WESTERN MINING ACTION PROJECT

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To: Nora Rasure,
Objection Reviewing Officer
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RE: OBJECTION to the
La Sal Mines Complex Plan of Operations Amendment (POA)(Project)
Environmental Assessment (EA) and Draft Decision Notice and Finding
of No Significant Impact (Draft DN/FONSI)
Responsible Official: Brian M. Pentecost, Forest Supervisor
Manti-La Sal National Forest

I. INTRODUCTION

Pursuant to 36 CFR Part 218, Uranium Watch, Living Rivers, Grand Canyon Trust, Center for Biological Diversity, and the Information Network for Responsible Mining (collectively Objectors), by their undersigned attorneys, file this Objection to the EA (DOI-BLM-UT-Y010-2011-0048-EA dated April 2014) and Draft DN/FONSI issued by Forest Supervisor Brian Pentecost for the La Sal Mines Complex. *See* November 18, 2014 Interested Party letter from Moab/Monticello District Ranger Michael Diem;
http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/74732_FSPLT3_2390878.pdf.

Pursuant to Part 218, Uranium Watch (UW) is the lead objector. Contact person: Sarah M. Fields, Program Director, Uranium Watch, P.O. Box 344, Moab, Utah 84532. However, all Objectors are represented by their undersigned counsel and all U.S. Forest Service (USFS) correspondence regarding this Objection should be directed to Mr. Flynn at the above letterhead address and contact information.

All of the Objectors filed comments on the EA and proposed USFS/BLM actions on or about

August 20, 2012, and have fully participated in the USFS review of the Project. Pursuant to 36 CFR 218.8, the parties state that the following content of this Objection demonstrates the connections between the August 20, 2012, comments (or "previous comments") for all issues raised herein, unless the issue or statement in the EA or Draft DN/FONSI arose or was made after the opportunity for comment on the EA closed on August 21, 2012, as detailed herein.

II. THE PROPOSED PROJECT WOULD VIOLATE NUMEROUS FEDERAL LAWS AND CANNOT BE APPROVED AS PROPOSED IN THE DRAFT DN/FONSI.

As detailed herein, and as noted in the previous comments, the Project would violate numerous federal public lands, environmental, wildlife, historic/cultural preservation and related laws, regulations, and policies. As such, the USFS cannot approve the proposed POA, as amended by any of the action alternatives, including Alternative C proposed to be approved in the Draft DN/FONSI. These laws (with their implementing regulations and policies) include, but are not limited to: the National Environmental Policy Act (NEPA), Forest Service Organic Act of 1897 (Organic Act), the 1872 Mining Law, the National Forest Management Act (NFMA), the Endangered Species Act (ESA), the Clean Water Act (CWA), the Clean Air Act (CAA), and the National Historic Preservation Act (NHPA).

The remedy for these violations is for the USFS to not issue any Final DN that would authorize approval of any POA for any action alternative reviewed in the EA (i.e., the USFS must deny/reject any such POA) that does not fully comply with each and every law, regulation, and policy noted herein. The Regional Forester must remand the EA and Draft DN/FONSI back to the Manti-La Sal National Forest with instructions to correct all errors noted herein before the USFS can consider approving any operations at the site. At a minimum, as noted herein and in the previous comments, any such potential approval must be accompanied by a complete and adequate Environmental Impact Statement (EIS) prepared in compliance with NEPA.

III. THE USFS (and BLM) MUST PREPARE AN EIS

For the reasons articulated herein, and in the previous comments, the EA is substantially inadequate and violates NEPA. The EA and Draft DN/FONSI fail to take the requisite "hard look" at the La Sal Mines Complex Project. The EA is fundamentally flawed because of inaccurate and incomplete information. Critical and explanatory data, methodologies, and analysis are simply not provided; this failure goes to the heart of NEPA's requirements regarding full and transparent disclosure of issues so that the public can credibly comment on the proposal. Among other inadequacies noted herein, the EA fails to properly review all direct, indirect, and cumulative impacts (as well as connected actions), fails to properly review all reasonable alternatives, fails to conduct the required baseline analysis, defers consideration of critical information until after the NEPA process is concluded, fails to conduct the proper mitigation analysis (including the effectiveness of all mitigation measures), presents significant new issues for which the public did not have the proper opportunity to comment upon before the close of the comment period on the EA in 2012, and fails to adequately respond to public and other agency comments (including the August 20, 2012, comments of the Objectors). Further, due to the obvious potential for significant impacts, the proposed DN/FONSI cannot be sustained under NEPA.

Despite the proposed finding of "no significant impact," the Project will clearly result in significant impacts to land, air, wildlife, surface and groundwater, recreation, human health (including mine workers), and cultural/historic resources among affected resources noted herein. The Project itself is massive. It proposes substantial mining and exploration operations in three phases covering over 20 years. New exploration drill holes alone would total 3,800, with the associated roads and infrastructure. EA at 4-27. Over 212 acres of public and private land will be directly and adversely impacted, not including the impacts from related and connected operations such as the White Mesa Mill and ore transportation across miles of southeastern Utah.

The previous comments submitted by the Objectors on August 20, 2012 (including cited and linked documents), discussing the reasons why an EIS must be prepared, Conclusion section pp. 55-61, are hereby incorporated by reference into this Objection pursuant to 36 CFR §218.8(b).

As noted herein and in the previous comments, due to the potential for significant impacts, and due to the inadequacies of the EA, a FONSI is arbitrary and capricious and cannot be issued. "[I]f the EA is deficient under NEPA in one of the ways Plaintiff has previously argued, then the [agency's] DN/FONSI is necessarily arbitrary and capricious because it relied on the 2012 EA." Gifford Pinchot Task Force v. Perez, 2014 WL 3019165, *40 (D. Or. 2014)(joint USFS/BLM EA violated NEPA). *See also* Native Ecosystems Council v. Tidwell, 599 F.3d 926, 937 (9th Cir. 2010) (USFS violated NEPA in issuing FONSI based on inadequate analysis); Ctr. for Biological Diversity v. NHTSA, 538 F.3d 1172, 1223-24 (9th Cir. 2008) (When an EA fails to comply with NEPA requirements, it "do[es] not constitute a 'hard look' at the environmental consequences of the action as required by NEPA. Thus, the FONSI is arbitrary and capricious.").

The USFS has decided not to prepare an EIS, yet this decision was made without the critical information regarding baseline conditions, direct/indirect/cumulative impacts, and other NEPA requirements noted herein and in the previous comments. Such refusal to prepare an EIS must be based on the required "hard look" at potential adverse impacts, baseline conditions, etc. 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 a 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).

The FONSI failed to satisfy these requirements because the EA lacks the critical analysis and information detailed above – i.e., it failed to provide the "convincing statement of reasons." "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). In other uranium mining situations, with far less adverse impacts and duration, the USFS prepares 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 in contrast to the La Sal Complex. *See* 73 Fed. Reg. 60233 (Oct. 10, 2008).

The following additional Objection issues are discussed in no particular order of importance. As such, pursuant to the Administrative Procedure Act, 5 U.S.C. §553-706, and USFS requirements, the Regional Forester's Office must provide a detailed response to each of the issues/objections raised in this Objection.

IV. SPECIFIC OBJECTION ISSUES

A. Deferral of Critical Environmental, Cultural, Wildlife, Radiological, and Other Reviews Violates NEPA

As noted in the previous comments, and as now admitted in the EA and Draft DN/FONSI, the EA and Draft DN/FONSI repeatedly defer review of critical NEPA-required information until some point in the future – long after the NEPA public review process has ended. At a minimum, the failure to include this relevant information in the EA raises the potential for significant impacts and thus warrants the preparation of an EIS. This sort of approve-first, review-later approach violates NEPA.

The Draft DN/FONSI acknowledges that critical information has not been supplied by the applicant or provided by the agency in the EA. For example, the USFS will only require critical radon modeling and assessments of expected radon discharge rates until after the project is approved and long after the public NEPA process is completed with the issuance of the EA:

> The proponent shall submit pre-construction radon modeling for FS review prior to constructing ventilation shafts on NFS lands. … These assessments shall estimate expected radon discharge rates, location of potential receptors to the proposed ventilation shaft, and compliance with applicable regulations.

Draft DN/FONSI at 15. The EA admits that these issues are important to human health and the environment, but again allows this required information to be submitted in the future, after public review:

> Several radiological concerns were identified regarding potential risks associated with the project including those that could be caused by the release of radon gas from mine ventilation shafts. **As discussed in public scoping comments, Denison had past compliance issues associated with air quality regulations for radon, a gas that is released from ventilation shafts at underground uranium mines.** Denison addressed these past compliance issues with the EPA and the state of Utah, the appropriate agencies for regulation of radon gas released from uranium mine ventilation shafts (additional information regarding these regulatory issues is presented in Section 3.3.8). **Radon gas can**

> **be hazardous in high concentrations, and exhaust of radon gas from the La Sal Mines Complex is required to protect worker health and safety.** Generally, radon released into the atmosphere quickly dissipates. However, radon discharge from ventilation shafts is closely monitored to mitigate risks to potential surface receptors. Alternative C would address the potential for similar compliance issues with new ventilation shafts by requiring Energy Fuels to submit pre-construction radon modeling for BLM or FS review prior to constructing vents on BLM or NFS lands. The pre-construction modeling would be conducted in accordance with US Environmental Protection Agency and Utah Division of Air Quality (UDAQ) requirements. These assessments would estimate expected radon discharge rates, location of potential receptors to the proposed ventilation shaft, and compliance with applicable regulations.

EA at 2-13 (emphasis added). The EA further demonstrates this permit-first, review later approach:

> Alternative C would include a requirement that Energy Fuels provide pre-construction radon modeling to BLM and/or FS to demonstrate that the vent shaft would be expected to meet the 10 mrem/yr standard for radon emissions. If preconstruction radon modeling does not demonstrate that the vent shaft would be expected to comply with the regulation, design modifications would be implemented to comply with the regulation, or the ventilation shaft would not be constructed. These design modifications may include, for example, modifying the underground ventilation plan to provide for placement of a vent shaft further from a receptor location. Therefore, Alternative C would be relatively more protective of the public than Alternative A. However, Energy Fuels would be subject to the existing NESHAP regulations under both Alternative A and Alternative C.

EA at 4-37. The same is true for important cultural resources information: "Prior to construction of exploration drill holes, ventilation shafts, and associated access roads on NFS lands, the proponent shall conduct cultural resource surveys of the specific locations these facilities within in Phases 1, 2 and 3." Id. "At this time only a small portion of the project area has been subject to surface inventory for cultural resources. These studies have identified cultural resources but it is likely that other unidentified cultural resources are present in uninventoried portions of the project area. Buried archaeological deposits may also be present in certain depositional environments." EA at 3-9.

> Before initiation of these activities in Phases 1, 2 and 3, Energy Fuels would provide BLM or FS (as appropriate based on jurisdiction) the specific locations for exploration drilling or ventilation shaft construction within the perimeters of each of the three phases. **However, cultural resource surveys have not been completed for all areas that could potentially be affected by Alternative A, which prevents BLM and the FS from conducting a detailed assessment of potential effects on cultural resources for Alternative A.**

EA at 2-13. The agency's attempt to review and protect these un-surveyed resources is to simply require future surveys and analysis – again, long after the NEPA process has been closed:

> Alternative C would also approve a specific number of exploration drill holes, ventilation shafts, and associated access roads within the perimeters and phases proposed for Alternative A. However, Alternative C would require avoidance of cultural resources

> eligible for listing on the NRHP, which would be identified with preconstruction cultural resource surveys of the specific locations for exploration drill holes, ventilation shafts, and associated access roads. The cultural resource surveys and plans for avoidance would be provided to BLM or FS (as appropriate based on jurisdiction) prior to construction. This requirement of avoidance of cultural resources eligible for listing on the NRHP would ensure that future exploration drilling or ventilation shaft construction is protective of cultural resources.

EA at 2-14.

Critical wildlife information is also missing from the EA, as the agency will only obtain the necessary information in the future:

> Prior to construction of exploration drill holes, ventilation shafts, and associated access roads on NFS lands, the proponent shall conduct wildlife and vegetation surveys of the specific locations for exploration drill holes, ventilation shafts, and associated access roads within in Phases 1, 2 and 3.
>
> These areas shall be surveyed for the presence of threatened, endangered or sensitive wildlife or vegetation including:
>
> > Bald eagle (Haliaeetus leucocephalus)
> > Ferruginous hawk (Buteo regalis)
> > Flammulated owl (Otus flammeolus)
> > Gunnison's Prairie dog (Cynomys gunnisoni)
> > Lewis' woodpecker (Melanerpes lewis)
> > Northern goshawk (Accipiter gentilis)
> > Peregrine falcon (Falco peregrinus anatum)
> > Golden eagle (Aquila chrysaetos)
> > Beaman's Townsendia (Townsendia beamanii), a BLM sensitive plant species
>
> If these species are found to be present or likely to be present in the project area, potential effects to the species shall be managed in accordance with FS regulations, directives, and as set forth in terms and conditions of approval for the POA, which are included as Attachment 2.

Draft DN/FONSI at 15-16. No mention of ESA consultation is provided (*see* below section on ESA violations). Additional wildlife analysis has been postponed:

> If construction is scheduled between the dates of January 1 and September 31, breeding season raptor surveys will be required prior to construction. Field surveys will be conducted as determined by the authorized officer of BLM or the FS as applicable. Based on the result of the field survey, the authorized officer will determine what buffers and timing limitations are appropriate and necessary.

Draft DN/FONSI at 19-20. The agency has precluded the required public review of the survey

results or "what buffers and timing limitations are appropriate and necessary." The EA repeats this same scheme:

> Several concerns related to potential effects to wildlife were identified based on scoping. However, existing wildlife surveys for the three proposed phases are not sufficient to fully evaluate potential effects to wildlife and vegetation for Alternative A.
>
> To address this concern, Alternative C would require pre-construction wildlife and vegetation surveys prior to exploration drilling, ventilation shaft construction or access road construction in each phase. Alternative C would require that these areas be surveyed for the presence of threatened, endangered or sensitive wildlife or vegetation prior to construction, and that potential affects to these species be managed as set forth in terms and conditions of approval for the POA, which is attached as Appendix F. These surveys would focus on special status species including:
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> - ☐Bald eagle (*Haliaeetus leucocephalus*)
> - ☐Ferruginous hawk (*Buteo regalis*)
> - ☐Flammulated owl (*Otus flammeolus*)
> - ☐Gunnison's Prairie dog (*Cynomys gunnisoni*)
> - ☐Lewis' woodpecker (*Melanerpes lewis*)
> - ☐Northern goshawk (*Accipiter gentilis*)
> - ☐Peregrine falcon (*Falco peregrinus anatum*)
> - ☐Golden eagle (*Aquila chrysaetos*)
> - ☐Beaman's Townsendia (*Townsendia beamanii*), a BLM sensitive plant species
>
> This component of Alternative C would provide improved protection of wildlife during the three proposed phases of vent shaft construction, exploration drilling and access road construction, and facilitate compliance with BLM Area Management Plan and Forest Plan requirements.

EA at 2-14. *See also* EA at 4-78 ("If construction is scheduled between the dates of January 1 and September 30, raptor surveys would be required prior to construction. Field surveys would be conducted as determined by the authorized officer of BLM or the FS as applicable. Based on the results of the field survey, the authorized officer would determine if appropriate buffers and timing limitations are necessary.").

Reclamation and related project requirements have also yet to be identified, despite the acknowledgement that additional lands will be disturbed: "The proponent shall identify potential soil borrow sources within the permitted surface disturbance of federally managed lands and on adjacent state or private lands that could be used to increase the extent of soil replacement and soil cover thickness during reclamation of the mine facilities." Draft DN/FONSI at 16.

For the critical monitoring plans for groundwater impacts, these plans have also yet to be submitted and will only be required after project approval. "Within 6 months of approval of the POA, the operator shall provide a groundwater monitoring plan for BLM and FS approval that will provide for monitoring of groundwater quality and quantity at the La Sal Mines Complex." Id. at 21.

> [U]nder Alternative C, a water quality monitoring program would be implemented to monitor for any potential changes or other effects to water quality or quantity. This program would be initially designed by Energy Fuels and submitted to BLM and FS for approval. After agency approval, the monitoring instrumentation would be installed and monitoring would commence.

EA at 4-28. The same is true for monitoring for soils: "Within 6 months of approval of the POA, the operator shall provide a soils monitoring plan to BLM and FS for approval that will provide for monitoring of effects to soils from mine ventilation shafts." Draft DN/FONSI at 21.

All of these approve-first, review/analyze-later approaches violate NEPA's fundamental requirement that this information be subject to public review during the NEPA process. NEPA ensures that before approving a project, federal agencies (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).

> The centerpiece of environmental regulation in the United States, NEPA requires federal agencies to pause before committing resources to a project and consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives. *See* 42 U.S.C. § 4331(b) (congressional declaration of national environmental policy). By focusing both agency and public attention on the environmental effects of proposed actions, NEPA facilitates informed decisionmaking by agencies and allows the political process to check those decisions. Balt. Gas & Elec. Co. v. Natural Res. Defense Council, 462 U.S. 87, 97 (1983) (identifying the facilitation of informed agency decisionmaking and public involvement as the "twin aims" of NEPA). The requirements of the statute have been augmented by longstanding regulations issued by the Council of Environmental Quality ("CEQ"), to which we owe substantial deference.

