BEFORE THE REGIONAL FORESTER OF REGION FOUR OF THE UNITED STATES FOREST SERVICE

In Re: Appeal of Decision Notice/	)
Finding Of No Significant Impact and	)
Environmental Assessment for the	)
Deer Creek Coal Mine Plan	)
Modification, Fed. Coal Leases U-06309	)
U-2810, SL-050862, SL-051221 on the	)
Manti-La Sal National Forest	)

UTAH ENVIRONMENTAL CONGRESS
1817 South Main, Suite 10
Salt Lake City, UT 84115

APPELLANT

APPEAL NO. ____

INTRODUCTION

STATEMENT OF FACTS

ARGUMENTS

REQUEST FOR RELIEF

DATED this 13 day of October, 2005

By _____

Kevin Mueller, Executive Director,
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1817 South Main, Suite #10
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on behalf of appellant

Introduction

NOTICE IS HEREBY GIVEN that the Utah Environmental Congress (UEC) appeals pursuant to 36 CFR § 215.7 to the Regional Forester of Region Four from the Decision Notice/Finding Of No Significant Impact (DN/FONSI) and Environmental Assessment (EA) for the Deer Creek Coal Mine Plan Modification, Fed. Coal Leases U-06309, U-2810, SL-050862, SL-051221 signed by Rod Player for Forest Supervisor Alice B. Carlton on August 25, 2005. This decision was noticed in the Sun Advocate (newspaper of record) on August 30, 2005.

The UEC is a non-profit organization dedicated to maintaining, protecting, and restoring the native ecosystems of Utah. The UEC has an organizational interest in the proper and lawful management of National Forests in Utah, including the Manti-La Sal National Forest. The UEC's members, staff, and board of directors participate in a wide range of recreational activities on the Manti-La Sal National Forest, including the area in and surrounding the action approved in the Rida/Huntington Canyon area.

The UEC represents 265 individual members, 37 organizations, and 59 businesses representing approximately 30,000 people, many of whom frequently use, recreate, hunt, fish, visit and otherwise enjoy this project area on the Manti-La Sal National Forest, and have a direct interest in its management.

The UEC claims standing to participate in the public land decision-making process on the grounds that it has been involved in forest management issues since its founding. Our members have hiked, fished, hunted deer and elk, recreated, enjoyed, and photographed the Manti-La Sal National Forest, including the project area. Our collective membership includes professional photography businesses and freelance photographers who make their living in part by photographing Utah's National Forests, including the Wasatch Plateau portion of the Manti-La Sal National Forest. The direct and indirect impacts associated with this decision detract from the rugged, natural splendor, biodiversity, fishing/hunting values and wilderness values in the affected watersheds that make these lands appealing to both professional photographers and our members who find enjoyment from and recreate in this project area.

In addition, the UEC's members are taxpayers that are required to pay for the activities approved. The irretrievable commitments of financial resources associated with this project are also borne by the American people as a whole. The UEC claims partial ownership of the public lands covered by this decision and consequently has legal standing to participate in the process and challenge those decisions it finds legally unacceptable.

The appellant is appealing the August DN/FONSI and EA on the grounds the decision and environmental documentation is legally indefensible. The appellant argues that the Manti-La Sal National Forest (MLSNF) has violated the National Environmental Policy

Act (NEPA), the National Forest Management Act (NFMA), well as the Administrative Procedures Act (APA).

The appellant desires and will request relief in the form of a remand of the decision made in the DN/FONSI signed by Rod Player for Forest Supervisor Alice B. Carlton on August 25, 2005 that was noticed on August 30, 2005 in the newspaper of record.

Statement of Facts

The action proposed and approved is described as follows:
The new facilities would be located in Rilda Canyon, in Section 28, Township 16 South, Range 7 East, Salt Lake Baseline and Meridian, Emery County, Utah, about 8 miles west of the town of Huntington. The proposed mining plan modification calls for the construction of new surface facilities in Rilda Canyon, down-canyon from the existing facilities in Left Fork.
The proposed facilities would cover a long, slender area approximately 4,000 feet long by 200 feet wide covering 13.1 acres on the canyon floor. Of this area, the support facilities (portals, shop, office, etc.) would cover an area approximately 2,000 feet long by 120 to 250 feet wide (9.0 acres) at the west (up-canyon) end of the site. The remainder of the site to the east of the mine yard area would have hydrologic controls, two topsoil stockpiles, and a road turnaround. All facilities would be entirely on the north side of Rilda Canyon Creek except for one topsoil stockpile. The proposal would use the existing county road and 25 kv power line that run through the site. The county road would be paved. See Appendix E, Map 4 (Layout of Proposed Surface Facilities) for a complete description of the proposed facilities. Proposed facilities would include:
Structures: Office/bathhouse/warehouse building; four (4) vertical retaining walls constructed of 12-inch thick concrete; two (2) other retaining walls in the yard area; water treatment building; mine ventilation fan; 168-stall parking lot; underground vehicle parking garage; steel frame building to house fan motors; steel framed storage sheds to house bagged rock dust, ready-mix concrete, and other dry products; oil shed; fueling dock with 4,000 gallon above-ground diesel fuel storage tank; steel shed for storage of cans of oil and lubricant; rock dust silo; pneumatic pipeline for rock dust; and a sediment pond with supporting drainage structures.
Power: An existing 25 kv power line already provides power at the Left Fork Portal Facility. A transformer would be installed to supply power to the Rilda Canyon portal facility and there would be diesel generator backups for the ventilation fan.
Water related facilities:
Culinary system: 10,000-gallon steel water storage tank for treated culinary water.
Sewage system: Waste water from office/bathhouse/warehouse would be separated into gray water and black water. A 20,000-gallon temporary storage tank would hold black water (sewage) until it can be transported by truck to an approved disposal facility. Gray water (discharge from boot wash, showers, floor drains, etc) would be stored before being pumped into an abandoned portion of the underground mine workings. Permits from the U.S. Mine Safety and Health Administration (MSHA) and Utah Department of Environmental Quality, Division of Drinking Water Quality would be obtained.
Runoff system: a two compartmented runoff collection tank with 1) a 7,540 gallon compartment for gray water, and 2) an 18,500 gallon

compartment for temporary storage of surface runoff water. Surface runoff would spill over into the gray water compartment of the tank. This system would also include an emergency spillway connected by pipe to the sediment pond; pump station to move surface runoff into collection tank.

Drainage system: two systems, 1) for collection of "undisturbed" or overland runoff water from above the portal site and from adjacent side slopes that bypasses the developed area and moves this runoff into the natural channel, and 2) for collection of runoff and all non-sewage waste water from the disturbed portal area, parking lots, storage areas, bathhouse/office/ warehouse, and fan area to convey it to the runoff collection tank for discharge into the mine. Culverts would direct any overflow to the sediment pond.

Storage: Mining and snow removal material and equipment would be stored on asphalt and gravel surface areas on the cut or embankment fills. A primary covered storage area would be constructed west of the parking garage to store non-coal waste, coal waste, oil, fuel facilities and bulk rock dust. Secondary covered storage areas would be constructed to store crib blocks, roof bolts, conveyor hardware, conveyor belting, beams, and other associated construction/repair materials. Another covered non-coal waste/sand/rock waste storage area would be constructed on the north side of the mine yard between the fan and access portal. Sand and salt for winter road maintenance would also be stored here. Coal and non-coal wastes would be hauled away.

Soil Stockpile Storage Areas: Two topsoil and subsoil stockpile areas not contiguous to the main facilities and on previously disturbed land (approximately 800 feet by 300 feet, 3.0 acres, and 320 feet by 220 feet, 1.1 acres) would be created. The smaller stockpile would be on the south side of Rilda Canyon Creek and accessed via the existing bridge.

County Road: The existing gravel road would be paved and widened. The road would be realigned to make curves less acute. The design speed would be increased. A trailhead parking lot would be installed to the east of the limited access mine yard to provide public access to Forest Service recreation areas west of the proposed facility.

The projected active life of the facilities is 15-20 years. When the mine shuts down, the site would be reclaimed. Structures would be removed, the site regraded to its original topography, topsoil from the stockpiles redistributed over the site, and all disturbed areas revegetated. The county road would be returned to a gravel surface. Reclamation would take approximately twelve years, two years for the actual demolition and site restoration work and the balance of the time for vegetation to become established before final bond release.

The OSM usage analyzes the magnitude of impacts in terms of their intensity or severity and their duration. The following table from EA table 4.1 defines important terminology:

Table 4.1 OSM Analysis Terminology	
CONTEXT:routine action for OSM	
INTENSITY OF IMPACTS	
Negligible	ranging from immeasurable and undetectable to lower levels of detection
Minor	detectable, but slight
Moderate	readily apparent environmental effects
Potential to become major	potentially severe adverse or exceptional beneficial environmental impacts
Major	severe adverse or exceptional beneficial environmental impacts
DURATION OF IMPACTS	
Short term	life of the mine, including the reclamation period (approximately 30 years)
Long term	after bond release

Note that short term impact means for 30 years, and also note definitions of intensity of impacts.

The Proposed Action would occur in phases over a period of approximately 30 years. The type of activity occurring and thus the environmental effects would vary with each phase. The initial construction of the facilities would occur for 0-2 years. Active mining operations would take place for approximately 15 years. Active reclamation (demolition and removal of facilities, restoration of topography, topsoil replacement, revegetation) would take about 2 years. This would be followed by a SMCRA-mandated 10-year bond release period to establish vegetation. PacifiCorp's management responsibility for the site lasts until bond release, or approximately 30 years. Active mining and reclamation would last about 20 years. The balance of the time would consist of custodial management (monitoring and maintenance).

