

Wayland, Joshua

From: Jeff Comstock <jcomstock@moffatcounty.net>
Sent: Tuesday, June 25, 2019 2:12 PM
To: Rutson, Vicki; Wayland, Joshua
Cc: dcook@moffatcounty.net; 'Ray Beck'; 'Donald.'; 'Bair, Betsy (Gardner)'; Kelsey_Foy@gardner.senate.gov; George Rossman; Brandon.Bainer@mail.house.gov; Matthew_Kireker@bennet.senate.gov
Subject: Response to STB Cooperating Denial Letter
Attachments: Surface Transportation Board-Cooperating Agency Response- Moffat County.pdf; Final Sage Grouse MOU- BLM-MoCo- Cooperating Agency.pdf

Ms. Rutson and Mr. Wayland,

Please see the attached letter, and supporting attachment, responding to your Cooperating Agency phone calls and letter to Moffat County. Although we appreciate your offer to “consult” with Moffat County, we find “Cooperating Agency Status” significantly more relevant to Moffat County on the limited issues we desire “Cooperation”. All three Commissioners and myself are available almost any time for a phone discussion regarding this topic.

Jeff Comstock, Director

Moffat County Natural Resources Dept.
221 W. Victory Way, Suite 130
Craig, Colorado 81625
Phone: (970) 826-3400



VIA EMAIL

June 25, 2019

Victoria Rutson
Director, Office of Environmental Analysis
and Federal Preservation Officer
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001
Vicki.Rutson@stb.gov

Joshua Wayland
Environmental Protection Specialist
Surface Transportation Board
Office of Environmental Analysis
395 E Street, SW
Washington, DC 20423-0001
Joshua.Wayland@stb.gov

Re: Uinta Basin Railway Cooperating Agency Request – Docket No. FD 36284

Ms. Rutson and Mr. Wayland:

By voicemail, Ms. Rutson informed each of the Moffat County Commissioners (“Commissioners”), that it is the Surface Transportation Board’s (“Board”) “longstanding practice” to only invite entities with federal permitting jurisdiction to participate as cooperating agencies. By letter dated June 7, you explained that “[Council on Environmental Quality] regulations do not require that the Board invite local entities to be cooperating agencies.” Your letter, however, ignores multiple CEQ directives that require federal agencies to identify and invite local governments to be cooperating agencies. Moffat County believes that the CEQ direction override the unwritten policies of the Board.

The CEQ rules bind all federal agencies, commissions and boards unless compliance violates another federal law. 40 C.F.R. § 1500.3. Thus, the Board is bound by CEQ rules and CEQ direction and memoranda issued to implement those regulations is persuasive authority for how the Board should invite cooperating agencies to participate.

The CEQ distilled the cooperating agency determination into two steps in 1999: (1) *identifying* state, tribal, and local governments that have jurisdiction by law and special expertise; and (2) “*determin[ing]* whether such non-federal agencies are interested in assuming the responsibilities of becoming a cooperating agency. . . .” See Attach. 1, CEQ Memorandum, *Designation of Non-Federal Agencies to be Cooperating Agencies in Implementing the Procedure of the NEPA*, at 1 (July 28, 1999). Notice that the premise of the 1999 memorandum was to direct federal agencies to identify and invite local governments to participate as cooperating agencies if they had special expertise or jurisdiction by law. The CEQ concluded that “cooperator status for appropriate non-federal agencies should be routinely solicited.” *Id.* at 2.

The CEQ reprimanded federal agencies “longstanding practice” of failing to seek *and grant* cooperating agency status to state and local governments. See Attach. 2, CEQ Memorandum, *Cooperating Agencies in Implementing the Procedural Requirements of the NEPA*, at 1 (Jan. 30, 2002). In its 2002 memorandum that

affirmed the 1999 memorandum, CEQ emphasized that “[c]ooperating agency status is a major component of agency stakeholder involvement” and that failure to invite, and accept, local governments has ultimately led to the “inconsistent implementation of NEPA.” *Id.* The 2002 memorandum implements the clear and unambiguous mandate that federal agencies conduct the NEPA process “*in cooperation with* State and local governments.” 42 U.S.C. §§ 4331(a) (emphasis added). The Board’s “longstanding practice” is precisely the type of practice that the 1999 and 2002 memorandum were drafted to end.

