WESTERN MINING ACTION PROJECT

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Via Email – Attachments on CD sent via U.S. Mail

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RE: Roca Honda Mine Supplement to the Draft EIS -- Comments

Dear Supervisor Kohrman and Acting State Director Seidlitz:

Pursuant to the Forest Service's February 20, 2015 Interested Parties letter, please accept these comments on the Supplement to the Roca Honda Uranium Mine (Mine) Draft Environmental Impact Statement (SDEIS) from the Multicultural Alliance for a Safe Environment (MASE), submitted by their undersigned counsel. Two computer discs containing the noted attached documents to be included in the administrative record are being mailed to your office today as well. MASE is a non-profit coalition of organizations from uranium impacted communities working to protect their communities from further damage from uranium mining and milling and to ensure clean-up of legacy uranium waste. MASE is comprised of a core group of organizations (and their members) that include: (1) Bluewater Valley Downstream Alliance (BVDA), a citizens group made up largely of residents and property owners directly affected by groundwater pollution and radiation releases from uranium mining and milling in northwest New Mexico; (2) Eastern Navajo Diné Against Uranium Mining (ENDAUM), a grassroots group opposing construction of uranium mines in and near the Eastern Navajo Agency due to the significant threats to human health and environmental resources; (3) Laguna-Acoma Coalition for a Safe Environment (LACSE), a group of residents of Laguna and Acoma Pueblos dedicated to assessing community and environmental health from impacts of past

uranium development and protecting sacred cultural sites and areas, including Mt. Taylor, a mountain sacred to Indigenous peoples of New Mexico; (4) Post-71 Uranium Workers Committee (Post '71), a group of former uranium miners , millers, ore haulers, and drillers working to document health conditions among people who worked in the uranium industry and to protect future workers and residents of the region threatened by uranium operations; and (5) Red Water Pond Road Community Association (RWPRCA), an organization of Diné families who have experienced and lived with the impacts of uranium mining and milling in the region since the 1960s. MASE's mission is to restore the land and water contaminated by uranium mining and milling, improve the health of community members, and protect and preserve the natural and cultural environment in which we live.

These comments hereby adopt, reiterate, and incorporate all previous comments submitted by MASE and its constituent organizations regarding the Roca Honda Mine and all related operations and activities. Because the DEIS and the new pipeline alternative suffers from numerous errors and omissions and violates the National Environmental Policy Act (NEPA), MASE urges the United States Forest Service (USFS or Forest Service) to prepare and submit for public review a revised Draft EIS (and SDEIS) and not simply proceed to issue a Final EIS. As mandated by the regulations governing environmental impact statements, "The draft statement [EIS] must fulfill and satisfy to the fullest extent possible the requirements established for final statements." 40 C.F.R. § 1502.9(a). A supplemental Draft EIS must be circulated for public comment and filed in the same manner as an original Draft EIS. 40 C.F.R. § 1502.9(c)(4).

Also as noted below, and in previous MASE comments, the proposed Roca Honda uranium mine, including the new pipeline alternative, if approved by the USFS and/or BLM, would violate numerous other federal laws, regulations, and agency policies and cannot be approved. In addition, because the new pipeline as described in the Feb. 20, 2015 letter is proposed to cross lands under the management of the Bureau of Land Management (BLM), the BLM must conduct its own review under its NEPA, the National Historic Preservation Act (NHPA), Native American resource review and protection requirements, FLPMA, Clean Water Act, and other environmental and public land law requirements. It may be possible, however, for BLM and the USFS to jointly undertake their reviews, but all BLM requirements, as well as USFS requirements, will now apply to the project. Notation to USFS requirements apply equally to BLM where applicable (e.g., NEPA, FLPMA, NHPA, CWA, etc.).

At the outset, all NEPA, FLPMA, NHPA, CWA, ESA and other requirements applicable to the Mine, including those noted in MASE's previous comments, apply to the new pipeline alternative and to BLM. Due to the new location(s) of, and adverse impact(s) from, project components for this new alternative, the agencies must conduct a detailed and thorough review of all aspects of the new alternative, alone and in combination with the previous Mine components.

A. <u>All Baseline Conditions Must Be Fully Analyzed</u>

The baseline conditions (affected environment) of the pipeline route and potentially affected resources (e.g., land, air quality, surface and ground water quantity, quality, flow, and other conditions, visual, wildlife, cultural/religious/historical, recreation, etc.) of the pipeline route itself as well as adjacent and nearby lands and resources that may be affected by the pipeline

construction, eventual placement, and operations. This necessarily includes all potentially affected resources at and downstream from the discharge point.

The USFS/BLM must "describe the environment of the areas to be affected or created by the alternatives under consideration." 40 C.F.R. § 1502.15. "Without establishing the baseline conditions . . . there is simply no way to determine what effect the [action] will have on the environment, and consequently, no way to comply with NEPA." Half Moon Bay Fisherman's Mktg. Ass'n v. Carlucci, 857 F.2d 505, 510 (9th Cir. 1988). The lack of an adequate baseline analysis fatally flaws an agency's NEPA review. "[O]nce a project begins, the pre-project environment becomes a thing of the past and evaluation of the project's effect becomes simply impossible." Northern Plains Resource Council v. Surf. Transp. Brd., 668 F.3d 1067, 1083 (9th Cir. 2011). "[W]ithout [baseline] data, an agency cannot carefully consider information about significant environment impacts. Thus, the agency fail[s] to consider an important aspect of the problem, resulting in an arbitrary and capricious decision." Id. at 1085. *See also* Gifford Pinchot Task Force v. Perez, 2014 WL 3019165 (D. Or. 2014)(same); Idaho Conservation League v. U.S. Forest Service, 2012 WL 3758161, *16-17 (D. Idaho 2012)(same); Shoshone-Bannock Tribes of Fort Hall Reservation v. U.S. Dept. of Interior, 2011 WL 1743656, at *10 (D. Idaho 2011)(same).