New Mexico ex rel. Richardson v. BLM, 565 F.3d at 683, 703 (10th Cir. 2009). "NEPA mandates that federal agencies take into consideration the impacts of their actions on the environment in the hopes that such consideration will lead to environmentally sound decisions that balance the needs of humans and the environment in which they live." Wyoming Outdoor Council v. U.S. Army Corps of Eng'rs, 351 F. Supp. 2d 1232, 1239-40 (D. Wyo. 2005).

> NEPA does mandate that an agency "take a 'hard look' at the impacts of a proposed action." Citizens' Comm. to Save Our Canyons, 513 F.3d at 1179 (10th Cir. 2008) (quoting Friends of the Bow v. Thompson, 124 F.3d 1210, 1213 (10th Cir. 1997)). . . . 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."; *see also* 40 C.F.R. § 1502.2(g) ("Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made."); id. § 1502.5.

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).

> NEPA is not designed to postpone analysis of an environmental consequence to the last possible moment. Rather, it is designed to require such analysis as soon as it can reasonably be done. *See* Save Our Ecosystems v. Clark, 747 F.2d 1240, 1246 n. 9 (9th Cir.1984) ("Reasonable forecasting and speculation is ... implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry,'" quoting Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n, 481 F.2d 1079, 1092 (D.C.Cir.1973)).

Kern v. U.S. Bureau of Land Management, 284 F.3d 1062, 1072 (9th Cir. 2002).

NEPA regulations also require that the agency obtain the missing important information during the NEPA process, not after:

> When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.
> (a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.
> (b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:
> (1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

40 CFR § 1502.22.

> An agency must take into account all "reasonably foreseeable significant adverse effects" of the proposed action in its analysis of environmental effects. 40 C.F.R. § 1502.22; *see also id.* § 1508.7. NEPA also requires an agency to analyze missing and incomplete information. As we explain in greater detail below, an agency must either obtain information that is "essential to a reasoned choice among alternatives" or explain why such information was too costly or difficult to obtain. *Id.* § 1502.22.

Native Village of Point Hope v. Jewell, 740 F.3d 489, 493 (9th Cir. 2014). "If there is 'essential'

information at the plan- or site-specific development and production stage, [the agency] will be required to perform the analysis under § 1502.22(b)." Id. at 499. "[W]hen the *nature* of the effect is reasonably foreseeable but its *extent* is not, we think that the agency may not simply ignore the effect. The CEQ has devised a specific procedure for 'evaluating reasonably foreseeable significant adverse effects on the human environment' when 'there is incomplete or unavailable information.' 40 C.F.R. § 1502.22." Mid States Coalition for Progress v. Surface Transportation Board, 345 F.3d 520, 549-550 (8th Cir. 2003)(emphasis in original).

The USFS's (and BLM's) failure to obtain this information, or make the necessary showings under § 1502.22, for all direct, indirect and cumulative impacts thus violates NEPA.

The USFS cannot fail to protect these resources simply by saying that the extent of impacts is uncertain and that analysis will occur in the future.

> [W]e [the federal courts] nonetheless have a responsibility to ensure that an agency's decision is not arbitrary. **It is not enough for the Service to simply invoke "scientific uncertainty" to justify its action**. As the Supreme Court has explained, "[r]ecognizing that policymaking in a complex society must account for uncertainty ... does not imply that it is sufficient for an agency to merely recite the terms 'substantial uncertainty' as a justification for its actions." State Farm, 463 U.S. at 52, 103 S.Ct. 2856. The Service must rationally explain why the uncertainty regarding the impact of whitebark pine loss on the grizzly counsels in favor of delisting now, rather than, for example, more study. *See* id. Otherwise, we might as well be deferring to a coin flip.

Greater Yellowstone Coalition v. Servheen, 665 F.3d 1015, 1028 (9th Cir. 2011)(emphasis added). Also, the uncertainties concerning the extent of project impacts does not relieve the Forest Service of the responsibility under NEPA to analyze the mitigation of likely impacts at the outset. South Fork Band Council v. U.S. Department of the Interior, 588 F. 3d 718 (9th Cir, 2009).

> BLM argues that an effectiveness discussion was not required because it is impossible to predict the precise location and extent of groundwater reduction, and that problems should instead be identified and addressed as they arise. But NEPA requires that a hard look be taken, if possible, *before* the environmentally harmful actions are put into effect. *National Parks & Conservation Association v. Babbitt*, 241 F.3d 722, 733 (9th Cir.2001).
>
> In this instance, the EIS states that BLM has identified fifty perennial springs and one perennial creek that are the most likely to dry up, though among these it is impossible to "conclusively identify specific springs and seeps that would or would not be impacted." **That these individual harms are somewhat uncertain due to BLM's limited understanding of the hydrologic features of the area does not relieve BLM of the responsibility under NEPA to discuss mitigation of reasonably likely impacts at the outset**. *See National Parks*, 241 F.3d at 733("lack of knowledge does not excuse the preparation of an EIS; rather it requires [the agency] to do the necessary work to obtain it.") Even if the discussion must necessarily be tentative or contingent, NEPA requires that the agency give some sense of whether the drying up of these water resources could be avoided.

South Fork Band Council, 588 F.3d at 727 (emphasis added). Here, the lack of an adequate baseline and impacts analysis of the impacts to ground and surface water, wildlife, air quality, cultural resources, etc., and their dependent resources noted herein, along with the lack of an adequate mitigation discussion (including effectiveness, see also below discussion) violates NEPA.

B. Failure to Obtain Adequate Information on Baseline Conditions Violates NEPA

As noted in the August 20, 2012 comments, and related to the NEPA requirement that the agency cannot defer critical analysis as noted above, the USFS/BLM must "describe the environment of the areas to be affected or created by the alternatives under consideration." 40 C.F.R. § 1502.15. "Without establishing the baseline conditions . . . there is simply no way to determine what effect the [action] will have on the environment, and consequently, no way to comply with NEPA." Half Moon Bay Fisherman's Mktg. Ass'n v. Carlucci, 857 F.2d 505, 510 (9th Cir. 1988). The lack of an adequate baseline analysis fatally flaws an agency's NEPA review. "[O]nce a project begins, the pre-project environment becomes a thing of the past and evaluation of the project's effect becomes simply impossible." Northern Plains Resource Council v. Surf. Transp. Brd., 668 F.3d 1067, 1083 (9th Cir. 2011). "[W]ithout [baseline] data, an agency cannot carefully consider information about significant environment impacts. Thus, the agency fail[s] to consider an important aspect of the problem, resulting in an arbitrary and capricious decision." Id. at 1085.

NEPA requires that EAs contain the required baseline analysis. In Gifford Pinchot Task Force v. Perez, 2014 WL 3019165, *28 (D. Or. 2014), the court rejected the USFS's argument that only EISs are required to contain baseline analysis, noting "the importance of obtaining baseline condition information before assessing the environmental impacts of a proposed project."

In Idaho Conservation League v. U.S. Forest Service, 2012 WL 3758161, *17 (D. Idaho 2012), the court concluded that the USFS violated NEPA by authorizing exploratory hardrock mineral drilling without adequately analyzing the baseline groundwater and hydrology. The court explained that the USFS cannot rely on assumptions or mitigation measures, such as a closed drilling system, to satisfy NEPA's obligations. Id. Instead, the EA must include "a baseline hydrogeologic study to examine the existing density and extent of bedrock fractures, the hydraulic conductivity of the local geologic formations, and [measures of] the local groundwater levels to estimate groundwater flow directions." Id. at *16.

The court in Shoshone-Bannock Tribes of Fort Hall Reservation v. U.S. Dept. of Interior, 2011 WL 1743656, at *10 (D. Idaho 2011), reached a similar conclusion. There, the impact of a new mine waste dump was "highly uncertain" because BLM permitted it without studying groundwater "flows and potential contamination." Id.

The applicant also acknowledges that full baseline information must be obtained as part of the NEPA process: "Both the BLM and Forest service regulations require baseline information to support environmental analyses in accordance with NEPA." *Hydrogeologic Evaluation of the Denison Mines (USA) Corp., La Sal Mines Complex* (CDM 2009b), at 1-5 (Attachment N to Denison POA).

Here, the EA does not contain the required analysis of baseline conditions. The EA admits that groundwater quality will be affected by the various aspects of the project. EA Section 4.6.1. "Aspects of Alternative A that could affect groundwater quality or quantity include construction, operation, and reclamation of ventilation shafts; exploration drilling; and surface and underground mining practices." EA at 4-23. The EA admits that the project may adversely affect the drinking water of La Sal area residents, among other concerns. Section 4.6.1.

Although Alternative C proposes some additional groundwater mitigation, all of these aspects of the Project will still have the potential to adversely affect groundwater. EA at 4-28. Although it may be debated as to whether the mitigation measures noted in Alternative C are adequate (see below discussion on the inadequate mitigation analysis), there is no doubt that groundwater quality may be affected by all action alternatives. As such, baseline information on the current groundwater conditions (especially quality) must be fully analyzed.

To meet this baseline requirement for the critical baseline groundwater and water quality conditions, the EA relies on a 1983 USGS report summarizing water conditions in the Dolores River Basin, which does not include any site-specific information of the La Sal Complex site.

> Groundwater quality data for the alluvial aquifer, D aquifer, and M aquifer are summarized below based on data provided by Weir et al. (1983).
> ☐Groundwater from alluvial aquifers has moderate to high concentrations of total dissolved solids, chloride and sulfate with neutral pH
> ☐Groundwater from the Dakota aquifer has high concentrations of total dissolved solids, chloride and sulfate with neutral pH
> ☐Groundwater from the Salt Wash aquifer has moderate concentrations of total dissolved solids, chloride and sulfate with neutral pH

EA at 3-18, -19, *citing* Weir, James E.; Maxfield, E. Blair; Zimmerman; Everett A. 1983, Regional Hydrology of the Dolores River Basin, Eastern Paradox Basin, Colorado and Utah. USGS Water-Resources Investigations Report 83-4217 (attached).

Besides the fact that this information is over 30 years old and does not represent current conditions (itself a mark of unreliability under NEPA), it does not contain any site-specific data, and importantly, no data on the critical radiological baseline conditions at all. As noted in the 1983 report:

> Most water-quality data in the Dolores River basin, presented in table 9, were obtained from unpublished files of the U.S. Geological Survey and from Feltis (1966). **Water-quality data are meager or lacking in large parts of the area, and no data were obtainable for water in some of the hydrogeologic units.**

1983 Report at 38. Although the EA primarily relies on the 1983 report, it also mentions as noted above, Denison's 2009 Hydrogeologic report and the general Lowe report from 1996. Like the 1983 USGS report, none of these documents contains the requisite site-specific baseline analysis of groundwater quality. Indeed, the Denison report relies on the 1983 report for its discussion of baseline groundwater quality. 2009 report at 4-2.

An outdated, cursory, and generalized region-wide report on surface and groundwater in the Dolores River Basin cannot conceivably contain the requisite current baseline groundwater conditions at the La Sal Complex site. It should also be noted that the western portions of the Complex are in the Colorado River Basin, not the Dolores River Basin.

"NEPA requires that the agency provide the data on which it bases its environmental analysis. Such analyses must occur ***before the proposed action is approved***, not afterward." Northern Plains, 668 F.3d at 1083 (emphasis added) ("plans to conduct surveys and studies as part of its post-approval mitigation measures," in the absence of baseline data, fails to take the requisite "hard look" at environmental impacts).

Similarly, the EA fails to include the current baseline conditions for radon, cultural resources, and wildlife, among other impacted resources (including the lack of any on-site air quality data). As noted above, the agencies propose to approve the project (and have already completed their NEPA review in the EA) despite the fact that surveys and analysis of these resources will only occur (if at all) in the future. Thus, the USFS's (and BLM's) failure to obtain and analyze the baseline conditions for these and all affected resources violates NEPA.

C. Failure to Submit a Complete Mining Plan in Violation of 1897 Organic Act, USFS Regulations and Policies, and NEPA.

As noted in the previous comments, the POA submitted by the applicant fails to contain the requisite information required for the agency and public to review all of the impacts that may occur during the project's 20+ year life. Little, if any, detailed information is provided about the location of the various project facilities such as the 3,800 drill holes, roads, vents, and other operations. Deferring the requirement on the company to submit a complete mine plan, and deferring any analysis of the connected actions and/or cumulative impacts from the mill, not only violates NEPA, it contradicts the USFS' own regulations and policies.

It is well established that the Forest Service must reject an incomplete and unreasonable Plan of Operations (PoO). "[T]he Forest Service clearly has the power to reject an unreasonable plan, and to impose conditions on the mining activity." Baker v. United States Department of Agriculture, 928 F. Supp. 1513, 1518 (D. Idaho 1996). "The Forest Service may reject an unreasonable or illegal plan of operations." DEIS at 30. The "reasonableness" of the PoO and the duty of the agency to protect surface resources are expressly linked together. According to the agency's mining regulations, upon receipt of a plan of operations: "[t]he authorized officer shall … analyze the proposal, considering the economics of the operation along with the other factors in determining the reasonableness of the requirements for surface resource protection." 36 CFR § 228.5. It is impossible for the agency to adequately process the PoO, and to adequately involve the public in that review, when the submittal of critical aspects of the project plan are missing and/or deferred to the future.

The POA is not "reasonable" because it is clearly incomplete. The applicant has not submitted a detailed mining plan of operation as required by 36 CFR § 228.4(c)(3) & (d), § 228.8, and § 228.12 and as defined by § 228.3(a). Among these requirements is the mandate that the PoO must include:

> A map or sketch showing information sufficient to locate the proposed area of operations on the ground, existing and/or proposed roads or access routes to be used in connection with the operations as set forth in §228.12 and the approximate location and size of areas where surface resources will be disturbed.
>
> Information sufficient to describe or identify the type of operations proposed and how they would be conducted, the type and standard of existing and proposed roads or access routes, the means of transportation used or to be used as set forth in §228.12, the period during which the proposed activity will take place, and the measures to be taken to meet the requirements for environmental protection in § 228.8.

36 CFR § 228.4(c)(2)-(3). For the project roads, Section 228.12 further requires that the POA contain "a map showing the proposed route of access." "Approval of the means of such access as part of a plan of operations shall specify the location of the access route." 36 CFR §228.12. The agency has the authority, and indeed the obligation, to delay or deny consideration of the POA until it has received all relevant information about necessary aspects of the mine plan.

Among other deficiencies, neither the POA nor the EA contain the requisite information to "specify the location of the access route" to the thousands of drill holes and vents proposed to be approved by the Draft DN/FONSI. The fact that the company has yet to provide this information is not grounds for failing to require it.

> The [agency] may require information beyond that submitted with an initial MPO [Mining Plan of Operations]. **"[I]nsofar as [the agency] has determined that it lacks adequate information on *any* relevant aspect of a plan of operations, [the agency] not only has the authority to require the filing of supplemental information, it has the obligation to do so."** Great Basin Mine Watch, 146 I.B.L.A. 248, 256 (1998).

Center for Biological Diversity v. U.S. Dept. of Interior, 623 F.3d 633, 644 (9th Cir. 2010) (emphasis added). Although that case dealt with mineral operations on BLM lands, the same analysis applies to USFS lands. "Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. 40 C.F.R. § 1500.1(b). General statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided." Western Watersheds Project v. Kraayenbrink,632 F.3d 472, 491 (9th Cir. 2011).

Although an applicant can submit an "initial plan" if the "development of a plan for the entire operation is not possible," §228.4(d), that is not the case here, as the USFS proposes to approve the entire operation. If this were a case where an "initial plan" was submitted and approved, the operator would be required to submit "a supplemental plan or plans whenever it is proposed to undertake any significant surface disturbance not covered by the initial plan." §228.4(d). Because the USFS does not intend on requiring any "supplemental plans" for public review under NEPA in the future, all of the information for the agency and public to review the entire project must be contained in the POA.

The failure of the PoO to describe, let alone detail, the location and other aspects of Phase 2 and 3 (let alone failing to have this information for much of Phase 1) renders the POA incomplete and any NEPA review based on such incomplete information inadequate under NEPA. The USFS should inform the applicant that the agency cannot process the POA until the required information is submitted. The public, through the USFS, should not be required to spend financial resources (via the NEPA process) to gather information the applicant is required to, but failed to, submit.

D. Failure to Review All Cumulative Impacts Violates NEPA

As noted in the previous comments, and herein, the EA fails to take the required hard look at all direct, indirect, and cumulative impacts. To comply with NEPA, the USFS must consider all direct, indirect, and cumulative environmental impacts of the proposed action. 40 CFR § 1502.16; 40 CFR § 1508.8; 40 CFR § 1508.25(c). "Direct effects" are caused by the action and occur at the same time and place as the proposed project. 40 CFR § 1508.8(a). "Indirect effects" are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. 40 CFR § 1508.8(b). All types of impacts include "effects on natural resources and on the components, structures, and functioning of affected ecosystems," as well as "aesthetic, historic, cultural, economic, social or health [effects]." Id. "Cumulative effects" are defined as:

> [T]he impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 CFR § 1508.7. In a cumulative impact analysis, an agency must take a "hard look" at all actions.

