

July 9, 2018

Vernal Field Office, BLM

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**RE: Comments on Enefit American Oil Utility Corridor Project Final Environmental Impact Statement, DOI-BLM-UT-G010-2014-0007-EIS**

Reviewers:

Thank you for the opportunity to provide comments on the Final Environmental Impact Statement (“FEIS”) for the Enefit American Oil Utility Corridor Project, DOI-BLM-UT-G010-2014-0007-EIS, prepared pursuant to the National Environmental Policy Act (“NEPA”). We are submitting these comments on behalf of the Grand Canyon Trust, Sierra Club, Southern Utah Wilderness Alliance, Waterkeeper Alliance, Living Rivers, Natural Resources Defense Council, Center for Biological Diversity, Utah Physicians for a Healthy Environment, and Earthjustice.

**I. Introduction.**

The Bureau of Land Management (“BLM”) prepared the FEIS in response to five applications for rights-of-way (“ROWS”) across federal land submitted by Enefit American Oil (“EAO” or “Enefit”) and Moon Lake Electric Association for authorization to construct and operate 19 miles of water supply pipeline, 9 miles of natural gas supply pipeline, 11 miles of oil product delivery pipeline, 30 miles of overhead 138-kilovolt (“kV”) power lines, and 6 miles of upgrading and paving of a county access road (“Utility Project”). With the subsidy of ROWs over federal public land for power, fuel, water, and roads, Enefit would build its proposed South Project on private land. The South Project would involve:

- building a half-square mile industrial complex in the desert—the first commercial-scale oil shale retorting and processing operation in the United States;
- strip mining up to 28 million tons of rock per year over 14 square miles of undeveloped lands—resulting in waste rock totaling up to 750 million tons;
- removing up to 100 billion gallons of water from the already over-allocated Colorado River basin during the next three decades, a time when climate change and growing populations are likely to reduce river flows even further;
- nearly doubling oil production in the Uinta Basin, which already has over ten thousand oil and gas wells;
- emitting toxic air pollutants in an area recently designated as violating national health standards for smog due to winter-time inversions and pollution from existing fossil fuel production facilities; and

- using an extraction and refining process that results in nearly 40% more carbon dioxide emissions per unit of energy than conventional oil, and more even than notoriously dirty tar sands, at a time when the world needs to move quickly to cleaner, not dirtier, fuels if humanity is to avoid the worst impacts of climate change.

The BLM Vernal Field Office issued a draft environmental impact statement (“DEIS”) on the Utility Project in April 2016. On June 14, 2016, Grand Canyon Trust (“the Trust”) and others timely submitted comments on the DEIS. The comments contended that (1) BLM must reject the ROW applications because they are not in the public interest; (2) the DEIS failed to take a “hard look” at the impacts of the South Project and development of the related research, development, and demonstration (“RD&D”) lease; and (3) BLM must prepare a revised DEIS to remedy the numerous inadequacies. *See* letter of A. M. Tapp, Grand Canyon Trust *et al.* to S. Howard, BLM (June 14, 2016), attached as Exhibit 1 (“Trust DEIS Comment”).

Rather than prepare a supplemental DEIS, BLM issued the FEIS with few substantive revisions or additions, carrying forward many of the DEIS’s inadequacies into the FEIS. Accordingly, this comment letter incorporates by reference the Trust’s DEIS comments. It addresses inadequacies from the DEIS that have gone uncorrected in the FEIS; new information provided in the FEIS; BLM’s response to comments in the FEIS; and new information that has arisen since BLM released the DEIS. The undersigned do not waive any issue raised in comments on the DEIS but not addressed in this letter.

Most importantly, Enefit has continually failed to provide the information necessary to bolster its self-serving assertion that it could build and operate the South Project even without the ROWs it has requested from BLM. This assertion is the basis for BLM’s conclusion that the agency’s decision making on the ROWs will have no bearing on whether the South Project—and all of its downstream environmental impacts—can proceed. As such, it is the linchpin supporting the FEIS’s refusal to analyze or weigh any of the South Project’s environmental impacts, on the ground that the South Project is “outside of the BLM’s jurisdiction” and “not necessary for a reasoned choice” between alternatives. *See* FEIS Appx. I1-1. While BLM repeatedly relies on the effect of this assertion on the NEPA process, Enefit’s assertions remains just that: contentions by a project proponent—not objective conclusions supported by evidence.

NEPA requires more: it requires that BLM skeptically review and independently research Enefit’s self-serving assumptions. Rather than obtaining the information necessary to do so, BLM surrendered in the face of Enefit’s “unwilling[ness] to expend further resources to develop the mine plan and engineering specifications until it receives a decision on the utility corridor rights-of-way application,” because, Enefit averred, development of multiple design requirements would be “cost prohibitive to complete.” FEIS 4-92. Enefit cannot have it both ways. It cannot vigorously assert that the Utility Project is irrelevant to the South Project’s viability, but then refuse to provide any supporting evidence *until* BLM approves the Utility Project. This appears to be a blatant attempt by Enefit to avoid NEPA review of the South Project. And rather than requiring more information before making a decision, as it should have done, BLM has played into Enefit’s hands and accepted the company’s self-serving statements without the necessary support. BLM must correct this fundamental flaw in a revised EIS before it can make a decision to approve or deny Enefit’s applications.

## II. The South Project and Utility Project are connected actions.

When determining the scope of an EIS for a major federal action, Council on Environmental (“CEQ”) regulations implementing NEPA require that agencies consider “direct,” “indirect,” and “cumulative” impacts of the action and any “connected actions”—those that are “closely related” to the major federal action. 40 C.F.R. § 1508.25. Connected actions must be considered together to prevent an agency from dividing a project into multiple “actions,” “each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.” *Native Ecosystems Council v. Dombek*, 304 F.3d 886, 894 (9th Cir. 2002) (citation omitted). Non-federal actions undertaken exclusively by private parties on private land may be connected actions. *See also Alpine Lakes Prot. Soc’y v. U.S. Forest Serv.*, 838 F. Supp. 478, 482 (W.D. Wash. 1993); *Thomas v. Peterson*, 753 F.2d 754, 758 (9th Cir. 1985); *Rocky Mountain Wild v. Dallas*, 2017 WL 6350384, at \*10 (D. Colo. May 19, 2017) (holding that future development on private lands is a connected action if it would not be possible without agency approval of one of the action alternatives).

Actions are “connected” if they: “(i) [a]utomatically trigger other actions which may require environmental impact statements; (ii) [c]annot or will not proceed unless other actions are taken previously or simultaneously; and (iii) [a]re interdependent parts of a larger action and depend on the larger action for their justification.” 40 C.F.R. § 1508.25. Both the Ninth and Tenth Circuits utilize an “independent utility” test to determine whether multiple actions are connected so as to require an agency to consider them in a single NEPA review. *Native Ecosystems Council*, 304 F.3d at 894; *Utahns for Better Transp. v. U.S. Dep’t of Transp.*, 305 F.3d 1152, 1183 (10th Cir. 2002). “The crux of the test is whether *each of two projects* would have taken place with or without the other and thus had independent utility.” *Sierra Club v. BLM*, 786 F.3d 1219, 1226 (9th Cir. 2015) (quoting *Cal. ex rel. Imperial Cnty. Air Pollution Control Dist. v. U.S. Dep’t of the Interior*, 767 F.3d 781, 795 (9th Cir. 2014)) (internal quotation marks omitted) (emphasis added); *Wilderness Workshop v. BLM*, 531 F.3d 1220, 1229 (10th Cir. 2008). This test requires analysis of both projects to determine whether they both would have taken place without the other. *Id.*

Here, neither the Utility Project nor the South Project has independent utility. First, BLM abused its discretion in assuming that the South Project will proceed to full buildout regardless of the Utility Project’s approval. BLM based this conclusion exclusively on Enefit’s unsupported assertions. The agency did not perform any independent analysis. Second, the Utility Project’s only immediate purpose is to service the South Project, and any other potential uses are remote and speculative.

### A. **BLM’s assumption that the South Project would proceed to full buildout without the Utility Project is arbitrary, capricious, and an abuse of discretion, because it is based entirely on Enefit’s unsupported assertions without any independent analysis.**

In the FEIS, BLM abandoned the DEIS’s conclusion that development of the South Project is a non-federal connected action to the Utility Project. DEIS ES-1. Instead, the FEIS reinforces its

assumption, based solely on the applicant's self-serving statements, that the South Project will be constructed with or without the considerable subsidy the five ROWs provide. The FEIS considers the South Project a private action, which may have cumulative impacts on the environment alongside the ROWs. FEIS ES-2–ES-3. This change only emphasizes the underlying flaw in BLM's analysis: its position that the South Project will proceed to full buildout regardless of the Utility project's approval.

In support of this assumption, BLM noted that “[t]he Applicant already has vehicular access to its land, water can be trucked in to the South Project site, and product can be trucked out. The Applicant also can negotiate access to natural gas supplies and electricity from an existing pipeline and power line that cross the company's private property.” FEIS 1-5. This explanation of the South Project's prospect for substitute utilities absent the Utility Project, however, merely parrots Enefit's unsubstantiated assurances that such alternative means exist. It does not reflect any independent technical or economic feasibility analysis by BLM. Without independent analysis, BLM's conclusion that the South Project will proceed to full buildout regardless of the Utility Project's approval—and thus has independent utility—is arbitrary, capricious, and an abuse of discretion. *See Hammond v. Norton*, 370 F. Supp. 2d 226, 251–53 (D.D.C. 2005).

In *Hammond*, BLM concluded that a proposed pipeline would have alternative sources of supply, and thus had independent utility and was not a connected action to another pipeline segment. The court set aside this conclusion, because it was based only on the applicant's “unsubstantiated assurances” and “self-serving statements or assumptions,” which cannot substitute for the agency's own analysis and investigation in the preparation of an EIS. “[W]hen the agency has good cause to believe that information is inaccurate or exaggerated, it has a duty to substantiate it.” *Id.* (citations omitted).

Other cases have articulated a similar requirement that agencies receiving outcome-determinative information from a project proponent must independently verify that information, especially if there is reason to doubt its objectivity. *See, e.g., Fla. Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 401 F. Supp. 2d 1298, 1323 (S.D. Fla. 2005) (“Representations by the applicant alone, who clearly has an interest in obtaining the permit and whose theory of independent utility . . . can only be considered a post-hoc rationalization to secure a permit as rapidly as possible, cannot be sufficient to establish a project's independent utility, without independent evaluation by the agency based on record evidence”) (internal quotation marks omitted); *Env'tl. Law & Policy Ctr. v. U.S. Nuclear Regulatory Comm'n*, 470 F.3d 676, 683 (7th Cir. 2006) (NEPA requires an agency to “exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project”); *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 669 (7th Cir. 1997); *Van Abbema v. Fornell*, 807 F.2d 633, 639 (7th Cir. 1986) (holding that it is arbitrary and capricious for an agency to base “its conclusions on entirely false premises or information, even when its attention is specifically directed to possible defects in its information.”); *Am. Rivers v. Fed. Energy Regulatory Comm'n*, \_\_\_ F.3d \_\_\_, 2018 WL 3320870, at \*12–\*13 (D.C. Cir. July 6, 2018) (holding that the Commission's NEPA analysis of a power plant license improperly relied only on a more-than-decade-old-survey of fish entrainment studies and estimates provided by the applicant itself: “No updated information was collected; no field studies were conducted. Nor was any independent verification of [the applicant's] estimates undertaken . . . its estimates were entirely unmoored from any empirical scientific, or otherwise verifiable study or source . . . .

The Commission’s acceptance, hook, line, and sinker, of [the applicant’s] outdated estimates, without any interrogation or verification of those numbers is . . . certainly unreasoned.”).

Rather than merely reciting a project proponent’s unsupported assertions that a proposal is independently feasible, an agency must itself take a hard look at the matter. *Cf. Sierra Club*, 786 F.3d at 1223 (upholding BLM’s conclusion that an easement for a road over federal land had independent utility and was not a connected action to a private wind farm, because BLM considered and analyzed the “technical and economic feasibility” of building an access road on private land); *see also Colo. Wild v. U.S. Forest Serv.*, 435 F.3d 1204, 1213 (10th Cir. 2006) (requiring a “reasoned basis for agency action”).

Here, as in *Hammond*, the only facts in the administrative record to support BLM’s conclusion that the South Project could proceed independently are “self-serving and unreliable.” *See* 370 F. Supp. 2d at 251–53. Enefit’s unwillingness to expend further resources until BLM makes a decision on the Utility Project is “self-serving” because it allows the company to use unfounded assumptions to its advantage, stacking the deck in favor of the South Project by presuming it would happen regardless of BLM’s decision making. *See id.* It is also “unreliable” because it is not borne out in reality. *See id.* at 253. If Enefit were capable of completing the South Project on its own, presumably it would have begun doing so sometime over the past five years. Its delay pending BLM action underscores that it depends on the Utility Project more than it will admit. Due to Enefit’s delay, BLM has “good cause” to believe that information it has received from Enefit is inaccurate or exaggerated. *See id.* at 252. Thus, the burden—which is normally on plaintiffs to show that an agency’s decision was unreasonable or an abuse of discretion—shifts to BLM to substantiate Enefit’s claims, rather than taking them at face value. *See id.* at 252 (holding that “when the agency has good cause to believe that information is inaccurate or exaggerated, it has a duty to substantiate it”); *see also Env’t. Law & Policy Ctr.*, 470 F.3d at 683 (requiring agencies to “exercise a degree of skepticism” when dealing with self-serving statements); *Am. Rivers*, 2018 WL 3320870, at \*12–\*13 (holding that the agency had to undertake “independent verification” of an applicant’s own evidence, which was “unmoored from any empirical, scientific, or otherwise verifiable study or source”).

In this case, the U.S. Environmental Protection Agency (“EPA”) submitted a letter to BLM discussing the Draft EIS, as it did in *Hammond*. This letter states that “the analysis of the South Project falls substantially short of the level of detail and rigor appropriate to evaluate the environmental impacts of the project before BLM.” *See* EPA DEIS Comments, FEIS Appx. I1-1. The EPA letter also notes that “[a]s a result of Enefit’s refusal to provide sufficient information to support a quantified effects analysis, the Draft EIS does not take a hard look at the potential indirect impacts associated with the South Project.” *Id.* at I1-2. The letter adds that the DEIS “makes the unsupported assertion that the No Action Alternative (denial of the ROW) would lead to the project proponent supplying the necessary utilities and shipping the oil produced via other means, primarily trucking. This assumption leads to other conclusions in the Draft EIS which are likewise unsupported by analysis . . . . Because this conclusion is foundational to an appropriate analysis of impacts, it cannot be asserted without investigation and economic analysis to determine if trucking in fact is feasible or likely, and whether the additional expense of trucking would make the project uneconomic or would significantly change either the scope or the timing of the oil shale development.” *Id.* at I1-11.

The import of the EPA letter has not diminished since the release of the FEIS in May 2018. BLM's response to EPA's comments does not address EPA's underlying concern, which is that BLM and Enefit have not demonstrated the independent viability of the South Project. Instead, BLM's response simply repeats the same claims in the DEIS that the South Project "will proceed to full buildout regardless of the BLM decision to be made for the Utility Project." FEIS Appx. I1-1. The FEIS also reports that Enefit has "reiterated" that the South Project will move forward regardless of BLM's ultimate decision on the ROW applications, and that BLM "has no jurisdiction over the South Project." *Id.* at I1-1–I1-2. But these explanations do nothing to alleviate EPA's (and the Trust's) original concern: that the South Project may not even be viable unless the Utility Project is approved. Reiterating the same self-serving assertions is unavailing.

