Michael Toll (*admitted pro hac vice)*
Grand Canyon Trust
4404 Alcott Street
Denver, CO 80211
mtoll@grandcanyontrust.org
303-309-2165

Attorney for Grand Canyon Trust

Edward B. Zukoski *(admitted pro hac vice)*
Center for Biological Diversity
1536 Wynkoop Street, Suite 421
Denver, CO 80202
tzukoski@biologicaldiversity.org
303-641-3149

Attorney for Center for Biological Diversity

Heidi McIntosh (Utah State Bar No. 6277)
Michael Hiatt *(admitted pro hac vice)*
Thomas Delehanty *(admitted pro hac vice)*
Earthjustice
633 17th Street, Suite 1600
Denver, CO 80202
hmcintosh@earthjustice.org
mhiatt@earthjustice.org
tdelehanty@earthjustice.org
303-623-9466

Attorneys for Living Rivers, Grand Canyon Trust, Center for Biological Diversity, Natural Resources Defense Council, Sierra Club, Waterkeeper Alliance, Inc., Colorado Riverkeeper, and Utah Physicians for a Healthy Environment

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

LIVING RIVERS, *et al.*, Plaintiffs, v. DAVID BERNHARDT, *et al.*, Federal Defendants, ENEFIT AMERICAN OIL CO., Intervenor-Defendant	No. 4:19-cv-00041-DN-PK **OPENING BRIEF** Oral Argument Requested Judge David Nuffer Magistrate Judge Paul Kohler

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF ISSUES

Plaintiffs Living Rivers, Grand Canyon Trust, Center for Biological Diversity, Natural Resources Defense Council, Sierra Club, Waterkeeper Alliance, Inc., Colorado Riverkeeper, and Utah Physicians for a Healthy Environment challenge the Bureau of Land Management (BLM) and U.S. Fish and Wildlife Service's (Service) failure to comply with two bedrock environmental laws when granting to Enefit American Oil Co. several rights-of-way across public lands in the Uinta Basin to build and operate the nation's first commercial-scale oil shale mine and processing plant. Dubbed the South Project, Enefit's facility would nearly double the oil output of the entire Uinta Basin, consuming massive amounts of water and emitting vast amounts of air pollutants into a region with already-unsafe air quality.

Plaintiffs present the following issues for review:

1. Whether BLM violated the National Environmental Policy Act (NEPA) in its environmental review of the rights-of-way by assuming, without any independent evaluation, that even if BLM took no action and denied the rights-of-way, Enefit would build the South Project, undiminished in scale, despite all evidence in the record to the contrary.

2. Whether BLM violated NEPA by failing to analyze the South Project as an indirect effect of approving the rights-of-way.

3. Whether BLM violated NEPA when it failed to take a hard look at the South Project's impacts.

4. Whether the Service violated the Endangered Species Act (ESA) when its biological opinion for the rights-of-way failed to evaluate the South Project's impacts on endangered species.

5. Whether BLM violated the ESA's mandate to avoid jeopardizing the continued existence of endangered species or adversely modifying their critical habitat.

6. Whether BLM violated NEPA by failing to take a hard look at the cumulative effects of Enefit's mining of a neighboring federal oil-shale lease.

STATEMENT OF THE CASE[1]

I. The South Project and Utility Corridor

In the rugged badlands of the Uinta Basin, just upstream from the confluence of the Green and White Rivers, on the eastern bank of one of the region's few perennial waterways, Enefit plans to turn nearly fifteen square miles of undeveloped land into the nation's first commercial-scale oil-shale mining and processing facility. With that facility, Enefit would produce more than 18 million barrels of crude oil every year for more than three decades.

Enefit, an Estonian state-owned company, is the largest oil-shale producer in the world.[2] In 2011, it set its sights on Utah's abundant oil-shale reserves by purchasing the assets of the now-defunct Oil Shale Exploration Company, including its more-than-30,000 acres of land and resource holdings in the Uinta Basin.[3] The first phase of Enefit's development plans calls for building an oil-shale processing plant sprawling over half of a square mile, mining up to 9,000 acres of surrounding land, and running the mined oil shale through the plant to produce 50,000

[1] BLM's administrative record uses the Bates stamp prefix "ENEFIT AR" before the specific Bates number (e.g., ENEFIT AR 00000000). Because both BLM and the Service have administrative records in this case, BLM's record will be cited as BLM_00000000, and the Service's record will be cited as FWS_00000000.
[2] BLM_00002960.
[3] BLM_00006017–20 (showing Enefit's Uinta Basin holdings).

barrels of processed crude oil every day for more than 30 years.[4] That oil-shale mine and processing plant are collectively known as the "South Project."

Oil shale is a sedimentary rock with a high concentration of kerogen, a precursor to oil.[5] Because this rock was never buried deeply enough for pressure and heat to transform the kerogen into oil, producing oil from kerogen requires nature's unfinished work to be carried out. Through a process called retorting, oil shale is heated to more than 700ºF to release a petroleum-like synthetic crude oil.[6] A second process, called upgrading, further heats the synthetic crude oil together with hydrogen and other chemicals to reduce its viscosity for transport.[7] Although oil shale has been touted as a potential source of unconventional fuel for more than a century, no commercial production of crude oil from oil shale has occurred in the United States due to persistent technical and economic challenges associated with oil-shale processing.[8]

Oil shale mining, retorting, and upgrading requires "constant inputs of water, labor, electricity, natural gas," and a constant means to move the produced oil to market.[9] Because the South Project will be surrounded by BLM-administered public land, satisfying these demands, in Enefit's words, "*requires* a right-of-way [] grant" from BLM "to construct, own and operate a utility corridor … to the site."[10] So, in 2012 and 2013, the company applied to BLM for seven rights-of-way across federal public lands to allow for upgrades to the site's unpaved access road and construction and operation of a water supply pipeline, a natural gas supply pipeline, two

[4] BLM_00008119–20.
[5] BLM_00025956.
[6] *Id.*
[7] BLM_00020912–13.
[8] *See* BLM_00025958; BLM_00004158.
[9] *See* BLM_00015098–99.
[10] BLM_00015220 (emphasis added).

electric transmission lines, a pipeline to pump processed oil to refineries, and numerous temporary construction "laydown yards."[11] These rights-of-way are collectively referred to as the "Utility Corridor." The sole purpose of these Utility Corridor rights-of-way—their raison d'être—is to enable Enefit to build and operate the South Project mine and processing plant.[12] Maps showing the Utility Corridor and South Project area are attached as **Exhibits 1 and 2.**

The South Project mine would produce about 28 million tons of raw oil shale ore rock every year for more than 30 years.[13] Processing that oil shale through the onsite retorting and upgrading plant would churn out more than 18 million barrels of refinery-ready crude oil every year during those three-plus decades.[14] That would nearly double the Uinta Basin's current oil production from every oil producer combined.[15] Once the South Project plant is operational, Enefit plans to use it to process oil shale mined from its other Uinta Basin landholdings.[16]

According to the EPA, "the South Project is likely to result in significant impacts to human health and [the] environment."[17] The mine and processing plant will consume up to nearly 11,000 acre-feet of water per year from nearby surface waterways—"the same magnitude as *all* existing municipal and industrial sources in the Uinta Basin."[18] During stretches of wintertime, the Basin's ozone levels have been among the worst in the nation, mostly due to oil

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[11] BLM_00007741; BLM_00008823. Moon Lake Electric Association applied for the transmission line right-of-way and eventually would own and operate the lines, but Enefit is responsible for construction and is acting in Moon Lake's place during the NEPA process. *See* BLM_10009284.
[12] BLM_00015220; BLM_00007741.
[13] BLM_00008052; BLM_00008046.
[14] *See* BLM_00008065.
[15] *Id.*
[16] *See* BLM_00015222.
[17] BLM_00005916
[18] BLM_00001826 (emphasis added).

and gas development.[19] Nearly doubling the Basin's oil production would dramatically increase the region's emissions of ozone precursors and other air pollutants, including greenhouse gases.[20] Strip mining and processing more than 800 million tons of oil shale ore rock from nearly fifteen square miles of undeveloped land will generate hundreds of millions of tons of stockpiled overburden, oil shale, and oil-shale processing wastes.[21] Those stockpiles and scraped landscapes could discharge huge loads of sediment, salt, metals, and hydrocarbons to nearby waterways, home to four endangered fish species—the bonytail chub, Colorado pikeminnow, humpback chub, and razorback sucker ("endangered fish").[22]

II. Statutory and Regulatory Framework

A. The National Environmental Policy Act

NEPA is our "national charter for protection of the environment."[23] The statute has two primary aims. First, it "ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts" of a proposed action.[24] Second, it requires "that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision."[25] NEPA does not command a particular result, but rather

[19] BLM_00002254–56; BLM_00020798.
[20] *See* BLM_00027579–583.
[21] *See* BLM_00008052, BLM_00008066.
[22] *See* BLM_00008066, 00008070, 00008074–75, 00008101–02.
[23] 40 C.F.R. § 1500.1.
[24] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).
[25] *Id.*

"prescribes the necessary process by which federal agencies must take a 'hard look' at the environmental consequences of the proposed courses of action."[26]

Under NEPA, an agency must prepare an environmental impact statement (EIS) for "major Federal actions significantly affecting the quality of the human environment."[27] An EIS must analyze the proposed action's direct, indirect, and cumulative effects.[28] "Indirect effects" are those that "are caused by the [project] and are later in time or farther removed in distance, but are still reasonably foreseeable.[29] "Cumulative effects" are those that "result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions."[30] When a proposed federal action is a right-of-way across public land to serve a proposed project on adjacent private land, and the private action or its effects "can be prevented or modified by BLM decision-making," the effects of the private project "are properly considered indirect effects of the BLM action and must be analyzed as effects of the BLM action."[31] Additionally, an EIS must analyze alternatives to the proposed action, including a "no action" alternative, "so that reviewers may evaluate their comparative merits."[32]

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[26] *Pennaco Energy, Inc. v. U.S. Dep't of the Interior*, 377 F.3d 1147, 1150 (10th Cir. 2004).
[27] *Id.* (quoting 42 U.S.C. § 4332(C))
[28] 40 C.F.R. §§ 1502.16(b), 1508.7, 1508.8, 1508.25(c).
[29] *Id*. § 1508.8(b).
[30] *Id.* § 1508.7.
[31] BLM Permanent Instruction Memorandum (PIM) No. 2018-023 (Sept. 10, 2018), https://www.blm.gov/policy/pim-2018-023 (revising BLM NEPA Handbook (H-1790-1)) (citing 40 C.F.R §§ 1508.7, 1508.25(c)).
[32] *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1226–27 (10th Cir. 2017) (citing 40 C.F.R. § 1502.14).