> [A]nalysis of cumulative impacts must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment. … Without such information, neither the courts nor the public ... can be assured that the [agency] provided the hard look that it is required to provide.

Te-Moak Tribe of Western Shoshone, 608 F.3d 592, 603 (9th Cir. 2010) (rejecting EA for mineral operation that had failed to include detailed analysis of impacts from nearby proposed mining operations).

"The CEQ regulations require agencies to discuss the cumulative impacts of a project as part of the environmental analysis. 40 C.F.R. § 1508.7." Davis v. Mineta, 302 F.3d 1104, 1125 (10th Cir. 2002). "Of course, effects must be considered cumulatively, and impacts that are insignificant standing alone continue to require analysis if they are significant when combined with other impacts. 40 C.F.R. §1508.25(a)(2)." New Mexico ex rel Richardson v. BLM, 565 F.3d 683, 713, n. 36 (10th Cir. 2009). *See also* Wyoming Outdoor Council v. U.S. Army Corps of Eng'rs, 351 F. Supp. 2d 1232, 1243 (D. Wyo. 2005) (failure to adequately review all cumulative impacts is arbitrary and capricious and violates NEPA).

A cumulative impact analysis must provide a "useful analysis" that includes a detailed and quantified evaluation of cumulative impacts to allow for informed decision-making and public disclosure. Kern v. U.S. Bureau of Land Management, 284 F.3d 1062, 1066 (9th Cir. 2002); Ocean Advocates v. U.S. Army Corps of Engineers, 361 F.3d 1108 1118 (9th Cir. 2004). The NEPA requirement to analyze cumulative impacts prevents agencies from undertaking a piecemeal review of environmental impacts. Earth Island Institute v. U.S. Forest Service, 351 F.3d 1291, 1306-07 (9th Cir. 2003).

The NEPA obligation to consider cumulative impacts extends to all "past," "present," and "reasonably foreseeable" future projects. Blue Mountains, 161 F.3d at 1214-15; Kern v. BLM, 284 F.3d at 1076; Hall v. Norton, 266 F.3d 969, 978 (9th Cir. 2001) (finding cumulative analysis on land exchange for one development failed to consider impacts from other developments potentially subject to land exchanges); Great Basin Mine Watch v. Hankins, 456 F.3d 955, 971-974 (9th Cir. 2006)(requiring "mine-specific … cumulative data," a "quantified assessment of their [other projects] combined environmental impacts," and "objective quantification of the impacts" from other existing and proposed mining operations in the region). The cumulative impacts analysis must include "reasonably foreseeable future actions," which is a lower threshold than is used to determine whether an agency violates NEPA's segmentation prohibition. Wilderness Workshop v. U.S. Bureau of Land Mgmt., 531 F.3d 1220, 1229 (10th Cir. 2008) quoting O'Reilly v. U.S. Army Corps of Eng'rs, 477 F.3d 225, 236 (5th Cir. 2007) (citing 40 C.F.R. § 1508.23)("While a cumulative impact analysis requires the [reviewing agency] to include 'reasonably foreseeable' future actions in its review, improper segmentation is usually concerned with projects that have reached the proposal stage.").

Thus, in this case, the USFS must consider the cumulative impacts from all past, present, and reasonably foreseeable future projects in the region on, at a minimum, water and air quality including ground and surface water quantity and quality, recreation, cultural/religious, wildlife, transportation/traffic, scenic and visual resources, etc.

As held by the court decisions noted herein, this means that the impacts from other projects – not just the current project under review – must be fully reviewed. This includes, at a minimum, the impacts from the transportation of ore to a mill, as well as the environmental impacts from the mill itself.

This duty to review extends to the mill's, as well as other projects, impacts on both public and private lands. Cumulative impacts must be reviewed "regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 CFR § 1508.7. For example, in considering a challenge to federal approval of mineral leasing and mining, a court required an agency to look at the impacts from the proposed mill that would process ore from mines/leases, despite the fact that the proposed mill would be on private lands and despite the fact that the mill was not directly associated with the mines/leases being proposed and was not included in the lease/mining proposals. The court held:

> [The agency's] other two arguments—that the effects of the mill need not be evaluated because (1) it is being built by a company on private land, and (2) approval of the mill is

> controlled by other governmental entities—lack merit. Regardless of whether an EA or EIS is being prepared, the agency conducting the analysis must consider the "cumulative impacts" of the proposed action. …
>
> Nothing in this regulation suggests that ''cumulative impacts'' are limited to those occurring on [public] land, or that [the agency] need not consider the impacts from related activities that another federal agency is in charge of approving or disapproving.

Colorado Environmental Coalition v. Office of Legacy Management, 819 F.Supp.2d 1193, 1212 (D. Colo. 2011). *See also* Sierra Club v. U.S. Dept. of Energy, 255 F.Supp.2d 1177, 1185 (D. Colo. 2002) (agency must review impacts from "reasonably foreseeable" mine on private land when preparing NEPA document for federal land easement related to the future mine. "The fact that a private company will undertake the mining is irrelevant under NEPA regulations. *See* 40 C.F.R. § 1508.7 ('regardless of what agency or person undertakes such other actions')").

Agencies must analyze all indirect and cumulative adverse environmental effects that are "reasonably foreseeable" if it is sufficiently likely to occur. These impacts include the off-site adverse effects from the smelting/processing and transportation. "The Forest Service says that cumulative impacts from non-Federal actions need not be analyzed because the Federal government cannot control them. That interpretation is inconsistent with 40 C.F.R. § 1508.7, which specifically requires such analysis." Center for Biological Diversity v. National Highway Traffic Safety Administration, 508 F.3d 508, 517 (9th Cir. 2007)(agency must review of impact of greenhouse gases when setting vehicle fuel economy standards), *quoting* Res. Ltd., Inc. v. Robertson, 35 F.3d 1300, 1306 (9th Cir.1994). "[S]tatements that the indirect and cumulative effects will be minimal or that such effects are inevitable are insufficient under NEPA." Ctr. for Biological Diversity v. U.S. Dept. of Interior, 623 F.3d 633, 640 (9th Cir. 2010). In one leading case, the agency was required to review the impacts from the burning of coal when reviewing the proposed railway access and transportation of the coal. Mid States Coalition for Progress v. Surface Transportation Board, 345 F.3d 520, 548-550 (8th Cir. 2003). This was required even though the power plants using the coal were hundreds of miles away.

Further, as noted above, the fact that milling and other cumulative impacting-activities in the area may be on private land is not an excuse to avoid undertaking the required analysis. This is true under NEPA, as well as the USFS's broad authority over the project, including operations on private land. "Congress may regulate conduct occurring on or off federal land which affects federal land. *See, e.g.*, Kleppe v. New Mexico, 426 U.S. 529, 539 (1976); Minnesota v. Block, 660 F.2d 1240, 1249 (8th Cir.1981)." Duncan Energy Co. v. U.S. Forest Service, 50 F.3d 584, 589 (8th Cir. 1995) (upholding Forest Service authority over private property interests). **"It is well established that [the Property Clause of the U.S. Constitution] grants to the United States power to regulate conduct on non-federal land when reasonably necessary to protect adjacent federal property or navigable waters."** U.S. v. Lindsey, 595 F.2d 5, 6 (9th Cir. 1979)(emphasis added).

The Supreme Court has recognized for over a century that Congress may regulate activity on private lands as a means of protecting public property. *See* Camfield v. United States, 167 U.S. 518 (1897); United States v. Alford, 274 U.S. 264, 267 (1927) ("Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests."). "[T]he power granted by the

Property Clause is broad enough to reach beyond territorial limits." Kleppe v. New Mexico, 426 U.S. 529, 538 (1976).

Agencies cannot avoid reviewing cumulative impacts by simply discussing general effects (and even that was not done in the EA):

> As we have observed on multiple occasions, "general statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided." *Klamath–Siskiyou*, 387 F.3d at 993–94 (quoting *Ocean Advocates*, 361 F.3d at 1128). Even if the BLM was unable to indicate with any great degree of certainty the results of the Project, because the cumulative effects analysis requires an agency to predict future conditions, uncertainty is an inherent part of the process. Therefore, a general statement about uncertainty does not satisfy the procedural requirement that an agency take a hard look at the environmental effects of an action. The BLM can certainly explain specific projections with reference to uncertainty; however, it may not rely on a statement of uncertainty to avoid even attempting the requisite analysis.

Oregon Natural Resources Council Fund v. Brong, 492 F.3d 1120, 1134 (9th Cir. 2007).

Here, the EA's "cumulative effects" analysis consists of little more than a generalized discussion of potential transportation impacts related to milling. That is unacceptable, as the revised EA or EIS must provide the detailed quantitative analysis of all of the "past, present, and reasonably foreseeable actions" in the region, along with the ore hauling route, mines feeding the mill, etc.

At a minimum, the EA should have evaluated the current groundwater characteristics in both quality and quantity, at the White Mesa mill and mine sites as well as the potential for the mill to generate environmental impacts during the 20+ year life of the La Sal Complex, as well as after operations have ceased but impacts linger.

1. Failure to Fully Review Cumulative Impacts Related to Transportation and Processing of Ore at the White Mesa Mill

The EA's cumulative impacts analysis failed to include a full review of the impacts from delivering the ore to the White Mesa mill, as well as mill operations and current and potential conditions. Federal courts have recently rejected the federal agency's attempt to avoid looking at the off-site transportation and other impacts when reviewing a Plan of Operations for a mining/milling project. South Fork Band Council v. Department of the Interior, 588 F.3d 718, 725-726 (9th Cir. 2009). This includes impacts to air quality, traffic, safety, recreation and cultural resources. Regarding off-site impacts from the milling and transportation, federal courts have also rejected the argument that reliance on state-issued permits or analysis satisfied the agency's independent duty under NEPA. Id.

> 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. Klamath-Siskiyou Wildlands Center v. BLM, 387 F.3d 989, 998 (9th Cir.2004).

South Fork Band Council, 588 F.3d at 726.

Regarding the White Mesa Mill, the EA failed to fully review all the impacts from that mill and related operations. The EA admits that the White Mesa Mill must be analyzed as a cumulative impact under NEPA. EA Section 4.6.2. Yet at most, the EA provides a brief discussion of current air quality permits and a reference to a USGS report regarding some review of uranium contamination of groundwater, soils, and vegetation. That is inadequate under NEPA.

First, the referenced USGS report, *Assessment of Potential Migration of Radionuclides and Trace Elements from the White Mesa Uranium Mill to the Ute Mountain Ute Reservation and Surrounding Areas, Southeastern Utah* (Naftz et al. 2011), was not prepared pursuant to NEPA and cannot be used as a substitute for NEPA compliance. "A non-NEPA document … cannot satisfy a federal agency's obligations under NEPA." South Fork Band Council, 588 F.3d at 726. Further, simply acknowledging the contamination issues, without any detailed analysis of remediation issues and future uses/impacts from the Mill during the 20+-year life of the La Sal Complex fails to take the required hard look at the cumulative impacts from the Mill for the next 20+ years. In any event, that report reviewed only certain issues and certainly does not analyze all of the contamination issues associated with the White Mesa Mill (e.g., there is no mention of the chloroform plume noted in the attached documents noted immediately below).

The EA also neglects to review the other contamination and related issues associated with the Mill. The following readily-available attached documents (which were not considered in the EA) show the extent of the contamination issues at the mill and highlight the associated lack of adequate review by the USFS/BLM. *See* Ute Mountain Ute Tribe, Request for Agency Action, January 11, 2013; Ute Mountain Ute Tribe (UMUT), Identification of Potential Tailings Cell Influence in Groundwater at White Mesa Mill; Feb. 11, 2009 letter from Utah Dept. of Environmental Quality to UI Corp.; Series of letters between UMUT and Utah DEQ in 2011 (combined in one PDF); Summary of Reports of Chloride as Indication of Tailings Leakage; Report from RRDI Corp. to UMUT dated 12-1-11; Amended Stipulated Consent Agreement, Utah Water Quality Board; UMUT re: Bioavailability, Bioaccumulation and Food Chain Transfer of Airborne Radionuclides; UMUT report Deficiencies in DUSA's Environmental Monitoring Program, 2011; UMUT report Particular Concerns with Alternative Feed Materials; 4-23-12 letter from UMUT to UDRC; 10-4-12 letter from UMUT to UDRC; 1-11-13 UMUT Request for Agency Action; 12-16-11 UMUT Comments to UDRC on License Renewal; Denison 2013 Tailings Cell Report, March/April 2014.

In particular, the EA fails to analyze or consider recent violations of the federal Clean Air Act (CAA) at the White Mesa Mill. This is a violation of the USFS's NEPA and CAA obligations. Indeed, in analyzing the air quality and other impacts of its actions under NEPA, USFS must pay special attention to "the degree to which the proposed action affects public health or safety." 40 C.F.R. § 1508.27(b)(2). Additionally, to comply with NEPA requirement, USFS must explain how its actions will or will not comply with environmental law and policies, including the National Emission Standards for Hazardous Air Pollutants (NESHAPs). See 40 C.F.R. § 1502.2(d), 1508.27(b)(10). Under the USFS mining regulations, it cannot approve a mine plan of operations

without ensuring that the project (including the Mill and the La Sal Complex) will comply with all air and water quality, hazardous/toxic materials, and other environmental laws. 36 C.F.R. § 228.8. For these reasons, it is incumbent on the USFS to consider and review in detail the White Mesa Mill's violation of the radon emission and work practice standards set forth in NESHAP Subpart W, 40 C.F.R. § 61.250 *et seq*. That did not occur here.

Over the past two years, 2012 and 2103, emissions from the White Mesa Mill's tailings impoundments exceeded the 20 pCi/m^{2}-sec standard set forth in NESHAP Subpart W. 40 C.F.R. § 61.252 (a). 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/m^2-sec of radon-222 in June, 2012")(attached); 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/m^2-sec of radon-222")(attached). As uranium ore continues to be mined and processed, including from the La Sal Complex mines, the waste from the processing will be deposited in the mill's tailings impoundments, which will continue to emit radon. There are also more than two impoundments in operation at the Mill, which violates 40 C.F.R. § 61.252(b).

The EA must consider and analyze these violations of the federal Clean Air Act and other legal requirements at the White Mesa Mill as part of its cumulative impacts analysis and other regulatory duties. This is particularly important due to the Mill's vicinity to the White Mesa Community of the Ute Mountain Ute tribal nation, the City of Blanding, Utah; and the City of Bluff, Utah. All three of these communities fall within the 80km radius of harm from radon exceedances at the White Mesa Mill. It is thus particularly important for the EA to consider and analyze these cumulative impacts with regard the White Mesa Mill. See 40 C.F.R. § 1508.27(b)(2) ("the degree to which the proposed action affects public health or safety").

In addition, as uranium ore continues to be mined and processed, it will be necessary for that mill to construct as many as 4 additional 40-acre tailings impoundments. The construction of new tailings impoundments will result in the destruction of unique and significant cultural resources on White Mesa. *See* Fields, White Mesa Archeological Sites: A Report (attached). Original mill construction and the recent construction of Cell 4-B also resulted in the destruction of pit houses and other cultural resources that have been found eligible for inclusion in the National Register of Historic Places. *See* Public Participation Summary, 6-14-10 (attached).

All of these documents show the significant environmental impacts and concerns related to and resulting from the White Mesa Mill. The failure of the EA to consider, let alone review in detail, these documents and the issues noted therein, violates NEPA's requirement that the agency take a hard look at these impacts. The fact that the Mill may continue to operate using other uranium ore sources does not eliminate the USFS's duty to fully analyze all cumulative impacts from the Mill that may occur during the 20+ years that it is projected to accept ore from the La Sal Complex. The EA's decision to limit its cumulative impacts review from the Mill based on the simple fact that the Mill operates under Utah state permits does not 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. Klamath-Siskiyou Wildlands Center v. BLM, 387 F.3d 989, 998 (9th Cir.2004).

South Fork Band Council, 588 F.3d at 726.

The EA asserts that, because the Mill will likely operate regardless of the La Sal Complex ore, the agency need not fully review the cumulative impacts related to the Mill. EA at 4-30. That fundamentally misinterprets the agency's NEPA duties. The cumulative impacts requirement cannot be avoided merely because the impacts from the Mill may continue without La Sal Complex ore (even if true). If that were true, the agency would hardly ever have to conduct cumulative impacts analysis, since many of the Past (Pa), Present (Pr), and Reasonably Foreseeable Future Actions (RFFA) have no relationship to the La Sal Complex project. Here, the agency mistakes its duty to review "connected actions" in the same EA/EIS (which requires a direct relationship between the projects) with its separate duty to analyze cumulative impacts in the area, regardless of whether the projects are connected. *See* Wilderness Workshop v. U.S. Bureau of Land Mgmt., 531 F.3d 1220, 1229 (10th Cir. 2008)(discussing difference between connected action review and cumulative impacts review under NEPA).

