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VIA EMAIL AND US MAIL

Sean D. Reyes
Utah Attorney General
PO Box 142320
Salt Lake City, UT 84114-2320

Re: Illegality of CIB's Use of Mineral Lease Funds for Private Major Infrastructure, including the $53 million loan for investment in the Oakland Export Terminal

Dear Mr. Reyes:

The Permanent Community Impact Board ("CIB") has requested that you review and approve the CIB's decision to loan $53 million to four Utah counties for investment in a private export terminal in Oakland, California. On behalf of a group of my Clients in Southeast Utah, I write to support and expand the analysis contained in Attorney General Opinion 92-03, which found that private economic development projects may not be funded with Utah's mineral lease funds paid to the CIB because they are not "public facilities" and "public services" as required under federal and state law.

My Clients include Living Rivers, a Utah non-profit organization based in Grand County; Dennis Willis, a Carbon County resident; Nine Mile Canyon Coalition, a Utah non-profit organization based in Carbon County; Herm Hoops, a Uintah County resident; and Holiday River Expeditions, a Utah corporation with offices in Emery and Uintah Counties. Mr. Willis and Mr. Hoops are each residents of communities impacted by mineral development, and Living Rivers, Nine Mile Canyon Coalition, and Holiday River Expeditions maintain offices in such communities with Directors and Members or clients impacted by mineral development in rural Utah.

My Clients are troubled by the CIB's set aside or funding of private major infrastructure projects in lieu of increased grant funding for projects in their communities, such as the Price water and sewer improvement project, the new Castle Dale City Hall building, and the Grand County jail remodel. The diversion of tens of millions of dollars to private major infrastructure, especially when such infrastructure is out-of-state, harms my Clients by depriving them of essential public services that should otherwise be grant funded by the CIB and results in an increased tax burden on my Clients (or their members) to pay for such services. My Clients are further concerned that the CIB's subsidization of private industry and resulting increased mineral development has harmed and threatens to harm natural resources in Southeast Utah. These

resources include viewsheds, creeks and rivers, watersheds, canyons, trails, cultural resources, and clean air, on which my Clients rely for their livelihoods, recreation, health, and safety.

We appreciate the CIB's concern to first confirm the legality of the loan, and we believe that you must reject the CIB's loan for investment in the Oakland Export Terminal as illegal now because it funds private major infrastructure that does not provide a local governmental service to Utah residents, was not designed to primarily promote Utah's public interest, and is not open and available to the public as required by law.

In addition, to further ensure that the CIB does not continue to fund private economic development projects, we respectfully request you to:

1. Provide guidance that projects funded by the CIB's share of mineral lease funds must provide a local governmental service to Utah residents for a dominant public purpose and effect; and, where a facility is concerned, be owned or operated by a public entity or otherwise provide public access to Utah residents; and

2. Clarify for the CIB that projects out-of-state or with a dominant purpose of generating a profit for private industry and which are closed or may be closed to the public at the option of the owner, including but not limited to commodity export terminals, pipelines, electric transmission lines, and rail lines that exclusively carry fossil fuels are not "public facilities" or "public services" under law and may not be funded by mineral lease monies paid into the CIB Fund.

I. FEDERAL LAW PROHIBITS USE OF CIB FUNDING FOR PRIVATE FOR-PROFIT PROJECTS

The Federal Mineral Leasing Act requires lessees to pay one-half of royalty payments earned on the production of fossil fuels in Utah to the state to alleviate the social and economic impact caused by development of minerals. Such "community impact alleviation" shall be achieved through grants and loans to subdivisions of the state for planning and public infrastructure. *See* Mineral Leasing Act ("MLA"), 30 USC 181, *et seq*.; Utah Community Impact Alleviation Act, Utah Code 35-8a-301, *et seq*. The CIB's recent funding and prioritization of pipelines, rail lines to move fossil fuels, electric transmission lines, and other private facilities, like the Oakland Export Terminal, clearly ignore the plain language of the Mineral Leasing Act, its legislative history, and prior opinions of the Utah Attorney General that prohibit use of CIB funding for private projects for private profit.

