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Via E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street SW
Washington, DC 20423

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July 7, 2020
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**RE: Finance Docket No. 36284, Seven County Infrastructure Coalition—Rail
Construction & Operation—in Utah, Carbon, Duchesne, and Uintah Counties, UT**

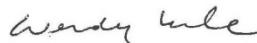
Dear Ms. Brown,

On behalf of the members and staff of the Center for Biological Diversity and in accordance with Decision 50313 issued June 17, 2020, the Center submits the following reply to the May 29, 2020, Seven County Infrastructure Coalition petition under 49 U.S.C. § 10502 for exemption from the prior approval requirements of 49 U.S.C. § 10901 in the above-referenced docket.

The Center for Biological Diversity (Center) is a non-profit environmental organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. This reply is submitted on behalf of the Center's more than 1.7 million staff, members, and online activists, including more than 680 members and 11,000 supporters who live in in Utah, including in the Uinta Basin. In order to prevent needless and unlawful environmental destruction and pollution the Center works to ensure that the impacts of development projects are fully understood, that public processes are rigorously adhered to, and that environmental and other laws are followed.

The Center respectfully replies to the Coalition's Petition for Exemption under 49 U.S.C. § 10502. For the reasons detailed below, the Petition and conditional approval should be denied, and the construction and operation of the proposed Uinta Basin Railway (or "project") should remain subject to prior Board approval pursuant to 49 U.S.C. § 10901.

Sincerely,



Wendy Park

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36284

**SEVEN COUNTY INFRASTRUCTURE COALITION—
CONSTRUCTION AND OPERATION—IN UTAH, CARBON,
DUCHESNE, AND Uintah COUNTIES, UT.**

REPLY TO PETITION FOR EXEMPTION

INTRODUCTION

The Seven County Infrastructure Coalition’s (“SCIC” or “Coalition”) Petition for Exemption has failed to provide unique or compelling reasons for the Board to grant conditional approval of its proposed Uinta Basin Rail project. Accordingly, the Board need not reach the merits of the Petition until the preparation of the environmental record for the project is complete.

In any event, the SCIC is not entitled to an exemption, and full licensing procedures are required for approval of the railway. Rather than allowing the market to decide whether an oil railway should be developed, the SCIC is (illegally) spending tens of millions of dollars in public grants to subsidize the railway and private industry. The SCIC’s primary motivation in developing the railway is to aid private oil companies by providing a cheaper shipping alternative, but the railway is not financially viable without public subsidies. Troublingly, the SCIC, and ultimately the public, are assuming the entire financial risk for the first stage of the project (acquisition of the right-of-way and federal permit), while the SCIC’s private developer partner is assuming virtually no risk, putting the SCIC in a much weaker bargaining position in the ongoing negotiation of a development agreement. As a result, the SCIC, its member counties, and/or taxpayers could be required to issue municipal bonds and assume even greater financial

risk on unfavorable terms in the negotiation of a development agreement. These circumstances require the Board to ensure that the project is financially sound and does not result in financial harm to the public or taxpayers.

Indeed, there has been little public transparency, public involvement, and accountability in the SCIC's decisions to pursue and invest public funds in the project. The Utah Attorney General has questioned the use of public funds for a private development project., while the Utah State Treasurer has criticized the rush to move forward with the project, including the SCIC's hasty selection of the project developer. And decisions relating to the rail project have been made virtually without any public input.

Further, even with public subsidies and public financing the project is unlikely to turn a profit. The project's construction could cost several billion dollars, but at present, the SCIC and its private developer have not obtained any financing for its construction, and it is highly questionable whether the developer can achieve the financing. The project's profitability is doubtful. Insufficient proven oil quantities are available in the Uinta Basin to justify the project's construction, and there is a limited portfolio of potential industries and shipping commodities that the railway could service. The collapse in the global oil market and U.S. shale industry and weak market forecasts also make it unlikely that a real market need for new crude oil transportation capacity exists in the Basin. Because public agencies are propping up a project that private developers will not pursue on their own, and municipal bonds could be used to finance the project,¹ the public may be on the hook for a multi-billion-dollar project unable to pay for itself.

¹ Drexel Hamilton Infrastructure Partners L.P., Rio Grande Pacific, Request for Information (RFI) Response for the Commercialization, Financing, Construction, Operation, and Maintenance of the Uinta Basin Railway by the

Given the potentially enormous financial risk to the public, procedural irregularities and lack of public involvement so far in the SCIC's decisionmaking, and serious questions over the project's financial viability, full licensing procedures are necessary to ensure that the Board does not approve a financially unsound project to the public's detriment, contrary to the Rail Transportation Policy under section 10101. Specifically, full licensing procedures are required to carry out the rail transportation policies "to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense," and "to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes." *See Texas Cent. R.R. & Infrastructure, Inc.*, STB Finance Docket No. 36025, at *5-6 (STB served June 20, 2019) (questions raised as to project's cost estimates, funding sources, "potential pursuit of public financing," and "sufficiency and availability of funds for the project" justified inquiry into whether application was required to carry out these policies) (citing 49 U.S.C. §§ 10101(4) and (5)).

At a minimum, the SCIC should be required to provide information about the project's financial feasibility before the Board decides whether to grant the exemption. *See id.* at *6 (noting "application...would provide the Board with additional information pertaining to the financial condition of the applicant and financial feasibility of the project that would assist the Board in considering the transportation merits of the project"); *Ozark Mountain Railroad* ("Ozark I"), 1994 ICC LEXIS 271, ICC Finance Docket No. 32204, at *2, *4 (ICC served Nov. 22, 1994) (noting Board's requiring applicant to submit additional financial information to determine whether an application should be required, which led to Board revoking conditional

Seven Counties Infrastructure Coalition of Utah (2019), at 4, 5.

approval and requiring application); *Ozark Mountain Railroad* (“*Ozark II*”), 1995 ICC LEXIS 248, ICC Finance Docket No. 32204, at *8 (Sept. 7, 1995) (affirming prior decision that Board “may require the submission of additional information in rail exemption proceedings if the impact of the proposed exemption cannot be readily ascertained from the information contained in the petition, or if significant adverse impacts might occur if the proposed exemption were granted”).

In addition, significant controversies over the project compel a full licensing proceeding. *Ozark I*, at *4 (requiring formal application in light of “the magnitude of this project and the number of interests that would be affected” and “significant opposition” to project). Full licensing procedures would also allow the Board to fully weigh the project’s costs and benefits. Before the Board makes its decision, the Board should fully develop a public record of the project’s financial fitness, so that any financial risks and risks to communities can be weighed against the project’s highly speculative purported benefits. *See Great Lakes Basin Transp., Inc.*, STB Finance Docket No. 3592_0 (STB Served Aug. 31, 2017) (Board evaluates applicant’s financial fitness “to protect...the affected communities from needless disruptions and environmental impacts if the applicant were to start construction but not be able to complete the project and provide the proposed service”).