B. All Direct and Indirect Impacts Must be Fully Analyzed

A quantified assessment of all direct, indirect, and cumulative impacts of all past, present, and reasonably foreseeable future activities along the 20.4 to 26.4 mile pipeline route and at and downstream of the discharge point. NEPA requires that BLM fully consider all direct, indirect, and cumulative environmental impacts of the proposed action. 40 C.F.R. §§ 1502.16; 1508.8; 1508.25(c). Impacts that must be analyzed include "effects on natural resources and on the components, structures, and functioning of affected ecosystems," as well as "aesthetic, historic, cultural, economic, social or health [effects]." Direct effects are caused by the action and occur at the same time and place as the proposed project. 40 C.F.R. § 1508.8(a). 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). MASE previously noted the lack of such sufficient analysis in the DEIS, with the additional mileage and acreage of the pipeline necessarily adding to the need for a complete review of such impacts. As just one example, the additional effects on the receiving stream (users, water rights, aquatic and animal life, etc.) and groundwater must be fully analyzed.

The need to analyze both the baseline conditions, as well as all direct, indirect, and cumulative impacts for the long pipeline and new discharges is especially important due to new water concerns raised by this alternative. For example, the "Briefing" attached to the Feb. 20, 2015 letter states that: "Under this alternative, the water would be piped south from the mine and discharged into the Rio San Jose, where it could be available to downstream uses." This vague agency language has already been interpreted in alternate ways throughout the community. Some have read the agency documents as saying that additional water would be injected into the current water rights allocation system while others read the agency documents as saying that the mine water would be conveyed to specific users via water leases that would bypass current water rights holders. The range of alternative proposals for conveyance and use of the discharged mine water requires a full analysis of the baseline conditions and all such current and potential rights

and uses of the mine water, including those in the immediate vicinity of the discharge point, as well as significantly downstream.

This is especially true due to the complex legal relationships between and among senior and other water rights in the Rio San Jose, its tributaries, and downstream receiving waters in the Rio Grande Basin, Rio San Jose Basin, and San Juan Basin. For example, which water rights holders may be eligible to divert and appropriate these waters? What rights attach to the water at the point of discharge? Can the federal agencies and/or mine operator lease the water and avoid current asserted water rights? What is the extent of water rights holders in the downstream Rio Grande and Rio San Jose Basins that might have claims on any available water in the region? What are the uses of these waters (industrial, agricultural, etc.)? Additional effects on water rights are particularly relevant in this case, because water rights in the Rio San Jose (into which San Mateo Creek drains and the basin where the proposed Roca Honda mine would be located) basin have yet to be adjudicated, and effects from dewatering the Roca Honda mine would likely complicate and confuse the ongoing adjudication or impair yet to be determined water rights. *See, generally, State of New Mexico v. Kerr McGee, et.al.*, No. CB-83-190-CV/CB-83-220-CV (consolidated). The simple statement that: "The Rio San Jose is a water resources used by Milan, Grants and the Acoma and Laguna Pueblos" (Feb. 20, 2015 "Briefing) is not the type of required detailed analysis of the potential users and uses of the pumped and discharged water carried by the pipeline.

Moreover, information regarding baseline conditions within the effected San Mateo Creek watershed is still being collected. As part of the Federal Government's 5 Year Plan for investigating uranium mining and milling contamination in the Grants Mineral Belt, where the proposed Roca Honda mine would be located, the U.S. Environmental Protection Agency, Region 6, and the New Mexico Environment Department are conducting a groundwater quality baseline assessment of the San Mateo Creek watershed. *See, e.g.*, http://www.epa.gov/region6/6sf/newmexico/grants/grants-nm-site-activities-update-11-14.pdf (attached). At a minimum, the Forest Service should allow the completion of this groundwater assessment in order to accurately characterize baseline conditions that Alternative 4 would impact.

C. A Detailed and Quantified Assessment of All Cumulative Impacts Must be Provided and Analyzed

In addition to direct and indirect impacts, all cumulative effects/impacts must be fully analyzed. "Cumulative effects" are defined 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 CFR § 1508.7. In a cumulative impact analysis, an agency must take a "hard look" at all actions.

> [A]nalysis 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, 608 F.3d 592, 603 (9th Cir. 2010) (rejecting EA for mineral operation that had failed to include detailed analysis of impacts from nearby proposed mining operations).

"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 1104, 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 v. BLM, 565 F.3d 683, 713, n. 36 (10th Cir. 2009). *See also* Wyoming Outdoor Council v. U.S. Army Corps of Eng'rs, 351 F. Supp. 2d 1232, 1243 (D. Wyo. 2005) (failure to adequately review all cumulative impacts is arbitrary and capricious and violates NEPA).

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 "past," "present," and "reasonably foreseeable" future projects. Blue Mountains, 161 F.3d at 1214-15; Kern v. BLM, 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). The cumulative impacts analysis must include "reasonably foreseeable future actions," which is a lower threshold than is used to determine whether an agency violates NEPA's segmentation prohibition. Wilderness Workshop v. U.S. Bureau of Land Mgmt., 531 F.3d 1220, 1229 (10th Cir. 2008) quoting O'Reilly v. U.S. Army Corps of Eng'rs, 477 F.3d 225, 236 (5th Cir. 2007) (citing 40 C.F.R. § 1508.23)("While a cumulative impact analysis requires the [reviewing agency] to include 'reasonably foreseeable' future actions in its review, improper segmentation is usually concerned with projects that have reached the proposal stage.").

Thus, in this case, the USFS and BLM must consider the cumulative impacts from all past, present, and reasonably foreseeable future projects in the region on, at a minimum, water and air

quality including ground and surface water quantity and quality, recreation, cultural/religious, wildlife, transportation/traffic, scenic and visual resources, etc.

As held by the court decisions noted herein, this means that the impacts from other projects – not just the current project under review – must be fully reviewed. This includes, at a minimum, the impacts from the transportation of ore to a mill, as well as the environmental impacts from processing and waste disposal at the mill itself. This is particularly true where the White Mesa Mill involves impacts to both federal land and Indian Country.

This duty to review extends to the Mill's, as well as other projects', impacts on both public and private lands. Cumulative impacts must be reviewed "regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 CFR § 1508.7. For example, in considering a challenge to federal approval of mineral leasing and mining, a court required an agency to look at the impacts from the proposed mill that would process ore from mines/leases, despite the fact that the proposed mill would be on private lands and despite the fact that the mill was not directly associated with the mines/leases being proposed and was not included in the lease/mining proposals. The court held:

> [The agency's] other two arguments—that the effects of the mill need not be evaluated because (1) it is being built by a company on private land, and (2) approval of the mill is controlled by other governmental entities—lack merit. Regardless of whether an EA or EIS is being prepared, the agency conducting the analysis must consider the "cumulative impacts" of the proposed action. …
>
> Nothing in this regulation suggests that ''cumulative impacts'' are limited to those occurring on [public] land, or that [the agency] need not consider the impacts from related activities that another federal agency is in charge of approving or disapproving.