Specifically, the MLA directs the States to use the royalty payments earned on the production of fossil fuels paid into its mineral lease account (the "CIB Fund") for "(i) planning, (ii) construction and maintenance of public facilities, and (iii) provision of public service." 30 USC § 191. The MLA does not define "public" as used therein. However, its legislative history and various federal regulations, as discussed below, interpret "public" in the traditional and common sense of the word: open and available to the people and for the benefit of the people.

The MLA's legislative history confirms that "public facilities" and "public services" do not mean private facilities operated for private profit, like the Oakland Export Terminal. AG Opinion 92-03 carefully analyzed the legislative history of the planning and public use restrictions. As the Attorney General observed, the MLA's legislative history provides numerous examples of what Congress meant by "public facilities" and "public services" including:

- Schools;
- Roads;
- Hospitals;
- Sewers and sewage disposal;
- Police Protection and Law Enforcement;
- Community Service;
- Search rescue and emergency;
- Public health;
- Libraries;
- Recreation; and
- Local government services.

See, e.g., AG Op. 92-03, p2-6, citing MLA, at § 191 (1976); H.R. Report No. 681 (HR Rep. 681), 94th Cong., 2d Sess. 19-20 (1976); S. Report No. 367 (S Rep. 367), 94th Cong., 2d Sess. 8 (1976); S. Report No. 1262 (S Rep. 1262), 94th Cong., 2d Sess. 9 (1976).

Further, the MLA's legislative history clearly shows an intent to specifically benefit: 1) Communities impacted by mineral development and their inhabitants; 2) Local communities affected by boom and bust cycles that accompany natural resources development; 3) Large numbers of new residents living in areas with mineral development; and 4) Local people bearing the impact of helping to meet national energy needs. Id.

The Attorney General's analysis is consistent with other federal laws which uniformly indicate that "public facilities and services" are improvements and services that promote and increase the welfare of the public. Simply put, they make life easier for people and communities, they are owned by a public entity or generally open and available to the public, and they are not operated for the purpose of generating a private profit. Examples of "public facilities and services" found in federal regulations include:

- Hospitals, health care clinics, and nursing homes;[1]
- Law enforcement and emergency services, such as firehouses;[2]
- Parks and recreation;[3]
- Sewer and water treatment plants;[4]

[1] Energy Impacted Area Development Assistance Program (EIAD), 7 CFR 1948.53(q) and (r); Housing and Urban Development (HUD), 24 CFR 570.21, 570.201, and 1003.201.
[2] EIAD, 7 CFR 1948.53(q) and (r); HUD, 24 CFR at 570.201.
[3] Id.
[4] Id. at 1948.53(q); Department of the Army and Defense, 33 CFR 263.25(c)(1).

- Community centers;[5]
- Municipal buildings, including libraries, city or town halls, jailhouses, and courthouses;[6]
- Schools and education;[7]
- Homeless shelters, convalescent homes, and halfway houses for run-away children, drug offenders or parolees;[8]
- Battered spouse shelters and temporary housing for disaster victims;[9]
- Group homes for mentally-handicapped persons;[10]
- Employment services;[11]
- Counseling;[12]
- Energy conservation;[13]
- Child care;[14]
- Drug abuse programs;[15]

Further, one of the most complete definitions under federal law is contained in the Departments of the Army and Defense's regulations for the Continuing Authority Programs.Under these programs, "public works" are "those important and essential public facilities which serve the general public and are owned and operated by federal, state, and local governments, such as water supply systems and sewage disposal plants." 33 CFR 263.25(c)(1). "Public services" are defined as serving "the general public and not intended to earn a profit." Id. at (c)(3).

There is not a single instance in which private economic development qualifies as a "public facility" or "public service" under the MLA, its legislative history, or other federal law. Accordingly, the Utah Attorney General's office properly concluded in Opinion 92-03 that private economic development does not qualify for CIB funding under federal law. Economic development may be a goal or purpose of the project, but "economic development by itself is not one of the traditional local government services that Congress intended to be eligible for funding by mineral monies." AG Op. 92-03, p5-6.

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[5] Id.
[6] Id.
[7] EIAD, 7 CFR 1948.53(q) and (r); HUD, 24 CFR at 570.201.
[8] HUD, 24 CFR at 570.21, 570.201, and 1003.201.

