August 9, 2018
Vernal Field Office, BLM
Attn: Stephanie Howard
170 South 500 East
Vernal, UT 84078
Via email: blm_ut_vernal_comments@blm.gov; showard@blm.gov

RE: Comments on Environmental Assessment for SITLA Indemnity Selection Surface and Mineral Estate (Serial Number UTU-90091), DOI-BLM-UT-G010-2014-0142-EA

Dear Ms. Howard:

Thank you for the opportunity to provide comments on the Environmental Assessment for the SITLA Indemnity Selection Surface and Mineral Estate (Serial Number UTU-90091), DOI-BLM-UT-G010-2014-0142-EA ("Indemnity Selection EA"), prepared pursuant to the National Environmental Policy Act ("NEPA"). Thank you also for your assistance in making available documents referenced in the EA. We submit these comments on behalf of Grand Canyon Trust, Center for Biological Diversity, Colorado Riverkeeper, Living Rivers, Natural Resources Defense Council, Rocky Mountain Wild, Sierra Club, Southern Utah Wilderness Alliance, Utah Chapter Sierra Club, Utah Physicians for a Healthy Environment, Waterkeeper Alliance, Western Watersheds Project, and Earthjustice. Utah Native Plant Society also joins these comments but only with respect to issues involving native plants and their ecosystems.

As explained below, the Indemnity Selection EA does not fulfill the central aim of NEPA: to sharply define the issues and provide a clear basis for choice among options. *See* 40 C.F.R. § 1502.14. Its principal flaw is its refusal to recognize that the *purpose* of the Indemnity Selection, from the transferee's perspective, is to make the land in question available for oil shale strip mining. This error forecloses, at the outset, any substantive discussion of the "comparative merits" of the two alternatives—one of which would facilitate strip mining, while the other would likely prevent it. *See id.* § 1502.14(b). This same error also precludes the Bureau of Land Management ("BLM") from considering the Indemnity Selection as a "connected action" to related federal approvals intended to facilitate oil shale development in this area. *See id.* § 1508.25(a)(1). Finally, it prevents the EA from disclosing the foreseeable impacts of oil shale mining on specific resources, such as rare plants, fossils, water resources, wildlife, air quality, and soils. Because these impacts are potentially significant, BLM must prepare an environmental impact statement ("EIS") for the Indemnity Selection. Further, BLM fails to demonstrate that it has complied with the National Historic Preservation Act or the Vernal Field Office resource management plan in evaluating this proposal.

I. BACKGROUND

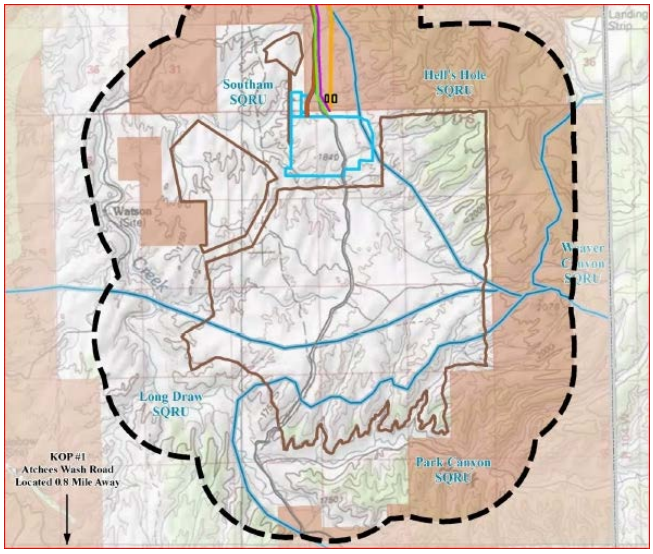
A. The State Of Utah's Indemnity Selection Application Is Driven by Enefit's Desire to Mine the Parcel for Oil Shale.

On August 29, 2013, the state of Utah filed with BLM a "Petition for Classification/State Application for Indemnity Selection" for a 440-acre parcel of BLM land that is completely

surrounded by private property owned by Enefit American Oil ("EAO" or "Enefit"). Due to its shape, the BLM parcel is referred to as the "Z-parcel." Evidence in BLM's and the State's possession shows that the State is seeking ownership of this parcel at the behest of Enefit, to which the State intends to lease or sell the land to facilitate development of Enefit's proposed oil shale strip mining and processing operation, known as the South Project. The Indemnity Selection is one of several federal actions intended to facilitate development of the South Project. Of the others, the most significant is the Utility Project, which would enable construction of pipelines and power lines across BLM-managed land via rights-of-way to provide the water, natural gas, and electricity needed to operate the South Project, and to export the 50,000 barrels per day of synthetic crude oil that the South Project would produce from strip-mined oil shale.

Indemnity selections allow the State to obtain federal property in lieu of lands that the State was entitled to obtain at statehood. Utah was entitled to obtain four sections (mile-square parcels) for each township (a square six miles on a side) of federal land. But some of the lands the State was entitled to were already held in federal "reservations" (including tribal reservations and military posts) or were otherwise unavailable. To make up for this deficit, federal law and regulations permit the State to "select" parcels of federal lands (with some restrictions) of equal acreage to those otherwise off-limits to the State due to their inclusion in reservations. 43 U.S.C. §§ 851, 852; 43 C.F.R. Part 2621.

The BLM parcel at issue that the State has proposed to select as an Indemnity Selection is shown as the dark beige "Z" on the upper left of Map 1, below. The white area, where the South Project would be located, is Enefit's private land. The multicolored north-south lines at the top center of the map show the location of the Utility Project rights-of-way.



Map 1. From Map A-9b, BLM, Final EIS, Enefit Right of Way Project (2018). Dark beige indicates BLM-owned land. Dark brown lines indicate Enefit's mine site area. The dotted black line is what BLM designated as the utility right-of-way "project study area."

Enefit is the driving force behind Utah's selection of the Z-parcel. Records show that the State of Utah, through the School and Institutional Trust Lands Administration ("SITLA"), is working at Enefit's behest and direction in attempting to transfer the land from BLM to Utah so that the

state can lease the land to Enefit for oil shale mining as part of the company's South Project. Over a four-year period, Enefit repeatedly contacted SITLA staff to request that they pressure BLM to move forward with the Indemnity Selection process. Enefit staff refer to SITLA's acquisition of the Z-parcel as "part of our project" and part of "our mine plan."[1]

SITLA staff, in a 2016 memo explaining the Indemnity Selection to the agency's board, acknowledged that the Indemnity Selection is meant to further Enefit's South Project mining operation, the same purpose as the Utility Project:

> Continued BLM ownership of the parcel would negatively impact the efficienty [sic] of EAO's mine plan. *EAO approached SITLA about acquiring this parcel (called the "Z Parcel" due to its shape) so that it could be leased by EAO to support its mining operation*….
>
> SITLA selected the Z Parcel *because of its ability to support a mining project that includes other SITLA lands* (see map); *the ability to sell the surface to EAO for cash*; and the opportunity to acquire an estimated 49.3 million barrels of kerogen at what we believe will be a low cost to the trust.

Memo of John Andrews, SITLA to Land Exchange Committee & SITLA Board of Trustees (May 11, 2016) [SITLA GRAMA production pages D208-048-49] (emphasis added), attached as Ex. 5.

Additionally, Enefit GIS data from 2013 identify the Z-parcel as part of Enefit's "preliminary mine site area." Comparing the map below (Map 2, below) with that published in the 2018 Utility Project Final EIS ("FEIS") (Map 1, above) shows that the FEIS map omits from the proposed mine site the southeast portion of Z-parcel Enefit identified in 2013 as part of the mine site.

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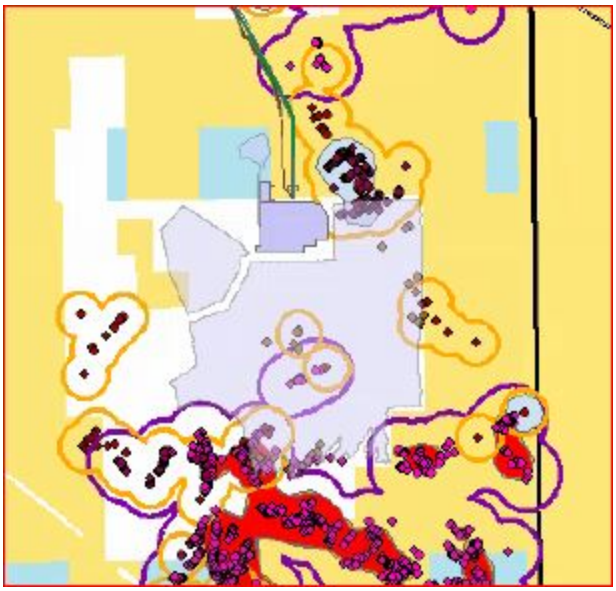
[1] Email of R.L. Hrenko-Browning, Enefit to J. Andrews, SITLA (June 6, 2016 1:13 PM) [SITLA GRAMA production at page D208-036] ("Just wanted to let you know that I will meet with the [Utah congressional] delegation in DC this week and will mention the Z parcel *as part of our project update*" (emphasis added)), attached as Ex. 1; Email of R.L. Hrenko-Browning, Enefit to J. Andrews, SITLA (June 13, 2016 10:39 AM) [SITLA GRAMA production D208-037] (discussing PowerPoint Hrenko-Browning will present to SITLA's board, stating "I will present Enefit, our activities, *and how the Z parcel fits into our mine plan*…." (emphasis added)), attached as Ex. 2; Email of R.L. Hrenko-Browning, Enefit to J. Andrews, SITLA (June 16, 2016 4:47 PM) [SITLA GRAMA production page D208-038] (complaining about BLM's unwillingness to accept certain parcels for mitigation, and stating "[l]ets [sic] make a decision after the BLM call, but try to keep moving forward *so that we have some hope of being able to include this parcel in our mine plan* (or at least can make an informed decision to remove it in a timely manner." (emphasis added)), attached as Ex. 3; Email of J. Andrews, SITLA to J. Lekas, *et al.*, SITLA Board (May 11, 2016 5:02 PM) [SITLA GRAMA production page D208-047] ("The memo and attachments relate to a proposed in-lieu selection *associated with Enefit's oil shale proposal in Uintah County*." (emphasis added)), attached as Ex. 4.



Map 2. From admin. record, Rocky Mountain Wild v. Walsh, 1:15-cv-00615-WJM (D. Colo.), page 27,042. Light purple areas are labeled "EAO_PrelimMineSiteArea_04082013." Note mine site overlap with the Z-parcel, not shown in Map 1.

In short, Enefit pressed SITLA to seek title to the Z-parcel for the purpose of mining oil shale on the parcel, and SITLA is seeking title "because of" the parcel's ability to support that very same mining project.

Like SITLA, BLM has long known that the Z-parcel's selection is related to oil shale development. Indeed, SITLA has told BLM as much. As one SITLA staffer succinctly characterized the State's application in a 2014 email to BLM: "its [sic] an oil shale transfer." Email of L. Hunsaker, Utah to C. Cox, BLM (May 20, 2014) [SITLA GRAMA production page D208-0133], attached as Ex. 6.

A 2015 email exchange between SITLA and BLM underscores this point. Seeking information on the Indemnity Selection, a BLM staffer assumed that the purpose of the parcel's selection is to facilitate oil shale production, but asked SITLA to provide more detail. The BLM staffer stated:

> Our NEPA team does not have an actual proposal from SITLA. We do have a one page description created by the BLM that summarizes what we think is the proposal but nothing definitive from SITLA. The EA assumes that certain resources will be impacted *because the land will eventually become part of the oil shale development*. If this is true, the EA is essentially complete but we need a proposal from SITLA stating this intent and including some details as to development, etc. If this is not the intent of SITLA for the parcel, we need to know what is reasonably foreseeable as intended use so the EA reflects those (potentially different) impacts to resources on the parcel."

Email of R. Rymerson, BLM to J. Andrews, SITLA (Aug. 26, 2015 5:30 PM) [SITLA GRAMA production page D208-0115] (emphasis added), attached as Ex. 7.

In response to the question as to "what is reasonably foreseeable," SITLA described the Indemnity Selection's purpose to facilitate "long-term mineral development" by Enefit for oil shale, and made clear SITLA's intent to lease the parcel to Enefit.

> BLM needs to know what SITLA is planning to do with the property once we acquire it. You can basically use the following: "Upon acquisition of the subject property, *SITLA intends to lease it to Enefit American Oil (EAO) for long-term future mineral development and ancillary surfaces uses*, subject to terms and conditions provided by mine plan approvals issued by Utah DOGM, and consistent with proposed operations plans submitted by EAO to BLM in connection with pending ROW approvals." - or something like that. I assume you all know Enefit's general plan, and I would just paste that in.

Email of J. Andrews, SITLA to R. Rymerson, BLM (Aug. 26, 2015 6:18 PM) [SITLA GRAMA production page D208-0116] (emphasis added), attached as Ex. 8. This passage also makes clear that both the Utility Project and the Indemnity Selection are "connect[ed]" with Enefit's plan to build the South Project.

B. BLM's Analysis of the Z-Parcel in Utility Corridor NEPA Documents Assumes at Least Some of the Z-Parcel Will Be Mined for Oil Shale.

Despite its acknowledgement that Utah seeks the Z-parcel to support Enefit's oil shale development, BLM failed to even mention the pending Indemnity Selection application in its 2016 draft EIS regarding the Utility Project.