The appellant has participated in the public comment and involvement process at all points in this process. All of the issues raised in this appeal were raised in comments. All comments submitted by and on behalf of appellant are hereby incorporated by reference, as well as the Forest Plan and associated ROD and FEIS.

Arguments

The ensuing arguments will demonstrate the Manti-La Sal National Forest (MLSNF) has violated National Environmental Policy Act (NEPA), the National Forest Management Act (NFMA), the Forest Plan, as well as the Administrative Procedures Act (APA).

I. The Manti-La Sal National Forest violated the NEPA by failing to prepare an adequate analysis of the cumulative impacts, compartmentalization of related actions and their impacts, and because the EA does not support a Finding Of No Significant Impacts (FONSI).

"Cumulative impact" is defined in NEPA as, "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future action regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time."[1]

In deciding whether an agency's decision not to prepare an EIS is appropriate, the "responsible agency must have 'reasonably concluded' that the project will have no significant adverse environmental consequences." San Francisco v. United States, 615 F.2d 498, 500 (9th Cir. 1980). An agency's decision not to prepare an EIS is impermissible if the agency fails to "supply a convincing statement of reasons why potential effects are insignificant." The Steamboaters v. FERC, 759 F.2d 1382, 1383 (9th Cir. 1985). "[T]he statement of reasons is "crucial" to determining whether the agency took a "hard look" at the potential environmental impact of a project. The Steamboaters v. FERC, 759 F.2d at 1393; Kleppe v. Sierra: Club, .427 U.S. 390, 410, n.21 (1976).

> "To support an EA/FONSI, an agency must produce 'a convincing statement of reasons to explain why a project's impacts are insignificant.'" Pacific Marine Conservation Council, Inc., v. Evans, 200 F.Supp.2d 1194, 1204(N.D.Cal. 2002).

> "Significant", "effects", and "human environment" are all defined in detail by the Council on Environmental Quality regulations implementing NEPA. 40 C.F.R. 1508.27, 1508.8, 1508.14. In particular, "effects" include indirect effects, "related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems." 40 C.F.R., 1508(b). In addition, effects include: "ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative."

[1] 40 CFR 1508.7

A federal agency's Environmental Assessment "must give a realistic evaluation of the total impacts and cannot isolate a proposed project, viewing it in a vacuum." Grand Canyon Trust v. Federal Aviation Administration, 290 F.3d 339, 342 (D.C.Cir. 2002).

Many parts of the EA disclose significant direct/indirect impacts from the action approved. For example:

"Road construction activity would primarily be confined to the disturbed corridor along each side of the existing road right-of-way. Widening and realigning the road would cause a temporary (less than 2 months), *major* increase in noise, fugitive dust, and sediment during the construction period. After that the effect would be *minor and short term*, and would eliminate or drastically reduce noise, fugitive dust and sediment runoff for the life of operations." EA page 48.

In light of above and the terminology table for effects presented supra in the statement of facts the action approved will involve severe adverse environmental impacts ("major") during road construction work in the form of noise, fugitive dust, and sediment impacts. This will be followed by detectible but slight impacts ("minor") for approximately 30 years ("short term"). In light of the fact that the EA discloses severe adverse temporary sedimentation impacts followed by lesser detectible impacts for 30 years impacts to aquatic habitat and macroinvertebrates MIS is significant. To top it off EA page 36 (footnote) discloses that the mitigation for this that consists primarily of buffer zones along the stream "would be as narrow as 25-30 feet in three locations where the active channel meanders north." In light of this, appellant notes that EA page 21 discloses that the current aquatic community MIS (macroinvertebrates) BCI "does not meet the Forest Plan standard of 75." The total significant temporary and additional lesser 30 year long impacts to the aquatic community in combination with the disclosure that this resource is already below Forest Plan standard underlines the substantive and procedural problems and legal failures resulting from the issuance of this FONSI when the evidence indicates significant impacts.

Furthermore, this one road construction component in Rilda Canyon is but one component of the much larger action approved that results in additional significant impacts in context and intensity to NEPA's human environment. Because the EA also compartmentalizes the larger action required and its total impacts there are additional impacts not accounted for. This illegal compartmentalization includes: (1) the change in the right-of-way to make it 80 feet wide that is said to be needed on the bottom of EA page 47, (2) due to traffic congestion and safety issues on highway U-31 resulting from the 20- fold increase in traffic coming off the highway onto the new paved road up Rilda Canyon (EA page 48), the company has already begun construction of a new left hand turn land on U-31 and (3) other actions such as the proposed drilling for water in Rilda Canyon necessitated by the action approved with this project (see attached comments). The FONSI is not supported by evidence before the agency and the need for an EIS is obviated. Furthermore, because actions needed such as the new left hand turn lane on

highway 31 are already committed to, under construction, and not analyzed as a component of this action, and because the new ROW needed is not incorporated or analyzed with this action, and the new water wells required by the action (see attached comments) are compartmentalized into other decisions and analyses, some of which are already being constructed, this EA and DN/FONSI is legally inadequate under NEPA not simply because of disclosed significant impacts, but also because the compartmentalization of the larger action required and its impacts additionally compounds the inadequacy of the EA and DN/FONSI.

Other direct/indirect effects of other components of the approved action add to the sum total significant direct/indirect impacts not accounted for above, where significant impacts are already indicated. One example is the other impacts from the action approved to MIS such as Golden eagle, macroinvertebrates, and Deer and elk MIS.

"The proposed facilities and related activities would interfere with the eagles' typical foraging flight path (down the side canyon to the main trunk of Rilda Canyon) and reduce the value of the foraging area in the canyon. The Forest Service estimates that 747 acres of foraging habitat would be reduced in value by the operations (USDA-FS 2005b). Additionally, fan noise could disturb the nesting birds. As discussed in part 4.2.1.6, Noise Resources,
fan noise attenuates with distance. The history of the nest shows a degree of tolerance for the existing fan noise and mine activity in the left fork of Rilda Canyon, but the proposed facilities would be closer and busier. Golden eagle behavioral responses to the proposed facilities could result in reduced foraging activity, interrupted nesting and breeding, reduced nest productivity, or territory abandonment (USDA-FS 2005b)." EA page 34

Here, the fan noise, road use and other parts of the approved action will cause impacts for a 30 year (short term) period that could result in territory abandonment. Page 35 of the EA indicates that there may also be other detectible minor impacts to MIS wildlife for 30 years

"Under the proposed action, there would be moderate effects on non-game/non-special status wildlife (depending on species) because of indirect habitat loss due to noise and activity-related avoidance/disturbance effects. These moderate effects would be short term. They would last for the projected life of the active mining and reclamation operations in Rilda Canyon (15-20 years) and would cease when the site entered the custodial reclamation phase (approximately 10 years)." EA page 35

This shows additional readily apparent environmental effects/impacts ("moderate") that may last about 30 years to additional wildlife.

Compounding the above is the inadequate cumulative effects analysis. Page 53 of the EA notes that big game MIS such as elk and its critical winter range in Rilda canyon will incur not just direct/indirect impacts for about 30 years from this action, but proposed coalbed methane exploration will add cumulative impacts, as will indirect impacts from "the proposed timber sale site." However, it is never said what proposed timber sale

would add to cumulative impacts to the elk MIS. EA page 95 and 96 displays the reasonably foreseeable actions and their residual effects that would add to the total cumulative impacts of this action, and the only timber sale mentioned is the SITLA timber sale. Because the residual effects of this timber sale are said to include only increased soil compaction, increased erosion, and road access to a roadless area, but NO impacts to the critical elk MIS winter range are disclosed, it is unknown what timber sale site would add to the cumulative impacts of the critical elk MIS winter range in the area. Finally, while EA page 53-54 notes private economic loss to agricultural areas resulting from the elk MIS being displaced onto hay fields, damaging fences and irrigation fields, there is no attempt to disclose the resulting cumulative impacts to the elk MIS or its population trends resulting from those off-Forest conflicts with private interests.

The EA and FONSI are additionally adequate because the action includes includes uncertain effects and application of an experimental procedure or practice.

"This experimental practice would test the feasibility of storing of existing topsoil materials in place in areas where: 1) original, pre-existing soil structure was disturbed by historical coal mining; 2) native soils lie on steep slopes." EA page 25.

This contradicts with finding of no significant impact point 4 of the DN/FONSI. Finally, as indicated in the attached FAX from the Forest Service, it has long been suspected even by the Forest that the proposed facilities may result in significant impacts. While the EA indicates that there are significant impacts and the cumulative effects analysis is not complete, the need for an EIS is obviated even when there may be significant impacts.

"[E]ven a slight increase in adverse conditions that form an existing environmental milieu may sometimes threaten harm that is significant. One more factory ... may represent the straw that breaks the back of the environmental camel."
Grand Canyon Trust v. Federal Aviation Administration, 290 F.3d 339, 343 (D.C.Cir. 2002). "To support an EA/FONSI, an agency must produce 'a convincing statement of reasons to explain why a project's impacts are insignificant.'"
Pacific Marine Conservation Council, Inc., v. Evans, 200 F.Supp.2d 1194, 1204 (N.D.Cal. 2002). The government "is not required to find a proposed project insignificant in the absence of readily available information to the contrary; rather, it is required to create an EIS for any project which may significantly affect the environment. Under NEPA, it cannot use the lack of existing information as a basis for acting without preparing an EIS...." Sierra Club v. Norton, 207 F.Supp.2d 1310, 1336 (S.D.Ala. 2002). Adequate Research Must Be Done. "NEPA requires each agency to undertake research needed adequately to expose environmental harms." Sierra Club v. Norton, 207 F.Supp.2d 1310, 1335 (S.D.Ala. 2002). "An agency must generally prepare an EIS if the environmental effects of a proposed agency action are highly uncertain." ... "Preparation of an EIS is mandated where uncertainty may be resolved by further collection of data, or where the collection of data may prevent speculation on potential effects." ... "The purpose of an EIS is to obviate the need for speculation by insuring that available data are

gathered and analyzed prior to the implementation of the proposed action." Makua v. Rumsfeld, 163 F.Supp.2d 1202, 1216-17 (D.Hawaii 2001).