Colorado Environmental Coalition v. Office of Legacy Management, 819 F.Supp.2d 1193, 1212 (D. Colo. 2011). *See also* Sierra Club v. U.S. Dept. of Energy, 255 F.Supp.2d 1177, 1185 (D. Colo. 2002) (agency must review impacts from "reasonably foreseeable" mine on private land when preparing NEPA document for federal land easement related to the future mine. "The fact that a private company will undertake the mining is irrelevant under NEPA regulations. *See* 40 C.F.R. § 1508.7 ('regardless of what agency or person undertakes such other actions')").

Agencies must analyze all indirect and cumulative adverse environmental effects that are "reasonably foreseeable" if it is sufficiently likely to occur. These impacts include the off-site adverse effects from the smelting/processing and transportation. "The Forest Service says that cumulative impacts from non-Federal actions need not be analyzed because the Federal government cannot control them. That interpretation is inconsistent with 40 C.F.R. § 1508.7, which specifically requires such analysis." Center for Biological Diversity v. National Highway Traffic Safety Administration, 508 F.3d 508, 517 (9th Cir. 2007)(agency must review of impact of greenhouse gases when setting vehicle fuel economy standards), *quoting* Res. Ltd., Inc. v. Robertson, 35 F.3d 1300, 1306 (9th Cir.1994). "[S]tatements that the indirect and cumulative effects will be minimal or that such effects are inevitable are insufficient under NEPA." Ctr. for Biological Diversity v. U.S. Dept. of Interior, 623 F.3d 633, 640 (9th Cir. 2010). In one leading case, the agency was required to review the impacts from the burning of coal when reviewing the

proposed railway access and transportation of the coal. Mid States Coalition for Progress v. Surface Transportation Board, 345 F.3d 520, 548-550 (8th Cir. 2003). This was required even though the power plants using the coal were hundreds of miles away.

Further, as noted herein and in previous comments, the fact that milling and other cumulative impacting-activities in the area may be on private land is not an excuse to avoid undertaking the required analysis. This is true under NEPA, as well as the USFS's broad authority over the project, including operations on private land. "Congress may regulate conduct occurring on or off federal land which affects federal land. *See, e.g.*, Kleppe v. New Mexico, 426 U.S. 529, 539 (1976); Minnesota v. Block, 660 F.2d 1240, 1249 (8th Cir.1981)." Duncan Energy Co. v. U.S. Forest Service, 50 F.3d 584, 589 (8th Cir. 1995) (upholding Forest Service authority over private property interests). "It is well established that [the Property Clause of the U.S. Constitution] grants to the United States power to regulate conduct on non-federal land when reasonably necessary to protect adjacent federal property or navigable waters." U.S. v. Lindsey, 595 F.2d 5, 6 (9th Cir. 1979).

The Supreme Court has recognized for over a century that Congress may regulate activity on private lands as a means of protecting public property. *See* Camfield v. United States, 167 U.S. 518 (1897); United States v. Alford, 274 U.S. 264, 267 (1927) ("Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests."). "[T]he power granted by the Property Clause is broad enough to reach beyond territorial limits." Kleppe v. New Mexico, 426 U.S. 529, 538 (1976).

Agencies cannot avoid reviewing cumulative impacts by simply discussing general effects:

> As we have observed on multiple occasions, "general statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided." *Klamath–Siskiyou*, 387 F.3d at 993–94 (quoting *Ocean Advocates*, 361 F.3d at 1128). Even if the BLM was unable to indicate with any great degree of certainty the results of the Project, because the cumulative effects analysis requires an agency to predict future conditions, uncertainty is an inherent part of the process. Therefore, a general statement about uncertainty does not satisfy the procedural requirement that an agency take a hard look at the environmental effects of an action. The BLM can certainly explain specific projections with reference to uncertainty; however, it may not rely on a statement of uncertainty to avoid even attempting the requisite analysis.

Oregon Natural Resources Council Fund v. Brong, 492 F.3d 1120, 1134 (9th Cir. 2007).

At a minimum, the revised DEIS must include the current groundwater characteristics in both quality and quantity, at the White Mesa Mill and mine sites as well as the potential for the Mill to generate environmental impacts during the life of the Roca Honda Mine (pipeline included), as well as after operations have ceased but impacts linger.

1. Failure to Fully Review Cumulative Impacts Related to Transportation and Processing of Ore at the White Mesa Mill

The revised DEIS must include a full review of the impacts from delivering the ore to the White Mesa Mill, as well as Mill operations and current and potential conditions/impacts. Project proponent Energy Fuels recently filed an updated mineral resource estimate and preliminary economic assessment for the Roca Honda uranium project. *See* Technical Report on the Roca Honda Project, McKinley County, State of New Mexico, U.S.A. (February 27, 2015)(attached). There, the company acknowledged that the White Mesa Mill is the preferred milling destination as it would reduce capital costs and the time and licensing risks associated with constructing a new mill. Although the original DEIS did not fully ascertain the location of the milling of the Roca Honda ore, now it is clear that the White Mesa Mill is that location. At a minimum, the agencies must fully review that site, as well as any other potential site.

Federal courts have consistently rejected the federal agency's attempt to avoid looking at the off-site transportation and other impacts when reviewing a Plan of Operations for a mining/milling project. South Fork Band Council v. Department of the Interior, 588 F.3d 718, 725-726 (9th Cir. 2009). This includes impacts to air quality, traffic, safety, recreation and cultural resources. Regarding off-site impacts from the milling and transportation, federal courts have also rejected the argument that reliance on state-issued permits or analysis satisfied the agency's independent duty under NEPA. Id.

> BLM argues that the off-site impacts need not be evaluated because the Goldstrike [mill] facility operates pursuant to a state permit under the Clean Air Act. This argument also is without merit. A non-NEPA document -- let alone one prepared and adopted by a state government -- cannot satisfy a federal agency's obligations under NEPA. Klamath-Siskiyou Wildlands Center v. BLM, 387 F.3d 989, 998 (9th Cir.2004).

