failed to Adequately Consider Environmental Justice

As a federal agency, the Interior Department/BLM is subject to and must comply with the Executive Order 12898, Actions to Address Environmental Justice in Minority Populations and Low-Income Populations 59 FR 7629 (February 11, 1994). That order provides:

"Section 1–1.Implementation.1–101.Agency Responsibilities. To the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States..."

Approval of the proposed mine expansion by BLM and milling of ore at the White Mesa Mill would clearly have a negative and disproportionate impact on the health and well-being of tribal members living in the White Mesa Ute Community of the Ute Mountain Ute Tribe only three miles from the White Mesa Uranium Mill. Given this disproportionate impact, BLM seriously erred by eliminating environmental justice considerations from further analysis. See EA at 36 ("Resources potentially present in the Project Area, but that would not be impacted by the Proposed Action to a degree that detailed analysis is required, include... environmental justice.")

D. BLM has not adequately analyzed mitigation measures or imposed conditions on the proposed Modification that are necessary to protect the environment.

The Draft EA also fails to properly consider how impacts of the mine expansion and other activities in the region can be mitigated. NEPA requires BLM to: (1) "include appropriate mitigation measures not already included in the proposed action or alternatives," 40 C.F.R. § 1502.14(f); and (2) "include discussions of: . . . [m]eans to mitigate adverse environmental impacts (if not already covered under 1502.14(f))." 40 CFR § 1502.16(h). NEPA regulations define "mitigation" as a way to avoid, minimize, rectify, or compensate for the impact of a

potentially harmful action. 40 C.F.R. §§1508.20(a)-(e). “[O]mission of a reasonably complete discussion of possible mitigation measures would undermine the ‘action-forcing’ function of NEPA. Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects.” *Robertson*, 490 U.S. at 353.

NEPA documents must analyze mitigation measures with “sufficient detail to ensure that environmental consequences have been fairly evaluated.” *Methow Valley*, 490 U.S. at 352, 109 S.Ct. 1835.

An essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective. *Compare Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1381 (9th Cir.1998) (disapproving an EIS that lacked such an assessment) *with Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 477 (9th Cir.2000) (upholding an EIS where “[e]ach mitigating process was evaluated separately and given an effectiveness rating”). The Supreme Court has required a mitigation discussion precisely for the purpose of evaluating whether anticipated environmental impacts can be avoided. *Methow Valley*, 490 U.S. at 351–52, 109 S.Ct. 1835(citing 42 U.S.C. § 4332(C)(ii)). A mitigation discussion without at least *some* evaluation of effectiveness is useless in making that determination.

South Fork Band Council v. Dept. of Interior, 588 F.3d 718, 727 (9th Cir. 2009)(rejecting EIS for failure to conduct adequate review of mitigation and mitigation effectiveness in mine EIS). “The comments submitted by [plaintiff] also call into question the efficacy of the mitigation measures and rely on several scientific studies. In the face of such concerns, it is difficult for this Court to see how the [agency’s] reliance on mitigation is supported by substantial evidence in the record.” *Wyoming Outdoor Council*, 351 F. Supp. 2d at 1251, n. 8.

The requirement to sufficiently review and analyze proposed mitigation measures is particularly applicable where, as here, federal agencies propose to forgo preparation of an EIS based on a finding of no significant impact. *National Audubon Society v. Hoffman*, 132 F.3d 7, 17 (2d Cir. 1997) (“[W]e emphasize the requirement that mitigation measures be supported by substantial evidence in order to avoid creating a temptation for federal agencies to rely on mitigation proposals as a way to avoid preparation of an EIS.”); *Friends of the Ompopomposuc v. FERC*, 968 F.2d 1549, 1556-57 (2nd Cir. 1992); *Abenaki Nation of Misissquoi v. Hughes*, 805 F.Supp. 234, 245 (D. Vt. 1992), *aff’d* 990 F.2d 729 (2nd Cir. 1993).

The Draft EA does not fulfill these requirements. It asserts that it “identifies mitigation measures to potentially reduce or eliminate ... impacts” (Draft EA at 1), but a close read of the document belies this assertion. In fact, as set forth below, the Draft EA provides only brief references and assumptions pertaining to mitigation measures. Indeed, nowhere does the Draft EA even attempt to provide a comprehensive list or other detailed description of the mitigation measures proposed for the project. Further, the Draft EA explains that BLM has not incorporated *any* additional mitigation into the proposal apart from those measures proposed by the applicant. Draft EA at 33-34 (“An alternative for BLM-added mitigation of the Proposed Action was examined and not carried forward for further analysis.”).