In light of all of the above the DN/FONSI is arbitrary and capricious and in violation of the NEPA and the APA because the FONSI is contradicted by the evidence before the agency and because the cumulative effects analysis is not complete, and because components of the larger action required to complete this project have been illegally compartmentalized outside of this environmental document.

II. The Manti-La Sal National Forest violated -the Forest Plan and National Forest Management Act (NFMA) requirements for Management Indicator Species and Diversity monitoring and standards -and NEPA regulations at 40 CFR part 1505.2 - 1505.3.

Page 5 of the Record Of Decision (ROD) (incorporated by reference) that approves the current Forest Plan states, "During implementation, when various projects are designed, site-specific analysis will be required. Analyses may take the form of Environmental Assessments [40 CFR 1508.9], environmental Impact Statements [40 CFR 1508.11], or categorical exclusions [40 CFR 1508.4]. The Supervisor may amend the Forest Plan in accordance with 36 CFR 219.10(f) [1982]. Any resulting documents will be tiered to the FEIS, pursuant to 40 CFR 1508.28 [1982]." This EA is therefore tiered to the Forest Plan FEIS and no Forest Plan amendments are proposed, analyzed, or contemplated at this time. Page 14 of the Forest Plan ROD states, " Maintaining visual quality objectives, viable populations of wildlife management indicator species" ..."are all examples of standards and guidelines which act as mitigation measures." It goes on to state, "Mitigating measures, stated as standards and guidelines, are intended to be adopted and enforced in project level activities"

The Manti-La Sal National Forest 1986 Forest Plan, as amended, identifies these 6 MIS:

- Northern goshawk
- Elk
- Mule deer
- Macroinvertebrates
- Golden Eagle
- Aberts squirrel

All but the last of the abve MIS tare selected and used for this analysis. However there is a failure to monitor these MIS population trends. Oddly, even for some of the most important MIS for this project area (such as macroinvertebrates), there is no functional project area presentation or analysis of its population trends. The recent 10th Circuit Court of Appeals rulings inform these issues:

The Forest Service must gather quantitative data on actual MIS populations that allows it to estimate the effects of any forest management activities on the animal population trends, and determine the relationship between management activities and population trend changes." Utah Environmental Congress v. Bosworth, 2004 U.S. App. LEXIS 12441 (10th Cir. 2004).

Under a plain reading of § 219.19 and UEC I, we conclude that the Forest Service must select an MIS with some evidence that it is "present in the [project] area." The Forest Service must then collect "actual, quantitative population data," id. at 1226, to monitor population trends and to determine relationships to habitat changes. See 36 C.F.R. § 219.19(a)(6)."... "Selecting only one or two (or a few) acceptable MIS actually present in a project area cannot satisfy the overall monitoring obligations of § 219.19. See Martin, 168 F.3d at 7 (concluding that the Forest Service violated §§ 219.19 and 219.26 because it "ha[d] no population data for half of the MIS in the Forest and thus [could not] reliably gauge the impact of the timber projects on these species"). Utah Envtl. Cong. v. Bosworth, No. 03-4251, 2005 U.S. App. LEXIS 17619, at *1 (10th Cir. Aug. 19, 2005).

As this Circuit Court has ruled, the Forest is entitled deference in the MIS it selects for projects implementing the Forest Plan, but in order to meet the requirements of §219.19, that MIS selection must include sufficient MIS actually in the project area and gather population trend data so that the effects of the project implementing the Forest Plan on the MIS population trends can be determined and analyzed to meet the NFMA and Forest Plan requirements. This needs to be done in the analysis of this project, and evidence in the EA indicates that the Forest has not met its MIS selection or monitoring requirements. Details on the selected MIS are below.

The MLSNF Forest Plan page IV-6 identifies macroinvertebrates as a Management Indicator Species (MIS), and the WRR for this project selects and considers this MIS for the analysis of this proposed action. Forest Plan FEIS page III-34 states that the macroinvertebrates MIS, "are ecological indicator species in aquatic habitats and the ability of that habitat to support fisheries" ... "Aquatic habitat on the Forest consists of 680 miles of stream fisheries and 1,765 acres of lakes and reservoirs. Macroinvertebrates are found in these areas" ... "Changes in aquatic habitats, resulting from activities in the terrestrial habitat, are rapidly seen through changes in the species composition and biomass of macroinvertebrates." A list of five aquatic insects is identified as what is minimally needed to accomplish any meaningful assessment of impacts from a project on the aquatic ecosystem. The Forest Plan and its FEIS state that the chosen list of macroinvertebrates would be treated as one MIS.[2] The same page of the Forest Plan and its FEIS state, "These habitats can be **monitored for macroinvertebrates on a priority**

[2] Forest Plan FEIS page III-34, and Forest Plan page II-34

basis as needed to determine the specific effects of any one project or activity, as well as the effects of general Forest land management, on the aquatic resources." The Forest has simply not met this obligation. The macroinvertebrates MIS monitoring standards state, "Improve and maintain a good or above Diversity Index (DAT) of 11-17, a standing crop of 1.6 – 4.0, and a Biotic Condition Index (BCI) or 75 or above." Forest Plan page III-20. The Forest Plan Chapter 4 monitoring table for macroinvertebrates states, "for baseline stations or **as needed for select project activities**" include a minimum of gathering of data using the R4 GAWS, BCI and HCI macroinvertebrates indices. The Forest Plan expects the macroinvertebrates trend data to be collected "For baseline stations or as needed for select project activities."

Aquatic macroinvertebrates monitoring is well established to be a good aquatic management indicator species, as is explained in the introduction to the Data Analysis and Interpretation section of the Aquatic Macroinvertebrates Monitoring Reports you receive from the National Aquatic Monitoring Center, which does your macroinvertebrates monitoring. The Forest's 1999 macroinvertebrates MIS monitoring report from this Utah State lab is enclosed to provide an example (CD). Reading the report makes is overwhelmingly clear that the National Aquatic Monitoring Center sees strong value in monitoring aquatic macroinvertebrates because changes in their indices quickly reflect changes in aquatic habitats – even within one year of management activities in the affected watershed.

This analysis uses the Forest Plan and also applies the 1982 NFMA MIS regulations:

"Management Indicator Species (MIS) are species identified by the USDA-FS to fulfill requirements of 36 CFR Chapter II - 219.19. MIS are used as proxies to monitor habitat conditions. For the MLSNF, there are the following MIS:
Mule deer (*Odocoileus hemionus*)
Northern goshawk (*Accipiter gentilis*)
Golden eagle (*Aquila chrysaetos*)
Aquatic macroinvertebrates (several phyla)
Elk and mule deer are discussed in part 3.3.1.1.1 above. The northern goshawk is discussed in part 3.3.1.1.2, Special Status Animal Species, above." EA page 19-20

No other NFMA regulations are cited or relied upon. The only NFMA regulations cited and used are the 1982 NFMA regulations, including 36 CFR part 219.19. This is consistent with the Forest Plan and its FEIS and ROD that this decision has been tiered to.

Page 35 and other parts of the EA discloses smaller but measurable impacts to terrestrial MIS for the "short term" 30 year duration of the action approved. EA page 34 notes that the golden eagle MIS effects could result in territory abandonment. Sedimentation is an impact on the aquatic community and its macroinvertebrates MIS. As disclosed earlier and on page 48 of the ea there will be temporary major impacts (defined as severe adverse impacts in the EA) from sedimentation increases followed by lesser minor (but

measurable) additional impacts from the action approved that would last about 3 decades. In light of this appellant points the Regional Forester to page 20-21 of the EA:

"Aquatic Macroinvertebrates
Aquatic macroinvertebrates are a group of water-dwelling invertebrates (insects, crustaceans, mollusks, worms, etc.) that are important as indicators of water quality and as a prey base for fish. Key representatives are the insect orders Ephemeroptera (mayflies), Plecoptera (stoneflies), and Trichoptera (caddisflies), whose immature forms are aquatic. Because different species have different tolerances for environmental conditions, the particular mix of macroinvertebrates present can give an indication of water quality. Several numerical indices based on macroinvertebrate composition, such as the Hilsenhoff Biotic Index (HBI) and the Biotic Condition Index (BCI), are used to infer water quality.
Aquatic macroinvertebrates in Rilda Canyon Creek were sampled at several locations in May 2004. A total of 814 individuals representing 33 taxa were collected in 6 samples. Mayflies of the genus *Baetis* dominated the samples (nearly half of the total specimens), with *Cinygmula* mayflies and oligochaete worms secondary dominants, comprising around a tenth of the total each (Vinson 2004). The Rilda Canyon Creek samples had a mean HBI of 3.28 (0-10 scale), indicating "slight organic enrichment." The mean dominance weighted community tolerance quotient (CTQd) was 72. This index varies from around 20 to 100; lower values indicate better water quality (Vinson 2004). Using a potential (i.e. reference, or CTQp) value of 50 with this CTQd gives a BCI value of 69.4, which does not meet the Forest Plan standard of 75. Existing BCI data suggest that portions of the Huntington Creek watershed are stable and portions are experiencing a downward trend, but there are too few data to reliably determine trends for macroinvertebrates on the MLSNF (USDA-FS 2005b)." EA page 20-21.