Enefit's proposed substitutes to supply the South Project absent the Utility Project each require BLM's independent scrutiny, as their technical and economic feasibility are highly questionable. And while BLM sought additional explanation from Enefit, and received two letters from the company on these issues, Enefit's responses are unconvincing, and BLM failed to undertake any independent analysis of Enefit's dubious contentions.<sup>1</sup>

Alternative sources of water:

- Enefit claims an alternate water supply option is to "[u]se trucks to provide daily/weekly delivery of water." FEIS 4-165. To provide the 15 cubic feet per second ("cfs") (6,732.47 gallons per minute ("gpm")) needed to operate the South Project, however, Enefit would need to run one large capacity (9,000-gallon) tanker truck from the Green River to the South Project every 80 seconds, twenty-four hours a day, for thirty years. This is almost certainly an insurmountable technical and financial obstacle.
- Enefit claims it could immediately use another water right, #49-1639, to supply the South Project, a groundwater right with an approved point of diversion located within Enefit's private property. FEIS 4-165; Enefit Nov. 2016 Letter to BLM (Exhibit 2) at 7. The maximum quantity of #49-1639 is 48 acre-feet per year, yet Enefit's projected water needs run to 10,866 acre-feet per year. FEIS at 4-66, 4-111. Water right #49-1639 thus would supply less than one-half of one percent of Enefit's total water needs for the South Project.
- Enefit claims it could convert several groundwater monitoring wells on its private property to diversion wells, using six 250-horsepower units to produce 15 cfs of groundwater. FEIS 4-165; Enefit Nov. 2016 Letter (Exhibit 2) at 7. But Enefit could not use that groundwater for the South Project without making a significant investment in reverse osmosis treatment to remove high levels of dissolved solids.

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<sup>1</sup> See letter of R. Clerico, Enefit to G. Torres, BLM (Nov. 18, 2016) ("Enefit Nov. 2016 Letter"), attached as Exhibit 2; letter of R. Clerico, Enefit to G. Torres, BLM (Feb. 28, 2017) ("Enefit Feb. 2017 Letter"), attached as Exhibit 3.

Alternative sources of natural gas:

- To supply the natural gas necessary for South Project operations, Enefit claims that it could connect to the existing Summit MidStream Partners Red Rock Gathering natural gas system, or to natural gas pipelines owned by Enterprise Products Partners. FEIS 4-164; Enefit Nov. 2016 Letter (Exhibit 2) at 6. Utilizing Summit’s unprocessed natural gas, however, would require Enefit to install a costly gas cleaning unit at the South Project plant site. FEIS 4-164.

Alternative sources of electricity:

- Enefit claims it could use an existing 69-kV transmission line to supply electricity to the South Project, and depending on its available capacity, could use a combination of natural gas from Summit or electric generators running on trucked-in diesel fuel. FEIS 4-165; Enefit Nov. 2016 Letter (Exhibit 2) at 6. Enefit anticipates needing 125 to 200 MW of electric capacity, FEIS 4-166, whereas the 69-kV line may not have more than 5 to 6 MW of available capacity, *id.* at 4-165. Enefit’s proposed electricity alternative would thus supply 2.5 to 4.8 percent of Enefit’s total electric demand. Accordingly, Enefit would primarily rely on natural gas (necessitating even more supply through alternative pipelines) or trucked diesel to supply on-site generators. *See* Enefit Feb. 2017 Letter (Exhibit 3) at 3.

Alternative means to deliver synthetic crude oil to market:

- Enefit claims that it could truck oil product 10 miles north of the South Project to an existing Chevron pipeline. FEIS 4-166; Enefit Nov. 2016 Letter (Exhibit 2) at 7. Based on the South Project’s anticipated production of 50,000 barrels of synthetic crude oil per day (2.1 million gallons per day), and considering a tanker truck can hold approximately 9,000 gallons, Enefit would have to run 233 tanker trucks every day, or about 10 tanker trucks per hour—one truck roughly every 6 minutes, for 24 hours per day for 30 years. *See* Michael Merry, “What is the Capacity of a Tanker Truck?” *Sciencing* (Apr. 24, 2017), <https://sciencing.com/capacity-tanker-truck-7505350.html>. This proposition, like trucking water, is a potentially insurmountable technical and economic obstacle. Enefit has admitted that trucking oil product to market “would ultimately prove to be neither practical nor economically feasible at target South Project production levels” due to the “already heavily stressed . . . over-the-road crude oil transport from the Uinta Basin region” and truck transport being “nearly 1,400% more expensive than pipeline transport.” Letter of R. Clerico, Enefit to BLM, “EAO Response to Data Gaps” (Mar. 22, 2015), attached as Exhibit 4. (This estimate for percentage increase over pipeline transport could also be relevant to the cost of transporting water by truck versus pipeline, but BLM has not asked Enefit for this information, and has not verified Enefit’s claims that truck transport of any relevant commodity is economically feasible.)

In each of the above cases, BLM’s discussion of these alternatives merely parrots the statements in Enefit’s letters. In many cases, the discussion in the FEIS is a word-for-word copy of Enefit’s

statements in its letters.<sup>2</sup> It is thus clear that BLM has done little besides take Enefit's word for it, without doing any independent investigation or review at all.

BLM failed to independently analyze the feasibility of Enefit's proposed substitutes for supplying the South Project in the absence of the Utility Project. And given Enefit's own admission that one of these supposedly practicable alternatives is "neither practical nor economically feasible," they are highly suspect. *See* Letter of R. Clerico, Enefit to BLM, "EAO Response to Data Gaps" (Mar. 22, 2015) (Exhibit 4). Thus, BLM's assumption that the South Project would proceed to full buildout and development regardless of the Utility Project's approval, and its conclusion that the South Project has independent utility and thus is not a connected action to the Utility Project, was arbitrary, capricious, and an abuse of discretion. Nothing in the documents Enefit provided to BLM since publication of the DEIS supports BLM's continued erroneous assumptions.<sup>3</sup>

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<sup>2</sup> *Compare* Enefit Feb. 2017 Letter (Exhibit 3) at 3 *with* FEIS 4-164–4-165 (verbatim copying of Enefit's alternative water supply discussion, e.g. "EAO [The Applicant] owns water right No. 49-1639, a groundwater right with an approved point of diversion located within the South Project private property boundary and an existing six [6]-inch diameter, 750-foot-deep well completed in the Douglas Creek [F]ormation.") *Compare also* Enefit Feb. 2017 Letter (Exhibit 3) at 1–2 *with* FEIS 4-164 (verbatim copying of Enefit's alternative natural gas supply discussion, e.g. "Summit's gas on this existing pipeline is unprocessed; therefore, Enefit [the Applicant] would need to install a gas cleaning unit at the South Project plant site to remove natural gas liquids and improve gas quality."). *Compare also* Enefit Feb. 2017 Letter (Exhibit 3) at 2–3 *with* FEIS 4-165–4-166 (verbatim copying of Enefit's alternative electric supply discussion, e.g. "The substation facilities within the South Project plant site would likely be smaller since they would be configured to import a smaller quantity of electricity (only that necessary [needed] for construction and startup) and would not be configured to return electricity to the grid at full operation."). *Compare also* Enefit Feb. 2017 Letter (Exhibit 3) at 4 ("In the absence of a new pipeline interconnection to regional crude oil transportation systems (i.e. the No Action alternative), EAO would truck our product oil.") *with* FEIS 4-166–4-167 ("Without the Utility Project, the Applicant would truck their product oil.") (verbatim copying of Enefit's alternative product oil delivery discussion, e.g., "In this instance, the tank farm would still be present on the South Project plant site, and centrifugal pumps would still be deployed. However, rather than sizing those pumps for delivery across 11 miles of pipeline, the pumps would be sized only large enough to accommodate filling of tanker trucks.").

<sup>3</sup> BLM cannot argue that it lacks expertise to make judgments about Enefit's ability or willingness to undertake the South Project absent the ROWs. It is abundantly clear that without the subsidy of the ROWs, Enefit faces far greater expenses and significant practical hurdles in implementing the South Project. It is also clear that such additional expenses and hurdles will make it far less likely that the South Project will ever be built, and will, at a minimum, significantly impact how, and how much, shale oil Enefit will produce. BLM's minimal analysis—and its acceptance of Enefit's self-serving assertions of the South Project's independent viability—ignore this reality.



**B. The Utility Project lacks independent utility because its only immediate purpose is to service the South Project and any other potential uses are remote and speculative.**

BLM is equally flawed in its conclusion—presented for the first time in the FEIS—that the Utility Project has independent utility to serve some non-oil shale related project. The FEIS asserts that the Utility Project “could be used to facilitate and service potential future development of oil and gas or other oil shale development” on or around Enefit’s private property by parties other than Enefit, “independent of the completion of the South Project.” FEIS 1-5. Additionally, BLM noted that the Utility Project could be useful even without the South Project because Enefit’s private land “could be utilized for development of a pipeline terminal, oil upgrading facility, or similar use to provide access to an interstate common carrier crude oil system all in addition to (or as an alternative to) the activities proposed for the South Project.” FEIS 1-5.<sup>4</sup> And Enefit’s private property could be used “for many additional conditional uses subject to approval by the County under a Conditional Use Permit,” some of which presumably could utilize the Utility Project. *Id.*

These statements merely parrot Enefit’s unsupported assertions without any independent analysis. *See* Enefit Nov. 2016 Letter (Exhibit 2); Enefit Feb. 2017 Letter (Exhibit 3); *see also Hammond*, 370 F. Supp. 2d at 251–53 (“unsubstantiated assurances” and “self-serving statements or assumptions” cannot substitute for the agency’s own analysis and investigation in the preparation of an EIS). The FEIS presents no information suggesting that any other parties are seeking to develop oil, gas, or oil shale resources on or around Enefit’s property or that those parties would seek to utilize the Utility Corridor. Moreover, BLM provided no information that Enefit plans to use its private property for development of a pipeline terminal or oil upgrading facility. BLM does not assert that there is any “immediate purpose” for the Utility Project apart from servicing the South Project, and the supposed alternative uses of the Utility Project are remote and speculative. *See Wilderness Workshop*, 531 F.3d at 1230 (proposed pipeline has independent utility and is not a connected action to future gas well development because applicant has an “immediate purpose for building” the pipeline “that has nothing to do” with the potentially connected action); *Sierra Club*, 786 F.3d at 1226 (identifying reasons for improving a federal road apart from providing access to a private wind farm).

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<sup>4</sup> Enefit’s own statements confirm that it has failed to adequately state the purpose and need of the Utility Project. In its November 18, 2016 letter to BLM, Enefit says that oil shale development is “certainly not the only possibility for a block of private land this significant . . . . EAO could develop any number of alternative projects on the Enefit South private property with the requested utilities, should that situation become preferred.” Enefit Nov. 2016 Letter (Exhibit 2) at 10. It is inconsistent for Enefit to vigorously assert that the South Project will be fully developed regardless of BLM’s decision on the Utility Project, and on the other hand to claim that it does not know what the South Project parcel will even be used for. Although the South Project’s completion is still the reasonably foreseeable outcome of Utility Project approval, statements from BLM and Enefit show that it is hardly a foregone conclusion. Against this backdrop, it was arbitrary and capricious for BLM to conclude that its decision on the Utility Project will have no bearing on whether Enefit can and will develop the South Project independently, using alternative means.

The independent utility test demands more than conjecture about how the Utility Project *might* be used. The question is whether there is an authentic justification for building the Utility Project without the South Project. Yet the FEIS offers no such justification. To the contrary, the only logical conclusion is that the Utility Project does not have independent utility, because no immediate, non-speculative uses of the Utility Project exist absent the South Project's development. *See Wilderness Workshop*, 531 F.3d at 1230. BLM's parroting of Enefit's unsupported proposed alternative uses of the Utility Project, without any independent analysis, cannot justify BLM's conclusion that the Utility Project would be constructed regardless of the South Project. *See Hammond*, 370 F. Supp. 2d at 251–53.

Therefore, because neither the South Project nor the Utility Project has independent utility, BLM's conclusion that the South Project is not a connected action is arbitrary, capricious, and an abuse of discretion. *See Sierra Club*, 786 F.3d at 1226 (two projects are connected actions unless "each of two projects" has independent utility). BLM must prepare a revised EIS to analyze the South Project as connected action to the Utility Project, including the South Project's direct, indirect, and cumulative impacts.

### **III. BLM failed to consider a reasonable range of alternatives to the proposed action.**

The requirement that agencies consider alternatives to the action under review is "the heart of the environmental impact statement." *Fuel Safe Washington v. Fed. Energy Regulatory Comm'n*, 389 F.3d 1313, 1323 (10th Cir. 2004) (quoting 40 C.F.R. § 1502.14). Therefore, agencies are required to "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14(a).

#### **A. BLM failed to consider a true no action alternative.**

One alternative agencies must consider is the "no action" alternative." 40 C.F.R. § 1502.14(d). The no action alternative establishes a "baseline for measuring the effects of the proposed action". *Biodiversity Conservation All. v. U.S. Forest Serv.*, 765 F.3d 1264, 1269 (10th Cir. 2014); *see also Friends of Se.'s Future v. Morrison*, 153 F.3d 1059, 1065–66 (9th Cir.1998).

In requiring consideration of a no action alternative, agencies must "compare the potential impacts of the proposed major federal action to the known impacts of *maintaining the status quo*. In other words, the *current level of activity* is used as a benchmark." *Biodiversity Conservation All.*, 765 F.3d at 1269 (quoting *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1040 (10th Cir. 2001)) (emphasis added). The no action alternative "may be thought of in terms of *continuing with the present course of action* until that action is changed." *Id.* (citation omitted); *see also Am. Rivers v. Fed. Energy Regulatory Comm'n*, 201 F.3d 1186, 1201 (9th Cir.1999).

Here, the FEIS purports to analyze two alternatives: the proposed action of granting the five ROWs and constructing the Utility Project and the no action alternative of denying the five ROWs with no Utility Project construction. Both the proposed action and no action alternative are premised on the full buildout and development of the South Project. FEIS 4-2 ("No Action Alternative assumes that the South Project would go forward irrespective of whether the BLM

approves the rights-of-way grants”). But as explained in Section II.A. above, BLM’s assumption that the South Project would proceed to full buildout regardless of the Utility Project’s approval—the no action alternative—was arbitrary, capricious, and an abuse of discretion because BLM failed to independently analyze the feasibility of Enefit’s proposed substitutes for supplying the South Project absent the Utility Project. And BLM’s reliance on that arbitrary and capricious assumption “as the basis for distinguishing between the no action alternative and the preferred alternative” also “render[s] its comparison of the preferred alternative . . . and the no action alternative arbitrary and capricious.” *WildEarth Guardians v. BLM*, 870 F.3d 1222, 1233–34, 1238 (10th Cir. 2017). In other words, because BLM unlawfully assumed that the South Project will proceed to full buildout regardless of the Utility Project’s approval, the no action alternative based on BLM’s flawed assumption is unlawful too.