The NEPA review must also specify which mines may feed the mill, and the USFS cannot simply assert that this information is too speculative. Further, regarding transportation, the Forest Service must evaluate the cumulative impacts related to the movement of ore shipments through the towns on the route(s) to the mill.

The EA failed to address the cumulative impacts associated with the emission of unmeasured and unregulated amounts of radon from the radium-bearing solid and liquid wastes after the ore from the La Sal Mines Complex and other uranium mines[1] (most of which are on lands managed by the federal government) has been processed at the White Mesa Mill.

These wastes are disposed of in tailings impoundments and liquid effluent holding/evaporation ponds and other ponds holding processing and other solutions at the White Mesa Mill operation. The EA failed to analyze the cumulative impacts from the emission of radon from these impoundments. The EA failed to consider the fact that current Environmental Protection Agency (EPA) National Emission Standards for Radon Emissions from Operating Mill Tailings, promulgated pursuant to the Clean Air Act (CAA), do not have a radon emission limit and compliance requirements for tailings impoundments constructed after December 1989 and for any liquid holding/evaporation impoundments or ponds. 40 C.F.R. Part 61 Subpart W. Currently, there are 6 White Mesa impoundments that emit radon (Cells 1, 2, 3, 4A, 4B, and Roberts Pond, but only Cell 3 is required to comply with the 20 pico Curie per-square-meter-per-second (20 pCi/m^2-sec) EPA radon flux standard. 40 C.F.R. § 61.252(a).

During Mill operation, the owner of the Mill (also the owner of the La Sal Mines Complex) does not have to report the radon emissions, nor take corrective actions if the emissions exceed a specific

[1] Most recent operating Energy Fuels mines: Rim and Daneros Mines (Utah), Sunday Mines Complex (Colorado), Arizona 1 and Pinenut Mines (Arizona).

numerical standard for impoundments constructed after December 1989 (Cells 4A and 4B). Current EPA Subpart W standards do not apply to the emission of radon during the "closure period," when the tailings impoundments are being dewatered and when radon emissions increase significantly. The closure period can last a decade or more. The EPA does not require the monitoring, reporting, and control of the radon emissions from the liquid impoundments or ponds at White Mesa (currently Cells 1, 3, 4A, 4B, and Roberts Pond). The EPA has always assumed the radon emissions from liquid impoundment at conventional uranium mills were minimal, but recent data on the radium content of those impoundments[2] and an EPA determination[3] that, for every 1,000 pCi per liter of radium, the radon emissions are 7 pCi/m^2-sec, demonstrates that the radon emissions from solution impoundments and ponds at White Mesa are far in excess of the EPA 20 pCi/m^2-sec radon flux standard. Additional information and evaluation of the White Mesa liquid impoundments was submitted to the EPA by the Ute Mt. Ute Tribe[4] as part of the tribal consultation associated with the EPA's proposed revisions to 40 C.F.R. Part 61 Subpart W.[5]

The Subpart W proposed rules would eliminate radon monitoring requirement for impoundments constructed prior to December 1989 (Cell 3). Cell 2 is considered closed and no longer falls within Subpart W regulatory requirements. However, the Utah Division of Radiation Control[6] will require the licensee to demonstrate compliance with the 20 pCi/m^2-sec) radon emission standard until a new MILDOS-Area Model to analyze a higher radon flux is completed. The current White Mesa radon emission situation is summarized in Table 1, below:

[2] White Mesa Mill 2013 Annual Tailings Wastewater Monitoring Report; Groundwater Quality Discharge Permit, UGW370004, Energy Fuels Resources (USA) Inc., November 1, 2013. http://www.radiationcontrol.utah.gov/Uranium_Mills/denison/docs/2013/dec/2013AnnualTailingsReportFinal.pdf

[3] Risk Assessment Revision for40 CFR Part 61 Subpart W – Radon Emissions from Operating Mill Tailings: Task 5 – Radon Emission from Evaporation Ponds, Table 6, page 17; S. Cohen and Associates, November 9, 2010. http://www.epa.gov/radiation/docs/neshaps/subpart-w/riskassessmentrevision.pdf

[4] Non Privileged Records (July-Sept 2014, Part 1), pages 405-416. http://www.epa.gov/radiation/docs/neshaps/npr/2014-july-sept-part1.pdf
Non Privileged Records (July-Sept 2014, Part 2) pages 1-3 and 200-246. http://www.epa.gov/radiation/docs/neshaps/npr/2014-july-sept-part2.pdf

[5] http://www.epa.gov/radiation/neshaps/subpartw/rulemaking-activity.html

[6] http://www.deq.utah.gov/businesses/E/energyfuels/docs/2014/07Jul/EnergyFuels072814.pdf

TABLE 1: WHITE MESA MILL IMPOUNDMENT RADON EMISSION REGULATION UNDER 40 C.F.R. PART 61 SUBPART W			
IMPOUND-MENT	**TYPE**	**REGULATION**	**2013 EMISSIONS**
Cell 1	Impoundment for holding and evaporation of liquid effluents.	Radon emissions from liquid impoundments not monitored and controlled under Subpart W and the CAA.	228.9 pCi/m^2-sec
Cell 2 Operational	Impoundment for solid tailings disposal.	Radon emissions regulated under CAA and Subpart W 20 pCi/m^2-sec radon flux standard.	Exceeded 20 pCi/m^2-sec standard in 2012 due to dewatering.
Cell 2 Closure	Impoundment for solid tailings disposal. Dewatering.	Entered "closure period" as of 7/23/14. No CAA radon flux standard for the indefinite closure period.	
Cell 3 Operational	Impoundment for solid tailings disposal. Most of impoundment with interim cover.	Radon emissions regulated under CAA and Subpart W 20 pCi/m^2-sec radon flux standard.	Problems 20 pCi/m^2-sec standard compliance in 2013.
Cell 3 Liquid Pond	Liquid pond on top of Cell 3 solid tailings.	No radon emission limit, monitoring, reporting, or control of radon emissions from liquid pond.	573.3 pCi/m^2-sec
Cell 3 Closure	Impoundment for solid tailings disposal. Dewatering.	No CAA radon flux standard for the indefinite closure period.	
Cell 4A Operational	Impoundment for solid tailings disposal. Liquids currently on top of tailings slurry.	Radon emissions from liquids that cover most of Cell 4A not monitored or controlled.	110.6 pCi/m^2-sec
Cell 4A Operational	Solid tailings with or without liquid cover on part of impoundment.	No radon emission limit, monitoring, reporting, or control because Cell was constructed after December 1989.	Radon emissions regulated under CAA. No radon emission standard.

TABLE 1: WHITE MESA MILL IMPOUNDMENT RADON EMISSION REGULATION UNDER 40 C.F.R. PART 61 SUBPART W			
IMPOUND-MENT	**TYPE**	**REGULATION**	**2013 EMISSIONS**
Cell 4A Closure	Impoundment for solid tailings disposal.	No CAA radon flux standard for the indefinite closure period.	
Cell 4B Operational	Impoundment for solid tailings disposal. Being used to hold and evaporate solutions.	Radon emissions from liquids in impoundments not monitored or controlled.	102.2 pCi/m^2-sec
Cell 4B Operational	Impoundment for solid tailings disposal with or without liquid cover on part of impoundment.	No radon emission limit, monitoring, reporting, or control because Cell was constructed after December 1989.	
Cell 4B Closure	Impoundment for solid tailings disposal.	Radon emissions not regulated under CAA. No radon emission standard for the indefinite closure period.	
Roberts Pond	Smaller Evaporation Pond	Not regulated under Subpart W.	No data on radium content.
Future Impoundments	Impoundments used initially for liquids or liquids on top of solids. Later impoundments used for solid tailings disposal.	No radon emission limit, monitoring, reporting, or control under the CAA for liquids or solids during operation and closure.	

In sum, the La Sal Mines Complex EA must characterize and analyze the cumulative impacts from the known, monitored, and controlled, and unknown, unmonitored, and uncontrolled levels of radon that will be released from the White Mesa Mill into the foreseeable future.

2. Failure to Fully Review Other Cumulative Impacts.

The EA admits that the cumulative impacts from other past (Pa), present (Pr), and reasonably foreseeable future actions (RFFA) must be reviewed under NEPA. EA at 4-2 (listing Pa, Pr, RFFA projects/impacts). However, no quantified assessment of the impacts from these actions is contained in the EA, as required by NEPA. *See* Great Basin Mine Watch v. Hankins, 456 F.3d 955, 971-974 (9th Cir. 2006)(requiring "mine-specific … cumulative data," a "quantified assessment of their [other projects] combined environmental impacts," and "objective quantification of the impacts" from other existing and proposed mining operations in the region).

For example, despite admitting the potential for impacts from all of these activities, no air quality analysis is provided. EA Section 4.2.2. Similarly, no water quality analysis is provided. EA Section 4.6.2 (groundwater). Indeed, despite acknowledging the likelihood of water impacts from the already-approved nearby Energy Queen Mine, no water quality analysis is provided. The EA bases this on the following:

> Reasonably foreseeable future mining activities include resumption of mining at the Energy Queen Mine and the Pine Ridge Mine, and development of a mining shaft and other surface infrastructure at the Redd Block IV Mine. The Top Rim Sandstone may be saturated at the Redd Block IV site, and mine dewatering may be necessary. It is unlikely that these reasonably foreseeable future actions would cause cumulative effects to groundwater quality because any storage or treatment of mine water at surface facilities of the Energy Queen Mine or the Redd Block IV Mine would require a permit issued by the state of Utah, and modern water storage and treatment methods. For example, the state permit addressing these facilities at the Energy Queen Mine requires double lined water storage ponds with leak detection systems, and treatment of mine water to meet all water quality standards. Therefore, it is unlikely that these reasonably foreseeable future actions would cause cumulative effects to groundwater.

EA at 4-29. As noted above, however, USFS/BLM cannot simply rely on the fact that Utah has or will issue permits for these operations as a substitute for NEPA compliance. South Fork Band Council, 588 F.3d at 726.

Overall, thus, in addition to the lack of cumulative impacts analysis related to milling, the EA fails to provide the NEPA-required level of analysis for other past, present, or reasonably foreseeable future activities in the region. The EA's mention of impacts from other mines in the area, as well as other activities such as grazing, energy exploration and development, off-road recreation, etc., is minimal at best and fails to provide the "sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment." Te-Moak Tribe of Western Shoshone, 608 F.3d 592, 603 (9th Cir. 2010). The EA fails to provide the project specific "cumulative data," a "quantified assessment of their [other projects'] combined environmental impacts," and "objective quantification of the impacts" from other existing and proposed activities in the region. Great Basin Mine Watch v. Hankins, 456 F.3d at 971-974.

E. Failure to Review the La Sal Complex Operations as a Connected Action with the White Mesa Mill

As noted in the previous comments, the agencies failed to consider the La Sal Complex Operations as a Connected Action with the White Mesa Mill. As admitted in the EA, "all ore produced in the La Sal Area would be processed at the existing White Mesa mill." EA at 4-4. It is undisputed that the White Mesa Mill is the only operating uranium processing mill in the United States. Thus, without the White Mesa Mill, the La Sal Complex mines would have nowhere to process the ore. Indeed, without the Mill, the entire purpose of the La Sal Complex – to explore for and produce uranium ore for processing at the White Mesa Mill – would be non-existent.

Based on these undisputed facts, the USFS/BLM are required to consider the Mill and the La Sal Complex as connected actions in the same NEPA document. Under NEPA, 42 U.S.C.S. § 4321 *et seq*., a single NEPA review document is required for actions or projects when the projects are connected, cumulative or similar. 40 C.F.R. § 1508.25. Council on Environmental Quality (CEQ) regulations provide that actions are "connected" if they … "(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously," or "(iii) Are interdependent parts of a large action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1). Because the Complex would not occur without the occurrence of the Mill, the Mill is a connected action and must be considered within the same NEPA document as the Mine. "[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 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.

The fact that the Mill may operate without the ore from the La Sal Complex, even if true as alleged in the EA, does not mean that the mining of the ore from the La Sal Complex is not dependent on the continued operation of the Mill. Thus, as a separate NEPA duty from the requirement to review the cumulative impacts from the Mill, the USFS/BLM were required to review the impacts from both projects in one NEPA document.

F. The EA Fails to Review Reasonable Alternatives

As noted in the previous comments, the USFS/BLM failed to fully review reasonable alternatives to the activities at the La Sal Complex. NEPA requires the agency to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(E); 40 CFR § 1508.9(b). It must "rigorously explore and objectively evaluate all reasonable alternatives" to the proposed action. City of Tenakee Springs v. Clough, 915 F.2d 1308, 1310 (9th Cir. 1990). Indeed, NEPA's implementing regulations recognize that the consideration of alternatives is "the heart of the environmental impact statement." 40 CFR 1502.14, quoted in Alaska Wilderness Recreation and Tourism Ass'n v. Morrison, 67 F.3d 723, 729 (9th Cir. 1995).

"The obligation to consider alternatives to the proposed action is at the heart of the NEPA process, and is 'operative even if the agency finds no significant environmental impact.' Greater

Yellowstone Coal. v. Flowers, 359 F.3d 1257, 1277 (10th Cir.2004)." Dine Citizens Against Ruining Our Env't v. Klein, 747 F. Supp. 2d 1234, 1254 (D. Colo. 2010). "The agency may not, however, 'define the project so narrowly that it foreclose[s] a reasonable consideration of alternatives [sic].' Utah Envtl. Cong. v. Bosworth, 439 F.3d 1184, 1195 (10th Cir.2006) (quoting Davis, 302 F.3d at 1119)." Dine Citizens, 747 F. Supp. 2d at 1255.

> An agency must meaningfully consider and discuss alternatives in the process of reaching a decision. *C.f.* 40 C.F.R. § 1502.14 (describing the discussion of alternatives in an EIS and noting that it "should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public").

Id. at 1256. The "reasonable alternatives" requirement applies to EAs as well as EISs. "Agencies are required to consider alternatives in both EISs and EAs and must give full and meaningful consideration of all reasonable alternatives." Te-Moak Tribe, 608 F.3d at 601-02.

Here, the agencies did not consider a number of reasonable alternatives, such as those involving a different extent and scope of review and approval: (1) permitting only one phase at a time in order to allow public review of each phase; (2) permitting only one of the various projects at the current time; (3) limiting the number of exploration drill and other sites; and (4) minimizing the adverse impacts from all project operations as required by 36 CFR part 228. Under any of these alternatives, the authorized environmental impacts will be lessened and equally important, the public will be able to review detailed project aspects instead of the current proposal to approve all three phases and all operations at once, with little detailed review of the site-specific impacts.

The agencies cannot skew the project's purpose and need to avoid consideration of these reasonable alternatives:

> [A]gencies are not permitted "to define the objectives [of a proposed action] so narrowly as to preclude a reasonable consideration of alternatives." *Citizens' Comm. to Save Our Canyons,* 297 F.3d at 1030; *see also Utah Envtl. Cong. v. Bosworth,* 439 F.3d at 1184 (stating that an agency cannot "define the project so narrowly that it foreclose[s] a reasonable consideration of alternatives" (quoting *Davis v. Mineta,* 302 F.3d 1104, 1119 (10th Cir.2002)) (internal quotation marks omitted)).

Wyoming v. U.S. Dep't of Agric., 661 F.3d 1209, 1244 (10th Cir. 2011) ("how the agency defines the purpose of the proposed action sets the contours for its exploration of available alternatives.")

By limiting its options to approving only the full multi-phase and all-projects, USFS/BLM have improperly defined the purpose and need of the project and failed to consider the full range of reasonable alternatives.

G. Approval of All Phases and Projects at the Current Time, Without Detailed Information on the Project's Site-Specific Uses and Impacts, Violates NEPA.

As noted in the previous comments, the agencies' decision to review and approve all three phases,

and all of the projects contained in the La Sal Complex, precludes the agency and the public from taking the requisite hard look under NEPA. As noted above, the USFS's proposal to approve all aspects of the project (three phases, 3,800 drill holes, etc.) also violates the USFS's plan of operations adequacy and reasonableness requirements.

As admitted throughout the EA, the agencies have no information as to the actual location of the vast majority of the operations proposed to be approved via the Draft DN/FONSI. There is simply no way for the public to comment upon the project's operations when critical details such as the location of the drill sites, roads, and vents will be, among other missing information. The agency proposes to approve the **entire** multi-phase project and there will be no additional public review or NEPA analysis, after this approval, for the future phases of exploration and mining.

The USFS/BLM cannot comply with NEPA's requirement to review all reasonably foreseeable environmental impacts when it admits that critical aspects of the approved project are unknown. If the company decides to proceed with Phase II or Phase III after it reviews the drilling information from Phase I, **then** it can propose an additional specific exploration project. Only then can the agencies adequately review the impacts of further exploration and meaningfully involve the public in the NEPA process.

The proposed approval of the multi-phase project despite knowing the details of impacts from the future phases is even more egregious in light of the EA's acknowledgement that critical surveys for wildlife, radon, cultural resources, and other impacted resources have not yet been done. *See* above discussion.