B. The Endangered Species Act

The ESA is the "most comprehensive legislation for preservation of endangered species ever enacted by any nation."[33] In enacting the ESA, Congress "intended endangered species to be afforded the highest of priorities" and therefore adopted a policy of "institutionalized caution" in addressing the needs of such species.[34] The stated "policy" of the ESA is thus that all federal agencies "shall seek to conserve endangered species … and shall utilize their authorities in furtherance of the purposes of the Act."[35]

To further that policy, ESA Section 7(a)(2) prohibits federal agencies from undertaking actions that are "likely to jeopardize the continued existence" of any endangered or threatened species or likely to "result in the destruction or adverse modification" of critical habitat.[36] To that end, the ESA and its implementing regulations impose procedural duties requiring federal "action agencies"—here, BLM—to consult with the Service before undertaking any "action" that "may affect" an endangered species or its critical habitat.[37] For "major construction activities" like the Utility Corridor, BLM must first prepare a biological assessment evaluating the "effects of the action" and its "cumulative effects" on endangered species and critical habitat to determine whether such species or habitat are "likely to be adversely affected by the action."[38] "Effects of the action" are defined as "the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or

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[33] *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).
[34] *Id.* at 174, 194.
[35] 16 U.S.C. § 1531(b).
[36] *Id.* § 1536(a)(2).
[37] *Id.*; 50 C.F.R. § 402.14(a) (2018).
[38] *Id.* § 402.12 (2018).

interdependent with that action."[39] The test for whether an action is interrelated or interdependent with the proposed action is "but for" causation—"but for the proposed action, would the other action occur."[40] Indirect effects are "those that are caused by the proposed action and are later in time, but still are reasonably certain to occur."[41] "Cumulative effects" are "those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action."[42]

If the action agency's biological assessment concludes that the proposed action "may affect" endangered species or critical habitat, it must initiate formal consultation with the Service.[43] The Service must then review all relevant information, evaluate the "effects of the action" taken together with its "cumulative effects," and formulate a biological opinion determining whether the action is likely to jeopardize the continued existence of the species or adversely modify critical habitat.[44]

III. BLM and the Service's NEPA analysis and ESA consultation

In 2013, BLM notified the public of its intent to prepare a draft EIS for the proposed Utility Corridor.[45] As BLM drafted the EIS, Enefit repeatedly stressed to BLM that if it denied

[39] *Id.* § 402.02 (2018). On October 28, 2019, new ESA regulations went into effect, which redefined "effects of the action." *See* 84 Fed. Reg. 44,976, 44,976–78 (Aug. 27, 2019); 84 Fed. Reg. 50,333 (Sept. 25, 2019). These revised regulations do not apply to this case because they are prospective in application and their implementation post-dates the Service's consultation. 84 Fed. Reg. at 44,976 ("revisions to the regulations in this rule are prospective").
[40] 51 Fed. Reg. 19,926, 19,932 (June 3, 1986); *Sierra Club v. Marsh*, 816 F.2d 1376, 1387 (9th Cir. 1987).
[41] 50 C.F.R. § 402.02.
[42] *Id.*
[43] *Id.* § 402.14(a).
[44] *Id.* § 402.14(g).
[45] 78 Fed. Reg. 39,313 (July 1, 2013).

the Utility Corridor, the company would nonetheless fully build the South Project, undiminished in scale, by securing alternative utility sources.[46] Making this claim served Enefit's interests regardless of whether Enefit could in fact secure these alternative utility sources, for if Enefit wanted to avoid rigorous scrutiny of the South Project in the EIS, and avoid the South Project's impacts being considered a consequence of BLM's approval of the Utility Corridor, Enefit needed to convince the agency that it would build the South Project even without the Utility Corridor.[47]

BLM issued a draft EIS in 2016.[48] Because the agency accepted Enefit's assertions that it has "other reasonable access to utilities for development of the South Project," the draft EIS's no-action alternative—denial of the Utility Corridor—"assume[d] the South Project would go forward should the rights-of-way not be approved."[49] Yet because BLM determined that "some of the effects of the South Project can be modified" if the agency denied the Utility Corridor, the draft EIS treated those effects as "indirect effects."[50] Meanwhile, BLM treated as "cumulative effects" those effects of the South Project that, in the agency's view, "cannot be modified by BLM decision-making."[51]

The Plaintiffs submitted extensive comments on the draft EIS, noting, among many other flaws, that BLM unreasonably assumed the South Project would be fully built under the no-

[46] *See, e.g.*, BLM_00001354–55; BLM_00001507–10; BLM_00001536–45.
[47] *See* BLM_00005782 ("The distinction [whether or not the South Project would be fully built without the Utility Corridor] affects the level and type of analysis required for the South Project in the Utility Corridor Project EIS"); BLM_00005775 (Enefit's attorney: "once the projects are called connected"—and thus discussed as indirect effects—"the analysis tends to increase.").
[48] BLM_00006932.
[49] BLM_00006966.
[50] BLM_00006965.
[51] BLM_00006965–66.

action alternative by securing alternative utilities, that all of the South Project's impacts should be analyzed as indirect effects caused by the agency's approval of the Utility Corridor, and that the agency failed to take a hard look at the South Project's impacts.[52] Echoing the Plaintiffs' concerns, the U.S. Environmental Protection Agency's (EPA) commented that BLM "makes the unsupported assertion that the No Action Alternative (denial of the [rights-of-way]) would lead to the project proponent supplying the necessary utilities and shipping the oil produced via other means," which "leads to other conclusions in the Draft EIS which are likewise unsupported by analysis."[53] "Because," the EPA continued, "this conclusion is foundational to an appropriate analysis of impacts, it cannot be asserted without investigation and economic analysis to determine" if securing the alternative utilities is "feasible or likely," and whether the alternative utilities "would significantly change … the scope … of the oil shale development."[54]

BLM issued its final EIS (FEIS) in May 2018.[55] The no-action alternative remained the same. Without any independent analysis or support in the record beyond Enefit's self-serving assertions, BLM assumed Enefit would build the South Project, undiminished in scale, using alternative utility sources if the agency denied the Utility Corridor.[56] The agency thus assumed that the South Project's tremendous adverse environmental impacts would occur regardless of BLM's decision.[57] In discussing the Utility Corridor's impacts, the FEIS changed course from the draft EIS and treated all, rather than only some, of the South Project's impacts as cumulative

[52] BLM_00002463.
[53] BLM_00008534.
[54] *Id.*
[55] BLM_00007717.
[56] *See* BLM_00007775, 00007742–43
[57] BLM_00007745.

effects not caused by the agency's approval of the rights-of-way.[58] The only indirect effects BLM considered were the relatively minor harms from constructing, operating, and maintaining the Utility Corridor's pipelines, transmission lines, and road upgrade.[59] In so doing, BLM concluded that none of the South Project's environmental damage would result from BLM's approval of the Utility Corridor, even though providing utilities to enable the South Project is the only purpose of the rights-of-way. BLM then relegated its analysis of that environmental damage to the cumulative-effects section of the FEIS and provided only an admittedly "limited," general discussion of that damage.[60]

Before publishing the FEIS, BLM also prepared a biological assessment under the ESA and requested that the Service initiate ESA-section 7 consultation over the Utility Corridor's impacts to endangered species, including the four endangered fish species.[61] On that subject, BLM's Biological Assessment was a nearly verbatim copy of the "limited" discussion in the FEIS. As in the FEIS, the Biological Assessment examined as indirect effects only the minimal water use needed to construct and maintain the Utility Corridor, while treating the massive Green River water withdrawal, made possible by the Utility Corridor and necessary to operate the South Project, as a cumulative effect not caused by BLM's approval.[62] Yet because the Service historically has determined that any withdrawal of water from the Green River—even the minimal amount Enefit would use to construct and maintain the Utility Corridor—is likely to

[58] BLM_00007742–43.
[59] BLM_00007961.
[60] BLM_00007775.
[61] BLM_00009175.
[62] BLM_00009255, BLM_00009270–72.

jeopardize the four endangered fish species, BLM was required to consult with the Service on the Utility Corridor.[63]

In July 2018, the Service completed its consultation by issuing a Biological Opinion (BiOp) that addressed how the minor water withdrawal needed to build and maintain the Utility Corridor would harm the endangered fish.[64] The BiOp did not mention the South Project's massive water withdrawal from the Green River that would flow through the Utility Corridor's water pipeline or the significant sedimentation and leachate impacts on nearby waterways. With the BiOp in hand, BLM issued its Record of Decision (ROD) in September 2018 approving all of the rights-of-way.[65]

In February 2019, the Plaintiffs notified the Service and BLM of their intent to sue, in accordance with the ESA's citizen suit provision.[66] The Plaintiffs pointed out numerous flaws in the BiOp, including the failure to evaluate, or even mention, the South Project's impacts on the four endangered fish species.[67] In response, the Service sought to amend the BiOp, which it did in September 2019.

The amended BiOp contained little more analysis than the original.[68] While it was no longer silent about the South Project, it failed to address the South Project's impacts as effects resulting from BLM's decision to approve the Utility Corridor, adopting instead the Biological Assessment's categorization of the South Project as a "cumulative effect."[69] Even there,

[63] *See* FWS_000754; FWS_001875-77.
[64] FWS_000299.
[65] BLM_00008813.
[66] 16 U.S.C. § 1540(g); FWS_000408.
[67] *Id.*
[68] FWS_001483.
[69] FWS_001497–1500.

however, it offered no discussion of the impacts from the South Project's water withdrawal, sedimentation, and leachate on the endangered fish species.[70] A few months later, BLM informed the Plaintiffs that it "has determined that the amended [BiOp] does not change the underlying assumptions or conclusions" in BLM's decision, and thus it "will carry forward with implementing the ROD."[71] The Plaintiffs then sent the Service and BLM a new notice of intent to sue under the ESA, detailing the amended BiOp's deficiencies.[72] Receiving no response, the Plaintiffs filed an Amended and Supplemental Complaint for Declaratory and Injunctive Relief on February 26, 2020.[73]

SUMMARY OF THE ARGUMENT

The crux of this case is BLM's arbitrary assumption that, even if the agency denies the Utility Corridor rights-of-way, "the South Project will proceed to full buildout," undiminished in scale, via alternative sources of water, natural gas, electricity, and oil product transport. That assumption resulted in an unlawfully narrow NEPA analysis and ESA consultation, and it has no support in the administrative record, for it depended solely on Enefit's unsubstantiated, self-serving, and unreliable assurances. In fact, the record is replete with Enefit's admissions that these hypothetical alternative utilities are technically and economically infeasible. Yet there is no hint that BLM independently evaluated their feasibility. BLM's assumption was thus arbitrary and capricious. And that assumption was the inextricable foundation of the FEIS's analysis of the Utility Corridor, including the no-action alternative, the discussion of indirect effects, and

[70] *Id.*
[71] BLM_00029151.
[72] FWS_001506.
[73] ECF No. 61.

more. As a consequence, the FEIS presupposes that the South Project will significantly damage the environment, when in fact that would result only from BLM's approval of the Utility Corridor. Because understanding the significant harm that would flow from BLM's approval of the Utility Corridor is essential both to the agency making an informed decision and to allowing informed public comment, BLM's flawed assumption, and the FEIS's resulting flawed analysis, rendered the FEIS and the ROD arbitrary and capricious.

Moreover, even if it were proper to treat the South Project's impacts as "cumulative effects," BLM nonetheless failed to adequately analyze how the South Project would damage water and air, and the greenhouse gas emissions it would produce. Despite abundant highly relevant record evidence that would allow a detailed, quantitative estimate of the South Project's impacts, the FEIS offered only a cursory, qualitative, and generally uninformative discussion of those impacts, violating NEPA's "hard look" mandate.

BLM's arbitrary-and-capricious assumption that the South Project would be fully built without the Utility Corridor also fatally undermined the ESA consultation between BLM and the Service. BLM's Biological Assessment improperly considered the South Project's massive water-withdrawal, sedimentation, and leachate impacts to be "cumulative effects" of the Utility Corridor. The Service's BiOp, in turn, likewise improperly treated the South Project's impacts on the four endangered fish species as cumulative effects, rather than effects attributable to BLM's approval of the Utility Corridor. That is a particularly remarkable position with respect to the South Project's huge Green River water withdrawal given that Enefit admits that withdrawal and its impacts on the endangered fish would not occur but for the agency's approval. This critical error meant that the Service's analysis of harm to the four endangered fish species improperly

minimized the most significant impacts of BLM's decision, and improperly disclaimed any ability to protect those species from the South Project. This error rendered the BiOp arbitrary and capricious in violation of the ESA. And because the ROD approving the Utility Corridor relied on that flawed BiOp, BLM violated the ESA's mandate to ensure that the agency's actions do not jeopardize the continued existence of endangered species or adversely modify their critical habitat.

