WESTERN RESOURCE
ADVOCATES

December 20, 2010

Bureau of Land Management
Vernal Field Office
170 South 500 East
Vernal, UT 84078

Re: Earth Energy Resources Inc. Water Well Pad Expansion Amend ROW UTU-86004, Environmental Assessment DOI BLM UT-G010-2010-0309-EA.

We submit these comments on behalf of Living Rivers. Living Rivers is a nonprofit organization of approximately 300 members and supporters dedicated to restoring river ecosystems by mobilizing public support and involvement for river restoration; to educating and enlisting humanity to protect and restore the quality of the natural river ecosystems; and to using all lawful means to carry out these objectives. The main focus of Living Rivers is restoration of the Colorado River. Living Rivers is a member of the New York-based Waterkeeper Alliance. Living Rivers members use and enjoy public lands throughout Utah, including the Tavaputs Plateau area. Living Rivers members use these lands for a variety of purposes, including: recreation, solitude, scientific study, and aesthetic appreciation. Living Rivers members visit and recreate (e.g., study, hunt, camp, bird, sightsee, and enjoy solitude) throughout the lands that are the subject of this environmental assessment (EA), including the Tavaputs Plateau and surrounding public lands. Living Rivers members have a substantial interest in resources affected by this matter, including wildlife, plant communities, night skies, air quality, water quality, and cultural sites. Living Rivers members also have a substantial interest in ensuring that the Bureau of Land Management (BLM) complies with federal law and regulation.

No Surface Occupancy Stipulation

The EA notes that BLM's initial review of the project found that aspects of this project fall within an area designated by the Vernal Field Office RMP/ROD (RMP) as prohibiting all forms of surface disturbing activities. EA at 3. The EA then states that on-the-ground review revealed that the area to which the No Surface Occupancy (NSO) stipulation applies is actually ¼ mile from the proposed project location. However, the EA does not clarify which aspects of the project are located outside of the NSO area – the well pad and/or the pipeline right of way (ROW) – and whether the mapping error also applies to the ROW. In short, BLM must clarify whether every aspect of the project, or just the well pad, falls outside the NSO area.

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Greater Sage Grouse Lek and Nesting Areas

The BLM must ensure adequate protection of the greater sage grouse courtship and nesting habitat from impacts resulting from the proposed project and has failed to do so for several reasons. First, there are inconsistencies within the EA that BLM must correct. In Chapter 3, the EA talks about an 80% decline in the greater sage grouse range, while in Chapter 4 the agency cites a 60% decline. Additionally, in Chapter 2 the EA outlines that construction or drilling are prohibited in the areas of greater sage grouse nesting from March 1 to June 30, while in Chapter 4 it delineates the no-construction timeframe as being from March 1 to June 15. Admittedly both of these inconsistencies are minor, but they should be corrected.

Second, the BLM admits that both direct and indirect impacts to greater sage grouse nesting and courtship habitat would occur as a result of this activity. The agency further restricts ground disturbance activities within the March-June timeframe in an attempt to minimize those impacts. However, the agency does not require the company to notify BLM if activities will in fact occur during the restricted period. Instead, the agency states that a BLM or other qualified biologist "should" be notified. EA at 6. This is insufficient. In order to adequately protect the sage grouse, BLM must prohibit any activity during the relevant timeframe. Failure to do so would mean that BLM must prepare an environmental impact statement to assess the potential significant environmental impacts of the proposed project on this imperiled bird. At the very least, the agency must require Earth Energy Resources to notify BLM if the mitigation measures outlined by the agency will be violated, must require that a proper survey of the area be completed, and must inform BLM of the survey results before it is allowed to conduct those activities.

Third, as outlined below, in its environmental analysis of this action, BLM must also consider the impact on the greater sage grouse from the construction and operation of PR Springs mine, not just the areas of the well pad and ROW. Because the water emanating from BLM land is essential to production in the mine, the consequences of the mine on the greater sage grouse population must be considered.

Water Consumption

The EA fails to note the amount of water that the construction and operation of the mine will consume, and the possible impacts of that water usage on the area's plant and animal communities. Based on documents contained in the public record, the mine's initial 62-acre pit will consume almost 60,000,000 gallons of water per year, or over 411,000,000 gallons during the 7-years it will take to complete mining and processing of this initial area. This amounts to approximately 20.4 acre-feet of water for each acre mined during this period. It is reasonably foreseeable that if this initial pit is commercially successful, Earth Energy Resources will expand its operations onto other areas within its leased area. Currently, the company has 5,930 acres under lease. If the operations were to cover the entire 5,930-acre area, the total water consumption of the mine would be approximately 120,972 acre-feet of water. In an area largely devoid of water resources, water usage on this scale could have significant, detrimental impacts on the area's ecosystem. For that reasons, the EA must consider both the short -term and long-term, cumulative impacts of this water usage on the area's environment.

