

From: Floyd, Kathryn K. <KKFloyd@Venable.com>
Sent: Tuesday, February 2, 2021 7:36 PM
To: Wayland, Joshua; joseph_moore@fws.gov
Cc: Fawal, Margaret K.; 'Mike McKee'; Gosselin, Danielle
Subject: Proposed Uinta Basin Railway Project
Attachments: STB Letter.pdf; Response re Rail Terminals.pdf

Please see the attached correspondence.

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February 2, 2021

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U.S. Fish and Wildlife Service
Utah Field Office
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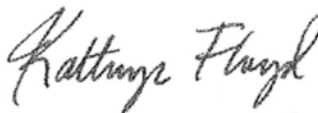
Re: Proposed Uinta Basin Railway Project

Mr. Wayland and Mr. Moore,

On behalf of the Seven County Infrastructure Coalition, I am providing a courtesy copy of the Coalition's recent response to the U.S. Army Corps of Engineers request for information on rail loading terminals associated with the Uinta Basin Railway.

Please let me know if you have any questions regarding the information contained in the attached response.

Sincerely,



Kathryn K. Floyd

Counsel for Seven County Infrastructure Coalition

Enclosure

cc: Mike McKee
Danielle Gosselin

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February 2, 2021

Nicole Fresard
Senior Project Manager
Nevada-Utah Section
Regulatory Division
U.S. Army Corps of Engineers
533 West 2600 South, Suite 150
Bountiful, Utah 84010

Re: Uinta Basin Railway; SPK-2019-00308; Response to November 17, 2020 Request
for Information on Rail Terminal Facilities

Ms. Fresard:

On behalf of the Seven County Infrastructure Coalition, I am writing in response to your letter dated November 17, 2020 requesting additional information on rail loading terminals that would be used to transfer commodities between trucks and rail care on the proposed Uinta Basin Railway. Specifically, the letter states that the Section 404 permit application submitted by the Coalition and Uinta Basin Railway LLC does not set forth a single and complete project because the Railway would not be viable without such terminals.

The Coalition appreciates the time that you and others at the U.S. Army Corps of Engineers have taken to discuss this issue, including during our call on January 12, 2021. It was particularly useful for us to hear more information on the Corps' regulatory needs and to provide additional information to you on why terminal facilities are not proposed as part of the project and why the Railway is independent from any future terminals. The purpose of this letter is to summarize the information we provided during that call.

As an initial matter, as discussed on the phone, the Coalition does not believe that the term "single and complete project" applies to individual Section 404 permit applications. The Corps' regulation, 33 C.F.R. § 330.2(i), requiring consideration of a "single and complete project" is for nationwide permits, and we have not located any precedent applying this term to individual permits. Rather, under 33 CFR § 325.1(d)(2), individual permit applications must be for "all activities which the applicant plans to undertake which are reasonably related to the same project and for which a DA permit would be required." Here, the Coalition and the Uinta Basin

Railway are the applicant and neither party “plans to undertake” construction of rail terminal facilities. Thus, such facilities are properly not part of the current 404 permit application.

With that said, we understand based on our conversation that the Corps wants to ensure that the Railway, as proposed, meets the project’s purpose and need. As explained during that call, and detailed below, the proposed Railway has independent utility from any future terminals and thus is a complete project that meets the stated purpose and need.

First, financing and construction of the rail line does not depend on the presence of a terminal. The Coalition’s private partners, Rio Grande Pacific Corporation (RGPC) and Drexel Hamilton Infrastructure Partners (DHIP), have engaged in and continue to engage in commercial discussions with potential shippers of commodities on the rail line, including oil, aggregates, fracking sand, hay, and lumber. These conversations involve “take-or-pay” agreements, which are contractual obligations to ship a specific amount of a commodity over a specific period of time and do not include any obligation to construct and operate a terminal. Importantly, execution of these agreements is not contingent on a terminal being sited or proposed by any party. In fact, several oil producers and midstream companies have stated their desire to construct their own terminals at locations they choose, of a size they choose, independently of the railway.