The above establishes that there is a:

-Failure to gather population trend data for this MIS;
-Failure to meet Forest Plan standard (commited to in the Forest Plan ROD) of a minimum macroinvertebrates MIS of BCI 75;
-Failure to gather data and maintain Forest Plan monitoring and standards for HBI.

All of the above is in violation of the Forest Plan and NFMA. This also is in violation of NFMA regulations cited and applied for this project that includes 36 CFR part 219.19.

This is also in violation of NEPA and its implementing regulations at 40 CFR part 1505.2 and 1505.3. " Mitigation (1505.2(c)) and other conditions established in the environmental impact statement or during its review and commited as part of the decision shall be implemented by the lead agency or other appropriate consenting agency"

As noted earlier page 14 of the Forest Plan ROD states, " Maintaining visual quality objectives, viable populations of wildlife management indicator species" ..."are all examples of standards and guidelines which act as mitigation measures." It goes on to state, "Mitigating measures, stated as standards and guidelines, are intended to be

adopted and enforced in project level activities" Failure to monitor, and the failure to enforce the monitoring and mitigation measures for MIS such as the macroinvertebrates MIS with this action implementing the Forest Plan that was approved in with the Forest Plan ROD is arbitrary, capricious, and in violation of NEPA, its above implementing regulations, and the APA.

III. The Manti-La Sal National Forest violated the mandate of the Administrative Procedures Act.

The Manti-La Sal National Forest acted arbitrarily and capriciously in reaching its decision. The APA requires all agency actions to conform to general standards of regularity and rationality. The courts will overturn agency decisions that are "arbitrary, capricious, or an abuse of discretion."[3] The Supreme Court has held:

> "Normally, an agency [action] would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[4]

The appellant has demonstrated that the Forest Service acted arbitrarily and capriciously in violation of the APA and NEPA by issuing the FONSI when the evidence in the EA runs counter to the finding of no significant impact. The failures to commit to, implement, and follow the monitoring and standards committed to in the Forest Plan ROD for MIS such as macroinvertebrates monitoring and minimum standards is arbitrary and capricious, violating the NEPA and the APA. The NFMA and Forest Plan violations relating to MIS are also already demonstrated to be in violation of the APA.

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[3] 5 USC 706

[4] Motor Vehicle Manufacturers' Association v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983)

Request for Relief

Due to the violations of the numerous Federal laws, regulations, the Forest Plan, its FEIS and ROD, the appellant asserts that this project cannot be considered legal. The appellant requests relief in the form of a full remand of the decision made in the DN/FONSI for this project.

Providing a voice for the voiceless

Utah Environmental Congress

September 1, 2005

Tom Lloyd,
Ferron/Price Ranger District,
Manti-La Sal National Forest
Box 310
Ferron, Utah 84532

Dear Tom,

The Utah Environmental Congress (UEC) and Grand Canyon Trust appreciate this opportunity to submit comments on the proposed action to drill for exploratory holes for water development in the Right Fork of Rilda Canyon and in Mill Fork Canyon. UEC and Grand Canyon Trust are interested parties, and we would like to be maintained on electronic, mailing, and contact lists for this proposed action.

The scoping letter received on August 18th and the legal notice published on August 16th request that substantive comments be sent to Tom Lloyd by September 2, 2005. Substantive comments are defined in both notices (attached) as, "Substantive comments are those within the scope of, are specific to, and have a direct relationship to the proposed action, and include supporting reasons that the Responsible Official should consider in reaching a decision." This is the correct and appropriate definition of substantive comments, as it is defined by the ARA comment and appeal regulations at 36 CFR§215.2. Arbitrarily, the 2-week comment period specified in the legal notice in the newspaper of record and scoping letter is not the legal comment period. "Comment period" is defined at 36 CFR§215.2 as, "The 30-callendar-day period following publication of the legal notice in the newspaper of record of a proposed action, during which the public has the opportunity to provide comments to a Responsible Official on a proposed action subject to this part, except for projects requiring an EIS which follow CEQ procedures for notice and comment." The required comment period for all proposed actions implementing the Forest Plan must be 30 days, and we request that the Forest provide the required comment period on this proposed action, which has not been provided to-date. If you choose to ignore this requirement please explain your rationale for denying that in writing.

The portions of the ARA regulations at 36 CFR§215 that exempted categorically excluded (CE) proposed actions implementing the Forest Plan from comment and appeal regulations have been found to be illegal and were struck from the CFR two months ago. CE's are subject to the substantive comment period and are appealable, as mandated by Congress when it passed the ARA in 1992. As indicated below in the court's order, §215.4(a) that excluded CEs from notice and comment procedures and §215.12(f) that excluded CEs from appeal procedures have been severed from the Forest Service ARA comment and appeal regulations:

> *"IT IS THEREFORE ORDERED:*
> *The following regulations are invalid as stated in this Order* ***and will be severed from the Forest Service regulations****: 36 C.F.R. § 215.4(a) (excluding from notice and comment procedures projects and activities that are categorically excluded from documentation in*

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an EIS or EA); 36 C.F.R. § 215.12(f) (excluding from appeal procedures decisions that have been excluded from documentation in an EIS or EA); 36 C.F.R. § 215.20(b) (exempting from notice, comment, and appeal procedures decisions signed directly by the Secretary); 36 C.F.R. § 215.10(a) (permitting delegation of the determination that an emergency situation exists); and 36 C.F.R. § 215.18(b)(1) (providing that an appeal decision will be sent to appellants five days after the decision is rendered).Dated at Anchorage, Alaska, this 2nd day of July 2005. /s/James K. Singleton, Jr. JAMES K. SINGLETON, JR.
United States District Judge IN THE UNITED STATES DISTRICT COURT
Case No. CIV F-03-6386 JKS

The Forest needs to notice this action pursuant to the ARA regulations §215 and allow for the 30-day substantive comment period. This has not been done as 2 weeks is not the regulations' required 30-day substantive comment period on the proposed action. Given that 36 CFR§215.12(f) has been stricken from the CFR, this decision will be subject to the ARA appeal process even **if** the proposed action is Categorically Excluded. This proposed action needs to be noticed for 30 days and the decision made administratively appealable under the ARA regulations at 36 CFR §215. If this is not done, the Forest will be in contempt of court and will violate the ARA. Please let us know as soon as possible in writing if you do not intend to provide the ARA's 30 day substantive comment period on this proposed action or if you do **not** intend to make the decision for this action subject to administrative appeal. If you do intend to provide the ARA's 30 day substantive comment period on this proposed action and you intend to make this decision subject to administrative appeal, we do not need you to write us and tell us that, as providing those ARA public involvement procedures is expected because it is the law.

The map attached to the scoping letter indicates a clear need to authorize temporary and/or long term use of some roads or routes that are not currently classified or temporary roads. One example is the (at least temporary) road access that will be needed to access proposed drill hole #2, which is in or immediately adjacent to Left Fork Rilda Canyon Creek. Granting use through any permit or authorization approving the current proposed action, even if temporary, for the unclassified roads and other routes that are not classified roads in the area is an activity that constitutes new road construction per the National forest transportation system CFR direction at 36 CFR§212.

Some of new road construction and road use would appear to also be inside IRA and/or draft roadless, undeveloped area identified for the Forest Plan revision. The analysis of impacts from this and compliance with law/regulation would require at least an environmental assessment in and of itself. Significance under NEPA can be triggered even just by the possibility of a proposed action being in violation of law/regulation. We remind the Forest of the following road-related definitions:

"Classified Roads. Roads wholly or partially within or adjacent to National Forest System lands that are determined to be needed for long-term motor vehicle access, including State roads, county roads, privately owned roads, National Forest System roads, and other roads authorized by the Forest Service." 36 CFR§212.1

"Unclassified Roads. Roads on National Forest System lands that are not managed as part of the forest transportation system, such as unplanned roads, abandoned travelways, and off-road vehicle tracks that have not been designated and managed as a trail; and those roads that were

once under permit or other authorization and were not decommissioned upon the termination of the authorization." 36 CFR§212.1

"New Road Construction. Activity that results in the addition of forest classified or temporary road miles." 36 CFR§212.1

"Road Reconstruction. Activity that results in improvement or realignment of an existing classified road as defined below:

(1) Road Improvement: Activity that results in an increase of an existing road's traffic service level, expands its capacity, or changes its original design function.

(2) Road Realignment: Activity that results in a new location of and existing road or portions of an existing road and treatment of the old roadway." 36 CFR§212.1 (Emphasis added)

We remind the Forest that unclassified roads are not, by definition, under permit or authorization. The proposal described in the scoping letter would involve authorization for use of unclassified roads and/or non-existent routes not even identified as unclassified roads with this decision and associated permits or authorizations. This indicates that segments of unclassified road (or other unspecified routes) must be added as classified or temporary road to approve the currently proposed action. (Conversely, to permit authorized use of an unclassified road [without designating it as a temporary or classified road] would be in violation of the transportation system regulations at 36 CFR §212 and FSM 7710-7712 direction.) The description of new road construction (temporary and/or classified) that would occur with the proposed action needs to be clearly disclosed, and the effects analysis needs to be completed in an environmental document before approving the proposed action.

Furthermore, the road construction (temporary and/or classified) inherent to the proposed action (bun not clearly disclosed) is also inconsistent with the Roadless Area Conservation Rule and recent Bush administration interim directives for roadless area conservation. This may need to be a decision that is signed by the Chief of the Forest Service due to the road construction in IRA. The road use and construction would also result in direct, indirect and cumulative impacts to the aquatic and riparian communities and habitats in South Fork Rilda Canyon creek, North Fork Rilda Canyon creek, and Mill Fork Creek.