South Fork Band Council, 588 F.3d at 726.

Regarding the White Mesa Mill, the attached documents (on computer disc) must be fully reviewed and considered. These following readily-available attached documents (which were not considered in the DEIS) show the extent of the contamination issues at the mill and highlight the associated lack of adequate review by the USFS/BLM. *See* Ute Mountain Ute Tribe, Request for Agency Action, January 11, 2013; Ute Mountain Ute Tribe (UMUT), Identification of Potential Tailings Cell Influence in Groundwater at White Mesa Mill; Feb. 11, 2009 letter from Utah Dept. of Environmental Quality to UI Corp.; Series of letters between UMUT and Utah DEQ in 2011 (combined in one PDF); Summary of Reports of Chloride as Indication of Tailings Leakage; Report from RRDI Corp. to UMUT dated 12-1-11; Amended Stipulated Consent Agreement, Utah Water Quality Board; UMUT re: Bioavailability, Bioaccumulation and Food Chain Transfer of Airborne Radionuclides; UMUT report Deficiencies in DUSA's Environmental Monitoring Program, 2011; UMUT report Particular Concerns with Alternative Feed Materials; 4-23-12 letter from UMUT to UDRC; 10-4-12 letter from UMUT to UDRC; 1-11-13 UMUT Request for Agency Action; 12-16-11 UMUT Comments to UDRC on License Renewal; Denison 2013 Tailings Cell Report, March/April 2014.

In particular, the revised DEIS must fully analyze recent and ongoing violations of the federal Clean Air Act (CAA) at the White Mesa Mill. Ignoring the ongoing particulate and radon emissions identified by state and federal agency records would violate the USFS's NEPA and CAA obligations. Indeed, in analyzing the air quality and other impacts of its actions under NEPA, the agencies must pay special attention to "the degree to which the proposed action affects public health or safety." 40 C.F.R. § 1508.27(b)(2). Additionally, to comply with NEPA requirements, USFS/BLM must explain how its actions will or will not comply with environmental law and policies, including the National Emission Standards for Hazardous Air Pollutants (NESHAPs). See 40 C.F.R. § 1502.2(d), 1508.27(b)(10).

Under the USFS mining regulations, it cannot approve a mine plan of operations without ensuring that the project (including the Mill and the Roca Honda Mine) will comply with all air and water quality, hazardous/toxic materials, and other environmental laws. 36 C.F.R. § 228.8. For these reasons, it is incumbent on the USFS to consider and review in detail the White Mesa Mill's violation of the radon emission and work practice standards set forth in NESHAP Subpart W, 40 C.F.R. § 61.250 *et seq*. The same is true for BLM. *See* 43 CFR Part 3809 and FLPMA's requirement to "prevent unnecessary or undue degradation" to public land resources. This is true under NEPA, and as also explained herein, under FLPMA's mandate that the agencies cannot approve the pipeline ROW unless it is shown that the project is in the public interest (among other requirements).

Federal studies have confirmed that airborne emissions and water contamination from the White Mesa Mill threaten the health of people who reside and recreate near the mill. The United States Geological Service has carried out several projects that provide data that must be disclosed and analyzed in the NEPA process. A project analyzing pathways into the Ute Mountain Ute Reservation was completed in 2010, with follow-ups that address pathways involving air, surface water, and groundwater.[1] A USGS study was completed in 2011 that confirmed and called for more investigation into the off-site deposition of radioactive materials from the White Mesa Mill.[2] USGS documented only a few of the significant impacts to human health and the environment posed by the proposal to mill ore from the Roca Honda Mine at White Mesa. A comprehensive list of White Mesa Mill issues is provided and continually updated on the Wise-Uranium website, which is an information clearinghouse used by industry, regulators, and the public to monitor and identify uranium mining and milling impacts and issues.[3]

Over the past two recent years, 2012 and 2103, emissions from the White Mesa Mill's tailings impoundments exceeded the 20 pCi/m^{2}-sec standard set forth in NESHAP Subpart W. 40 C.F.R. § 61.252 (a). Utah DAQ Memorandum on Energy Fuels, NESHAP Part 61 Subpart W Annual Report (April 17, 2013) ("Status: In Violation. The 2013 annual report indicated that Cell #2 exceed the 20.00 pCi/m2-sec of radon-222 in June, 2012")(attached); Utah DAQ Memorandum on Energy Fuels, NESHAP Part 61 Subpart W Annual Report (April 3rd, 2014) ("Status: In

[1] http://ut.water.usgs.gov/projects/whitemesa/ (White Mesa Uranium Investigation); Project Chief: David Naftz, USGS Salt Lake City, Utah; Cooperator: USEPA and Ute Mountain Ute Tribe).
[2] http://pubs.usgs.gov/sir/2011/5231/ (Naftz, D.L., Ranalli, A.J., Rowland, R.C., and Marston, T.M., 2011, Assessment of potential migration of radionuclides and trace elements from the White Mesa uranium mill to the Ute Mountain Ute Reservation and surrounding areas, southeastern Utah: U.S. Geological Survey Science Investigations Report 2011–5231, 146 p.)
[3] http://www.wise-uranium.org/umopwm.html

Violation. The 2013 annual report indicated that Cell #2 exceeded the 20.00 pCi/m2-sec of radon-222")(attached). As uranium ore continues to be mined and processed, including from the Roca Honda and other mining operations proposed to supply ore to the Mill (such as the La Sal Complex mines in Utah), the waste from the processing will be deposited in the Mill's tailings impoundments, which will continue to emit radon. There are also more than two impoundments in operation at the Mill, which violates 40 C.F.R. § 61.252(b).

The revised DEIS must consider and analyze these violations of the federal Clean Air Act and other legal requirements at the White Mesa Mill as part of its cumulative impacts analysis and other regulatory duties. This is particularly important due to the Mill's vicinity to the White Mesa Community of the Ute Mountain Ute tribal nation, the City of Blanding, Utah; and the City of Bluff, Utah. All three of these communities fall within the 80km radius of harm from radon exceedances at the White Mesa Mill. It is thus particularly important for the revised DEIS to consider and analyze these cumulative impacts with regard the White Mesa Mill. See 40 C.F.R. § 1508.27(b)(2) ("the degree to which the proposed action affects public health or safety").