ARGUMENT

I. The SCIC Has Failed to Meet Its Burden of Justifying Conditional Approval

As an initial matter, the Board should not grant conditional approval of the project or consider the petition for exemption until the environmental review for the project is complete. Agency policy dictates that the Board “determine the transportation merits of a construction proposal based on a complete record, including the environmental record,” unless the applicant

makes “a showing of some unique or compelling circumstances” warranting conditional approval. *California High-Speed Rail Authority*, STB Finance Docket No. 35724 (Sub-No.1), at 2 (STB served Dec. 4, 2013). The Board has “an independent statutory obligation to review thoroughly transactions brought before the agency for authorization under the Interstate Commerce Act.” *Id.* Accordingly, the Board has “questioned the benefits [of conditional approval] to a construction applicant given that the Board must consider the environmental effects of the construction proposal before any final approval can be given and before any construction may begin.” *Id.*

The current economic downturn is not a unique or compelling circumstance warranting conditional approval of the project. The SCIC fails to explain how conditional approval would provide any benefits to the project or economy. It merely mentions the ongoing pandemic’s economic impacts and claims that “minimizing the impacts by completing federal review and approval processes as efficiently as possible for projects that have the potential to provide substantial economic stimulation is important to state and local economies.” Pet. at 27. But it fails to explain how conditional approval would increase efficiencies in the federal review and approval processes or mitigate economic impacts or somehow benefit the project. *See Alaska Railroad Corp.*, STB Finance Docket No. 34658 (October 2, 2007) (denying conditional approval because applicant failed to “demonstrate[] that a two-step decisional process is needed for it to obtain the necessary funding [for project]” or that “the engineering, procurement, contracting, and permitting processes related to the construction project cannot move forward while the environmental review progresses”).

As the SCIC acknowledges, thorough consideration of the project’s environmental impacts would still be required before the Board makes a final decision on the project. *See* Pet. at

27-28. A conditional approval does not authorize any activity. “[N]o construction may begin until after the environmental review is completed and the Board issues its *final* decision.” *California High-Speed Rail, supra*, at 2 (emphasis added) (denying conditional approval based on applicant’s claim that it was contractually required to notify contractor by a certain date that construction could proceed, or else renegotiate contract). A conditional approval also has little value given “the possibility that the Board could deny the petition for exemption notwithstanding a prior conditional grant.” *See id.* at 2-3. Even if conditional approval were to somehow result in the project’s expedited approval and implementation, it is highly unlikely that the project’s touted economic benefits would be realized, given questions about its financial feasibility, as explained more fully in section II(C) below.

In sum, no unique or compelling circumstances justify conditional approval. Likewise, the SCIC fails to show how conditional approval would carry out Executive Order on Regulatory Relief to Support Economic Recovery. Pet. at 27. Accordingly, the Board need not consider the petition for exemption or transportation merits until the Office of Environmental Analysis has completed its environmental review of the project and preparation of a final EIS.

II. The Board Should Deny the Petition for Exemption

If the Board finds a two-step process is warranted, the Board should open a proceeding to allow full consideration of the merits of the petition for exemption. *See* 49 U.S.C. § 10502 (“The Board may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.”) In any event, the petition for exemption should not be granted. Contrary to the Coalition’s claims, the Board cannot find that full licensing proceedings are “not necessary to carry out the transportation policy of section 10101,” as required under section 10502 to grant an exemption.

A. The SCIC's Assumption of Enormous Financial Risk To Develop the Project Requires Closer Review of the Project's Viability

Rather than letting the financial market decide whether a railway should be developed to serve Uinta Basin oil producers, the SCIC is using \$27.9 million in public funds to subsidize the railway. The SCIC will also be liable for acquiring the right-of-way if it cannot reach a development agreement with its proposed private development partner. Given this potential liability, it may be forced to assume even greater financial risk to finance the over one-billion-dollar project by issuing municipal bonds. The potentially significant financial risks to public entities and taxpayers justify an inquiry into the viability of the project and the financial fitness of its project proponents. *Cf. California High Speed Rail, supra*, at *20 (“Many rail construction cases involve private rather than government funding. In such cases, the Board has typically declined to undertake a rigorous analysis of future profitability because the financial marketplace ultimately determines the viability of any rail line project and whether an authorized rail line is built. Thus, at least in privately funded construction cases, investors rather than the Board will determine if a proposed line will be financially viable.”).²

1. The SCIC is using \$27.9 million in public funds to subsidize the project

The railway project is primarily intended to benefit oil producers in Utah's Uinta Basin, in northeastern Utah, but the SCIC is using millions in public funds to finance the project. *See*

² In *California High Speed Rail*, the Board declined to require a full application even though public funds were at stake. However, in that case “funding decisions ha[d] already been made by bodies directly empowered to make those decisions, including [the Federal Rail Administration] and the voters of California,” and there was a “significant amount of public information and participation regarding the funding decisions available in this case.” *Id.* at *20. Here, however, there is significant controversy over whether public funding may be used for a private economic development project, as discussed in section II(B)(1) below. Further, the public was not involved in the SCIC's decision to pursue the rail project or allocate public funds to the project, as further discussed in section II(B)(3).

Petition at 38. In its 2018 application to the Utah Permanent Community Impact Board (CIB) for a \$27.9 million grant for engineering, environmental studies, federal permitting, and other pre-construction” costs for the railway, the SCIC made clear that the project’s purpose is to increase the price of Uinta crude and increase oil production in the Basin.³ For example, the application states:

Uinta crude is stranded in the Basin, resulting in a loss (due to discounts created by limited access to outside markets) to oil producers of more than \$3 billion over the last decade.

Despite generally desirable quality, the Basin’s waxy, high pour point crude oil has always presented a transportation challenge in the absence of pipeline or rail options. Trucking is not an economic option for reaching alternate markets beyond Utah. The Salt Lake City refineries are the most sensible choice under present circumstances. The lack of competition for the product has resulted in a significant price discount compared to West Texas Intermediate (WTI), the U.S. onshore benchmark crude oil. The discount has averaged 17.5% over the past decade.

It is believed access to alternate markets will raise the price paid for the Uinta Basin waxy crude and allow significant increases in oil production.⁴

However, the project is dependent on public subsidies for it to be financially viable.

According to a study commissioned by the SCIC, a private railroad firm has “relatively little incentive to invest in the construction of the [proposed railway], especially given the high associated capital costs projected and lack of current [oil] production levels sufficient to justify construction.”⁵ As a result, the SCIC found that public investment was necessary to construct the railway. See SCIC Oct. 2018 Meeting Minutes at 3 (SCIC’s lawyer noting that “Rail is viable,

³ SCIC, Large Infrastructure Set-Aside Fund, FY 2019 Application (Sept. 2018) at 11.

⁴ SCIC Grant Application (Sept. 2018) at 11; *see also id.* at 11, 12 (touting various benefits related to alternative markets for oil).

⁵ R.L. Banks & Associates, Pre-Feasibility Study of a Prospective Railroad Connecting the Uinta Basin to the National Rail Network (2018) at 31, available at: https://www.biologicaldiversity.org/programs/public_lands/pdfs/RL-Banks-SCIC-full-pre-feasibility-study.pdf

however, not at a rate of return that would entice private industry. Therefore, it would be appropriate for a public body to proceed with the Rail project....”).

Both SCIC’s representatives and its private developer partner Drexel Hamilton Infrastructure Partners LP (Drexel Hamilton) have expressed that the project could not go forward without public subsidies, including the \$27.9 million CIB grant to the SCIC for the project. Before the grant was approved, the SCIC threatened that, “If the funding is rejected, the project may not move forward.”⁶ Drexel Hamilton’s representative backed this assertion, explaining “from a capital partner standpoint *after* [the grant] allocation they should have commercial viability and commit the rest of the funds for finalization of construction.”⁷ In other words, Drexel Hamilton was not willing to invest in the project unless the CIB granted the full \$27.9 million for the railway, an amount which far exceeds the five to \$15 million it says it may invest in the railway.⁸ Despite significant controversies over the allocation of public funds for a private economic development project (as further detailed in section B), the CIB approved two grants totaling the entire requested amount for the project’s pre-construction costs in November 2018 and June 2019. The private developer is not required to reimburse the SCIC for these costs. Thus, the SCIC and public are assuming the entire financial risk of obtaining the federal permit to construct and operate the oil railway.

2. The SCIC is assuming great financial risk in the event it does not reach an agreement with the developer

⁶ June 13, 2019 CIB Meeting Minutes at 20, available at: <https://jobs.utah.gov/housing/community/cib/documents/061319cibminutes.pdf>.