After conservation groups raised BLM's omission, the agency added verbiage in its May 2018 Utility Project FEIS. The FEIS admitted that "both the Utility Project and the Z-parcel may further Enefit's purposes," but it declined to address the two projects together as connected actions under NEPA.[2] BLM, Utility Project FEIS (May 2018) at Appx. I6-8. BLM asserted that the Utility Project FEIS adequately discloses the foreseeable impacts of transferring the Z-parcel to Utah by discussing the South Project's cumulative impacts, because the FEIS assumes oil shale will be developed across the South Project, as well as across 56 acres of the Z-parcel. *Id.* at Appx. I6-11; *see also id*. at ES-4 ("potential impacts of developing the Indemnity Selection, if issued, have been incorporated into the cumulative impacts analysis *as a RFFA [reasonably foreseeable future action] as an extension of the South Project mining operations*.") (emphasis added); *id.* (assuming "approximately 56 acres [of the Z-parcel] would be subject to surface mining. This mining would be incidental to the South Project's 7,000- to 9,000-acre private mine…. Because of the small proportion of the Indemnity Selection mining assumption compared to the South Project mining proposal (less than 1 percent), the Indemnity Selection cumulative effects discussion is subsumed into the South Project mining discussion."). The FEIS did not explain the origin of the 56-acre figure.

[2] Actions are connected if they "(i) Automatically trigger other actions which may require environmental impact statements"; "(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously"; or "(iii) Are interdependent parts of a larger action and depend on the larger action for their justification. 40 C.F.R. § 1508.25(a).

The Utility Project FEIS concludes that Enefit's surface mining of the Z-parcel is reasonably foreseeable and interconnected with the South Project. Critically, BLM's earlier acknowledgment contradicts assumptions it makes in the Indemnity Selection EA. Specifically, the EA contends that oil shale development is *not* reasonably foreseeable at the Z-parcel. As explained below, this assumption is in large part responsible for the EA's failure to comply with NEPA, specifically its mandate to analyze "indirect" effects of a proposed action. *See* 40 C.F.R. § 1508.8(b).

II. BLM'S CONCLUSION THAT THE PARCEL IS NOT "MINERAL IN CHARACTER" IS ARBITRARY AND CAPRICIOUS.

A. The State May Select "Mineral in Character" Lands for Similar Lands.

As noted above, federal law and regulations permit the State to "select" parcels of federal lands (with some restrictions) of equal acreage to those otherwise off-limits to the State due to their inclusion in reservations. 43 U.S.C. §§ 851, 852; 43 C.F.R. Part 2621. Because equality of acreage did not always equal equality of value of the lands, Congress adopted a caveat to the equal-acreage mandate. Specifically, "[n]o lands mineral in character may be selected by a State except to the extent that the selection is being made as indemnity for mineral lands lost to the State because of appropriation before title could pass to the State." 43 U.S.C. § 852(a)(1). *See also Andrus v. Utah*, 446 U.S. 500, 510 (1980) (with 43 U.S.C. § 852, "Congress gave the States the right to select mineral lands to replace lost school lands, and that right was expressly conditioned on a determination that the lost lands were also mineral in character."); 43 C.F.R. § 2621.0–3(b)(1) ("No lands mineral in character may be selected except to the extent that the selection is made as indemnity for mineral lands."). BLM policy follows this law, and provides additional detail as to what lands may meet the definition of "mineral in character." *See* BLM Manual 2621.07(C). Other guidance indicates that lands are to be considered "mineral in character" where "known conditions are such as reasonably to engender the belief that the land contains mineral of such quality and such quantity as to render its extraction profitable and justify expenditures to that end." BLM Manual 3060.14, available at https://www.blm.gov/sites/blm.gov/files/uploads/mediacenter_blmpolicymanual3060.pdf (last viewed Aug. 9, 2018).

However, the State of Utah and BLM apparently agreed that the State need not identify base property that is "mineral in character" when it selects mineral lands from the United States because "the State of Utah … 'pooled' values of base lands in 1982–1984. Because all remaining base lands were valued at that time, and the State's remaining entitlement converted to a dollar value (as adjusted pursuant to subsequent agreement), the mineral character of the base lands is not a consideration in this selection." State Application for Selection (Aug. 29, 2013) at Appx. B.

B. BLM's Conclusion That the Z-Parcel Is Not "Mineral in Character" Is Arbitrary and Capricious.

The Indemnity Selection EA's contention that oil shale development on the Z-parcel is not reasonably foreseeable relies in part on a "Mineral Report" submitted by a staff mining engineer. *See* E.S. Perkes, BLM, Mineral Land Report for the State of Utah Indemnity (In Lieu) Selection (Mar. 1, 2018) at 10, attached as Ex. 9 ("Mineral Report"). The Mineral Report concludes that

the Z-parcel is not "mineral in character," on the ground that "oil cannot be commercially produced from this parcel's oil shale." *Id.*; *see also* Indemnity Selection EA at 8 n.1 (quoting Mineral Report). Specifically, the Report states:

> (1) "There is no commercial production of oil from oil shale currently in the United States";
>
> (2) Oil shale commercial production is assumed not viable unless oil is priced at least $91 a barrel, according to a 13-year-old Rand Corporation study; and
>
> (3) It would not be profitable to mine and produce petroleum product from only Z-parcel's 440 acres.

Mineral Report (Ex. 9) at 10. The EA adds that the Z-parcel "was not identified in the Programmatic Oil Shale ROD (BLM 2013) as being available for oil shale development." Indemnity Selection EA at 8. The EA also asserts that "[n]o mineral development is currently reasonably foreseeable since no leases or sale contracts exist in the project area." *Id.* at 14.

BLM's assertion in the EA and the Mineral Report that the Z-parcel is not "mineral in character" is arbitrary and capricious. It contradicts BLM's own evidence, assumptions, and prior analysis. *See, e.g.*, Utility Project FEIS at ES-3. It even contradicts information elsewhere in the EA and Mineral Report. Notwithstanding their conclusions, these documents both expressly indicate that the Z-parcel is rich in oil shale deposits. For example, they state that:

- The land is "a geologically prospective oil shale area." Indemnity Selection EA at 7.
- "The parcel has a high potential for oil shale with a high degree of confidence." Mineral Report (Ex. 9) at 8; *see also id*. at 9 (shorthand determination for same).
- The Z-parcel's "lands were classified as mineral lands by the USGS in 1916." Indemnity Selection EA at 7–8 (footnote omitted). *See also* 2018 Mineral Report (Ex. 9) at 2 ("On May 23, 1916, the United States Geological Survey (USGS) classified the lands in this parcel (T. 11 S., R. 25 E.) in a letter to the commissioner of the General Land Office as mineral lands, having a 'high prospective mineral value' and valuable as a source for petroleum and nitrogen (oil shales).")[3]
- "The area was classified as prospectively valuable on November 2, 1981[.]" *Id.* at 9.
- "The area was classified as part of the Southeastern Uinta Basin Oil Shale Leasing Area on November 2, 1981[.]" *Id.*

[3] The Mineral Report (Ex. 9), at 10, dismisses the 1916 classification because "there is no finding of 'Mineral in Character' or there is no 'Known Oil Shale Leasing Area.'" But USGS's finding shows that more than 100 years ago, the federal government understood valuable oil shale deposits existed in the area—a conclusion that the ensuing decades have supported.

- The EA admits that the Z-parcel is surrounded by privately owned land and minerals, and that their owner—Enefit—"has expressed interest in permitting an oil shale strip mine and processing plant through the State of Utah." Indemnity Selection EA at 8.

Further, both the 2008 Final Programmatic EIS for oil shale and tar sands leasing and the 2012 Final Programmatic EIS identified the Z-parcel as among the "most geologically prospective" federal lands for oil shale development.[4] BLM's 2008 Record of Decision (ROD) designated the Z-parcel as open for oil shale leasing.[5] While BLM's Record of Decision following the 2012 Programmatic EIS chose not to open the Z-parcel to leasing, BLM removed hundreds of thousands of acres of lands open to leasing by the 2008 ROD *not* because the lands failed to contain valuable oil shale deposits, but in order to protect other multiple use values—including wilderness character, sage-grouse habitat, and areas of critical environmental concern—threatened by damaging oil shale mining.[6] The Z-parcel was apparently excluded for its value as sage-grouse habitat.[7] The Indemnity Selection EA's implication that the Z-parcel is not "mineral in character" because the land was not open to oil shale leasing in 2013, *see* Indemnity Selection EA at 8, is thus misleading at best and disingenuous at worst.

In addition, Enefit clearly believes there are valuable oil shale deposits in the Z-parcel, as it included the Z-parcel in its 2013 mining proposal. *See* Map 2, *supra*. Enefit is also the moving force behind SITLA's application to acquire this parcel for the very purpose of mining oil shale there. *See supra* at 3-4. Enefit urged the State of Utah to obtain title to the parcel apparently in part out of concern that BLM would not lease the parcel and its valuable oil shale. *See, e.g.*, Memo of John Andrews (May 11, 2016) (Ex. 5); *supra* at 4. It is hard to imagine better evidence for the existence of valuable minerals than a ready buyer pressuring agencies to help them obtain rights to those minerals.

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[4] BLM, Final Programmatic EIS, Proposed Oil Shale and Tar Sands RMP Amendments (Sep. 2008) at 2-29 (showing Z-parcel as part of the "Most Geologically Prospective Area" for oil shale, and, under the chosen alternative (Alt. B), showing the Z-parcel available for oil shale leasing), excerpts attached as Ex. 10. BLM, Final Programmatic EIS, Proposed Land Use Plan Amendments for Allocation of Oil Shale and Tar Sands Resources (Nov. 2012) at 2-24 (showing Z-parcel as part of the "Most Geologically Prospective Area" for oil shale), excerpts attached as Ex. 11.

[5] BLM, Approved RMP Amendments/Record of Decision for Oil Shale and Tar Sands Resources, (Nov. 2008) at 13-14, excerpts attached as Ex. 12.

[6] *See* BLM, Approved Land Use Plan Amendments/Record of Decision for Allocation of Oil Shale and Tar Sands Resources Mar. 2013) at 20-28. The Z-parcel was open to oil shale leasing under two other alternatives the 2012 Final Programmatic EIS BLM reviewed. *See* BLM, Final Programmatic EIS, Proposed Land Use Plan Amendments for Allocation of Oil Shale and Tar Sands Resources (Nov. 2012) at 2-24 (showing Z-parcel open for leasing under Alt. 1); *id* at 2-53 (showing Z-parcel open for leasing under Alt. 4).

[7] *See* BLM, Final Programmatic EIS, Proposed Land Use Plan Amendments for Allocation of Oil Shale and Tar Sands Resources (Nov. 2012) (Ex. 11) at 2-40 (showing the Z-parcel overlying occupied sage-grouse habitat).

The Indemnity Selection EA's assertion that mineral development is not reasonably foreseeable is particularly arbitrary in light of BLM's own acknowledgments to the contrary. For instance, BLM concluded in May 2018 that mining and development of the Z-parcel's oil shale was "reasonably foreseeable" as part of Enefit's South Project. *See supra* at 5; *see also* Utility Project FEIS at 4-95 ("The BLM assumes that if the State acquires the land they will lease it for oil shale development incidental to the South Project mine.").

BLM cannot have it both ways. It cannot assume that development of the South Project is inevitable in the Utility Project FEIS (whose purpose is to provide utilities for oil shale development), and two months later completely reverse course to conclude that development of part of the South Project is *not* reasonably foreseeable. This is the epitome of arbitrary and capricious analysis.

For the same reason, the Mineral Report's assumption that the Z-parcel is not "mineral in character" because "[t]here is no commercial production of oil from oil shale currently in the United States," rings hollow. Enefit has proposed a massive oil shale strip mine and processing plant on private land directly adjacent to the Z-parcel, and its plans include strip mining that parcel. *See supra* at 2-3. The Utility Project seeks to facilitate exactly that development, and the Utility Project FEIS labeled the South Project "reasonably foreseeable." Although there is no commercial oil shale production in the United States *at present*, Enefit intends to develop oil shale on the very land at issue. In light of Enefit's persistent and sustained efforts to build its oil shale strip mine on land including the Z-parcel, BLM's reliance on an outdated study of oil shale's profitability is also arbitrary. *See* Indemnity Selection EA at 8 n.1 (citing 2005 Rand Corporation report).

Furthermore, the Mineral Report's conclusion that it would not be profitable to mine and produce petroleum product from *only* the Z-parcel's 440 acres is divorced from reality. The parcel is surrounded by private land that would be part of the South Project, and Enefit has already identified it as part of the proposed South Project mine. BLM has already concluded that it will foreseeably be part of the South Project mine, and has admitted in its EA that Enefit wishes to operate an oil shale strip mine and processing plant on land that abuts the Z-parcel. Indemnity Selection EA at 8. And the State has already told BLM that it will lease the land to Enefit for oil shale development. The Mineral Report arbitrarily turns a blind eye to all of this critical context.[8]

[8] An additional problem with the Mineral Report is its failure to abide by BLM's categorical exclusion ("CX") policy. Preparation of a Mineral Report is one of the activities that BLM has categorically excluded from the NEPA process, on the ground that it does not itself have a significant impact on the environment. *See* BLM, NEPA Handbook H-1790-1 (Jan. 2008) at Appx. 4-154. But CXs are themselves subject to procedural requirements under NEPA. *See id.* at 17. For one thing, BLM must identify the applicable CX for a proposed action. *See id.* at 18 (BLM must "[v]erify that the proposed action fits within . . . a BLM CX"). BLM has not done this for the Mineral Report, which does not mention its conformity with a CX. For another thing, BLM must consider whether extraordinary circumstances preclude the use of the identified CX. *See id.* at Appx. 4-147; *see also W. Watersheds Proj. v. Jewell*, 221 F. Supp. 3d 1308, 1313 (D. Utah 2016). These circumstances include actions that will significantly impact public health and

Finally, it is arbitrary and capricious to conclude, as the EA does, that oil shale development is not "reasonably foreseeable since no leases or sale contracts exist for the area," but to concede in the same document that in Enefit's South Project area, which "completely surround[s]" the Z-parcel, reasonably foreseeable activities include "South Project oil shale and other mineral development." *Id.* at 8, 22–23.