Finally, BLM's complete lack of analysis in the FEIS of the cumulative effects of developing Enefit's neighboring federal oil-shale lease also failed to satisfy NEPA's "hard look" mandate.

The Plaintiffs therefore request that this Court declare the FEIS and BiOp unlawful and vacate the ROD and all Utility Corridor rights-of-way granted to Enefit.

ARGUMENT

I. Standard of Review

Courts review NEPA and ESA claims under the Administrative Procedure Act (APA).[74] Under the APA, a court must set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[75]

The arbitrary-and-capricious standard requires courts to undertake a "thorough, probing, in-depth review" to ascertain whether the agency "examined the relevant data and articulated a rational connection between the facts found and the decision made."[76] Agency action is arbitrary

[74] 5 U.S.C. § 701 *et seq.*; *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 704 (10th Cir. 2010); *Coal. for Sustainable Res., Inc. v. U.S. Forest Serv.*, 259 F.3d 1244, 1248–49 (10th Cir. 2001).
[75] 5 U.S.C. § 706(2)(A).
[76] *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994) (citation omitted).

and capricious if the decision "runs counter to the evidence before the agency" or if it is not supported by "substantial evidence" in the record.[77] Courts must "consider only the agency's reasoning at the time of decisionmaking, excluding post-hoc rationalization concocted by counsel in briefs or argument."[78]

II. Plaintiffs have standing.

The Plaintiffs have standing in this case because their members have suffered (1) an "injury in fact" that is (2) "fairly traceable to the challenged action of the defendant" and is (3) likely to "be redressed by a favorable decision."[79] "[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity."[80]

Here, BLM and the Service's inadequate analysis under NEPA and the ESA injured the Plaintiffs' "concrete interests" by creating an "increased risk of actual, threatened, or imminent environmental harm."[81] The Plaintiffs' members use and enjoy public lands within and near the Utility Corridor, the South Project, and Enefit's federal oil-shale lease.[82] Those members' aesthetic and recreational interests in hiking, camping, rafting, and wildlife viewing, among other

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[77] *Id.*

[78] *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 704 (10th Cir. 2009).

[79] *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). The Plaintiffs satisfy the requirements for organizational standing because their members have standing, the claims are germane to their organizational purposes, and participation by individual members is not required to secure the relief sought. *Comm. to Save Rio Hondo v. Lucero*, 102 F.3d 445, 447 n.3 (10th Cir. 1996).

[80] *Friends of the Earth*, 528 U.S. at 183 (internal quotation marks omitted); *see also S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1156 (10th Cir. 2013).

[81] *See Sierra Club v. U.S. Dep't of Energy*, 287 F.3d 1256, 1265–66 (10th Cir. 2002); *see also Rio Hondo*, 102 F.3d at 452.

[82] J. Weisheit Decl. ¶¶ 10, 14–16, 18–20 (**Exhibit 3**); T. McKinnon Decl. ¶¶ 10–11(**Exhibit 4**); R. Beam Decl. ¶¶ 17, 19–21, 23–24 (**Exhibit 5**); R. Bloxham Decl. ¶¶ 8–17, 19 (**Exhibit 6**).

interests, will be harmed by Enefit's construction and operation of the Utility Corridor, and by increased traffic and air, light, and noise pollution from the Utility Corridor and the South Project.[83] Those harms result from BLM and the Service's failure to comply with NEPA and the ESA, for that led BLM to unlawfully approve the Utility Corridor.[84] And a favorable ruling is likely to redress those harms because it would vacate BLM's approval of the rights-of-way.[85]

III. BLM violated NEPA by failing to analyze a true no-action alternative.

NEPA's requirement to consider a range of alternatives, including a "no action" alternative, is the "heart" of the EIS because it "sharply defin[es]" the comparative "environmental impacts of the proposal and the alternatives" for the decisionmaker and the public.[86] The no-action alternative must use the "current level of activity … as a benchmark" to "compare the potential impacts of the proposed major federal action to the known impacts of maintaining the status quo."[87] Here, the FEIS considered in detail only two alternatives—the proposed action of approving all of the Utility Corridor rights-of-way and the no-action alternative of denying them all.[88]

The FEIS observed that "[o]nly conceptual and preliminary studies on the South Project have been conducted to date."[89] Yet under the no-action alternative, rather than using the status quo of no construction at the South Project, BLM assumed the South Project will "continue to

[83] Ex. 3 ¶¶ 17, 22–26; Ex. 4 ¶¶ 12–13; Ex. 5 ¶¶ 17–19, 21–22, 25–28; Ex. 6 ¶¶ 10–11, 13–15, 18–21.
[84] *Sierra Club*, 287 F.3d at 1265–66.
[85] *Id.*
[86] 40 C.F.R. § 1502.14.
[87] *Biodiversity Conservation All. v. U.S. Forest Serv.*, 765 F.3d 1264, 1269 (10th Cir. 2014).
[88] BLM_00007746.
[89] BLM_00008052.

full buildout" by securing alternative utility supplies that would be more environmentally harmful than the Utility Corridor.[90] In doing so, the FEIS perversely asserts that approving the Utility Corridor will be *less* environmentally harmful than denying it.[91] And the ROD expressly relied on that backwards assertion to justify approving the rights-of-way.[92]

As explained below, BLM's assumption is arbitrary and capricious. In relying on that unreasonable assumption "as the basis for distinguishing between the no action alternative and the preferred alternative," the FEIS failed to "sharply defin[e]" the difference between approving and denying the Utility Corridor.[93] This deficiency "is more than a mere flyspeck"—the assumption that the South Project would proceed to full buildout under the no-action alternative "was key to the ultimate decision" to approve the Utility Corridor.[94] Thus, the FEIS's "comparison of the preferred alternative … and the no action alternative [was] arbitrary and capricious," for it "defeat[ed] NEPA's goals of informed decisionmaking and informed public comment."[95]

A. It was arbitrary and capricious for BLM to assume that the South Project would "proceed to full buildout" without the Utility Corridor.

The FEIS "assumes" that "the South Project will proceed to full buildout"—producing 50,000 barrels of oil per day—"regardless of the BLM's decision" on the Utility Corridor because the South Project's "required utilities would be secured by alternative means."[96] That

[90] BLM_00007775, 00007742–43, 00008127–57.
[91] BLM_00007753.
[92] BLM_00008835.
[93] *See* *WildEarth Guardians*, 870 F.3d at 1235, 1238.
[94] *See* *id.* at 1237 (quoting *Richardson*, 565 F.3d at 704).
[95] *See* *id.* at 1233, 1237.
[96] BLM_00007743; BLM_00007963; BLM_00008057.

assumption "was arbitrary and capricious because it lack[ed] support in the administrative record."[97]

In *WildEarth Guardians*, the Tenth Circuit explained that an agency violates NEPA when it makes unreasonable and unsupported assumptions in an EIS.[98] In that case, BLM had "assum[ed]" that denying a coal lease would not reduce coal combustion and therefore concluded that denying the lease (the "no action" alternative) would have the same effects as issuing the lease (the "proposed action").[99] This, the Tenth Circuit held, "was arbitrary and capricious because it lack[ed] support in the administrative record."[100] The agency "did not provide any reasoning or analysis" to support its assumption, which was "contradicted" by "other portions" of the very sources "on which it relie[d]."[101]

NEPA also requires an agency to "verify the accuracy of information supplied by an applicant," particularly when that information is central to the agency's consideration of an alternative to the proposed action.[102] In *Utahns for Better Transp.*, the Tenth Circuit found that an EIS for a proposed highway project in Utah violated NEPA by rejecting an alternative highway alignment in part on the basis of costs without independently "verif[ying] the cost

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[97] *WildEarth Guardians*, 870 F.3d at 1233–34.
[98] *See id.* at 1236.
[99] *Id.* at 1233–34.
[100] *Id.*
[101] *Id.* at 1234, 1238; *see also Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 623 F.3d 633, 636, 640–41, 646–49 (9th Cir. 2010) (BLM failed to take a hard look at proposed action's impacts when it "assumed without analysis" that "mining would occur in the same manner and to the same extent … regardless of whether" BLM approved the project, despite "much in the record indicating precisely the opposite.").
[102] *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1165 (10th Cir. 2002) (citing 40 C.F.R. § 1506.5(a)), *as modified on reh'g*, 319 F.3d 1207 (10th Cir. 2003) (citing 40 C.F.R. § 1506.5(a)).

estimates supplied by the Applicant."[103] Because the alternative's feasibility was critical to the agency's analysis, the court found that the agency's "obligation under NEPA to evaluate submitted information independently" is "more than a technical requirement"; it is necessary "to meet the NEPA goals of informed decisionmaking and public comment."[104]

Likewise, when an applicant asserts that a proposed project will move forward regardless of an agency's decision, courts have held that NEPA requires agencies to independently analyze rather than "merely accept[]" the applicant's "self-serving statements or assumptions."[105] In *Hammond*, the court held arbitrary and capricious BLM's assumption that a project would be built regardless of whether BLM approved a separate right-of-way for a pipeline planned to be the source of petroleum products for the project.[106] BLM's assumption that the project "would have alternative sources of supply was unjustifiable," the court found, "because the only facts in the administrative record to support it were … [the applicant's] unsubstantiated assurances to that effect."[107] Because the record "called into question the accuracy of … [the applicant's] assurances," BLM had a "duty to substantiate" the applicant's "self-serving and unreliable statements."[108] Many other courts agree.[109]

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[103] *Id.*
[104] *Id.* at 1165, 1166, 1181; *see also S. Utah Wilderness All. v. Bankert*, 2007 WL 2873788, at *5 (D. Utah Oct. 3, 2007) (citing 40 C.F.R. § 1506.5(a)) (when a third party hired by the project proponent prepares an environmental assessment, BLM must "independently evaluate" the information provided by the applicant).
[105] *Hammond v. Norton*, 370 F. Supp. 2d 226, 247, 251 (D.D.C. 2005).
[106] *Id.* at 234, 245, 247–48, 253.
[107] *See id.* at 248, 253.
[108] *Id.*at 252–53.
[109] *See, e.g.*, *Am. Rivers v. Fed. Energy Regulatory Comm'n*, 895 F.3d 32, 50–51 (D.C. Cir. 2018) (NEPA analysis improperly relied exclusively on information provided by applicant "without any interrogation or verification" of that information); *Sierra Club v. Bureau of Land Mgmt.*, 786 F.3d 1219, 1222 (9th Cir. 2015) (BLM's assumption that a wind farm on private land

Here, BLM's core assumption is arbitrary and capricious because the agency "merely accept[ed]" Enefit's unsupported, "self-serving statements or assumptions" that it could secure alternative utilities to allow full buildout of the South Project.[110] The record contains "no hint" that the agency "gave independent thought to the feasibility" of those alternatives.[111] Indeed, when the Service questioned this central assumption, BLM responded only that it "formed this opinion because Enefit has consistently stated and written to the BLM, investors, and to the general public that the South Project will proceed to full buildout, even if the BLM denies the requested Utility Project"[112]—as if a project proponent's repetition of self-serving assertions could substitute for the independent, rigorous analysis NEPA demands.