⁷ *Id.* (emphasis added).

⁸ *Id.* at 11.

Until the developer and SCIC negotiate a development agreement—the deadline for which is March 31, 2021—the SCIC (and ultimately, the public) is assuming virtually all the investment risk in the project, including the pre-construction costs and right-of-way purchase. Under the Memorandum of Understanding (MOU) or “preliminary agreement” between SCIC and Drexel Hamilton, see Petition at 37, the SCIC is responsible for costs incidental to purchasing the right-of-way, while Drexel Hamilton is responsible for purchasing the right of way from private landowners.⁹ However, Drexel Hamilton will transfer the right-of-way under either of the following conditions:

- (a) Drexel and the Coalition have entered into, each in its sole discretion, a definitive long-term agreement(s) whereby Drexel or Drexel’s affiliates will have long term rights to arrange for Development Rights of the proposed railway...; or
- (b) By and no later than June 1, 2020 [renegotiated to March 2021 under the amended agreement¹⁰], provided that reimbursement has been paid in full....¹¹

While Drexel Hamilton will pay for purchase of the right-of-way if the parties reach an agreement, the SCIC’s lawyer has stated that the SCIC will be obligated to reimburse Drexel Hamilton for the right-of-way if Drexel Hamilton walks away from the project.¹² The MOU

⁹ See SCIC and Drexel Hamilton Infrastructure Partners, L.P., Memorandum of Understanding Regarding the Development of the Uinta Basin Railway (“MOU”) (May 2019) and MOU with First Amendment (Oct. 31, 2019), ¶¶ 1, 4.

¹⁰ MOU with Second Amendment (May 27, 2020), ¶ 2.

¹¹ MOU with First Amendment at ¶ 2.

¹² Thompson, John, Ute Tribe chastises Seven County Coalition, demands inclusion in railway decision-making (May 27, 2020), available at <https://ubmedia.biz/news/16628/ute-tribe-chastises-seven-county-coalition-demands-inclusion-in-railway-decision-making/>. According to this source, “During a meeting held last October, SCIC Attorney Eric Johnson explained that if Drexel Hamilton remains a partner in the UBR, the right-of-way will be transferred without cost to SCIC. But if Drexel Hamilton pulls out, SCIC is on the hook to reimburse the firm for its out-of-pocket costs associated with buying the railway easement.” *Id.*

supports this interpretation, providing that the SCIC “shall” reimburse Drexel Hamilton for the right-of-way if a development agreement is not reached by March 2021:

The Developer’s obligation to transfer all Right of Way to the Coalition by June 1, 2020 [now March 31, 2021 under the seconded amended MOU] *shall be binding regardless of whether Drexel and the Coalition have entered an agreement* giving Drexel or Drexel’s affiliates long term rights to arrange for the Development Rights of the proposed railway and *shall* be transferred to the extent permitted by law.... In the event the Right of Way is transferred to the Coalition as set forth in Paragraph 2(a) above [i.e., when the parties reach a negotiated development agreement], such transfer shall be made at no cost to the Coalition. In the event the Right of Way is transferred to the Coalition as set forth in Paragraph 2(b) above [i.e., upon reimbursement by SCIC], the Coalition *shall* reimburse the Developer in full at the time of transfer for the amounts paid by the Developer to property owners to acquire the Right of Way. The Coalition has no obligation to reimburse Developer under paragraph 2(b) above in the event the Coalition elects to not proceed with the Uintah Basin Railway or the route for which Right of Way has been purchased.¹³

Thus, if the parties are unable to come to agreement on the private-partnership and development terms and Drexel Hamilton walks away, but the SCIC still wishes to pursue the project, the SCIC will have assumed the risk of purchasing the right of way, plus it will have spent nearly \$28 million in public funds on the engineering and federal permitting costs for the project, without a private development partner to develop the project. On the other hand, Drexel Hamilton will have assumed no financial risk unless and until a development agreement is reached, or unless the SCIC pulls out of the project—a highly unlikely prospect, in light of its sunk costs in the NEPA review and federal permit. Given Drexel Hamilton’s ability to walk away at no cost and the SCIC’s liability for the right-of-way acquisition if an agreement is not reached, Drexel Hamilton has greater leverage in negotiating the development agreement,

¹³ MOU with First Amendment at ¶ 3.

including financing terms, which could be skewed unfavorably against the SCIC and the public interest.

3. The SCIC may be forced to finance the project with municipal bonds and assume even greater financial risk

The details of the project's financing are yet to be worked out, but it is possible, and perhaps likely, that municipal bonds could be used to finance the project. The MOU between the SCIC and Drexel Hamilton notes that municipal bond financing is an option. Specifically, it commits the parties "to agree upon an arrangement... for development of the [railway], which financing may include tax exempt or other municipal conduit bonds issued by the [SCIC], or other loan or credit arrangements."¹⁴ Given Drexel Hamilton's superior bargaining position, Drexel Hamilton may push for financing of the project with municipal bonds, transferring the financial risk of developing the railway to local governments and the public. Indeed, given the speculative nature of the project (as further discussed below), this may be the only option that the SCIC and Drexel Hamilton have to finance the project.

In sum, the SCIC and public have already assumed great financial risk and could assume even greater risk to develop the project. These unique circumstances require the Board's review of the project's financial viability.

B. The SCIC's Illegal Use of Public Funds and Other Missteps Warrant Full Review by the Board

¹⁴ See SCIC and Drexel Hamilton Infrastructure Partners, L.P., Memorandum of Understanding Regarding the Development of the Uinta Basin Railway ("MOU") (2019) at recital B and provision 5. at ¶ 2.

Irregularities in the appropriation of public funds for the project and selection of a developer, and the lack of public information and public input about the project require closer scrutiny of the project's viability and purported benefits.

1. The SCIC's misuse of public funds for a private development project requires closer review of the project

Significant controversy exists over the allocation of the \$27.9 million in public funds for the railway. The Utah Attorney General acting in its capacity as the CIB's attorney raised questions over the legality of the use of CIB funds for a private economic development project.¹⁵

Specifically, CIB funds are derived from federal mineral lease revenues, and under the Mineral Leasing Act (MLA) and Utah Community Impact Alleviation Act, such funds must be used for projects that alleviate federal development mineral impacts on local communities. *See, e.g., Utah Code Ann. § 35A-8-301(1)* (“It is the intent of the Legislature to make available funds received by the state from federal mineral lease revenues . . . *to be used for the alleviation of social, economic, and public finance impacts resulting from the development of natural resources in this state*, subject to the limitations provided for in Section 35 of the [MLA].” (emphasis added)). Accordingly, these statutes limit the use of these funds to “(i) planning, (ii) construction and maintenance of public facilities, and (iii) provision of public services.” 30 U.S.C. § 191(a); Utah Code Ann. § 35A-8-305(1)(a). As the Utah Attorney General pointed out, the railway project is intended to aid oil producers by spurring increased oil production in the Uinta Basin, which would only exacerbate mineral development impacts, contrary to the purpose of these funds to *alleviate* mineral extraction impacts:

¹⁵ November 8, 2018 CIB Meeting Minutes at 24; June 13, 2019 CIB Meeting Minutes at 12; *see also generally* Letters between Utah Attorney General and SCIC from October 2018.