BLM's tortured logic could be understood as mere pretext to avoid a "mineral in character" determination, thus permitting BLM to undervalue the minerals it seeks to give away to the State (and Enefit). To avoid such arbitrary and capricious analysis, BLM must complete a new mineral report that addresses facts and context demonstrating that the Z-parcel is indeed "mineral in character." Further, any appraisal of the parcel's value by the Office of Valuation Services against the State of Utah's balance for Indemnity Selections cannot rely on the Mineral Report, but must address the facts discussed above. We also urge BLM to disclose that valuation to the public in any subsequently-prepared NEPA document so that the public may be assured that the federal government has not undervalued the public's mineral estate as the Mineral Report has done.

III. THE INDEMNITY SELECTION EA FAILS TO COMPLY WITH NEPA.

A. The Indemnity Selection and the Utility Project Are Connected Actions.

In previous comments on the Indemnity Selection and on the Utility Project FEIS, Earthjustice and others argued that BLM must consider the State of Utah's Indemnity Selection of the Z-parcel as a connected action to the Utility Project, as both are intended to facilitate oil shale development on the same lands. *See* Utility Project FEIS at Appx. I6-8 (publishing Grand Canyon Trust comment letter); letter of E. Zukoski, Earthjustice to E. Roberson, BLM (May 12, 2017), attached as Ex. 13. BLM's Indemnity Selection EA provides a handful of reasons for refusing to consider the two actions as connected in a single EIS, all of which lack merit. In addition, the contradictory assumptions in the Indemnity Selection EA and the Utility Project FEIS bolster the case for BLM to prepare a single EIS comprehensively addressing Enefit's oil shale plans.

1. Agencies Must Address Connected, Cumulative, or Similar Actions in the Same NEPA Document.

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

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safety, natural resources, or cultural resources, or that are highly controversial. 43 C.F.R. §§ 46.215(a), (b), & (c). Again, BLM has not considered any of these extraordinary circumstances in issuing the Mineral Report. Because the Mineral Report was issued in violation of NEPA, the Indemnity Selection EA cannot rely on its conclusions.

An agency must consider all "connected actions" in a single EIS. *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 968–69 (9th Cir. 2006). *See also Kleppe v. Sierra Club*, 427 U.S. 390, 399 (1976) (a single environmental review document is required for distinct projects when there is a single proposal governing the projects); *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 998 (9th Cir. 2004) ("[p]roposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement"); *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1182 (10th Cir. 2002). The "purpose of this requirement is to prevent an agency from dividing a project into multiple actions, each of which individually has an insignificant environmental impact, but which collectively have a substantial impact." *Great Basin Mine Watch*, 456 F.3d at 969 (quotation marks omitted).

NEPA regulations further require that agencies "shall" consider in a single EIS "[c]umulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement." 40 C.F.R. § 1508.25(a)(2). "[C]umulative actions must be considered together to prevent an agency from dividing a project into multiple actions, each of which individually has an insignificant environmental impact, but which collectively has a substantial impact." *Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1118 (9th Cir. 2000) (*abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1178 (9th Cir. 2011)) (internal quotations omitted). Courts have held that "where several foreseeable similar projects in a geographical region have a cumulative impact, they should be evaluated in a single EIS." *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1312 (9th Cir. 1990). *See also Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014) (holding that an agency "impermissibly 'segments' NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration"); *N.C. Alliance for Transp. Reform, Inc. v. U.S. Dep't of Transp.*, 151 F. Supp. 2d 661, 684–85 (M.D.N.C. 2001) (ordering agency to consider in a single EIS two separate halves of a highway beltway proposal, because the two will have cumulative impacts); *Wash. Trails Ass'n v. U.S. Forest Serv.*, 935 F. Supp. 1117, 1122 (W.D. Wash. 1996) (finding agency violated NEPA when it failed to consider in a single EIS multiple proposed actions involving trails that could connect).

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

2. <u>The Indemnity Selection and Utility Project Are Connected, Cumulative, or Similar Actions Which BLM Should Address in One NEPA Document</u>.

Courts have made clear that an agency must not "segment" its NEPA analysis of a proposal. This rule "prevents agencies from dividing one project into multiple individual actions each of which individually has an insignificant environmental impact, but which collectively have a substantial

impact." *NRDC v. Hodel*, 865 F.2d 288, 297 (D.C. Cir. 1988). The transfer of the Z-parcel to the State of Utah is just such an action; even if it is individually insignificant (a conclusion the facts do not support), its impact is additive to Enefit's proposed Utility Project and South Project. These actions are connected, cumulative, and similar. Because they are "interdependent parts of a larger action and depend on the larger action for their justification," 40 C.F.R. § 1508.25(a)(1)(iii), BLM should have addressed them in a single EIS. The Utility Project and Indemnity Selection are "connected actions" because they both are a part of, and integral to, the South Project, and both depend upon the South Project for their justification. Enefit expressly proposed the Utility Project to facilitate its oil shale strip mining and processing facility; the company considers the Z-parcel to be part of its mine plan; and the company is the moving force behind SITLA's application for Indemnity Selection, because it intends to mine at least part of the parcel. *See* FEIS Appx. I6-4–I6-16; *supra* at 2–4. Without the South Project, the State would never have sought the Z-parcel for Indemnity Selection, nor would Enefit have applied for the Utility Project rights-of-way.

The two are also "cumulative" actions because they will have cumulatively significant impacts. The Utility Project and the Indemnity Selection are both part of Enefit's South Project proposal and will collectively have significant impacts. They are in the same region—less than two miles separate the Utility Project's proposed southern terminus from the Z-parcel. FEIS Appx. I6-8 (BLM response to comment). And the two projects will likely have cumulative impacts, as the FEIS also admits. *Id*. I6-11 ("Impacts on resources of concern from development of the Z-parcel may accumulate with the [ROWs]").

The Utility Project and Indemnity Selection are also "similar" actions because they "have similarities that provide a basis for evaluating their environmental consequences together," including "common timing [and] geography." 40 C.F.R. § 1508.25(a)(3). The two projects are proximate to one another, involve surface disturbance to serve mining operations, and were proposed to serve Enefit's mining plans.

The Indemnity Selection EA's contention that the two projects (and two others) are not "connected" are erroneous for several reasons:

First, BLM argues that there is "no common proponent" between the Utility Project and Indemnity Selection—the State of Utah proposed obtaining title to the Z-parcel, while Enefit proposed the Utility Project. Indemnity Selection EA at 3. There is no requirement, however, that two connected projects have the same proponent. Rather, different segments of a project can share a "common purpose" while having "different owners." *See Sierra Club v. FERC*, 867 F.3d 1357, 1363–64 (D.C. Cir. 2017). In any case, just as Enefit is the proponent of the Utility Project, so too is the company the not-so-hidden hand behind the Indemnity Selection. BLM cannot its obligation to evaluate connected actions in a single EIS just because Utah (at Enefit's behest, and to facilitate Enefit's plans) is seeking title to the land, rather than Enefit itself.

Second, BLM asserts that there is "no common timing" linking the two proposals because the FEIS for the Utility Project has already been issued, while the Indemnity Selection process remains at the "draft EA" stage. Indemnity Selection EA at 3. This ignores that both projects have been pending before BLM for much of the last four years. That the Utility Project, rather

than the Indemnity Selection, was the first to proceed to the "final" NEPA stage reflects only that BLM *chose* to move first on the Utility Project—not that there was "no common timing." *Id.*

BLM began scoping on the Utility Project on July 1, 2013. Utility Project FEIS at ES-28. Less than two months later, and less than a month after the close of the Utility Project scoping period, BLM received the State's application for the Indemnity Selection of the Z-parcel. *Id*.; *see also* letter of J. Palma, BLM to K. Carter, SITLA (Aug. 30, 2013), attached as Ex. 14. Just a few weeks after receiving the Indemnity Selection application, BLM staff in the Utah State Office flagged the two projects as potentially related. "I know that there is an EIS process beginning for the Enefit ROW corridor project, so the Vernal Field Office will need to see how this [the Indemnity Selection] relates NEPA-wise" to the Utility Project. *See* email of M. DeKeyrel, BLM State Office to J. Andrews, SITLA (Sep. 23, 2013 1:56 PM) [SITLA GRAMA production page D208-147]), attached as Ex. 15. BLM staff thus understood as early as Utah's submission of its Indemnity Selection application—near the beginning of the Utility Project NEPA process—that the two projects might be connected. Further, BLM issued its scoping notice for the Indemnity Selection proposal in April 2014, long before BLM issued the Utility Project draft EIS, and before BLM had even met with its Agency Interdisciplinary Team on the Utility Project. Indemnity Selection EA at 5; Project Utility FEIS at ES-26. BLM's decision to issue its Indemnity Selection EA on the very day that it closed the public comment period on the Utility Project FEIS is highly suspicious, because it may suggest an effort to segment the two proposals and their public comments, rather than considering them as one interrelated project. But at a minimum, this release schedule shows that the timing of the two proposals has overlapped for nearly half a decade. BLM was "plainly aware of the physical, functional, and financial links between the two projects." *See Delaware Riverkeeper*, 753 F.3d at 1318. Its contention that there is no "common timing" between the two projects is not grounded in reality.

Third, while BLM admits that the geography of the two projects "is similar"—one of the criteria that requires preparation of a single NEPA document—it alleges that that geography "is … not the same." Indemnity Selection EA at 3; *see also* 40 C.F.R. § 1508.25(a)(3). But the Utility Project and Indemnity Selection are less than two miles apart. And the Utility Project's express purpose is to facilitate oil shale development at the South Project, which will *include* the Z-parcel. BLM's identified "study area" for the Utility Project even includes the Z-parcel. *See* Map 1, *supra*. Courts have found actions to be "cumulative" and thus require preparation of a single EIS where "similar projects" will occur in the same "geographical region." *City of Tenakee Springs*, 915 F.2d at 1312. That is precisely the case here, as BLM admits that the cumulative impacts analysis area for the two projects overlap. *See* Indemnity Selection EA at 23-26 (defining the cumulative impact area for the Z-parcel transfer to include Enefit's South Project, which the Utility Project will access). The Utility Project FEIS attempts to address the impacts of mining the Z-parcel, which the Indemnity Selection is meant to facilitate. In sum, the facts, and BLM's prior analysis, demonstrate that the geography of two proposals overlaps.

Fourth, BLM asserts that the impacts of the two proposals are "not the same" because "[t]he impacts of the Indemnity Selection are limited to the administrative action of transferring land and mineral ownership to SITLA." *Id*. at 3. BLM apparently takes the position that the Indemnity Selection is nothing more than a paper transaction which will have no impact on land management. *See id.* at 22 ("No oil shale development would occur as a result of the ownership transfer.") This ignores the facts. Refusing to look at the reasonably foreseeable impacts of the

land transfer amounts to willful blindness, in violation of NEPA. *See New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 718 (10th Cir. 2009) (holding that "assessment of all reasonably foreseeable impacts must occur at the earliest practicable point, and must take place before an 'irretrievable commitment of resources' is made") (quoting 42 U.S.C. § 4332(2)(C)).

Fifth, BLM asserts that there is no "common purpose" between the Utility Project and Indemnity Selection, which the agency defines as "proponent purpose." Indemnity Selection EA at 3. This ignores the law as well as facts known to BLM. The two actions "are closely related," 40 C.F.R. § 1508.25(a)(1), because both serve Enefit's plan to develop the South Project, and they "[a]re interdependent parts" of that larger action. *Id.* § 1508.25(a)(1)(iii).

BLM alleges that the Utility Project and the Indemnity Selection share no common purpose because the State of Utah will not necessarily lease the Z-parcel to Enefit. Indemnity Selection EA at 3 ("Although Enefit has been in communication with SITLA regarding the 440 acres, this disposal does not guarantee development by Enefit. SITLA would be at liberty to lease the land for oil and gas development, sell it, permit livestock grazing on it, or retain it for future development."). This ignores the BLM's own conclusion, as part of its Utility Project cumulative impact analysis, that the Z-parcel would be mined for oil shale. *See supra* at 5. It also ignores the State of Utah's repeated statements that the purpose of its application for the Z-parcel was to aid Enefit's South Project. *See supra* at 3-4. And while BLM alleges that transfer to SITLA does not "guarantee" the land will be leased to Enefit for oil shale, NEPA does not require "guarantees," but analysis of what is reasonably foreseeable. There is no question that Enefit pressed SITLA to obtain the Z-parcel; that the State of Utah has repeatedly stated it will lease the land to Enefit, and that Enefit has plans to mine the parcel. BLM's ignoring the obvious undermines the letter and spirit of NEPA.[9]

BLM also claims that "all four projects are subject to different authorities," to show that the two actions are not connected. Indemnity Selection EA at 3. But again, this is not the legal standard for connected actions. As comments on the Utility Project stated, "To allege, as BLM does, that 'these [two] projects do not have a direct relationship,' FEIS Appx. I6-8, ignores the obvious: that the South Project is the single governing proposal which unites both the Utility Project and the in-lieu selection actions, whether the South Project is before BLM or not. BLM cites no case law or regulation that permits an agency to turn a blind eye to two connected actions because the proponent is fortuitously able to segment them into separate applications under separate statutes." Grand Canyon Trust *et al.*, Comments on Enefit American Oil Utility Corridor Project (July 9, 2018) at 37, attached as Ex. 16.