Is this proposed action consistent with the Forest Plan and the 1982 NFMA regulations it is developed and implemented pursuant to? With the planning, analysis, and implementation of the proposed action, is the Forest relying upon the current Forest Plan and the 1982 NFMA regulations it is based entirely upon? Please let us know in writing as soon as possible if this is **not** the case, as we will have additional substantive comments **if** the proposed action is being analyzed and/or implemented pursuant to the 2005 NFMA regulations instead of the Forest Plan/1982 regulations. Furthermore, given that the Forest has not implemented an EMS with a minimum scope that includes the "land management planning process," implementation of this action could not possibly be consistent with the 2005 NFMA implementing regulations or directives. Additional comments on the proposed action as it relates to NFMA and the Forest Plan will be raised again later in these comments.

The past, present, and reasonably foreseeable cumulative impacts of this project and in the affected watersheds and habitat areas will potentially cause long lasting and cumulatively significant environmental impacts. The markedly out of date macroinvertebrates MIS data for the

creeks in and near this project area clearly indicates that existing impacts in the watershed had resulted in sub-standard water quality and below-standard aquatic MIS population trends.

The proposed stream disturbance, drilling, and the associated larger action to install a new coal mine portal, road and facility (with wastewater to be disposed) from the larger proposed action in the project area action raise many questions with respects to how stream flow and quality will be impacted. If stream flow is to be compromised in any way through stream water displacement, loss of water, the human 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, Colorado River cutthroat trout populations/habitat, resident trout, 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 this proposed water drilling action, as well as the larger action it is associated with – the new coal mine portal, road, and facility. There are also unanswered questions about the extent of potential harm to local as well as downstream populations of trout and TES fish or their habitat. A detailed analysis will be necessary to determine the extent of impacts to aquatic species in the project area and downstream. Because this is associated with the larger proposed action that is in this project area to construct a new coal mine portal, road, and facility, we are attaching UEC's earlier comments on the larger proposed action in the project area to these substantive comments because they bear directly upon and raise substantive concerns relating to the proposed action.

Full analysis of threatened and endangered species as well as consultation with U.S. Fish and Wildlife Service should be conducted for potentially impacted T and E aquatic species or their habitat. The project area is in fact near active Golden eagle MIS, goshawk MIS, other protected raptors, and other avian TES wildlife that would be impacted by the proposed action directly, indirectly, and cumulatively. This needs to be disclosed and analyzed before approving this action, closely monitored during implementation. Also, appropriate, proven-effective mitigation measures need to be required in the decision document if this proposed action is approved.

While it is obvious that the described proposed action should be inside the project area, it is not clear what the size, location, and extent of the project area for the proposed action actually are. Please mail UEC a map of the project area for this proposed action as soon as it is available. What selected MIS *in the project area* (as opposed to the whole National Forest) are being used in the analysis and monitoring of the proposed action? It is important to select and monitor more than just a few MIS with population trend data inside the project area to meet NFMA and the Forest Plan's fish and wildlife diversity MIS mandates. The 10th Circuit Court of Appeals ruling in UEC's favor on the 1000 Lakes Timber Sale directly informs this concern:

> *Under a plain reading of § 219.19 and UEC I, we conclude that the Forest Service must select an MIS with some evidence that it is "present in the [project] area." The Forest Service must then collect "actual, quantitative population data," id. at 1226, to monitor population trends and to determine relationships to habitat changes. See 36 C.F.R. § 219.19(a)(6). It must also confirm, with "good faith efforts," the presence of the selected MIS within a project area. UEC I, 372 F.3d at 1230. If no MIS representative is "present in the [project] area," the Forest Service must show good-faith efforts to confirm and explain the absence of selected MIS. It may be that the Forest Service selected an improper guild, or actions previously taken may have had a significant deleterious effect on the chosen MIS. "[W]here impossible, the Forest Service is not required by the applicable statutes and regulations to*

collect population data." Id. at 1229.

The Forest Service must select within each guild an appropriate MIS that is present in the project area. Selecting only one or two (or a few) acceptable MIS actually present in a project area cannot satisfy the overall monitoring obligations of § 219.19. See Martin, 168 F.3d at 7 (concluding that the Forest Service violated §§ 219.19 and 219.26 because it "ha[d] no population data for half of the MIS in the Forest and thus [could not] reliably gauge the impact of the timber projects on these species"). Utah Envtl. Cong. v. Bosworth, No. 03-4251, 2005 U.S. App. LEXIS 17619, at *1 (10th Cir. Aug. 19, 2005). (Emphasis added.)

A PDF copy of the ruling is available at www.uec-utah.org. As this Circuit Court has ruled, the Forest Service is entitled deference in the MIS it selects for projects implementing the Forest Plan, but in order to meet the requirements of §219.19, that MIS selection *must include MIS actually in the project area* so that the effects of the project on the MIS population trends can be determined and analyzed in meeting the NFMA and Forest Plan requirements. What MIS have you selected and monitored for the environmental analysis in the environmental document that is to be prepared? More than just a few need to be selected and monitored in the project area. Please let us know in writing as soon as possible and before a decision has been signed which MIS have been selected for the analysis in this project area, and what their population data is in the project area, and how it was decided that these MIS meet and effectuate the Forest Plan and NFMA wildlife diversity and MIS monitoring obligations.

The construction of the drills, waste water, and particularly the many water diversions and ancillary facilities would likely cause the elimination and/or damage to riparian vegetation thereby decreasing habitat for wildlife and MIS that depend on riparian vegetation.

Big game species in particular rely on habitat in the area. UDWR identifies this area as critical value big game habitat. Mule deer and Rocky mountain elk (among others) are both management indicator species for the Forest. The Forest Service must comply with applicable law and regulations incorporated into the Forest Plan (and its FEIS) direction, fish and wildlife direction, 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 as relied upon in the Forest Plan and its FEIS. The Forest Service needs to 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 area. Specifically, any site-specific analysis must address the impacts of development and drilling to MIS, MIS populations, and MIS habitat. The Forest has not been collecting aquatic MIS trend data in the affected watershed using the three indices required in the Plan, and what old data does exist demonstrates that the water quality and aquatic MIS trend data are below standards and Forest Plan direction. This action to further disturb and impact the three creeks in or adjacent to the proposed drilling and associated coal/water developments, which will disturb the highly erosive soils in the drainage will add cumulatively to the sub-standard conditions.

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.[1] The Manti-La Sal National Forest ranks first out of all six Utah National Forests in potential to produce big game. 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 and impact vegetation and also degrade habitat quality for wildlife thereby eliminating some suitable habitat for project area species. The value of riparian vegetation and habitat cannot be understated particularly in this relatively dry region of the state. Due to the dewatering of surface waters, fracturing of subsurface aquifers and hydrological disruption caused by this mine in recent years in the greater electric lake/Huntington creek watershed, the cumulative impacts to aquatic, riparian, TES and MIS resource conditions must be disclosed. 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. (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 have any impacts to the watershed, hydrology and aquatic habitat be eliminated from consideration. To accomplish this would necessitate alternative water drilling locations far away from these three creeks.

To what extent water has been utilized (or will be utilized) as a consumptive use is unknown and must be analyzed in any EA or EIS. Regardless, water diversion that is clearly foreseeable 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.

Aside from potential problems created by stream alteration and wastewater issues, there is reason to believe that water quality standards are not being met or would be impaired directly, indirectly or cumulatively. The removal of vegetation, the use of roads through heavy equipment, drilling machinery, and potential oil and waste water spills could all cause water quality to deteriorate. This project could easily cause water quality standards to deteriorate further than they currently have. The reviewing agency (Forest Service in this case) 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.

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[1] "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.

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).

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 creeks in the area; (2) analyze the specific limits on the levels of pollutants necessary to protect those designated uses; and (3) and demonstrate how multiple stream diversions comply with the anti-degradation 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).

The action 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 affected creeks 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/swimable 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 in the larger proposed action that this action is a part of, which by their very nature cannot support aquatic life, and by drilling in and adjacent to these three creeks, the Forest would potentially violate the antidegradation policy. 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 and proposed drilling in and adjacent to three streams would essentially turn the relevant portion of the living streams into

a dead stream, incapable of supporting plants, fish and other wildlife, proposed diversions potentially violates the antidegradation policy under the Clean Water Act and is therefore, likely unlawful. An EA/EIS is clearly indicated due to cumulatively significant impacts and CWA concerns.

For this project, environmentally preferable alternatives to the proposed action likely exist that have not yet been developed that would maintain the stream course in its current state and avoid impacts to water quality, quantity, aquatic habitat, riparian habitat, wetlands, TES and MIS wildlife populations/habitat. One immediately obvious environmentally preferable alternative is to explore off-Forest alternative drilling locations for additional water removal, or alternative drilling locations far away from these three creeks in the project area.

What monitoring system is in place that measures how mining has impacted surface hydrology, vegetation, and TES/MIS wildlife populations in this project area?

It is not consistent with the direction of the NEPA regulations or the FSH to CE this project from analysis and public disclosure in an environmental document (EA/EIS). Some of these issues were addressed earlier in these comments, but not specifically in terms of impacts to extraordinary circumstances and FSH direction. This project area has valuable habitat for (and may have populations of) TECPS species. This is critical big game habitat, a particularly important resource condition that will (and not just may) be cumulatively impacted by the proposed action. There will also be direct/indirect/and cumulative impacts to wetlands and aquatic communities/habitat. These constitute extraordinary circumstances. Furthermore significant state and/or federal dollars have already been spent to conserve/improve this critical and high value habitats and populations of TES resource conditions in the watershed.