The no action alternative must assess the impacts of “maintaining the status quo” at the “current level of activity.” *Biodiversity Conservation All.*, 765 F.3d at 1269. Because Enefit’s supposed substitute water, natural gas, electricity, and oil product delivery for the South Project absent the Utility Project are speculative and remote, and BLM has not analyzed their feasibility, the maintenance of the status quo at the current level of activity in the event of BLM’s denial of the Utility Project under the no action alternative would be the continuation of no development at the South Project. *See* FEIS ES-3 (“at this preliminary stage,” not even “detailed engineering and design information about the South Project” is known). BLM’s assumption of full South Project buildout in the no action alternative fails to “sharply defin[e]” the comparative environmental issues between the proposed action with South Project development and a no action alternative under which the South Project is not developed. *See* 40 C.F.R. § 1502.14. Thus, BLM has failed to provide a “clear basis for choice among options by the decisionmaker and the public.” *See id.*; *see also WildEarth Guardians*, 870 F.3d at 1235.

Even if Enefit maintained some ability to construct the South Project absent the Utility Project, BLM has not analyzed the possibility that Enefit would rationally scale back the South Project from its full buildout and production capacity. With the “alternative means” discussed above, Enefit’s cost of production is certain to increase, and although BLM has failed to estimate (and Enefit has failed to provide) the precise increase, there is a distinct possibility of decreasing returns to scale given the likelihood of increased costs associated with truck transport. In other words, the cost of procuring the utilities and export capacity for 50,000 barrels per day could be more than double the cost for 25,000 barrels per day, or more than ten times the cost for 5,000 barrels per day. Nonetheless, BLM has not analyzed or even considered any possible reduced output under the no action alternative, just as it failed to consider the possibility that the South Project may not be viable at all without the requested utilities. Instead, it has blindly repeated—as if repetition could substitute for rigor—that the South Project “will proceed to full buildout regardless” of BLM’s decision on the Utility Project. *See, e.g.*, FEIS Appx. I1–I1-4, I1-9–I1-12, I1-19, I1-21, I4-1–I4-2, I5-2, I6-1.

Due to these deficiencies, BLM must revise or supplement the FEIS to analyze a true no action alternative in which the Utility Project is not constructed and, as a result, the South Project is not developed or is reduced in scale. Otherwise, BLM eliminates any meaningful difference between the proposed action and no action alternative, fails to establish a “baseline for

measuring the effects of the proposed action,” *Biodiversity Conservation All.*, 765 F.3d at 1269, and rips the “heart” out of the FEIS. *See* 40 C.F.R. § 1502.14.

- i. **BLM failed to take a hard look at the impacts of the no action alternative, even assuming Enefit would build the South Project without federal ROWs.**

A separate problem is that even *if* the South Project could proceed to full buildout absent the Utility Project, BLM nonetheless failed to take a hard look at the South Project’s impacts under the no action alternative. On one hand, BLM is using the putative plausibility of Enefit’s asserted “alternative means” as an excuse for its determination that its selection of an alternative will not affect Enefit’s ability to complete the South Project. FEIS ES-13. On the other hand, BLM does not actually analyze the feasibility or expected impacts of these purported “alternative means.”

Although Enefit, not BLM, would implement the alternative means, BLM nonetheless was required to analyze them in the FEIS because they are reasonably foreseeable private actions that would stem from the government taking no action. CEQ’s “Forty Most Asked Questions” concerning NEPA explain that analysis of the no action alternative requires the agency to compare the “resulting environmental effects from taking no action” with “the effects of permitting the proposed activity or an alternative activity to go forward.” 46 Fed. Reg. 18026-01, 18027 (Mar. 23, 1981). Where a choice of “no action” by the agency would result in “predictable actions by others,” this consequence of the no action alternative should be included in the analysis. *Id.* “For example, if denial of permission to build a railroad to a facility would lead to construction of a road and increased truck traffic, the EIS should analyze this consequence of the ‘no action’ alternative.” *Id.*

In many instances in the FEIS, BLM has presumed that Enefit’s suggested “alternative means” could replace the Utility Project for water, natural gas, electricity, and product delivery. But the FEIS does not analyze the tradeoffs between the proposed action and these private actions it contends are predictable under the no action alternative. BLM added section 4.4 to the FEIS to describe alternative means of completing the South Project, but BLM’s position is that it is “not required to compare or contrast alternatives or develop mitigation for the South Project, and analysis of the South Project itself is not necessary for a reasoned choice between Utility Project alternatives for the purposes of NEPA.” FEIS Appx. I1-1. BLM is ignoring the requirement that an agency analyze the predictable private actions resulting from the no action alternative. Section 4.4 contains little, if any, discussion of the environmental effects of the alternative means as compared to the Utility Project.

**Concerning water**, following Enefit’s lead, BLM fails to identify what it believes to be the most likely alternative for supplying water to the South Project; instead it mentions several possibilities, and does not analyze the environmental impacts of any of them.

First, BLM proposes that Enefit could use water from right #49-258 “with its approved points of surface diversion on the White River, to be accessed via the Applicant’s private property adjacent to the White River,” using “trucks to provide daily/weekly delivery of water.” FEIS 4-

165. But BLM does not analyze the foreseeable environmental impacts of this option, including greater air pollution and traffic from the high number of truck trips required per day. Nor does it weigh the no action alternative's smaller footprint, if the ROWs are not built, against greater truck traffic or greater groundwater depletion under Enefit's proposed alternative means. Nor does BLM address the impacts of another obvious alternative should water be withdrawn from the White River: a shorter pipeline ROW across BLM land. BLM fails to explain why the agency fails to address such a shorter pipeline as a potentially reasonable alternative to the proposed action.

Second, BLM mentions the possibility of creating a groundwater wellfield using pumps on Enefit's private property, but it does not discuss the groundwater or surface water depletion that would occur from pumping 15 cfs from the ground. FEIS 4-165. Groundwater pumping would change the manner of depletion of surface waters, both in place and in timing, because groundwater pumping causes lagged, if any, depletions to surface water. The extent of impacts to groundwater, and the link between groundwater and surface water on the South Project property, are nowhere disclosed to the public, despite the fact that such information is necessary to understand whether and how groundwater withdrawals of the scale Enefit contemplates could deplete aquifers and/or surface flows in the Upper Colorado River and its tributaries. The impacts of groundwater pumping to Green and White River flows are, in fact, likely to be less (if there are impacts at all), making such an alternative far less damaging than the proposed action to imperiled fish. *See* section III.B., *infra*. Instead of any of the required analysis between alternatives, the FEIS states that the no action alternative's impacts on water availability are the "Same as Utility Project," except that "the planned utility corridors would not be constructed and associated impacts would not occur." FEIS 2-48. This conclusion lacks any grounding in the record, and is inconsistent with differences between no action and the proposed action that BLM itself has highlighted elsewhere in the FEIS.

BLM excuses its failure to disclose impacts to groundwater by alleging that "disclosure of impacts on ground water from the South Project are not necessary to inform a reasoned decision between the Utility Project alternatives." FEIS Appx. I6-66. This statement is false. The use of groundwater would have appreciably different impacts on water depletions in the Upper Colorado River Basin, because those depletions would be less, or would occur later in time, and at a different location. Thus, those impacts are critical to understanding the difference between the proposed action and the no action alternative for the water pipeline. The FEIS also says that if Enefit pumps groundwater, it "may require" additional reverse osmosis units to remove dissolved solids. However, it does not analyze the air, energy, financial, or other environmental or social impacts of running these units. FEIS 4-165.

In sum, BLM has failed to take a hard look at the impact of the "no action" alternative concerning the water pipeline, even assuming Enefit could build the South Project without the pipeline.

**Concerning natural gas**, Enefit states that if BLM does not approve the ROW for a natural gas line, then Enefit will use the 6-inch Summit MidStream pipeline approximately 0.5 miles from the South Project plant site. FEIS 4-164. Although BLM admits that Enefit would need to install a gas cleaning unit so that the South Project could use the unprocessed Summit gas, it

does not disclose the engineering specifics or environmental impacts of such a unit. Nor does BLM weigh those impacts against the impacts of the proposed action (e.g., no need for a gas cleaning unit, but ground disturbance over nine miles due to gas line construction across BLM's ROW). The FEIS also does not discuss the environmental impacts of an alternative hydrogen supply method for hydrotreating, a "partial oxidation" ("POX") unit. It does not discuss the environmental tradeoffs between the proposed gas line, the alternate Summit gas line, or the alternative of providing natural gas via trucks (*see* FEIS 4-164). The physical footprint (and thus the environmental impacts) on public land from a shorter pipeline will be less using an existing pipeline, as compared to building a new one, especially because the footprint of a new POX unit would likely be small.

The FEIS also suggests, again without analysis, that "[t]rucks could provide daily/weekly delivery of natural gas." FEIS 4-164. Although the FEIS mentions that the risk of spills "could result" from increased truck traffic (FEIS 4-190), it does not weigh this environmental risk against the relative risks of the other means of providing natural gas to the South Project. Enefit's November 18, 2016 letter to BLM claims that the Summit pipeline "courses through EAO's Enefit South private land parcel." Enefit Nov. 2016 Letter (Exhibit 2) at 6. However, it is not clear whether the existing pipeline is already on Enefit's property, as the FEIS says that the Summit pipeline is "approximately 0.5 mile west of the South Project plant site. FEIS 4-164. If the gas line would need to be connected to Enefit's property, this would require an additional BLM ROW, which BLM has not analyzed.

**Concerning electricity**, the FEIS does not discuss the environmental consequences of the possibility of upgrading the existing 69-kV line. Nor does it mention that such an upgrade would itself require BLM environmental review, because the existing 69-kV line crosses BLM land. For the additional alternative of onsite generation using diesel or natural gas generators, BLM has not discussed the additional truck trips or pipeline capacity that would be needed to provide these fuels for electric production, on top of existing needs. BLM also does not discuss the possibly lower environmental impact of using this existing 69-kV line; because this line is already present on Enefit's property, this alternative would avoid building the 30 miles of 138-kV line in the proposed action. *See* FEIS ES-1. Nor does BLM address this possibility as a reasonable alternative that BLM would implement, given that upgrading the existing line would require access across, and thus BLM approval for, the upgrade. Failure to analyze such an alternative violates NEPA.

**For product oil delivery**, Enefit's identified alternative to the Utility Project pipeline is to truck its synthetic crude oil output. Although BLM concedes that the "risk of spills of solid and hazardous waste could result from increased truck traffic," it does not quantify these risks or weigh them against the risks inherent in the proposed alternative (because pipelines also spill, and because resulting spills are much larger than spills from a single truck).

Additionally, the FEIS provides no map showing the location of any the infrastructure that would be used under the no action alternative. The maps provided in the FEIS at Appendix A do not show the Summit MidStream pipeline or gas line that are supposed to be a half-mile west of the plant site. The map does show a pair of pipelines about 8 miles north, and 4 miles northwest, of the plant site, but these are not the pipelines discussed in the no action alternative. The lack of

this information makes it impossible for BLM or the public to understand the tradeoffs that may be involved, or resources at stake in, for example, upgrading the existing 69-kV line as opposed to using the proposed ROW.

## ii. Summary.

The utter lack of detail in BLM’s analysis of the no action alternative means that BLM did not—indeed, could not—weigh the environmental tradeoffs between the two actions it has presented in the FEIS. NEPA requires agencies to ascertain pertinent information on the relative costs and benefits of alternatives, such that they can “properly evaluate the severity of the adverse effects.” *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989). Without this information, agencies are fundamentally unable to fulfill NEPA’s central aim: “requiring agencies to look before they leap.” *See Diné Citizens Against Ruining Our Environment v. Jewell*, 2018 WL 1940992, at \*17 (D.N.M. Apr. 23, 2018). Instead, it is obvious that BLM has put the cart before the horse: it has chosen to facilitate Enfit’s development of oil shale at the South Project, and with this decision as a starting point, it conducted its NEPA process to justify that decision. It has released two NEPA documents (the DEIS and the FEIS) that paint the South Project as a foregone conclusion—thus purportedly relieving BLM of any duty to consider that project’s impacts. This is the opposite of how NEPA is supposed to work; it is a violation of the bedrock principle that a NEPA document should inform the agency and guide its decision-making process—not merely serve as a post-hoc justification for a decision the agency has already made. *See Pennaco Energy, Inc. v. U.S. Dep’t of the Interior*, 377 F.3d 1147, 1159 (10th Cir. 2004) (“Agencies are required to satisfy [] NEPA before committing themselves irretrievably to a given course of action, so that the action can be shaped to account for environmental values.”) (internal quotations omitted). In sum, BLM continues to ignore the tradeoffs at stake in subsidizing a highly destructive fossil fuel mining and production facility.

### **B. BLM failed to consider other reasonable alternatives to the proposed action that would reduce the Utility Project’s impacts on public lands.**

CEQ regulations require agencies to “rigorously explore and objectively evaluate all reasonable alternatives,” and to explain why any alternatives were eliminated. 40 C.F.R. § 1502.14(a). Consideration of alternatives ensures that the decision maker “has before him and takes into proper account all possible approaches to a particular project.” *Calvert Cliffs’ Coordinating Comm. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971). The agency must consider a “range of alternatives, even if it does not consider every available alternative.” *Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1181 (9th Cir. 1990). An agency is not required to consider alternatives that are unreasonable in light of the project’s purposes, although it cannot define its purpose so narrowly that only one alternative will do. *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1174 (10th Cir. 1999).

In addition to the proposed action and the no action alternative, BLM initially evaluated 32 alternatives, including various utility alignments, river crossing locations and methods, and water supply locations. FEIS 2-37. Each of these 32 alternatives was proposed by Enfit, and none were carried forward by BLM for detailed analysis. *Id.* Of the 32 alternatives to the proposed action, not one proposed the approval of some, but not all, of the five ROWs. *See* EPA DEIS

Comments, “Additional Comments” at 4, FEIS Appx. I1-11 BLM’s all-or-nothing approach to alternatives in the FEIS is striking because, as discussed above, BLM’s assumption of full South Project buildout in the no action alternative is based on Enefit’s assertion that it has independent substitutes for each aspect of the Utility Project. This means that some of those substitutes could be combined with parts of the Utility Project to form an alternative that is neither an all-out grant nor all-out denial of the five ROWs. BLM justifies the no action alternative’s assumption of full South Project buildout on the plausibility—albeit unsupported and unanalyzed—of substitute water, natural gas, electricity, and oil product delivery for the South Project absent the Utility Project. Thus, it is unreasonable that BLM failed to consider an alternative to the proposed action that incorporates some of the supposed substitute utilities, which would lead it to approve fewer than all five requested ROWs.

For example, based on Enefit’s assertions, BLM noted that Enefit “could contract with Mapco to utilize natural gas from their two existing 10-inch diameter natural gas liquids pipelines within the South Project site,” and could supply electricity through “[o]n-site power generation in the boiler(s) by combusting natural gas.” FEIS 4-164, 4-166. Additionally, Enefit supposedly could obtain all of the water needed for the South Project simply by changing the points of diversion of its water right #49-258 to a groundwater well field located on its private property within the South Project area and installing six submersible pumps. If true, BLM could grant ROWs for an access road and oil product pipeline, but deny ROWs for water and natural gas pipelines and electric transmission lines and thereby avoid disturbing more than 600 acres of public lands, while reducing water depletions in the Upper Colorado River Basin, thus limiting impacts to imperiled fish. *See* FEIS 2-3 – 2-4, Table 2-2.