Additionally, BLM asserts that it need not consider the Utility Project and the Indemnity Selection proposals as "cumulative actions" because "[i]mpacts that accumulate with the Indemnity Selection are disclosed in this EA." EA at 3. But the Indemnity Selection EA does not actually disclose the cumulative impacts of the Utility Project and the Indemnity Selection

[9] The EA's supposition that SITLA *could* lease the Z-parcel for oil development is puzzling given BLM's conclusion that the lands have a low probability of producing oil or gas in economic quantities. 2018 Mineral Report (Ex. 9) at 12.

together; it contains only the most general and unilluminating narrative of the impacts of the Indemnity Selection. Grand Canyon Trust *et al*. Utility Project FEIS Comments (Ex. 16) at 37.

In sum, BLM's determination that the Utility Project and South Project are not connected to the Indemnity Selection is contrary to law.

B. The EA Fails to Address the Foreseeable, Indirect Impacts of Oil Shale Mining.

1. NEPA requires BLM to disclose the indirect and cumulative impacts of oil shale mining on the Z-parcel.

BLM repeatedly takes the position that impacts from the transfer of the Z-parcel to the State of Utah are not reasonably foreseeable. "No mineral development is currently reasonably foreseeable [on the Z-parcel] since no leases or sale contracts exist in the project area." Indemnity Selection EA at 14, 22. This conclusion is fundamentally at odds with SITLA's plain statements to BLM that the Indemnity Selection is "an oil shale transfer," and that "SITLA *intends* to lease [the Z-parcel] to [Enefit] for long-term future mineral development and ancillary surfaces uses." *See supra* at 4, 5. It is also at odds with BLM's own conclusion in the Utility Project EIS that oil shale mining of at least a portion of the Z-parcel is reasonably foreseeable. *See supra* at 5.

The EA's analysis of impacts to individual resources is tainted by this flaw. For virtually every resource, the EA repeats that "the act of transferring the land and minerals has no effect," or that the transfer of ownership "will not directly *or indirectly* affect" the resource. *See, e.g.*, Indemnity Selection EA at 16 ("no effect"); *id*. at 17-19 (no direct or indirect impact) (emphasis added). These assumptions are in error because the indirect impact of the transfer to the State of Utah is Enefit mining the parcel, with all the impacts that entails.

NEPA requires agencies to disclose not only the direct effects of its proposal, but the proposal's indirect effects and cumulative impacts. "Indirect effects" are "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b). "Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." *Id.* § 1508.7.

In determining what is "reasonably foreseeable," an agency must engage in "reasonable forecasting and speculation." *Delaware Riverkeeper*, 753 F.3d at 1210. The agency "need not foresee the unforeseeable, but by the same token neither can it avoid drafting an impact statement simply because describing the environmental effects of and alternatives to particular agency action involves some degree of forecasting." *Scientists' Inst. for Pub. Info v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973). An agency "must use its best efforts to find out all that it reasonably can." *City of Davis v. Coleman*, 521 F.2d 661, 676, (9th Cir. 1975).

When the purpose of a land trade is to make possible a commercial development, BLM must disclose the impacts of the development as foreseeable. In *Western Land Exchange Project v.*

BLM, 315 F. Supp. 2d 1068, 1089 (D. Nev. 2004), the court held that a plan to privatize BLM land in Nevada would lead changes in land use, which were not just reasonably foreseeable, but were actually intended. "Aggressive development of the land was the assumed purpose of the entire disposal project." *Id.* at 1089–90. The court concluded that BLM's failure to prepare an EIS for the land disposal was arbitrary and capricious. *Id.* at 1097.

Here, aggressive development is likewise the goal of the Indemnity Selection, and BLM has admitted as much in the Utility Project FEIS, where the agency presumes, "based on email exchanges between the State and Enefit, that the State would make the 440 acres available for oil shale leasing." Utility Project FEIS I6-12. In the Indemnity Selection EA, BLM refuses to consider the impacts of foreseeable oil shale mining, under the new assumption that oil shale development is *not* foreseeable. Indemnity Selection EA at 8. As in *Western Land Exchange Project*, this development is not just foreseeable—it is the *purpose* of the Indemnity Selection. BLM's refusal to consider oil shale development as such, and the accompanying failure to consider its indirect impacts, renders the EA incapable of making environmental information available "before actions are taken." 40 C.F.R. § 1500.1(b). This cuts the heart out of the NEPA analysis.

Similarly, in *Center for Biological Diversity v. U.S. Department of the Interior*, 623 F.3d 633, 636 (9th Cir. 2010), plaintiffs challenged a land exchange from BLM to a mining company, in which BLM concluded that the company's mining plans would be the same whether or not the United States owned the land. The court set aside the EIS and ROD, holding that this assumption was arbitrary and capricious because if the lands remained publicly owned, Asarco's operations would be subject to federal mining and environmental laws (including NEPA), whereas if Asarco took title to the land, it would not have to comply with federal law. *Id.* at 643. BLM could not simply assume that private responses of its action to make land available were minimal or no different than the baseline.

BLM's NEPA process in this case has followed a similar path as in *Center for Biological Diversity*. In the face of a mining company's candidly expressed wishes to proceed with development in the absence of federal regulation, the agency acted expeditiously to make the Z-parcel available, and then made a flawed assumption in its NEPA analysis. In *Center for Biological Diversity*, it was that the environmental impacts of the proposed action would be no different than the no action alternative—even though keeping the land public would require the company to file a plan of development and comply with NEPA. Here, it is that oil shale development is not foreseeable (and thus not subject to analysis as an "indirect effect")—even though BLM concluded the opposite in its earlier NEPA documentation.

Lest BLM claim ignorance of Utah's or Enefit's motives for the Z-parcel, the Ninth Circuit long ago explained that NEPA imposes "an affirmative duty" on a federal agency disposing of land "to receive assurances of the plans of the private developer prior to the [conveyance]." *Nat'l Forest Preservation Group v. Butz*, 485 F.2d 408, 412 (9th Cir. 1973). In short, "ignorance" by a federal agency of the plans the receiving party may have for the land will not excuse lack of disclosure of impacts. *Id.*; *see also Colo. River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1434 (C.D. Cal. 1985) ("While effects which are not reasonably foreseeable may be disregarded, an agency should not attempt to travel the easy path and hastily label the impact of the [action] as too speculative and not worthy of agency review.").

While BLM contends that mineral development of the Z-parcel is not foreseeable because there are currently no *leases* or *sale contracts* exist in the project, Indemnity Selection EA at 14, it does not even attempt to explain why it has prioritized those factors over other information, such as Enefit's correspondence with SITLA identifying the Indemnity Selection as "an oil shale transfer." In light of these earlier acknowledgments, the impacts from oil shale development are not so "highly speculative or indefinite" as to render analysis unnecessary. *See W. Land Exchange Proj.*, 315 F. Supp. 2d at 1090 (quoting *Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1163 (9th Cir.1998)).

Moreover, the EA effectively acknowledges, as the Utility Project FEIS does, that the Z-parcel could not be developed for oil shale under current management plans. *See* Indemnity Selection EA at 8 ("In addition, the In Lieu selection area was not identified in the Programmatic Oil Shale ROD (BLM 2013) as being available for oil shale development."). The EA must recognize that the Indemnity Selection creates changed circumstances by making oil shale development far more feasible than it would be under continued federal ownership. Rather than taking a "hard look" at the foreseeable impacts of its decisionmaking, BLM "has averted its eyes from what is in plain view before it." *See Center for Biological Diversity*, 623 F.3d at 646.

In any subsequently prepared NEPA document, BLM must disclose the indirect impacts of mining the Z-parcel to all resources analyzed.

2. <u>BLM fails to disclose adequately the impacts of foreseeable oil shale mining on the Z-parcel</u>.

Despite the fact that BLM alleges no direct or indirect impacts to the Z-parcel's values will result from the transfer, the EA's analysis of the proposed action alternative's impacts to individual resources often contains a few sentences or less providing only the most general discussion of the potential impacts of developing the parcel. These vague discussions do not address a "reasonably foreseeable development" scenario, as many BLM NEPA documents do, and as the Utility Project FEIS did for the South Project by designating it a "reasonably foreseeable future action." *See* Utility Project FEIS at 4-92. They do not constitute the hard look NEPA requires. But the EA discloses enough to show that the transfer of the Z-parcel to SITLA will cause potentially significant impacts to wildlife, water resources, and other values. Therefore, BLM must prepare a full EIS on the transfer.

The EA's analysis of impacts to individual resources is addressed in detail below.

a. *Impacts to rare plants*

BLM has not taken a "hard look" at the proposed action's foreseeable impacts to rare plant species. BLM concedes that transfer of the Z-parcel to the State of Utah and subsequent development "could result in *detrimental effects on populations or individuals* of BLM Sensitive plant species in the area, including suitable habitat loss and fragmentation, impacts from dust due to vehicle traffic, and invasions of non-native plant species and noxious weeds." Indemnity

Selection EA at 15 (emphasis added).[10] The EA also admits that "it is possible that should the Proposed Action Alternative be selected these [threatened, endangered, proposed or candidate species] would not be granted the same level of protection on State land as would listed species." However, the EA contains no analysis as to how that lower level of protection would actually impact the plants. Indemnity Selection EA at 15–16 (emphasis added).

For one thing, BLM must consider the potential indirect and cumulative impacts of the proposed land transfer on important plant populations, discussed below. Potential impacts could include access, water depletion, dust deposition, and impacts on connectivity for pollinators. With respect to listed or candidate species, the State of Utah, BLM, U.S. Fish and Wildlife Service ("FWS"), and private landowners are operating under a Conservation Agreement for *Penstemon grahamii* (Graham's penstemon) and *P. albifluvis* (White River penstemon). [11] This agreement is intended to provide some protections for the plants so as to prevent a listing under the Endangered Species Act ("ESA"). The southeast portion of the Z-parcel is located between two conservation areas with known occurrences of *P. albifluvis*. There is some modeled (potential) suitable habitat for this species in the project area, according to a model commissioned by BLM (known as the Albeke habitat model). The project area could contain populations connecting the two areas. Also, *Penstemon albifluvis* was collected less than 0.5 miles from the Z-parcel in 2014. In addition, the Z-parcel is located within 2–3 miles of high density clusters of occurrences (areas with large numbers of known plant occurrences that are critical to the conservation of the species) of White River penstemon, according to BLM and FWS occurrence data compiled and maintained by the Penstemon Conservation Agreement Team. The FWS has identified certain populations of White River penstemon as particularly important to the persistence of the species either because the populations contain high number of plants or because the populations provide

[10] There are at least two BLM sensitive species in or near the project area. Oilshale catseye, or *Cryptantha barnebyi* (now *Oreocarya barnebyi*) has been documented two miles west of Watson and most likely occurs within the project area.[10] Graham's catseye, or *Cryptantha grahamii* (now *Oreocarya grahamii)* has been found in very near the project area[10]; further, it is well-known from Uintah County[10]. We request that BLM correct the EA's statement (at page 9) that this species is not known from Uintah County.

In addition, there are other rare plants in the Watson area, including species endemic to the Green River Formation such as oil shale columbine, or *Aquilegia barnebyi* (Utah Native Plant Society rank: Watch), Rollins' catseye, or *Cryptantha rollinsii* (Utah Native Plant Society rank: no rank), Bareby's thistle, or *Cirsium barnebyi* (Utah Native Plant Society rank: Medium), manystem blazingstar, or *Mentzelia uintahensis* (syn. *Mentzelia multicaulis* var. *uintahensis*) (Utah Native Plant Society rank: Watch), and unnamed feverfew, ir *Parthenium ligulatum* (Utah Native Plant Society rank: Watch). These plants have no formal status but are of conservation concern. The Z-parcel contains habitat for all these plants and could potentially have occurrences of any of them. To disclose potential impacts to these plants, BLM should conduct surveys for all of these species before considering any management action.

[11] The taxonomy of *Penstemon scariosus* var. *albifluvis* is being updated. Unpublished genetics work suggests the variety should be elevated to a full species, *P. albifluvis*. If botanists make the change, the plant would be accorded higher priority for listing than if it remained a variety of *P. scariosus*.

critical connectivity linkages between populations, including population 4, which is within a conservation area located roughly 3 miles north of the parcel.[12] Further, there is a high density cluster of plants in population 2, in a conservation area, located roughly 2 miles south of the Z-parcel area within the EAO project boundary. The EA does not take a hard look at potential impacts on these populations.

Given the extreme degree of endangerment of both *Penstemon* species from oil shale development, road building, off-highway vehicles, dust, habitat destruction, grazing, pollinator disruption, and climate change, it is imperative to maintain habitat that would allow plants to expand or migrate into nearby suitable habitat. BLM has a predictive model for potential occurrences of the two *Penstemon* species, but the EA does not disclose whether the Z-parcel includes predicted suitable habitat. The Z-parcel appears to be a relatively undeveloped area, which could represent excellent energy mitigation offsets for the tremendous habitat losses that are planned on other SITLA (and BLM) properties. It could be retained for that reason alone. Transferring the Z-parcel to SITLA for oil shale leasing may lead to detrimental and irreversible population declines in the future, which, at the very least, BLM must disclose.