In addition, as uranium ore continues to be mined and processed, it will be necessary for that mill to construct as many as 4 additional 40-acre tailings impoundments in order to process the Roca Honda ores. In addition to increased environmental impacts, the construction of new tailings impoundments will result in the destruction of unique and significant cultural resources on White Mesa. *See* Fields, White Mesa Archeological Sites: A Report (attached). Original mill construction and the recent construction of Cell 4-B also resulted in the destruction of pit houses and other cultural resources that have been found eligible for inclusion in the National Register of Historic Places. *See* Public Participation Summary, 6-14-10 (attached).

All of these documents show the significant environmental impacts and concerns related to and resulting from the White Mesa Mill. The revised DEIS must review in detail these documents and the issues noted therein under NEPA's requirement that the agency take a hard look at these impacts. The fact that the Mill may continue to operate using other uranium ore sources does not eliminate the USFS's duty to fully analyze all cumulative impacts from the Mill that may occur during the many years that it is projected to accept ore from the Roca Honda Mine. The scope of analysis must also include the required perpetual government ownership and care of the radioactive tailings created by processing the ore from the Roca Honda Mine.

Further, the agencies cannot limit their cumulative impacts review from the Mill based on the simple fact that the Mill operates under Utah state permits as that does not satisfy NEPA.

> BLM argues that the off-site impacts need not be evaluated because the Goldstrike [mill] facility operates pursuant to a state permit under the Clean Air Act. This argument also is without merit. A non-NEPA document -- let alone one prepared and adopted by a state government -- cannot satisfy a federal agency's obligations under NEPA. Klamath-Siskiyou Wildlands Center v. BLM, 387 F.3d 989, 998 (9th Cir.2004).

South Fork Band Council, 588 F.3d at 726. The cumulative impacts requirement cannot be avoided merely because the impacts from the Mill may continue without Roca Honda ore (even if true). The agencies cannot mistake their duty to review "connected actions" in the same EIS (which requires a direct relationship between the projects) with its separate duty to analyze

cumulative impacts in the area, regardless of whether the projects are connected. *See* Wilderness Workshop v. U.S. Bureau of Land Mgmt., 531 F.3d 1220, 1229 (10th Cir. 2008)(discussing difference between connected action review and cumulative impacts review under NEPA).

The NEPA review must also specify and analyze the other mines, most of which involve federal public land, which may feed the mill, and the USFS/BLM cannot simply assert that this information is too speculative. Further, regarding transportation, the agencies must evaluate the cumulative impacts related to the movement of ore shipments through the towns on the route(s) to the mill from Roca Honda as well as the other mines, as these certainly are cumulative impacts.

The revised DEIS must fully analyze the cumulative impacts associated with the emission of unmeasured and unregulated amounts of radon from the radium-bearing solid and liquid wastes after the ore from the Roca Honda and other uranium mines[4] (most of which are on lands managed by the federal government) has been processed at the White Mesa Mill.

These wastes are disposed of in tailings impoundments and liquid effluent holding/evaporation ponds and other ponds holding processing and other solutions at the White Mesa Mill operation. The revised DEIS must analyze the cumulative impacts from the emission of radon from these impoundments. The revised DEIS must consider the fact that current Environmental Protection Agency (EPA) National Emission Standards for Radon Emissions from Operating Mill Tailings, promulgated pursuant to the Clean Air Act (CAA), do not have a radon emission limit and compliance requirements for tailings impoundments constructed after December 1989 and for any liquid holding/evaporation impoundments or ponds. 40 C.F.R. Part 61 Subpart W. Currently, there are 6 White Mesa impoundments that emit radon (Cells 1, 2, 3, 4A, 4B, and Roberts Pond, but only Cell 3 is required to comply with the 20 pico Curie per-square-meter-per-second (20 pCi/m^2-sec) EPA radon flux standard. 40 C.F.R. § 61.252(a).

During Mill operation, the owner of the Mill does not have to report the radon emissions, nor take corrective actions if the emissions exceed a specific numerical standard for impoundments constructed after December 1989 (Cells 4A and 4B). Currently, EPA Subpart W numeric standards do not apply to the emission of radon during the "closure period," when the tailings impoundments are being dewatered and when radon emissions increase significantly. The closure period can last a decade or more. The inadequate and outdated EPA Subpart W regulations have not yet been reviewed and revised, despite a 1990 Clean Air Act mandate and 2009 settlement agreement. 74 Fed. Reg. 45951 (September 4, 2009). The regulations that remain in effect do not ensure adequate monitoring, reporting, and control of the radon emissions from the liquid impoundments or ponds at White Mesa (currently Cells 1, 3, 4A, 4B, and Roberts Pond). The EPA wrongly assumes, despite evidence to the contrary, that radon emissions from liquid impoundment at conventional uranium mills were minimal. Additional recent data on the radium content of those impoundments[5] and an EPA determination[6] that, for

[4] In addition to the La Sal Complex, other likely or currently operating Energy Fuels mines include: Rim and Daneros Mines (Utah), Sunday Mines Complex (Colorado), Canyon, Arizona 1 and Pinenut Mines (Arizona).

[5] White Mesa Mill 2013 Annual Tailings Wastewater Monitoring Report; Groundwater Quality Discharge Permit, UGW370004, Energy Fuels Resources (USA) Inc., November 1, 2013.

every 1,000 pCi per liter of radium, the radon emissions are 7 pCi/m^2-sec, demonstrate that the radon emissions from solution impoundments and ponds at White Mesa are far in excess of the EPA 20 pCi/m^2-sec radon flux standard. Additional information and evaluation of the White Mesa liquid impoundments was submitted to the EPA by the Ute Mt. Ute Tribe[7] as part of the tribal consultation associated with the EPA's proposed revisions to 40 C.F.R. Part 61 Subpart W.[8]

The need for site specific NEPA analysis of radon emission is confirmed where EPA has issued a controversial Subpart W proposed rule that would eliminate all Clean Air Act radon monitoring requirements, including existing numeric standards for impoundments constructed prior to December 1989. The owner now claims that Cell 2 is subject to the closure exemption and and no longer falls within Subpart W's numeric standards. However, the need for NEPA analysis is confirmed where the Utah Division of Radiation Control[9] recognizes the health threat posed by radon emissions and requires the licensee to monitor radon emissions and demonstrate compliance with the 20 pCi/m^2-sec radon emission standard.

