

[print](#)

Local attorney asks Utah Attorney General to stop CIB from allocating money for Oakland Export Terminal, other projects

by Molly Marcello

Staff Writer

10.29.15 - 09:52 am

Pressured by dwindling mineral lease revenues, the Utah Permanent Community Impact Fund Board (CIB) is now debating the benefits of continuing to set aside money for major infrastructure projects. Underscoring the board's discussions is the potential that continuing to commit mineral lease revenues to major infrastructure projects — as the CIB has done in recent years — may violate both state and federal laws.

In an Oct. 22 letter to Utah Attorney General Sean D. Reyes, Moab attorney Christina Sloan asserted that under state and federal law, CIB-funded projects must be public infrastructure or services that are open and available to the citizens.

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

CIB board member and Carbon County Commissioner Jae Potter said major infrastructure projects need to be “fully vetted, fully contracted, and fully within the parameters of the law,” but he also told board members on Oct. 1 that supporting large-scale developments in public/private partnerships could secure the state's economic future.

“Why is [major infrastructure] good for all of the state? Because it perhaps increases the production of whatever mineral it might be and it also then provides access to market,” Potter said. “Then hopefully, if we're really going down the road that we talked about originally — that is being a public/private partnership — that definitely has return for the counties because of their right of ways, their ability to participate in the project and the return [the county receives from the project] is needed there for not only the CIB, [but] funding in the form of loans and return to the counties.”

Citing low mineral lease revenue and therefore, dwindling revenue in CIB coffers, board chairman Keith Heaton said during the meeting that if the board continues setting aside money for major infrastructure projects, it must use greater discretion when funding community projects, weeding out “wants” from “needs.”

“[It's] the question of whether or not we are going to continue to fund things — recreational projects, municipal buildings — that may or may not be necessary at this time. Or if we're going to focus on larger infrastructure issues that involve transporting materials and things that are critical to this fund, basically,” Heaton said.

Utah State Treasurer and CIB board member Richard Ellis said during the Oct. 1 meeting that more major infrastructure projects asking the board for “significant” funding are coming, including a heated pipeline and a rail line project. This, he said, makes the board's decisions about future policy and direction even more important.

“I know there are county commissioners sitting around [this] table that want a rail line, and a transmission line, and a heated pipeline and I'm just saying the money's not going to be there for CIB to help on those projects,” Ellis said. “We either decide, do we fund [community] needs today or do we fund [community] wants; do we do a whole repaving of towns at this time or do we scale that back to half or a quarter of their requests?”

But Ellis said legal questions still remain regarding the actions by the board in funding major infrastructure projects.

“Legality is still an issue for these major infrastructure projects. There’s still legal discussions going on,” Ellis told The Times-Independent. “It’s not resolved and the [Utah] Attorney General’s office is looking at it.”

Legal Decisions Ahead

The Utah Attorney General’s office confirmed that it is currently reviewing two projects with CIB staff and the applicants’ lawyers — the \$53 million “throughput capacity project” in Oakland, and the \$1.35 million electrical transmission line through the Book Cliffs. However, the Attorney General’s office declined to provide any further details to The Times-Independent, citing “legal client privilege.”

However, the Utah Attorney General’s office has made conclusive decisions regarding the use of mineral lease revenues in the past, when former CIB Chairman Joseph Jenkins asked the state’s legal authority in 1993 if the board could make loans or grants for “economic development.”

Quoting heavily from the Federal Mineral Lease Act, the state Attorney General’s office concluded in 1993 that because economic development projects do not qualify as construction and maintenance of public facilities, planning, or providing a public service, they are not eligible for funding with mineral lease revenues.

“Economic development, by itself is not one of the traditional local government services that Congress intended to be eligible for funding by mineral monies ...,” the state Attorney General’s office concluded in 1993. “The use of mineral lease monies for ‘mere’ economic development — usually meaning assistance to private businesses and enterprises in their operations — raises Utah Constitutional issues.”

Although the AG’s office would not currently comment on its 1993 opinion because it was written 22 years ago, Sloan said all opinions by the state office are considered accurate until updated.