The section devoted to mitigation measures for the proposed action states simply that “[t]he mitigation measures incorporated into the Proposed Action would effectively minimize impacts. It is expected that the built-in measures would be effective and that no residual impacts would result.” Draft EA at 80. This type of truncated review and unsupported reliance on the effectiveness of mitigation is not acceptable. BLM should revise its NEPA analysis to fully analyze the effectiveness of each proposed mitigation measure for all potentially affected resources.

When the Draft EA references specific mitigation measures, it fails to provide the necessary level of detail or analysis. For instance, air impacts to Natural Bridges National Monument are asserted to be minimal because “[p]otential fugitive dust impacts from the mine operations would be minimal at the monument due to implementation of UDAQ AO mitigation measures and the Fugitive Dust Control Plan.” Draft EA at 63. The cumulative impacts section adds that “[c]umulative impacts to air quality would be limited due to a lack of existing industrial development in the local area, and due to mitigation measures that would be required for future development.” Draft EA at 96. And that is the sum total of BLM’s analysis, even though it had committed in response to the National Park Service scoping comment to review and analyze the effectiveness of mitigation for impacts to air quality. EA Appx. D, Table 1, page 2 (“The environmental analysis will help determine the effectiveness of these measures as well as identify any additional mitigation measures that may be needed.”). No details, description, analysis, or effectiveness determination is set out to back up the Draft EA’s assertions about mitigating air quality impacts. This is precisely the type of unsupported assertion that NEPA prohibits – particularly in an EA for which a FONSI is proposed.

Similarly, in its discussion of air quality impacts from the White Mesa Mill, the Draft EA states that “[m]itigation includes opacity limitations at sources of fugitive dust, application of water or chemical treatments to roads, fuel requirements for internal combustion engines, and limitations and testing procedures for specialized equipment.” Draft EA at 62. However, no analysis or any detail is provided as to whether these mitigation measures will be effective.

And last, with respect to historic resources, BLM asserts that it “determined that the project would result in no adverse effect to historic properties, provided that the eligible site is avoided or a mitigation plan developed and implemented with the SHPO and the BLM.” Appendix D, Table 1, page 10. However, no mitigation plan appears to have been developed or analyzed in the Draft EA. A FONSI that relies on mitigation must be supported by an EA that includes analysis to justify the finding that significant impacts will not occur. Here, without a developed mitigation plan, the BLM has not complied with NEPA.

E. BLM’s proposed finding of no significant impact is unsupported.

The draft FONSI does not contain any analysis or reasoning to explain BLM’s decision not to prepare an EIS. The FONSI is a decision that terminates the NEPA process, and provides the basis for the agency to take action without preparing an EIS. *Dine Citizens Against Ruining Our Env’t v. Klein*, 747 F. Supp. 2d 1234, 1249 (D. Colo. 2010); *Davis v. Mineta*, 302 F.3d 1104, 1112 (10th Cir. 2002). A FONSI must supply a “convincing statement of reasons” to explain why a proposed project’s impacts are insignificant. *Blue Mts. Biodiversity Project v.*

Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998). This statement is “crucial to determining whether the agency took a ‘hard look’ at the potential environmental impact of a project.” *Id.*

BLM has proposed in its Draft EA and FONSI not to prepare an EIS for the Daneros Mine expansion, yet this decision was made without critical information regarding direct, indirect, and cumulative impacts, mitigation, and other matters described above. Such refusal to prepare an EIS must be based on the required “hard look” at potential adverse impacts. The FONSI must be “accompanied by a convincing statement of reasons to explain why a project’s impacts are insignificant.” *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001). “If an agency decides not to prepare an EIS, it must supply that convincing statement of reasons to explain why a project’s impacts are insignificant. The statement of reasons is crucial to determining whether the agency took a hard look at the potential environmental impact of a project.” *Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 937 (9th Cir. 2010) (USFS violated NEPA in issuing FONSI based on inadequate analysis). “An agency cannot ... avoid its statutory responsibilities under NEPA merely by asserting that an activity it wishes to pursue will have an insignificant effect on the environment. Instead, an agency must provide a reasoned explanation of its decision.” *Jones v. Gordon*, 792 F.2d 821, 828 (9th Cir. 1986). *See also*, *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1213–14 (9th Cir. 1998) (EIS required where the USFS lacked information about how project may affect sediment input into streams); *Anderson v. Evans*, 350 F.3d 815, 832-35 (9th Cir. 2002) (“uncertain” impacts required EIS).