Here, the revised DEIS must characterize and analyze the cumulative impacts from the known, monitored, and controlled, and unknown, unmonitored, and uncontrolled levels of radon and other radioactive and toxic pollutants that will be released from the White Mesa Mill into the foreseeable future.

2. *Failure to Review Cumulative Water Impacts from the Mt. Taylor Mine*

In its review of the cumulative impacts associated with the proposed Roca Honda mine, the Forest Service analyzed the existing water rights in the San Juan basin. DEIS at 179. However, under New Mexico law, dewatering a mine does not create or require exercise of a water right. NMSA 1978, § 72-12A-5.A.

Here, the existing Mt. Taylor uranium mine, located within 3 miles of the proposed Roca Honda mine, has applied to the New Mexico Mining and Minerals Division to re-start uranium production. *See*, http://www.emnrd.state.nm.us/MMD/MARP/documents/2013_MtTaylor_Rev13-2_StandbyToActive_CI002RE_Text_Tables_Figures.pdf. (attached). In the application to re-activate the Mt. Taylor mine, the mine operators indicate that dewatering operations could pump

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http://www.radiationcontrol.utah.gov/Uranium_Mills/denison/docs/2013/dec/2013AnnualTailingsReportFinal.pdf (attached)

[6] Risk Assessment Revision for 40 CFR Part 61 Subpart W – Radon Emissions from Operating Mill Tailings: Task 5 – Radon Emission from Evaporation Ponds, Table 6, page 17; S. Cohen and Associates, November 9, 2010.
http://www.epa.gov/radiation/docs/neshaps/subpart-w/riskassessmentrevision.pdf (attached)

[7] Non Privileged Records (July-Sept 2014, Part 1), pages 405-416.
http://www.epa.gov/radiation/docs/neshaps/npr/2014-july-sept-part1.pdf
Non Privileged Records (July-Sept 2014, Part 2) pages 1-3 and 200-246.
http://www.epa.gov/radiation/docs/neshaps/npr/2014-july-sept-part2.pdf

[8] http://www.epa.gov/radiation/neshaps/subpartw/rulemaking-activity.html

[9] http://www.deq.utah.gov/businesses/E/energyfuels/docs/2014/07Jul/EnergyFuels072814.pdf (attached)

as much as 12,000 gpm initially, with sustained groundwater pumping of 4000-5000 gpm. *Id*., § 2.2 at 5. Because these pumping rates are anticipated for mine dewatering and thus not related to an existing water right, the Forest Services' survey of existing water rights to justify its cumulative impacts analysis is inadequate. The revised DEIS should account for the anticipated dewatering activities at the Mt. Taylor mine.

Further, uranium ore from the Mt. Taylor mine will, like uranium ore from the Roca Honda mine, necessarily be processed at the White Mesa mill. The revised DEIS should analyze the cumulative impacts of the additional ore from the Mt. Taylor mine being processed at the White Mesa mill. *See*, Section C.2, above.

Finally, during dewatering at the Mt. Taylor Mine, the operators have indicated that mine water will be discharged into an unnamed arroyo in San Lucas Canyon. The Forest Service should evaluate and analyze the cumulative impacts of this discharge on the local ground and surface water hydrology, when combined with proposed Alternative 4.

3. *Failure to Review Cumulative Flooding Impacts*

The proposed pipeline is anticipated to discharge between 2000 and 4500 gallons of water per minute into the Rio San Jose at a point in Milan, New Mexico. From the Forest Service's description, the point of discharge will be close to the existing Homestake uranium mill Superfund site. In recent years, most recently in 2013, heavy rains have caused flooding both locally and regionally in the Milan area, resulting in transport of radioactive and heavy metal contaminated soil being mobilized in that community. *See, e.g*., http://www.abqjournal.com/264394/news/heavy-rain-turns-drought-into-the-chaos-of-deluge.html. (attached). The USFS/BLM must disclose and evaluate the impacts that the additional Roca Honda discharge will have on the environment and public health when combined with anticipated increasing flooding in the Grants/Milan area.

4. *Failure to Fully Review Other Cumulative Impacts*.

The revised DEIS must also fully review the cumulative impacts from other past (Pa), present (Pr), and reasonably foreseeable future actions (RFFA) under NEPA. A "quantified assessment" of the impacts from these actions is required by NEPA. *See* 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). As noted above, however, USFS/BLM cannot simply rely on the fact that New Mexico has or will issue permits for these operations as a substitute for NEPA compliance. South Fork Band Council, 588 F.3d at 726.

D. BLM Must Review the Pipeline Under FLPMA Title V, and Cannot Approve the Pipeline as Proposed

As noted in MASE's previous comments to the USFS, much of the federal government's review and potential approval of the Roca Honda Project (if any) is not governed by the 1872 Mining

Law and agency mining regulations. With this new pipeline proposal to cross BLM lands, the same legal requirements apply to BLM as to the USFS. This is even more true for the BLM, as no mining whatsoever is involved with BLM lands over which the pipeline would cross. Under federal law, BLM must review the pipeline and related operations via the Right-of-Way ("ROW") provisions under FLPMA Title V. Also, due to the fact that the Mine and pipeline are not in the public interest, such approval cannot be given.

BLM must require the company to submit right-of-way or other special use permit authorizations and require that all mandates of FLPMA Title V and its implementing regulations are adhered to (e.g., no permit can be issued unless it can be shown that the issuance of the permits is in the best interests of the public, payment of fair market value, etc.). This is required because the approval of a pipeline and associated facilities is not a right covered by the 1872 Mining Law.

The Interior Department has ruled that roads and pipelines, including those across public land related to a mining operation, are not covered by statutory rights under the Mining Law. *See* Alanco Environmental Resources Corp., 145 IBLA 289, 297 (1998) ("construction of a road, was subject not only to authorization under 43 C.F.R. Subpart 3809, but also to issuance of a right-of-way under 43 C.F.R. Part 2800."). "[A] right-of-way must be obtained prior to transportation of water across Federal lands for mining." Far West Exploration, Inc., 100 IBLA 306, 308 n. 4 (1988) *citing* Desert Survivors, 96 IBLA 193 (1987). *See also*; Wayne D. Klump, 130 IBLA 98, 100 (1995) ("Regardless of his right of access across the public lands to his mining claims and of his prior water rights, use of the public lands must be in compliance with the requirements of the relevant statutes and regulations [FLPMA Title V and ROW regulations]."). As noted in Alanco, ROWs for access roads (as opposed to internal mine roads) are subject to FLPMA's Title V requirements.