The agencies had ample opportunity and authority to inventory the cultural and environmental resources acknowledged to exist in the project area prior to approving the entire project, yet they chose not to do so. Likewise, the agencies could have chosen to approve only the first phase of the proposed exploration, deferring approval of the additional phases until the applicant could identify the details of those phases. Finally, the agencies could have and should have, at a minimum, required the company to identify the areas it will impact in the first phase of exploration. Without conducting these basic inquiries, there is no way the agencies, or the public, could adequately assess the impacts of the exploration project to the cultural and environmental resources in the area.

By failing to conduct an adequate analysis of the impacts of the project, USFS/BLM also failed to fully involve the public in its decision-making processes. The CEQ regulations require that: "NEPA procedures must ensure that environmental information is available to public officials and citizens **before** decisions are made and **before** actions are taken." 40 CFR § 1500.1(b)(emphasis added).

> NEPA is not designed to postpone analysis of an environmental consequence to the last possible moment. Rather, it is designed to require such analysis as soon as it can reasonably be done. *See Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1246 n. 9 (9th Cir.1984) ("Reasonable forecasting and speculation is ... implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry.'"

Kern v. BLM, 284 F.3d 1062, 1072 (9th Cir. 2002).

In this case, the public has not been fully informed of the impacts that the entire project will have, nor have they had a chance to fully comment upon or review those impacts. As explained, rather than reviewing the impacts of the approved exploration now, the agencies have expressly deferred complete review until some unspecified future time. As a result, the EA violates NEPA.

H. The EA Fails to Fully Evaluate Mitigation Measures and Their Effectiveness

As noted in the previous comments, the EA failed to conduct an adequate review of mitigation measures, including the effectiveness of each mitigation measure, as required by NEPA. NEPA requires the USFS to: (1) "include appropriate mitigation measures not already included in the proposed action or alternatives," 40 CFR § 1502.14(f); and (2) "include discussions of: . . . Means 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.

The need for a detailed analysis of mitigation and its effectiveness is required under NEPA.

> [T]he Court holds that the Corps' reliance on mitigation measures that were unsupported by any evidence in the record cannot be given deference under NEPA. The Court remands to the Corps for further findings on cumulative impacts, impacts to ranchlands, **and the efficacy of mitigation measures.**

Wyoming Outdoor Council v. U.S. Army Corps of Eng'rs, 351 F. Supp. 2d 1232, 1238 (D. Wyo. 2005) (emphasis added).

> [NEPA] does require that an EIS discuss 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.

Thus, the EA's brief listing of mitigation measures is not acceptable. The agency is required to fully analyze the impacts to each resource, fully analyze each mitigation measure, and fully analyze the effectiveness of each proposed mitigation measure for all potentially affected resources (e.g., surface and ground water, air, land, wildlife, recreation, religious/cultural, etc.).

Further, reliance on future mitigation measures included in the EA cannot substitute for the required pre-approval NEPA review.

> [M]itigation measures, while necessary, are not alone sufficient to meet the [agency's] NEPA obligations to determine the projected extent of the environmental harm to enumerated resources *before* a project is approved. Mitigation measures may help alleviate impact *after* construction, but do not help to evaluate and understand the impact before construction. In a way, reliance on mitigation measures presupposes approval. It assumes that—regardless of what effects construction may have on resources—there are mitigation measures that might counteract the effect without first understanding the extent of the problem. This is inconsistent with what NEPA requires.

Northern Plains, 668 F.3d at 1084-85 (emphasis in original).

I. Failure to Minimize Adverse Impacts and Protect Public Resources under the Organic Act, 228 Regulations, and the NFMA

As noted in the previous comments, and due in large part the deficiencies in the EA and Draft DN/FONSI noted in this Objection, the USFS failed to meet its duty to protect National Forest resources. The Forest Service's authority to regulate mining operations is governed by the Organic Administration Act of 1897 ("Organic Act"), 16 U.S.C. §551, among other laws, which authorizes the agency to promulgate rules and regulations for the national forests in order "to regulate their occupancy and use and to preserve the forests thereon from destruction . . . ."

As noted in Clouser v. Espy, a leading case on the Forest Service's authority over mining, the Organic Act "specifies that persons entering the national forests for the purpose of exploiting mineral resources 'must comply with the rules and regulations covering such national forests.'" Clouser v. Espy, 42 F.3d 1522, 1529, n.7 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 2577 (1995), *and reh'g. denied*, 116 S. Ct. 18 (1995). The relevant portions of the Organic Act state that:

> The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests . . . and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction.

16 U.S.C. §551. However, under the Organic Act, the agency may not categorically prohibit mining if conducted on valid claims: "Nothing in section . . . 551 of this title shall be construed

as prohibiting . . . any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof." 16 U.S.C. §478.

In 1974 and 1981, the agency adopted regulations under this authority, now known as the "36 CFR Part 228 regulations". The Supreme Court noted the connection between the Organic Act and the Part 228 regulations: "Through this delegation of authority, the Department of Agriculture's Forest Service has promulgated regulations so that 'use of the surface of National Forest System lands . . . shall be conducted so as to minimize adverse environmental impacts on National Forest System surface resources.'" California Coastal Commission v. Granite Rock Co., 480 U.S. 572, 582 (1987) (quoting 36 CFR § 228.1).

In United States v. Richardson, the Ninth Circuit Court of Appeals discussed the relationship between the Organic Act and mining rights, affirming a District of Oregon decision enjoining a particular prospecting method. United States v. Richardson, 599 F.2d 290 (9th Cir. 1979) (limiting mining proponent to non-destructive exploration methods). Both courts upheld the Forest Service's prohibition against "destructive" methods, noting "the Forest Service may require the locator of an unpatented mining claim on national forest lands to use nondestructive methods of prospecting." Id. at 291. Since the dispute arose just before the adoption of the current Forest Service mining regulations, the court based its decision on the "interrelationship of federal statutes concerning the national forests and mining on public lands [, namely] Rule 5.2, 30 U.S.C. § 26, 30 U.S.C. § 612, 16 U.S.C. § 551, and 16 U.S.C. § 478." Id. at 291-92.

In Clouser v. Espy, the Ninth Circuit affirmed the Forest Service's authority to impose significant restrictions on a mining operation, in that case limiting the claimant to access via pack-mule only. Clouser v. Espy, 42 F.3d 1522 (9th Cir. 1994). The court rejected the claimant's argument that such a restriction violated federal mining laws:

> In light of the broad language of [Organic Administration Act §] 551's grant of authority, [Organic Administration Act §] 478's clarification that activities of miners on national forest lands are subject to regulation under the statute, and this substantial body of case law, there can be no doubt that the Department of Agriculture possesses statutory authority to regulate activities related to mining—even in non-wilderness areas—in order to preserve the national forests.

Id. at 1530. Recent decisions have reinforced the USFS's broad authority over mining. "[T]he Secretary of Agriculture has long had the authority to restrict motorized access to specified areas of national forests, including to mining claims. *See* Clouser [v. Espy], 42 F.3d 1522, 1530 (9th Cir. 1994)." Public Lands for the People v. U.S. Dept. of Agriculture, 697, F.3d 1192, 1198 (9th Cir. 2012)(emphasis added)(upholding denial of access routes to mining claims in travel management plan).

Indeed, in Clouser, the court affirmed the ability of the agency to restrict mining even to the point that the project would no longer be economically viable. **"Virtually all forms of Forest Service regulation of mining claims—for instance, limiting the permissible methods of mining and prospecting in order to reduce incidental environmental damage—will result in increased operating costs, and thereby will affect claim validity**." Id. In fact, under the Mining Law itself,

the expense associated with compliance with environmental regulations may so increase the cost of mining as to render a claim not valuable. United States v. Kosanke Sand Corp., 12 IBLA 282, 299 (1973). *See also* Great Basin Mine Watch, 146 IBLA 248, 256 (1998).

Thus, any argument that the agency is precluded from meeting its statutory and regulatory obligations because they allegedly make a mine operation "too expensive" is not supported by federal law and applicable court decisions and thus can be rejected.

Further, under the Organic Act, and the 36 CFR Part 228 regulations, the agency cannot approve a mining PoO unless it can be demonstrated that all feasible measures have been taken to "minimize adverse impacts" on National Forest resources, including all measures to protect wildlife and habitat. The "operator shall take all practicable measures to maintain and protect fisheries and wildlife habitat." 36 CFR 228.8(e).

This language was recently relied upon by the federal courts in overturning a USFS-approved mining operation that did not adequately protect wildlife. "The operator also has a separate regulatory obligation to 'take all practicable measures to maintain and protect fisheries and wildlife habitat which may be affected by the operations.' 36 C.F.R.§ 228.8(e)." Rock Creek Alliance v. Forest Service, 703 F.Supp.2d 1152, 1164 (D. Montana 2010) (Forest Service PoO approval violated Organic Act and 228 regulations by failing to protect water quality and fisheries). "Under the Organic Act the Forest Service must minimize adverse environmental impacts where feasible and must require [the project applicant] to take all practicable measures to maintain and protect fisheries and wildlife habitat." Id. at 1170. At a minimum, it is impossible to meet this requirement when the USFS does not even have the necessary wildlife surveys as noted above.

In summary, the Forest Service's Organic Act requires that the agency "must . . . ensure that its approval of a plan or project does not result in the 'destruction' and 'degradation' of the public forests." Clouser v. Madigan, 1992 WL 694368, at *4 (D. Or. 1992), *aff'd sub nom.* Clouser v. Espy, 42 F.3d 1522 (9th Cir. 1994).

The USFS failed to meet these mandates in this case. As shown herein, including the numerous examples showing the unacceptable environmental impacts that are predicted to occur if any of the action alternatives are approved (even with the limited mitigation measures proposed), impacts which the agency has failed to prevent or minimize, the USFS has and will violate the Organic Act and Part 228 regulations.

Additionally, the failure to fully review the baseline conditions and the deferral of mitigation and other analysis to the future violates the NFMA. Under the NFMA, the agency cannot approve a mining Plan of Operations that would violate any provision of the Forest Plan. Once a Forest Plan is adopted, all resource plans, permits, contracts, and other instruments for use of the lands must be consistent with it. 16 U.S.C. § 1604(i). The NFMA requires all site-specific actions authorized by the Forest Service, including a mining plan, to be consistent with Forest Plan standards and guidelines. "Such projects must be consistent with the applicable forest plan. Utah Envtl. Cong. v. Bosworth (UEC III), 443 F.3d 732, 737 (10th Cir. 2006)(citing the NFMA "consistency clause," 16 U.S.C. § 1604(i))." Forest Guardians v. United States Forest Serv., 641 F.3d 423, 427 (10th Cir. 2011). *See also* Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1068 n.4 (9th Cir.

1998)(same).

USFS authorization of mining and mineral exploration must comply with all Forest Plan and NFMA requirements. *See* Hells Canyon Preservation Council v. Haines, 2006 WL 2252554, *7-*10 (D. Oregon 2006) (finding ROD and PoO approval for mining violated Forest Plan and other standards); Rock Creek Alliance v. U.S. Forest Service, 703 F.Supp.2d 1152, 1187, n. 23 (D. Mont. 2010)(same).

Here, the Manti-La Sal Forest Plan requires that, for each decision (such as approval of the POA), the agency must:

> Maintain or improve habitat carrying capacity for elk or deer.
> Maintain or improve wildlife habitat diversity.
> Maintain or improve fisheries habitat.
> Protect, maintain, and/or improve habitat for threatened or endangered and sensitive plants and animals.
> Provide habitat for viable populations of the existing vertebrate and invertebrate species found on the Forest.

Forest Plan at III-3. It impossible for the USFS to assert that it has met these duties when it failed to ascertain the baseline conditions for critical wildlife species (noted above), and deferred the review and imposition of mitigation measures until the future (without any public review).

J. Deferral of Cultural Resources Analysis Violates the NHPA

As noted in the previous comments and herein, the USFS/BLM defer much of the on-site cultural resources analysis to the future, long after the project is approved. Such a permit-first, study later approach violates not only NEPA, but the NHPA as well.

> [T]he fundamental purpose of the NHPA is to ensure the preservation of historical resources. *See* 16 U.S.C. § 470a(d)(1)(A) (requiring the Secretary to "promulgate regulations to assist Indian tribes in preserving their particular historic properties" and "to encourage coordination ... in historic preservation planning and in the identification, evaluation, protection, and interpretation of historic properties"); *see also Nat'l Indian Youth Council v. Watt*, 664 F.2d 220, 226 (10th Cir.1981) ("The purpose of the National Historic Preservation Act (NHPA), is the preservation of historic resources."). Early consultation with tribes is encouraged by the regulations "to ensure that all types of historic properties and all public interests in such properties are given due consideration...." 16 U.S.C. § 470a(d)(1)(A).

Te-Moak Tribe of Western Shoshone v. U.S. Department of the Interior, 608 F.3d 592, 609 (9th Cir. 2010).

> Under the NHPA, a federal agency must make a reasonable and good faith effort to identify historic properties, 36 C.F.R. § 800.4(b); determine whether identified properties are eligible for listing on the National Register based on criteria in 36 C.F.R. § 60.4; assess the effects of

> the undertaking on any eligible historic properties found, 36 C.F.R. §§ 800.4(c), 800.5, 800.9(a); determine whether the effect will be adverse, 36 C.F.R. §§ 800.5(c), 800.9(b); and avoid or mitigate any adverse effects, 36 C.F.R. §§ 800.8[c], 800.9(c). The [federal agency] must confer with the State Historic Preservation Officer ("SHPO") and seek the approval of the Advisory Council on Historic Preservation ("Council").

Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 805 (9th Cir. 1999). *See also* 36 CFR § 800.8(c)(1)(v)(agency must "[d]evelop in consultation with identified consulting parties alternatives and proposed measures that might avoid, minimize or mitigate any adverse effects of the undertaking on historic properties and describe them in the EA.")

The Advisory Council on Historic Preservation ("ACHP"), the independent federal agency created by Congress to implement and enforce the NHPA, has exclusive authority to determine the methods for compliance with the NHPA's requirements. *See* National Center for Preservation Law v. Landrieu, 496 F. Supp. 716, 742 (D.S.C.), *aff'd per curiam*, 635 F.2d 324 (4th Cir. 1980). The ACHP's regulations "govern the implementation of Section 106," not only for the Council itself, but for all other federal agencies. Id. *See* National Trust for Historic Preservation v. U.S. Army Corps of Eng'rs, 552 F. Supp. 784, 790-91 (S.D. Ohio 1982).

NHPA § 106 ("Section 106") requires federal agencies, prior to approving any "undertaking," such as approval of the POA, to "take into account the effect of the undertaking on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register." 16 U.S.C. § 470(f). Section 106 applies to properties already listed in the National Register, as well as those properties that may be eligible for listing. *See* Pueblo of Sandia v. United States, 50 F.3d 856, 859 (10th Cir. 1995). Section 106 provides a mechanism by which governmental agencies may play an important role in "preserving, restoring, and maintaining the historic and cultural foundations of the nation." 16 U.S.C. § 470.

If an undertaking is the type that "may affect" an eligible site, the agency must make a reasonable and good faith effort to seek information from consulting parties, other members of the public, and Native American tribes to identify historic properties in the area of potential effect. *See* 36 CFR § 800.4(d)(2). *See also* Pueblo of Sandia, 50 F.3d at 859-863 (agency failed to make reasonable and good faith effort to identify historic properties). Consultation "must be 'initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking." Pit River Tribe v. U.S. Forest Service, 469 F.3d 768, 787 (9th Cir. 2006).

The NHPA also requires that federal agencies consult with any "Indian tribe ... that attaches religious and cultural significance" to the sites. 16 U.S.C. § 470(a)(d)(6)(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).

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.

Here, as noted in the previous comments and herein, consideration of numerous aspects of the project, from the milling/processing and transportation to impacts analysis and mitigation, are either entirely missing or deferred until sometime in the future. Such omissions and delays violate the NHPA requirements to review the impacts from the undertaking (i.e., review and approval of the POA) and consult with the Native American governments about the operations/impacts at the earliest possible time. In addition, deferring USFS review and regulation to the state of Utah regarding the critical contamination and other issues makes these failures worse, as Utah is under no NHPA obligation.

K. Violation of Endangered Species Act (ESA)

As noted in the previous comments, and based on new information arising after the close of the public comment period, the USFS and BLM fail to meet the substantive species and habitat protection provisions of the ESA. The EA and Draft DN/FONSI arbitrarily limit the analysis of endangered species to those impacts that may occur within the borders of the project area. Draft DN/FONSI at 10; EA, Section 3.3.16.1. By unreasonably limiting the geographic scope of analysis, the agencies conceal the direct, indirect, and cumulative impacts on four endangered fish and the newly-listed Yellow-Billed Cuckoo. Further, no consultation occurred because "SWCA biologists determined that all USFWS listed, candidate, and petitioned species for San Juan County, Utah, were unlikely to occur **in the project area**, and therefore the project would have no effect on those species (SWCA 2011)." EA at 3-49 (emphasis added). Both of these positions are incorrect under the ESA and cannot stand.

Section 7(a)(2) of the ESA imposes both procedural and substantive duties on federal agencies and their actions. Agencies must fulfill these section 7 duties based on the "best scientific and commercial information available." 16 U.S.C. § 1536(a)(2). Procedurally, federal agencies engage in a consultation process with 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 this consultation procedure is to facilitate informed agency decision-making in order to insure no jeopardy to endangered and threatened species and no adverse modification of critical habitat.