BLM’s proposed FONSI does not satisfy these requirements because the Draft EA lacks critical analysis and information as explained above. Without that analysis, the FONSI fails to provide a “convincing statement of reasons” to support the conclusion that impacts of the Modification will not be significant.

F. BLM should prepare an environmental impact statement.

If a hard look analysis reveals that a project’s impact is “significant,” then the agency must prepare an EIS. CEQ regulations provide guidance on factors agencies should consider in evaluating “significance” as they determine whether to issue a FONSI or prepare an EIS. The regulations require agencies to consider both the context and intensity of environmental impacts of the proposed project.

CEQ provides guidance on the how agencies should consider context.

“Context means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.”

40 CFR 1508.27(a).

Intensity refers to the severity of the impact, and the regulations list ten factors agencies must consider when they review the intensity of the impact. In addition, BLM must examine the direct, indirect, and cumulative impacts of the lease when applying the intensity factors. 40 C.F.R. §§ 1508.25(c) (requiring analysis of direct, indirect, and cumulative impacts). A court will review an agency's consideration of the intensity factors in evaluating whether the agency took the requisite "hard look" at the environmental impact. When an agency makes a FONSI based on conclusory findings that do not reflect adequate consideration of these factors, it will be reversed. *See e.g. Ocean Advocates v. United States Army Corps of Eng'rs*, 402 F.3d 846 (9th Cir. 2005); *Pennaco Energy Inc.*, 377 F.3d at 1159.

The threshold for an EIS merely requires the potential for the proposed action to result in significant environmental impact when evaluated against the significance factors. "An agency is required to prepare an EIS when there are substantial questions about whether a project *may* cause significant degradation of the human environment." *Native Ecosystems Council v. U.S. Forest Service*, 428 F.3d 1233, 1239 (9th Cir. 2005) (emphasis in original). "[T]his is a low standard." *California Wilderness Coalition v. U.S.*, 631 F.3d 1072, 1097 (9th Cir. 2011). Significance does not require absolute certainty that significant impacts will result, rather it is enough that a proposed action *may* result in a significant environmental impact. *Grand Canyon Trust v. FAA*, 290 F.3d 339, 340 (D.C. Cir. 2002). Indeed, the presence of one significance factor may be sufficient to deem the action significant and require the preparation of an EIS. *Nat'l Wildlife Fed'n v. Norton*, 332 F. Supp. 2d 170, 181 (D.D.C. 2004).

Here, the Daneros mine expansion may have significant environmental impacts when evaluated against the significance factors and thus an EIS is required. As a baseline matter, uranium mining and its extraction of radioactive material involves impacts that are unique and of greater intensity than other types of hardrock mining. Beyond this baseline, this particular uranium mine modification is extensive. BLM is proposing to approve a mine expansion from 4.5 acres to over 46.3 acres – over a ten-fold increase; to increase the effective life of the mine four-fold, from 5 years to 20 years; and to increase the amount of ore mined out of the site by 400,000 tons. As such, the proposed modification raises concern about public health and safety. *See* 40 C.F.R. 1508.27(b)(2). The threat of radioactive contamination from uranium mining and milling also triggers significant public concern and controversy, an intensity factor. *See* 40 CFR 1508.27(b)(4). And finally, uranium mining and associated radioactive contamination are uncertain, unique and unknown to the general public, another factor that cautions in favor of preparing an EIS. *See* 40 CFR 1508.27(b)(5).

Other intensity factors also weigh in favor of preparing an EIS. The Daneros Mine is less than five miles from Natural Bridges National Monument, and ore will be transported across the iconic Cedar Mesa region, one of the world's most important cultural landscapes. Thus, significance factors three and eight are met. *See* 40 CFR 1508.27(a)(3) ("Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas."); 40 CFR 1508.27(a)(8) ("[T]he degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.")