[9] Id.
[10] Id.
[11] HUD, 24 CFR at 570.201.
[12] Id.
[13] Id.
[14] Id.
[15] Id.

II. UTAH LAW PROHIBITS USE OF CIB FUNDING FOR PRIVATE FOR-PROFIT PROJECTS

Utah law, including statute, administrative rules, and case law, incorporate the language of the federal MLA and imposes the same restrictions. In doing so, Utah law also prohibits the use of CIB funding for private projects for private profit. The Utah statute governing the CIB Board is the Community Impact Alleviation Act at Utah Code § 35A-8-301, *et seq*. The Act's title is revealing, as is the fact that it is codified under the Utah Housing and Community Development Division. The Utah Community Impact Alleviation Act intends to do just that – alleviate impact in Utah communities, not in other states and not by subsidizing private industry for private profit. Id. at §§ 301; 303(6), 307(2).

The Community Impact Alleviation Act clarifies that "provision of public service" includes "contracts with public postsecondary institutions to fund research, education, or public service programs that benefit impacted counties or political subdivisions of the counties" and a "land use plan." Id. at § 305(4). Otherwise, the Utah Community Impact Alleviation Act delegates to the CIB the authority to create rules and criteria that govern the CIB funding process, which shall be consistent with the MLA. Id. at § at 307.

Accordingly, in 2012, the CIB adopted Administrative Rules to govern its mineral lease funding program, which are organized under the Workforce Services, Housing, and Community Development Rules. See R990-8. The CIB defines "public facilities and services" to mean "public infrastructure or services traditionally provided by local government entities." See R990-8-2. "Eligible applicants" include counties "which are or may be socially or economically impacted by mineral resource development." Id.

The CIB Rules require that "all applicants must demonstrate that the facilities or services provided will be *available and open to the general public* and that the proposed funding assistance is *not merely a device to pass along low interest governmental financing to the private sector*." See R990-8-3(J) (emphasis added). And the Rules further indicate that only projects within local communities may be funded since eligible projects must be listed on a counties' "*local* capital improvements list." R990-8-5(D) (emphasis added); *see also* Community Impact Alleviation Act, Utah Code § 35a-8-307(2) (factors by CIB to consider when evaluating applications shall include the "current taxes being paid by the subdivision or local agency's residents" and "all possible sources of state and local revenue"). And, in several sections, the administrative rules prioritize funding for facilities and services that address "bona fide public safety or health emergencies." *See e.g.*, R990-8-4(F) and 5(D).

Moreover, while the CIB Rules do not further define "public infrastructure or services traditionally provided by local government entities," other Utah statutes provide clear examples such as:

- Water rights and water supply, treatment, storage, and distribution facilities;[16]

[16] Impact Fees Act, Utah Code § 11-36a-102 (16) – (18) (emphasis added); County Land Use, Development and Management Act, Utah Code § 17-27a-403(3)(b); see also Utah Privatization Act, Utah Code § 73-10d-1 (defines

- Wastewater collection and treatment facilities;[17]
- Storm water, drainage, and flood control facilities;[18]
- Municipal power facilities;[19]
- Roadway facilities, which means a street or road and all necessary appurtenances;[20]
- Parks, recreation facilities, open space, and trails;[21]
- Public safety facilities, which means a building constructed or leased to house police, fire, or other public safety entities or a fire suppression vehicle;[22]
- Police and fire protection.[23]
- Environmental mitigation.[24]
- Sewage[25]
- Public utilities, rights of way and easements.[26]
- Schools and related facilities.[27]
- Garbage collection and disposal;[28]
- Health care;[29]
- Providing correctional and rehabilitative facilities and programs for detainees and prisoners;[30]
- Street lighting;[31]
- 911 and emergency dispatch;[32]
- Animal shelter and control;[33]
- Police protection[34]; and
- Cemeteries.[35]

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public services as drinking water, water, and wastewater collection, treatment, and disposal); Utah Code § 78B-2-216 (no adverse possession against land designated for public use, as defined).

[17] Id.

[18] Id.