BLM admits that the Z-parcel contains proposed critical habitat for *Penstemon albifluvis*, Indemnity Selection EA at 9, but downplays its significance by saying it represents only 0.1% of the proposed Critical Habitat. However, because a great deal of the Green River shale substrate that the plant requires has already been degraded, the seven acres being proposed for transfer could indeed be critical to the plant's continued existence. Giving away even a fraction of the small amount of habitat that remains, particularly where the intended recipient of the transfer proposes to strip mine the area, entails significant impacts on the *Penstemon* species, which BLM should have disclosed.

The EA fails to consider the impacts of this proposal on the proper scale. The analysis must include the cumulative effects of industrial development expected on this parcel, along with the impacts from oil shale extraction on plants throughout the extent of Enefit's proposed activities for the South Project, the RD&D lease, and other parcels. In addition, the impact of roads, dust, pollinator reductions, and other activities ancillary to development can have an effect on plants a quarter mile away or more.

Further, BLM cannot rely on its single, one-day survey to conclude whether the Z-parcel contains habitat for, or occurrences of, the species discussed above. The EA states: "A clearance survey of the Project Area was conducted by BLM botanists on June 29, 2017. No threatened, endangered, candidate or proposed species or suitable habitat for these species was identified within the specified parcel." Indemnity Selection EA, Appx. A at 5; *see also id*., App A at 4 (making similar statement for sensitive plants). This survey appears to be inadequate for several reasons.

For one thing, both the date and the duration of the survey are problematic. A single survey on a single date is insufficient to determine whether sensitive or imperiled species occur on a parcel that is more than 300 football fields in size. It is unlikely that a small team could have covered

[12] *See* Administrative Record in the matter of *Center for Native Ecosystems v. U.S. Fish and Wildlife Service* (D. Colo. 1:08-cv-02744-WDM) at AR 4792, AR 4803, and AR 4835.

such an area in just a few hours. A one-day survey is also insufficient because some species of concern, including *Penstemon grahamii*, do not flower every year and are very difficult to observe when not flowering.

In addition, the date of the survey—June 29—made it unlikely that BLM would detect White River Penstemon and Graham's Penstemon according to FWS data and BLM protocols. FWS fact sheets indicate that both the White River penstemon and Graham's penstemon are in flower ("anthesis") "in late May to early June and seeds mature by late June to early July." FWS, Fact Sheet, White River Beardtongue, available at https://www.fws.gov/utahfieldoffice/Documents/Plants/Handouts/White%20River%20Beardtongue%20Fact%20Sheet.pdf (last viewed Aug. 9, 2018), attached as Ex. 17; FWS, Fact Sheet, Graham's Beardtongue, available at https://www.fws.gov/utahfieldoffice/Documents/Plants/Handouts/Graham%27s%20Beardtongue%20Fact%20Sheet.pdf (last viewed Aug. 9. 2018), attached as Ex. 18; both fact sheets are available at https://www.fws.gov/utahfieldoffice/UBRarePlants.php (last viewed Aug. 9, 2018). By the time of the June 29, 2017 survey, both plants would have completed flowering and would thus be difficult to detect. This conclusion is supported by BLM's protocols for surveys, which states that the "usual start" of surveys for the plants is April 15, and the "usual end" is May 20. *See* BLM, Vernal Field Office, Conservation Measures and Survey Requirements, at PDF page 16, available at https://www.fws.gov/utahfieldoffice/Documents/Plants/2018/06_BLM_Conservation%20Measures-FY2018.pdf (last viewed Aug. 9, 2018), attached as Ex. 19. BLM does not explain why it undertook its survey of the Z-parcel more than a month after the "usual end" of the survey period for these plants.

In sum, although the EA discusses impacts on plant species to some extent, its analysis suffers from a number of omissions, which together mean that BLM has failed to take a hard look at the impacts of the Indemnity Selection.

b. *Impacts to fossils*

The EA does not address the potential impact of the Indemnity Selection on paleontological resources, asserting that such resources are "not present in the area impacted," and even if they are found. *See* Indemnity EA, Appx. A at 1, 4. BLM further states that even if fossils are discovered, such discovery "should facilitate the cessation of all related activities, followed by notification of the VFO [BLM Vernal Field Office] officer for mitigation procedures." *Id*., Appx. A at 4.

This analysis fails to comply with NEPA's hard look mandate for at least two reasons. First, the Z-parcel may contain fossil resources. Oil shale deposits are known to contain fossilized plant material. Further, the 2012 FEIS on oil shale leasing concluded that about 90% of the land initially open for oil shale leasing (which included the Z-parcel) "overlies geologic formations having a high potential to contain important paleontological resources." BLM, Final Programmatic EIS, Proposed Land Use Plan Amendments for Allocation of Oil Shale and Tar Sands Resources (Nov. 2012) (Ex. 11) at 2-92. BLM must explain why it concluded that such resources are "not present" within the Z-parcel.

Second, the EA appears to assume that BLM will have some role to play in managing fossil resources even after BLM transfers the Z-parcel to the State of Utah. This appears to be an error. We are unaware of any statute that would require BLM be notified, as the EA asserts, should those mining for oil shale encounter fossils after the Z-parcel has been transferred to the State.

In any subsequently prepared NEPA document, BLM must disclose the impact of the transfer of title, and foreseeable oil shale mining, on the parcel's fossil resources, and explain what authority BLM would retain, if any, to mitigate such impacts, as the EA implies.

c. *Impacts to groundwater, hydrology, and surface water quality*

BLM asserts that transferring the Z-parcel to SITLA would have "no effect" or "will not directly or indirectly affect" floodplains, ground or hydrologic conditions. Indemnity Selection EA at 16-17. This ignores the fact that oil shale mining across the 440-acre parcel, a foreseeable result of Enefit's proposal to mine the property, is likely to have damaging and significant impacts to water resources. Any subsequently prepared NEPA document must disclose such indirect impacts in detail.

The EA does admit that development of the Z-parcel could have damaging impacts, but it fails to provide anything other than the most general statements concerning those impacts. For example, the EA states that:

- development of the parcel by the State of Utah "*could have potential impacts to the floodplains and the function of those within this High Desert Ecosystem*. When floodplains are not functioning properly, the associated stream channel is destabilized and subject to excessive bank erosion…. Material displaced by development could be transported by precipitation events into the Evacuation Creek 100 year floodplain and potentially even further into the hydrologic system, such as into the lower White River and Green River floodplains." Indemnity Selection EA at 16.

- "If the lands are made available for mining, *groundwater could be affected* depending on the depth to groundwater in the area. The area occupied by the wet season water table is an area *which is particularly vulnerable to water quality contamination from spills or development waste leaching into the groundwater*." *Id*. (emphasis added).

- the State could develop the parcel and "[t]ypical development impacts to hydrologic conditions are usually the blocking of channels through increases in sedimentation from surface disturbance if proper sediment containment barriers are not utilized properly. Changes in flow paths both on the surface and subsurface *can alter how and when surface water reaches main drainage sinks* like the White and Green Rivers in the area. *This could also impact the amount of water reaching these rivers which rely on inputs from watersheds like the Evacuation Creek area and its surrounding tributaries*. Although the amount of water provided by the Evacuation Creek watershed is low based on the size of the watershed, *it still serves a functional role in transport of fresh water into these major rivers*." *Id*. at 17 (emphasis added).

- the State could develop the parcel and "Typical development impacts to surface water quality from include increased salts in the hydrologic system which could decrease

> suitability of water beneficial uses. Decreased water quality in Evacuation Creek, White River or Green River *may affect their beneficial uses*. Salt load in surface waters *can decrease habitat quality for the macro and micro invertebrates in the downstream rivers*." *Id*. (emphasis added).

These general statements fail to provide the level of detail needed to take the hard look NEPA requires.

Further, the EA fails to disclose that many of these potential impacts may harm an already-degraded watershed. Although the EA mentions the importance of Evacuation Creek, and admits that development made possible by the Indemnity Selection may degrade the Creek's water quality, the EA mentions only in passing that Evacuation Creek is already on Utah's list of impaired waters for boron, selenium, temperature, and total dissolved solids, under Clean Water Act section 303(d). *See* Indemnity Selection EA at 12; Utah Dep't of Envtl. Quality, 2016 Final Integrated Report, Chapter 3: Rivers and Stream Assessments at 36, attached as Ex. 20. Restoration, not further degradation, should be the priority for Evacuation Creek and other tributaries in the Upper Colorado River watershed.

In sum, the EA's discussion of water resources, while insufficient, nonetheless shows that the impacts to water resources from foreseeable oil shale mining of the Z-parcel are likely to be significant.

d. *Impacts to wildlife*

As with water resources, BLM asserts that transferring the Z-parcel to SITLA "will not directly or indirectly affect" wildlife, including migratory birds. Indemnity Selection EA at 18. Again, this ignores that the indirect impacts of the transfer include strip mining for oil shale mining, which is likely to eradicate wildlife habitat across the parcel. Any subsequently-prepared NEPA document must disclose such indirect impacts in detail.

In assessing the potential impacts of development to birds once the parcel is transferred, BLM is more frank than it is elsewhere in the EA, acknowledging that "[d]evelopment *may remove vegetation from the 440 acre parcel*. This would equate to a loss of nesting and foraging habitat…. Impacts may include: destruction of … nesting habitat, fragmentation of habitat, reduction of habitat patch size, increase in human presence, and nest abandonment…." Indemnity Selection EA at 18 (emphasis added). The EA also admits that "[d]evelopment would result in loss or fragmentation of crucial mule deer habitat, and Rocky Mountain bighorn sheep crucial yearlong habitat…. Habitat fragmentation and associated displacement of deer would result in a reduction in habitat use near the disturbed areas (a loss of habitat value), increased deer densities on adjoining habitat (which may be of poorer quality), increased stress from both intra- and interspecific competition and increased human-induced harassment, particularly along disturbed areas." *Id*. at 18-19. The EA does not contain maps displaying habitat values in the area, or disclose the acreage of crucial habitat on the Z-parcel and surrounding lands (which, if the South Project is developed, are also likely to be strip-mined).

Thus, as with impacts to water values, the EA's analysis fails to provide the details needed to take the hard look NEPA requires, although they show that the impacts to wildlife from foreseeable oil shale mining of the Z-parcel are likely to be significant.

e. Impacts to imperiled fish

The EA fails to address impacts to fish, including the fish protected by the ESA that inhabit the Upper Colorado River Basin, concluding that while they are "present" in the study area, they will not be "affected to a degree that detailed analysis is required. Indemnity Selection EA, Appx. A at 1, 7. The EA excuses this failure by stating: "There are no fish species (including their associated habitats) within the proposed area. Impacts to downstream habitat and water quality for all fish species are adequately addressed in the Surface Water Quality, and the Steams, Riparian, Wetlands, Floodplains sections of this document." *Id.*, Appx. A at 7. This analysis is arbitrary and capricious for two reasons.

First, the EA's sections concerning direct and indirect impacts to water quality and related values, while insufficient, predict that mining the Z-parcel (as Enefit and SITLA anticipate) could degrade fish habitat and impact stream flows. The EA predicts that the indirect impacts from developing the parcel could include: damage to floodplains and their function, including the White and Green River floodplains; groundwater contamination (which could ultimately impact surface water); alterations to the timing and flow of water from the Evacuation Creek watershed into the White and Green Rivers; degradation of beneficial uses of the two rivers; and "decreas[ing] habitat quality for the macro and micro invertebrates in the downstream rivers." *Id.* at 16-17. The EA, however, fails to disclose that these impacts to water quality could harm fish (including endangered and threatened species) in the White and Green Rivers, how they would do so, the degree of harm, etc. This violates NEPA's hard look mandate.

Second, apart from the impact directly attributable to mining of the Z-parcel, mining the parcel will prolong the processing of oil shale into synthetic crude oil at the South Project. That processing will require massive amounts of water—potentially over 10,000 acre-feet per year—which will be a new depletion from the Green River. *See* Utility Project FEIS at 4-111. The Indemnity Selection EA nowhere addresses this depletion, which is an indirect and foreseeable impact of BLM's facilitation of the South Project, including transferring the Z-parcel to Utah. This similarly violates NEPA.[13]

Finally, the potential for impacts to streamflows' timing and water level, to invertebrates upon which fish prey, and to pollution levels in rivers and tributaries are all potentially harmful to protected fish species. As such, they require BLM to consult with FWS under the ESA on the potential for the Indemnity Selection to harm critical habitat or jeopardize the threatened and endangered fish of the Upper Colorado River basin. It appears, as of this date, that no

[13] The EA's discussion of *cumulative* impacts to water values, which includes impacts of surface mining on the South Parcel (without mentioning water depletions), concludes that as a result of mining "salts and chemicals could potentially pollute important water sources like the White and Green Rivers." Indemnity Selection EA at 24, 25. The impacts of this potential pollution on fish are also nowhere described in the EA.

consultation has occurred. Indemnity Selection EA at 28. Failure to consult with FWS on the Indemnity Selection proposal in the face of these potential impacts would violate the ESA.

f. *Impacts to vegetation*

The EA fails to contain a section describing, or disclosing impacts to, vegetation, justifying the lack of analysis by concluding that these resources are "present, but not affected to a degree that a detailed analysis is required." Indemnity Selection EA, Appx. A at 1, 3. The EA asserts:

> No native vegetation removal is proposed. If the transfer occurs then it is assumed that the State would make the Project Area available for development. Development would require the construction of facilities and infrastructure that would remove native vegetation. However, these future actions would be outside the scope of the current proposal.