In terms of context, southeastern Utah and the greater Colorado Plateau have been ravaged by the impacts of poorly regulated and irresponsibly operated uranium mines and mills. The impact of this uranium contamination has been disproportionately borne by tribal nations across the Colorado Plateau, rendering the lack of a robust environmental justice analysis even more troubling. This is particularly true given the vicinity of the Daneros Mine and the White Mesa Mill to the communities, lands, and ancestral territories of the Ute Mountain Ute tribe. In sum, the proposed mine expansion would occur in a greater context of the legacy of uranium contamination and the potential for significant long-term impacts in the region. And that requires preparation of an EIS.

It is clear that the impacts of the proposed expansion meet the relatively low standard of raising a “substantial question” over whether the expansion “may” cause significant impact. Of note, in other uranium-mining proposals with far less adverse impacts and duration, BLM’s sister agency, the U.S. Forest Service (USFS) has prepared an EIS. For example, in Arizona, the USFS issued a Notice of Intent to Prepare an EIS for a uranium exploration project with just 10 drill sites with no actual mining proposed, a stark contrast to the Daneros Mine. *See* 73 Fed. Reg. 60233 (Oct. 10, 2008).

Finally, an EA is not an adequate substitute for the rigorous analysis and evaluation inherent in an EIS. As federal courts have held, “[n]o matter how thorough, an EA can never substitute for preparation of an EIS, if the proposed action could significantly affect the environment.” *Anderson v. Evans*, 314 F.3d 1006, 1023 (9th Cir. 2002). The Court further explained:

We stress in this regard that an EIS serves different purposes from an EA. An EA simply assesses whether there will be a significant impact on the environment. An EIS weighs any significant negative impacts of the proposed action against the positive objectives of the project. Preparation of an EIS thus ensures that decision-makers know that there is a risk of significant environmental impact and take that impact into consideration. As such, an EIS is more likely to attract the time and attention of both policymakers and the public.

Id. *See also Sierra Club v. Marsh*, 769 F.2d 868, 874–76 (1st Cir. 1985) (holding that “under NEPA and its implementing regulations, we cannot accept [] EAs as a substitute for an EIS—despite the time, effort, and analysis that went into their production—because an EA and an EIS serve very different purposes”); 46 Fed. Reg. 18,026, 18,037 (1981) (CEQ statement advising agencies to keep EAs to not more than about 10–15 pages and stating that “[i]n most cases . . . a lengthy EA indicates that an EIS is needed”).

III. BLM has not complied with the National Historic Preservation Act.

By failing to meaningfully communicate with Indian tribes that attach religious and cultural significance to the project area, BLM failed to fulfill its responsibilities under the National Historic Preservation Act (NHPA), 54 U.S.C. §§ 300101, *et seq.* BLM sent area tribes a single letter about the project, and though one tribe notified BLM that the area contained cultural

sites of significance to the tribe, BLM did nothing to follow up. This fell far short of BLM's obligations under the NHPA and must be remedied by re-initiating consultation in a full EIS.

The NHPA charges BLM with special stewardship responsibilities over cultural resources on land that is under the agency's "jurisdiction or control." A federal "undertaking" triggers the so-called "Section 106" process under NHPA, which requires BLM to "make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey." 36 C.F.R. § 800.4(b)(1). As part of this duty, BLM must account for information communicated to it by parties expressing an interest in historic properties affected by the undertaking. *Pueblo of Sandia v. United States*, 50 F.3d 856, 860–61 (10th Cir. 1995).

The NHPA also requires federal agencies to consult with any "Indian tribe ... that attaches religious and cultural significance" to the sites. 54 U.S.C. § 302706(b) Consultation must provide the tribe "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." 36 CFR § 800.2(c)(2)(ii). "The agency official shall ensure that the section 106 process is initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking." 36 CFR § 800.1(c) (emphasis added).

The NHPA requires that consultation with Indian tribes "recognize the government-to-government relationship between the Federal Government and Indian tribes." 36 CFR § 800.2(c)(2)(ii)(C). *See also* Presidential Executive Memorandum entitled "Government-to-Government Relations with Native American Tribal Governments" (April 29, 1994), 59 Fed. Reg. 22951, and Presidential Executive Order 13007, "Indian Sacred Sites" (May 24, 1996), 61 Fed. Reg. 26771.