Considering BLM’s obligation to “[r]igorously explore and objectively evaluate all reasonable alternatives,” 40 C.F.R. § 1502.14(a), and to “take any action necessary to prevent unnecessary or undue degradation of the lands,” 43 U.S.C. § 1732(b), BLM must independently analyze the technical and economic feasibility of Enefit’s claimed substitute supplies for the South Project. If BLM determines that Enefit’s substitute utilities for the South Project are technically and economically feasible, BLM must consider an alternative to the proposed action that approves fewer than all five ROWs.

#### **IV. BLM failed to take a “hard look” at the South Project’s anticipated impacts.**

NEPA has two fundamental purposes: (1) to guarantee that agencies take a “hard look” at the consequences of their actions before the actions occur by ensuring that “the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts”; and (2) to ensure that “the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision.” *Robertson*, 490 U.S. at 349; *see also* 42 U.S.C. § 4332(C)(i). By requiring agencies to take a “hard look” at the environmental consequences of their actions and to provide the relevant information to the public, NEPA ensures that the “most intelligent optimally beneficial decision will ultimately be made.” *Or. Nat. Desert Ass’n v. BLM*, 625 F.3d 1092, 1099–100 (9th Cir. 2010) (quoting *Calvert Cliffs’ Coordinating Comm.*, 449 F.2d at 1114). By failing to take the required hard look at a variety of impacts, the FEIS violates NEPA and undermines both of its purposes.



**A. BLM's justifications for failing to analyze the South Project's impacts lack merit.**

BLM acknowledges that although the South Project's significant effects on the human environment are reasonably foreseeable, the FEIS's analysis of the South Project's effects are "limited" because "at this preliminary stage, detailed engineering and design information about the South Project itself is not known." FEIS 1-5; *see also* DEIS ES-3 (making similar claim). BLM justifies its lack of South Project information and its resulting cursory, vague, and uninformative cumulative impacts<sup>5</sup> analysis by citing 40 C.F.R. § 1502.22. This regulation provides that an agency must obtain and include in the EIS information on "reasonably foreseeable significant adverse impacts" that is "essential to a reasoned choice among alternatives" if the "costs of obtaining" such information "are not exorbitant." *Lee v. U.S. Air Force*, 354 F.3d 1229, 1241 (10th Cir. 2004) (internal quotations omitted).

BLM's failure to include in the FEIS detailed information on the South Project, and its resulting failure to take a "hard look" at the South Project's impacts, is not excused under 40 C.F.R. § 1502.22. First, the incomplete information relevant to the reasonably foreseeable significant adverse impacts of the South project "is essential to a reasoned choice among alternatives." Second, BLM has not established that the overall costs of obtaining the missing South Project information are exorbitant. Even if the missing South Project information is exorbitant, BLM failed to include in the FEIS the requirements of 40 C.F.R. § 1502.22(b)(2), (3), and (4) regarding unavailable relevant information.

**1. The incomplete information on the South Project's adverse impacts is essential to a reasoned choice between the alternatives.**

Throughout the FEIS and BLM's responses to public comments on the DEIS, BLM repeatedly justifies its "limited," uninformative South Project impacts analysis by arguing that the South Project's unknown information is "not essential to a reasoned choice between the alternatives because the South Project will proceed to full buildout regardless of the BLM's decision [on the Utility Project]." *See, e.g.*, FEIS 4-97, 4-100, 4-101, 4-111, 4-115, 4-175, 4-179, 4-195; FEIS Appx. II-1–II-4; FEIS Appx. I6-1–I6-2, Appx. I6-32, Appx. I6-89, Appx. I6-98, Appx. I6-129.

As explained in section III.A, *supra*, because BLM's assumption that the South Project will proceed to full buildout regardless of the Utility Project's approval is arbitrary, capricious, and an abuse of discretion, the no action alternative based on BLM's arbitrary and capricious

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<sup>5</sup> BLM initially considered the South Project a "non-federal connected action" (*see* DEIS ES-1), but in the FEIS it changed course and chose to analyze the South Project only as a cumulative impact. FEIS ES-3 ("Because the South Project is not a federally proposed action, the impacts that were previously characterized as direct or indirect in the Draft EIS have been moved to the cumulative impacts section of this Final EIS."). As these comments have explained, the South Project is a connected action, and BLM's decision to discuss only its cumulative effects in the FEIS was arbitrary and capricious. In addition, BLM arbitrarily and capriciously failed to consider the South Project as an *indirect* effect of the proposed action. *See* 40 C.F.R. § 1508.8(b).

assumption is unlawful. *See WildEarth Guardians*, 870 F.3d at 1233–34, 1238. Enefit’s supposed substitute water, natural gas, electricity, and oil product delivery for the South Project absent the Utility Project are speculative and remote, and their feasibility is as yet unanalyzed by BLM. Thus, the maintenance of the “status quo” at the “current level of activity,” *Biodiversity Conservation All.*, 765 F.3d at 1269, in the event of BLM’s denial of the Utility Project under the no action alternative would be the continuation of no development at the South Project.

BLM incorrectly contends that the South Project’s unknown information is not essential to a reasoned choice between alternatives, based on the South Project proceeding to full buildout under both the no action alternative and the proposed action. Moreover, the no action alternative depends on BLM’s arbitrary and capricious assumption of full South Project buildout. Accordingly, BLM’s conclusion that detailed information about the South Project is not necessary to a reasoned choice between the alternatives itself is arbitrary, capricious, and an abuse of discretion. In other words, BLM’s central abuse of discretion is merely parroting Enefit’s assertion, without any independent analysis, that the South Project will proceed to full buildout regardless of the Utility Project’s approval. This makes the resulting no action alternative—and BLM’s conclusion that the South Project’s unknown information is not essential to a reasoned choice between the alternatives—arbitrary, capricious, and an abuse of discretion.

**2. BLM has not established that the costs of obtaining the missing South Project information are exorbitant.**

Because BLM abused its discretion in concluding that the missing South Project information is not essential to a reasoned choice among the alternatives, BLM must supplement the FEIS with all necessary information on the South Project to permit a thorough analysis of the its adverse impacts, as long as the “costs of obtaining” such information “are not exorbitant.” 40 C.F.R. § 1502.22; *Lee*, 354 F.3d at 1241. Throughout the FEIS, BLM repeats that obtaining the unknown information about the South Project’s impacts on various resources would be “cost prohibitive.” *See, e.g.*, FEIS 4-92, 4-97, 4-101, 4-115, 4-158. The FEIS notes that Enefit’s February 28, 2017 letter “indicate(s) that it is unwilling to expend further resources to develop the mine plan and engineering specifications until it receives a decision on the utility corridor ROW application due to the different design requirements between the proposed action and No Action alternatives and because development of these specifications for multiple design requirements would be cost prohibitive to complete.” FEIS 4-92. Obtaining the unknown information about the South Project purportedly would be cost-prohibitive “because it would require the Applicant to design and engineer the entire South Project twice—once with the Utility Project and once with utility alternatives.” FEIS 4-97; Trust DEIS Comment (Exhibit 1) at 27.

Moreover, Enefit and BLM cannot have it both ways. They cannot argue that providing design specs for the “no action” alternative would be “cost prohibitive” while simultaneously asserting that the “scope of facilities [at the South Project] would be the same under either the proposed action or the No Action alternative and there would be little, *if any*, material difference in the South Project between the two scenarios.” Enefit Nov. 2016 Letter (Exhibit 2) at 4 (emphasis added). Enefit’s assertion of no material difference was meant to support Enefit’s claim that the South Project will proceed to full buildout regardless of the Utility Project’s approval. But

Enefit's avowal that there would be "little, if any, material difference" in the South Project's design between the proposed action and the no action alternative directly undermines BLM's determination that obtaining the unknown information about the South Project's impacts would be cost-prohibitive. If there would be little, if any, material difference in the South Project with or without the Utility Project, it is disingenuous for Enefit to claim that it would have to design the South Project "twice." If, as Enefit claims, the South Project will proceed to full buildout regardless of the Utility Project's approval, then Enefit eventually will expend the resources to design the South Project. And if there is little, if any, material difference in the South Project with or without the Utility Project's approval, then it is unreasonable and an abuse of discretion for BLM to justify its cost-prohibitive determination on the incremental cost of designing the South Project with and without the Utility Project. At the very least, if the South Project will proceed to full buildout regardless of the Utility Project's approval, and Enefit thus will expend resources on designing the South Project regardless of the Utility Project's approval, then Enefit could provide detailed engineering specifications on the South Project facilities that will be identical with or without the Utility Project. (According to Enefit, the majority of South Project facilities would fall into this category.)

BLM's conclusion that obtaining the unknown information about the South Project's impacts would be cost prohibitive therefore is arbitrary, capricious, and an abuse of discretion. It is contradicted by Enefit's own statements and merely echoes Enefit's self-serving, unsupported assertion that information-gathering costs are cost-prohibitive. Accordingly, because the costs of obtaining the unknown information about the South Project's impacts "are not exorbitant," BLM must obtain and include in the FEIS all incomplete information on the South Project to permit a thorough analysis of the South Project's adverse impacts. *See* 40 C.F.R. § 1502.22.

**3. Even if the costs of obtaining the lacking South Project information are exorbitant, BLM nonetheless failed to satisfy the requirements of 40 C.F.R. § 1502.22(b)(2), (3), and (4) for unavailable information.**

40 C.F.R. § 1502.22(b) provides that if incomplete information "relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant . . . , the agency shall include with 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.

Even assuming that that the costs of obtaining the unknown information about the South Project's impacts are "exorbitant"—which is belied by Enefit's own statements—BLM

nonetheless violated 40 C.F.R. § 1502.22(b)(2), (3), and (4). By asserting throughout the FEIS that specific information about the South Project’s impacts to various resources is unknown, BLM satisfied, at most, 40 C.F.R. § 1502.22(b)(1). *See, e.g.*, FEIS 1-5, 2-24, 4-40, 4-97, 4-98, 4-101, 4-146. Yet the agency ignored the rest of the regulation’s requirements. It did not include in the FEIS a “statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts.” 40 C.F.R. § 1502.22(b)(2). Nor did it provide “a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts.” *Id.* at § 1502.22(b)(3). And it did not set forth an “evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.” *Id.* at § 1502.22(b)(4).

For example, in discussing the cumulative impacts of the South Project on greenhouse gases, the FEIS notes that “[e]missions data for the construction and operation of the South Project are not available at the time of this study.” FEIS 4-97. BLM’s general, qualitative analysis of the South Project’s impacts on greenhouse gases proceeds merely to summarize the “general nature of the anticipated air emissions sources that might result from the oil shale development planned for the South Project” based on BLM’s Programmatic Environmental Impact Statement for Oil Shale and Tar Sands Resources in Colorado, Utah, and Wyoming. FEIS 4-98. BLM additionally notes that an *Integrated Environmental Permit* issued to Enefit by the Estonian Environmental Agency for oil shale plants in Estonia, which are similar to the oil shale plant proposed for the South Project, could provide useful information about the oil shale retorting process Enefit plans to utilize for the South Project, including information about “facility characteristics; sources, limits, and monitoring/control technologies; facility monitoring and reporting requirements; and other conditions.” FEIS 4-158. The FEIS, however, provides no description or analysis of the permit’s information, much of which likely would prove useful in analyzing the South Project’s potential impacts. And the website to which the public is directed presents the permit in Estonian, which we suspect few members of the public (or BLM) understand. Without any BLM analysis of the permit, the FEIS’s citation to an Estonian-language permit proves less-than-helpful to the public’s consideration of the impacts from an oil shale plant comparable to the proposed South Project.<sup>6</sup>

BLM’s citation, without analysis, of the Oil Shale Programmatic Environmental Impact Statement and the *Integrated Environmental Permit* falls significantly short of BLM’s obligation to describe the relevance of the unavailable South Project emissions information, provide a summary of existing credible scientific evidence relevant to evaluating the foreseeable adverse impacts of the South Project’s emission, and evaluate such impacts based on any theoretical approaches or research methods generally accepted in the scientific community. 40 C.F.R. § 1502.22(b)(2)–(4). And BLM’s failure to satisfy the requirements of 40 C.F.R. §§ 1502.22(b)(2), (3), and (4) for the missing South Project greenhouse gas emissions information is the same across many of the resources considered in the FEIS. *See, e.g.*, FEIS 4-101–4-105 (air quality); FEIS 4-108–4-117 (water resources).

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<sup>6</sup> Agencies may incorporate non-NEPA documents by reference, but only if the agency describes the contents of those documents. 40 C.F.R. § 1502.21. It is clearly arbitrary for BLM to incorporate a document that is not in English and therefore impossible for the vast majority of the public (and, we assume, BLM staff) to understand.

If BLM maintains that the costs of obtaining the unknown information about the South Project's impacts are "exorbitant," it must revise the FEIS to satisfy the requirements of 40 C.F.R. § 1502.22(b)(2), (3), and (4). The FEIS provides neither detailed information about the South Project's impacts nor a description and analysis of scientific evidence relevant to evaluating the South Project's impacts, and thus "defeat the goals of informed decisionmaking and informed public comment" central to NEPA's purpose. *See Utahns for Better Transp.*, 305 F.3d at 1163, *as modified on reh'g*, 319 F.3d 1207 (10th Cir. 2003) (citations omitted); *see also* EPA DEIS Comments, FEIS Appx. I1-2 ("As a result of Enefit's refusal to provide sufficient information to support a quantified effects analysis, the Draft EIS does not take a hard look at the potential indirect impacts associated with the South Project.").

**B. BLM failed to take a "hard look" at the South Project's impacts on air quality in light of EPA's nonattainment designation for ozone in Duchesne and Uintah counties.**

On April 30, 2018, EPA finalized designations of portions of Duchesne and Uintah counties below a contiguous external perimeter of 6,250 feet elevation as nonattainment for ozone under the Clean Air Act.<sup>7</sup> EPA classified the ozone nonattainment as "marginal." This designation encompasses the entirety of the Utility Project and significant portions of the South Project.

This designation will require significant new air quality considerations, such as restrictions on fossil fuel development activities to bring the Basin into attainment with air quality standards within three years. *See* EPA, Fact Sheet – Final Area Designations for the National Ambient Air Quality Standards for Ozone Established in 2015 at 2 ("Nonattainment areas are required to meet the standard as quickly as possible, but no later than the maximum attainment date associated with each classification."). If such efforts fail to achieve applicable air quality standards within that period, EPA "must reclassify the area to a higher classification." *Id.*

Utah's updated ozone state implementation plan ("SIP") for implementation, maintenance, and enforcement is due within three years of the December 28, 2015 revision of the ozone national ambient air quality standard. 42 U.S.C. § 7410(a)(1). A separate deadline of three years from the April 30, 2018 nonattainment designation applies to SIP revisions establishing specific nonattainment provisions, such as permits for new or modified major stationary sources. 42 U.S.C. § 7502(c). If Utah does not submit an updated SIP as required, the Clean Air Act directs the Administrator to promulgate a federal implementation plan ("FIP"). 42 U.S.C. § 7410(c).

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<sup>7</sup> Although the finalized nonattainment designation came less than a month before BLM published the FEIS, nonattainment had been forthcoming for months. EPA notified Utah Governor Gary Herbert that it was planning to designate the Uinta Basin as nonattainment in December 2017. *See* Letter of Douglas H. Benevento, Regional Administrator to Governor Herbert (Dec. 20, 2017), attached as Exhibit 5, and EPA, Intended Area Designations for the 2015 Ozone National Ambient Air Quality Standards Technical Support Document (Dec. 20, 2017), attached as Exhibit 6. Thus, publication of the FEIS soon after the final nonattainment designation does not excuse BLM's failure to discuss the designation's impact on the South Project.