[19] Impact Fees Act, at § 102 (16) – (18) (emphasis added).

[20] Id.; Coal Mining and Reclamation Act, Utah Code § 40-10-25(2)(d); Resource Development Act, Utah Code § 63M-5-302(1) and (2); Special Service District Act, Utah Code §§ 17D-1-201; 78B-2-216.

[21] Id.

[22] Impact Fees Act, at § 102 (16) – (18) (emphasis added); Special Service District Act, at § 201.

[23] County Land Use, Development and Management Act, at § 403(3)(b).

[24] Impact Fees Act, at § 102 (16) – (18) (emphasis added).

[25] County Land Use, Development and Management Act, at § 403(3)(b).

[26] County Land Use, Development and Management Act, at § 403(3)(b); Coal Mining and Reclamation Act, at § 25(2)(d).

[27] Resource Development Act, at § 302(1) and (2).

[28] Special Service District Act, at § 1201

[29] Id.

[30] Id.

[31] Id.

[32] Id.

[33] Id.

[34] Id.

[35] Id.

Similarly, Utah courts have defined a "public facility" very precisely, as a facility that is "owned and operated by a public entity" or "open to the public for use that cannot be denied at the pleasure of the owner." Union Pac. RR v. Public Serv. Comm'n, 211 P.2d 851, 895 (Utah 1949). And Utah's Supreme Court has found that funding for a "public purpose" can be proven only where the funding is designed to promote the public interest as opposed to furtherance of the advantage of individuals or private entities, Tribe v. Salt Lake City Corp., 540 P.2d 499, 504 (Utah 1975), and public good is the dominant interest at stake. Utah Housing Finance Agency v. Smart, 561 P.2d 1052, 1055 (Utah 1977).

III. PROPOSED METHOD FOR DETERMINING HOW THE CIB DISTRIBUTES MINERAL LEASE MONIES IN THE CIB FUND

Based on the above sources, we respectfully request you provide the following guidance to the CIB by which it must evaluate projects to determine if they meet the definition of a "public facility" or a "public service" under federal and state law:

1. BENEFIT - Does the project provide a traditionally local governmental service to the Utah public? If the project does not provide a service traditionally provided by government or serves private entities and individuals, then CIB Funding must be denied.

2. PURPOSE - Is the project's dominant purpose and intended effect to enhance public welfare for Utah residents? If the project's dominant purpose and effect is to generate a private profit or generate private economic development, then CIB Funding must be denied.

3. ACCESS - Is the project owned or operated by a public entity or, if private, is it open and available to the Utah public? If a private owner may restrict public access at its pleasure and discretion, then CIB Funding must be denied.

IV. CONCLUSION

In recent years, the CIB has allocated or prioritized tens of millions of dollars of Utah's mineral lease money for projects that fail the three-prong test set forth above, violating federal and state law. Examples include pipelines across the state to move fossil fuels, including the $29 million victory pipeline in Duchesne County; the reservation of $50 million for a short-line railroad to move fossil fuels in southeast Utah; the set aside of $53 million investment in the out-of-state Oakland Export Terminal; and the new Major Infrastructure Set Aside Fund rule that expressly permits funding for pipelines at R990-8-8(C)(1).

CIB funding of private major infrastructure is illegal and undermines the very purpose of royalty payments to the states under the MLA – rather than alleviating the burden of mineral development as intended, it will only increase and exacerbate those burdens. In addition, little prosperity trickles down to the communities in which the private economic development occurs. The lion's share of the profit is enjoyed only by large private corporations. As mandated, the CIB must strive to do the opposite: alleviate that impact caused by mineral development,

increase the general welfare of Utah residents, and create livable Utah communities supported by essential services.

For these reasons, we respectfully request the Attorney General's office not only find the $53 million loan to four Utah counties for investment in Oakland, California unlawful, but expand its opinion to provide the CIB with a clear directive to immediately cease funding private major infrastructure projects that fail the three-prong test set forth above.

We appreciate your consideration of this letter, and we look forward to reviewing your opinion on this matter soon.

Sincerely,

THE SLOAN LAW FIRM, PLLC

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Christina R. Sloan

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