That BLM "did not provide any reasoning or analysis" to support its assumption is made all the more remarkable by the fact that it "was contradicted" by "other portions" of Enefit's own

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would be built even if the agency denied a right-of-way was reasonable because the record showed BLM examined an independent, third-party analysis "address[ing] the feasibility" of an alternative access road, independently "analyzed" whether the alternative access was "technically and economically feasible," and only then determined that the alternative access "was neither remote nor speculative"); *Envtl. Law & Policy Ctr. v. U.S. Nuclear Regulatory Comm'n*, 470 F.3d 676, 683 (7th Cir. 2006) (NEPA requires agencies to "exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project"); *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 668–69 (7th Cir. 1997) (environmental assessment was "incomplete and flawed" where there was "no hint that the Corps gave independent thought to the feasibility of alternatives"); *Fla. Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 401 F. Supp. 2d 1298, 1323 (S.D. Fla. 2005) ("Representations by the applicant alone … cannot be sufficient to establish" that one project would be built without the other "without independent evaluation by the agency based on record evidence"); *S. Utah Wilderness All. v. Norton*, 237 F. Supp. 2d 48, 53 n.3 (D.D.C. 2002) (rejecting BLM's argument that "there was no need to conduct an independent analysis of alternatives because the alternatives were not feasible" when "those assertions about feasibility were based solely on the statements" of the project applicant).

[110] *See Hammond*, 370 F. Supp. 2d at 251.

[111] *See Simmons*, 120 F.3d at 668–69.

[112] BLM_00028912.

statements "on which [BLM] relies," including the company's explicit admissions of the infeasibility of the hypothetical alternative utilities.[113] Indeed, BLM even acknowledged that "all possible [alternative utility] scenarios are hypothetical."[114] The Court thus "cannot defer" to BLM's "unanalyzed, conclusory" assumption that Enefit will build the South Project, undiminished in scale, without the Utility Corridor because the record "points uniformly in the opposite direction from the agency's determination."[115]

Because BLM's denial of the rights-of-way would deprive Enefit of the Utility Corridor's water, natural gas, and oil product pipelines,[116] and because the South Project requires constant inputs of water and natural gas, and a constant means to transport processed oil to market, a lack of record support for the economic or technical feasibility of securing alternative supplies of *any* of those necessary utilities would render BLM's assumption arbitrary and capricious. In this case, as explained in detail below, the record lacks any support for the feasibility of securing *all* of those alternative utilities. There is thus no "rational connection" between the record evidence and the FEIS's core assumption,[117] which rendered BLM's analysis based on that assumption—including the discussion of the no-action alternative—"unreasonable in violation of the 'rule of reason'" under NEPA.[118]

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[113] *See* *WildEarth Guardians*, 870 F.3d. at 1234, 1238.
[114] BLM_00005771.
[115] *See* *Richardson*, 565 F.3d at 707, 715; *see also* *Rocky Mountain Wild v. Vilsack*, 2013 WL 3233573, at *3 n.3 (D. Colo. June 26, 2013) (courts "cannot accept at face value an agency's unsupported conclusions").
[116] BLM_00007831 (no-action alternative would deny *all* rights-of-way).
[117] *See* *Olenhouse*, 42 F.3d at 1574.
[118] *See* *WildEarth Guardians*, 870 F.3d. at 1236.

1. The record does not support BLM's assumption that Enefit will transport the South Project's processed oil by alternative means.

Enefit plans to transport the South Project's 50,000 barrels-per-day of oil output—the amount churned out at full buildout—through the Utility Corridor's oil-product pipeline to refineries in Salt Lake City and beyond.[119] If BLM denied the rights-of-way, the FEIS asserts—parroting Enefit—that the company would truck out all this oil using the site's access route, called Dragon Road.[120] But the record is replete with evidence that this is not technically or economically feasible.

Because of limited access to the South Project site, truck traffic would rely on Dragon Road.[121] Dragon Road is "an unpaved rural" dirt road with "sharp horizontal and vertical curves, steep slopes, … virtually no drainage structures,"[122] and "limited visibility."[123] Because of its significant "road surface limitations," it is "not conducive to transporting heavy industrial equipment," nor "adequate for heavier traffic loads during construction and operation [of the South Project] without significantly-increased maintenance requirements,"[124] including "constantly" running water-sprayer trucks to manage the "exacerbate[d] … dust problem."[125] Accordingly, in applying for the right-of-way to pave and straighten Dragon Road, Enefit stated that the road "would *require* improvement" simply to "accommodate traffic during construction of the [Utility Corridor] and of the South Project, as well as general employee and supply traffic

[119] BLM_00007801–02.
[120] BLM_00008126–27.
[121] *See* BLM_00007810; BLM_00008154; BLM_00008156; BLM_00008835.
[122] BLM_00008888.
[123] BLM_00005899.
[124] BLM_00008888.
[125] BLM_00005899; BLM_00008888.

during operation of the South Project."[126] In other words, even if BLM approved the Utility Corridor and Enefit could pipe out the South Project's processed oil, Dragon Road would still "require" improvement merely to endure the South Project's routine traffic.

If BLM denied the Utility Corridor, "[n]o improvements would be made to Dragon Road. The existing Dragon Road would be used as is."[127] While Enefit vaguely asserted to BLM that it "*anticipates* that the existing road could handle increased traffic volumes," it conceded that the amount of increased traffic an unimproved Dragon Road could handle is as yet "undetermined."[128]

Yet back-of-the-envelope math lays bare the implausibility of trucking out 50,000 barrels of oil per day. Such a feat would require running about 291 single-haul tanker trucks roundtrip on Dragon Road every day for more than three decades.[129] That is one large oil tanker traveling to and from the South Project every 5 minutes, 24 hours per day, every day, for more than 30 years.[130] And that would be in addition to the 582 truck drivers who "would commute to the

[126] BLM_00001190 (emphasis added).
[127] BLM_00007064; *see also* BLM_00152200 ("Road improvements to Dragon Road … require a [right-of-way] grant.").
[128] BLM_00000016 (emphasis added).
[129] The FEIS states that trucking the South Project's oil would require about 210 trucks per day. BLM_00007795. The record shows that BLM's figure is erroneous, for it is based on assumed 249-barrel capacity double-trailer trucks. But Enefit expressly informed BLM that "[i]n its current condition, *Dragon Road is only suitable for single-haul trucks*" with a capacity of 172 barrels, which equates to 291 trucks per day. BLM_00001542 ("single and double trailer[s]" have "capacities of 172 barrels and 249 barrels, respectively") (emphasis added). 50,000 barrels per day / 172 barrels per truck = 291 trucks per day.
[130] 291 trucks per day / 24 hours = about 12 trucks per hour. *See* BLM_00001542 ("truck transport of product would … have to operate around [the] clock").

South Project each day";[131] the up to 150 "oil tankers, oil field services trucks, and passenger vehicles" that currently travel that stretch of Dragon Road each day;[132] the mine and processing plant "supply traffic during operation of the South Project";[133] and the daily commuter traffic from the estimated 1,730 employees working at the site.[134] Even optimistically assuming two-person carpooling of the daily South Project commuter traffic, that would be more than 1,597 large truck and vehicle trips on Dragon Road every day—one vehicle trip every 53 seconds, every day for more than 30 years.[135] That does not even include mine and processing plant supply traffic. Although the FEIS admitted that "additional tank truck traffic would accelerate the deterioration of the existing Dragon Road, which is not designed for the anticipated traffic levels,"[136] and the draft EIS more bluntly stated that "under the No Action Alternative … [Dragon Road] could disintegrate and deteriorate under the increased … truck traffic," the record lacks any discussion of the feasibility of running so many trucks along a narrow dirt road with sharp corners and limited visibility.[137]

BLM's treatment of this subject in the record amounted to two sentences referring to a report cited by Enefit, which notes that 300 trucks carry about 77,000 barrels of oil in the Uinta

[131] BLM_00001542. "Assuming a truck driver fleet … working on two 12-hour shifts," twice the number of drivers would be required than the total number of trucks, all of whom "would commute to the South Project each day." BLM_00001542. 291 trucks x 2 shifts = 582 drivers commuting to the site.
[132] BLM_00000016; BLM_00007944.
[133] BLM_00007810.
[134] BLM_00008114.
[135] 582 truck drivers / 2 per carpool = 291 daily trips. 1,730 daily employees / 2 per carpool = 856 daily trips. 291 trucks + 291 truck driver commuter trips + 856 employee trips + 150 currently traveling on Dragon Road = 1,597 daily trips / 24 hours = 67 vehicle trips per hour.
[136] BLM_00008156.
[137] BLM_00007088.

Basin every day.[138] Enefit suggests—and BLM repeats—that this somehow demonstrates the feasibility of trucking the South Project's 50,000 barrels per day along a single dirt road.[139] That report, however, explains that those 300 oil trucks—nearly the same number of oil trucks Enefit would be required to run every day along Dragon Road—are carrying 69% of the Uinta Basin's *entire* daily oil production; are traveling on the main, paved federal highway in northeast Utah; and have the same adverse road impacts as *1.5 million cars each day*.[140] Yet the record lacks any discussion of whether it is technically feasible to add the equivalent of 1.5 million cars to the existing traffic on this unimproved, dirt road every day for more than 30 years, or the economic feasibility of a single operator transporting by truck the same amount of oil as more than two-thirds of the entire Uinta Basin's daily oil output.

Enefit, however, removed all doubt, expressly admitting to BLM that trucking the South Project's oil would be "nearly 1,400% more expensive than pipeline transport," and "would ultimately prove to be *neither practical nor economically feasible at target South Project production levels*."[141] The FEIS's assumption that Enefit could transport processed oil from the South Project without the Utility Corridor's oil pipeline or without improving Dragon Road is thus arbitrary and capricious.[142]

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[138] BLM_00002105 (citing Rural Planning Group, Uintah Basin Oil (2015), http://ruralplanning.org/oil/assets/utah-oil_web.pdf).
[139] *See* BLM_00001768.
[140] Rural Planning Group, Uintah Basin Oil, http://ruralplanning.org/oil/assets/utah-oil_web.pdf, p. 45 (cited in BLM_00002105).
[141] BLM_00001544 (emphasis added).
[142] *See* *WildEarth Guardians*, 870 F.3d at 1236; *Utahns*, 305 F.3d at 1165.

2. The record does not support BLM's assumption that Enefit will satisfy the South Project's water demand by alternative means.

The South Project would consume up to 15 cubic feet of water per second, or nearly 11,000 acre-feet per year (afy), every year for more than 30 years.[143] Enefit would withdraw that water from the Green River under Water Right No. 49-258 and pump it to the South Project through the Utility Corridor's water pipeline.[144] If BLM denied the Utility Corridor rights-of-way, "water usage [at the South Project] would be the same," but Enefit claims it would source the water "from a different location."[145] Though the company assured BLM that it has a few options, none are backed up by the record.