The 1999 direction builds on the 1981 iteration of CEQ’s Forty Most Asked Questions. The CEQ’s 40 Most Asked Questions state that “the lead agency *should seek the cooperation of state or local agencies of similar qualifications*. . . The request for cooperation should come at the earliest possible time in the NEPA process.” 46 Fed. Reg. 18026-01, *Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations*, (1981) (emphasis added). Indeed, entities that have jurisdiction by law – like Moffat County – “cannot opt out entirely of the duty to cooperate on the EIS” after they have been invited and accepted because the project *requires* those permits and approvals. *Id.* In other words, the CEQ recognized that cooperating agency status is essential when a non-federal entity has authority over all or some part of the project and thus its successful completion. The CEQ’s Forty Questions guidance remains persuasive authority on the interpretation of NEPA rules and regulations. *See e.g., New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 705 (10th Cir. 2009).

Your statement that it is the Board’s “policy” or “practice” to not offer cooperating agency status to any state or local government, therefore, clearly contradicts the repeated direction from CEQ as to how the rules regarding cooperating agency status are to be implemented. And, contrary to your voice mail, the Board is not doing Moffat County any favors by willfully excluding it from participating as a *CEQ recognized cooperating agency*. Moffat County has many years of experience with controversial federal projects, such as identification and management of Greater Sage-Grouse habitat, water allocation and storage projects under federal river compacts, renewable and non-renewable energy transmission corridors, and land use plans for public and National Forest lands. Moffat County uses legal and environmental consultants to effectively participate in these projects. Your claim that Moffat County will somehow benefit from participating as a “consulting” agency – a status not recognized by CEQ or Surface Transportation Board rules – flies in the face of decades of work with other federal agencies and the special standing granted to cooperating agencies. If the CEQ intended to create additional categories of “consulting” agencies, it would have done so in the rules.

A. *Moffat County Has Jurisdiction by Law*, 40 C.F.R. §§ 1508.5, 1508.15

The CEQ regulations define jurisdiction by law to mean “agency authority to approve, veto, or finance all or part of the proposal.” 40 C.F.R. § 1508.15; CEQ Memorandum, *Cooperating Agencies in Implementing the Procedural Requirements of the NEPA*, at 4 (Jan. 30, 2002). Moffat County has broad authority under the Local Land Use Control and Conservation Act including, protecting lands from immediate or foreseeable material danger to significant wildlife habitat, Colo. Rev. Stat. § 29-20-104(1)(b), regulating the use of land to minimize the impact thereof on the community or surrounding areas, *id.* at (1)(g), and “otherwise planning for and regulating the use of land so as to provide planned and orderly use of land and protection of the environment in a manner consistent with constitutional rights.” *Id.* at 1(h).

Commissioners are also authorized to “to provide for the physical development of the unincorporated territory within the county and for the zoning of all or any part of such unincorporated territory.” Colo. Rev. Stat. § 30-28-102. The Commissioners may also enforce the zoning regulations by withholding permits. Colo. Rev. Stat. § 30-28-114. Moffat County has adopted zoning, and other land use control regulations to guide development of all lands in the County. *See* Moffat County Zoning Resolution Section 400. The Project Proponent for the Uinta Basin Railway would need to apply for, and be approved of, a Conditional Use Permit pursuant to Section 405.3. For example, TransWest Express, LLC, a wholly owned affiliate of The Anschutz

Corporation, was required to apply for and receive a Conditional Use Permit before it could begin construction of a 3,000 megawatt transmission line through Moffat County. The Uinta Basin Railway is no different and any construction must also conform to Moffat County zoning and permitting.

Thus, Moffat County has substantial jurisdiction by law over the Railway and the Board must respect the CEQ's guidance and offer Moffat County cooperating agency status.

B. Moffat County Has Special Expertise, 40 C.F.R. §§ 1508.5, 1508.26

CEQ defines special expertise as a "statutory responsibility, agency mission, or related program experience." 40 C.F.R. § 1508.26. The CEQ guidance focuses on whether a non-federal agency has expertise as to the alternatives in the EIS or the significant environmental, social, or economic impacts associated with the proposed action. CEQ Memorandum, *Cooperating Agencies in Implementing the Procedural Requirements of the NEPA*, at 2, 4 (Jan. 30, 2002). A non-federal agency that has "expertise regarding the proposed actions' relationship to the objectives of regional, State and local land use plans, policies, and controls (1502.16©)" would be allowed cooperating agency status. *Id.* at Attach. 2.

