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Rilda Expansion
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1594 West North Temple, Suite 1210
P.O Box 145801
Salt Lake City, Utah 84114-5801

Re: Construction of New Surface Facilities in Rilda Canyon

Dear Ms. Malin:

These comments are being submitted on behalf of Utah Environmental Congress. These comments are submitted in regards to the environmental impacts that are anticipated as a result of the construction of new surface facilities in Rilda Canyon. It is our understanding that UDOGM and OSM will be jointly responsible for preparation of an environmental assessment pursuant to the National Environmental Policy Act 42 U.S.C. §4331 et. seq. Please accepts these comments on the proposed Rilda Canyon Portal Facility and incorporate any comment into your EA.

Because of the magnitude and public concern over this project, we believe that the lead agency must, at a minimum, prepare and submit for public review a Draft EA which would be subject to 30-day public notice and comment. Further, we respectfully request a copy of the EA and an opportunity to comment on the EA pursuant to NEPA when it is available. *See* 40 C.F.R. §1503.1.

Notwithstanding the Utah Cooperative Agreement, UDOGM's role as the lead agency for preparation of the EA is inappropriate under the circumstances. First, fulfillment of the duty to prepare an EA is a federal duty under a federal law, namely NEPA. Second, this project will result in significant surface impacts that makes the U.S. Forest Service (NFS or FS) the most appropriate agency to implement duties pursuant to NEPA. Additionally, "for leasing proposals which primarily involve the NFS or adjoining private lands with Federal minerals and which primarily involve NFS issues, the FS will have the lead for environmental analysis and, when necessary, documentation in an environmental assessment or environmental impact statement."[1] Because the Rilda Canyon project is entirely on FS lands and will have direct and irreparable impacts such as stream diversion, vegetation loss, and impacts to wildlife, Federal law requires that FS be the lead agency for preparation of the EA.

There are a number of environmental impacts that are anticipated on the surface that justify the U.S. Forest Service's acting as the lead agency for preparation of an EA. The U.S. Forest Service is charged with the protection of surface resources. 30 C.F.R. §740.4. In this case, the entire project (including construction of a ventilation fan, portal facilities, office, bathhouse, parking lot, and staging areas) will occur on NFS lands. Further, an existing county road would be bypassed to provide access to water

[1] *See* Interagency agreement between the Bureau of Land Management and the Forest Service for Mineral Leasing

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developments and other mine facilities, and as acknowledged in the legal notice, the Manti-La Sal National Forest would therefore be the lead agency for issuing any required road easements for the project[2]. Diversion of Rilda Creek through a 1,200 foot culvert is expected, and the driving of a 2100 foot long rock slope to intersect the Hiawatha Seam will all occur on NFS land. Surface disturbance is expected and the diversion of stream flow will likely irreparably impact area aquatic species. Further, the project area located on Rilda Canyon/Creek is directly upstream of Huntington Creek, a state of Utah Blue Ribbon Trout stream, which contains Colorado Cutthroat Trout.

Additionally, because the impacts of this project will potentially cause long lasting and significant environmental impacts, an Environmental Impact Statement (EIS) and not merely an EA is required. At this point the environmental impacts of the proposed project are unknown, but the proposed stream diversion could cause significant impacts. A recent federal court has explained that "an EIS must be prepared if substantial questions are raised as to whether a project may cause significant degradation of some human environmental factor. To trigger this requirement a plaintiff need not show that significant effects will in fact occur, raising substantial questions whether a project may have a significant effect is sufficient". League of Wilderness Defenders - Blue Mts. Biodiversity Project v. Marquis-Brong, 259 F. Supp. 2d 1115 (D. Or. 2003).

The proposed stream diversion raises many questions with respects to how stream flow will be impacted. If stream flow is to be compromised in any way through stream water displacement, loss of water or through installation of an imperfectly designed culvert the area environment will deteriorate. The proposed action could cause potential adverse effects to area wildlife, fish, and vegetation, which all depend on a reliable source of water. Aquatic wildlife of particular concern includes macroinvertebrates, amphibians, and mollusks. At this point there are likely impacts to macroinvertebrates a Manti La Sal National Forest management indicator species, which would result from the diversion of Rilda Creek. There are also unanswered questions about the extent of potential harm to downstream populations of trout. A detailed analysis will be necessary to determine the extent of impacts to aquatic species in the project area and downstream.