The consultation mandate is triggered when there is an "agency action" that "may affect" a listed species or designated critical habitat. The ESA's implementing regulations broadly define agency "action" to mean "all activities or programs of any kind authorized, funded, or carried out, in whole

or in part, by Federal agencies in the United States or upon the high seas. 50 C.F.R. § 402.02. Examples include, but are not limited to "actions directly or indirectly causing modifications to the land, water, or air." The "action area" 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).

> Similar to NEPA, the ESA and its implementing regulations require consultation on all "indirect" as well as "direct" impacts of a federal agency action. *See* 50 C.F.R. § 402.02. In addition, the analysis must include "effects of other activities that are interrelated or interdependent with" the agency's proposed action. *Id.* The consultation process must also consider the action's "cumulative effects," which are "are those effects of future State or private activities . . . that are reasonably certain to occur within the action area." *Id.* An "action area" is defined as "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. "Effects of the action" means "direct and indirect effects of an action on the species or critical habitat together with the effects of other activities that are interrelated or interdependent with that action." *Id.* "Cumulative impacts" are those effects of future State or private activities . . . that are reasonably certain to occur within the action area." *Id.* Further, "interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration." *Id.*
>
> [...]
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> In Plaintiffs' view, DOE's actions extend beyond the immediate scope of the Easement and, like the NEPA analysis, includes the mine as well. As the § 7 regulations provide, in addition to direct impacts of the action, agencies must consider indirect and cumulative impacts as well as "interrelated and interdependent actions." 50 C.F.R. § 402.02. Consequently, courts have required agencies to consider all related impacts. *Conner v. Burford*, 848 F.2d 1441, 1453-54 (9th Cir. 1988) (requiring ESA consultation to address not only oil and gas leases, but also future exploration and development); *Defenders of Wildlife v. Babbitt*, 130 F. Supp.2d 121, 128-130 (D.D.C. 2001) (requiring ESA § 7 consultation analysis to include impacts of all activities within the action area that affect listed species); *Greenpeace v. National Marine Fisheries Serv.*, 80 F. Supp.2d 1137, 1149 (W.D. Wash. 2000) (finding management plans unlawful for failing to consider cumulative impacts on the species).

Sierra Club v. United States DOE, 255 F. Supp. 2d 1177, 1187-88 (D. Colo. 2002). *See also* Defenders of Wildlife v. Norton, 130 F. Supp. 2d 121, 128 (D.D.C. 2001) (deeming consultation "deficient because of the[] overly narrow definition of action area, which results in the exclusion of certain relevant impacts from the environmental baseline"). In light of the "expansive regulatory definition of action area," the appropriate scope of analysis encompasses all areas where pronghorn may be directly or indirectly affected by agency action. 130 F. Supp. 2d at 129-30. "Similarly, with respect to the BLM grazing allotments BO, defendants argue that the action area consists solely of the grazing allotment lands, in other words, the immediate area involved. ... The regulations explicitly reject such a definition of the action area." 130 F. Supp. 2d at 128-29.

Requests for consultation must contain a "description of the specific area that may be affected by the action." 50 C.F.R. § 402.14(c)(2)

Here, as acknowledged in the EA, the project's impacts are not limited to just the La Sal Complex, but includes the transportation and milling of the ore to/from/at the White Mesa Mill.

The term "may affect" is also broadly construed by FWS to include "[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character," and is thus easily triggered. 51 Fed. Reg. at 19926. The federal agency must "review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. 16 U.S.C. §1536(a)(2); *see also* Rio Grande Silvery Minnow v. Bureau of Reclamation, 601 F.3d 1096, 1104 (10th Cir. 2010). If the agency determines that an action "may affect" listed species or critical habitat, it must consult with FWS. 50 C.F.R. § 402.14; Rio Grande, 601 F.3d at 1105.

The consultation process provides a means by which federal agencies may comply with Section 7(a)(2)'s substantive prohibitions to avoid jeopardy to listed species and adverse modification of critical habitat. At the conclusion of consultation, FWS provides the action agency a biological opinion regarding whether the agency's action satisfies the Section 7 standards. FWS evaluates the effects of the proposed action on the survival of the species and any potential destruction or adverse modification of critical habitat. Rio Grande, 601 F.3d at 1105. Courts have recognized the importance these procedural requirements play in ensuring that agencies carry out the substantive provisions and intent of the ESA.

> The strict substantive provisions of the ESA justify more stringent enforcement of its procedural requirements, because the procedural requirements are designed to ensure compliance with the substantive provisions . . . If an [action] is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result. The latter is of course, impermissible.

Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985) (emphasis in original). From the initiation of the consultation process until FWS issues a biological opinion, the federal agency is prohibited from making "any irreversible or irretrievable commitment of resources …which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures." 16 U.S.C. § 1536(d).

The USFS/BLM based its decision not to engage in even informal consultation on its view that because listed species "were unlikely to occur in the project area … the project would have no effect on those species (SWCA 2011)." EA at 3-49. However, that is not the test for consultation under the ESA. As stated recently by the federal courts, in a case dealing with nearby uranium leasing and mining, the fact that a project's effect may be "highly unlikely" satisfies the "may affect" standard triggering consultation.

> This ''may affect'' standard triggering the consultation requirement is low. ''*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); *cf. Pac. Shores Subdivision Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 538 F.Supp.2d 242, 261 (D.D.C.2008) (in evaluating ESA regulation requiring an initial take statement ''if such take may occur,'' the court stated that ''the term 'may' is broadly interpreted under ESA regulations and the FWS's obligation to issue an incidental take statement was triggered by the possibility of take of the brown pelican, *regardless of how unlikely that possibility may have seemed.*'') (emphasis added).

The Court holds that [the action agency's] determination that effects on listed species would be ''highly unlikely'' satisfies this low ''may affect'' standard.

Colorado Environmental Coalition v. Office of Legacy Management, 819 F.Supp.2d 1193, 1221-22 (D. Colo. 2011)(emphasis added). Similarly, here, the EA found that it was "unlikely" that listed species inhabited the project area. Thus, in addition to the legal error of limiting ESA review to just the immediate project area as noted above, the refusal to initiate consultation based on this "unlikely" position violates the ESA and its implementing regulations. Further, as noted above, the agencies' decision to postpone wildlife surveys for all project activities until the future renders the decision not to consult arbitrary and capricious.

In addition to the impacts to species at the immediate site and off-site areas such as the transportation routes and the White Mesa Mill, potential impacts to listed species may occur due to the project's (and others in the area) water management activities. The Fish and Wildlife Service has proposed critical habitat for the Yellow-Billed Cuckoo on the San Juan River at Bluff, Utah (downstream from the White Mesa Mill) and on the Colorado River and the Dolores River near their confluence at the Colorado/Utah border. http://www.fws.gov/sacramento/outreach/Public-Advisories/WesternYellow-BilledCuckoo/outreach_PA_Western-Yellow-Billed-Cuckoo.htm (providing maps and proposed critical habitat rule). The final rule confirmed the need for consultation on impacts to Yellow-Billed Cuckoo:

> The majority of streams and water delivery facilities within the range of the western yellow-billed cuckoo are at least partly managed by Federal entities or proposed activities that would have a Federal nexus. As a result, these Federal agencies have an obligation under section 7 the Act to conserve endangered or threatened species and their habitat. […] New projects on Federal land or funding by the Federal government will be subject to section 7 consultations, as will reauthorization of Federal projects.

79 Fed. Reg 60007 (10/3/2014). "Threats from water projects and water management are significant threats" to the Yellow-Billed Cuckoo. 79 Fed. Reg. 600012.

> Our review of the best available scientific and commercial information identified numerous activities or processes that threaten to destroy, modify, or curtail the western yellow billed cuckoo's habitat or range now or are likely to in the near future in any portion of the western yellow-billed cuckoo range. These include habitat loss from reservoirs and water

management, surface and groundwater diversion, flood control activities, gravel mining, agriculture, livestock grazing, invasive nonnative plants and their control, and climate change.

79 Fed. Reg 60026. Despite these clear directives, the direct, indirect, and cumulative impacts of surface and groundwater diversions for consumptive water uses, particularly water consumed directly by uranium mining and milling and other projects in the area, is not addressed in the EA/FONSI. Despite the impacts of groundwater and surface water diversions to the Cuckoo, the Forest Service has not sought section 7 consultation. The undisclosed cumulative effects on this newly listed threatened species prevents use of a DN/FONSI and renders the EA unlawful.

Consumptive water use by the mining and milling projects, particularly when the viewed in context of the widespread impacts caused by federal water projects, is ignored. The EA reveals that undisclosed volumes of water must be used to control dust and radon emissions at the mines and mill, but nowhere are these consumptive uses quantified. By limiting the geographic scope of the, the EA is blind to the consumptive use of water. Water use is not analyzed in context of their cumulative impact on ESA listed species whose existence are jeopardized by over-appropriation of the region's rivers, which are controlled and managed through a series of federal water projects that threaten the continued existence of the Yellow-Billed Cuckoo.

Similarly, the unique and cumulative impact on Yellow-Billed Cuckoo from radiological and heavy metals runoff from uranium milling operations upgradient from proposed critical habitat on the San Juan River near Bluff, Utah has not been considered. There is no analysis of cumulative impacts of mine pollution in combination with other mines and pollution sources on proposed critical habitat located on stretches of the Dolores River and Colorado River down-gradient in the watershed from the proposed mines. *See, e.g.* Colorado Environmental Coalition v. Office of Legacy Management, 819 F.Supp.2d 1193 (D. Colo. 2011)(discussing large-scale leasing and permitting for uranium operations in the Dolores River basin).

For similar reasons, four federally endangered fish species are likely to be negatively affected by the consumptive water use: the razorback sucker, the humpback chub, the bonytail chub and the Colorado pikeminnow. All four of the endangered Colorado River fish species may be present in the Colorado River just downstream from the confluence with the Dolores. In addition, some individuals of Colorado pikeminnow may be present in the Dolores River. The Colorado pikeminnow was known to occur historically in the Dolores River as far upstream as the Paradox Valley (upstream from the confluence with the San Miguel River). Colorado pikeminnow were recorded in the river as recently as 1991, when four pikeminnow were captured within the lower 1.2 miles of the Dolores River[7]. The razorback sucker may occur in the Colorado River downstream from the confluence with the Dolores River and is stocked in the Colorado River upstream of the confluence with the Dolores River[8].

[7] Valdez, R.A., Masslich, W.J, and Wasowicz, A. 1992. Dolores River native fish habitat suitability study in Utah Division of Wildlife Resources, ed: Salt Lake City, UT.

[8] U.S. Fish and Wildlife Service. 2008. Programmatic biological opinion for water depletions associated with Bureau of Land Management's fluid mineral program within the Upper Colorado River Basin in Colorado in Ecological Services Office, ed: Grand Junction, CO.

There are relatively large and healthy populations of humpback chub in the Colorado River near the confluence with the Dolores River[9]. One of the very few remaining wild populations of bonytail occurs in the Colorado River upstream from the confluence with the Dolores River, and since 1996 bonytail have been stocked in the Colorado River in Utah near the confluence with the Dolores River.[2,3] In addition, critical habitat for all four of the endangered Colorado River fish has been designated in portions of the Colorado River downstream from the confluence of the Dolores River. These mines may affect these fish species in several ways. Streamflow regulation, habitat modification, competition and predation with nonnative fish species, pesticides and pollutants, are major threats to all four of the endangered CO river fish species. The reduction of flows in streams and rivers, due to the cumulative impacts of diversion of water, is one of the primary factors in the decline of these species.

Past activities, including past uranium mining and processing on federal lands in the surrounding region, oil and gas development, and irrigation in areas with soils high in selenium, have resulted in water quality problems in the Dolores and Colorado Rivers. For example, uranium mill tailings on the Department of Energy lease tracts near the Dolores River contaminated the alluvial aquifer with uranium, selenium, manganese, molybdenum, nitrate, radium 226, radium 228, benzene, and toluene. According to U.S. Fish and Wildlife Service (2007), "Uranium processing facilities operated during the late 1940's through the 1960's severely impacted the river and may have contributed to the decline of Colorado pikeminnow in the Dolores River drainage."[10] Valdez et al. (2002) found that, "Native fish composition and abundance were found to be poor downstream of the San Miguel confluence, a river reach heavily impacted by poor water quality due to uranium tailings". Ongoing and future activities in the area, including uranium mining, oil and gas development, and irrigation, are also resulting in increased pollution in the Dolores and Colorado River basins. Proposed and inactive uranium mines and mills in the area may also result in runoff and discharge of contaminants into the Dolores River watersheds. The EA and Draft DN/FONSI failed to analyze the cumulative impacts of current proposal with other impacts on the fish.

In this over-appropriated and stressed section of the Colorado and Dolores River watersheds, surface and ground water diversions, pollution, and consumptive use by past, present, and foreseeable mines and mills create significant impacts to these species of four river fish and the Yellow-Billed Cuckoo. However, direct, indirect, and cumulative impacts from uranium mining and milling were excluded from NEPA analysis and ESA consultation by limiting the analysis to the project area. Draft DN/FONSI at 10; EA, Section 3.3.16.1. By limiting the scope of the analysis, the scope and intensity of the impacts were concealed, and the required significance finding was unlawfully avoided. 40 CFR § 1508.27.

Where the Forest Service and BLM have not consulted with the Fish and Wildlife Service, federal agency personnel cannot lawfully approve the DN or issue a FONSI. Failing to consult with ESA

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[9] U.S. Fish and Wildlife Service. 2008. Programmatic biological opinion for water depletions associated with Bureau of Land Management's fluid mineral program within the Upper Colorado River Basin in Colorado in Ecological Services Office, ed: Grand Junction, CO.

[10] U.S. Fish and Wildlife Service. 2007. Recovery implementation program recovery action plan: recovery implementation program for endangered fish species in the upper Colorado River Basin in Region 6, ed: Denver, CO. *See also* Valdez RA, Masslich WJ, Wasowicz A. 1992. Dolores River native fish habitat suitability study in Utah Division of Wildlife Resources, ed: Salt Lake City, UT.

leaves individual agency personnel vulnerable to civil and criminal liability. Bennett v. Spear, 520 U.S. 154, 170 (1997)(an action agency ignores ESA duties "at its own peril (and that of its employees), for 'any person' who knowingly 'takes' an endangered or threatened species is subject to substantial civil and criminal penalties.").

In order to comply with federal law and to protect ESA-listed species and agency personnel, the Forest Service must prepare an EIS and initiate ESA section 7 consultation on the direct, indirect, and cumulative impacts to the Yellow Billed Cuckoo and the four Colorado River fish and other listed species.

V. ADDITIONAL OBJECTION ISSUES

As noted in the previous comments, the EA and Draft DN/FONSI (for new issues first appearing in that document) violate NEPA and the USFS's duties to ensure that all impacts are fully reviewed and that all adverse impacts are fully minimized pursuant to 36 CFR Part 228.

The EA fails to fully review all air quality impacts from the Project. For example, it only considered the criteria pollutants of PM10 and NO2. EA at 3-6 (Table 3-3). This is despite the fact that:

> Criteria pollutants and HAPs would be emitted from the mine vents. Criteria pollutant emissions (PM10, PM2.5, SO2, NOx, CO, ozone and lead) from the mine vents are not addressed in the air AO issued by UDEQ, but rather are regulated by MSHA which requires that the amount of airborne particulate matter in the mine be less than 1 milligram per cubic meter of air (mg/m3). This limit is designed to protect mine workers. Any particulate matter (in the form of either PM10 or PM2.5) emissions exiting the mine vents would be less than 1 mg/m3 and would disperse quickly in the outside air. Combustion emissions (PM10, PM2.5, SO2, NOx, and CO) from mobile underground equipment would be emitted from the mine vents.

EA at 4-8,-9.

For the dispersion modeling for air pollution, the EA was based on the applicants' report, which only considered emissions from Alternative A, which the EA admits will have less emissions of PM10 than Alternative C, which is proposed to be approved by the Draft DN/FONSI. EA at 4-7, Table 4-1.

> The projected increase in PM10 emissions from the La Sal Mines Complex was identified as a measurement criterion for Air Quality. Under Alternative A, additional PM10 emissions would be 0.69 ton/yr as discussed previously. Under Alternative C, this measurement criterion increases to 1.69 ton/yr, which includes the additional PM10 emissions associated with the expanded Pandora DRA.

EA at 4-11. This represents more than double the expected increase in PM10 emissions, with no analysis/modeling to account for the increase. Without proper baseline information (noted above) and up-to-date modeling results, the agency's claim that the project will comply with all Clean Air

Act and related air quality requirements cannot be supported. As such, under USFS regulations at 36 CFR Part 228, the agency cannot approve the project.