Also, as mentioned earlier, we comment that parts of the project area are identified by the UEC as qualifying roadless, undeveloped area, and by the Manti-La Sal NF as partially inside IRA. This also involves impacts to this resource that cumulatively may be significant. New road construction and use, as well as the proposed drill pads, waste substances, and drill facilities will undoubtedly impact/effect this roadless resource condition. Pursuant to FSH 1909.15 chapter 30 section 30.3 this proposed action must not be categorically excluded because it will have impacts on several resource conditions that will result in extraordinary circumstances. Furthermore, the impacts on the TES, IRA, wetland, and other listed resource conditions (FSH) may easily be directly, indirectly, and cumulatively significant. An EIS is indicated, not categorical exclusion.

In terms of the NEPA regulations, this proposed action may have significant cumulative effects on the human environment, especially TEPCS, MIS, and big game, as well as potential wilderness area, and wetlands and aquatic/riparian communities and downstream water uses. Given that cumulative impacts in the area resulting from the connected action to build a new mine portal and facility in this project area will be significant, 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 drilling in and near the three streams and tapping of the underlying aquifer may cause individually and/or cumulatively significant impacts. This is particularly obvious when impacts of this action are contemplated in light of the significant impacts of the directly associated larger action or plan for a new coal mine portal and facility right on top of and next to these creeks. 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).

Cumulative impacts to Colorado River cutthroat trout habitat and other T and E fish habitat in this watershed also, may be cumulatively significant. The cumulative effects analysis must account for the past, present, and reasonably foreseeable cumulative effects from the current subsidence mining as well as very reasonably foreseeable expansions of this mine in the watershed and project area. Please read attachments that outline just a few of the existing and reasonably foreseeable coal mining actions in this project area that must be addressed.

Tiering this decision to the Forest Plan EIS will not meet requirements for cumulative effects analysis of the currently unprecedented level of coal exploration on the Forest because the Forest Plan lacks an adequate programmatic cumulative effects analysis of current levels of coal exploration and extraction on the Forest. This further underlines the need to proceed with an EIS.

The Migratory Bird Treaty Act (MBTA) makes it unlawful to take, kill, or possess migratory birds, their parts, nests, or eggs.[2] Executive Order 13186 issued in January of 2001 re-instituted the responsibilities of Federal agencies to comply with the MBTA. It's well known that many migratory bird species are currently declining across the intermountain west, and the proposed action may result in cumulatively significant impacts to and taking of migratory bird resources. We recommend the Forest conduct a rigorous evaluation using the newest data and research to minimize impacts to migratory birds (and their habitat), including a focus on species on the 2002 List of Birds of Conservation Concern and species that are listed among the Partner's in Flight Priority Species. To help meet responsibilities under Executive Order 13186 (Responsibilities of Federal Agencies to Protect Migratory Birds), the UEC recommends that you conduct activities outside critical breeding seasons for migratory birds, minimize temporary and long-term habitat losses, and mitigate all unavoidable habitat losses. If your activities occur in the spring or summer, we recommend you conduct surveys for migratory birds to assist you in your efforts to comply with the Migratory Bird Treaty Act (16 U.S.C. 703-712) and E.O. 13186. If some portion of your mitigation includes off-site habitat enhancement, it should be in-kind and either within the watershed of the impacted habitat or within the foraging range of the habitat-dependent species. To be in compliance with the language and intent of the MBTA and EO 13186, and NEPA's mandate for rigorous analysis, the environmental analysis must disclose and rigorously analyze how the proposed activities would or would not be in compliance with the Migratory Bird Treaty Act and Executive Order 13186. The Forest has been instructed to "develop and implement, within two years, a Memorandum of Understanding (MOU) with the Fish and Wildlife Service (Service) that shall promote the conservation of migratory bird populations." (EO 13186 § 3) We are not aware of any current MOUs. Please demonstrate within the environmental analysis for this project that such an MOU has been developed and entered into with the USFWS. Because this is such an important issue that should inform the public and the decision maker, we request a copy be provided within or as an appendix to the final document, and not simply included in the project file.

[2] 16 U.S.C. § 703-712.

We also request an opportunity to provide comments on the site-specific environmental document and any supporting scientific/specialist reports before a decision has been made. Failure to provide the environmental document (EA/EIS) for comment before a decision is made would be in violation of the NEPA. The regulations implementing the ARA do not conflict with or override this NEPA requirement. 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 NEPA environmental analysis.

Sincerely,

Kevin Mueller,
Executive Director
Utah Environmental Congress

Mary O'Brien
Grand Canyon Trust

United States Department of Agriculture
Forest Service
Manti-La Sal National Forest

Ferron/Price Ranger District
Ferron Work Center
115 West Canyon Road
P.O. Box 310
Ferron, UT 84523
Phone # (435) 384-2372
Fax # (435) 384-3296

File Code: 1950-1/2820-4
Date: August 16, 2005

Kevin Mueller
Utah Environmental Congress
1817 South Main, #9
Salt Lake City, UT 84115

Dear Kevin:

The Ferron/Price Ranger District, Manti-La Sal National Forest is evaluating the possible environmental effects of a proposal from Energy West/PacifiCorp to conduct hydrologic investigation in the Right Fork of Rilda Canyon (Sec. 29, T. 16 S., R. 7 E., SLBM) and in Mill Fork Canyon (Sec. 21, T. 17 S, R. 7 E, SLBM) (Map I). The purpose of the investigation is to further study the feasibility of developing a new water collection system for the North Emery Water Users Special Service District. The drilling would occur on National Forest System lands administered by the Manti-La Sal National Forest.

The proposal is to drill 4 holes, a maximum of 60 feet deep. Access to the drill sites would be on existing roads. Drilling would be done along existing roads with a truck-mounted rig. Surface disturbance would be less than 100 sq. ft. per site, and would be reclaimed to Forest Service specifications. Since the project as proposed, would have minimal disturbances to land and resources, it is anticipated this may be categorically excluded from further NEPA analysis (EA or EIS) under category 31.2(8), Forest Service Handbook, 1909.15.

The public is invited to comment on the proposed action. Substantive comments are those within the scope of, are specific to, and have a direct relationship to the proposed action, and include supporting reasons that the Responsible Official should consider in reaching a decision. Comments received in response to this solicitation, must include name, organization and address of those who comment, and will be considered part of the public record for this project. Comments should be sent to Tom Lloyd, Ferron/Price Ranger District, Manti-La Sal National Forest, Box 310, Ferron, Utah 84523, by September 2, 2005.

For further information, contact Tom Lloyd at (435) 384-2372.

Sincerely,

Kim Albrecht Acting For

MESIA NYMAN
District Ranger

Attachment: Proposed Project Area Map

Public Notice:

LEGAL NOTICE
Ferron/Price Ranger diStrict
Manti-La Sal National Forest
Emery County, Utah

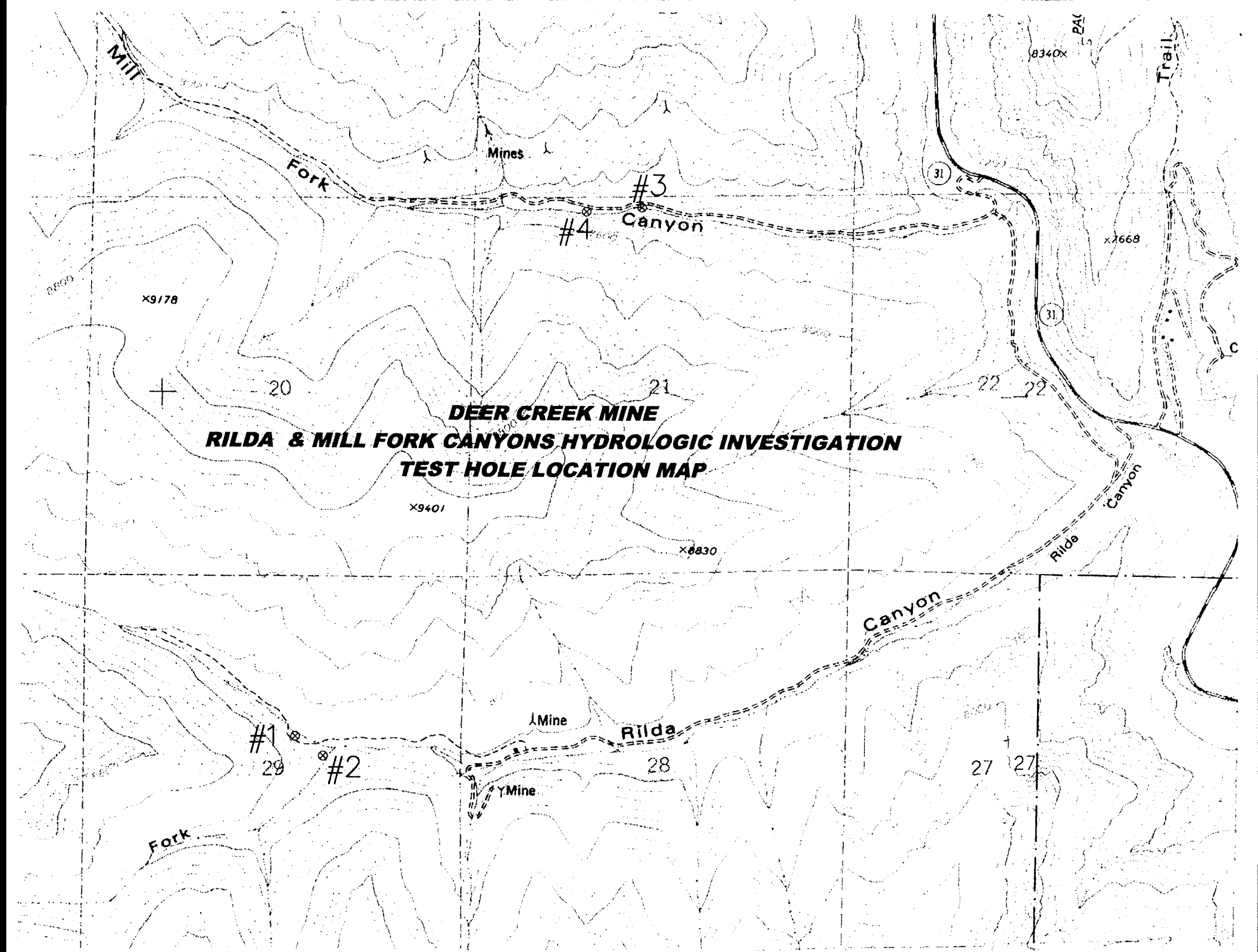
The Ferron/Price Ranger District, Manti-La Sal National Forest, is evaluating the possible environmental effects of a proposal from Energy West/PacifCorp to conduct a hydrologic investigation in the Right Fork of Rilda Canyon (Sec. 29, T. 16 S., R. 7 E., SLBM) and in Mill Fork Canyon (Sec. 21, T. 17 S, R. 7 E, SLBM). The purpose of the investigation is to further study the feasibility of developing a new water collection system for the North Emery Water Users Special Service District. The drilling would occur on National Forest System lands administered by the Manti-La Sal National Forest.