Full analysis of threatened and endangered species as well as consultation with U.S. Fish and Wildlife Service should be conducted, specifically for the Mexican Spotted Owl (MSO) since this area may contain suitable habitat. Habitat surveying for MSO should be conducted throughout the project area focusing on cliffs, rock outcroppings, and other escarpments, which may contain MSO. The project area is within ½ mile of an active Golden eagle nest that needs to be closely monitored and appropriate mitigation measures provided.

The construction of the culvert facilities would likely cause the elimination of riparian vegetation thereby decreasing habitat for wildlife that depends on riparian vegetation. Big games species in particular rely on such habitat.

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[2] For this reason, and because it is a related and reasonably foreseeable action, any road easement on NFS lands must be analyzed in the EA as part of the cumulative impacts of the project.

Mule deer and Rocky mountain elk (among others) are both management indicator species for the forest. Therefore, the Forest Service must comply with applicable law and regulations and conduct a quantitative analysis of population trends of these MIS prior to project approval and development. 36 C.F.R. §§219.19 and 219.26 (1999). The Forest Service needs present population data for the MIS and must use this data to determine relationships between the habitat impacts and population changes. Such data must be provided and evaluated in a site-specific EA or EIS for the project. Specifically, any site-specific analysis must address the impacts of development to MIS, MIS populations, and MIS habitat.

Because this project will occur on Forest Service lands, compliance with the Manti La Sal Land Resource Management Plan (LRMP) is required and conformity with the requirements NF's LRMP must be demonstrated. The Manti La Sal LRMP requires protection of deer/elk habitat and their water sources.[3] This particular area of Utah is traditionally scarce in water and thus a diversion of Rilda Creek (and associated development) could sacrifice available water resources. The removal of riparian vegetation could potentially disturb big game habitat, and would therefore violate the forest plan.

The Manti La Sal National Forest ranks first out of all six Utah National Forests in potential to produce big game. MLS LRMP, p. II-29. "The primary land uses associated with the area are wildlife habitat, critical winter range for elk, and high priority summer range for deer and elk". *Minor Exploration Analysis and Findings for the Deer Creek Mine*, p. 7. The LRMP requires that habitat be maintained for minimum viable populations of vertebrate wildlife species. Id. at III-22. This requires that habitat and habitat diversity improvement or at least maintenance of the status quo. Id. Specifically vegetative composition should be maintained to at least 50% of current habitat (1980) for existing wildlife. Id.

The project as currently proposed will remove vegetation thereby eliminating suitable habitat for area species. The value of riparian vegetation and habitat cannot be understated particularly in this relatively dry region of the state. An estimated 60-70% of western bird species (Ohmart 1996) and as many as 80% of wildlife species in Arizona and New Mexico (Chaney et al. 1990) and in southeastern Oregon (Thomas et al. 1979) are dependent on riparian habitats. Because of this riparian ecosystems are considered to be important repositories for biodiversity throughout the west. A.J. Belsky, A. Matzke, S. Uselman, 1999.

Riparian zones provide key service for all ecosystems, but are especially important in dry regions, where they provide the main source of moisture for plants and wildlife, and the main source of water for downstream plant, animal, and human communities. (Meehan et al. 1977, Thurow 1991, Armour et al. 1994). Rooted streamside plants retard streambank erosion, filter sediments out of the water, build up and stabilize streambanks and streambeds, and provide shade, food, and nutrients for aquatic and riparian species.

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[3] "In areas of historic water shortages during the dry season of the year develop water as appropriate." "Manage key deer and elk habitat so as to minimize disturbance during the period of use." LRMP at III-20.

(Weingar 1977, Thomas et al. 1979, Kauffman and Kruegar 1984). In short the elimination of riparian vegetation will cause irreversible impacts that harm the long term integrity of this area. We recommend that any component of this project that would remove vegetation alongside Rilda Creek be eliminated from serious consideration.

To what extent water has been utilized or will be utilized as a consumptive use is unknown and should be analyzed in any EA or EIS. Regardless, water diversion in this instance (and consumptive use practices) could threaten downstream Colorado River endangered fish including the Colorado pikeminnow, humpback chub, bonytail chub, and razorback sucker. The US Fish and Wildlife Service considers depletion of water in the Colorado River drainage a threat to the existence of these endangered fish. *See* Deer Creek Mine Technical Analysis, p. 9.