Federal courts interpreting these laws, regulations, and guidance have found that consultation requires robust engagement with tribal nations and investigation of cultural resources. *See Slockish v. U.S. FHWA*, 682 F.Supp.2d 1178, 1198 –99 9 (D. Oregon 2010) ("[B]y failing to include key stakeholders in the process, defendants may have acted without information necessary for them to comply with their obligations under [the NHPA]."). Indeed, in *Pueblo of Sandia*, the Tenth Circuit held that, even though local affected Tribes declined to respond to repeated U.S. Forest Service requests for information on cultural resources, the fact that the agency was aware that such resources existed in the area "was sufficient to require the Forest Service to engage in further investigations, especially in light of regulations warning that tribes might be hesitant to divulge the type of information sought." *Pueblo of Sandia*, 50 F.3d at 860.

Merely providing a tribal nation with information about a project through a letter does not meet NHPA obligations. Rather the NHPA requires meaningful engagement with the tribal nations whose cultural resources may be affected by the undertaking. *See Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dept. of the Interior*, 755 F.Supp.2d 1104, 1118 (S.D. Cal. 2010) ("The sheer number of documents is not meaningful. The number of letters, reports,

meetings, etc. and the size of the various documents doesn't in itself show the NHPA-required consultation occurred.”). “[R]ecitals of law (including Section 106), professions of good intent, and solicitations to consult ... do not, by themselves, show [the agency] actually complied with the law.” *Id.* at 1118.

On February 4, 2014, as part of the scoping process, BLM sent letters to 12 tribes with potential interest in the historic properties and cultural resources within the action area. EA at 99. BLM received responses from both the Hopi Tribe and Navajo Tribe raising concerns about the project, but the record does not show that BLM attempted to carry out any further consultation.

The record does not indicate that BLM made further response to either of the sovereign nations' letters. Indeed, the only action BLM took was to make a minor modification in the EA and draft FONSI that obligates the BLM to inform the Navajo Tribe upon finding cultural resources. EA Appendix D, Table 1 at 4.

Merely sending a single letter to tribal nations with ties to the impacted area is insufficient to meet BLM's responsibilities under the NHPA. Rather, a letter is intended to signal the initiation of consultation. As the Advisory Council for Historic Preservation notes:

“Consultation with an Indian tribe or tribes **should be initiated** by the agency official through a letter to the leadership of each tribe, with a copy going to each tribe's THPO, or for a tribe without a THPO, its cultural resource officer. Indian tribes are sovereign nations and their leaders must be shown the same respect and formality given to leaders of other sovereign nations. Since tribal elections often result in changes in leadership, agency officials should contact the tribe prior to executing the letters in order to ascertain that the correspondence is correctly addressed to the appropriate points of contact. **It is helpful to follow up such correspondence with direct telephone communication to ensure the letter has been received.**”

Advisory Council for Historic Preservation, *CONSULTATION WITH INDIAN TRIBES IN THE SECTION 106 REVIEW PROCESS: A HANDBOOK*, (November 2008) at 16. (emphasis added).

BLM erred by failing to meaningfully communicate with impacted tribes beyond sending its initial letter. The record does not indicate that BLM initiated direct telephone communication after issuing its letter as advised by the ACHP. Of note, BLM did not receive any confirmation that tribes besides the Navajo Nation and Hopi Tribe even received the letter; the EA shows “no response received” for 10 of the 12 tribes contacted. EA at 98-99. This alone should have prompted BLM to follow up with the impacted tribal nations. Moreover, the record does not indicate that BLM made any attempt to engage in further investigations after the Navajo Nation informed BLM of the presence of culturally significant sites in the action area. This is in direct contravention of both ACHP guidance and the holdings of federal courts. *See Pueblo of Sandia*, 50 F.3d at 860.

BLM should re-initiate consultation with all impacted tribes in a meaningful manner as outlined in the ACHP Handbook, and conduct a full investigation into the cultural sites raised by

the Navajo Nation or any other tribal nation that participates in the consultation process. Anything less will result in a NEPA and NHPA document that fails to include key stakeholders in the process and is, as a result, legally inadequate. *See Slockish*, 682 F.Supp.2d at 1198-99.

* * *

We appreciate the opportunity to comment on the Draft EA.

Sincerely,

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