SCIC's Application raises serious questions about whether its requested grant will be used for the MLA's intended purpose: alleviating the burden of impacts from mineral development on local communities. Instead, it appears the Proposed Project may actually exacerbate current burdens and create new burdens associated with increased mineral development. SCIC's economic analysis relies heavily upon a model that will significantly increase oil production in order for the railroad to become economically viable.¹⁶

Further, while the SCIC claimed that the project would benefit local communities by reducing truck traffic, traffic accidents, and air pollution, the Utah Attorney General and CIB's own staff questioned these claims:

SCIC representatives have claimed that the railroad will provide a transportation alternative to trucks that are currently used to haul crude oil, which cause pollution, traffic, and accidents. However, the CIB's experts believe that even if the railroad is built, truck traffic to Salt Lake City area refineries will still occur at relatively similar levels to those currently experienced. And, even if truck traffic is reduced, a significant increase in oil production will nevertheless increase burdens to local communities—not alleviate these burdens, as required by the MLA.¹⁷

These concerns were repeatedly raised by the Utah Attorney General's Office in letters to the SCIC and in both CIB meetings considering and approving the requested grants.¹⁸ However, the CIB did not require any evidence or make findings to support the SCIC's claims of community benefits. A recent legislative audit of the CIB specifically highlighted the Utah Attorney General's concerns and recommends reforms within the CIB based on these concerns.¹⁹ Specifically, it recommends the adoption of "policies which can clearly determine if a project is adding rather than alleviating the impacts of mineral extraction, primarily promotes economic

¹⁶ First Letter from Allison Garner, Office of the Utah Attorney General to Eric Johnson, Attorney for SCIC (October 17, 2018) at 4.

¹⁷ *Id.*

¹⁸ November 8, 2018 CIB Meeting Minutes at 24; June 13, 2019 CIB Meeting Minutes at 12; see also generally Letters between Utah Attorney General and SCIC from October 2018.

¹⁹ Office of the Legislative Auditor General, State of Utah, Report to the Utah Legislature, No. 2020-03, A Performance Audit of the Permanent Community Impact Fund ("Legislative Audit"), at 12, available at <https://le.utah.gov/interim/2020/pdf/00002533.pdf>.)

development, or provides low interest government financing to the private sector,” contrary to the Mineral Leasing Act and Utah Community Impact Alleviation Act’s intent.

The misuse of public funds intended to benefit the public generally for a private economic development project, and questions about the project’s benefits to local communities raised by the Utah Attorney General, demand closer scrutiny of whether the project will benefit communities in the Uinta Basin.

2. The SCIC rushed the selection of a developer

In the June 2019 CIB meeting to approve the second phase of funding for the railway, numerous questions were raised by Utah State Treasurer David Damschen as to whether procurement protocols had been properly followed or whether the process was being rushed.²⁰ A “primary concern” was “the magnitude and technical nature of the project” and that the SCIC’s members “lack the level of experience” to carry out the project.²¹ The State Treasurer emphasized “the importance of engaging all the right kinds of contract professionals with the needed expertise,” but found the SCIC’s procurement process to be “troubling.”²² Specifically, he expressed concern that “with a project of this scope and size, it is a concern there were only two bidders [to commercialize the project] with Drexel Hamilton being one,” and that the SCIC failed to post a request for proposal (RFP) in a national electronic system to “maximiz[e] transparency and competition and improv[e] the outcome of procurements.”²³

In light of the SCIC’s questionable approach to procuring its development partner and the SCIC’s failure to follow standard procurement practices, closer scrutiny of the SCIC’s and

²⁰ June 13, 2019 CIB Meeting Minutes at 18-19.

²¹ *Id.* at 19.

²² *Id.* at 18.

²³ *Id.* at 19.

Drexel Hamilton’s ability to develop and commercialize a financially viable railway is necessary. *See Ozark Mountain I, supra* at *9, *12 (requiring application under section 10901 based on public concerns that project proponent lacked necessary experience and would be “unable to construct and operate the proposed lines”). Indeed, as the State Treasurer noted in the meeting to consider the CIB grant, the project’s return on investment is “speculative,” and the SCIC and Drexel Hamilton “may not be able to deliver on promises.”²⁴

3. The SCIC failed to involve the public in its decisionmaking

Despite the significant economic and environmental challenges of developing rail in the Uinta Basin, the SCIC has so far entirely failed to involve the public in its decisionmaking regarding the rail. The SCIC has never once solicited public input on its proposal to bring rail to the region or on any of the rail feasibility studies it has commissioned. Further, it made virtually no effort to involve the public in its decision to apply for the CIB grants.

The SCIC is an “interlocal agency” composed of representatives from each of its seven member counties and is dedicated to the development of major infrastructure in eastern Utah. In its own words, its “main roles are to identify revenue-producing infrastructure assets that will benefit the region. Its mission is to plan infrastructure corridors, procure funding, permit, design, secure rights-of-way and own such facilities.”²⁵ The Board is composed of an Executive Director and Board members, with Board representatives from each of its member counties.²⁶ The public does not elect Board members to sit on its Board, but rather each of its Board members is an elected official appointed by the county they represent.

²⁴ *Id.* at 19-20.

²⁵ SCIC, <http://scic-utah.org/about>.

²⁶ SCIC, <http://scic-utah.org/staff>.

While the SCIC's meetings are open to the public, the SCIC does not traditionally provide advance public notice of its development proposals or solicit public input on its proposals unless required by law. Unlike other state agencies or political subdivisions in the state, the SCIC's rules and regulations do not require public notice and comment on its development proposals before they are approved.²⁷ At a June 2019 CIB meeting, in response to a question whether each of the counties is required to have a public hearing on any of its proposals before making any decisions, the SCIC's Executive Director did not directly answer the question, but stated that "the Coalition is made up of seven counties with an elected official that comes from each county and they are authorized to speak on behalf [of] their county."²⁸

Accordingly, the public has had little to no involvement in the SCIC's decision to pursue the oil rail project. The SCIC has never provided public notice of or solicited public comment on the project proposal, including the selection of a "preferred alternative," or whether to seek a federal loan or enter into a public-private partnership with Drexel Hamilton.

In addition, the public has had virtually no involvement in the SCIC's decisions to seek grants from the CIB, despite that the CIB's rules require it to "to have a vigorous public participation effort" and to provide "complete and detailed information...to the public regarding the proposed project and its financing" before applying for a grant:

The [CIB] requires all applicants to have a vigorous public participation effort. All applicants shall hold at least one formal public hearing to solicit comment concerning the size, scope and nature of any funding request *prior* to its submission to the Board. In that public hearing, the public shall be advised the financing may be in the form of a loan, even if the application requests a grant.

²⁷ See generally, SCIC, Rules and Regulations Manual, available at: <http://scic-utah.org/themes/Seven%20County%20Infrastructure%20Coalition/assets/docs/about/Rules-and-Regulations-Manual-2016-01-08.pdf>.

²⁸ June 13, 2020 Meeting Minutes at 15.

Complete and detailed information shall be given to the public regarding the proposed project and its financing. The information shall include the expected financial impact including potential repayment terms and the costs to the public as user fees, special assessments, or property taxes if the financing is in the form of a loan. The Board may require additional public hearings if it determines the applicant did not adequately disclose to the public the impact of the financial assistance during the initial public hearing.²⁹

In February 2018, the SCIC held a public hearing on the proposed grant application in Salt Lake City, hundreds of miles from the Uinta Basin counties, and only *after* it had already submitted its grant application to the CIB. The only notice that the SCIC provided to the public of its grant request was a brief mention of the agenda item on its website, which simply stated “Public Hearing on CIB rail funding application \$30Million.”³⁰ The notice was posted three days before the meeting,³¹ and no public comments were received during the public hearing.³² The Utah Attorney General noted that the SCIC failed to provide “completed and detailed information” about the project at the hearing, and failed to hold a hearing in the project area.³³

In September 2018, the SCIC resubmitted its application to the CIB after withdrawing its prior application.³⁴ At the CIB’s request,³⁵ the SCIC held another public hearing on the grant application in October 2018, but still only *after* it had already submitted its application. Again, the SCIC failed to do any public outreach to encourage attendance at the public hearing, other than post a notice of the hearing on its website and on the state website for public notices, only

²⁹ Utah Admin. Code R. 990-8-3(E).