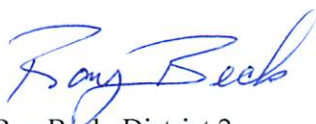
As explained previously, Moffat County has significant experience working with energy transmission companies, natural gas developers, wind and solar energy, transportation planning, wildlife migration and sensitive species planning, with the Bureau of Land Management, U.S. Forest Service, the National Park Service, and the Bureau of Reclamation. Moffat County does not intend to frustrate the Board's analysis, process, or needlessly interfere in issues or matters that do not affect Moffat County. Moffat County only wishes to participate as a cooperating agency in order to ensure that the issues germane to Moffat County are adequately addressed – for example socioeconomic analysis of Moffat County, permit issues, assessment and tax base analysis, and public land uses that may be impacted by the railway.

Moffat County hopes this letter can resolve the issue. Attached to this email, you will find a template MOU that Moffat County has used in the past with the Bureau of Land Management to show the scope of the duties Moffat County intends to fulfill. Please contact the Commissioners at your earliest convenience to discuss any further issues.

Respectfully,



Don Cook, Chairman
Moffat County Commissioner



Ray Beck, District 2
Moffat County Commissioner



Donald Broom, District 3
Moffat County Commissioner

CC: Senator Cory Gardner
Senator Michael Bennet
Representative Scott Tipton

MEMORANDUM OF UNDERSTANDING
BETWEEN
MOFFAT COUNTY
THE UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
BY AND THROUGH THE NORTHWEST COLORADO DISTRICT BLM DISTRICT MANAGER
REGARDING
DEVELOPMENT OF THE NORTHWEST COLORADO SAGE-GROUSE
ENVIRONMENTAL IMPACT STATEMENT

**Memorandum of Understanding
Between Moffat County and the Bureau of Land Management**

1. Parties to and Purpose for this Document:

This Memorandum of Understanding (MOU) is entered into between Moffat County and the United States Department of the Interior, Bureau of Land Management (BLM), by and through the Northwest Colorado District Manager (BLM), for the purpose of coordinating and cooperating in conducting an environmental analysis and preparing the Environmental Impact Statement (EIS) for the Northwest Colorado Sage Grouse EIS Plan Amendment (Project). This MOU establishes Moffat County as a "cooperating agency" in the EIS and documentation process and establishes procedures through which Moffat County and the BLM will participate on the BLM interdisciplinary team (IDT) to conduct the analyses and develop the EIS.

Moffat County has designated Jeff Comstock, as primary representative, and Tom Gray, as alternate representative, to represent Moffat County as its members on the IDT. The alternate representative may represent Moffat County, if Jeff Comstock is unavailable.

2. Background:

The BLM is writing an Environmental Impact Statement to analyze incorporating new sage-grouse conservation measures into its Resource Management Plans for the five field offices within the District: the Colorado River Valley Field Office in Silt, the Grand Junction Field Office, the Kremmling Field Office, the Little Snake Field Office in Craig and the White River Field Office in Meeker.

More than 1.8 million acres of Colorado's greater sage-grouse habitat are on BLM lands in the Northwest District.

The intent of the EIS is to provide National Environmental Policy Act (NEPA) documentation and support for the Record of Decision (ROD), if applicable.

Consistent with the National Environmental Policy Act of 1969, 42 U.S.C. 4321 et. seq., as amended, and pursuant to the Code of Federal Regulations (40 CFR 1501.6 and 1508.5), State or local governments may participate in the development of environmental documentation for projects in which or where they have jurisdiction by law or special expertise.

The BLM has offered and Moffat County has accepted cooperating agency status in the development of the EIS for the Project.

3. Term of MOU:

This MOU shall commence upon the day and date last signed and executed by the duly authorized representatives of the parties to this MOU, and shall remain in full force and effect until terminated. This MOU may be terminated, without cause, by either party upon thirty (30) days written notice to the other party, which notice shall be delivered by hand or by certified mail.