First, Enefit asserted that it could withdraw the water from the White River rather than the Green River.[146] Yet Enefit has conceded to BLM that there are "insufficient lands available" along the White River for the necessary water-withdrawal infrastructure.[147] And beyond the technical infeasibility, "[f]rom an economic standpoint, diversion from the White River would likely not be comparable to the proposed action."[148] Indeed, withdrawing from the White River would "likely require" relocating existing pipelines, disturbing a cultural site, constructing permanent aboveground structures in the river's floodplain, conducting a separate ESA Section 7 consultation, applying for time-consuming and uncertain authorizations from the Utah Division of Water Resources (UDWR), and constructing a "costly" large storage reservoir.[149] Moreover,

[143] BLM_00008071.
[144] BLM_00007798–801.
[145] BLM_00001768.
[146] BLM_00000015.
[147] BLM_00000041–42.
[148] *Id.*
[149] BLM_00000041–43.

to transport the water from the White River to the South Project, a separate right-of-way "across BLM land would still be necessary," a speculative prospect.[150]

Second, Enefit claimed it could obtain the necessary water by converting existing groundwater monitoring wells on the South Project to water supply wells and pumping groundwater under the same water right (No. 49-258) it planned to use for its Green River withdrawal.[151] That would require authorization from UDWR to change the water right's withdrawal location.[152] Enefit, however, does not own that water right.[153] It merely has a "contractual right to use" the water.[154] Nothing in the record indicates that the water-right owner would pursue the uncertain, years-long process required to change the water right's withdrawal location. What's more, Enefit has not performed the years-long "testing on the [monitoring] wells to determine long-term availability and yield" of the aquifer, which "would need to [be] conduct[ed]" before the prerequisite authorization from UDWR could be sought.[155] All told, this alternative is purely speculative, leading BLM to state in the draft EIS that "[i]t is unlikely the existing monitoring wells on the Applicant's private property could be converted to supply wells."[156] The agency could not have been clearer: "Based on BLM's knowledge of hydrography in the area, BLM does not believe this activity would be sufficient to meet [the South Project's] water demands."[157]

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[150] BLM_00001539.
[151] BLM_00001776–77.
[152] *Id.*
[153] BLM_00007872 (Water Right No. 49-258 owned by Deseret Generation and Transmission); BLM_00001817 (water right "is not held" by Enefit).
[154] BLM_00001817.
[155] BLM_00001540.
[156] BLM_00007284.
[157] BLM_00007063.

Third, Enefit claimed it could purchase and truck water to the South Project.[158] But delivering nearly 11,000 afy of water would require running one large tanker truck on Dragon Road, roundtrip, every 64 seconds, 24 hours a day, every day, for more than 30 years.[159] And that would be in addition to the oil-product truck traffic described above. The technical and economic feasibility of such a feat is—like trucking the South Project's oil product—facially dubious at best. And Enefit removed all doubt by admitting to BLM that, even if it obtained some amount of water from other sources, merely "supply[ing] the balance" of the South Project's water demand via trucking—so, significantly less than the South Project's full 11,000 afy demand—"*would almost certainly be both technically and economically infeasible*."[160]

Finally, Enefit maintains that it could pump groundwater for the South Project under a different water right (No. 49-1639) owned by the company.[161] But the FEIS failed to mention that UDWR records show this water right to be capped at 48 afy, *less than one-half of one percent* of the South Project's needs.[162]

Having lobbed up this scattershot of possible alternatives, Enefit finally settled on a single game plan in a letter to BLM sent shortly before the agency issued the FEIS.[163] The company claimed it would obtain the South Project's water from both its 48 afy water right (No.

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[158] BLM_00001544; BLM_00007063.
[159] 172 barrel-capacity truck = 7,224 gallons per truck. 10,867 acre-feet = 3,541,027,510 gallons. 3,541,027,510 gallons / 7,224 gallons per truck = 490,175 trucks per year / 365 days = 1343 trucks per day / 24 hours = 56 tanker trucks every hour.
[160] BLM_00001544 (emphasis added).
[161] BLM AR 00000015.
[162] BLM_00004382; UDWR, https://waterrights.utah.gov/asp_apps/wrprint/wrprint.asp?wrnum=49-1639.
[163] BLM_00001774.

49-1639) and the converted groundwater monitoring wells (under water right No. 49-258).[164] Yet Enefit neglected to mention that its 48 afy water right would leave over 99 percent of the South Project's water demand unsatisfied. And even though BLM itself expressly determined in the draft EIS that the idea of monitoring-well conversion was infeasible, and there is no indication in the record that the owner of water right No. 49-258 would seek the prerequisite authorization from UDWR, BLM continued to list this theoretical alternative water source in the FEIS—without any independent substantiation—to attempt to justify its assumption that the South Project would be fully built without the Utility Corridor water pipeline.[165]

Strikingly, the FEIS also listed as potential alternative water sources the other alternatives that Enefit had by that time disavowed: trucking and withdrawals from the White River.[166] All told, because Enefit's only feasible alternative source of water would not satisfy even one one-hundredth of the South Project's water needs, the FEIS's assumption that Enefit could secure enough water without the Utility Corridor's water pipeline is arbitrary and capricious.[167]

3. The record does not support BLM's assumption that Enefit will satisfy the South Project's natural gas demand with alternative means.

To transport oil from the South Project to market, Enefit requires hydrogen for the "upgrading" process, which reduces the oil's viscosity.[168] Enefit intends to obtain hydrogen by extracting it from natural gas, which it would pump to the site through the Utility Corridor's

[164] BLM_00001776–77.
[165] BLM_00008125.
[166] BLM_00008125.
[167] *See, e.g.*, *WildEarth Guardians*, 870 F.3d at 1236; *Utahns*, 305 F.3d at 1165.
[168] BLM_00001537.

natural gas pipeline.[169] If BLM denied the Utility Corridor, Enefit claimed it had three alternatives to supply the hydrogen. Yet again, the record says otherwise.

First, Enefit asserted that it could obtain hydrogen from natural gas liquids from two existing pipelines that traverse the South Project site.[170] Enefit has admitted, though, that these liquids are not "a viable hydrogen source" for the South Project because they are "more than 400 percent more expensive than natural gas and therefore uneconomic."[171]

Second, Enefit asserted that, if BLM denied the Utility Corridor, "a [partial oxidation] unit could be deployed" to extract the needed hydrogen from "off-gas streams" produced elsewhere at the South Project plant.[172] But Enefit has conceded that obtaining hydrogen from a partial-oxidation unit "may not yield a sufficient flow rate of hydrogen" to enable its "target full build-out production level"; would "be a departure from industry standards"; and would be "considerably more expensive" than natural gas. [173] Ultimately, Enefit stated this option is "unlikely" to be "economical when compared" to natural gas delivered through the Utility Corridor.[174]

Finally, shortly before BLM issued the FEIS, Enefit informed BLM that the company had settled on the idea of obtaining substitute natural gas supplies from Summit Midstream Partners' existing natural gas pipeline that crosses the South Project site.[175] Enefit informed BLM that the Summit pipeline could provide a flow of about 100 MMBtu per hour of natural gas to supply the

[169] BLM_00008123.
[170] BLM_00001538.
[171] *Id.*
[172] *Id.*
[173] BLM_00001538–39.
[174] *Id.*
[175] BLM_00001774–75.

South Project.[176] But Enefit had already alerted BLM that to reach full buildout, the South Project would require "more than 2,000 MMBtu per hour of natural gas (not including natural gas required for on-site power generation …)."[177] The Summit pipeline would thus supply *less than 5 percent* of the South Project's natural gas demand.

Even though Enefit's own statements reveal that the Summit natural gas pipeline cannot supply the South Project's needs, and although Enefit had disavowed and deemed infeasible the idea of using natural gas liquids or a partial-oxidation unit, BLM nevertheless continued to list all three supposed alternatives in the FEIS, without independent evaluation.[178] Lacking any support in the record, the FEIS's assumption that Enefit could provide sufficient natural gas to the South Project without the Utility Corridor's natural gas pipeline was arbitrary and capricious.[179]

* * *

All told, the record contradicts BLM's conclusion that, absent the Utility Corridor, Enefit had alternative means to supply the South Project's needed utilities. As a result, it was arbitrary and capricious for BLM to assume in the no-action alternative that "the South Project will proceed to full buildout" even if the agency denied the Utility Corridor rights-of-way.

[176] BLM_00001774.
[177] BLM_00001538.
[178] BLM_00008124.
[179] *See, e.g.*, *WildEarth Guardians*, 870 F.3d at 1236; *Utahns*, 305 F.3d at 1165.

IV. BLM violated NEPA by failing to analyze the South Project's impacts as "indirect effects" caused by the agency's approval of the Utility Corridor.

A. BLM's unreasonable assumption rendered the FEIS's indirect effects discussion arbitrary and capricious.

BLM's arbitrary assumption that Enefit will build the South Project, undiminished in scale, without the Utility Corridor also poisoned the FEIS's analysis of the Utility Corridor's indirect effects.[180] NEPA requires agencies to evaluate the indirect effects of a proposed project, which are those that "are caused by the [project] and are later in time or farther removed in distance, but are still reasonably foreseeable."[181] Here, the FEIS identified as indirect effects of the Utility Corridor's approval only the relatively minor environmental impacts from constructing, operating, and maintaining the Utility Corridor's pipelines, transmission lines, and road upgrade.[182] While the FEIS concedes that "the South Project … [and] its effects are reasonably foreseeable,"[183] BLM maintains that the South Project's impacts "do[] not qualify as … indirect effect[s]" because the South Project "will proceed to full buildout regardless of the BLM's decision" and thus "it is not caused by the Utility [Corridor]."[184] As such, the FEIS considered the South Project's impacts only as background, cumulative effects that "are not attributable to" BLM's approval of the Utility Corridor and that "do not count toward the significance of the [Utility Corridor's] impacts."[185]

[180] BLM_00007961–62.
[181] 40 C.F.R. §§ 1502.16(b), 1508.8(b), 1508.25(c).
[182] BLM_00007962.
[183] BLM_00007743.
[184] BLM_00002117.
[185] BLM_00007752.

Because that categorization was based on the agency's arbitrary full-buildout assumption, it was equally arbitrary for BLM not to analyze the South Project's environmental impacts as indirect effects of the Utility Corridor.[186] Indeed, because the sole reason for the Utility Corridor is to provide "needed infrastructure" for the South Project,[187] BLM's position that the South Project "does not result" from approving the Utility Corridor "contains its own refutation."[188] As a result, the FEIS did not satisfy the "key requirement of NEPA" to "consider and disclose the actual environmental effects" that would not occur but for the agency's approval of the Utility Corridor, so that BLM could "bring[] those effects to bear on [its] decision[]."[189] This deficiency "defeat[ed]" NEPA's "goals of informed decisionmaking and informed public comment," rendering the FEIS and ROD arbitrary and capricious.[190]

B. Even if Enefit could build the South Project without the Utility Corridor, BLM's indirect-effects analysis was still unlawful.

Even assuming, for the sake of argument, that Enefit could build the South Project in some form without the Utility Corridor, BLM's indirect-effects analysis was still flawed owing to its failure to recognize what the agency and Enefit repeatedly admitted—that denying the Utility Corridor would change how the South Project would be developed.

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[186] *See* *WildEarth Guardians*, 870 F.3d at 1235 (that BLM's "assumption lacks support in the record is enough for us to conclude that the analysis which rests on this assumption is arbitrary and capricious"); *Citizens for a Healthy Cmty. v. BLM*, 377 F. Supp. 3d 1223, 1237 (D. Colo. 2019) (BLM "acted in an arbitrary and capricious manner and violated NEPA by not taking a hard look at … foreseeable indirect effects").

[187] BLM_00007746.

[188] *See* *City of Davis v. Coleman*, 521 F.2d 661, 677 (9th Cir. 1975) (EIS improperly failed to analyze induced development as indirect effect of federal approval of highway project whose purpose was to spur that development).

[189] *See* *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 96 (1983).

[190] *See* *Utahns*, 305 F.3d at 1163.