³⁰ Feb. 6, 2018 SCIC Meeting Agenda for Feb. 9, 2018, available at <https://www.utah.gov/pmn/files/367921.docx>.

³¹ *Id.*

³² SCIC, Feb. 9, 2018 Meeting Minutes at 3.

³³ Second Letter from Alison Garner, Office of the Utah Attorney General to Eric Johnson at 5 (Oct. 30, 2018).

³⁴ First Letter from Aliston Garner, Office of the Utah Attorney General to Eric Johnson at 7 n.49 (Oct 17, 2018)

³⁵ Second Letter from Alison Garner, Office of the Utah Attorney General to Eric Johnson at 5 (Oct. 30, 2018).

two days before the hearing.³⁶ The public notice stated in full: “The [SCIC] will hold a Public Hearing to receive input from the public with respect to an application to the Community Impact Board for the Rail project for \$27,900,000, and related matters. The public is invited to attend and provide comments.”³⁷ No other information was provided about the project. Only one member of the public spoke at the hearing to ask a question.³⁸ Moreover, the CIB itself did not solicit any public input on the grant proposal or receive public comment at the meetings concerning the grant request. The CIB exclusively relies on the applicant to solicit public input.

The SCIC’s failures to involve the public in its decisions to develop the rail and seek public funding for the project militate in favor of full licensing procedures. *See* note 2 above.

C. Numerous Questions about the Project’s Financial Viability Require the SCIC to Submit a Formal Application

Numerous questions exist as to whether an oil railway in the Uinta Basin would be financially feasible. Construction costs of a railway along a route similar to its preferred route were previously projected at \$4.5 billion, but the SCIC’s cost projection for the railway is now a third of the initial cost, raising questions as to the reliability of the SCIC’s cost projections. In any case, the required financing for the project has not yet been secured, and whether it can be achieved for a potentially multi-billion dollar project appears increasingly unlikely. The viability of additional shipping capacity in the Uinta Basin is highly doubtful, in light of existing rail alternatives, the Basin’s limited conventional reserves, and the long-term decline in the oil market, made worse by the ongoing pandemic and crash in oil prices.

³⁶ SCIC, Oct. 9, 2018 Notice of Public Hearing.

³⁷ *Id.*

³⁸ SCIC, October 11, 2018 Meeting Minutes at 3.

1. The project could cost billions of dollars but has yet to obtain financing for construction costs

It is unclear that financing is available to cover construction costs of the Uinta Basin Railway. While most recently the Coalition and its partners have claimed that the Uinta Basin Railway would cost \$1.5 billion to construct, previous studies have resulted in much higher estimates. A 2015 Feasibility Study by the Utah Department of Transportation (UDOT) (2015 UDOT Feasibility Study) estimated a cost of \$4.5 billion³⁹ for a route similar to the Coalition's current preferred Whitmore Park alternative. The report concluded that "[t]wo alignments would be feasible to construct, with Alternative 2 through along U.S. 191 being preferred by UDOT. Nonetheless, on December 1, 2014, Uintah and Duchesne Counties informed UDOT of their determination that the return on investment for the rail line was insufficient to justify the \$4.5-billion construction cost. The Counties also concluded that the \$300 million in upfront cost to the owner to plan and implement construction was too costly."⁴⁰ The Coalition has provided little evidence about how the estimated construction cost was cut by two thirds between 2015 and the present.

Whether \$1.5 billion or \$4.5 billion, it remains unclear where the money to cover construction costs will come from. Drexel Hamilton is responsible for financing the purchase of the right-of-way and financing development of the railway, transload, and other facilities.⁴¹ The original deadline for Drexel Hamilton to prepare a proposal for the financing of right-of-way acquisition and development of the project was June 1, 2020.⁴² However, citing delays due to the COVID-19 pandemic — perplexingly the same reason that the Coalition cites as justification to

³⁹ UDOT, Uinta Basin Railroad Feasibility Study Summary Report (2015) at 39.

⁴⁰ *Id* at 39.

⁴¹ MOU at recital B and ¶ 5.

⁴² *Id* at ¶ 5.

expedite the project in its Petition — Drexel Hamilton was not able to complete this critical work of securing shippers by the original deadline, which was recently extended to March 31, 2020.⁴³ While the recent global collapse in oil demand and prices has likely made arranging for the financing of the railway significantly more difficult, there are indications — in addition to missing the initial deadline — that Drexel Hamilton and others had already been struggling to complete such work before the collapse. In February 2020, SCIC’s contractor HDR Inc. pulled out of the “[f]inancial modeling and rail operator procurement commercialization” work they had been responsible for after finding “[t]hemselves unable to follow through providing these services.”⁴⁴

And as earlier noted, it is telling that private industry has not seriously pursued this project independently. The idea has received massive government subsidies in the form of a 2001 study⁴⁵ and the 2015, 2016, and 2018 government-funded studies discussed herein, as well as the CIB grants totaling \$27.9 million. The idea for a Uinta Basin Railway has existed for decades, but private investors have never pursued the idea on their own. It remains to be seen whether the requisite private industry interest exists to transform the Uinta Basin Railway from a series of expensive government-funded studies and conceptual engineering exercises into an actual, viable railroad.

2. Alternate oil shipping options exist and are not being fully utilized

The SCIC’s stated justification for bringing a railway to the basin is that oil production is currently capped in the Uinta Basin due to the lack of shipping alternatives to trucking. However,

⁴³ SCIC, DHIP, Rio Grande Pacific Corporation, Ute Indian Tribe of the Uintah and Ouray Reservation, Memorandum of Understanding Amendment No. 2 Regarding the Development of the Uinta Basin Railway (2020) at ¶ 2.

⁴⁴ SCIC, Meeting Minutes, February 21, 2020 at 9. Available at <http://scic-utah.org/meetings>.

it is unclear whether there is any demand for additional shipping in the Uinta Basin. Shipping options already exist to bring crude oils produced in the Uinta Basin to refineries in the Salt Lake City area and elsewhere, but are not being fully utilized. As of April 2020, the refinery utilization rate for the northern Rocky Mountain states — a good proxy for the Salt Lake refineries — was down to only about 64%,⁴⁶ meaning there is currently established, unused shipping capacity to carry Uinta Basin crude oil to these nearby refineries.

Furthermore, three existing truck-to-rail crude oil transloading facilities — Price River Terminal, Savage Services terminal, and Wildcat Loadout — are operating in Carbon County, Utah.⁴⁷ These facilities already provide access to the national rail network, providing a similar service to what would be provided by the Uinta Basin Railway. Little data about these facilities' capacity and current utilization is publicly available. There are an additional three transloading facilities along the Wasatch Front: the SLGW Terminal in Salt Lake City, Scoular Terminal in Ogden, and Savage Terminal in Midvale.⁴⁸ Given the high capital costs of constructing the Uinta Basin Railway, it is unclear whether the railway will provide shipping that is cheaper than currently existing rail shipping alternatives.