4. Responsibilities of Moffat County:

- Moffat County will participate in the EIS and documentation process by providing information regarding environmental issues in which or where Moffat County has jurisdiction by law or special expertise.
- Moffat County will have one member appointed to the IDT, as identified in Paragraph 1 above. Moffat County member may attend and participate in IDT meetings, will provide supporting documentation, and will provide input as necessary, according to IDT protocol.
- Moffat County will provide information from its records to the IDT, as needed.
- Moffat County will submit information at its discretion or upon request by any IDT members or the BLM project manager, within the specified time frames.
- Through Moffat County's IDT member, Moffat County will have the opportunity for input to preliminary draft documents prepared during the EIS process. The IDT members may, at any time during the effective term of this MOU, request records by contacting Moffat County point of contact identified in Section 8i.
- Moffat County will provide public records, and other records deemed appropriate, and consistent with the provisions specified in Section 8g.

5. Responsibilities of the BLM:

In accordance with 40 CFR 1501.5, the BLM is the Project lead agency.

- The BLM Project IDT leader is Erin Dreyfuss.
- The BLM will keep all IDT members apprised of current events in relation to the development of the EIS.
- The BLM will utilize Moffat County input and proposals to the maximum extent possible, consistent with legal requirements and its responsibility as lead agency.
- Beyond including Moffat County in all IDT meetings, the BLM will appropriately involve other County governments and Colorado State Government in other meetings where involvement would be necessary or of benefit to the process.
- The BLM will ensure that input from Moffat County is appropriately incorporated into the EIS.
- Any decisions on BLM-administered lands and federal mineral estate under BLM jurisdiction will be made by the BLM.

6. Mutual Responsibilities of Moffat County and the BLM:

- Moffat County and the BLM will cooperate in apprising each other, as far in advance as possible, of any related actions or problems that might affect the EIS and documentation process or that might affect either party.
- The parties will cooperate in the development and review of any operating guidelines or agreements between Moffat County or the BLM and other entities involved in Moffat County for the EIS which might affect the writing of the EIS.
- The BLM and Moffat County agree to meet on issues concerning the EIS at the request of either party.

The Moffat County representative, the IDT leader, and the Northwest Colorado District Manager will serve as the MOU core team. The purpose of the MOU core team will be to coordinate communication among the parties to the MOU throughout the EIS process. MOU core team members will be responsible for relaying information to and from their constituents on a timely basis.

7. Payment:

No payment shall be made to either party by the other as a result of this MOU, including but not limited to, payment for any cost incurred as a result of carrying out any responsibility identified above. Each party shall pay its own costs. During the course of the project, should it become necessary for one party to purchase from or make payment or reimbursement to the other party, such arrangements will be covered in a separate cooperative agreement.

8. General Provisions:

a. Amendments.

Either party may request changes in this MOU. Any changes, modifications, revisions, or amendments to this MOU, which are mutually agreed upon by and between the parties to this MOU, shall be incorporated by written instrument, executed and signed by all parties to this MOU and are effective in accordance with the terms of paragraph 3 above.

b. Applicable Law.

The construction, interpretation and enforcement of this MOU shall be governed by the applicable laws of the United States and Moffat County.

c. Entirety of Agreement.

This MOU, consisting of seven (7) pages, represents the entire and integrated agreement between the parties and supersedes all prior negotiations, representations and agreements

concerning the EIS, whether written or oral.

d. Severability.

Should any portion of this MOU be determined to be illegal or unenforceable, the remainder of the MOU shall continue in full force and effect, and either party may renegotiate the terms affected by the severance.

e. Sovereign Immunity.

Moffat County and the BLM do not waive their sovereign immunity by entering into this MOU, and each fully retains all immunities and defenses provided by law with respect to any action based on or occurring as a result of this MOU.

f. Third Party Beneficiary Rights.

The parties do not intend to create in any other individual or entity the status of third party beneficiary, and this MOU shall not be construed so as to create such status. The rights, duties and obligations contained in this MOU shall operate only between the parties to this MOU, and shall inure solely to the benefit of the parties to this MOU. The provisions of this MOU are intended only to assist the parties in determining and performing their obligations under this MOU. The parties to this MOU intend and expressly agree that only parties signatory to this MOU shall have any legal or equitable right to seek to enforce this MOU, to seek any remedy arising out of a party's performance or failure to perform any term or condition of this MOU, or to bring an action for the breach of this MOU.

g. Exchange of Information.

Parties to this MOU will have access to all information relevant to the fulfillment of their responsibilities under this agreement. Data provided pursuant to this agreement may contain proprietary BLM or Moffat County information. All records or information requested of either party by the other will be reviewed by the releasing party prior to release. To the extent permissible under law, any recipient of proprietary information agrees not to disclose, transmit, or otherwise divulge this information without prior approval from the releasing party. Any breach of this provision may result in termination of this MOU.

h. Administrative Considerations.