For marginal nonattainment areas, SIPs must include reasonably available control measures and control technology (“RACM” and “RACT”), an emissions inventory, reasonable further progress requirements, a new source review (“NSR”) program, offset requirements, and contingency measures. Each NSR program must set forth “pre-construction review” requirements that applicants must meet before permitting agencies may issue permits to construct or operate any equipment that will increase nonattainment emissions. 40 C.F.R. § 51.165(a)(2). The offset requirement means that each new source review permit program set forth in a nonattainment area SIP must require that emission increases from new and modified major sources be offset by corresponding emissions reductions. 42 U.S.C. § 7503. The offset ratio for marginal areas is 1.1:1. 40 C.F.R. § 51.165(a)(9)(ii)(A). Any major new stationary air pollution source permitted in a nonattainment area must achieve the lowest achievable emissions rate—equivalent to the most stringent emissions limitation found in a SIP for the same class or category of source. *See* 42 U.S.C. §§ 7503(a)(2), 7501(3).

BLM’s FEIS should have discussed how the South Project would affect the already-polluted airshed in which it is sited, and how the South Project could comply with the Clean Air Act nonattainment provisions. But instead of discussing the recent nonattainment designation, the FEIS says only that in October 2016, Utah Governor Herbert proposed designating areas below 6,250 feet in Uintah and Duchesne Counties as nonattainment for ozone, and that the majority of the Utility Project would be within the proposed boundary. FEIS 3-13. It does not acknowledge that EPA recently finalized this nonattainment designation. It also does not mention that the majority of the South Project property is also now within the nonattainment boundary. BLM’s response to comments says that the Uinta Basin “likely” will be designated nonattainment, but any resulting “regulatory processes are beyond the scope of this EIS.” FEIS Appx. I1-3.

The FEIS’s excuse for not discussing ozone nonattainment is that the South Project is beyond BLM’s jurisdiction, and thus that air quality impacts of the South Project are not pertinent to the EIS because the South Project will “proceed to full buildout” regardless of BLM’s decision on the Utility Project. *Id.* I8-16; I6-2. As discussed above, BLM’s conclusion that the South Project would proceed to full buildout without the Utility Project is unsupported. The currently available information shows that BLM’s decision on the Utility Project would significantly affect the cost of supplying and operating the South Project, and that these cost increases would impact the South Project’s financial viability. Accordingly, BLM should have considered the South Project a connected action, and should have analyzed its anticipated air pollution impacts as an indirect effect—especially in light of recent changes in federal air standards for the Uinta Basin. *See* 40 C.F.R. §§ 1508.25(a), 1508.8(b). With this discussion, BLM has failed to address EPA’s recent ozone nonattainment designation for the Uinta Basin. The FEIS cannot support a record of decision (“ROD”) on this proposal.

### **C. The FEIS arbitrarily and capriciously failed to address the Clean Air Act’s conformity requirements.**

The Clean Air Act requires federal agencies to conform their activities to air quality standards and SIPs: “No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity” that does not conform to an approved SIP. 42 U.S.C. § 7506(c)(1). Thus, agency

actions must not “(i) cause or contribute to any new violation of any [air quality] standard in any area; (ii) increase the frequency or severity of any existing violation of any standard in any area; or (iii) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.” *Id.* For federal actions not related to transportation plans, “a conformity determination is required for each criteria pollutant or precursor where the total of direct and indirect emissions of the criteria pollutant or precursor in a nonattainment or maintenance area caused by a Federal action would equal or exceed . . . 100 [tons per year].” 40 C.F.R. § 51.853(b)(1). “Direct emissions” are “those emissions of a criteria pollutant or its precursors that are caused or initiated by the Federal action and occur at the same time and place as the action.” 40 C.F.R. § 51.852; *see also* 40 C.F.R. § 93.152. “Indirect emissions” are both foreseeable and caused by a Federal action, but they may occur later in time or distance. A Federal agency must have practical control over indirect emissions due to a “continuing program responsibility.” *Id.*

To demonstrate conformity, federal agencies must follow the procedures in 40 C.F.R. §§ 93.158 & 93.159. Additionally, BLM’s internal regulations require that it follow a 10-step process for conducting a general conformity determination in compliance with the Clean Air Act, 42 U.S.C. § 7506. *See* BLM Instruction Memorandum No. 2013-025 (Dec. 4, 2012), *available at*: <https://www.blm.gov/policy/im-2013-025-0>. Under the Clean Air Act, failure by any person, including a government agency, to comply with an emission standard or limitation can result in enforcement actions and application of civil penalties. *See* 42 U.S.C. §7604(a).

In addition to the Clean Air Act’s requirements that federal actions do not violate air quality standards, the Federal Land Policy and Management Act (“FLPMA”) contains an independent requirement that any instrument allowing development of public land contain terms and conditions requiring compliance with applicable air quality standards and SIPs. 43 U.S.C. § 1732(c). Each ROW BLM grants must contain terms and conditions that “require compliance” with applicable federal or state air quality standards. *Id.* § 1765(a). The FEIS contained no discussion of these conformity requirements or how BLM would meet them, making its discussion of environmental impacts arbitrary and capricious.

#### **D. BLM failed to take a hard look at the impacts of a potential synthetic crude oil pipeline rupture.**

Although the Trust’s comments on the DEIS explained that BLM failed to take a hard look at a potential spill of synthetic crude oil (“SCO”) produced at the South Project plant and transported by the pipeline proposed for approval in the ROW project, BLM’s only response is that “[n]o impacts . . . are anticipated from the Utility Project.” FEIS Appx. I6-63; *see also* Trust DEIS Comment (Exhibit 1) at 47–50. Enefit has represented that it plans to construct spill prevention equipment, such as flow meters, to reduce the chance of spills and to detect leaks quickly. FEIS ES-10. But BLM’s mention of these engineering plans does not rise to the level of NEPA analysis, which requires BLM to consider the potential for, and impact of, an oil spill. This presumption of the best-case scenario, with no analysis of impact, means that BLM has failed to take a hard look at the impact of a spill. Further, the FEIS’s discussion, FEIS 4-40, of the likely *volume* of an individual spill, *assuming* the pipeline’s spill detection technology works, says nothing about the *impacts* of such a spill, or the *frequency* that they are likely to occur.

BLM asserts that it is ignorant of the chemical composition of the synthetic crude oil Enefit intends to produce and ship from the South Project. FEIS 4-40 (“The chemical composition of the SCO product is not known by the BLM at this time.”). But this information, or a reasonable projection of the likely nature of the product, is necessary to analyze the anticipated impact or prevention of an oil spill. It is unclear how Enefit can assert that it can effectively design flow meters, shutoff valves, and other leak prevention measures without knowledge of the oil’s composition. Without such knowledge, it is also nearly impossible for BLM to evaluate the impact of a spill of that product to a wetland or river, or the difficulties with any possible containment or removal of that product. BLM’s failure to obtain this information from Enefit, or to make reasonable assumptions about the nature of the product, violates NEPA’s hard look mandate.

Significant new information since publication of the DEIS in the science of oil pipeline spills and oil’s environmental interactions indicates not only that pipeline spills can occur, but that their impacts can be severe. The latest science suggests that BLM should exercise greater caution when permitting oil pipeline projects. For example, studies and articles released since the publication of the DEIS:

- Indicate that commonly used oil and gas pipeline leak monitoring methods have poor accuracy and large positioning errors (*see* Jian-Guo Feng *et al.*, “Analysis and summary of oil & gas pipeline leak monitoring and localization methods,” *Advanced Materials and Energy Sustainability* (2017), attached as Exhibit 7).
- Advance our understanding of the oil spill risk assessment and impact modelling capabilities (*see* Jake R. Nelson *et al.*, “Oil spill modeling: Risk, spatial vulnerability, and impact assessment,” *Progress in Physical Geography: Earth and Environment* (December 12, 2017), attached as Exhibit 8).
- Suggest that automated spill monitoring, like the Supervisory Control and Data Acquisition system proposed for the oil product pipeline, could potentially exacerbate the risk of an aggravated spill (*see* David Wesley & Louis Alfonso Dau, “Complacency and Automation Bias in the Enbridge Pipeline Disaster,” *Ergonomics in Design: The Quarterly of Human Factors Applications* (November 2016), attached as Exhibit 9).
- Indicate that even recently constructed pipelines spill considerably more than project proponents, or agency regulators, estimate. *See* Valerie Volcovici & Richard Valdmanis, *Keystone’s existing pipeline spills far more than predicted to regulators*, Reuters (Nov. 27, 2017), attached as Exhibit 10. The article states that before constructing the pipeline, TransCanada provided a spill risk assessment that estimated the chance of a leak of more than 50 barrels to be “not more than once every seven to eleven years over the entire length of the pipeline in the United States.” *Id.* Instead, the pipeline had three significant leaks just in 2010, including a 5,000-barrel spill. *Id.*
- Show that the risk of pipelines spill increases the longer the pipeline is in use due to aging and fatigue. Andrew Cosham & Phil Hopkins, *How Many Pipelines in North America Have Failed by Fatigue and Why?*, 2 Pipeline Safety Management Systems



(Sept. 26–30, 2016), attached as Exhibit 11. “The number of failures in onshore liquid pipelines in the U.S. that can be attribute to fatigue has increased, with over half of such failures having occurred in the last ten years.” *Id.*

A spill from Enefit’s planned petroleum pipeline is reasonably foreseeable, reinforcing BLM’s duty to disclose the potential impacts of such a spill. Additional data from the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) has continued to update the data cited by BLM on pipeline incidents in near real time. The FEIS entirely failed to consider this available and relevant incident data for January 2015 through May 2018. In that time, there were 761 reported crude oil pipeline spills in the United States, resulting in the unintentional release of 111,031 barrels of oil. Of those incidents, 14.2% were caused by incorrect operation, and 3.4% were caused by excavation damage—meaning 18% in total were caused by human error. PHMSA considered 239 incidents (32.7%) to be significant. PHMSA, Pipeline Incident Flagged Files (July 5, 2018), <https://www.phmsa.dot.gov/data-and-statistics/pipeline/pipeline-incident-flagged-files>. This data shows that pipeline spills continue to occur regularly, and continue to result in significant and damaging pollution, even when a pipeline is designed to minimize the potential for leaks and spills and best management practices are in place.

Other reports collating spill data also show frequent and numerous pipeline spills. One compilation found that over the last thirty years, just under 9,000 significant pipeline-related incidents have taken place across the country. George Joseph, *30 Years of Oil and Gas Pipeline Accidents, Mapped*, CityLab, Nov. 30, 2016, attached as Exhibit 12. Another review found that nearly nine million gallons of crude oil spilled from U.S. pipelines between 2010 and late 2016. Rebecca Harrington, *Here’s how much oil has spilled from US pipelines since 2010*, Business Insider, Dec. 15, 2016, available at: <http://www.businessinsider.com/how-much-oil-spills-from-pipelines-us-america-natural-gas-2016-12> (last visited July 2, 2018). Between 2010 and 2016, there were about 1,300 crude oil spills, amounting to about one spill every other day in the U.S. *Id.*

Further, a 2016 National Academy of Sciences study concluded that there was little in the way of effective regulation of similar types of oil. See National Academy of Sciences, *Spills of Diluted Bitumen from Pipelines: A Comparative Study of Environmental Fate, Effects and Response* (2016), attached as Exhibit 13. The Academy discusses negative effects of a bitumen spill on different areas, including land, wetlands, and bodies of water, and how response tactics must be more rigorous than for other, lighter forms of crude oil. *Id.* at 82. The report expresses concern that “there are a number of areas where the current regulatory framework is not effectively addressing the potential environmental impacts of spills of diluted bitumen.” *Id.* at 106. BLM’s failure to address the fact that spills from the SCO pipeline are likely to be more difficult to remediate than conventional oil spills, in light of this information, is arbitrary and capricious.

BLM’s response to comments on the potential for oil spills underscores the agency’s failure to take a hard look at these impacts. The FEIS responded to comments on the impacts of ruptures of pipelines by directing readers to its response to comments on impacts from solid and hazardous waste (see FEIS Appx. I6-63), which in turn state simply, “No impacts related to solid or hazardous waste are anticipated from the Utility Project.” FEIS Appx. I6-62.

However, without an estimate of a spill's likelihood or the impact of a release of SCO to the environment, particularly a waterbody or wetland, it is unclear how the agency could reliably assess the potential impact of the proposed project. BLM must disclose available information about the potential for pipelines to rupture or spill, or make reasonable projections based on the information it has or can gather.

BLM attempts to excuse its failure to discuss the composition of Enefit's SCO by pointing to the lack of information it has received from Enefit. But BLM nonetheless has a duty to either obtain necessary information or disclose that it is lacking. If the cost of obtaining needed information is exorbitant, BLM must include a description of the unavailable or incomplete information, along with a summary of existing relevant scientific evidence and the agency's evaluation of impacts based on generally accepted theoretical approaches. *See* 40 C.F.R. §1502.22(b)(1).

BLM has not provided this information, or its evaluation of anticipated impacts based on theoretical approaches. Nor does BLM assert that it would be exorbitantly expensive to obtain such information. The agency has failed to provide a reasoned consideration of the threat of an oil spill and the environmental impacts that such a spill would likely cause. Nor has it compared this risk under the proposed action to the relative risk of one of Enefit's proposed alternatives, such as trucking the synthetic crude oil, which could reduce risk because each truck carries only 9,000 gallons. BLM must supplement its FEIS with this analysis.

**E. BLM failed to take a hard look at water depletion and availability in the Upper Colorado River Basin.**

Enefit's South Project will consume a tremendous amount of water. Its anticipated consumption of 15 cfs is equivalent to more than 646,000 gallons of water per day. Over the anticipated 30-year life of the project, it would consume more than 100 billion gallons of water.<sup>8</sup> Its source would be the Upper Colorado River Basin, an area that is already suffering higher temperatures and more frequent drought due to climate change, and which provides habitat for a number of imperiled fish species. Additionally, there is significant doubt that the water Enefit proposes to transport using the Utility Project, for use at the South Project, is legally available for industrial operations. The FEIS failed to discuss these issues, which are pertinent to the need for, and the environmental impacts of, the proposed action.

**a. BLM failed to analyze the anticipated effects of climate change on water availability in the Upper Colorado River watershed.**

Since the publication of the DEIS in 2016, evidence has increased that climate change will result in rapid depletion of water resources in the Upper Colorado River Basin as temperatures increase, putting a strain on the surrounding communities that rely on water in the river. This indicates that the significant water withdrawal anticipated for the South Project, and facilitated

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<sup>8</sup> 15 cfs = 6732.488 gpm. 6732.488 gpm × 1440 min/day × 365 days/year × 30 years = 106,157,878,522 gallons.

by the pipeline ROW BLM intends to approve, will have more severe impacts than those disclosed in the FEIS.