Aside from potential problems created by stream alteration there is reason to believe that water quality standards are not being met. The removal of vegetation, the use of roads through heavy equipment, and potential oil spills could all cause water quality to deteriorate. Within the Deer Creek Mine area there have already been problems with water quality due to irregular monitoring of water quality. This project could easily cause water quality standards to deteriorate. The reviewing agency will need to show how the proposed project will comply with all applicable water quality standards. Failure to do so will cause the lead agency to violate the federal Clean Water Act as implemented by the state of Utah.

The lead agency may also need to comply with other provisions of the Clean Water Act based on the proposed stream diversion. This may include compliance with §404 of the CWA or some additional stream alteration permit. Stream alteration permits are typically obtained from the state engineer's office although in certain instances the U.S. Army Corp of Engineers may need to approve the permit. These permits must be obtained prior to release of a draft EA or EIS. Further, the impacts of the diversion (and compliance with the CWA) must be analyzed in the EA or EIS.

The goal of the Clean Water Act (CWA) is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). "The word 'integrity'. . . refers to a condition in which the natural structure and function of ecosystems [are] maintained." H.R. Rep. No. 92-911, at 76 (1972); see also Minnehaha Creek Watershed Dist. v. Hoffman, 597 F.2d 617, 625 (8th Cir. 1979). The legislative history of the Clean Water Act, in turn, defines "natural" as "that condition in existence before the activities of man invoked perturbations which prevented the system from returning to its original state of equilibrium." H.R. Rep. No. 92-911, at 76. "Any change induced by man which overtaxes the ability of nature to restore conditions to 'natural' or 'original' is an unacceptable perturbation." H.R. Rep. No. 92-911, at 77.

According to Congress, a primary goal of the CWA is to maintain the natural structure of streams. Such an interpretation is supported by case authority which holds that the "Clean Water Act should be construed broadly to encompass deleterious environmental effects of projects." Riverside Irrigation Dist. v. Andrews, 568 F. Supp. 583, 588 (D.

Colo. 1983), aff'd 758 F.2d 508 (10th Cir. 1983). Taking a live stream and channeling it through an artificial diversion violates the natural structure of the stream. As one recent case stated:

> The Clean Water Act (CWA) was "a bold and sweeping legislative initiative," United States v. Commonwealth of P.R., 721 F.2d 832, 834 (1st Cir. 1983), enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a)(1994). "This objective incorporated a broad, systematic view of the goal of maintaining and improving water quality: as the House report on the legislation put it, 'the word "integrity" ... refers to a condition in which the natural structure and function of ecosystems [are] maintained.'" United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132, 106 S.Ct. 455, 462 (1985) (quoting H.R.Rep. No. 92-911, at 76 (1972) U.S. Code Cong. & Admin.News 1972, at 3744).

Dubois v. U.S. Department of Agriculture, 102 F.3d 1273, 1294 (1st Cir. 1996). In this case, it is clear that the elimination of over 1,200 feet of Rilda Creek does not "maintain the natural structure and function of the ecosystem" in that watershed.

Under the CWA, states must adopt water quality standards for all water bodies within the state. 33 U.S.C. § 1313.

> These standards include three components: (1) designated uses for each body of water, such as recreational, agricultural, or industrial uses; (2) specific limits on the levels of pollutants necessary to protect those designated uses; and (3) an antidegradation policy designed to protect existing uses and preserve the present condition of the waters.

National Wildlife Fed'n v. Browner, 127 F.3d 1126, 1127 (D.C. Cir. 1997) (citing 40 C.F.R. §§ 131.10 - 131.12).

"A water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses." 40 C.F.R. § 131.2. EPA implementing regulations define designated uses of water as "those uses specified in water quality standards for each water body or segment whether or not they are being attained." 40 C.F.R. § 131.3(f). The minimal designated use for a water body is the "fishable/swimmable" designation. See 33 U.S.C. § 1251(a)(2).

Thus, in any EA or EIS prepared for the project the lead agency must (1) determine the designated uses for Rilda Creek; (2) analyze the specific limits on the levels of pollutants necessary to protect those designated uses; and (3) and demonstrate how a 1,200 stream diversion of Rilda Creek complies with the antidegradation policy designed to protect existing uses and preserve the present condition of the waters.