Pursuant to 204(b) of the Unfunded Mandates Reform Act of 1995, responsible Federal Agency officials may meet or enter into project level MOUs with officials of State and local Governments or their designees. During such meetings and development, implementation and monitoring of such MOUs, views, information and advice are exchanged, or input relative to the implementation of Federal programs is obtained. Such meetings and MOUs will further the administration of intergovernmental coordination. The meetings or MOUs referred to include, but are not limited to, meetings called for the purpose of exchanging views, information, advice or recommendations, or for facilitating any other interaction

relating to intergovernmental responsibilities or administration.

Nothing in this MOU will be construed as limiting or affecting in any way the authority or legal responsibility of Moffat County or the BLM, or as binding either Moffat County or the BLM to perform beyond the respective authority of each, or to require either assuming or expending any sum in excess of appropriations available. It is understood that all the provisions herein must be within financial, legal, and personnel limitations, as determined practical by Moffat County and the BLM for their respective responsibilities. This MOU is neither a fiscal nor a funds obligation document.

Nothing in this MOU will be construed to extend jurisdiction or decision-making authority to the BLM for planning and management of land and resource uses for any non-Federal lands or resources in the Project area. Similarly, nothing in this MOU will be construed to extend jurisdiction or decision-making authority to Moffat County for planning and management of land or resource uses on the Federal lands or mineral estates administered by the BLM. Both Moffat County and the BLM will work together cooperatively and will communicate about issues of mutual concern.

i. Contacts:

The primary points of contact for carrying out the provisions of this MOU are:

Moffat County

PRIMARY REPRESENTATIVE
Jeff Comstock

ALTERNATE REPRESENTATIVE
Any Moffat County Commissioner

BLM

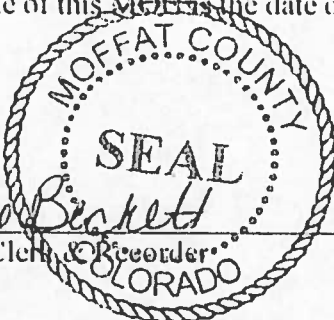
Erin Dreyfuss
2815 H Road
Grand Junction, CO 81506

9. Signature:

In witness whereof, the parties to this MOU through their duly authorized representatives have executed this MOU on the days and dates set out below, and certify that they have read, understood, and agreed to the terms and conditions, of this MOU as set forth herein.

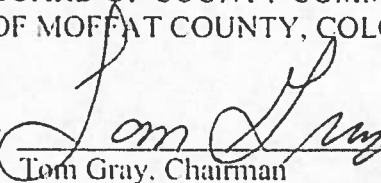
The effective date of this MOU is the date of the signature last affixed to this page.

ATTEST:

The seal of Moffat County, Colorado, is a circular emblem with a rope-like border. Inside the border, the words "MOFFAT COUNTY" are at the top and "COLORADO" is at the bottom, separated by dots. In the center, the word "SEAL" is prominently displayed. A signature, "Stephanie Beckett", is written across the seal.
Stephanie Beckett
Moffat County Clerk & Recorder

BOARD OF COUNTY COMMISSIONERS
OF MOFFAT COUNTY, COLORADO

By

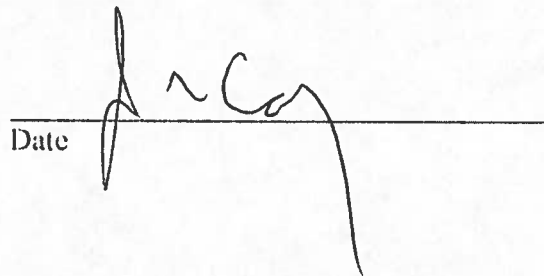
A handwritten signature in cursive script, appearing to read "Tom Gray", is written over a horizontal line.
Tom Gray, Chairman

Date Aug. 13, 2012

U. S. DEPARTMENT OF THE INTERIOR,
BUREAU OF LAND MANAGEMENT,
by and through:

8-20-12
James A. Cagney
Northwest Colorado District Manager

Date

A handwritten signature in cursive script, appearing to read "J. A. Cagney", is written over a horizontal line.