These new studies assess historical and more recent data on Upper Colorado River Basin streamflow, snowmelt, and runoff efficiency to conclude that the Basin has undergone significant changes in recent years, trending towards lower amounts of water availability now and in the future. These studies include:

- Shannon M. Jones & David S. Gutzler, *Spatial and Seasonal Variations in Aridification across Southwest North America*, 29 J. of Climate 4637–49 (2016), attached as Exhibit 14. The study concludes that anthropogenic global warming has caused changes in the hydrology of Southwest North American since the end of the 20<sup>th</sup> century. Drought is a regular occurrence in the region, but projections for 21<sup>st</sup> century aridification predict that there will be sustained dry conditions that will inhibit future drought recovery. *Id.* Dry areas, like the Upper Colorado River Basin, will get drier and will stay that way. *Id.*
- Toby R. Ault *et al.*, *Relative impacts of mitigation, temperature, and precipitation on 21<sup>st</sup> century megadrought risk in the American Southwest*, Sci. Advances 1–8 (2016), attached as Exhibit 15. This study concludes that the risk of a mega-drought in the Colorado River Basin increases anywhere from 70–99% due to regional temperature increases, even if precipitation increases. A mega-drought in the Southwest would impose “unprecedented stress on the limited water resources of the area.” *Id.* at 1. An aggressive reduction in global greenhouse gas emissions would cut the risk of a mega-drought nearly in half. *Id.*
- Andreas F. Prein *et al.*, *Running dry: The U.S. Southwest’s drift into a drier climate state*, 43 Geophysical Res. Letters 1–8 (2016), attached as Exhibit 16. This study shows that there have been droughts in the American Southwest that have led to economic losses of more than \$100 billion since 2000. Climate model simulations predict significant drying trends in the area, leading to a higher drought risk in the coming years. *Id.*
- Connie A. Woodhouse *et al.*, *Increasing influence of air temperature on upper Colorado River streamflow*, 43 Geophysical Res. Letters 2174–81 (2016), attached as Exhibit 17. This study concludes that in years where the streamflow of the Upper Colorado River Basin is greater or less than expected for the season’s precipitation, higher temperatures in the area are about 40% of the cause. So, the dry seasons are drier and the wet seasons are wetter. *Id.* Warming temperatures in addition to natural drought variability in the Upper Colorado River Basin will “exacerbate the effects of droughts on both water supplies and on demand for water by human and natural systems.” *Id.* at 7.
- Bradley Udall & Jonathan Overpeck, *The twenty-first century Colorado River hot drought and implications for the future*, 53 Water Resources Res. 2404–18 (2017), attached as Exhibit 18. This study found that increasing temperatures are anywhere from 1/6 to 1/2 to blame for Colorado River streamflow loss. Udall & Overpeck concluded that future impacts of climate change on flow of the Colorado River will be much more serious than hydrologists previously assumed, especially if there are not substantial reductions in greenhouse gas emissions. *Id.* at 1. Continued low streamflow in the Upper

Colorado River Basin will result in declines at Lake Mead, which will eventually cause lower basin states (like Arizona, California, and Nevada) to experience water delivery shortages. *Id.* at 2405. Lower basin states (like Colorado, New Mexico, Utah, and Wyoming) will endure worsening water shortages. *Id.*

- Gregory McCabe *et al.*, *Evidence that Recent Warming is Reducing Upper Colorado River Flows*, 21 *Am. Meteorological Soc’y: Earth Interactions* 1–14, at 2 (2017), attached as Exhibit 19. This study demonstrates that increases in temperature have caused a reduction in flow and runoff efficiency in the Upper Colorado River Basin, which are the “largest documented temperature-related reductions since record keeping began.” In fact, two recently published studies are the “first studies to show a negative effect of recent warming on Upper Colorado River Basin streamflow in the instrumental record.” *Id.* at 2. Natural climatic variability in combination with increased temperatures causes precipitation reductions and dry conditions, which will result in “droughts of unprecedented severity.” *Id.* at 12.
- Kurt C. Solander, Katrina E. Bennett, & Richard S. Middleton, *Shifts in historical streamflow extremes in the Colorado River Basin*, 12 *J. of Hydrology: Regional Studies* 363–77, at 363 (2017), attached as Exhibit 20. This study finds a “strong temporal variability in streamflow changes” in the Upper Colorado River Basin, where there are higher increases in streamflow during wet seasons, and decreases in streamflow during dry seasons. There have been declines in streamflow of up to 41% for high and low flows during the summer, which is peak runoff season, and increases of up to 24% in streamflow for the spring. Solander, Bennett, & Middleton at 363. This indicates a diminishing water supply during drier times, which could result in “shortages for the generation of power or regional water supplies.” *Id.* at 370. The extreme decreases and increases in flow means that “critical water and energy supply infrastructure [will be more] vulnerable to floods and droughts.” *Id.* at 363.
- John C. Fyfe *et al.*, *Large near-term projected snowpack loss over the western United States*, 8 *Nature Comm.* 14996 (2017), attached as Exhibit 21. This study predicts that snowpack in the Western United States will suffer losses of up to 60% in the next thirty years. This loss is consistent with the results of other climate simulations for the area that are caused by both natural and anthropogenic changes in temperature. *Id.*
- Katrina E. Bennett *et al.*, *Global Sensitivity of Simulated Water Balance Indicators Under Future Climate Change in the Colorado Basin*, 54 *Water Resources Res.* 132–49 (2017), attached as Exhibit 22. This study notes that Colorado River flows have a recorded history of decade-long droughts and occasional wet periods, which are likely to recur with greater intensity in the future as temperatures rise. *Id.*
- Connie A. Woodhouse & Gregory T. Pederson, *Investigating Runoff Efficiency in Upper Colorado River Streamflow Over Past Centuries*, 54 *Water Resources Res.* 1–15 (2018), attached as Exhibit 23. This study addresses runoff efficiency, the relationship between runoff and precipitation, finding that it is heavily influenced by temperature fluctuations. Warming temperatures will reduce runoff efficiency regardless of the level of precipitation experienced. *Id.* This means that future streamflow will be less than

anticipated, further exacerbating the effects of droughts and decreasing available water supplies. *Id.*

Together, these studies predict more drought and reduced streamflows in the Upper Colorado—at a time when BLM is proposing to make possible a new, up-to 15 cfs (10,866 acre-feet per year) withdrawal for a massive industrial facility. The FEIS relies on more than three-year-old draft Utah study, *Uintah Basin Planning for the Future*, which largely ignores climate change, and which does not address the latest science predicting more and more dire droughts and lower streamflows. See FEIS 3-22; *Uintah Basin Planning for the Future* (Feb. 2015) (Draft), available at <https://water.utah.gov/Planning/SWP/Unitah/UintahBasin2015.pdf>. The FEIS’s failure to address the latest high-quality data concerning the impacts of climate change on water availability, and the cumulative impacts of climate change combined with the withdrawal that the ROW will make possible, violates NEPA’s hard look mandate.

**b. BLM failed to take a hard look at the South Project’s anticipated effects on fish species protected by the Endangered Species Act.**

If water right #49-258 could be used for Enefit’s oil shale operation, which the discussion in section IV.E.c., *infra*, disputes, at 10,866 acre-feet per year, the project’s water use would far exceed the minimum of 4,500 acre-feet per year that triggers Endangered Species Act (“ESA”) section 7 formal consultation. In addition to formal consultation, the applicant must pay a depletion fee, and additional actions required by the Recovery Implementation Program Recovery Action Plan (“RIPRAP”) may be necessary. See U.S. Fish and Wildlife Service (“FWS”), DEIS Comments Appendix A, FEIS Appx. I1-28. FWS’s comments also explained that “[a] depletion from any portion of the contributing drainages is considered to adversely affect or adversely modify the critical habitat of the endangered fish species by reducing water quantity and quality. Therefore, a project that depletes water from any of these drainages, including non-occupied headwater reaches, must be evaluated with regard to the criteria described in the pertinent fish recovery programs.” *Id.* at I1-24.

RIPRAP identifies actions required to recover the endangered fish species in the Upper Colorado River Basin. It is an adaptive management plan intended to provide reasonable and prudent alternatives for projects undergoing ESA section 7 formal consultation in the upper basin. FWS’s comments on the DEIS noted that under the agency’s guidelines for water depletions in the Colorado River basin, Enefit’s intended depletion would be considered a new (not historic) depletion, and thus would require formal consultation with FWS, including determination of mitigation actions under RIPRAP. *Id.* at I1-20.

BLM’s FEIS indicates that it has not coordinated this required analysis with FWS. Section 4.2.10.1 (FEIS 4-66) explains the consultation requirement, but does not discuss how this consultation will affect the South Project. Nor does it explain how Enefit’s water withdrawals will be “evaluated with regard to the criteria described in the pertinent fish recovery programs.” See FWS DEIS Comments Appendix A, FEIS Appx. I1-24. BLM’s response to comments says only that “[t]ext regarding the appropriate processes for the water right and the need to consult with FWS has been added to Section 4.2.10.1,” and that because “the South Project will go forward to full buildout regardless of [] the BLM decision to be made on the Utility Project,”

“the consumption of water by the South Project will not be a part of the BLM consultation except as a cumulative impact disclosure.” FEIS Appx. I1-21.

This discussion is wholly inadequate. If public ROWs are providing the water the South Project will consume, then it is irrelevant that “the South Project will go forward to full buildout” regardless of BLM’s decision. Enefit would convey the water from DGT water right #49-258 through the Utility Project—not through any “alternative means” to the South Project. In other words, the federal portion of the project would be responsible for the depletion in the watershed where endangered fish species are located. If Enefit pursued the alternative means it has suggested, the timing and location of the South Project’s water depletions would be entirely different. Thus, the South Project’s supposed independent viability cannot excuse BLM’s failure to discuss the environmental impacts and anticipated section 7 consultation associated with Enefit’s planned water withdrawals. Under CEQ regulations, those depletions would be an indirect result of approving the Utility Project, which BLM must discuss. *See* 40 C.F.R. § 1508.8(b) (defining indirect effects as those that are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable”).<sup>9</sup>

BLM’s internal discussion of this issue is as follows.

As far as the Colorado fish go, the biggest concern from the USFWS is that the estimated water withdrawal from the Green River is 10-11K acre-feet/year. In the past, any depletions less than 100 acre-feet were not of a concern. However in this case, *the USFWS has never seen any project that uses this much water (at least not anything coming out of the VFO) and they are having a hard time getting their head around this.*

Email from Kelly Buckner to Deborah Brown *et al.* (Oct. 13, 2016) (emphasis added), attached as Exhibit 24. This discussion shows the unprecedented nature of Enefit’s planned water withdrawal.

In addition to FWS’s study of the environmental impacts of such a large depletion, a technical memo and policy brief released by Ecoshift Consulting, LLC analyzed the water use related to development of oil shale in the Colorado River Basin. *See* Ecoshift Consulting, LLC, Technical Memorandum, *Greenhouse Gas & Water Footprints of Oil Shale & Tar Sands Resources & Projects in the Upper Colorado River Basin* (June 2018), attached as Exhibit 25. This study highlights the incongruity between oil shale development and water availability in the Upper Colorado River ecosystem. Among its major findings is an estimate that if full commercial development of oil shale occurs, the water footprint of the United States’ unconventional fuel

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<sup>9</sup> *Sierra Club*, 786 F.3d at 1224, held that BLM did not have to discuss the direct effects of a private wind farm connected to the grid by a BLM ROW. The court’s holding in *Sierra Club* rested on its separate conclusion that the developer “had the option of an alternative route traversing private property,” meaning “construction of the Wind Project was not dependent on existence of the federal right-of-way.” The same is not true here. As discussed above, Enefit’s alternative means are not demonstrably viable—all available information suggests that the South Project is dependent on federal ROWs.

industry would equal between one-fifth to eight times the entire annual flow of the Colorado River. *Id.* Regardless of the exact level of water consumption, Enefit's oil shale operation would sharply stress an already drying and over-allocated Colorado River ecosystem. *Id.*

The Ecoshift report also highlights the importance of FWS consultation to BLM's decision on the Utility Project. Relegating ESA consultation to an afterthought is tantamount to BLM burying its head in the sand and ignoring the severe impact the Utility Project and South Project would have on Colorado River flows, and on the species that survive on those flows. Further, because the consultation could result in the imposition of mitigation measures, BLM should not issue a ROD on the Utility Project without allowing FWS to complete its consultation and determination of which RIPRAP actions are necessary.

**c. BLM failed to take a hard look at the availability of water resources, which is pertinent to the purpose and need for the Utility Project.**

The FEIS avers that Enefit will use water right #49-258 from Deseret Generation and Transmission ("DGT"), which is for 15 cfs and which BLM claims has been "Approved for Irrigation, Domestic, Mining, and Industrial." FEIS 3-22. Enefit's proposal is to use the Utility Project to transport this water from the Bonanza Power Plant via a buried pipeline. *Id.* 2-4. Comments from FWS on the DEIS indicated that although this water right has a priority date of February 1965, it has not been perfected. According to Utah Code § 73-3-12(2)(b), the State Engineer can extend the time to perfect a water right up to 50 years from the date the application is approved. The State Engineer can extend the time to perfect a water right beyond 50 years if the applicant is a "public water supplier or a wholesale electrical cooperative," and shows that "the water applied for in the application is needed to meet the reasonable future requirements of the public." *Id.* § 73-3-12(4)(b).

As explained below, the history of water right #49-258 suggests that Enefit, the previous owner of this water right, sold it to DGT so that DGT could take advantage of its status as an electrical provider to request an extension of time to perfect the right past 2015, and then sell the water right back to Enefit. This is a blatant attempt to game the system and extend the perfection time for the water right past 50 years, even though both parties intend the water to be used for oil shale production, not electrical production.

DGT acquired water right #49-258 from EAO Real Estate Corporation (a subsidiary of Enefit) in October 2012. In February 2013, DGT filed a change application to add points of diversion along the Green River to right #49-258, which had formerly applied to the White River. DGT Change Application, attached as Exhibit 26. Then in July 2013, DGT filed a request for extension of time to perfect its water right until 2025. DGT averred that it had recently acquired right #49-258 to "secure sufficient water rights for the expansion of its Bonanza Power Plant to meet the reasonable future electrical requirements of its customers. As a wholesale electrical cooperative, pursuant to Utah Code § 73-3-12(4), DG&T requests that the proof due date for the Water Right be extended until July 31, 2025." DGT Request for Extension of Time, attached as Exhibit 27. DGT elaborated that it needed an extension to meet growing demand for electricity resulting from "rapid growth within the natural resources/industrial development sector, as well

as the continuing growth of communities” in DGT’s service sector, and to account for reduction in generation capacity at a neighboring coal power plant. *Id.*

Following the change application, the State Engineer issued an order adding additional points of diversion. Order of the State Engineer (March 27, 2014), attached as Exhibit 28. Regarding allowed uses, the Engineer’s order says “The nature of use of the water is the same as heretofore [including “mining purposes, and for industrial purposes (Mining, retorting, drilling, steam generation, cooling, and sanitation)] but, in addition, the following use is being added: The water is to be used for power steam power [sic] generation at Bonanza.” The State Engineer’s next order, from April 21, 2014 grants DGT an extension beyond the 50-year deadline to perfect its water right. This order says:

The documentation submitted by the applicant indicates that an additional 500 MW generating unit will be needed within the next 5 to 15 years and a third unit will be needed within the next 15 to 25 years to meet the growing demand for electricity. This water right is needed to provide sufficient water for those additional generating capacities.

It is the opinion of the state engineer that the applicant has met the requirements of UCA §73-3-12 and that an extension of time beyond the 50-year period can be approved. Additionally, it should be noted that Change Application Number 49-258 (a38730), approved on March 27, 2014, changed the use of water under this water right to power generation by the applicant.