“The 1993 Attorney General opinion is presumed accurate until corrected or amended by the Attorney General,” Sloan said. “And the law hasn’t changed. The Attorney General opinion is largely based on review of federal law, as it admits in [the 1993 opinion], and those federal laws haven’t changed since 1976. And neither has controlling or dispositive law in Utah.”

In her letter, Sloan, who is representing Living Rivers, Nine Mile Canyon Coalition, and Holiday River Expeditions, asked the state Attorney General’s office to use its 1993 interpretation, provide clear directives to the board regarding major infrastructure projects, and specifically find the throughput capacity project in Oakland an unlawful use of mineral lease revenue.

“The CIB’s recent funding and prioritization of pipelines, rail lines to move fossil fuels, electric transmission lines, and other private facilities, like the Oakland Export Terminal, clearly ignore the plain language of the Mineral Leasing Act, its legislative history and prior opinions of the Utah Attorney General that prohibit use of CIB funding for private projects for private profit,” Sloan wrote.

Oakland says ‘no’ to Utah coal

Regardless of the Utah Attorney General’s opinion about CIB funding for throughput capacity, the Oakland terminal itself — which is still in development — may have come to a standstill in California. On Oct. 2, the California-based law firm Earthjustice filed a lawsuit against the terminal’s developer, Terminal Logistics Solutions, for agreeing to ship Utah’s coal.

“Coal was never discussed as a potential commodity that would be shipped through the terminal, and none of the environmental review for the Army Base redevelopment project has evaluated the environmental and health effects of coal transportation,” the Earthjustice lawsuit states. “Indeed, the developers assured the public on multiple occasions — including in face-to-face meetings — that coal

would not be shipped through the terminal.”

Sierra Club lawyer Jessica Yarnall said she first heard about coal being part of the Oakland terminal development when The Richfield Reaper reported on April 7 that the CIB committed \$53 million dollars for throughput capacity.

After the article appeared, Jeff Holt, commission chairman for the Utah Department of Transportation Board, and the throughput project advisor for the four counties, emailed his partners, including CIB members Potter and Claudia Jarrett, saying they must “downplay” the role of coal when speaking to the press.

“Please discuss any comments to the press ahead of time with the rest of the team,” Holt wrote. “If anything needs to be said, the script was to downplay coal and discuss bulk products and a bulk terminal ... the key concept is – this is a bulk terminal, many commodities can and will go through the terminal. (Could coal be one of them, you ask? Sure, I guess so, but we have so many products here in the State of Utah that need rail.) Less press [is] best. Controlled message is critical.”

Yarnall said many Oakland residents, already concerned about diesel pollution and hazardous waste exposure in the heavily industrialized area near the terminal development, are beginning a grassroots effort to ban coal entirely in the city. A Sept. 21 City of Oakland Health and Safety hearing drew hundreds of people wanting to speak against coal in the terminal development.

“There was a strong showing of community opposition to coal. The meeting started at 4 p.m. and didn’t conclude until after 10 p.m.,” Yarnall said. “Folks feel very passionately about this issue in Oakland.”

In 2014, the Oakland City Council passed a resolution to “Oppose Transportation of Hazardous Fossil Fuel Materials” through the city, including coal. And in May, Oakland Mayor Libby Schaaf wrote the terminal’s developer, Phil Tagami, urging him to drop the throughput capacity deal with the four Utah counties.

“Please declare definitively that you will respect the policy of the City of Oakland and you will not allow coal to come through Oakland,” Schaaf wrote. “If you don’t do that soon, we will all have to expend time and energy in a public battle that no one needs and will distract us all from the important work at hand of moving Oakland towards a brighter future.”

But “expending time and energy” has already begun. The City of Oakland will vote on a coal ban in early December and Earthjustice lawyers expect it will take several months to a year before their lawsuit is heard in court.

As for the CIB, board members say they will continue discussing major infrastructure at their next meeting on Nov. 5 in Moab. The meeting begins at 8:30 a.m. at the Red Cliffs Lodge, located at mile marker 14 on state Route 128.

© moabtimes.com 2015