3. The rail is unlikely to be profitable

A 2018 feasibility study for the Uinta Basin Railway (2018 Pre-feasibility Study) found that the viability of the railway depends on increased oil production in the Uinta Basin once the railway is established. Specifically, the study's conclusion that the future profitability of the railway justified its construction depends on its underlying assumption that "[shipping volume]

⁴⁶ Vanden Berg, Michael D, Utah Geological Survey, Fact Sheet: The COVID-19 Pandemic's Impact on Utah's Petroleum Industry (2020), available at:

<https://ugspub.nr.utah.gov/publications/circular/c-127/factsheet.pdf>

⁴⁷ Utah Department of Transportation, Utah State Rail Plan (2015) at 144, available at:

https://www.udot.utah.gov/main_old/uconowner.gf?n=22029103377080492

⁴⁸ *Id.*

forecasts reflect a ‘ramp up’ period in their early years, driven by gradually increased production of crude oil in the Uinta Basin and an assumed greater acceptance of the Uinta Basin’s crudes at various refineries....”⁴⁹ Specifically, oil production in the Basin must roughly triple to quadruple from 70,000 to 90,000 barrels per day to 225,000 to 350,000 barrels per day for the railway to be viable.⁵⁰ The study notes that “[t]he need to achieve and sustain a high volume of traffic and revenue is even more critical in the case of a railroad such as that investigated herein because the financial performance of the Uinta Basin Railroad will be tested further by the need to overcome the extremely high capital costs....”⁵¹ The study names “[f]our significant potential challenges to the achievement of the projected volumes,” which include the stability of the future price of oil, reluctance of the region’s oil producers to make commitments, and unknown demand for Uinta Basin crude oils outside of existing markets.⁵² These challenges and the ability to achieve a high volume of railway traffic are potentially insurmountable, especially in light of current historically dire market conditions and forecasts.

a. Limited proven reserves will not provide a shipping market over the long-term

Extremely limited proven oil reserves in the Uinta Basin do not justify a multi-billion dollar infrastructure expenditure. While estimates of proven conventional oil reserves in Utah vary widely, the 2014 update to the state’s 10-year Strategic Energy Plan estimated 504 million barrels remained in Utah as of 2014.⁵³ The U.S. Energy Information Administration (EIA)

⁴⁹ See R.L. Banks Study at vii.

⁵⁰ *Id.* at vii, 15, 17.

⁵¹ See *id.* at 14.

⁵² *Id.* at 14, 15.

⁵³ Utah Office of Energy Development, Energy Initiatives & Imperatives, Utah’s 10-Year Strategic Energy Plan 2.0, Updated Plan (2014), available at: https://energy.utah.gov/wp-content/uploads/2019/07/10-Year-Strategy_2.0_.pdf.

estimated 401 million barrels remained at the end of 2018.⁵⁴ In 2019 the rate of crude oil production in Utah — wherein roughly 80 to 90 percent of oil production occurs in the Uinta Basin — was roughly 37 million barrels per year, or 103,000 barrels of oil per day (bopd).⁵⁵ At that rate, proven reserves in the state would be exhausted in roughly 11 years using EIA numbers. If production rates were to increase by between 130,000 and 350,000 bopd due to the construction and operation of the Uinta Basin Railway as the Coalition claims,⁵⁶ annual production would increase to between about 85 million and 165 million barrels. At those rates conventional oil reserves in the state would be exhausted within roughly 2.5 to 5 years. This is consistent with the predictions developed in a 2016 reassessment of the Uinta Basin Railway commissioned by the SCIC (2016 Reassessment) that built upon the 2015 Feasibility Study. The 2016 Reassessment shows railway income from conventional oil dropping to zero dollars by 2030.⁵⁷ The analysis explains that “[t]he sharp spike and dip in revenue is driven by the capture of remaining conventional, proven crude oil output of the Uinta Basin to the new rail line upon the anticipated opening of the rail line in 2024, followed by depletion of this resource in 2028...”⁵⁸

⁵⁴ USEIA, Crude Oil Proved Reserves, Reserves Changes, and Production (2019), available at: https://www.eia.gov/dnav/pet/PET_CRD_PRES_DCU_SUT_A.htm.

⁵⁵ USEIA, Crude Oil Production (2020), available at: https://www.eia.gov/dnav/pet/pet_crd_crpdn_adc_mbbldpd_a.htm.

⁵⁶ See Seven County Infrastructure Coalition Response to OEA’s September 25, 2019 Information Request No. 2 at 2 (2019), available at http://www.uintabasinrailwayeis.com/documents/Response_to_OEA_Information_Request_2.pdf.

⁵⁷ HDR, Inc., Proposed Railway Access to the Uinta Basin: A Reassessment, Uinta Basin Railway Income Statement (2016) at Table 1.

⁵⁸ *Id.* at 18.

After that point, the analysis predicts that railway revenue will be driven by “an increase in gas production and the inception and growth of secondary oil production.”⁵⁹ Under the analysis’ Scenario 2, secondary oil production is of potential — not proven — reserves, and consists of “crude oil produced by secondary means such as horizontal drilling and fracturing, waterflood, and acidification[n].”⁶⁰ The report states that this secondary production “[i]s likely to occur as oil prices rise and are able to cover the additional cost of secondary extraction methods such as horizontal drilling and extensive fracturing, waterflood, or acidification.”⁶¹ Underlying these predictions is the assumption of a steady increase in crude oil prices,⁶² but conditions have changed drastically since 2016, proving that assumption wrong in the intervening years and providing new reasons to doubt such forecasts moving forward.

While the SCIC’s 2018 Pre-feasibility Study provides a more recent analysis than the 2016 Reassessment, the Coalition has refused to release an unredacted version of the 2018 study. In redacted versions of the 2018 Pre-feasibility Study obtained by the Center, the SCIC has n redacted the market forecast, transportation rate, and other data underlying the study’s conclusions on the economic feasibility of the project.⁶³ Such data should be made publicly available so that the Board and public can determine whether assertions of the railway’s viability are based on reasonable assumptions.⁶⁴

⁵⁹ *Id.*

⁶⁰ *Id.* at 15.

⁶¹ *Id.* at 16.

⁶² *Id.* at 16.

⁶³ *Supra* at for example Tables ES-2, ES-3, ES-4, pages 62-65.

⁶⁴ While the Center has been able to obtain unredacted copies of the 2015 UDOT Feasibility Study and the 2016 Reassessment and redacted copies of the 2018 Pre-feasibility Study, the Coalition via the CIB and Department of Workforce Services, “[h]as claimed all studies as Protected documents under UT CODE 63G-2-30(1,2,8,9).” Stapley, W., Information Disclosure Officer, Utah Department of Workforce Services, Dec. 19, 2019 correspondence with Ann

b. The recent global oil market collapse and relatively high production costs make it unlikely that oil producers will ramp up oil production

Even data from 2016 and 2018 should be considered stale and must be updated to reflect current market conditions and predictions. It is worth noting that long term forecasts — good or bad — of global oil prices are notoriously fraught due to the market’s legendary volatility.⁶⁵ In 2020, global demand for oil dropped precipitously due to critical measures taken to respond to COVID-19. Along with demand, prices fell to historic lows, with Uinta Basin waxy crude futures momentarily selling for -\$50.13 per barrel.⁶⁶ Due to these developments, as well as the global recognition of the urgent need to transition away from fossil fuels in order to avoid the worst impacts of global climate change, predictions about future oil extraction and consumption are in the midst of being drastically revised and reduced. Recently, Rystad Energy, a preeminent energy analysis firm, significantly reduced its estimates of global recoverable oil resources and changed its prediction of global peak oil consumption to occur three years sooner in 2027 or 2028.⁶⁷ In a world of decreasing oil consumption, crude oils from the Uinta Basin will face tough competition from crude oils produced in other regions where production costs may be significantly lower. A 2017 study contracted by the Coalition found that “When selling direct to [U.S. Gulf Coast] refiners, \$81.10 per barrel is an estimated “break-even” [West Texas

Brown, Open Government Coordinator, Center for Biological Diversity re: GRAMA request regarding Seven County Infrastructure Coalition's Applications for funding for the Uintah Basin Railway, at 1. The Center is appealing the withholding of the unredacted study.

⁶⁵ McNally, Robert, Columbia University Press, *Crude Volatility: The History and the Future of Boom-Bust Oil Prices* (2019).