Throughout the last period of operation, Denison's (now Energy Fuels Resources, Inc.) radon vents were in violation of 40 C.F.R. Part 61 Subpart B requirements. There were periods when the dose to the nearest receptor exceeded the 10 mrem dose standard. Throughout the period of operation Denison used Method A-7 to monitor the radon emissions from the vents, rather than Method A-6. Use of Method A-7 requires prior EPA approval. Denison did not seek this approval until after the August 17, 2010, EPA Notice of Violation. Denison began to use both types of monitoring devices on some of the vents for comparison, but the EPA had not approved the use of Method A-7 when the mines closed down in 2012. Other violations were identified in the Notice of Violation. *See* EPA Notice of Violation 8-17-10 (attached).

The EA, Section 3.3.8.4 states: "EPA issued a *Final Order and Settlement Agreement* addressing the alleged violations in November 2011 (EPA 2011c). EPA found that violations had occurred with respect to not conducting continuous monitoring at four vent holes, but did not find that Denison had violated the 10 mrem/yr standard or the requirements for prior approval from EPA for use of Method A-7 to monitor radon-222 emissions from vent holes. As part of the settlement agreement, monitoring of radon-222 emissions from the La Sal Mines Complex was conducted using both Methods A-6 and A-7 in accordance with EPA's requirements (Energy Fuels 2013a) until interim shutdown of the mine occurred."

The Statement in the EA mischaracterized the situation. Regardless of whether the EPA cited Denison for not using the right radon monitoring device, Denison requested permission to use Method A-7, then conducted monitoring using both devices for comparison, and had to submit that data to the EPA before the EPA would approve their request to use the AERMOD computer model and use Method A-7. The EPA has yet to approve Denison's request to use the AERMOD computer model and use Method A-7 to monitor the radon flux from the radon vents. Also, Denison was required to submit monthly monitoring results, which is what they were required to do. These results should have been considered.

The EA (Section 2.4.2) states: "However, radon discharge from ventilation shafts is closely monitored to mitigate risks to potential surface receptors." This is not true, since past monitoring has not complied with EPA requirements. Also, there is no requirement to close the radon vents during temporary cessation of operation when radon is emitted due to natural air flow. According to the Energy Fuels November 28, 2012, letter to the BLM, "some of the vent shafts have been temporarily sealed with metal covers, a number will be left open and operating to provide a secondary escape hatchway from the Pandora Mine."

Energy Fuels does not define "operating," nor did they identify the vents that were sealed and the ones left open. One concern would be vents near the town of La Sal (one of which is 1/4 mile from the Elementary School).

The EA (Section 2.4.2) states: "Alternative C would address the potential for similar compliance issues with new ventilation shafts by requiring Energy Fuels to submit pre-construction radon modeling for BLM or FS review prior to constructing vents on BLM or NFS lands. The pre-

construction modeling would be conducted in accordance with US Environmental Protection Agency and Utah Division of Air Quality (UDAQ) requirements. These assessments would estimate expected radon discharge rates, location of potential receptors to the proposed ventilation shaft, and compliance with applicable regulations." Yet there is no evidence that EPA and DAQ have a pre-constriction modeling requirement or methodology. The EA does not identify such a modeling requirement or methodology.

The EA (Section 2.4.2) states: "The pre-construction radon assessment would demonstrate that emissions from the ventilation shaft would be in compliance with the requirements of 40 CFR 61 Subpart B. If preconstruction radon modeling does not demonstrate that the vent hole would be expected to comply with the regulation, design modifications would be implemented to comply with the regulation, or the ventilation shaft would not be constructed."

A model is not going to demonstrate definitively that the ventilation shaft would be in compliance with the requirements of Subpart B, particularly when the radon emissions from more than one shaft would impact a receptor (home, workplace). The mine owner has to submit the ventilation plans to MSHA for approval. They determine where and when vents are required. Denison had to install a vent very quickly a few years ago because of the high radon levels underground. If Energy Fuels could not install a vent in an area, they might not be able to put workers in that area.

Compilation of POAs: The EA states: Compilation and modification of activities previously approved by two existing BLM Plan of Operations (POs) and three FS POs and associated PO amendments, **including any existing disturbed areas associated with the La Sal mines complex resulting from historic operations that may not have been fully delineated in those documents or in correspondence with previous operator**s into one POA that will address the entire La Sal Mines Complex. The EA included the bolded statement because there never was a POA for the La Sal Mine and the Snowball Mine, nor an EA. The BLM allowed Denison to start using the La Sal Mine portal and place additional material on the waste rock piles at the La Sal Mine. Yet Denison did not include a Plan of Operations for the La Sal Mine or Snowball Mine in their 2010 POA. The EA fails to include an Environmental Analysis of the La Sal and Snowball Mines. There never was a PoO for these mines in 1981, when one was required, and there was no EA or EIS.

The EA does not adequately address the environmental impacts associated with the restart of the La Sal Mines Complex. One example of an impact is large releases of radon and allowing the workers to enter the mines when radon levels are quite high. MSHA had to order workers to leave the Beaver Shaft when it reopened because of the radon levels underground.

Radon Vents on Private Land: The EA identifies 31 new vent shafts that would intersect D-aquifer (Table 2-4). EA Section 4.6.1.3 states: "However, neither BLM nor the FS have regulatory jurisdiction for vent shafts on private lands, and the agencies cannot enforce the additional design feature of Alternative C for reclamation of vents on private lands. This causes some uncertainty in the comparative analysis of the potential benefits of Alternative C as it relates to vent shaft reclamation at the La Sal Mines Complex. The number of vent shafts intersecting the D-aquifer that would be backfilled with development rock during reclamation was identified as a measurement indicator to address this issue. This measurement indicator has a value of zero for Alternative C, which assumes that Energy Fuels would voluntarily apply this design feature for reclamation of

vent shafts on private lands." Yet there is no assurance in the record that this will be the case. As such, the EA must review the potential that these "voluntary" measures would not occur.

Also, as noted above, the federal agencies do have authority over private land operations in order to protect public land resources. *See* Camfield v. United States, 167 U.S. 518 (1897); United States v. Alford, 274 U.S. 264, 267 (1927) ("Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests."). "[T]he power granted by the Property Clause is broad enough to reach beyond territorial limits." Kleppe v. New Mexico, 426 U.S. 529, 538 (1976).

The EA fails to give a realistic evaluation of the impacts to the water sources in the D-aquifer. In the past, wells had to be drilled around exploration drill holes to dewater the area, so that an effective drill hole could be completed. The EA does not discuss the extra drill holes and dewatering that would have to occur for vent and exploration drill holes in the area west of the Beaver Shaft on private land, where drilling would intersect the D-aquifer.

Short Term Shut Down of the Mine: The EA includes "Stipulation of an interim management plan that establishes requirements for short-term shutdown of the mine if economic conditions change." The mines have been shut down since 2012. There is no evidence in the record that the mine operator has taken the actions fulfilling those interim management plan actions.

Revegetation of Forest Lands: The EA states (Alternative A and C): "Revegetation is anticipated to require 3 to 5 years, depending on seasonal growth patterns, precipitation, weather, and natural disturbances. Upon the completion of all reclamation activities, revegetation success would be measured in accordance with UAC Rule R647-4-111, such that revegetation has achieved 70 percent of the original or adjacent cover." However, vents holes and some of the exploration occur in areas where there are Ponderosa pine, Gambel oaks, and piñon pine trees, with some grass understory. There is no evidence to support the assertion that 70% of the cover can be restored in 3-5 years. The whole area is marked by access roads (readily visible from the air) that have never been restored.

EA, Section 2.4.1. Ventilation Shaft Reclamation: The EA does not identify the existing ventilation shafts on BLM or USFS land that are not lined, or inadequately lined.

EA Table 1-1. Relevant Permits or Approvals Required for the Proposed Action, identifies Air Order/ National Emission Standards for Hazardous Air Pollutants (DAQE-AN014150002- 09). The DAQ Approval Order only applies to the non-radioactive emissions, not the radon emissions regulated by the Utah Dept. of Environmental Quality, Div. of Air Quality, pursuant to 40 CFR Part 61 Subpart B. The EA fails to identify the approvals required by the DAQ for construction and operation of the vents.

Table 1-1 does not include water rights approvals for water that is used in the mining processes. The Utah Division of Water Rights approves the use of water for mining purposes.

EA, Section 2.4.6. Management of Noise: Over the next phases of operation of the La Sal Mines, most of the vents will be on private land up hill from La Sal Community. The existing vents that created high noise levels in the La Sal area were from vents on private land. The loudest vent that

one can get close to is on BLM land (Pandora #2), which sounds like you're next to a major highway. Not audible in La Sal, this vent but would impact wildlife and anyone in the area. The EA does not give a credible description of the noise impacts that would not be mitigated.

EA Table 2-4. Summary of Alternatives with Respect to Issues and Measurement Indicators. This table states under Radiation Concerns, that the expected gamma radiation exposure at DRAs during active mining is 24 to 360 microroentgens per hour (μR/hr) and the maximum gamma radiation exposure at DRAs after reclamation is complete is 50 μR/hr under Alternative C. This is not translated into millirem per year dose level to compare with the existing dose standard for the dose from uranium mines. 360 μR/hr equals about 2,742 millirems per year, or 270 times the dose standard for exposure to the nearest receptor from the uranium mines. 50 μR/hr equals 380 mrem per year, 38 times the current exposure limit.

EA Section 3.3.5.6 Existing and Future Uses of Groundwater. The EA states: "The current water supply for the underground mine is an existing well utilizing a water right owned by UMETCO Minerals Corporation. Energy Fuels is in the process of reapplying for this water right in accordance with state water rights law (Personal Communication, F. Filas, Energy Fuels, 2013)."

The EA fails to provide the pertinent water rights for the operation of the La Sal Mines Complex and fails to determine if sufficient water for the operation of the La Sal Mines Complex is owned by Energy Fuels.

There are currently 3 water rights associated with the Mines. Two water rights are in the Beaver Shaft area (05-1620 and 05-1721). These water right still belong to UMETCO Minerals Corporation. There is no evidence on the Utah Division of Water Rights (DWR) files, which are readily available to the public, that Denison nor Energy Fuels applied to have those water right transferred to their ownership. There is another water right associated with the Pandora Mine (05-3313). However, that well is not being used and has not been proved to have been put to beneficial use. According to information submitted by Denison Mines to the DWR in April 2012, the well produced a small amount of water for about a year, then silted in. The well needs to be re-drilled and possibly deepened. On December 15, 2014, Energy Fuels Resources (USA) Inc. and Energy Fuels Holding Corp. reported the conveyance of that water right to EFR Colorado Plateau LLC, of the same address, therefore, currently none of the usable water associated with the La Sal Mines Complex belongs to Energy Fuels or associated entity.

EA Section 3.3.8.4 Radon-222 Emissions and Compliance with NESHAP. The EA fails to acknowledge that the mine portals are a major source of radon emissions, and the radon emissions must be measured just as those from the vents. This section restates the discussion of the NOV regarding radon emissions, but does not provide all the information. Energy Fuels must get EPA approval to continue using Method A-7 and must get EPA Approval to use the AERMOD computer model. Energy Fuels has not received such approvals from the EPA.

EA, Section 3.3.17 Worker Health and Safety. The EA says that it is important to look at the type of citations, but makes no mention of several citations associated with exposure to radon during the operation of the Pandora Mine and La Sal Complex (Beaver Shaft and La Sal). Reliance Resources Inc. no longer operates the Pandora Mine, as of April 2013. The EA determined that there are high

doses from the ore piles and waste rock piles, yet MSHA does not regulate doses to the workers from those sources, nor requires protective equipment for workers above ground. Workers have had to go to radon vents to remove ice that accumulates from the emission of underground moisture during the winter, yet there is no acknowledgement of this worker activity and determination if protective gear is required.

Regarding the failure to review all cumulative impacts from the White Mesa Mill, the EA at 4-29, states that all operations at the White Mesa Mill are strictly regulated by the state of Utah in accordance with state and Federal requirements. This is not true. The Mill has not operated in accordance with 40 CFR Part 61 Subpart W. There are more than the two operational impoundments allowed under Subpart W in operation at the White Mesa Mill.

There are high levels of radon emissions from over 135 acres of liquid impoundments that are not being regulated. There is no emission standard and no requirements to determine or control those emissions. Subpart W does not require the monitoring and control of radon emissions from new solid tailings impoundments during operation of the impoundments, does not require the monitoring and control of radon emissions from existing (pre-1989) and new impoundments during closure (when tailings impoundments are drying out and radon emissions increase), and proposes to eliminate the requirement for monitoring and control of radon emissions from existing impoundments.

White Mesa Cell 2 in not in compliance with 10 CFR Part 40, Appendix A, Criterion 6A, and 40 CFR § 192.32 requirement for an approved closure plan and reclamation milestones. The processing of ore from the La Sal Complex will contribute to unregulated release of radon from the White Mesa Mill. The more ore processed, the greater number of tailings cells are required, the greater the amount of tailings, and the greater the radon emissions.

The EA Section 4.8.2.2 assumes that ventilation shafts would be reclaimed as the mine expands in future development. However, during the operation of the Complex from 2007 to 2012, Denison did not retire and reclaim any of the ventilation shafts. There was an older shaft that was not used, but it was not plugged. So, there is no basis for the assumption that unused ventilation shafts will be plugged before the final closure of the Mine Complex.

EA Section 4.9.1.1. Direct and Indirect Effects of Alternatives A and C. The EA states (page 4-37): Under Alternatives A and C, radon emissions from the La Sal Mines Complex are expected to have little or no long-term effect on air quality, because radon quickly dissipates in the atmosphere and has a brief half-life. However, they will have a short-term effect. The radon is a heavy gas, that will sink to the ground during certain conditions, such as nighttime cold air drainage, and flow from higher elevations (where vents are located on the side of the La Sal Mountains) to lower elevations (where people live). The radon does not just go away, it quickly decays into highly radioactive progeny. These progeny are taken up by dust, water, and soils in the vicinity of the source. There is no requirement to monitor the radon and other radionuclides at receptor locations. There is no ongoing program to monitor radon in homes or work sites in the vicinity of the La Sal Mines. There is no discussion in the EA of the proximity of the La Sal Elementary School to the Beaver Shaft and surrounding radon vents.

The EA relies on SENES Reports. SENES is a company that serves the uranium industry. They do contract work for Energy Fuels Resources and the previous owner of the La Sal Complex, Denison Mines (USA) Corp. They are not an independent source of data and information.

The EA, at 4-41, discusses the NRC dose standard: "The NRC dose standard for decommissioned uranium milling facilities is set forth at 10 CFR 20 Subpart D §20.1402 – *Radiological Criteria for Unrestricted Use.* The state of Utah has adopted the same criterion for decommissioned uranium milling facilities in UAC Rule R313-15-402." Here the EA ignores the EPA radiological criteria for the release of uranium mill property for unrestricted use. The cleanup action level (above background) is (i) 5 picocuries per gram (pCi/g), averaged over the first 15 centimeters (cm) below the surface, and (ii) 15 pCi/g, averaged over 15 cm thick layers more than 15 cm below the surface" (40 C.F.R. §192.33(b)(2). The EPA has adopted similar standards for uranium mine cleanup. See Uranium Watch Statement of Reasons for IBLA appeal of La Sal #2 Mine. The agencies have failed to define "deleterious" material in terms of radiological content of that material.

EA, at 4-43, Radon and Cancer Risk, confuses dose from all sources with the dose from radon gas and radioactive particulates that are inhaled. The EA adopts the arguments of the uranium industry. Also, there have been no health studies conducted for citizens or workers in the La Sal area. There is no baseline health data.

EA, at 4-43, Particulates and Cancer Risk, states: "Moreover, ore piles, development rock areas and loading operations would be located in controlled areas of the site with limited public access. During operations, the public would have no access to ore piles or to dust generating equipment or activities." This is not true. The Snowball Mine, La Sal Mine, and Beaver Shaft waste rock piles on BLM land are not behind fences and are readily accessible to the public. A member of the public can access the Beaver Shaft waste rock pile on BLM land. A member of the public can drive onto that pile, and in the past waste rock was removed from the pile by an unknown member of the public. There is a La Sal Mine waste rock pile that is adjacent to a public road that goes between the La Sal Mine and the Pandora/Snowball mines. After reclamation, these piles will not be fenced and eventually the gate restricting access to the Pandora waste rock pile will probably be removed. Only waste rock on private land will be restricted.

EA, at 4-45, Water Quality and Soils, states: "In spring, 2013, a gamma survey with collocated soil sampling was conducted at three existing vent shafts to evaluate potential increases in radionuclide concentrations near exhausting ventilation shafts. An apparent increase in gamma radiation was observed within approximately 15 to 33 ft from the portal areas, with gamma exposure measured at values of up to 44 μR/hr." Here the EA does not cite that survey and include it in the EA appendices. The EA puts the gamma levels in terms that are not measured so that they can be compared to existing radium activity standards for clean up of radium in soils (40 C.F.R. § 192.33(b)(2)) or the Subpart B dose standard. The section says that "gamma radiation was observed within approximately 15 to 33 ft from the portal areas," then says that "data suggest that there may be a slight increase in radionuclides near the vent shafts." The EA does not differentiate between the portals (Pandora, Beaver Shaft, La Sal, and Snowball) and the ventilation shafts. This is confusing, because the observations could have been at the portals, vent shafts, or both. The soils around the portals can expose workers, and those soils are disturbed by workers and equipment.