Earth Energy Resources also has an agreement with the Uintah Water Conservancy District, which is a designated purveyor of Colorado River water and is linked to Utah's overall allocation as prescribed by the Upper Colorado River Compact of 1948. Therefore, the water for this mining activity is considered as tributary water of the Colorado River Basin.

The Colorado River allocations of the Upper Basin states are not fixed like the allocations of the Lower Basin states and Mexico. The allocation of the Upper Basin states is divided on a percentage of what is left over, once the fixed demands (8.25 million acre-feet) of the Lower Basin and Mexico are met below the confluence of the Paria River near Lee's Ferry, Arizona. According to the Hydrologic Determination of 2007, the amount of water left for the Upper Basin states to consume annually is 5.76 million acre-feet.

The agencies of the Department of Interior are aware that the Colorado River is presently being transformed by sustained drought and climate change. The current 11-year drought has reduced the annual supply of the Colorado River by 31%, which equates to an annual system loss of 4 million acre-feet of water. The Hydrologic Determination for the Upper Basin states has, however, not been adjusted to reflect this system loss, nor has it been adjusted to reflect the system losses to climate change, which Secretary Salazar has mandated to consider in resource planning documents.

It is highly likely that the Hydrologic Determination of the Upper Basin could be modified in the timeframe of the Earth Energy Resources mining operation. Based on the information provided by Earth Energy Resources' application, the amount of water need to mine the total acreage of the company's leased land would be approximately 121,000 acre-feet. This is a considerable amount of water. For example, this same amount of water could supply Grand County's population and community agriculture for about 25 years.

Living Rivers does not believe there is sufficient groundwater at depth in the Uinta Basin for this project. Even lower Grand County, with the benefit of the La Sal Mountains and the corresponding recharge of 30 inches of precipitation per year, only produces 6,400 acre-feet of groundwater per year. The precipitation available for recharge in the East Tavaputs Plateau is only about 12 inches per year. Consequently, it is entirely possible that Earth Energy Resources would completely exhaust the available groundwater of the area and dry up the springs and seeps of Desolation and Grey canyons along with many their corresponding side canyons.

NEPA

A. NEPA Requires a Federal Agency to Consider the Environmental Consequences of its Actions

The National Environmental Policy Act, 42 U.S.C. §§ 4321–4370f, is our "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). It makes environmental protection a part of the mandate of every federal agency. 42 U.S.C. § 4332(1); *Calvert Cliffs Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1112 (D.C. Cir. 1971). It requires federal agencies to take environmental considerations into account in their decision

making "to the fullest extent possible." 42 U.S.C. § 4332; 40 C.F.R. § 1500.2; *Envtl. Def. Fund v. Matthews*, 410 F. Supp. 336, 338 (D.D.C. 1976). It also supplements the existing authority of agencies to allow them to act based on environmental considerations. *Envtl. Def. Fund*, 410 F. Supp. at 337-38; see also 42 U.S.C. § 4335. NEPA seeks to ensure that federal agencies take a "hard look" at environmental concerns. *Young v. Gen. Servs. Admin.*, 99 F. Supp. 2d 59, 67 (D.D.C. 2000).

One of NEPA's primary purposes is to ensure that an agency, '"in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.'" *Id*. (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)). NEPA also '"guarantees that the relevant information [concerning environmental impacts] will be made available to the larger audience,'" including the public, '"that may also play a role in the decisionmaking process and the implementation of the decision.'" *Id*. As the D.C. Circuit has noted, "NEPA thus stands as landmark legislation, requiring federal agencies to consider the environmental effects of major federal actions, [and] empowering the public to scrutinize this consideration. . . ." *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 147 (D.C. Cir. 1985).

The cornerstone of NEPA's protections is the environmental impact statement (EIS). Young, 99 F. Supp. 2d at 67. NEPA requires federal agencies to prepare an EIS before undertaking any "major federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The EIS requires a detailed, "hard look" at the environmental impact of—and alternatives to—the proposed action. *Young*, 99 F. Supp. 2d at 67. The EIS serves to ensure informed decision making to the end that "the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 371 (1979). Through complying with NEPA, agencies "consider environmental issues just as they consider other issues within their mandates." *Calvert Cliffs*, 449 F.2d at 1112. By considering these issues, compliance with NEPA's procedure is "almost certain to affect the agency's substantive decision." *Robertson*, 490 U.S. at 350.[1]