BLM's NEPA Handbook explains that if a reasonably foreseeable "non-Federal action or its effects can be *prevented or modified* by BLM decision-making, then the effects of the non-Federal action are properly considered indirect effects of the BLM action and must be analyzed as effects of the BLM action."[191] As Enefit recognized, the FEIS "should … discuss[] … the extent to which the South Project and its effects can be prevented or modified by the BLM decision-making on the Utility [Corridor], as these are the portions of the South Project which need to be included as indirect effects of the [Utility Corridor]."[192]

BLM and Enefit have repeatedly conceded that "[i]f BLM rejects the application for rights-of-way, then the South Project *would be developed differently* and, thus, *would be modified by the BLM's decision*."[193] The "two projects," Enefit said, "are interdependent."[194] Thus, the South Project and its effects "are properly considered indirect effects of the BLM action" because the South Project "can be prevented *or modified*" by BLM's decision on the Utility Corridor.[195]

[191] BLM PIM No. 2018-023 (Sept. 10, 2018), *available at* https://www.blm.gov/policy/pim-2018-023 (revising BLM NEPA Handbook (H-1790-1)) (emphasis added).
[192] BLM_00001820 (internal quotation marks omitted).
[193] BLM_00005780 (emphasis added); *see also* BLM_00000016 (without Utility Corridor, "the scope of facilities on the private land would be anticipated to change"); BLM_00000024 ("South Project will vary based on the approval or disapproval of the Utility Project."); BLM_10009231 ("the project as proposed would not go forward[,] [s]o, it is dependent upon the [rights-of-way]"); BLM_00001844 (Enefit: BLM should "assume that all aspects of the South Project could be modified by BLM decision-making"); BLM_10008960 ("[D]iscussion … with Enefit made it clear that … the design of the South Project is pending and … would be affected by the BLM's decision … result[ing] in a different design" without the Utility Corridor).
[194] BLM_00005775.
[195] BLM PIM No. 2018-023 (emphasis added).

BLM's failure to disclose and analyze the South Project's environmental impacts as indirect effects—effects that would only occur if BLM approved the Utility Corridor—therefore rendered the FEIS and ROD arbitrary and capricious."[196]

V. The FEIS failed to take a "hard look" at the South Project's impacts, regardless of whether they are cumulative or indirect effects.

An "EIS is arbitrary and capricious if it fails to take a 'hard look' at the environmental effects" of a proposed action.[197] Under that standard, courts "examine the administrative record, as a whole, to determine whether the [agency] made a reasonable, good faith, objective presentation of those impacts sufficient to foster public participation and informed decision making."[198] Here, even if BLM properly treated the South Project's impacts as cumulative effects, the FEIS's admittedly "limited" analysis of those effects failed to satisfy NEPA's hard-look mandate.[199]

A. BLM failed to take a hard look at the South Project's water-quality impacts.

An agency must quantitatively estimate environmental impacts, rather than take a "broad, qualitative approach," when it has "non-speculative figures that it could use to quantify" the impacts.[200]

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[196] *See* *Utahns*, 305 F.3d at 1163.
[197] *WildEarth Guardians*, 870 F.3d at 1233.
[198] *Colo. Envtl. Coalition v. Dombeck*, 185 F.3d 1162, 1177 (10th Cir. 1999).
[199] *See* BLM_00007743.
[200] *Diné Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831, 858 (10th Cir. 2019); *see also* *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (without a quantitative estimate of impacts, "it is difficult to see" how an agency "could engage in informed decision making" with respect to those impacts "or how informed public comment could be possible."); *Envtl. Defense Fund, Inc. v. Andrus*, 619 F.2d 1368, 1375 (10th Cir. 1980) ("hard look" requires "detailed discussion" of environmental effects if the necessary information can be "readily ascertained").

The FEIS did not quantify the South Project's impacts on surface water and groundwater. Instead, it offered only a vague, qualitative discussion of the types of impacts that could result from a generic mining operation.[201] While the FEIS notes that there are "29 ephemeral channels" in the South Project area with a "significant nexus" to the Green River and White River, it includes no discussion, qualitative or otherwise, of how the South Project would degrade these riparian areas.[202] And the FEIS mentions only generically that "removal of vegetation, removal of topsoil, and alternation of erosion and drainage patterns" could "potential[ly] impact[]" the "[f]loodplains associated with Evacuation Creek [that] are present in the South Project area."[203]

BLM gives a single reason for not "quantify[ing] specific impacts" from the South Project on "Evacuation Creek floodplains," on riparian areas, and on surface and groundwater: "footprint data for the South Project" and "[s]pecific areas to be disturbed" are, BLM claims, "unknown at this time due to the lack of detailed engineering plans or mine plans of operations."[204] This claim is belied by the record.

A detailed map made by Enefit that "outlines the footprint and plan for the mine and facilities" was sent to BLM by the EPA in 2016.[205] That "sequencing map" of the South Project shows the plant site location, a pit dump, the locations where Enefit plans to conduct oil-shale mining operations *each year* for the 30-year life of the mine, and the relative location of the

[201] *See, e.g.*, BLM_00008072 ("exposed soils from … mining operations *could* … lead[] to increases in sediment and salt contributions downstream") (emphasis added); BLM_00008074 (leachates "*may* enter nearby surface water bodies or groundwater") (emphasis added).
[202] BLM_00008075.
[203] *Id.*
[204] *Id.*
[205] BLM_00006004.

"Evacuation Creek Zone" traversing the site.[206] This map was included in a PowerPoint presentation in which Enefit also detailed the "life of mine production schedule," which specified the cubic yards of overburden, tons of oil shale rock, and cubic yards of spent shale that will be generated each year.[207] The FEIS even notes that "[m]ining is expected to commence in the northeast and east portions" of the South Project, that "[a]pproximately 300 to 500 acres will be actively mined at any given time," and that "[r]eclamation of the mined areas … will begin approximately 2 to 3 years after commencement of mining in an area and will proceed concurrently with progressing mining activities."[208] The record is also replete with materials documenting the type of waste generated from oil-shale mining and processing, including its chemical constituents.[209] More precise information about "areas to be disturbed" at the South Project is difficult to imagine.

Armed with this substantial, detailed record evidence, BLM had a wealth of "non-speculative" information that it "could use to quantify" how the South Project would affect Evacuation Creek's floodplains, riparian areas, and surface and groundwater resources.[210] Yet the FEIS did not "provide[] a satisfactory explanation for why" a "quantification … [was] not feasible."[211] That the "sequencing" mine map or other information may have been preliminary,

[206] BLM_00006030
[207] BLM_00006031.
[208] BLM_00008119.
[209] *See*, *e.g.*, BLM_00002594 (toxicological risks of oil-shale waste); BLM_00014589 (characteristics of spent shale); BLM_00026471–82.
[210] *See* *Diné*, 923 F.3d at 858.
[211] *See* *Sierra Club*, 867 F.3d at 1374.

rather than final, does not excuse BLM's failure to quantify water-quality impacts.[212] "Reasonable forecasting and speculation is … implicit in NEPA."[213]

All told, the FEIS failed to make "a reasonable, good faith, objective presentation" of the South Project's impacts on water resources.[214] It therefore failed to satisfy NEPA's "hard look" standard, rendering the FEIS and the ROD arbitrary and capricious.[215]

B. The FEIS failed to take a hard look at the South Project's air pollution and greenhouse gas emissions.

The FEIS offers only a qualitative, "general description" of the South Project's air pollution and carbon emissions.[216] Using "typical oil and gas mining and refining operations" in the region as a proxy to describe the "general nature" of anticipated emissions, the FEIS notes merely that air-quality impacts "could potentially occur," the South Project "could" emit a host of air pollutants, and it could emit greenhouse gasses that "may" be higher than certain reporting requirements.[217] Then, in a statement apparently intended to play down the South Project's air pollution, the FEIS notes that "[o]verall the South Project [will] contribute[] 50,000 barrels of shale oil *per day* in a region that now produces over 20 million barrels of conventionally extracted oil *per year*."[218] But that means, apples-to-apples, that the South Project would produce 18.3 million barrels of oil per year in a region producing about 20 million barrels per year—

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[212] *Id.*
[213] *Scientists' Inst. for Pub. Info. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973).
[214] *See Colo. Envtl. Coal.*, 185 F.3d at 1177.
[215] *Diné*, 923 F.3d at 858–59; *WildEarth Guardians*, 870 F.3d at 1233.
[216] BLM_00008057–61.
[217] BLM_00008057–59, 00008062–63.
[218] BLM_0008065 (emphasis added).

nearly *doubling* the entire Uinta Basin's oil output and potentially doubling the entire Basin's emissions of ozone-precursor emissions, greenhouse gasses, and other pollutants.

Two ozone precursors, nitrogen oxides (NOx) and volatile organic compounds (VOCs), are of particular concern in the Uinta Basin given the region's dangerous ground-level wintertime ozone levels.[219] Oil and gas development is "by far the dominant source" of ozone-precursor emissions in the Uinta Basin.[220] Yet despite nearly doubling the Uinta Basin's current oil production, the FEIS merely observes that "[a]s a new source of NO_X and VOC emissions, the operation of the South Project *may* have *some* contributory effect on the current winter ozone episodes."[221]

The reasons BLM gives for not being more thorough are twofold. First, a quantified emissions estimate is unnecessary, BLM claims, because a detailed quantification will occur later during the EPA's Clean Air Act permitting process.[222] But the FEIS elsewhere claims, and the EPA agreed, that the South Project may be able to avoid Clean Air Act permitting.[223] Regardless, the "existence of permit requirements overseen by another federal agency or state permitting authority cannot substitute for a proper NEPA analysis."[224]

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[219] *See* BLM_00008064; 80 Fed. Reg. 65,292, 65,302 (Oct. 26, 2015) (detailing ground-level ozone's significant adverse health impacts); 83 Fed. Reg. 25,776, 25,836 (June 4, 2018) (Uinta Basin designated as "nonattainment" under the Clean Air Act's ozone standard).
[220] BLM_00019590.
[221] BLM_00008065 (emphasis added).
[222] BLM_00008057–58; BLM_00008061.
[223] BLM_00008121; BLM_00006164.
[224] *Sierra Club*, 867 F.3d at 1375; *see also WildEarth Guardians v. U.S. Office of Surface Mining, Reclamation & Enforcement*, 104 F. Supp. 3d 1208, 1227–-28 (D. Colo. 2015) ("hard look" required under NEPA even if proposed action compliant with other laws).

Second, BLM maintains that it could not quantitatively estimate how much air pollution and greenhouse gasses the South Project would emit because it "has not yet been fully designed and engineered," so "[e]missions data for the … South Project are not available."[225] Yet the record contains a wealth of relevant, detailed information sufficient to permit a rigorous, quantitative estimate of the South Project's emissions, even if Enefit has not completed the project's final engineering.