Id., Appx. A at 3. The EA's statement that development impacts are "outside the scope of the current proposal" is in error because development of the parcel is the very purpose of, and a foreseeable indirect impact of, the transfer of the Z-parcel to SITLA. Further, the EA's refusal to address vegetation impacts directly contradicts BLM's disclosure, in its analysis of impacts to migratory birds, that "[d]evelopment may remove vegetation from the 440 acre parcel." *Id.* at 18. To take the hard look NEPA requires, BLM must disclose the nature of, and the potential impacts to, vegetation resulting from the foreseeable development of the Z-parcel resulting from the parcel's transfer.

g. *Impacts to air and climate impacts*

The Indemnity Selection EA contains no analysis of air or climate impacts, justifying the lack of analysis by concluding that these resources are "present, but not affected to a degree that a detailed analysis is required." Indemnity Selection EA, Appx. A at 1. The EA asserts:

> No emissions would occur from transferring ownership of the subject land and minerals to the state of Utah. If future development were to occur on the land once it was transferred, emissions may result, *but it is not possible at this time to determine the nature or quantity of emissions under any future potential development scenarios because no applications or permits exist for development on this land*. Development would be subject to the State's permitting processes.

Id. (emphasis added).

This lack of analysis violates NEPA's hard look mandate. Climate change is one to the most important and difficult issues facing humanity and the planet today. Enefit's development of the Z-parcel is the very purpose of the State of Utah's proposal, therefore BLM must disclose the air and climate impacts of that development. At least a part of the Z-parcel is within Enefit's preliminary mine plan. As a result, the additional mining, processing and combustion of shale oil from the Z-parcel will result in additional climate pollution. The EA discloses that "[a]t a moderate size facility (25,000 barrels per day) there is … about four years' worth of shale oil resource in the ground of this parcel," or about 36.5 million barrels of shale oil. Indemnity Selection EA at 8 n.1. If all the Z-parcel is commercially mined, that would produce ore to

require the South Project's oil shale retort facility to run for two years. That oil shale would, as BLM admits, likely stay in the ground absent the Indemnity Selection because BLM's management plan does not open the Z-parcel to oil shale leasing. *See supra* at 8. Even if only a fraction of this resource is mined, the mining, production, and combustion of shale oil will cause climate pollution. BLM must attempt to estimate the nature and quantity of that pollution (for example, by developing a "reasonably foreseeable development scenario" for the parcel), or explain why the agency cannot, pursuant to 40 C.F.R. § 1502.22. It has failed to do so here.

Further, the mining and processing (and, to a certain degree, the combustion) of oil shale made available for mining due to the proposed action will have air quality impacts beyond climate pollution. That air pollution will be emitted in the Uintah Basin, an area already suffering from unhealthy levels of ozone (smog). On April 30, 2018, EPA finalized designations of portions of Duchesne and Uintah counties below a contiguous external perimeter of 6,250 feet elevation as nonattainment for ozone under the Clean Air Act. EPA classified the ozone nonattainment as "marginal." This designation encompasses the entirety of the Utility Project and significant portions of the South Project—including the lands within the Z-parcel.

This designation will require significant new air quality considerations, such as restrictions on fossil fuel development activities to bring the Basin into attainment with air quality standards within three years. *See* EPA, Fact Sheet – Final Area Designations for the National Ambient Air Quality Standards for Ozone Established in 2015 at 2 ("Nonattainment areas are required to meet the standard as quickly as possible, but no later than the maximum attainment date associated with each classification."), attached as Ex. 21, and available at https://www.epa.gov/sites/production/files/2018-04/documents/placeholder_0.pdf (last viewed Aug. 9, 2018). If such efforts fail to achieve applicable air quality standards within that period, EPA "must reclassify the area to a higher classification." *Id.*

Utah's updated ozone state implementation plan ("SIP") for implementation, maintenance, and enforcement is due within three years of the December 28, 2015 revision of the ozone national ambient air quality standard. 42 U.S.C. § 7410(a)(1). A separate deadline of three years from the April 30, 2018 nonattainment designation applies to SIP revisions establishing specific nonattainment provisions, such as permits for new or modified major stationary sources. 42 U.S.C. § 7502(c). If Utah does not submit an updated SIP as required, the Clean Air Act directs the Administrator to promulgate a federal implementation plan ("FIP"). 42 U.S.C. § 7410(c). For marginal nonattainment areas, SIPs must include reasonably available control measures and control technology ("RACM" and "RACT"), an emissions inventory, reasonable further progress requirements, a new source review ("NSR") program, offset requirements, and contingency measures. Each NSR program must set forth "pre-construction review" requirements that applicants must meet before permitting agencies may issue permits to construct or operate any equipment that will increase nonattainment emissions. 40 C.F.R. § 51.165(a)(2). The offset requirement means that each new source review permit program set forth in a nonattainment area SIP must require that emission increases from new and modified major sources be offset by corresponding emissions reductions. 42 U.S.C. § 7503. The offset ratio for marginal areas is 1.1:1. 40 C.F.R. § 51.165(a)(9)(ii)(A). Any major new stationary air pollution source permitted in a nonattainment area must achieve the lowest achievable emissions rate—equivalent to the most stringent emissions limitation found in a SIP for the same class or category of source. *See* 42 U.S.C. §§ 7503(a)(2), 7501(3).

The Indemnity Selection EA should have discussed how the transfer of the parcel to SITLA, and the foreseeable mining of the parcel, would affect the already-polluted airshed in which it is sited. The EA fails to do so. It does not even mention nonattainment designation. The EA's failure to even mention, let alone analyze, air quality standards violates NEPA.

h. *Environmental justice and cultural resources*

The EA asserts: "No minority or low income populations or communities exist in or near the project area, so no impacts would occur." Indemnity Selection EA, Appx. A at 3. The EA's assertion is contradicted by its acknowledgment that the Ute Tribe "did not support the [proposed action] because the land is within the exterior boundaries of the Uintah and Ouray Reservation and [they] assert ownership of those lands." *Id.*, Appx. A at 2. The fact that the land at issue is within the asserted exterior boundary of an Indian reservation contradicts the EA's statement that there are no minority populations or communities near the project area. The fact that the Ute Tribe asserts ownership of the Z-parcel, and that that parcel would not be offered, let alone transferred, to the Tribe refutes the EA's statement that "no impacts would occur." Any subsequently prepared NEPA document must address and correct these errors.

Pursuant to NEPA, BLM must also analyze potential impacts to *all cultural resources*, not just historic properties. *See* BLM Manual 8100.03F, The Foundations For Managing Cultural Resources (2004) ("Cultural Resources need not be determined eligible for the National Register of Historic Places … to receive consideration under the National Environmental Policy Act."), available at https://www.blm.gov/sites/blm.gov/files/uploads/mediacenter_blmpolicymanual8100.pdf (last viewed Aug. 9, 2018). Here, BLM has failed to evaluate any effects to cultural resources. Indemnity Selection EA, Appx. A at 1-2. The EA notes that there is one historic property, but does not mention any other cultural resources. *Id.* Furthermore, BLM makes no attempt to evaluate direct, indirect, or cumulative impacts that would result from transferring the parcel to SITLA, let alone the eventual development of the parcel for oil shale. *Id.* This does not satisfy NEPA's "hard look" requirement.

i. *Recreation impacts*

The EA contains contradictory statements about access to the parcel that any subsequent NEPA document must address. The EA states that public county roads reach the Z-parcel. "Access to the in lieu parcel is via a Uintah County Class B and D road across private lands." Indemnity Selection EA at 4. However, the EA simultaneously asserts that "no recreation occurs on the parcel, it is surrounded by private land, without access. Therefore, no impacts to current recreation opportunities would be anticipated." *Id.*, Appx. A at 5. Both of these statements cannot be true. Either public highways provide public access to the parcel, or they do not. Any subsequently prepared NEPA document must address this inconsistency.

j. *Socio-economic impacts*

The EA violates NEPA because it fails to take a hard look at the socio-economic impacts of transferring the Z-parcel to SITLA. The EA declines to analyze socioeconomic impacts, justifying that decision by concluding that these resources are "present, but not affected to a

degree that a detailed analysis is required." Indemnity Selection EA, Appx. A at 1, 5. The EA asserts:

> No impact to the social or economic status of the County would occur from the transfer of the subject lands and minerals to the State. No development is proposed or occurring in the project area. It is anticipated that if the land is transferred, the land and/or minerals will be made available for lease or sale. *Subsequent development that may occur is too speculative to be analyzed at this time*.

Id., Appx. A at 5 (emphasis added). Again, the allegation that development is "too speculative" ignores that such development is the very purpose of the transfer, and that BLM concluded development of the South Project was reasonably foreseeable in the Utility Project FEIS. As noted above, if all the Z-parcel is commercially mined, that would produce ore to require the South Project's oil shale retort facility to run for two years. Maintaining the South Project processing plant for two years (or even a fraction of that) will have socio-economic impacts in terms of jobs, royalties, taxes, etc., all of which likely have multiplier effects in terms of pollution, water demand, etc. The EA discloses none of these impacts, violating NEPA.

k. *Impacts to soils*

The EA contains no analysis of impacts to soils, violating NEPA's hard look requirement. The EA justifies this lack of analysis by concluding that these resources are "present, but not affected to a degree that a detailed analysis is required." Indemnity Selection EA, Appx. A at 1, 5. The EA's analysis avers: "There would be no direct impacts to the Physical/Biological aspects of soils in the transfer of land ownership." *Id.*, Appx. A at 5.

Here, the EA ignores (again) the indirect and foreseeable impacts of the transfer of ownership: development of the Z-parcel. Oil shale mining will involve either strip mining (as the EA's analysis of impacts to migratory birds assumes the elimination of vegetation across the entire parcel, and as the EA's analysis of impacts to floodplains and surface waters) or underground mining, which will involve massive subsidence, with resultant impacts to soils. Any subsequently prepared NEPA document must address impacts to soils from oil shale mining.

l. *Impacts to visual resources*

The EA contains no analysis of impacts to visual resources, violating NEPA's hard look mandate. The EA excuses this lack of analysis on the grounds that these resources are "present, but not affected to a degree that a detailed analysis is required." Indemnity Selection EA, Appx. A at 1, 5. The EA asserts that "disposal [of the property] would remove VRM classification for this area. There is no surface disturbance that would occur as a result of the transfer of land and mineral owner[s]hip." *Id.*, Appx. A at 5. BLM once more ignores the indirect and foreseeable impacts of oil shale mining, which BLM presumes (both in the Utility Project FEIS and elsewhere in this EA) would occur, and the EA's conclusion that the entire parcel could see its vegetation removed as the surface of the parcel is strip-mined. Without protections for visual resources in place, it is foreseeable that the Z-parcel will be scarred, and its scenic

value severely degraded as it moves from a natural landscape to one completely altered by mining. Failing to account for these impacts violates NEPA.

m. *Cumulative impacts*

The cumulative impact analysis must be more than perfunctory; it must provide a "useful analysis of the cumulative impacts of past, present, and future projects." *See Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 810 (9th Cir. 1999).

In its analysis of cumulative impacts, the EA generally makes two alternative contentions: first, that no cumulative impacts will result from the Indemnity Selection because the mere transfer of the Z-parcel to the State of Utah will have no environmental impacts; and second, that if the State of Utah does develop the parcel, damaging impacts could result. As shown above, the first contention ignores reality. The second contention requires that BLM prepare an EIS to address the direct, indirect, and cumulative impacts of the Indemnity Selection.

The EA repeatedly asserts, using boilerplate language, that there can be no accumulation of impacts of other action together with those of the Indemnity Selection because that transfer of title will, by itself, have zero impacts. *See* Indemnity Selection EA at 23 (stating, re: impacts to plants, that "[t]he Proposed Action would not contribute" to impacts caused by other actions because it Indemnity Selection is merely "a proposal to transfer the In Lieu selection lands and minerals to State ownership."); *id*. at 23, 24, 25 (using same language to dismiss potential for cumulative impacts to floodplains, groundwater quality, hydrology, surface water quality, migratory birds, wildlife, and sage-grouse). But these assertions are arbitrary and capricious because Enefit, the State of Utah, and BLM all recognize that the purpose and effect of the Indemnity Selection is to facilitate oil shale mining on the Z-parcel.

Where the EA assumes, as it must, that mining the Z-parcel will have impacts that may accumulate with other actions—particularly with Enefit plan to develop the South Project and mine lands on and adjacent to the parcel—the EA discloses impacts that are potentially significant, and thus that require preparation of an EIS. For example, in addressing cumulative impacts to rare plants, BLM states that the South Project is one of the "reasonably foreseeable activities ongoing in this cumulative impact area." *Id*. at 23. BLM further admits that the cumulative impacts of activities on BLM sensitive plants include the introduction of "non-native invasive plant species [which] *could have significant adverse impacts* on BLM Sensitive plant species that may be out[-]competed." *Id*. (emphasis added). For listed or candidate plants, BLM makes a similar statement, namely that "such an environmental shift" resulting from impacts due to non-native plants "*would probably have negative impacts* on Threatened, Endangered, Proposed, or Candidate species." *Id.* (emphasis added).

The EA admits that cumulative impacts to water resources may also be significant if one assumes the Z-parcel will likely be developed, acknowledging that the proposed action, together with the South Project and related actions could degrade:

- Floodplains ("Cumulative impacts include sedimentation and leaching of salts and chemicals into floodplain environments. The salts and chemicals *could potentially pollute important water sources* like the White and Green Rivers. Increased sedimentation into a

floodplain *may change the overall function of active floodplain*s."). Indemnity Selection EA at 23-24 (emphasis added).