The Interior Board of Land Appeals has expressly rejected the argument that rights under the mining laws apply to pipelines and access roads:

> Clearly, FLPMA repealed or amended previous acts and Title V now requires that BLM approve a right-of-way application prior to the transportation of water across public land for mining purposes. See 43 U.S.C. § 1761 (1982). As was the case prior to passage of Title V of FLPMA, however, approval of such an application remains a discretionary matter and the Secretary has broad discretion regarding the amount of information he may require from an applicant for a right-of-way grant prior to accepting the application for consideration. Bumble Bee Seafoods, Inc., 65 IBLA 391 (1982). A decision approving a right-of-way application must be made upon a reasoned analysis of the factors involved in the right-of-way, with due regard for the public interest. See East Canyon Irrigation Co., 47 IBLA 155 (1980).
>
> BLM apparently contends that a mining claimant does not need a right-of-way to convey water from land outside the claim for use on the claim. It asserts that such use is encompassed in the implied rights of access which a mining claimant possesses under the mining laws. Such an assertion cannot be credited.
>
> The implied right of access to mining claims never embraced the right to convey

> water from outside the claim for use on the claim. This latter right emanated from an express statutory grant in the 1866 mining act. See 30 U.S.C. § 51 (1970) and 43 U.S.C. § 661 (1970). In enacting FLPMA, Congress repealed the 1866 grant of a right-of-way for the construction of ditches and canals (see § 706(a) of FLPMA, 90 Stat. 2793) and provided, in section 501(a)(1), 43 U.S.C. § 1761(a)(1), for the grant of a right-of-way for the conveyance of water under new procedures. In effect, Congress substituted one statutory procedure for another. There is simply no authority for the assertion that mining claimants need not obtain a right-of-way under Title V for conveyance of water from lands outside the claim onto the claim.

Desert Survivors, 96 IBLA 193, 196 (1987)(emphasis in original). *See also* Far West Exploration, 100 IBLA 306, 309, n. 4 (1988)("a right-of-way must be obtained prior to transportation of water across Federal lands for mining."). The leading treatise on federal natural resources law confirms this rule: "Rights-of-way must be explicitly applied for and granted; approvals of mining plans or other operational plans do not implicitly confer a right-of-way." Coggins and Glicksman, PUBLIC NATURAL RESOURCES LAW, §15.21.

Under FLPMA Title V, Section 504, BLM may grant a SUP/ROW only if it "(4) will do no unnecessary damage to the environment." 43 U.S.C. § 1764(a). Rights of way "shall be granted, issued or renewed … consistent with … any other applicable laws." Id. § 1764(c). A right-of-way that "may have significant impact on the environment" requires submission of a plan of construction, operation, and rehabilitation of the right-of-way. Id. § 1764(d). A Title V SUP/ROW "shall contain terms and conditions which will … (ii) minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment." Id. § 1765(a). In addition, the SUP/ROW can only be issued if activities resulting from the SUP/ROW:

> (i) protect Federal property and economic interests; (ii) manage efficiently the lands which are subject to the right-of-way or adjacent thereto and protect the other lawful users of the lands adjacent to or traversed by such right-of-way; (iii) protect lives and property; (iv) protect the interests of individuals living in the general area traversed by the right-of-way who rely on the fish, wildlife, and other biotic resources of the area for subsistence purposes; (v) require location of the right-of-way along a route that will cause least damage to the environment, taking into consideration feasibility and other relevant factors; and (vi) otherwise protect the public interest in the lands traversed by the right-of-way or adjacent thereto.

FLPMA, § 1765(b).

At least three important potential substantive requirements flow from the FLPMA's SUP/ROW provisions. First, BLM has a mandatory duty under Section 505(a) to impose conditions that "**will** minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment." Id. §1765(a) (emphasis added). The terms of this section do not limit "damage" specifically to the land within the ROW corridor. Rather, the repeated use of the expansive term "the environment" indicates that the overall effects of the SUP/ROW on wildlife, environmental, cultural/religious/historical, and scenic and aesthetic values must be evaluated

and these resources protected. In addition, the obligation to impose terms and conditions that "protect Federal property and economic interests" in Section 505(b) requires that the BLM must impose conditions that protect not only the land crossed by the right-of-way, but **all** federal land affected by the approval of the SUP/ROW.

Second, the requirements in Section 505(b) mandate a BLM determination as to what conditions are "necessary" to protect federal property and economic interests, as well as "otherwise **protect[ing] the public interest in the lands traversed by the right-of-way or adjacent thereto**." (emphasis added). This means that the agency can only approve the SUP/ROW if it "protects the public interest in lands" not only upon which the road would traverse, but also lands and resources adjacent to and associated with the SUP/ROW. As noted herein and previous comments, BLM/USFS would be unable to make a finding that granting the ROW would "protect the public interest."

Third, FLPMA requires that the right-of-way grant "do no unnecessary damage to the environment" and be "consistent with … any other applicable laws," *id*. §§ 1764(a)-(c). This means that a grant of a SUP/ROW leading to the mine (and the mine itself) must satisfy all applicable laws, regulations and policies, including those protecting Native American resources, the Endangered Species Act, Clean Water Act, all state and local laws, etc.

The federal courts have recently and repeatedly held that the federal land agency not only has the authority to consider the adverse impacts on lands and waters outside the immediate ROW corridor, it has an obligation to protect these resources under FLPMA. In County of Okanogan v. National Marine Fisheries Service, 347 F.3d 1081 (9th Cir. 2003), the court affirmed the Forest Service's imposition of mandatory minimum stream flows as a condition of granting a ROW for a water pipeline across USFS land. This was true even when the condition/requirement restricted or denied vested property rights (in that case, water rights). Id. at 1085-86.

The BLM thus cannot issue a SUP/ROW that fails to "protect the environment" as required by FLPMA, including the environmental resource values in and not within the ROW corridor. "FLPMA itself does not authorize the Supervisor's consideration of the interests of private facility owners as weighed against environmental interests such as protection of fish and wildlife habitat. FLPMA *requires* all land-use authorizations to contain terms and conditions which will protect resources and the environment." Colorado Trout Unlimited v. U.S. Dept. of Agriculture, 320 F.Supp.2d 1090, 1108 (D. Colo. 2004)(emphasis in original) appeal dismissed as moot, 441 F.3d 1214 (10th Cir. 2006).