The U.S. Supreme Court has squarely held that:

> The text [of the CWA] makes it plain that water quality standards contain two components. We think the language of § 303 is most naturally read to require that a project be consistent with *both* components, namely, the designated uses *and* the water quality criteria. Accordingly, under the literal terms of the statute, a project that does not comply with a designated use of the water does not comply with the applicable water quality standards.

PUD No. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700, 714-715, 114 S.Ct. 1900 (1994)(emphasis in original).

Here, the diversion at Rilda Canyon cannot violate state and federal antidegradation regulations. According to federal regulation, applicable antidegradation policies "shall, at a minimum, be consistent with . . . [e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." 40 C.F.R. § 131.12(a)(1). Under this regulation, "'**no activity is allowable . . . which could partially or completely eliminate any existing use**.'" PUD No. 1, 511 U.S. at 718-19, 114 S.Ct. at 1912 (emphasis added)(citing EPA, Questions and Answers on Antidegradation 3 (Aug. 1985)). Thus, any activity which would even *partially* eliminate those uses in Rilda Creek is not permitted.

Under the CWA, the minimum designated use for navigable water is the "fishable/swimmable" designation, which "provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." 33 U.S.C. § 1251(a)(2). But the protection is not limited to streams which support fish: A water body composed of solely plants and invertebrates is also protected under the antidegradation policy. Bragg v. Robertson, 72 F. Supp.2d 642, 662 n.38 (S.D. W. Va. 1999) (citing EPA, Water Quality Standards Handbook § 4.4). Under federal regulations, limited degradation is permitted only where (1) the quality of the water exceeds levels necessary to support the fishable/swimmable use designation, and (2) the quality of water necessary to protect all existing uses is maintained. 40 C.F.R. § 131.12(a)(2).

By creating artificial stream diversions, which by their very nature cannot support aquatic life, PacifiCorp would potentially violate the antidegradation policy applicable to Rilda Creek. The quality and quantity of water necessary to protect existing aquatic life and other designated uses **must** be maintained and such demonstration must take place in any EA or EIS developed for the project. See 40 C.F.R. § 131.12(a)(2). Because artificial diversion of the stream would essentially turn the relevant portion of this living stream into a dead stream, incapable of supporting plants, fish and other wildlife, PacifiCorp's proposed diversions potentially violates the antidegradation policy under the Clean Water Act and is therefore, likely unlawful.

Pursuant to the National Historic Preservation Act and Manti La Sal special coal lease stipulations the lead agency will be required to survey for historic sites that are eligible

for listing on the National Register for Historic Properties. If surveys indicate that such sites exist consultation and other procedures pursuant to §106 must occur.

Special coal lease stipulation #3 requires a study to quantify existing surface resources. The study should locate, quantify, and demonstrate the interrelationship of the geology, topography, surface and groundwater hydrology, vegetation and wildlife. There has been regular flow data recorded in the project area; however it is unknown whether the above study has been completed. This study is very important because it will help determine whether area wildlife and vegetation have an adequate water supply to maintain their viability.

For this project environmentally preferable alternatives likely exist that would maintain the stream course in its current state. Stipulation six of the coal lease would support selection of the environmentally preferable alterative.[4] Because alternatives exist that would protect the area environment to a greater degree than the proposed alternative the environmentally preferred alternative should be chosen.

Pursuant to stipulation seven the lessee will be required to establish a monitoring system that is to provide a continuing record of change over time on how mining impacts the area environment.[5] There has been regular monitoring of stream flow for the Deer Creek mine, however it is unclear whether the monitoring system in place measures how mining has impacted surface hydrology and vegetation.

We thank you for the opportunity to comment on this project, and look forward to receiving a copy of the EA or EIS when it is released so that we may comment on the project.

Sincerely,

Joel Ban
Wildlaw Southwest

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[4] Stipulation 6: "Where alternative sites are available, and each alternative is technically feasible, the alternative involving the least damage to the scenery and other resources *shall* be selected…."

[5] Stipulation 7: "The lessee shall be required to establish a monitoring system to locate measure and quantify the progressive and final effects of underground mining activities on the topographic surface, underground and surface hydrology and vegetation. The monitoring system shall utilize techniques which will provide a continuing record of change over time and an analytical method and measurement of a number of points over the lease area. The monitoring shall incorporate and be an extension of the baseline data."