- Hydrology ("Cumulative impacts could include increases in sedimentation from surface disturbing activities and the leaching of salts and chemicals from human activity and mineral development into the hydrologic system in the area. The salts and chemicals *could potentially pollute important water sources* like the White and Green Rivers…. If dynamics in the fluvial environment change above natural regimes it *could alter aquatic systems for the long term*."). *Id*. at 24 (emphasis added).

- Surface water (similarly concluding cumulative impacts from salts and chemicals "*could potentially pollute important water sources* like the White and Green Rivers."). *Id.* at 25 (emphasis added).

- Groundwater ("Cumulative impacts include sedimentation and leaching of salts and chemicals into groundwater. The salts and chemicals *could potentially pollute groundwater sources*."). *Id*. at 24 (emphasis added).

As discussed further below, these potentially significant cumulative impacts further demonstrate that BLM must prepare an EIS.

The EA contains similar admissions about potentially significant cumulative impacts to wildlife, when the South Project and the Z-parcel are considered together, including:

- Migratory birds ("Cumulative effects include[] individual bird disturbance from human presence and activities and fragmentation and destruction of habitats from surface disturbance and increased non-native invasive plant species. Further introduction of non-native invasive plant species *could have significant adverse impacts on migratory birds that are dependent upon prevalent species for their survival*. In general such an environmental shift would *probably have negative impacts on migratory birds and raptors* and would favor non-native and readily adaptive species."). *Id.* (emphasis added).

- Other wildlife (also describing harm due to "fragmentation and destruction of habitats from surface disturbance and increased non-native invasive plant species," and stating that "[f]urther introduction of non-native invasive plant species *could have adverse impacts on big game species* that are dependent upon native vegetation species for their survival."). *Id.* at 26 (emphasis added); *see also id*. (reaching similar conclusions for sage-grouse).

The potential for negative cumulative impacts to sensitive and imperiled plants, to water resources, and wildlife shows that BLM must prepare an EIS on the Indemnity Selection proposal.

3. <u>Because the EA concludes mining impacts to key resources are possible, BLM must prepare an EIS</u>.

NEPA's implementing regulations direct agencies to determine whether to prepare an EIS based on the results of an EA. 40 C.F.R. § 1501.4(c). To necessitate preparation of an EIS, an agency

need not know that significant effects *will* occur—only that its action "*may* have a significant effect upon the environment." *National Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2000). Thus, if the EA raises "substantial questions whether a project may have a significant effect," the agency *must* prepare an EIS. *Greenpeace Action v. Franklin*, 14 F.3d 1323, 1332 (9th Cir. 1992). In considering whether an effect is significant, the agency should consider "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts." 40 C.F.R. § 1508.27(b)(7); *see also Kern v. BLM*, 284 F.3d 1062, 1075 (9th Cir. 2002).

As noted above, the EA's statement of direct impacts mentions numerous potentially significant impacts, which raise substantial questions whether the Indemnity Selection may have a significant effect on the environment. Although the EA contends that the proposed land transfer will not have any direct or indirect impacts on most identified resources, this is erroneous. *See W. Land Exchange Proj.*, 315 F. Supp. 2d at 1088–89 (rejecting BLM's contention that mere transfer of title will have no environmental effects at all, based on NEPA's requirement that agencies analyze "*all* foreseeable direct *and indirect* impacts") (emphasis in original).

Most notably, the possibility of oil shale development on the Z-parcel is a potentially significant indirect effect, which itself would have cumulatively significant effects alongside anticipated oil shale development at the Enefit South Project. As discussed above, the EA provided no reasoned basis for concluding that oil shale development on the parcel is not foreseeable.

The EA's analysis of cumulative impacts also exposes potentially significant environmental impacts. For one, oil shale development on the parcel would take place in a "cumulative impact area" with existing and foreseeable oil and gas drilling, pipeline construction, and power line construction. Indemnity Selection EA at 22. Other potentially significant cumulative impacts include effects on plants, water resources and wildlife, as discussed above.

For all these reasons, BLM's analysis of the Indemnity Selection meets the threshold for an EIS.[14]

C. BLM's Analysis of Impacts to Sage-Grouse Fails to Comply with NEPA and Applicable Management Plans.

1. BLM must ensure compensatory mitigation for the loss of sage-grouse habitat.

The EA identifies the Z-parcel as encompassing historically-occupied sage-grouse habitat and as within a designated General Habitat Management Area ("GHMA") for grouse. Indemnity

[14] BLM cannot rely on the Utility Project FEIS to address the cumulative impacts of that project and the Indemnity Selection because the former analysis contains virtually no disclosure of impacts to the Z-parcel.

Selection EA at 13-14. At least two provisions of the Utah Greater Sage-Grouse Approved Resource Management Plan Amendment ("ARMPA") govern the Indemnity Selection.

First, BLM is generally prohibited from transferring sage-grouse habitat out of federal ownership, unless BLM ensures that the transfer will have no, or a positive, impact on the bird.

> MA-LR-9: Lands classified as PHMA [priority habitat management areas] and GHMA for GRSG [greater sage-grouse] will be retained in federal management (Figure 2-12, Land Tenure [Appendix A]) unless: (1) the agency can demonstrate that disposal of the lands, including land exchanges, will provide a net conservation gain to the GRSG or (2) the agency can demonstrate that the disposal of the lands, including land exchanges, will have no direct or indirect adverse impact on conservation of the GRSG.

BLM, Utah Greater Sage-Grouse Approved Resource Management Plan Amendment (Sep. 2015) at 2-35, excerpts attached as Ex. 22.[15] Figure 2-12 identifies the Z-parcel in dark green, indicating it has been identified for "retention." *Id.* at Figure 2-12.

Second, BLM acknowledges that the Z-parcel's sage-grouse general habitat is "managed under MA-SSS-5 of the ARMPA." Indemnity Selection EA at 19. That ARMPA provision mandates that BLM must "apply the following management to meet the objective of a *net conservation gain* for discretionary actions that can result in habitat loss and degradation:"

> In all GRSG habitat, in undertaking BLM management actions, and … in authorizing third-party actions that result in habitat loss and degradation, the BLM will require and ensure mitigation that provides a net conservation gain to the species…. This will be achieved by avoiding, minimizing, and compensating for impacts by applying beneficial mitigation actions.

BLM, Utah Greater Sage-Grouse Approved Resource Management Plan Amendment (Ex. 22) at 2-12.

Together, these provisions require that BLM ensure that the State of Utah provide for compensatory mitigation for the transfer of sage-grouse habitat out of federal ownership, particularly because BLM admits that transfer of the Z-parcel would result in direct and indirect impacts to sage-grouse. *See* Indemnity Selection EA at 19-20.[16]

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[15] The Indemnity Selection EA fails to mention this provision. Any subsequently prepared NEPA document must address this omission.

[16] BLM cannot escape its duty to provide compensatory mitigation for the loss of sage-grouse habitat from transfer of the Z-parcel by relying on an instruction memo ("IM") that purports to prohibit such mitigation. *See* IM 2018-093 (July 24, 2018), available at https://www.blm.gov/policy/im-2018-093 (last viewed Aug. 9, 2018). That IM states: "*Except where the law specifically requires*, the BLM must not require compensatory mitigation from public land users." *Id*. (emphasis added). However, here the law *specifically requires* compensatory mitigation for actions that may degrade sage-grouse habitat. The ARMPA

2. BLM fails to ensure that sage-grouse mitigation will provide a conservation gain.

The Indemnity Selection EA relies on the Miners Draw Hazardous Fuels Project "to compensate for the 440 acres of GHMA" that will be transferred out of federal control. *Id.*, Appx. C, page 1.[17] In doing so, however, BLM relies on a project that has already been analyzed and approved, a violation of the principle that to ensure net conservation gain, mitigation measures must provide for "additionality." *See* Greater Sage-Grouse Mitigation Working Group, Report to the Sage-Grouse Task Force, Greater Sage-Grouse Compensatory Mitigation (Dec. 2016) at 9, attached as Ex. 23.

The Indemnity Selection EA admits that sage-grouse mitigation measures must provide additionality. Indemnity Selection EA, Appx. C, pages 1, 3. This captures the common-sense notion that those seeking to mitigate damage to grouse habitat should not be able to take credit where the beneficial activities would take place anyway, without the project proponent's assistance. As the interagency Greater Sage-Grouse Mitigation Workgroup explained:

> A key principle of compensatory mitigation is that compensatory mitigation measures must provide conservation benefits that are truly "additional" to what would have occurred in the absence of the compensatory mitigation measure. Mitigation is "additional" when it provides resource benefits that are demonstrably new and that would not have occurred without the compensatory mitigation measure, or where habitat risks or threats are reduced and management plans are in place to ensure habitat values are enhanced or secured. Additionality considerations generally include both resource and financial additionality.

Greater Sage-Grouse Mitigation Working Group, Report to the Sage-Grouse Task Force (Ex. 23) at 9.

Two facts undermine a claim of additionality for the Miners Draw. First, the Miners Draw project has *already been approved*, suggesting that BLM intended to approve and implement the project whether or not it received funding from the State of Utah. *See* BLM, Decision Record, Miners Draw Hazardous Fuels Project (July 20, 2018), attached as Ex. 24; BLM, Environmental Assessment, Miners Draw Hazardous Fuels Project (July 20, 2018), attached as Ex. 25. Neither the Miners Draw Decision Record nor the EA for that project discuss that the project could not

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mandates compensatory mitigation, and all actions undertaken pursuant to that plan must, by law, comply with the plan. As the Tenth Circuit has explained:

> FLPMA prohibits the BLM from taking actions inconsistent with the provisions of RMPs. *See* … 43 U.S.C. § 1732(a) ("The Secretary shall manage the public lands ... in accordance with the land use plans developed by him...."); 43 C.F.R. § 1610.5–3[a] ("All future resource management authorizations and actions ... shall conform to the approved plan.").

Utah Shared Access Alliance v. Carpenter, 463 F.3d 1125, 1129 (10th Cir. 2006).

[17] Note that all of the pages of Appendix C to the Indemnity EA are (mis)labelled B-1, B-2, etc.

be implemented absent the State of Utah's prospective funding contribution, nor do they mention funding at all.

Second, the Indemnity Selection EA nowhere asserts that the Miners Draw project will provide *additive* habitat restoration that would not happen without the State of Utah's financial contribution—only that the project will benefit grouse. Indemnity Selection EA, Appx. C.

In short, BLM cannot support a claim of net conservation gain for mitigating impacts as required by the ARMPA by funding a project that has already been approved, and for which BLM does not even allege that it meets the requirement of additionality.

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

Even if BLM can assert that Miners Draw project meets the test for conservation gain and additionality, BLM's analysis in the Indemnity Selection EA violates NEPA.

BLM prepared a separate EA on the Miners Draw project. The agency did not disclose to the public that the proposal to remove more than 2,000 acres of pinyon pine and Utah juniper, and apply herbicides at Miners Draw and the Indemnity Selection application were linked. Nor did BLM in either EA analyze their impacts together, though the two are connected actions (or cumulative actions) if the Miners Draw project would not have occurred but for BLM's approval of Indemnity Selection. If BLM can take argue that the State of Utah's financial contribution to the Miners Draw forest eradication project is additional mitigation, then the Indemnity Selection and Miner Draw projects are connected actions—integrated parts of the same action—that must be addressed together in a single NEPA document.

While elimination of over three square miles of pinyon-juniper stands may benefit sage-grouse, this action will have other impacts, which must be added to, and disclosed together with, the impacts of transferring the Z-parcel to the State of Utah to facilitate oil shale mining. Even though BLM considered the impacts of the Miners Draw project not to be "significant" on their own, those impacts could be significant cumulatively when considered together with the Indemnity Selection.[18] But the impacts of the forest eradication project were not disclosed in the Indemnity Selection EA, and not considered as a cumulative impact in that EA. Nor does the Indemnity Selection EA incorporate by reference of otherwise refer to the Miners Draw EA.

Thus, even if BLM can rely on the Miners Draw project as compensatory and additive mitigation for sage-grouse impacts of the Indemnity Selection, the agency failed to comply with NEPA in analyzing the impacts of these two linked projects in a single NEPA document.

[18] The Southern Utah Wilderness Alliance submitted comments on the Miners Draw EA alleging that BLM's analysis failed to take the hard look NEPA requires, raising the issue of whether the Miners Draw project, on its own, may have significant impact to cultural resources, ungulates and their habitat, hydrology, and other resources. Letter of L. Henry, SUWA to S. Howard, BLM (May 14, 2018), attached as Ex. 26.

IV. BLM FAILS TO COMPLY WITH THE NATIONAL HISTORIC PRESERVATION ACT.

Pursuant to Section 106 of the National Historic Preservation Act ("NHPA"), BLM must "make a reasonable and food faith effort" to identify cultural resources that may be affected by an undertaking. 36 C.F.R. § 800.4(b)(1). BLM's efforts to date concerning the Indemnity Selection of the Z-parcel fail to meet that standard.

A. BLM's Treatment of Cultural Resources Violates the NHPA.

Congress enacted the NHPA in 1966 to implement a broad national policy encouraging the preservation and protection of America's historic and cultural resources. *See* 54 U.S.C. § 300101. The heart of the NHPA is Section 106, which prohibits federal agencies from approving any federal "undertaking" unless the agency takes into account the effects of the undertaking on historic properties that are included in or eligible for inclusion in the National Register of Historic Places. 54 U.S.C. §§ 306108, 300320; *see also Pueblo of Sandia v. United States*, 50 F.3d 856, 859 (10th Cir. 1995). Section 106 is a "stop, look, and listen provision" that requires federal agencies to consider the effects of their actions and programs on historic properties and sacred sites before implementation. *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999).