On April 21, 2014, the State Engineer approved the extension of time request, noting that DGT is “a public water supplier or a wholesale electrical cooperative” and forecasted “the need for the water to produce power; and the power output of the project for the wholesale electrical cooperative within the next 40 years.” Amended Order of the State Engineer (Apr. 21, 2014) (quoting Utah Code § 73-3-12(4)), attached as Exhibit 29. The State Engineer noted that DGT’s submitted documentation “indicates that an additional 500 MW generating unit will be needed within the next 5 to 15 years and a third unit will be needed within the next 15 to 25 years to meet the growing demand for electricity. This water right is needed to provide sufficient water for those additional generating capacities.” *Id.* The state engineer also noted that the Change Application approved on March 27, 2014 “*changed the use of water under this water right to power generation by the applicant.*” *Id.* (emphasis added).

Allowing an electric cooperative to perfect a water right based on a use other than serving the public with water or electricity defeats the purpose of Utah Code § 73-3-12, which allows extensions of time only in these two circumstances. In DGT’s application for an extension past 50 years, the company represented that it needed the water it was requesting “to secure sufficient water rights for the expansion of its Bonanza Power Plant to meet the reasonable future electrical requirements of its customers.” DGT Request for Extension (July 17, 2013). If DGT intended from the start to sell this water back to Enefit, then its request for extension strongly suggests a factual misrepresentation. The State Engineer would not have granted the extension in the first place unless DGT had represented that it needed two additional electrical generating units, and the corresponding water capacity, over the next 25 years, for provision to the public. DGT’s



apparent misrepresentation in its application casts doubt on the extension the State Engineer subsequently granted.

Under state law, if DGT chooses to use water right #49-258 for a different purpose than wholesale electric, it would appear to need to file another change application, and because more than 50 years have passed since the right was filed in 1965, all uses aside from “public water supplier” and “wholesale electrical cooperative” have already lapsed. *See* Utah Code § 73-3-12.

BLM’s FEIS reports that Enefit “has agreed with DGT on conveyance of an existing, approved water right of 15 [cfs] from the Green River, transported through the DGT system, to a new buried pipeline that would be constructed from the DGT system termination point at the Bonanza Power Plant to the South Project plant site.” FEIS 2-4. The EIS reports that DGT “has until July 30, 2025, to develop the water right,” without mentioning that the right used to belong to Enefit, and without noting that this deadline was extended from July 10, 2015. BLM has ignored that using water right #49-258 for oil shale production is contrary to the express purpose for which the state engineer extended the time to perfect right #49-258: power generation by the applicant [DGT].” *See* Amended Order of the State Engineer (Apr. 21, 2014) (Exhibit 29) (“This water right is needed to provide sufficient water for those additional generating capacities.”).

BLM’s internal discussion on this topic is as follows:

The water withdrawal would be using an older but apparently unused water right that is held by the Bonanza power plant. The intention is that the power plant would start using this water right and then forward the water to the Enefit facility. Part of the issue is that the this [sic] water right has not been “perfected” (I think this means that it has never been used).

There may also the [sic] issue that if it is now going to be used, redirecting the water from the power plant was not the original intent of the water right. The issue with water rights probably needs to be worked out between the power plant, Enefit, and the Utah Division of Water Rights. In any case, the increase in the amount of water withdrawn has the attention from USFWS.

Email from Kelly Buckner to Deborah Brown *et al.* (Oct. 13, 2016), (Exhibit 24). This discussion indicates that Enefit and DGT plan to circumvent the problem of the water from right #49-258 being unavailable for its intended use by running it through the Bonanza power plant first. But a water right’s pathway to its ultimate use is irrelevant; the use itself is dispositive. As discussed above, using water right #49-258 for anything other than public water supply or wholesale electric production contravenes the terms of the extension granted in the April 21, 2014 State Engineer’s Order.

BLM failed to take a hard look at the availability of water resources to supply one portion of the proposed action. Without legally available water, BLM would lack any purpose and need to consider approving the water pipeline that is part of the Utility Project in its present incarnation.

#### **d. Summary.**

BLM has failed to take a hard look at the availability and impacts of Enefit's planned water consumption. The unprecedented quantity of water Enefit intends to withdraw (more than 10,000 acre-feet per year) demands that BLM consider the effect of climate change on reductions in water availability in the Upper Colorado River Basin, the severe impacts on biological resources from such a significant withdrawal from the Basin (through cooperation with FWS), and the legal availability of the water Enefit seeks to pump. BLM has done none of this required analysis. It has failed to satisfy NEPA's hard-look mandate, and even to articulate a clear purpose and need for the water pipeline ROW.

#### **F. BLM failed to take a hard look at the cumulative impact of offering Enefit a research, development and demonstration ("RD&D") lease.**

Several commenters on the DEIS, including EPA and the Trust, noted that the FEIS should evaluate the cumulative impacts of the Utility Project together with Enefit's application for a preferential right on its RD&D lease. *See* FEIS Appx. I1-6. However, the FEIS disclaims BLM's continuing oversight of the RD&D lease, concluding that this was a "separate process," the environmental effects of which were analyzed in a separate environmental assessment ("EA"). *Id.* The FEIS also contends that the Utility Project and the RD&D lease are on completely separate tracks, because they will each proceed absent the other. *Id.* But this discussion completely ignores that the Utility Project and the RD&D lease are *both* intended to facilitate Enefit's mining and processing of oil shale. They are thus connected actions with cumulative impacts under NEPA. BLM should have considered the effects of the RD&D lease in the FEIS, notwithstanding its preparation of an earlier EA for the RD&D lease.

Second, regarding foreseeability, the FEIS itself appears to assert simultaneously that:

(1) development of the RD&D lease is foreseeable for cumulative impact purposes (*see* FEIS 4-85; 4-90; *see also* FEIS Appx. I6-98 & I7-4 (asserting that impacts from the RD&D lease are included in the FEIS cumulative impact analysis); ES-4–ES-5 (alleging RD&D lease impacts are discussed qualitatively in the FEIS); FEIS 1-10 ("The RD&D and preferential right leases are within the BLM's authority for approval but are not connected to the Utility Project and, therefore, were considered in separate NEPA documents (UT-080-06-280-EA and DOI-BLM-UT-G010-2017-0056-CX). All disclosures relating to the RD&D and preferential right leases in this EIS are for Utility Project cumulative impact analysis purposes only and are based on the gross assumptions that (1) the leases will be issued and (2) the leases will be developed."));

and that

(2) development of the RD&D lease is not foreseeable. *See* FEIS Appx. I6-34, I6-36.

BLM has asserted that the RD&D development is reasonably foreseeable, but it has failed to consider the cumulative impacts of the RD&D lease, which are additive to development of the

Utility Project and the South Project. BLM in the RD&D lease categorical exclusion stated that development will be limited to RD&D lease activities (which are minimal). But in the FEIS, BLM has acknowledged that development activities will be full-scale oil shale development on the RD&D lease—and thus even higher environmental impacts. It was arbitrary and capricious for BLM to fail to disclose these impacts in the FEIS.

**G. BLM failed to consider the in-lieu selection of the “Z-Parcel” in the same EIS as the Utility Project, even though the two actions are connected, cumulative, and similar.**

In comments on the DEIS, Earthjustice contended that BLM must consider the State of Utah’s in-lieu selection of the “Z-parcel” as a connected action to the Utility Project, intended to facilitate oil shale development. *See* FEIS Appx. I6-8. BLM responded that “BLM has no common purpose for the Z-parcel and the Utility Project. Each is simply an external application to which BLM must respond.” *Id.* The FEIS states repeatedly that the indemnity selection of the Z-parcel and the South Project/rights-of-way are not “connected actions.” This is incorrect, because the two projects both have a common purpose. But even if the indemnity selection and the Utility Project were not “connected” actions, the FEIS fails to discuss these actions as “cumulative” or “similar” actions, which therefore should have been included in one EIS.

Additionally, BLM cannot rely on its FEIS for the Utility Project to consider the impacts of the indemnity selection, because there is no site-specific information in the FEIS on impacts to that parcel.

Regulations implementing NEPA define “connected actions” as those that “are closely related and therefore should be discussed in the same impact statement.” 40 C.F.R. § 1508.25(a)(1). Actions are connected if they “[a]re interdependent parts of a larger action and depend on the larger action for their justification.” *Id.* § 1508.25(a)(1)(iii). Further, “[p]roposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.” *Id.* § 1502.4(a).

An agency must consider all “connected actions” in a single EIS. *Great Basin Mine Watch v. Hankins*, 456 F. 3d 955, 968–69 (9th Cir. 2006). *See also Kleppe v. Sierra Club*, 427 U.S. 390, 399 (1976) (a single environmental review document is required for distinct projects when there is a single proposal governing the projects); *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 998 (9th Cir. 2004) (“[p]roposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement”); *Utahns for Better Transp.*, 305 F.3d at 1182. The “purpose of this requirement is to prevent an agency from dividing a project into multiple actions, each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.” *Great Basin Mine Watch*, 456 F. 3d at 969 (quotation marks omitted).

NEPA regulations further require that agencies “shall” consider in a single EIS “[c]umulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.” 40 C.F.R. § 1508.25(a)(2). “[C]umulative actions must be considered together to prevent an agency from dividing a project into multiple actions, each of which individually has an insignificant environmental impact, but

which collectively has a substantial impact.” *Wetlands Action Network v. U.S. Army Corps of Eng’rs*, 222 F.3d 1105, 1118 (9th Cir. 2000) (*abrogated on other grounds by Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1178 (9th Cir. 2011)) (internal quotations omitted). Courts have held that “where several foreseeable similar projects in a geographical region have a cumulative impact, they should be evaluated in a single EIS.” *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1312 (9th Cir. 1990). *See also N.C. Alliance for Transp. Reform, Inc. v. U.S. Dep’t of Transp.*, 151 F. Supp. 2d 661, 684–85 (M.D.N.C. 2001) (ordering agency to consider in a single EIS two separate halves of a highway beltway proposal, because the two will have cumulative impacts); *Wash. Trails Ass’n v. U.S. Forest Serv.*, 935 F. Supp. 1117, 1122 (W.D. Wash. 1996) (finding agency violated NEPA when it failed to consider in a single EIS multiple proposed actions involving trails that could connect).

NEPA regulations mandate that in evaluating the scope of an EIS, agencies “shall consider” “[s]imilar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.” 40 C.F.R. § 1508.25(a)(3).

The ROW applications and the transfer of the Z-parcel to the state of Utah are not only connected actions; they are also cumulative and similar actions. They are “interdependent parts of a larger action and depend on the larger action for their justification.” 40 C.F.R. § 1508.25(a)(1)(iii).

The two are “connected actions” because both of the proposals are a part of Enefit’s proposed South Project, and both depend upon the South Project for their justification. Enefit proposed the ROWs to facilitate its oil shale strip mining and processing facility; the company considers the parcel to be part of its mine plan; and the company is the moving force behind SITLA’s application for the Z-parcel, because the company intends to mine at least part of the parcel. *See* FEIS Appx. I6-4–I6-16. Without the South Project, there would be no in lieu selection, nor would there be a request for ROWs. Both projects serve the exact same project and the same master—Enefit.

The two are also “cumulative” actions because they will have cumulatively significant impacts. The Utility Project and the in-lieu selection are both part of Enefit’s South Project proposal, and will collectively have significant impacts. They are in the same region; as the FEIS admits, only a mile separates the utilities terminus from the Z-parcel. FEIS Appx. I6-8 (BLM response to comment). And the two will likely have cumulative impacts, as the FEIS also admits. *Id.* I6-11 (“Impacts on resources of concern from development of the Z-parcel may accumulate with the [ROWs]”). Enefit’s concern that the two projects might be confused strongly suggests that Enefit is segmenting these two projects to avoid BLM considering them together. *See id.* I6-13–I6-14.

And the two are “similar” actions because they “have similarities that provide a basis for evaluating their environmental consequences together,” including “common timing [and] geography.” 40 C.F.R. § 1508.25(a)(3). The two projects are proximate to one another, both

involve surface disturbance to serve mining operations, both were proposed to serve Enefit's mining plans, and both have been under BLM's consideration for years.

The FEIS rejects considering the in-lieu selection proposal together with the utility project on several grounds. But none of BLM's contentions provide a proper basis for escaping NEPA's mandate that the two be considered "connected actions." And none even address the criteria for "cumulative" or "similar" actions.

First, BLM admits that while "both the Utility Project and the Z-parcel may further Enefit's purposes," the two are not connected actions because *BLM* has no common purpose for the Z-parcel and the Utility Project. Each is simply an external application to which BLM must respond." FEIS Appx. I6-8 (emphasis added); *see also id.* I6-12 ("leasing and oil shale development of the Indemnity Selection is not a federal action"). But NEPA's regulations do not require that the *agency* have a common purpose. The two actions "are closely related," 40 C.F.R. § 1508.25(a)(1), because both serve the South Project, and they "[a]re interdependent parts" of that larger action. *Id.* § 1508.25(a)(1)(iii). Alleging that oil shale mining is not the purpose of BLM's potential disposal of the Z-parcel also ignores that is the purpose of Utah seeking the parcel and the foreseeable impact. To allege, as BLM does, that "these [two] projects do not have a direct relationship," FEIS Appx. I6-8, ignores the obvious: that the South Project is the single governing proposal which unites both the Utility Project and the in-lieu selection actions, whether the South Project is before BLM or not. BLM cites no case law or regulation that permits an agency to turn a blind eye to two connected actions because the proponent is fortuitously able to segment them into separate applications under separate statutes.

Second, BLM argues that because physical disturbance from the ROWs and the Z-parcel do not overlap precisely the same acreage, the actions are not connected. FEIS Appx. I6-8 ("No Utility Project spurs to the Z-parcel are planned or proposed."). But the two actions will take place within a mile of one another; the Utility Project is meant to facilitate mining of the South Project, which will include the Z-parcel. Courts have found actions to be "cumulative" and thus require preparation of a single EIS where "similar projects" will occur the same "geographical region [and will] have a cumulative impact." *City of Tenakee Springs*, 915 F.2d at 1312. That is precisely the case here.

Third, BLM appears to assert that because the impacts of transferring the Z-parcel to the State of Utah (which will allow oil shale mining there) are subsumed in the FEIS's cumulative impacts discussion of the South Project, BLM has discharged its duty to consider the two proposals together. FEIS Appx. I6-11. This ignores that NEPA mandates that two connected, cumulative, or similar actions be analyzed in full and decided upon the same EIS. BLM has not done so here. And its cumulative impacts analysis never addresses the tradeoffs between transferring to Utah and not doing so on the acreage that is the Z-parcel.

In sum, none of the FEIS's excuses for failing to address the in-lieu selection and the Utility Project together refute the fact that the two proposals are connected, cumulative and similar actions.

## **H. Enefit’s greater sage-grouse mitigation efforts fail to comply with the applicable sage-grouse resource management plan.**

The Trust submitted comments alleging that the Draft EIS failed to disclose impacts to, or ensure compliance with the applicable resource management plan (RMP) concerning, the imperiled sage-grouse. *See* Trust DEIS Comment (Exhibit 1) at 60–66. BLM acknowledges that it revised the Final EIS to respond to sage-grouse concerns, and added a new Appendix (F2) to address “Greater Sage-Grouse Required Design Features and Applicable Management Actions.” *See* FEIS at Appx. I6-76. However, these modifications fail to ensure compliance with the applicable RMP, and fail to take the hard look NEPA requires.