⁶⁶ Vanden Berg, Michael D, Utah Geological Survey, Fact Sheet: The COVID-19 Pandemic’s Impact on Utah’s Petroleum Industry (2020) at 1, available at: <https://ugspub.nr.utah.gov/publications/circular/c-127/factsheet.pdf>

⁶⁷ McCormick, M., Financial Times, Coronavirus will hasten ‘peak oil’ by three years, says research firm (2020), available at <https://www.ft.com/content/37551636-4d8e-4334-a7b0-64a474ba055e>.

Intermediate (WTI)] price by which Uinta Basin crude may be profitably shipped to those alternate markets.”⁶⁸ An \$81 per barrel break-even point is far higher than that of many other basins in the U.S. and around the world⁶⁹ and is far higher than current longer term price predictions around \$45.⁷⁰ Furthermore, in early discussions with Gulf Coast refiners, it seems that Uinta Basin crude would still likely be subject to a discount compared to WTI prices. The pre-feasibility study states that, “No refinery representative explicitly promised or suggested that Basin producers absolutely would realize WTI from that refinery or close to it.”⁷¹

In addition to bringing into question assumptions about ever increasing global oil consumption and prices, the recent collapse of the oil market has cast increasing doubt on the sustainability of the U.S. shale industry in particular. This industry relies upon the “secondary oil production” techniques on which railway revenue would depend after 2028, according to the 2016 Reassessment.⁷² These capital-intensive techniques are not only far more expensive to develop than conventional wells, but also create wells for which production rates drops off relatively quickly, leading to a need to drill ever more wells in order just to maintain production. While some analysts have noted for several years that the U.S. fracking industry has never turned a profit and issued warnings about this unsustainable business model,⁷³ until recently the

⁶⁸ HDR, Inc., Uinta Basin Oil Pipeline Study Final Report (2017) at 11. Available at <http://scic-utah.org/storage/app/uploads/public/5d0/27e/9ad/5d027e9ad1453049115378.pdf>.

⁶⁹ See for example IMF, Breakeven Oil Prices (No Date), available at: <https://data.imf.org/regular.aspx?key=60214246>.

⁷⁰ Longley, A. Bloomberg, Demand Growth for Oil Products Has Peaked, Citigroup Says (2020), available at: <https://www.bloomberg.com/news/articles/2020-07-01/demand-growth-for-oil-products-has-peaked-citigroup-says>

⁷¹ *Supra* at 17.

⁷² *Supra* at 18.

⁷³ See for example Institute for Energy Economics and Financial Analysis, IEEFA update: Fracking companies’ 2019 performance signals ongoing crisis (2020), available at: <https://ieefa.org/ieefa-update-fracking-companies-2019-performance-signals-ongoing-crisis/>

industry enjoyed seemingly unquestioned confidence from investors. This unending stream of financing allowed the industry to operate at a loss. But with drilling activity plummeting,⁷⁴ massive debts coming due starting this year,⁷⁵ major impending asset retirement obligations to cover costs of plugged and abandoned wells,⁷⁶ possible climate liability risks, and competition from cheaper conventional oil production in the rest of the world, the future of the U.S. oil shale industry is being called into question⁷⁷ and companies have already begun to go bankrupt.⁷⁸

In Utah, the outlook for oil drilling and fracking industries is also looking poor.⁷⁹ Even before the 2020 market crash, the region's major producers were not prioritizing activities in the Uinta Basin compared to other basins in which they held assets.⁸⁰ Analysts predicted flat production rates in the coming years absent increased capital expenditures, decreased drilling and completion costs, and increasing prices.⁸¹ As of May 1, 2020 the drilling rig count in Utah

⁷⁴ Baker Hughes, Rig Count Overview & Summary Count (2020), available at: <https://rigcount.bakerhughes.com/rig-count-overview>

⁷⁵ Phillips, M. and C. Krauss, New York Times, American Oil Drillers Were Hanging On by a Thread. Then Came the Virus (2020), available at <https://www.nytimes.com/2020/03/20/business/energy-environment/coronavirus-oil-companies-debt.html>.

⁷⁶ Carbon Tracker Initiative, It's Closing Time: The Huge Bill to Abandon Oilfields Comes Early (2020), available at <https://carbontracker.org/reports/its-closing-time/>.

⁷⁷ Stevens, P. CNBC, Shale industry will be rocked by \$300 billion in losses and a wave of bankruptcies, Deloitte says, available at: <https://www.cnbc.com/2020/06/22/shale-industry-will-be-rocked-by-300-billion-in-losses-and-a-wave-of-bankruptcies-deloitte-says.html>

⁷⁸ Turak, N., CNBC, Whiting Petroleum is just the 'first domino' to fall in US shale wipeout, strategist says (2020), available at: <https://www.cnbc.com/2020/04/02/coronavirus-whiting-petroleum-is-just-the-first-domino-to-fall-in-us-shale-wipeout-strategist-says.html>.

⁷⁹ Joi O'Donoghue, A., Deseret News, Utah's oil industry crumbling under coronavirus pressure: All drill rigs have left the state (2020), available at: <https://www.deseret.com/utah/2020/5/5/21246902/pandemic-covid-19-oil-industry-crumbling-under-coronavirus-pressure>; Maffly, B., The Salt Lake Tribune, Utah's oil industry is paying a heavy price for all that cheaper gas as demand plunges (2020), available at:

⁸⁰ Smith, H., BTU Analytics, Uinta Basin Economics: Horizontal or Bust? (2019), available at: <https://btuanalytics.com/shale-production/uinta-basin-economics/>

⁸¹ *Id.*

had dropped to zero.⁸² The major oil producers in the Uinta Basin are facing looming debt payments, shrinking revenues, and difficulty obtaining financing. For example, Ovintiv, formerly Encana and formerly Newfield Exploration Company, is reducing drilling activity, laying off employees,⁸³ has lost at least one key company leader,⁸⁴ and is reportedly facing “a potential rough year ahead.”⁸⁵ The company’s Myton office and store yard is located at one of the two termini of the Uinta Basin Railway. Another major producer in the basin, Crescent Point Energy Corp, has been losing favor with investors,⁸⁶ and EP Energy recently lost the financing it needed to emerge from chapter 11 bankruptcy.⁸⁷

It is unproven and unlikely that the addition of a railway would offset these myriad challenges of the industry at large and of the Uinta Basin producers in particular.

c. The railway is unlikely to serve other bulk commodities markets, which are weak, unstable, and unproven

While the oil industry’s woes have perhaps garnered more media and public attention, the fracked gas industry has been also been facing a crisis of oversupply, low demand, and crushing

⁸² YCharts, Utah Inland Rig Count (2020), available at: https://ycharts.com/indicators/utah_inland_rotary_rigs.

⁸³ Thompson, J., UB Media, Ovintiv announces company-wide layoffs (2020), available at: <https://www.sltrib.com/news/environment/2020/04/25/utahs-oil-industry-is/>
<https://ubmedia.biz/news/16777/ovintiv-announces-company-wide-layoffs/>.