To adequately "take into account" the impacts on archeological resources, all federal agencies must comply with binding Section 106 regulations established by the Advisory Council on Historic Preservation ("Advisory Council"). Under these regulations, the first step in the Section 106 process is for an agency to determine whether the "proposed [f]ederal action is an undertaking as defined in [Section] 800.16(y)." 36 C.F.R. § 800.3(a). Undertakings include any permit or approval authorizing use of federal lands. *Id.* § 800.16(y). If the proposed action is an undertaking, the agency must determine "whether it is a type of activity that has the potential to cause effects on historic properties." *Id.* § 800.3(a). An effect is defined broadly to include direct, indirect and/or cumulative adverse effects that might alter the characteristics that make a cultural site eligible for listing in the National Register of Historic Places. *See id.* § 800.5(a)(1); *id.* § 800.16(i); 65 Fed. Reg. 77,698, 77,712 (Dec. 12, 2000).

The agency next "[d]etermine[s] and document[s] the area of potential effects" and then "[r]eview[s] existing information on historic properties within [that] area." 36 C.F.R. § 800.4(a)(1)-(2). "Based on the information gathered, ... the agency ... shall take the steps necessary to identify historic properties within the area of potential effects." *Id.* § 800.4(b). "The agency shall make a reasonable and good faith effort to carry out appropriate identification efforts." *Id.* § 800.4(b)(1). If the undertaking is a type of activity with the potential to affect historic properties then the agency must determine whether in fact those properties "may be affected" by the particular undertaking at hand. *Id.* § 800.4(d)(2).[19]

[19] BLM may also determine that there are no historic properties present or there are historic properties present but the undertaking will have no effect upon them, at which point it consults with the State Historic Preservation Officer and notifies relevant Native American tribes of its conclusion. 36 C.F.R. § 800.4(d)(1).

If the agency official concludes that there *may be* an adverse effect, it engages the public and consults further with the state historic preservation officer, Native American tribes, any consulting parties, and the Advisory Council in an effort to resolve the adverse effects. *Id.* §§ 800.5(d)(2), 800.6.

B. BLM's No Adverse Effect Determination is Unsupported and Arbitrary.

BLM's conclusion that the Indemnity Selection would have no adverse effects on historic properties is arbitrary and capricious. By definition, this land transfer would have an adverse effect on historic properties. Section 106 regulations provide examples of adverse effects, including the "[t]ransfer, lease, or sale of property out of Federal ownership or control *without legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance*." 36 C.F.R. § 800.5(a)(2)(vii) (emphasis added). Here, BLM is proposing to do exactly that—transfer a 440 acre parcel that has not been fully surveyed and has at least one historic property—out of Federal ownership without legally enforceable restrictions to ensure long-term preservation to historic properties.[20] Indemnity Selection EA, Appx. A at 1.

Utah's cultural resource regulations are not as protective as Federal regulations. Utah's regulations do not require SITLA to account for potential indirect effects that are specifically enumerated in the Federal regulations. For instance, NHPA regulations broadly define adverse effects to include indirect effects such as changes "of the character of the property's use or of physical features within the property's setting that contribute to historic significance" and "[i]ntroduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features." 6 C.F.R. § 800.5(a)(2)(iv)-(v). Utah's regulations, on the other hand, only enumerate *direct* adverse effects that must be accounted for, such as "physical destruction of or damage to all or part of the property," "alteration of a property," or "removal of the property from its historic location." *See* Utah Admin. Code. R850-60-800(b). Accordingly, for any proposed projects on this parcel, SITLA would have to evaluate a much narrower range of potential effects. *See id.* SITLA would not have to account for potential effects from the introduction of visible or audible elements or changes to a site's character. This is not the same. Moreover, SHPO's verbal assurances that the State provides the same level of protection as BLM do not constitute "legally enforceable restrictions … to ensure long-term preservation." Indemnity Selection EA, Appx. A at 1-2; 36 C.F.R. § 800.5(a)(2)(vii).

In addition, Utah regulations do not require consultation with either Native American tribes or interested parties. *See generally* Utah Admin. Code. R850-60-500 *et seq.* This lack of required consultation is especially troubling where three Native American tribes have already raised issues with the Indemnity Selection. Indemnity Selection EA, Appx. A at 2. The Hopi Tribe disagreed with BLM's "no adverse effect" determination;" the Santa Clara Pueblo requested continued consultation; and the Ute Tribe objected to the Indemnity Selection. *Id.* Should BLM approve the land transfer, none of these tribes would have any meaningful involvement in the identification and preservation of cultural resources in the parcel. The involvement of tribes with historic ties to the lands within the parcel is necessary to adequately protect cultural resources

[20] Only 21% of the parcel has been surveyed for cultural resources. Indemnity Selection EA, Appx. 1 at 1. There is a good chance that the remaining 79% of the parcel contains cultural resources or historic properties.

and an essential part of compliance with Section 106. *See* 36 C.F.R. 800.2(c)(2)(ii). Federal regulations make clear that

> the agency official *shall ensure* that consultation in the section 106 process provides [an] Indian tribe … a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects.

Id. (emphasis added). If BLM transfers this parcel to SITLA, BLM cannot ensure that interested Native American tribes are given a reasonable opportunity to identify concerns and articulate their views on potential effects to historic properties. SITLA's and SHPO's vague declarations in verbal conversation that additional consultation will take place are not legally enforceable. Indemnity Selection EA, Appx. A at 2. Nor do those declarations ensure long-term protection of historic properties. *Id.* As a result, BLM cannot conclude that transferring the Z-parcel to SITLA will have no adverse effect on historic properties.

Because BLM cannot ensure that Utah law provides the same level of protection to historic properties as Federal law and cannot ensure that interested Native American tribes will be consulted in any future development, its "no adverse effect" determination is arbitrary and capricious.

V. BLM HAS FAILED TO ENSURE CONSISTENCY WITH THE VERNAL RMP.

The Indemnity Selection must be consistent with the Vernal Field Office resource management plan (RMP). 43 C.F.R. § 1610.5–3(a). In at least three ways, BLM has not ensured that the Indemnity Selection is consistent with the RMP.

First, the EA fails to mention RMP provision LAR-3 which states:

> The BLM will retain lands within its administrative jurisdiction, except where necessary to accomplish one or more of the following objectives:
>
> - Improve management of natural resources through consolidation of federal, state and private lands[.]
>
> - Secure key property necessary to protect special status species including threatened and endangered species, promote biological diversity, increase recreational opportunities, and preserve archaeological, paleontological and historical resources[.]

Vernal Field Office RMP, LAR-3, p. 86. BLM nowhere explains how the Indemnity Selection will "improve management of natural resource," which will in any event be difficult for BLM to allege because the agency it predicts potentially damaging impacts to a variety of values. For the same reason, BLM has not alleged, nor could it credibly allege, that the transfer of the Z-parcel will "secure" any property for the United States. Because the Indemnity Selection appears to

violate LAR-3, the selection cannot proceed. At a minimum, BLM must acknowledge this provision and explain how and why the Indemnity Selection meets the listed criteria.

Second, the EA fails to address whether BLM has consulted with local governments and landowners concerning the transfer of title. *See* BLM, Vernal Field Office RMP (Oct. 2008), LAR-8, p. 87 ("All disposal actions will be coordinated with adjoining landowners, local governments, and current land users."); Indemnity Selection EA at 27-28 (listing consultation with various entities but no Uintah County or adjoining landowners). BLM must undertake such consultation to comply with the plan.

Third, assuming BLM can transfer title of the Z-parcel to the State of Utah, the agency can only do so if it demonstrates that the transfer is in the public interest, which the agency has not, and cannot, do. BLM admits that Vernal RMP did not specifically identify the Z-parcel for disposal. Indemnity Selection EA at 4. Vernal RMP provision LAR-20 might still permit BLM to transfer title to the Z-parcel but only if certain conditions are met:

> Land ownership changes will be considered on lands not specifically identified in the Approved RMP (Figure 6a) for disposal or acquisition if the changes are in accordance with resource management objectives and other RMP decisions, determined to be in the public interest, and will accomplish one or more of the following criteria:
>
> - The changes are determined to be in the public interest. The public will benefit from land resources coming into public ownership, while at the same time accommodating the needs of local and state governments, including the needs for public purposes, community growth and the economy.
>
> - The changes result in a gain of important manageable resources on public lands such as crucial wildlife habitat, significant cultural sites, mineral resources, water sources, listed species by habitat, or areas key to productive ecosystems.
>
> - The changes ensure public access to lands in areas where access is needed and cannot otherwise be obtained.
>
> - The changes will promote more effective management and meet essential resource objectives through land ownership consolidation.
>
> - The changes result in acquisition of lands that serve regional or national priorities identified in applicable policy directives or legislation.

Vernal RMP, LAR-20, p. 89.

The BLM does not allege that the final four criteria apply, nor could the agency allege so. *See* Indemnity Selection EA at 4. Instead, BLM asserts, without explaining why or how, that the Indemnity Selection "would meet" the first criterion. The evidence, however, does not support such a conclusion. There is no evidence that "[t]he public will benefit from land resources

coming into public ownership," because land resources will be leaving federal public ownership. The potential for environmental damage—to water resources, vegetation, wildlife habitat, imperiled plants, air quality, etc.—from making the Z-parcel available for development is not in the public interest. The gravest environmental threat of our time—climate change—will be worsened by the Z-parcel's foreseeable development. Disposal of the parcel to the State of Utah conflicts with the stated desires of the Ute Tribe. Aside from fattening SITLA coffers (at the expense of U.S. taxpayers who otherwise would receive royalties if the parcel were leased) and a corporation controlled by a foreign government, there is little benefit, public or otherwise, to be gained from this proposal.[21] Because BLM provides no explanation for why or how this proposal meets the public interest, BLM cannot approve the Indemnity Selection without violating the Vernal Field Office RMP.

Unless and until BLM demonstrates compliance with these three plan provisions, including that the transfer is in the public interest, it cannot by law approve the Indemnity Selection.

CONCLUSION

Thank you for your attention to this matter and for the opportunity to comment. If you have any questions about these comments, please contact Alex Hardee, Earthjustice, at 303-996-9612 or via email at ahardee@earthjustice.org.

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[21] In any event, BLM has taken the position that no socioeconomic impacts are foreseeable from the transfer. *See* Indemnity Selection EA, Appx. A at 1, 5.

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TABLE OF EXHIBITS

Exhibit	Exhibit Description
1	E-mail of R.L. Hrenko-Browning, Enefit to J. Andrews, SITLA (June 6, 2016 1:13 PM)
2	E-mail of R.L. Hrenko-Browning, Enefit to J. Andrews, SITLA (June 13, 2016 10:39 AM)
3	E-mail of R.L. Hrenko-Browning, Enefit to J. Andrews, SITLA (June 16, 2016 4:47 PM)
4	E-mail of J. Andrews, SITLA to J. Lekas, *et al.*, SITLA Board (May 11, 2016 5:02 PM)
5	Memo of John Andrews, SITLA to Land Exchange Committee & SITLA Board of Trustees (May 11, 2016)
6	E-mail of L. Hunsaker, Utah to C. Cox, BLM (May 20, 2014)
7	E-mail of R. Rymerson, BLM to J. Andrews, SITLA (Aug. 26, 2015 5:30 PM)
8	E-mail of J. Andrews, SITLA to R. Rymerson, BLM (Aug. 26, 2015 6:18 PM)
9	E.S. Perkes, BLM, Mineral Land Report (Mar. 2018)
10	BLM, Final Programmatic EIS, Proposed Oil Shale and Tar Sands RMP Amendments (Sep. 2008) (excerpts)
11	BLM, Final Programmatic EIS, Proposed Land Use Plan Amendments for Allocation of Oil Shale and Tar Sands Resources (Nov. 2012) (excerpts)
12	BLM, Approved RMP Amendments/Record of Decision for Oil Shale and Tar Sands Resources, (Nov. 2008) (excerpts)
13	Letter of E. Zukoski, Earthjustice to E. Roberson, BLM (May 12, 2017)
14	Letter of J. Palma, BLM to K. Carter, SITLA (Aug. 30, 2013)
15	E-mail of M. DeKeyrel, BLM State Office to J. Andrews, SITLA (Sep. 23, 2013 1:56 PM)
16	Grand Canyon Trust *et al*., Comments on Enefit American Oil Utility Corridor Project (July 9, 2018)
17	FWS, Fact Sheet, White River Beardtongue
18	FWS, Fact Sheet, Graham's Beardtongue
19	BLM, Vernal Field Office, Conservation Measures and Survey Requirements
20	Utah Dep't of Envtl. Quality, 2016 Final Integrated Report, Chapter 3: Rivers and Stream Assessments (excerpts)
21	EPA, Fact Sheet – Final Area Designations for the National Ambient Air Quality Standards for Ozone Established in 2015
22	BLM, Utah Greater Sage-Grouse Approved Resource Management Plan Amendment (Sep. 2015)
23	Greater Sage-Grouse Mitigation Working Group, Report to the Sage-Grouse Task Force, Greater Sage-Grouse Compensatory Mitigation (Dec. 2016)
24	BLM, Decision Record, Miners Draw Hazardous Fuels Project (July 20, 2018)
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