[1] An EIS is required whenever a federal agency takes action with "significant" effects on the human environment. 42 U.S.C. § 4332(2). If an agency is unsure whether the effects of any given action are significant enough to warrant preparation of an EIS, it may prepare an EA, a concise public document that provides enough evidence and analysis to either support a finding of no significant impact, or to facilitate preparation of an EIS if effects are significant. 40 C.F.R. § 1508.9; *S. Utah Wilderness Alliance v. Norton*, 326 F. Supp. 2d 102, 116 (D.D.C. 2002). Agencies can also "categorically exclude" certain kinds of actions that do not individually or cumulatively have a significant effect on the environment. 40 C.F.R. § 1508.4. For such actions, neither an EA nor EIS is required. *Id*.

B. Significant Federal Agency Involvement in Non-Federal Actions Is Subject to NEPA.

NEPA's obligation to consider impacts and alternatives in an EIS is not limited to projects that are directly carried out by federal agencies. Council on Environmental Quality (CEQ) regulations define "major federal action" to include non-federal actions "which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18. Such actions include:

> (a) [N]ew and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies . . . [and] (b)(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

Id.

Consistent with these regulations, the D.C. Circuit recognizes that "major federal action" can occur even where it is chiefly advanced by a non-federal party. *See, e.g., Scientists' Inst. For Pub. Info. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1088 (D.C. Cir. 1973) ("there is 'Federal action' within the meaning of the statute not only when an agency proposes to build a facility itself, but also whenever an agency makes a decision which permits action by other parties which will affect the quality of the environment"); *Karst Envt'l Educ. & Prot. v. Envt'l Prot. Agency*, 475 F.3d 1291, 1295 (D.C. Cir. 2007) (NEPA imposes obligations on agencies "after a certain threshold of federal involvement"). All of the other circuits come to the same conclusion. *See,e.g., Save Barton Creek Ass'n v. FHWA*, 950 F.2d 1129, 1134 (5th Cir. 1992) ("We recognize that 'major federal action' can exist when the primary actors are not federal agencies.").

There is no single litmus test to determine when agency approval or permitting of such non-federal activities constitute "major federal action" under NEPA. *Hammond v. Norton*, 370 F. Supp. 2d 226, 255 (D.D.C. 2005); *Mineral Policy Ctr.*, 292 F. Supp. 2d at 54; *see also Ka Makani'O Kohala Ohana, Inc. v. Water Supply Dept. of County of Hawaii*, 295 F.3d 955, 960 (9th Cir. 2002) ("There are no clear standards for defining the point at which federal participation transforms a state or local project into a major federal action . . . . The matter is simply one of degree. . . ." (internal quotation marks and citations omitted)). Courts consider a number of factors, *Mineral Policy Ctr.*, 292 F. Supp. 2d at 54-55, and the analysis calls for "a situation-specific and fact-intensive analysis." *Southwest Williamson County Comm. Assoc. v. Slater*, 243 F.3d 270, 281 (6th Cir. 2001).

The central question in this case is whether BLM's approval of the water source for the PR Springs mine is a "major federal action" that encompasses the entire mine. Because this water source is located on BLM land, because it is an essential component to the mine, and because and it is reasonable foreseeable that the water from the well will be used for the mine, BLM has violated NEPA by failing to consider the water source as a cumulative or connection action – a necessary component – to the mine. BLM is therefore obligated to consider the

impacts of the mine prior to approving the well pad expansion. BLM's approval of the well pad, located on BLM land, is a "legal precondition" to the mine, and for that reason the agency must consider its participation in the project as constituting a major federal action.

C. **BLM's Failed to Consider the Cumulative Impacts of the PR Springs Mine as a Result of its Approval of the Water Well Pad and the ROW, and Failed to Consider its Approval of the Well Pad and the ROW as Connected Actions with the PR Spring Mine**

1. <u>The cumulative impacts of the PR Springs Mine must be considered along with approval of the water well pad and the ROW.</u>

CEQ regulations define cumulative impacts as:

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

40 C.F.R. §1508.7.

"The CEQ regulations require agencies to discuss the cumulative impacts of a project as part of the environmental analysis. 40 C.F.R. § 1508.7." *Davis v. Mineta,* 302 F.3d at 1125 (10th Cir. 2002). "Of course, effects must be considered cumulatively, and impacts that are insignificant standing alone continue to require analysis if they are significant when combined with other impacts. 40 C.F.R. §1508.25(a)(2)." *New Mexico ex rel. Richardson,* 565 F.3d at 713, n. 36. In a cumulative impact analysis, an agency must take a "hard look" at all actions. "An EA's analysis of cumulative impacts must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment. … Without such information, neither the courts nor the public ... can be assured that the [agency] provided the hard look that it is required to provide." *Te-Moak Tribe of Western Shoshone,* 2010 WL 2431001, at *8 (9th Cir., June 18, 2010) (citations omitted) (rejecting EA for mineral exploration that had failed to include detailed analysis of impacts from nearby proposed mining operations).