⁸⁴ Melinda Taylor, B., Rigzone, Ovintiv’s Head of Exploration Exits (2020), available at: https://www.rigzone.com/news/ovintivs_head_of_exploration_exits-22-jun-2020-162484-article/?utm_campaign=WEEKLY_2020_06_26&utm_source=GLOBAL_ENG&utm_medium=EM_NW_F6

⁸⁵ Robbins, D., Seeking Alpha, Ovintiv: A Potential Rough Year Ahead (2020), available at: <https://seekingalpha.com/article/4335076-ovintiv-potential-rough-year-ahead>

⁸⁶ Saha, D., Yahoo Finance, Hedge Funds Were Betting On Crescent Point Energy Corp (CPG) Before The Coronaivus (2020), available at: <https://finance.yahoo.com/news/hedge-funds-were-betting-crescent-161148738.html>

⁸⁷ Surria, A., A. Gladstone, and S. Biswas, The Wall Street Journal, EP Energy’s Apollo-Backed Financing Collapses After Oil Rout (2020), available at: <https://www.wsj.com/articles/ep-energys-apollo-backed-financing-collapses-after-oil-rout-11584395527>.

low prices.⁸⁸ According to the 2016 Reassessment, after conventional oil reserves are exhausted, future Uinta Basin Railway revenues would partially depend on revenues from inputs to gas development (“fracturing sand, tubular steel, drilling fluids, etc.”⁸⁹). Currently, fracked gas produced in Rocky Mountain states, including in the Uinta Basin, is strongly outcompeted by ample gas being produced in Canada and in the Permian Basin, often as a byproduct of other fossil fuel extraction activities. It is uncertain whether infrastructure projects currently proposed that may provide throughput capacity for Uinta Basin gas to be exported to Asia will ultimately be constructed and if they are constructed it is not clear that they would serve Uinta Basin producers. The proposed Jordan Cove export terminal and Pacific Connector pipeline is facing heavy opposition in Oregon where it has failed to obtain key state permits.⁹⁰ Furthermore, if Jordan Cove were to be constructed, it would likely serve mostly or exclusively Canadian gas producers, rather than producers in U.S. Rocky Mountain states.⁹¹ The final investment decision for another proposed export project, Energía Costa Azul, was also recently put on hold.⁹² While

⁸⁸ Slav, I., OilPrice.com, U.S. LNG Industry Needs Prices to Double (2020), available at: <https://oilprice.com/Energy/Natural-Gas/US-LNG-Industry-Needs-Prices-To-Double.html>

⁸⁹ *Supra* at 18.

⁹⁰ Melinda Taylor, B., Rigzone, Lawsuit Challenges FERC on Latest Jordan Cove LNG Approval (2020), available at: https://www.rigzone.com/news/lawsuit_challenges_ferc_on_latest_jordan_cove_lng_approval-04-jun-2020-162287-article/.

⁹¹ Evans, D., R. Schaaf, B. Gow, and Evans Schaaf Family, LLC, Comments on Certificate Policy Economic Benefits Test does not meet U.S. Public Interest CORRECTED COPY with Additional Information and EXHIBITS, particularly pertaining to Point 4 FERC Docket CP17-494-000 and CP17-495-000 (2020) at 2. Comments and exhibits available at: https://elibrary.ferc.gov/idmws/file_list.asp?accession_num=20200130-5149

⁹² S&P Global, Mexico liquefaction project sanctioning timing uncertain amid permit slowdown (2020), available at: <https://www.spglobal.com/platts/en/market-insights/latest-news/natural-gas/062520-mexico-liquefaction-project-sanctioning-timing-uncertain-amid-permit-slowdown>

one industry group claims that this project would serve Rocky Mountain fracked gas producers,⁹³ the first phase of the project would be relatively small and may end up moving gas from the Permian basin instead, though details remain unclear. All in all, the Uinta Basin fracked gas industry faces significant struggles that should be considered in any projections of railway revenue resulting from the transportation of material inputs to the industry.

Though the Coalition often claims that the railway would serve interests outside of the fossil fuel industry, tellingly, neither the 2016 Reassessment⁹⁴ nor the 2018 Pre-feasibility Study⁹⁵ make mention of the transport of agricultural goods such as alfalfa. These analyses, as well as the 2015 UDOT feasibility study, do not factor transport of such products into their rail revenue forecasts. The railway also is clearly not being designed to provide passenger rail service. Rather than ending at one of the Uinta Basin population centers, the railway would end at two remote sites: in Myton at Ovintiv's office and store yard and at Leland Bench in a remote Crescent Point oil field and the site of the proposed Uintah Advantage oil refinery. The STB's Office of Environmental Analysis has stated that "there are no plans for passenger rail service on the proposed rail line and no anticipated demand for passenger rail service."⁹⁶

Predictions of future rail revenue derived from the transport of unconventional crude oils (oil shale and oil/tar sands) should be considered purely speculative. The 2015 UDOT Feasibility Study states that, "[b]ased on the project's construction cost, UDOT determined that only two

⁹³ Consumer Energy Alliance, A Report on Natural Gas Markets for the Western States and Tribal Nations (2019), available at: <https://consumerenergyalliance.org/cms/wp-content/uploads/2019/04/WSTN-Report-2019-Low-Res.pdf>.

⁹⁴ *Supra*

⁹⁵ *Supra*

⁹⁶ Wayland, J., Aug. 6, 2019 correspondence Re: Uinta Basin Railway Environmental Impact Statement Question.

high-production scenarios would result in a positive return on investment. The two high-production scenarios would require that oil shale and sands technology be proven [and] that the price of oil remain above \$85 a barrel....”⁹⁷ Currently, these two assumptions are not met with crude prices around \$40 per barrel⁹⁸ and no profitable oil shale or tar sands developments operating in the Uinta Basin with consistency or at any significant scale. The 2016 Reassessment correctly notes that oil shale and oil sands production are not yet commercialized in the region.⁹⁹ For that reason, the assessment does not incorporate Scenarios 3 (oil sand) or 4 (oil shale) into its likely traffic scenario or railway income projections.¹⁰⁰

In sum, even during much more favorable market conditions than currently exist, the 2015 UDOT Feasibility Study, 2016 Reassessment, and 2018 Pre-Feasibility Study all cast significant doubt on the viability of the Uinta Basin Railway. Conditions from the reports’ traffic and revenue scenarios deemed necessary for the railway’s viability are unlikely to be met in the future. The Coalition has refused to make data from the most recent rail feasibility study public and no independent assessment of the railway’s viability has been conducted to the Center’s knowledge. Additionally, the monumental crash in fossil fuel markets that has taken place and the low chances of the market’s full recovery make it even more unlikely that the rail would be viable.

⁹⁷ *Supra* at 39.

⁹⁸ Bloomberg Energy, Markets Energy, WTI Crude Oil (Nymex) Available at: <https://www.bloomberg.com/energy> (Last accessed: July, 2020).

⁹⁹ *Supra* at 19.

¹⁰⁰ *Id.* at 15, 18, 22.

4. The Controversial Nature of the Project Requires the Board to Review the Project Under Its Full Licensing Procedures

Finally, as the Center and many other conservation and community organizations have raised in scoping comments on the project, development of the railway raises many significant environmental and socioeconomic issues, which must be weighed along with the project's financial risks, against its highly speculative benefits. The potential environmental and socioeconomic costs include destruction and fragmentation of public lands (including roadless areas in the national forest), loss of habitat of rare and endangered species, increased air pollution in an ozone non-attainment area, and lost property values of homes in the path of the railway. See *Texas Cent. R.R. & Infrastructure, Inc.*, *supra*, at *6 (service date June 20, 2019) (“[S]crutiny under the application process may be appropriate given the magnitude of the project, the substantial public interest, and the potential impact on numerous, local-area landowners”)

CONCLUSION

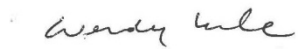
For the foregoing reasons, the Center respectfully requests that the Board deny the Coalition's Petition for Exemption, including its request for conditional approval of the project. At a minimum, the Center respectfully requests that the Board require the SCIC to submit additional information regarding the project's financial viability before deciding whether to grant the Petition, including, but not limited to, an unredacted version of the 2018 Pre-Feasibility Study commissioned by the SCIC.

Respectfully submitted,



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A handwritten signature in cursive script that reads "Wendy Park".

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of June 2020, I caused a copy of the foregoing Reply to Petition for Exemption to be served on all parties of record by email.

/s/ Wendy Park