The EPA explicitly advised BLM that BLM's own Programmatic EIS on Oil Shale and Tar Sands (Oil Shale PEIS), which is part of the record, provides "adequate information" for BLM "to provide a quantified estimate of [the South Project's emissions] impacts" in the FEIS.[226] The Oil Shale PEIS contains a detailed analysis of the impacts from each phase of the 50,000-barrel-per-day oil shale mine and processing facility originally proposed by the Oil Shale Exploration Company, the company Enefit purchased in 2011.[227] That facility was, according to Enefit, "similar to the South Project."[228] Indeed, the Oil Shale PEIS quantified the estimated emissions of ozone precursors, carbon dioxide, methane, and other pollutants from the "similar" facility.[229]

The FEIS's only discussion of the Oil Shale PEIS, however, is a single paragraph purporting to incorporate by reference all of that nearly 4,000-page document.[230] That paragraph does not mention that the document contains an estimated emissions quantification for an oil

[225] BLM_00008057, 00008061.
[226] BLM_00005914.
[227] BLM_00027574–583.
[228] BLM_00008118.
[229] BLM_00027582; BLM_00027583; *see also* 00002996–3004 (summarizing Oil Shale PEIS's quantified emissions estimates for the similar facility).
[230] BLM_00008118.

shale processing facility "similar to the South Project," nor does it cite to any identifying information in the Oil Shale PEIS to apprise the public of how the relevant data could inform an assessment of the South Project's air quality and greenhouse gas impacts.[231]

The record also contains an academic journal that quantitatively estimates the greenhouse-gas-emissions factors from mining and processing oil shale at Enefit's Estonian oil-shale plant,[232] which uses "the same … technology that will be used in Utah" at the South Project.[233] The FEIS notes that this academic report looks at greenhouse gas emissions "for an Estonian oil shale extraction/refining project that is generally similar to the proposed South Project," which "may offer a source of comparison[]" for the South Project's emissions.[234] Yet BLM then failed to use that point of comparison to quantify the South Project's estimated emissions. Instead, the FEIS merely asserted that greenhouse-gas emissions from the South Project would be less than 58 percent of the reported emissions from Enefit's Estonian facility.[235] Given that the figures in this obscure Estonian journal were not described in the text of the FEIS, included in an appendix to the FEIS, or otherwise made available to the public along with the

[231] *See* 43 C.F.R. § 46.135(b) (properly incorporating material by reference requires "[c]itations … [to] pertinent page numbers or other relevant identifying information"); 40 C.F.R. § 1502.21 (properly incorporating material by reference requires agency to describe its contents); *Pac. Rivers Council v. U.S. Forest Serv.*, 689 F.3d 1012, 1031 (9th Cir. 2012), *vacated on other grounds*, 570 U.S. 901 (2013) (if materials incorporated by reference into an EIS "were intended to serve as the analysis of the environmental consequences" of the proposed action, the "EIS needed to do more than incorporate them by reference. They should have been described and analyzed in the [EIS's] text.").
[232] BLM_00014979.
[233] BLM_00002954.
[234] BLM_00008128.
[235] *Id.*

FEIS, the agency improperly left the public to ponder: 58 percent of what amount? That does not satisfy NEPA's hard-look mandate.[236]

Moreover, an Enefit PowerPoint presentation in the record spells out the carbon intensity of the oil produced from Enefit's "similar" Estonian oil-shale plant.[237] The FEIS, however, never mentioned this information.

All told, the record contains abundant "non-speculative," highly relevant emissions figures that BLM "could use to quantify" the estimated South Project emissions of ozone-precursors, greenhouse gases, and other pollutants.[238] BLM "has not provided a satisfactory explanation for why" a "quantification … [was] not feasible."[239] Even if the information in the record would not allow a *precise* quantification, it is unreasonable for BLM to neglect to provide *some* quantified emissions estimate.[240] Without such an analysis, "informed decision making" and "informed public comment" on the Utility Corridor's cumulative emissions impacts was not possible.[241] The EPA perhaps said it best: "[A]dequate information exists … to provide a quantified estimate of impacts" from the South Project, without which BLM "does not adequately disclose the potential indirect effects associated with oil shale mining, and therefore does not appear to provide sufficient information to provide meaningful public understanding or comment on the Project's potential impacts."[242]

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[236] *See* *Pac. Rivers Council*, 689 F.3d at 1031.
[237] BLM_00002660.
[238] *See* *Diné*, 923 F.3d at 858.
[239] *See* *Sierra Club*, 867 F.3d at 1374.
[240] *See* *id.* ("educated assumptions are inevitable in the NEPA process"); *Scientists' Inst. for Pub. Info.*, 481 F.2d at 1092 ("[r]easonable forecasting and speculation is … implicit in NEPA").
[241] *See* *Sierra Club*, 867 F.3d at 1374.
[242] BLM_00005914; *see also* BLM_00005834.

Because the record contains ample information for BLM to provide a detailed, quantified estimate of the South Project's emissions, the FEIS's cursory, qualitative discussion did not satisfy NEPA's "hard look" mandate. The FEIS and ROD are therefore arbitrary and capricious.[243]

VI. The Service and BLM violated the ESA by failing to analyze how the South Project's water withdrawal and pollution would affect endangered fish.

During consultation under Section 7 of the ESA, BLM and the Service wholly failed to evaluate how the South Project would affect the four endangered Colorado River basin fish species. When the Service learned that the South Project would use 11,000 afy for more than 30 years from the Green River, it responded that it "has never seen any project that uses this much water."[244] And yet, even though BLM and Enefit acknowledged that if the agency denied the Utility Corridor, Enefit would not withdraw water from the Green River, the government did not analyze how enabling that withdrawal by approving the Utility Corridor would affect the endangered fish.[245]

The South Project's hundreds of millions of tons of stockpiled overburden, source rock, spent shale, and oil-shale-processing wastes, and thousands of acres of surface disturbance, moreover, will be located in a watershed with a "significant nexus" to the Green River and White River, home to the four endangered fish species.[246] Those stockpiles and the massive surface

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[243] *Diné*, 923 F.3d at 858; *see Envtl. Def. Fund, Inc. v. Andrus*, 619 F.2d 1368, 1375 (10th Cir. 1980).
[244] BLM_00004955.
[245] BLM_00001817 (withdrawal from Green River would not occur "without the BLM's authorization of a right-of-way for the newly-proposed water pipeline"); BLM_00001768 ("should the BLM deny the water supply pipeline [right-of-way], … the water … would simply be sourced from a different location").
[246] BLM_00008052, 00008066, 00008069–77.

disturbance would, according to BLM, create "a potentially large source" of sediment and salt, as well as metal and hydrocarbon leachate, all of which could "enter nearby surface water bodies" and "degrade the water quality."[247] This too, the government did not analyze under the ESA.

Owing to these errors, as explained below, the Service's biological opinion (BiOp) was arbitrary and capricious, and BLM's approval of the Utility Corridor in reliance on that BiOp consequently violated the ESA's no-jeopardy mandate.

A. The Service erred by failing to analyze the South Project's water withdrawal, sedimentation, and leachate as "effects of the action."

For years leading up to the FEIS, the Service steadfastly maintained that the "Utility Corridor Project and adjacent oil shale development at the South Project area are inter-dependent actions" because the South Project is "dependent upon the Utility Corridor"—that is, that the South Project's impacts would not occur but for BLM's approval of the Utility Corridor.[248] BLM informed the Service that it disagreed with that categorization because Enefit claimed it would fully build the South Project even if BLM denied the Utility Corridor.[249] Accordingly, as the FEIS did, BLM's Biological Assessment categorized the South Project's impacts as cumulative effects—that is, effects that are reasonably certain to occur but are not caused by the Utility Corridor.[250]

When the Service subsequently issued its BiOp, and amended BiOp (hereafter referred to as the "BiOp"), it reversed its earlier thinking and analyzed as "effects of the action" only the

[247] BLM_00008066, 00008070, 00008074.
[248] BLM_00006176; FWS_000282; *see also* FWS_002114 (Service will consult on South Project's "entire water depletion"); BLM_00028629.
[249] BLM_00028912.
[250] BLM_00009175; BLM_00009257; BLM_00009269–72.

effects of building and maintaining the Utility Corridor's pipelines, transmission lines, and upgraded Dragon Road.[251] Like the FEIS, the BiOp deemed the South Project's more-than-100 billion gallon Green River withdrawal and its sedimentation and leachate impacts to be cumulative effects that would occur no matter what.[252]

This was an error for the same reason that it was an error for BLM to treat the South Project's effects as "cumulative effects" under NEPA: There was no basis in the record to assume that Enefit had alternative utility supplies to allow the South Project to proceed as planned if BLM denied the Utility Corridor. And it is a critical error, for "the categorization issue is legally determinative."[253] Unlike "effects of the action"—whether indirect effects or effects of interrelated or interdependent actions—cumulative effects under the ESA "are essentially background considerations, relevant to the jeopardy determination but not constituting federal actions."[254] As such, "nonfederal actions giving rise to 'cumulative effects' … are beyond the action agency's power" to modify by imposing and enforcing mitigation measures.[255]

For the same reason that the FEIS should be set aside for arbitrarily assuming the South Project would proceed without the Utility Corridor, so too should the BiOp.[256]

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[251] FWS_001495–97.
[252] FWS_001497–1500
[253] *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1113 (9th Cir. 2012).
[254] *Id.* at 1113–14, 1116 (citing 50 C.F.R. § 402.02).
[255] *Id.* at 1113–14.
[256] *See City of Tacoma, Washington v. F.E.R.C.*, 460 F.3d 53, 76 (D.C. Cir. 2006) (BiOp arbitrary and capricious if it failed to consider the relevant factors); *Rio Grande Silvery Minnow v. Keys*, 469 F. Supp. 2d 973, 977 (D.N.M. 2002) (BiOp arbitrary and capricious if it "entirely failed to consider an important aspect of the problem").

B. Even assuming Enefit would build the South Project without the Utility Corridor, the Green River water withdrawal is an "effect of the action."

Because Enefit would withdraw the South Project's water from the Green River *only* if BLM approved the Utility Corridor's water pipeline, that withdrawal is "an effect of the action."[257] If BLM denied the Utility Corridor, Enefit has insisted that the company would instead supply the South Project's water demand by pumping groundwater from existing monitoring wells on the South Project property.[258] Even supposing this plan was feasible—and, as explained above, the record shows it is not—the effects on the endangered fish and their habitat would be entirely different than those resulting from using Utility Corridor's water pipeline.

With the Utility Corridor, Enefit will withdraw the South Project's up-to-nearly 11,000 afy of water from the Green River and deliver it by pipeline to the South Project site.[259] It is downstream of the "point of diversion"—the location of the water withdrawal from the Green River, shown on the FEIS's map attached hereto as **Exhibit 2**)—that the four endangered fish species would be harmed by Enefit's water withdrawal, from reduced streamflow, increased sedimentation and erosion, degraded physical habitat, and reduced water quality.[260]

The groundwater wells Enefit claims it would use if BLM denied the Utility Corridor are more than 30 miles away, and in an entirely different watershed, from the Green River point of

[257] BLM_00001817 (withdrawal from Green River would not occur "without the BLM's authorization of a right-of-way for the newly-proposed water pipeline"); BLM_00001768 ("should the BLM deny the water supply pipeline ROW, … the water usage would be the same[, but] it would simply be sourced from a different location").
[258] BLM_00001776–77.
[259] BLM_00007801, 00007798.
[260] *See* BLM_00008072, 00008076, 00008102.

diversion.[261] As a result, the effects on the endangered fish species from withdrawing groundwater from those wells would be vastly different than the effects from withdrawing water from the point of diversion on the Green River.