The proposal is to drill 4 holes, a maximum of 60 feet deep. Access to the drill sites would be on existing roads. Drilling would be done along existing roads with a truck-mounted rig. Surface disturbance would be less than 100 sq. ft. per site, and would be reclaimed to Forest Service specifications. Since the project, as proposed, would have minimal disturbances to land and resources, it is anticipated this may be categorically excluded from further NEPA analysis (EA or EIS) under category 31.2(8), Forest Service Handbook, 1909.15.

The public is invited to comment on the proposed actions. Substantive comments are those within the scope of, are specific to, and have a direct relationship to the proposed action, and include supporting reasons that the Responsible Official should consider in reaching a decision. Comments received in response to this solicitation, must include name, organization and address of those who comment, and will be considered part of the public record for this project. Comment should be sent to Tom Lloyd, Ferron/Price Ranger District, Manti-La Sal National Forest, Box 310, Ferron, Utah 84523, by September 2, 2005.

For further information, contact Tom Lloyd at (435)384-2372.
Published in the Sun Advocate August 16, 2005.

Public Notice ID: 4173341


DEER CREEK MINE
RILDA & MILL FORK CANYONS HYDROLOGIC INVESTIGATION
TEST HOLE LOCATION MAP
Mill
Fork
Mines
#3
#4
Canyon
#1
#2
Mine
Rilda
Canyon
Trail
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8340
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9178
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8830

June 1, 2004

Luci Malin
Utah Division of Oil, Gas, and Mining
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.

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

Further, an existing county road would be bypassed to provide access to water 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.

[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

September 1, 2004

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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."

Lucia Malin, Environmental Scientist
State of Utah, Department of Natural Resources
Division of Oil, Gas and Mining
1594 West North Temple, suite 1210
PO Box 145801
Salt Lake City, UT 84114-5801

Dear Ms Malin,

The Utah Environmental Congress (UEC) appreciates you letter of July 21, 2004 regarding the **PacifiCorp Deer Creek Mine – Rilda Expansion Project**. We are encouraged to learn that the proposal is going to be modified such that 1,200 feed of Rilda Creek will not be placed in a 'culvert.' We understand from you letter that ,when DOGM determines that the revised plan to construct a mine portal on the North side of the road to be complete, that revised plan will become the Proposed Action to be analyzed in an environmental assessment (EA).

The UEC hereby incorporates all earlier comments that have been submitted by the UEC and Wildlaw Southwest into these comments.

We look forward to the opportunity to submit comments on the Proposed Action when that has been finalized. Please include useful maps (preferably in 1:24,000 scale) with the notice of opportunity to comment on the proposed action so that the public and other Agencies may learn exactly where the proposed facilities may be located. It may be helpful to display the IRA boundaries on this map, as well as springs, streams, as well as the locations of Forest Plan management area prescriptions.

Direct, indirect, and cumulative effects to TEPS, MIS and FS Sensitive aquatic, terrestrial, avian, and migratory bird species continues to be a concern that should be explored. Effects that can be avoided should be avoided. Unavoidable direct, indirect, and cumulative effects should be mitigated.

The UEC also request the opportunity to review and comment on the EA that is prepared before a decision document has been prepared.

Please keep us on all mailing lists for this project, and mail the UEC hard copies of all environmental documents as they become available for review and comment. Thank you very much for your time and effort.

Sincerely,

Kevin Mueller,
Program Coordinator

CC: Joel Ban, Wildlaw Southwest, UEC attorney

USDA

MANTI-LA SAL NAT'L FOREST
Forest Supervisor's Office
& Price Ranger District
599 West Price River Drive
Price, UT 84501

Phone: (435) 637-2817
Fax: (435) 637-4940

Number: 801-539-4260

Date: 02/11/04

To: Kent Hoffman

From: Aaron Howe / Carter Reed

Subject: Ruby

Total Pages (including cover page): 5

Comments:

Rcd. your draft. Here is our draft that has been reviewed and ok'd by Alice and Barry. If have any questions, call Aaron at 435-636-3542, then dial 0 to get operator and have him paged. He is in a budget meeting. Carter

Plan to send via mail today and FAX to OSM before end of today. Thanks

United States Department of Agriculture
Forest Service
Manti-La Sal National Forest
Supervisor's Office
599 West Price River Drive
Price, UT 84501
Phone # (435) 637-2817
Fax # (435) 637-4940

File Code: 2820-4
Date:

Peter Rutledge
Chief Program Support Division, Western Regional
Coordinating Center
Office of Surface Mining
P.O. Box 46667
Denver, CO 80201-6667

Dear Mr. Rutledge:

This letter is in response to your January 28, 2004 letter requesting additional comments regarding the proposed Mine Permit Change for PacifiCorp's North Rilda Canyon portal facilities.

We have reviewed environmental documents previously completed and find that the proposal is not within the scope of prior NEPA documentation or agency decisions, nor is it authorized by the approved Mine Plan or permit. We believe the proposal will involve "significant surface disturbance" as defined in the Mineral Leasing Act of 1920 as amended by the Federal Coal Leasing Amendments Act of 1975 (Section 6), as it will extend completely across the canyon bottom and require piping 1,200 feet of perennial stream. For clarification, the entire 10.2-acre proposed project area is viewed as new disturbance because the 'previously disturbed and reclaimed' area referenced in your letter was associated with pre-SMCRA activities that were successfully restored to resource production over a decade ago.

We completed a preliminary assessment of the proposal relative the CEQ significance criteria at 40 CFR 1508.27 and believe that there is potential for significant effects (Attached). An environmental analysis should be prepared jointly by OSM and the FS in accordance with agency regulations, Forest Plan direction, and lease stipulations (U-2810, SL-051221 & U-06039). Additionally, the Forest has a connected action associated with Emery County's desire for a public road easement along the rerouted roadway.

We believe that the proposal should be designated as a Mine Plan Modification because of potential for significant effects, and because the action would be beyond the scope of prior mine plan approval/consent pursuant to the Minerals Leasing Act. An environmental analysis should be conducted to explore alternatives and mitigations, and disclose effects to the public. Preparation of an Environmental Assessment or Environmental Impact Statement should commence as soon as possible to avoid delays.

If you have any questions, contact Aaron Howe or Carter Reed at the Forest Supervisor's Office in Price, Utah.

Sincerely,

PRELIMINARY SIGNIFICANCE EVALUATION PROPOSED RILDA CANYON PORTAL FACILITIES

Manti-La Sal National Forest, 02/09/04

Significant Effects (CEQ Regulations)

The criteria used to determine significance as defined under NEPA are contained in 40 CFR 1508.27. "Significantly" as used in NEPA requires consideration of both context and intensity.

Context: Significance of an action must be analyzed in several contexts such as society as a whole, the affected region, the affected interests, and the locality. In case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short and long-term effects are relevant.

- For the Rilda Canyon project, the physical effects context would be generally defined as the Huntington Canyon drainage and watershed, including Rilda Creek and other tributaries. Effects to elk and deer herds would be much broader considering the affected herds and range of habitation and use. The affected human environment would involve a larger area consisting of at least the Castle Valley Area communities (recreation, livestock grazing, water use).

- The duration of effects would be 20 to more than 50 years considering both the length of time of facilities will be used plus time needed for reclamation to restore the understory and overstory vegetation, and the aquatic ecosystem to pre-mining conditions.

Intensity: This refers to the severity of impact considering ecologically critical areas, the extent to which the effects could be highly controversial, and whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance cannot be avoided by terming an action temporary or by breaking it down into small components.

- **Controversy** - Among the involved agencies there would most likely be general consensus regarding the magnitude and duration of effects, however affected interests are likely to strongly disagree.