The Interior Department, interpreting FLPMA V and its right-of-way regulations, has held that: "A right-of-way application may be denied, however, if the authorized officer determines that the grant of the proposed right-of-way would be inconsistent with the purpose for which the public lands are managed or if the grant of the proposed right-of-way would not be in the public interest or would be inconsistent with applicable laws." Clifford Bryden, 139 IBLA 387, 389-90 (1997) 1997 WL 558400 at *3 (affirming denial of right-of-way for water pipeline, where diversion from spring would be inconsistent with BLM wetland protection standards).

Similar to the County of Okanogan and Colorado Trout Unlimited federal court decisions noted above, the Interior Department has held that the fact that a ROW applicant has a property right

that may be adversely affected by the denial of the ROW does not override the agency's duties to protect the "public interest." In Kenneth Knight, 129 IBLA 182, 185 (1994), the BLM's denial of the ROW was affirmed due not only to the direct impact of the water pipeline, but on the adverse effects of the removal of the water in the first place:

> [T]he granting of the right-of-way and concomitant reduction of that resource, would, in all likelihood, adversely affect public land values, including grazing, wildlife, and riparian vegetation and wildlife habitat. The record is clear that, while construction of the improvements associated with the proposed right-of-way would have minimal immediate physical impact on the public lands, the effect of removal of water from those lands would be environmental degradation. Prevention of that degradation, by itself, justified BLM's rejection of the application.

1994 WL 481924 at *3. That was also the case in Clifford Bryden discussed above, as the adverse impacts from the removal of the water was considered just as important as the adverse impacts from the pipeline that would deliver the water. 139 IBLA at 388-89. *See also* C.B. Slabaugh, 116 IBLA 63 (1990) 1990 WL 308006 (affirming denial of right-of-way for water pipeline, where BLM sought to prevent applicant from establishing a water right in a wilderness study area).

In King's Meadow Ranches, 126 IBLA 339 (1993), 1993 WL 417949, the IBLA affirmed the denial of right-of-way for a water pipeline, where the pipeline would degrade riparian vegetation and reduce bald eagle habitat. The Department specifically noted that under FLPMA Title V: "[A]s BLM has held, **it is not private interests but the public interest that must be served by the issuance of a right-of-way**." 126 IBLA at 342, 1993 WL 417949 at *3 (emphasis added).

Here, due to the severe, long-lasting, and permanent impacts from the Mine on Native American resources, ground and surface waters (due to the dewatering of the water to be delivered via the pipeline), and other resources noted herein and in previous comments, any issuance of a ROW would be illegal.

E. The Agencies Must Consider the Impacts of Waste Treatment and Disposal.

The proposed Alternative 4 would involve treating mine water through ion exchange, and discharging the water through a pipeline. The ion exchange treatment process produces waste that is both radioactive and toxic. International Atomic Energy Agency, Technical Series No. 408, *Application of Ion Exchange Processes for the Treatment of Radioactive Waste and Management of Spent Ion Exchangers* at § 5 (2002) (attached). Nowhere does the current DEIS disclose or analyze the impacts of transporting or disposal of ion exchange waste, erroneously noting that natural uranium ore would be the only radioactive material transported from the Roca Honda mine. DEIS at 376. Moreover, because the solid wastes from the ion exchange process are likely subject to the requirements of the Resource Conservation and Recovery Act (RCRA), the cooperating agency, U.S. EPA, should review and analyze the impacts from ion exchange waste transport and disposal. *See*, Letter from Edwin Abrams to William C. Duncan, determining that ion exchange waste from electroplating process is subject to RCRA (May 5,

1987), available at http://yosemite.epa.gov/osw/rcra.nsf/0c994248c239947e85256d090071175f/9E8F60AFF0BA81C58525670F006BD76E/$file/11244.pdf. (attached).

Although the water treatment proposal is vague, it describes a multi-step process that goes beyond simple water treatment. Proposed Alternative 4 includes a process that first creates a RCRA waste stream composed of radium and other radionuclides and toxic constituents removed by barium chloride precipitation. An ion exchange process designed to concentrate uranium follows the precipitation stage. There is no mention of disposal methods for the concentrated uranium or the other waste stream(s) created by the ion exchange process. Presumably, one alternative being considered by the Energy Fuels involves sending the concentrated uranium to White Mesa for further processing into yellowcake. The proposed concentration, possession, and shipment of uranium "after removal from its place of deposit in nature" is directly regulated by the Atomic Energy Act (AEA) and requires a Nuclear Regulatory Commission (NRC) license, particularly when such activities involve federal land. 42 U.S.C. §§ 2092, 2097. Although Energy Fuels may or may not have a license issued by Utah to possess, receive, and process spent ion exchange resins and uranium concentrates in Utah, such a license cannot be extended to cover the proposed activities in New Mexico, where uranium processing is directly licensed by NRC.

Moreover, where it appears the activity is subject to both RCRA and AEA and where both U.S. EPA and U.S. NRC have jurisdiction and expertise, each must be included in the current NEPA process as cooperating agencies. Colorado Environmental Coalition v. Office of Legacy Management, 819 F.Supp.2d 1193, 1212 (D. Colo. 2011)("the Court concludes that DOE violated NEPA by failing to request the participation of EPA in the NEPA process at the earliest possible time." *citing* 40 C.F.R. § 1501.6(a)(1). NEPA's cooperating agency provision cannot be satisfied by merely sending a draft NEPA document to the agencies with jurisdiction and special expertise. Id. Where BLM and the Forest Service lack expertise in uranium concentration and the handling of radioactive and toxic solid waste streams, and where both are potentially subject to U.S. EPA and U.S. NRC jurisdiction, it is critical to involve these cooperating agencies before further action is taken to prepare the Supplemental Draft EIS.

Conclusion.

Thank you for your consideration of these comments and the relevant legal requirements. Please include all of the undersigned attorneys as well as the below-noted MASE representative in all public notices, email alerts, and mailing lists regarding the Roca Honda Mine. This includes the sending of hardcopies of any future DEIS, Supplemental DEIS, Final EIS, and Draft Record of Decision when they are made publically available.

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