EA, Section 4.9.2.1 Alternatives A and C states, "SENES (2011) modeled radon releases and constructed an isopleth map of regional radon activity assuming concurrent operation of three underground uranium mines in the area: the La Sal Mines Complex, the Rim Mine, and the Sunday Mine." This model is irrelevant. The modeling does not include emissions from the Department of Energy Leases in SW Colorado for which there is information regarding the radiologic levels and abandoned, unreclaimed, and reclaimed mines in the area (for example, Dunn, Homestake, La Sal # 2, Velvet, Wood, Sage, Energy Queen Mines, and the abandoned mines in the La Sal Mountains such as those in Browns Hole and Polar Mesa . It does not include releases of radon from the reclaimed Lisbon Valley Mill, which still does not have the final radon barrier.

EA, Section 4.12 Socioeconomics. This section makes no mention of the adverse effects associated with the uranium boom and bust economy. Uranium mining started up again in San Juan County in 2007, and was over in 2012, a 5-year period. What happened to the workers who lost their jobs when the mines closed in 2012.? What were the impacts of workers in San Juan County losing their jobs at 3 uranium mines (La Sal Complex, Pandora, and Daneros) in 2012 and the placement of the White Mesa Mill on standby at the end of 2014. There is no data on the fluctuation of the number of mine workers. There is no information on how many miners left their jobs to find work elsewhere during and after mine operation, nor on the impacts on the workers who lost their jobs. The EA ignores this significant socioeconomic aspect of the uranium industry in San Juan County.

EA, Section 4.13 Surface Water states: "There is no perennial or intermittent surface water in the proposed project area." This is not true. There is an irrigation ditch near the Beaver Shaft waste rock pile on BLM land and a larger irrigation ditch in the vicinity of that pile.

EA Section 4.15.2 Cumulative Effects, page 4-70, Vegetation Impacts. The discussion of impacts to vegetation states: "Considering existing vegetation cover types, the majority of the vegetation lost would be classified as Colorado Plateau Pinyon-Juniper Woodland and Inter-Mountain Basins Big Sagebrush Shrubland, both of which are common vegetation communities in the Manti-LaSal National Forest (FS 1986)." However, the vegetation in the Manti-La Sal impacted by the most recent vent installation and exploration drilling is primarily Ponderosa pine, Gamble oak, and piñon pine trees. There is no mention of maintaining this woodland habitat. These trees take years to become re-established. The description of the impacts in the Manti-La Sal vegetation is cursory and does not include cumulative impacts.

Waste Rock Pile Reclamation. Energy Fuels is not going to use the Snowball waste rock pile for the disposition of additional waste rock. The portal is not being used, except for ventilation. The EA states (page 4-50): "Mine-affected areas at the Pandora, Snowball, La Sal, and Beaver Shaft mines would be reclaimed after mining ceases. In accordance with BLM regulations at 43 CFR §3809.420, Energy Fuels is required to reclaim disturbance on Federal lands managed by BLM at the earliest feasible time after mining is complete." There is no justification for not reclaiming this waste rock pile at this time. The Snowball pile has a fairly steep slope, so it is unlikely that it can be reclaimed to a 1:3 slope (about 18.4 degrees), without extending the footprint of the pile. The EA (page 4-54) states: "Alternative A would also modify and modernize the existing reclamation plans for all DRAs, and require slope reduction before reclamation to improve slope stability and reclamation performance at all DRAs." But, there is no mention how this slope reduction would be

accomplished without increasing the disturbed areas for the Beaver Shaft, La Sal, and Snowball waste rock piles.

There are also access roads that can be reclaimed. The BLM and USFS have not assessed the area to determine which access roads can be reclaimed, or determined which impacted areas are associated with the Mines Complex.

VI. ADDITIONAL OBJECTIONS BASED ON AGENCY RESPONSE TO COMMENTS

The EA's Responses to Comments contained in Appendix C (Forest Service) and Appendix D (Bureau of Land Management) highlight many of the inadequacies discussed herein. In many instances, the agencies simply state, without support, that a particular analysis is not necessary or required pursuant to the agencies' mining regulations. However, as discussed, NEPA requires a review of all direct, indirect, and cumulative impacts associated with the proposal. As such, the EA is required to include discussion of these impacts. Examples include:

Appendix C

Comment 6-34 – the Forest Service states that identification and analysis of potential air-borne emissions from the mining operation "is not a necessary component of a POA for US Forest System Lands as set forth by 36 CFR § 228." However, 36 CFR § 228.8 requires the agency "to minimize adverse environmental impacts on National Forest surface resources" including protection of air quality. NEPA also requires analysis of impacts associated with all air quality contaminants.

Comment 6-68 – the Forest Service attempts to avoid the required analysis of radon impacts to mine workers and the environment by simply deferring to MSHA, the State of Utah, and EPA. However, as explained herein, NEPA requires an analysis of these impacts and does not allow the agency to avoid review by simply deferring all assessment of impacts to other agencies, particularly where no NEPA review will be required.

Comments 5-2, 5-3, 5-4 – the Forest Service repeatedly states that "Protection of cultural resources is required by existing laws and regulations." However, the fact that existing laws require protection of cultural resources does not excuse the Forest Service's obligation to conduct the required "hard look" under NEPA of impacts and potential mitigation for these resources.

Comments 6-71, 6-76, 6-80, 6-86 – Cumulative Impacts. The agency state states: "Additional analysis was completed of historic disturbance based on aerial photographs as described in Section 4.1." However, there is no timeline for reclamation of historical disturbances or evaluation of the impacted vegetation and effectiveness of any reclamation and revegetation efforts, as required to ensure minimization of impacts under Forest Service regulations and a "hard look" required by NEPA.

Comment 6-116 – The agency did not assess the cumulative surface disturbance impacts from historic, current, and proposed drilling activities associated with the La Sal Mines Complex (including Polar Mesa). As discussed in these objections, cumulative impacts include all past,

present, and reasonably foreseeable future impacts. The agency cannot simply define the spatial and temporal limits of its cumulative impact analysis to eliminate the reviews required by NEPA.

Comment 6-11, 6-125, 6-126, 6-128, 6-131, 6-133, 6-191 – the Forest Service states that instead of reviewing the impacts of reasonably foreseeable future exploration drilling in a NEPA document, it will do so outside of NEPA to apply "appropriate design features and bonding necessary to minimize site specific impacts." However, NEPA requires that all reasonably foreseeable future activities be reviewed in the current EA. The agency is not permitted under NEPA to simply defer all analysis to a future time, outside of the NEPA process.

Comment 6-19 – the Forest Service claims that all exploration drill holes will comply with State of Utah requirements, but NEPA does not permit such blind deferral of the review of impacts to state agencies to which NEPA does not apply. Further, the Forest Service provides no support, reference, or citation for its claims that no artesian groundwater is expected to be encountered on Forest System lands. NEPA and the Administrative Procedure Act require the agency to provide scientific support and analysis for any such conclusions.

Comments 6-16, 6-17, 6-37 – the Forest Service asserts that it need not review impacts to existing water rights that will be impacted by the project because such review "is not a required component of the Plan of Operations." However, 36 CFR § 228.8 requires the agency to minimize impacts, including to water, and NEPA requires a review of all discernable impacts of a project – regardless of whether the Forest Service regulations single them out or not. As such, ignoring impacts to water rights violates both Forest Service regulations and NEPA.

Comment 6-18 – the agency again improperly defers its analysis to the State of Utah. The fact that the State has regulations pertaining to abandonment does not excuse the agency from analyzing the impacts associated with the project under NEPA. To the extent the agency relies on the State's plugging requirements, the agency must assess the effectiveness of this proposed mitigation.

Comment 6-38, 6-39, 6-40, 6-41, 6-42, 6-43, 6-137 – the agency response to comments do not address the impacts from historical exploration holes (unplugged and inadequately plugged), historic vent holes, as well as planned vent holes. As detailed in the comments on the EA, this is particularly relevant west of the Beaver Shaft. Further, The EA ignored the plugging of at least two (2) shafts next to existing vents (Vent 900 and Vent 2300 #2). These shafts are not being used as vents, have not been sealed, are hazardous, and provide a conduit for water into the mines. The agency's POA requirements mandate that the agency "minimize" impacts to resources such as water. Thus, the assertion that it need not take into account water migration pathways that the proposed project will intersect and impact is false. In any case, NEPA requires a credible analysis of all indirect and direct impacts – this includes impacts associated with historic drill holes that have not been properly plugged which could affect the water resources or contamination at the site.

Comment 6-179 – The agency asserts that it has no regulatory jurisdiction over water rights, but this does not excuse the agency from its lack of analysis in the EA of the amount of water required for the mines and the impacts to the aquifer of the withdrawal of that water (Beaver Shaft, Pandora Mine, and Redd Ranches water). Forest Service regulations at 36 CFR § 228.8 require the agency to "minimize impacts" to National Forest resources and NEPA requires a review of all direct, indirect,

and cumulative impacts – including impacts to water quantity. Further, if sufficient quantities of water were not in fact available, this would further affect the impacts from the project, and must be reviewed in the NEPA document.

Comment 6-72 – the agency asserts that impacts to local jurisdictions and emergency responders resulting from the project are "out of scope of the proposed POA." However, such impacts are direct and indirect impacts of the project and thus must be analyzed under NEPA.
Comment 6-78, 6-79 – the agency asserts that a description of existing impacts on the ground is contained in figures 1-2 and 2-1 of the POA. However, NEPA requires that the agency analyze the impacts associated with past actions. A figure showing the locations of existing facilities does not provide the analysis of impacts required under NEPA.

Comment 6-98 – the agency states that it will not consider any efforts to set radon levels so as to protect human health and the environment, deferring to other agencies. However, 36 CFR § 228.8 requires the agency to minimize impacts. NEPA requires analysis of all potential mitigation. These analyses should have been included in the EA.

Comment 6-81 – the agency asserts that it does not have authority to require the proponent to reclaim historic disturbance at the mine site. However, 36 CFR § 228.8 specifically gives the agency the authority to minimize impacts to National Forest resources. Forest Service regulations and NEPA require that the agency review the alternative of requiring reclamation to minimize impacts on National Forest resources.

Comment 6-83 – the agency asserts that it need not review cumulative impacts associated with Polar Mesa. However, NEPA requires all cumulative impacts to be reviewed. Simply because Polar Mesa is not within the areas proposed to be affected by the project does not provide a basis to exclude these cumulative impacts from the NEPA review. This justification violates NEPA and must be reversed.

Comment 6-185, 6-189, 6-141, 6-112, 6-130, 6-169 – the agency improperly dismisses the necessity of having baseline vegetation data, and need for that data to demonstrate revegetation of 70% vegetation. Further, the agency is under a mandate pursuant to 36 CFR § 228.8 to minimize impacts to National Forest resources. Thus, deferral to State of Utah 70% requirement without analysis or consideration of alternative standards is not justified under the regulations, and does not meet NEPA's alternatives and resource impact review requirements. This lack of analysis is particularly problematic given the lack of any region-wide or forest-wide reclamation performance standards. Indeed, in responses to comments 6-112, 6-130, and 6-169 the agency admits that the baseline information necessary to review the impacts associated with revegetation has not been collected. NEPA requires a description of the baseline, pre-disturbance conditions (including current vegetation), and an assessment of the effectiveness of proposed mitigation (including revegetation). The lack of this information violates NEPA – especially where the agency intends to rely on a standard that requires 70% revegetation of the pre-disturbance conditions.

Comment 6-84, 6-30 – the agency states that review of impacts and reclamation associated with Polar Mesa, as well as the Beaver Shaft, La Sal, and Snowball mines is not required because those sites are "not located on lands subject to FS jurisdiction." However, as discussed herein, NEPA

requires analysis of impacts regardless of what agency or party owns the property. Simply because the Forest Service does not have jurisdiction over the lands is not a basis to exclude them from the agencies NEPA review.

Comment 6-121 – the agency asserts that the EA need not analyze alternative terms and conditions for addressing erosion during exploration drilling. However, NEPA requires an analysis of all reasonable alternatives to a proposal, and Forest Service regulations require the agency to minimize all impacts to National Forest resources. Thus, these analysis and alternatives must be discussed and reviewed in the EA.

Comment 2-1, 2-2 – the agency asserts that it is not required to review DRAs because they are not located on National Forest System lands and not subject to Forest Service jurisdiction. As discussed herein, NEPA requires analysis of impacts regardless of what agency or party owns the property. Simply because the Forest Service does not have jurisdiction over the lands is not a basis to exclude them from the agencies NEPA review.

Comment 6-73 – the agency asserts that impacts to transportation routes, roads, and access routes are "out of scope of the proposed POA." However, NEPA requires an analysis of all impacts of a project, whether direct, indirect, or cumulative, including these roads and routes.

Appendix D

Comment EPA-1 – the agency admits that it failed to disclose the predicted radon emissions and radon impacts to nearby receptors according to the procedures described in 40 CFR Part 261 Subpart B. Without explanation, the agency simply asserts that these predictions are "not necessary to support the effects analysis." Further, the agency asserts, again without any explanation, that such an analysis "is not possible based on current data." However, NEPA and the APA both require that the agency explain its course of action and its analysis, particularly such as here where it rejects specific recommendation from EPA, the expert agency in radon emissions. Further, where data is missing, NEPA requires that agency explain why collection of that data is not possible, or how the costs to do so would be exorbitant. 40 CFR § 1502.22. Absent such justifications, the agency is required to obtain that missing data. As it is, the EA violates NEPA and the APA.

Comment EPA-2 – the agency admits that it used a model to calculate radon emissions (Aermod) that is not an approved model under the applicable regulations. Despite this fact, and rather than revising its flawed approach, the agency instead attempts to justify its use of other models. However, no scientific basis is presented for this course of action, with no references or citations to support the agency's claims. NEPA and the APA require scientific integrity and a reasoned basis for the agency's actions. Further, the agency states that future modeling will be conducted using an EPA-approved model. This constitutes an admission that the modeling used prior did not comply. Such a tactic renders the NEPA analysis deficient.

Comment EPA-3 – the agency admits that it failed to present the total radiation dose (radon and particulate) to the workers and the public for the proposed action. In defense, the agency simply states, without any scientific support or further explanation, that "[i]t is not necessary to conduct additional modeling … to evaluate this issue." However, NEPA and the APA require scientific

integrity and a reasoned basis for the agency's actions. Unsupported statements that the analysis specifically recommended by the expert agency is not necessary do not fulfill the agency's duties under NEPA and the APA.

Comment EPA-6 – the agency admits that it failed to include information on water quality, including water quality data and a comparison of this data to Utah water quality standards for the affected aquifers for such known contaminants in the area such as uranium, vanadium, arsenic, and selenium. The agency failed to include this information in the EA despite the fact, as recognized by EPA, that the underground mining project is near to domestic water supplies. In its defense, the agency offers no substantive basis for failing to include this analysis – instead simply stating that "[t]he information recommended by the commenter is not necessary to support the EA analysis." However, no support, scientific or otherwise, is offered to justify the agency's refusal to follow up on conducting this important analysis. NEPA and the APA require scientific integrity and a reasoned basis for the agency's actions. Unsupported statements that the analysis specifically recommended by the expert agency is not necessary do not fulfill the agency's duties under NEPA and the APA.

Comment UW-21, UW-61 – the agency admits that previous disturbance at the site was not documented in the EA. However, NEPA requires an analysis of all past, present, and reasonably foreseeable actions. Promises to provide information in the future does not satisfy NEPA's requirements.

Comment UW-25 – the agency admits that the EA fails to assess impacts to groundwater resources on private and state lands that will be caused by the proposed action. The agency states that it neglected to review this impacts because they will occur on lands/waters that are outside of the federal agencies' jurisdiction. However, NEPA does not allow for the agency to draw such arbitrary distinctions. NEPA requires analysis of impacts without regard to the jurisdiction under which the impacted resources sit.

Comment UW-43, UW-44, UW 53 – the agency admits that it has not conducted a complete analysis of the water consumption and use by the proposed action. The agency states that it "defers" to the State of Utah with regard to water rights. However, NEPA requires an analysis of all impacts, including the impacts associated with water usage. The failure of the EA to include a complete analysis of water quantity impacts violated NEPA.

Comment UW-49 – the agency admits that it did not analyze the cumulative impacts associated with nearby mining disturbances, including Polar Mesa. The agency states that failed to do so because these areas are outside of the area to be impacted by the proposed action. However, NEPA's cumulative impacts review requirements are not limited strictly to the areas to be impacted. NEPA requires all cumulative impacts to be reviewed, not just those within the disturbance area associated with the project at hand.

VII. CONCLUSION

In conclusion, as detailed above and in the August 20, 2012 comments, the EA and Draft DN/FONSI fail to fully comply with numerous federal laws, regulations, policies and other requirements. As such, the Regional Forester's Office must remand both documents to the Manti-La Sal National Forest to correct all errors noted herein. At a minimum, any future draft decision to approve the POA must be accompanied by an EIS. The USFS cannot approve any of the action alternatives described in the EA and Draft DN/FONSI, or any alternative at all that the applicant may propose, unless and until all laws, etc., noted herein are satisfied. Please direct all communications regarding this Objection to the undersigned.

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