The FEIS notes that Management Action SSS-5 in the Utah Greater Sage-Grouse Approved RMP Amendment applies to the ROW proposal because “Project activities would result in habitat loss and degradation to sage-grouse GHMA [general habitat management areas].” FEIS 4-59. MA-SSS-5 mandates that in “GHMA, apply the fluid mineral RDFs [Required Design Features] that are associated with GHMA identified in Appendix C when authorizing/permitting site-specific fluid mineral development activities/projects.” Utah Sage-Grouse RMP Amendments 2-13. The Enefit Final EIS, in conformance with that provision, asserts that “Appendix F documents the conformance of the Utility Project with the [Utah Sage-Grouse RMP Amendments].” FEIS 4-59. Appendix F2 applies the RDFs from Appendix C of the Utah Sage-Grouse RMP Amendment to the Enefit Utility Project.

However, in applying the RDFs to the Enefit Project, BLM makes several errors. First, one of the RDFs requires project proponents to protect sage-grouse habitat, “[w]here technically and financially feasible, [by] bury[ing] distribution power lines . . . within existing disturbance.” FEIS Appx. F2-6. Neither the relevant appendix nor the FEIS itself addresses burying the power line as an alternative or explains why burying the proposed above-ground power line is not “technically [or] financially feasible.” Instead, BLM simply states that the right-of-way will permit overhead power line construction. *Id.* Because the FEIS fails to explain why the power lines cannot be buried technically or financially, BLM’s failure to apply this RDF is arbitrary and capricious.

Second, the FEIS appears to allow Enefit to take credit, as part of its mitigation plan, for a proposal that has already been analyzed and approved, a violation of the principle that mitigation measures must provide for “additionality.” Greater Sage-Grouse Mitigation Working Group, Report to the Sage-Grouse Task Force, Greater Sage-Grouse Compensatory Mitigation (Dec. 2016) at 9, attached as Exhibit 30.

In describing mitigation measures to address the hundreds of acres of sage-grouse habitat that the ROWs will degrade, the FEIS admits that such measures must provide additionality. FEIS Appx. F2-9. This captures the common-sense notion that those seeking to mitigate damage to grouse habitat should not be able to take credit where the beneficial activities would take place anyway, without the project proponent’s assistance. As the interagency Greater Sage-Grouse Mitigation Workgroup explained:

A key principle of compensatory mitigation is that compensatory mitigation measures must provide conservation benefits that are truly “additional” to what

would have occurred in the absence of the compensatory mitigation measure. Mitigation is “additional” when it provides resource benefits that are demonstrably new and that would not have occurred without the compensatory mitigation measure, or where habitat risks or threats are reduced and management plans are in place to ensure habitat values are enhanced or secured. Additionality considerations generally include both resource and financial additionality.

Greater Sage-Grouse Mitigation Working Group, Report to the Sage-Grouse Task Force, Greater Sage-Grouse Compensatory Mitigation (Dec. 2016) (Exhibit 30) at 9.

The FEIS identifies two projects that Enefit will fund to mitigate for the ROWs’ destruction of grouse habitat: the Goslin and Brown’s Park-Pigeon Canyon Pinyon-Juniper Lop and Scatter vegetation treatments. FEIS Appx. F2-12. The FEIS indicates that these two projects will be implemented in “the fall of 2017–2018 as reasonable mitigation for disturbance.” *Id.*

Three facts undermine a claim of additionality for these projects. First, the FEIS indicates that these projects may have already been *implemented* in the fall of 2017. If the projects have already occurred, Enefit clearly cannot take credit for protecting sage-grouse in a manner that otherwise would not occur.

Second, the Brown’s Park-Pigeon Canyon Pinyon-Juniper Lop and Scatter project was approved nine months *before* issuance of the Enefit FEIS, suggesting that BLM intended to approve and implement the project in any event. *See* BLM, Decision Record, Brown’s Park-Pigeon Canyon Lop and Scatter Project, DOI-BLM-UT-G010-2017-0044-EA (Sep. 18, 2017), attached as Exhibit 31; BLM, Environmental Assessment, Brown’s Park-Pigeon Canyon Lop and Scatter Project, DOI-BLM-UT-G010-2017-0044-EA (Sep. 2017), attached as Exhibit 32. Neither the Decision Record nor the EA discuss that the project could not be implemented absent Enefit’s prospective funding contribution, nor do they mention Enefit, or funding, at all.

Third, in addressing additionality, the FEIS does not assert that Brown’s Park-Pigeon Canyon project will provide additive habitat restoration that would not happen without Enefit’s contribution—only that the project will benefit grouse. FEIS Appx. F2-9–F2-10.

In short, Enefit cannot take credit for mitigating impacts by funding a project that was long ago approved, and perhaps even underway, which undermines any claim of additionality.

**I. To the extent that Enefit can take credit for sage-grouse mitigation efforts, it segmented analysis of those efforts, violating NEPA.**

Even if Enefit can take credit for making possible the Brown’s Park-Pigeon Canyon project, BLM’s analysis in the FEIS violated NEPA.

BLM prepared a separate EA on the Brown’s Park-Pigeon Canyon project. The agency did not disclose to the public that the lop and scatter project and the Enefit project were linked. Nor did it analyze their impacts together, though the two are connected actions (or cumulative actions) if the Brown’s Park-Pigeon Canyon project would not have occurred but for BLM’s approval of Enefit’s right-of-way applications. If Enefit can take credit for the Brown’s Park-Pigeon Canyon

project, the ROWs and the lop and scatter project are connected actions—integrated parts of the same action—that must be addressed together in a single NEPA document.

While elimination of over a square mile of pinyon-juniper stands may benefit grouse, this action will have other impacts, which must be added to, and disclosed together with, the impacts of the ROWs. Even if BLM considered the impacts of the Brown’s Park-Pigeon Canyon project not to be “significant” on their own, those impacts could be significant cumulatively when considered together with the Enefit ROWs. But the impacts of the lop and scatter project were not disclosed in the Enefit FEIS, and not considered as a cumulative impact in the FEIS. Nor does the Enefit FEIS incorporate by reference or otherwise refer to the Brown’s Park-Pigeon Canyon EA.

Thus, even if Enefit can take credit for the previously approved Brown’s Park-Pigeon Canyon project as mitigation for sage-grouse impacts of the ROWs, it failed to comply with NEPA in analyzing the impacts of the two projects together.

**J. BLM failed to disclose the climate pollution impacts of combustion of oil shale produced by the South Project.**

Given that available studies point to intensified impacts of climate change in the Upper Colorado River Basin, it was important for BLM’s FEIS to attempt to quantify the expected greenhouse gas pollution from its permitting of the Utility Project and the resulting impacts of the South Project. In its response to EPA’s comments on the DEIS, BLM disclaims any responsibility for the downstream greenhouse gas emissions associated with the South Project. It claims that “[i]mpacts from the South Project are not indirect effects; they are cumulative effects because the South Project is not a connected action and will go forward to full buildout regardless of whether the Utility Project Alternative is selected by the BLM.” FEIS Appx. I1-2. BLM continues that it “has no jurisdiction over the South Project,” and that “downstream product combustion is not necessary for a reasoned choice between alternatives in this EIS for the purposes of NEPA because the South Project will continue to full buildout regardless of the BLM decision on the Utility Project.” *Id.*

As discussed at length in preceding sections, BLM has not taken a hard look at whether the South Project could in fact proceed to a full buildout without federal ROWs. Accordingly, it has improperly categorized climate impacts from the South Project. Climate impacts are indirect. Because BLM has not analyzed the climate impacts of the Utility Project and the South Project, it has failed to take a hard look at this issue.

**V. BLM must prepare a revised FEIS to address its numerous inadequacies.**

For all of the foregoing reasons, BLM’s NEPA analysis of the Utility Project is inadequate. BLM’s most prominent error is its refusal to consider the South Project a connected action, based on the mistaken premise that it could proceed to full buildout without the ROWs the Utility Project would provide. This allows BLM to disclaim its own responsibility over any of the environmental impacts of the South Project, which would be far greater than those of the Utility Project alone. Additionally, even if BLM is correct that the South Project is independently viable, it nonetheless has neither analyzed nor disclosed the information necessary for a reasoned choice between alternatives. Specifically, it has failed to describe the full impacts of either the



no action alternative or the proposed action, such as either alternative's impacts on the Upper Colorado River or on air quality, or either alternative's likelihood of producing a catastrophic oil spill, among many other issues.

Without presentation and analysis of this information, the FEIS does not fulfill NEPA's requirement of informing an agency's decision on an environmentally significant proposal. To the contrary, the FEIS in its present form is no more than a post-hoc justification for a decision BLM appears already to have made—to subsidize Enefit's oil shale mining and production operation. In addition, the FEIS leaves BLM unable to select an environmentally preferable alternative—the option that “causes the least damage to the biological and physical environmental and best protects, preserves, and enhances historical, cultural, and natural resources.” *See* 43 C.F.R. § 46.30. According to 40 C.F.R. § 1505.2(b), BLM is required to identify the environmentally preferable alternative in its ROD, but its analysis to date means it simply cannot make an informed decision on this topic. BLM's environmental analysis to date also demonstrates that the proposed alternative would not be in the public interest under FLPMA. *See* 43 U.S.C. § 1761(a); 43 C.F.R. §§ 2804.26(a)(2) & (4); *see also* Trust DEIS Comment (Exhibit 1) at 5–20.

BLM must not issue a ROD approving the five ROWs based on the deficient FEIS. Instead, BLM should prepare a revised FEIS that addresses the inadequacies identified in this letter and our June 14, 2016 letter incorporated by reference herein.

Thank you for your attention to this matter. If you have any questions about these comments, please contact Alex Hardee, Earthjustice, at 303-996-9612.

Sincerely,



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## TABLE OF EXHIBITS

<b>Exhibit</b>	<b>Exhibit Description</b>
Exhibit 1	Letter of A. M. Tapp, Grand Canyon Trust <i>et al.</i> , to S. Howard, BLM (June 14, 2016)
Exhibit 2	Letter of R. Clerico, Enefit, to G. Torres, BLM (Nov. 18, 2016)
Exhibit 3	Letter of R. Clerico, Enefit, to G. Torres, BLM (Feb. 28, 2017)
Exhibit 4	Letter of R. Clerico, Enefit, to BLM, “EAO Response to Data Gaps” (Mar. 22, 2015)
Exhibit 5	Letter of Douglas H. Benevento, EPA, to Governor Herbert, Utah (Dec. 20, 2017)
Exhibit 6	EPA, Intended Area Designations for the 2015 Ozone National Ambient Air Quality Standards Technical Support Document (Dec. 20, 2017)
Exhibit 7	Jian-Guo Feng <i>et al.</i> , “Analysis and summary of oil & gas pipeline leak monitoring and localization methods,” <i>Advanced Materials and Energy Sustainability</i> (2017)
Exhibit 8	Jake R. Nelson <i>et al.</i> , “Oil spill modeling: Risk, spatial vulnerability, and impact assessment,” <i>Progress in Physical Geography: Earth and Environment</i> (December 12, 2017)
Exhibit 9	David Wesley & Louis Alfonso Dau, “Complacency and Automation Bias in the Enbridge Pipeline Disaster,” <i>Ergonomics in Design: The Quarterly of Human Factors Applications</i> (November 2016)
Exhibit 10	Valerie Volcovici & Richard Valdmanis, <i>Keystone’s existing pipeline spills far more than predicted to regulators</i> , Reuters (Nov. 27, 2017)
Exhibit 11	Andrew Cosham & Phil Hopkins, <i>How Many Pipelines in North America Have Failed By Fatigue and Why?</i> , 2 Pipeline Safety Management Systems (Sept. 26–30, 2016)
Exhibit 12	George Joseph, <i>30 Years of Oil and Gas Pipeline Accidents, Mapped</i> , CityLab (Nov. 30, 2016)
Exhibit 13	National Academy of Sciences, <i>Spills of Diluted Bitumen from Pipelines: A Comparative Study of Environmental Fate, Effects, and Response</i> (2016)
Exhibit 14	Shannon M. Jones & David S. Gutzler, <i>Spatial and Seasonal Variations in Aridification across Southwest North America</i> , 29 <i>J. of Climate</i> 4637–49 (2016)
Exhibit 15	Toby R. Ault, et al., <i>Relative impacts of mitigation, temperature, and precipitation on 21<sup>st</sup> century megadrought risk in the American Southwest</i> , <i>Sci. Advances</i> 1–8 (2016)
Exhibit 16	Andreas F. Prein, et al., <i>Running dry: The U.S. Southwest’s drift into a drier climate state</i> , 43 <i>Geophysical Res. Letters</i> 1–8 (2016)
Exhibit 17	Connie A. Woodhouse, et al., <i>Increasing influence of air temperature on upper Colorado River streamflow</i> , 43 <i>Geophysical Res. Letters</i> 2174–81 (2016)
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Exhibit 19	Gregory McCabe <i>et al.</i> , <i>Evidence that Recent Warming is Reducing Upper Colorado River Flows</i> , 21 <i>Am. Meteorological Soc’y: Earth Interactions</i> 1–14, at 2 (2017)
Exhibit 20	Kurt C. Solander, Katrina E. Bennett, & Richard S. Middleton, <i>Shifts in historical streamflow extremes in the Colorado River Basin</i> , 12 <i>J. of Hydrology: Regional Studies</i> 363–77 (2017)
Exhibit 21	John C. Fyfe, et al., <i>Large near-term projected snowpack loss over the western United States</i> , 8 <i>Nature Comm.</i> 14996 (2017)
Exhibit 22	Katrina E. Bennett <i>et al.</i> , <i>Global Sensitivity of Simulated Water Balance Indicators Under Future Climate Change in the Colorado Basin</i> , 54 <i>Water Resources Res.</i> 132–49 (2017)
Exhibit 23	Katrina E. Bennett <i>et al.</i> , <i>Global Sensitivity of Simulated Water Balance Indicators Under Future Climate Change in the Colorado Basin</i> , 54 <i>Water Resources Res.</i> 132–49 (2017)
Exhibit 24	Email from Kelly Buckner to Deborah Brown <i>et al.</i> (Oct. 13, 2016)
Exhibit 25	Ecoshift Consulting, LLC, Technical Memorandum, <i>Greenhouse Gas &amp; Water Footprints of Oil Shale &amp; Tar Sands Resources &amp; Projects in the Upper Colorado River Basin</i> (June 2018)
Exhibit 26	Application for Permanent Change of Water, State of Utah, Water Right No. 49-258 (Feb. 13, 2013).
Exhibit 27	Request for Extension of Time to File Proof of Beneficial Use, Water Right No. 49-258 (July 17, 2013)
Exhibit 28	Order of the State Engineer, Water Right Number 49-258 (Mar. 27, 2014)
Exhibit 29	Amended Order of the State Engineer, Water Right Number 49-258 (Apr. 21, 2014)
Exhibit 30	Greater Sage-Grouse Mitigation Working Group, Report to the Sage-Grouse Task Force, Greater Sage-Grouse Compensatory Mitigation (Dec. 2016)
Exhibit 31	BLM, Decision Record, Brown’s Park-Pigeon Canyon Lop and Scatter Project, DOI-BLM-UT-G010-2017-0044-EA (Sep. 18, 2017)
Exhibit 32	BLM, Environmental Assessment, Brown’s Park-Pigeon Canyon Lop and Scatter Project, DOI-BLM-UT-G010-2017-0044-EA (Sep. 2017)