- **Cumulative Effects** -There is little doubt that the analysis must consider the effects of the many actions and uses in the Huntington Canyon area to be defined as the affected environment. The proposed project is likely to cause significant effects to some resources by complete removal of a substantial amount of the aquatic ecosystem in the canyon and habitat for terrestrial wildlife. Cumulative effects to wildlife, water quality, recreation, and wildlife grazing are currently occurring due to the high-intensity human activities occurring in the area. They

ALICE B. CARLTON
Forest Supervisor

Enclosure

cc:
Regional Forester, Intermountain Region
Sally Wisely, Utah State Director, Bureau of Land Management
Mary Ann Wright, DOGM
D-2/3

consist of coalbed methane field development, other mine portal facilities (Deer Creek and Crandall Canyon), the Huntington Power Plant, subsidence of escarpments, breakout in the South Fork of Rilda Canyon, the mixing of coal, oil and gas, and recreation traffic along the Huntington Canyon Scenic Byway (State Route 31), recreation use, and livestock grazing.

- **Reduced flow in Huntington Creek potentially due to Subsidence at Skyline Mine** -Of specific concern regarding cumulative effects to fish habitat and macroinvertebrates in Huntington Creek is that minimum discharge to Huntington Creek from Electric Lake has been reduced from 12 CFS to 6 CFS to preserve water stored to meet power plant needs. This has affected fish and macroinvertebrate productivity. Only preliminary monitoring results are currently available.

- **Big-Game Winter Range (Forest Management Indicator Species)** -The proposed developments, combined with other activities in the Canyon and adjacent areas, would cumulatively interfere with big-game (elk) wintering and migration.

United States Department of Agriculture | Forest Service | Manti-La Sal National Forest

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File Code: 2820-4
Date: November 4, 2005

Appeal Resolution
between
Utah Environmental Congress
and the
Manti – La Sal National Forest

Per our resolution discussions regarding the October 13, 2005 administrative appeal filed by Utah Environmental Congress (UEC) of the Deer Creek Coal Mine Plan Modification (Fed. Coal leases U-06039, U-2810, SL-050862, SL-051221) Decision Notice/Finding of No Significant Impact and Environmental Assessment, we have created the following agreement.

The parties hereby agree as follows:

1. Manti-La Sal National Forest (MLSNF) Supervisor Alice Carlton is the Responsible Official for the appealed decision and has authority to commit the Forest Service to the terms of this agreement. UEC Executive Director Kevin Mueller commits the UEC to the terms of this agreement.

2. UEC hereby withdraws its October 13, 2005 administrative appeal of the Supervisor's decision to the Regional Forester. As required, UEC will mail a letter to the Regional Forester withdrawing the appeal.

3. The MLSNF shall include the following mandatory stipulations in its consent to OSM, regarding the mine plan modification for the Rilda Canyon facility, and concurrence to the Utah Division of Oil, Gas, and Mining (DOGM) for permitting associated with the mine plan modification for the Rilda Canyon Facility.

A) The mine operator shall implement an aquatic and riparian ecosystem improvement project in Rilda Creek that is the product of coordination among the Forest Service (including the Forest Fisheries Biologist and/or Forest Hydrologist) and Utah Division of Wildlife Resources (including the Fisheries Biologists). The objective of the project is to actively improve the aquatic and riparian ecosystem in Rilda Canyon below the proposed PacifiCorp facilities. Examples include but are not limited to raising the water table, improving cottonwood galleries, riparian, and aquatic habitats, containing dispersed camping, and reducing sediment. The specifics of the restoration project to be implemented will be developed, planned and monitored by the above Forest Service and UDWR biologists, and will be funded and implemented by PacifiCorp. Project implementation must begin no later than the field season following issuance of the permitting for the Rilda Canyon facility, providing that the permitting is completed prior

to 6 months before the end of that year's field season. If the permitting is completed less than 6 months prior to the end of the field season, the ecosystem improvement project will begin the following field season. The ecosystem improvement project must be completed no later than five years thereafter.

Annual monitoring or progress reports will be required. They will be prepared jointly by UDWR and the Forest Service and made available to UEC, DOGM, PacifiCorp, and the public. A copy of each annual report will be mailed to UEC each year. The results of each year's macroinvertebrates monitoring (see following section) will be included with each annual report mailed to the UEC. The FS, DOGM, and UEC will evaluate each annual monitoring report for 5 years following the beginning of aquatic and riparian ecosystem improvement project to determine if the project is moving towards its goals. If it appears that those goals are not being approached, the group will re-evaluate the ecosystem improvement project and modify those portions that are not successful, and the company will implement modified portions during the next field season.

B) The mine must commit to monitoring macroinvertebrates and water quality at 2 locations in Rilda Creek (upstream and downstream of the project area). Samples may be collected with the same protocol used by UDWR for the initial, baseline studies. However, the macroinvertebrates monitoring shall be done at least twice each year (dates to be determined by Forest Hydrologist/Fisheries Biologist) for 5 years after approval of the Rilda Canyon Facility project. This data and any supplemental reports will be included in the annual progress reports that will be mailed to the UEC. BCI will be included in the metrics calculated from the samples. At the end of 5 years, if macroinvertebrates do not meet the original Forest Plan standards (1986, as amended) including a BCI of 75, the Manti-La Sal N.F. will work with DOGM and will make a good faith effort to contact UEC, to meet, review data, and discuss actions available to resolve water quality and/or macroinvertebrate concerns. The mine shall then implement those actions as required by DOGM with Forest Service concurrence to resolve those macroinvertebrate and water quality problems.

C) The approximately 200 acres of timber harvesting said to be included for (big/small game and migratory bird) Wildlife Mitigation on Table 300-5 (page 21 of 'R645-301-300 Biology' document) is removed. It is recognized that removal of the timber harvesting component of Table 300-5 may result in other parts of this measure not occurring.

Signed:

Date: 11/4/05

Kevin Mueller,
Executive Director
Utah Environmental Congress

Alice B Carlton 11/4/05

Date:

Alice Carlton,
Forest Supervisor
Manti-La Sal National Forest

Wayne

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File Code: 2820-4
Date: December 1, 2005

Mary Ann Wright
Associate Director for Mining
Utah Division of Oil, Gas and Mining
1594 West North Temple, Suite 1210
P.O. Box 145801
Salt Lake City, UT 84114-5801

D Koons
c/015/0018

Subject: New Surface Facilities in Rilda Canyon, PacifiCorp, Deer Creek Mine, C/015/0018, Task ID #2266, Outgoing File

Dear Ms. Wright:

By this letter, the Forest Service consents to the Mining and Reclamation Plan for new surface facilities in Rilda Canyon for PacifiCorp's Deer Creek Mine as required by 30 U.S.C. § 207(c). My decision to consent to the modification, dated August 25, 2005, was upheld by the Regional Forester on administrative appeal on November 28, 2005. In accordance with regulations at 36 CFR § 215.9(b), my decision may be implemented on December 20, 2005. Forest Service consent to the Mining and Reclamation Plan will be effective on that date.

The mine plan revision application includes conditions for operations that are consistent with the Manti – La Sal National Forest Land and Resource Management Plan, and with lease stipulations consented to by the Forest Service. The proposed post-mining land uses of the location for the proposed surface facilities in Rilda Canyon are the same as the pre-mining land uses, and therefore are consistent with the Forest Plan. Forest Service consent is conditioned upon inclusion of terms in the mine plan that requires compliance with the Forest Plan standard for macroinvertebrates.[1] Since the current macroinvertebrate inventory of Rilda Creek is measured

[1] 30 CFR 740.4 Responsibilities (c) "The following responsibilities of OSM may be delegated to a state regulatory authority under a cooperative agreement: ...(2) Consultation with and obtaining the consent, as necessary, or the Federal land management agency with respect to post-mining land use and to special requirements necessary to protect non-coal resources of the areas affected by surface coal mining and reclamation operations:".

30 CFR 740.4 Responsibilities. (e) - "The Federal land management agency is responsible for: (1) Determining post-mining land uses; (2) Protection of non-mineral resources; (3) Requiring such conditions as may be appropriate to regulate surface coal mining and reclamation operations under provisions of law applicable to such lands under its jurisdiction; and (4) Where land containing leased Federal coal is under the surface jurisdiction of a Federal agency other than the Department, concur in the terms of the mine plan approval".

30 CFR 740.11(d) "Nothing in this subchapter shall affect in any way the authority of the Secretary or any Federal land management agency to include in any lease, license, permit, contract, or other instrument

at a Biotic Condition Index (BCI) of 69, conforming to the Forest Plan standard for BCI would mean that any mining related activities that caused the BCI to be reduced below 69 would require corrective action by the operator.

Also in accordance with our surface management agency responsibilities[2] to help protect non-coal resources, we desire that the Rilda Creek Riparian Habitat Restoration Project that is documented in the Permit Application Package/Mining and Reclamation Plan, Table 300-5 Rilda Canyon Wildlife Mitigation of the May 2005 "R645-301-300 Biology" document be retained and enforced under the permit.

Sincerely,

ALICE B. CARLTON
Forest Supervisor

cc: Regional Forester
Pete Rutledge, OSM
Kent Hoffman, BLM

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such conditions as may be appropriate to regulate surface coal mining and reclamation operations under provisions of law other than the Act on land under their jurisdiction".

30 CFR 740.13(d)(3) "The regulatory authority shall consult with the Federal land management agency to determine whether any permit revision will adversely affect Federal resources other than coal and whether the revision is consistent with that agency's land use plans for other Federal laws, regulations and executive orders for which it is responsible.".

[2] 30 CFR 740.4 Responsibilities, (e) - "The Federal land management agency is responsible for: (1) Determining post-mining land uses; (2) Protection of non-mineral resources; (3) Requiring such conditions as may be appropriate to regulate surface coal mining and reclamation operations under provisions of law applicable to such lands under its jurisdiction; and (4) Where land containing leased Federal coal is under the surface jurisdiction of a Federal agency other than the Department, concur in the terms of the mine plan approval".