A cumulative impact analysis must provide a "useful analysis" that includes a detailed and quantified evaluation of cumulative impacts to allow for informed decision-making and public disclosure. *Kern v. U.S. Bureau of Land Management,* 284 F.3d 1062, 1066 (9th Cir. 2002); *Ocean Advocates v. U.S. Army Corps of Engineers,* 361 F.3d 1108 1118 (9th Cir. 2004). The NEPA requirement to analyze cumulative impacts prevents agencies from undertaking a piecemeal review of environmental impacts. *Earth Island Institute v. U.S. Forest Service,* 351 F.3d 1291, 1306-07 (9th Cir. 2003). The NEPA obligation to consider cumulative impacts extends to all "present" and "reasonably foreseeable" future projects, including when a project is part of larger program or an identifiable series of projects. *Blue Mountains,* 161 F.3d at 1214-15; *Kern,* 284 F.3d at 1076; *Hall v. Norton,* 266 F.3d 969, 978 (9th Cir. 2001) (finding cumulative analysis on land exchange for one development failed to consider impacts from other developments potentially subject to land exchanges); *Great Basin Mine Watch v. Hankins,* 456

F.3d 955, 971-974 (9th Cir. 2006) (requiring "mine-specific … cumulative data," a "quantified assessment of their [other projects] combined environmental impacts," and "objective quantification of the impacts" from other existing and proposed mining operations in the region).

Thus, without an understanding of the "cumulative impacts," the BLM cannot credibly determine whether the impacts from the water well pad and ROW are insignificant – yet that is precisely what the agency did in this case. Certainly, the BLM is fully aware of the intended use of this water and there can be no doubt that the use of this water for the PR Springs mine is a "past, present, and reasonably foreseeable future action" that should have been reviewed prior to the agency's approval of the water well pad and the ROW. The agency's failure to conduct this required analysis violates NEPA.

2. <u>The approval of the Well Pad and the ROW must be considered connected actions with the PR Springs Mine.</u>

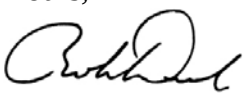
In addition to failing to consider the cumulative impacts from the PR Springs mine as part of its decision to approve the well pad and ROW, the BLM also fails to recognize that the well pad and ROW are part of the PR Springs mine. There is a separate requirement under NEPA which requires that "connected actions" be considered in one NEPA document. "[A]n agency is required to consider more than one action in a single [EA] if they are 'connected actions,' 'cumulative actions,' or 'similar actions.'" *Kleppe v. Sierra Club*, 427 U.S. 390, 408 (1976). The federal courts use a "but for" or "independent utility" test for connected actions. *Thomas v. Peterson*, 753 F. 2d 754, 758-60 (9th Cir. 1985). If one project cannot proceed without the other project (i.e., "but for" the other project), or if the first project is not "independent" of the second project, the two projects are considered connected actions and must be reviewed in the same EA. *Id.* "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. … The crux of the test is whether each of the two projects would have taken place with or without the other and thus had independent utility." *Great Basin Mine Watch*, 456 F.3d at 969 (9th Cir. 2006).

It is quite clear that "but for" approval of the water well pad and ROW, the mine could not go forward. Thus, because of the direct connection between the approved water well pad/ROW and the PR Springs mine, NEPA requires the BLM to consider the environmental impacts of the mine as part of its decision to allow the water well pad and ROW projects to go forward. In failing to consider the water well pad/ROW and the PR Springs mine as "connected actions" that should have been reviewed in the same NEPA document, and in failing to condition its approval on requiring Earth Energy Resources to reduce or mitigate impacts from the mine, the BLM violated NEPA. For the reasons listed above, BLM must include an analysis of the environmental impact of the entirety of the PR Springs mine project in this environmental analysis. Because it has not done so, this EA is fatally flawed.

Finally, because the water resources of the Colorado River and its tributaries are under severe stress at this time, and because the water used by this project will harm the pre-existing beneficiaries of Colorado River water, Living Rivers requests that BLM broaden its consultation on this project to include cooperating agencies or affected users such as the Bureau of

Reclamation, the National Park Service, the Bureau of Indian Affairs, the Ute Nation, US Fish and Wildlife Service, and the Environmental Protection Agency, and extend the comment period for this EA to allow for sufficient response time from these agencies/users.

Yours,



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