Likewise, the other hypothetical alternative water sources mentioned in the FEIS—withdrawing water from the White River or trucking in water from an undisclosed location—would affect surface water and the endangered fish species differently than the Green River withdrawal via the Utility Corridor.[262] As Enefit acknowledged, "withdrawal of the same amount of water" from a different location, even "from the same water right[,] … has a very different technical impact than withdrawal from the Green River."[263]

Accordingly, even assuming Enefit would fully build the South Project without the Utility Corridor, the water withdrawal from the Green River and that withdrawal's resulting impacts on the endangered fish species would not occur but for BLM's approval of the Utility Corridor. And Enefit agreed: the "effects on the Green River … (e.g. reduced flow, any associated changes in water quality, etc.) of … withdraw[ing] up to 15 cubic feet per second (cfs) … *would be a result of authorizing the Utility Project*."[264] Because BLM's approval of the Utility Corridor is a "but for" cause of the nearly 11,000 afy withdrawal from the Green River and the resulting impacts to the endangered fish, the ESA required the Service to treat those impacts as "effects of the action"—either as indirect effects of the Utility Corridor or effects of

[261] Ex. 2, BLM_00007803 (shows distance between Green River point of diversion and South Project site).
[262] BLM_00007803 (shows White River dozens of miles away from Green River point of diversion).
[263] BLM_00000041; BLM_00001842 ("The difference in withdrawal location is a primary source of the differences in [endangered fish] impacts.").
[264] BLM_00001837 (emphasis added).

an interrelated or interdependent action.[265] The Service's failure to do so rendered the BiOp arbitrary and capricious.[266]

C. Even if the South Project's effects were properly categorized as "cumulative effects," the Service erred by failing to evaluate those effects.

As noted above, the BiOp improperly treated the South Project's water withdrawal, sedimentation, and leachate as cumulative effects of the Utility Corridor, rather than effects of BLM's approval of the Utility Corridor. Yet the BiOp included zero analysis of those cumulative effects. Accordingly, even if the South Project's effects are properly considered cumulative effects, the BiOp nonetheless violated the ESA.

The BiOp attempts to explain away its lack of analysis of the massive withdrawal from the Green River by claiming the agency would consult on it at some indeterminate time in the future. Specifically, the BiOp says this consultation would happen either when "another federal nexus" applies to the South Project, or when Enefit applies to the Service for an ESA incidental take permit for the water withdrawal.[267]

But the Service cannot defer its analysis to these potential junctures, for it is not certain they will happen. In fact, the record indicates that a future ESA section 7 consultation may not occur.[268] And while Enefit may risk violating the ESA if it fails to apply for an incidental take permit to cover its Green River withdrawal, "pursuing an [incidental take permit] *is not*

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[265] *Sierra Club*, 816 F.2d at 1387; 51 Fed. Reg. 19,926, 19,932 (June 3, 1986).
[266] *See City of Tacoma*, 460 F.3d at 76; *Silvery Minnow*, 469 F. Supp. 2d at 977.
[267] FWS_001498–99.
[268] *See, e.g.*, BLM_00008121 (EPA: while Clean Air Act permitting generally requires ESA consultation, the South Project may be able to avoid such permitting); BLM_00006164–65.

mandatory and a party … may proceed without a permit."[269] It was thus unlawful for the Service to decline to evaluate the South Project's withdrawal from the Green River as a cumulative effect.[270]

The Service's approach to the effects from the South Project's sedimentation and leachate was equally flawed. The BiOp recognized that the South Project's sedimentation and leachate "have the potential to affect Colorado River fishes."[271] But the Service claims it could not analyze those impacts because it "could not locate any detailed information on the specific locations of mining activities" for the South Project."[272]

Again, this claim is contradicted by the record. As discussed above, the record includes a detailed "sequencing map" of the South Project showing, among other things, the locations where Enefit plans to mine *each year* of the project's 30-year life.[273] The record also includes Enefit's "life of mine production schedule," which details the amount of overburden, oil shale rock, and spent shale that will be produced each year.[274] It was thus arbitrary and capricious for the Service to claim that, due to a lack of detailed mining information, it could not analyze the

[269] *Defs. of Wildlife v. Bernal*, 204 F.3d 920, 927 (9th Cir. 2000) (emphasis added); *see also* Fish and Wildlife Service, Habitat Conservation Planning and Incidental Take Permit Processing Handbook, at 3-2 (2016) ("seeking an incidental take permit is a voluntary action by an applicant"); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 2005 WL 1278878, at *20 (D. Or. May 26, 2005) ("[T]he effects of … future non-federal proposed actions [subject to incidental take permits] are considered 'cumulative effects' for purposes of the jeopardy analysis 'until the section 7 consultation for the [incidental take] permit is completed.'").
[270] *See Sw. Center for Biological Diversity v. Bartel*, 470 F. Supp. 2d 1118, 1132–33 (S.D. Cal. 2006) (Service improperly relied on uncertain future consultation and incidental take permit to avoid evaluating impacts to species).
[271] FWS_001499.
[272] *Id.*
[273] BLM_00006004; 00006030.
[274] BLM_00006031.

effects of sedimentation and leachate, when that very information was readily available in the record.[275]

D. BLM violated ESA section 7(a)(2)'s requirement to avoid jeopardizing the endangered fish or adversely modifying their critical habitat.

Consultation is meant to ensure that the government does not take actions "likely to jeopardize the continued existence" of endangered species or "result in the destruction or adverse modification" of their critical habitat.[276] Ultimately, any action agency—here, BLM—has a duty to ensure that its actions comply with the ESA, and "[a]rbitrarily and capriciously relying on a faulty Biological Opinion violates this duty."[277] In other words, "an agency cannot meet its section 7 obligations by relying on a [BiOp] that is legally flawed or by failing to discuss information that would undercut the opinion's conclusions."[278]

As described above, the Service's BiOp was arbitrary and capricious because it failed to evaluate the South Project's water-withdrawal, sedimentation, and leachate impacts on the endangered fish species. BLM, in turn, relied on the fatally flawed BiOp in approving the Utility Corridor.[279] BLM's ROD approving the Utility Corridor therefore was arbitrary and capricious, and violated ESA section 7(a)(2)'s mandate to ensure the Utility Corridor is not likely to

[275] *See* *City of Tacoma*, 460 F.3d at 76; *Silvery Minnow*, 469 F. Supp. 2d at 977.
[276] 16 U.S.C. § 1536(a)(2).
[277] *Ctr. for Biological Diversity*, 698 F.3d at 1127.
[278] *Id.* at 1127–28; *see also* *Colo. Envtl. Coal. v. Office of Legacy Mgmt.*, 302 F. Supp. 3d 1251, 1272 (D. Colo. 2018) ("agency behaves arbitrary and capriciously when it relies on a BiOp resulting from a materially defective consultation").
[279] BLM_00008829 (ROD relying on original BiOp); BLM_00029150 (BLM deciding to "carry forward" with the ROD after reviewing amended BiOp).

jeopardize the continued existence of the endangered fish species or adversely modify their critical habitat.[280]

VII. BLM failed to take a hard look at the cumulative impacts from Enefit developing the RD&D and Preferential Leases.

Enefit's plans to produce oil shale in Utah extend beyond the South Project, as the company also holds other nearby oil-shale resources. The FEIS, however, failed to include any analysis—quantitative or qualitative—of the cumulative effects of Enefit's mining and processing of these other oil-shale holdings.

BLM manages the leasing of oil shale resources on federal land through its research, development, and demonstration (RD&D) lease program, which is designed to address the uncertainties surrounding the economic and technical feasibility of oil-shale processing technologies.[281] BLM leases 160-acre RD&D tracts for lessees to "demonstrate the technical and economic feasibility of oil shale extractive technologies."[282] These lessees also get preference rights to a contiguous area of 4,960 acres for commercial oil-shale development (so-called preferential leases) if the applicant demonstrates it can produce commercial quantities of oil from the 160-acre parcel.

Enefit holds an RD&D lease, which would swell to a 5,120-acre preferential lease if it can produce commercial quantities of oil from the RD&D lease.[283] The preferential lease site is adjacent to the South Project land holdings and is crossed by the Utility Corridor, as shown on

[280] *See* *Ctr. for Biological Diversity*, 698 F.3d at 1127–28.
[281] *See* BLM_00025930.
[282] *Id.*; *see also* 43 C.F.R. § 3900 *et seq.*
[283] *See* BLM_00007744–45, 00027554.

Exhibit 1.[284] If Enefit obtains a preferential lease, the company plans to run the oil shale mined from that lease through the South Project's processing plant, utilizing the Utility Corridor's water, natural gas, and oil product pipelines, transmission lines, and access road.[285]

The FEIS nominally treated the effects of developing the RD&D and preferential leases as cumulative effects because it is "reasonably foreseeable" that "the leases will be issued and … will be developed."[286] Yet the FEIS contains no analysis of these effects, even though developing these leases would add more than 5,000 acres to the up-to-9,000 acre South Project. In fact, the only mention of these effects asserts: "No development is proposed[;] … [t]herefore, emissions would not occur or would be negligible and would not contribute to cumulative effects from [greenhouse gases]."[287] Given that the FEIS states that it is "reasonably foreseeable" that the RD&D and preferential leases "will be issued and … developed,"[288] it is logically incoherent for the FEIS to then conclude that emissions from developing those tracts would not occur because no development is proposed. The rest of the FEIS's cumulative effects section is silent about the impacts from developing these leases.

By failing to take a hard look—indeed, any look—at the environmental impacts from Enefit's development of the neighboring RD&D and preferential leases, the FEIS's cumulative-effects analysis was arbitrary and capricious.[289]

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[284] Ex. 1; BLM_00007773.
[285] *See* BLM_00002271; BLM_00001198; BLM_00002949.
[286] BLM_00007779; BLM_00008045; BLM_00008055.
[287] BLM_00008060.
[288] BLM_00007779.
[289] *See* *Diné*, 923 F.3d at 858.

CONCLUSION AND RELIEF SOUGHT

Under the APA, courts "*shall* … hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary [or] capricious."[290] Accordingly, unlawful agency action must be vacated and remanded to the agency to act in compliance with its legal obligations.[291]

Due to the government's violations of NEPA and the ESA, the Plaintiffs respectfully request that the Court vacate and set aside BLM's ROD, the Service's initial and amended BiOp, and BLM's grant of the rights-of-way.

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Respectfully submitted,

Michael Toll
Attorney for Grand Canyon Trust

Heidi McIntosh
Michael Hiatt
Thomas Delehanty
Attorneys for Living Rivers, Grand Canyon Trust, Center for Biological Diversity, Natural Resources Defense Council, Sierra Club, Waterkeeper Alliance, Inc., Colorado Riverkeeper, and Utah Physicians for a Healthy Environment

Edward B. Zukoski
Attorney for Center for Biological Diversity

[290] 5 U.S.C. § 706(2)(A) (emphasis added); *see also Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187–88 (10th Cir. 1999) (as used in the APA, "shall means shall").
[291] *See, e.g.*, *WildEarth Guardians*, 870 F.3d at 1239 ("Vacatur of agency action is a common, and often appropriate form of injunctive relief granted by district courts."); *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1095 (9th Cir. 2011) ("appropriate remedy" for agency action found to violate APA "is to vacate that action"); *Skull Valley Band of Goshute Indians v. Davis*, 728 F. Supp. 2d 1287, 1306 (D. Utah 2010) (vacating BLM decision held arbitrary and capricious); *High Country Conservation Advocates v. U.S. Forest Serv.*, 67 F. Supp. 3d 1262, 1264-67 (D. Colo. 2014) (vacating agency action due to NEPA violations).

REQUEST FOR ORAL ARGUMENT

The Plaintiffs request oral argument due to the nature of complex issues raised herein, and believe that the decisional process would be significantly aided by oral argument.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7), I certify that this brief complies with the type-volume limitations of Rule 32(a)(7)(B)(i), as enlarged pursuant to the Court's June 12, 2020 Order, ECF No. 80, because it contains 14,987 words, excluding the parts of the brief exempted by Rule 32(f).

Michael Toll