Second, a terminal of any type is not required for the Uinta Basin Railway to be functional and operational. Freight consisting of many different commodities can be loaded and unloaded from Uinta Basin Railway trains at numerous locations along its proposed route without any site improvements, using mobile loading or unloading machinery and driving trucks on existing roadways or across unimproved land until adjacent to the railway. This could include crude oil, frac sand, sand and gravel, lumber, cement, or wind turbine components, of which numerous examples can be found in the U.S. being loaded and unloaded from trains with no fixed infrastructure or terminal in place.

Several Uinta Basin oil producers presently are loading substantial quantities of crude oil onto railway trains without any fixed or permanent infrastructure in place, or planned to be in place, other than the railway track itself. For example, at Wildcat, Utah, an oil producer is currently loading up to 25,000 bbl/day onto oil trains without any fixed infrastructure other than the railway track. The crude oil is pumped from the trucks directly into the railway tank cars using mobile pumps mounted on wheels that are towed behind pickup trucks to where they are needed. There are no storage tanks, loading racks, or piping in place, and none are planned. This type of loading could occur at several different places along the Uinta Basin Railway.

Finally, as we explained, railways are frequently constructed and operated separately from rail terminal facilities. An applicant granted authority to construct and operate a rail line by the Surface Transportation Board obtains a common carrier obligation, meaning that it has a statutory duty to provide “transportation or service on reasonable request.” 49 U.S.C. § 11101(a). A railroad may not refuse to provide service merely because to do so would be inconvenient or unprofitable. *G.S. Roofing Prods. Co. v. Surface Transp. Bd.*, 143 F.3d 387, 391 (8th Cir. 1998). This means that any shipper can request service from the Uinta Basin Railway, and those shippers can decide to construct and operate their own terminal facilities, or to use terminal facilities constructed and operated by other third parties. There are more than thirty lineal miles of the proposed Uinta Basin Railway route that have adequate space and geography for the construction of a terminal. Moreover, a shipper could locate a terminal at some distance from the Uinta Basin Railway and construct an independent industrial spur track or private line of rail to connect to the Uinta Basin Railway. Each shipper that ultimately uses the Uinta Basin Railway could construct its own terminal independently of every other shipper, resulting in several dozen terminals of various sizes and for various commodities, each financed, constructed, and operated independently of each other. And, as noted above, freight can be transferred to rail without any terminal infrastructure in place.

Although the exact location, number, and size of future rail terminals or transfer locations are unknown, OEA has made the reasonable assumption for purposes of the NEPA cumulative impacts analysis that two terminals will be constructed at the Railway’s terminus points near Myton and Leland Bench.¹ These terminus points were selected because the Coalition believes that they provide access to areas of potential shipper and/or receiver interest. Specifically, the points are anticipated to facilitate access to the railway due to (1) proximity to traffic source; (2) topography and location; and (3) surrounding land uses. In light of these factors, it is reasonable for OEA to conclude that rail terminals at these locations are reasonably foreseeable and to conduct its cumulative impacts analysis based on OEA’s knowledge on how similar terminals have been constructed and operated across the country.

¹ Whether something has independent utility is a separate and distinct question from whether it is a reasonably foreseeable cumulative impact under NEPA. *See, e.g., City of Boston Delegation v. Federal Energy Regulatory Commission*, 897 F.3d 241, 251-54 (D.C. Cir. 2018)

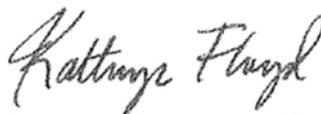
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Again, we appreciate the time you have spent discussing this issue with us, and we understand based on our previous conversation on January 12 that the information above has adequately addressed the Corps' stated concerns. Of course, if you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, reading "Kathryn Kusske Floyd". The signature is written in a cursive, flowing style.

Kathryn Kusske Floyd

Counsel for Seven County Infrastructure Coalition

cc: Jason Gibson, USACE
Mike McKee, SCIC