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

Re: The Community Impact Board's April 2015 Approval of $53 Million for Economic Development of Oakland Bulk and Oversized Terminal Violates Federal and State Law.

Dear Mr. Reyes:

We write to ask you to find that the federal Mineral Leasing Act and Utah law prohibit the Permanent Community Impact Board (CIB) from loaning $53 million to Sevier, Emery, Carbon and Sanpete Counties (Counties) to help finance a private developers' construction of a marine export terminal in Oakland, California. This letter is submitted on behalf of Center for Biological Diversity, Sierra Club, Grand Canyon Trust__ and their members, who are deeply concerned about the misuse of CIB funds to promote increased coal mining and coal exports, the Counties' chief proposed use of the terminal.

On April 2, 2015, after a single one-hour meeting, and with no prior public hearing, CIB approved the massive loan to help finance out-of-state private developers' Oakland Bulk and Oversized Terminal (Terminal) in Oakland, California. In exchange for their investment, the Counties would acquire the right to lease half of the Terminal's throughput capacity for 66 years in order to ship the Counties' coal to overseas markets. By providing cheaper access to these markets, the Counties intend to aid Kentucky-based coal developer Bowie Resources Partners (Bowie) in increasing its Utah coal production.

At the helm brokering this deal on behalf of the four counties is Jeff Holt, the current Chairman of the Utah Transportation Commission, a managing director at Bank of Montreal Capital (BMO Capital), and a recent CIB member.[1] Mr. Holt is the "strategic Infrastructure Advisor to the four Counties" seeking CIB funding for the investment in the Terminal, a deal brokered by Mr. Holt and BMO Capital.[2] At the same time, his designee and fellow Transportation Commission member still sits on the CIB Board.[3] Mr. Holt may be profiting in his private capacity from brokering this deal, and it is unclear whether that and his other potential conflicts were properly disclosed to the CIB or Attorney General.[4]

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[1] Mr. Holt, as UTC Chair, was a CIB member in 2014, *see. e.g.* https://jobs.utah.gov/housing/cib/documents/CIB_Legislative_Report_2014.pdf.

[2] Counties' April 2, 2015 presentation to CIB (Exhibit A).

[3] https://jobs.utah.gov/housing/cib/documents/CIB_Legislative_Report_FY2015.pdf.

[4] The $53 million loan from the CIB that also included a line item expense for "Project Expenses of approximately $3mm - [legal, expert studies on terminal and bulk markets, some engineering,***strategic advisory fees***]" which suggests that Mr. Holt and BMO Capital are direct financial beneficiaries of this transaction. *See generally* U.C.A 67-16-1 *et seq.*

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Both the Counties and CIB also rushed the deal and gave the public virtually no chance to provide input, raising additional concerns about the deal's propriety. The CIB provided no meaningful notice to the public about the requested funding—its April agenda lacked any detail as to the Counties' $53 million request.[5] Further, CIB rules require all funding applicants to have "a vigorous public participation effort," to inform the public of the proposed loan financing, including potential tax implications.[6] This process must include "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.*"[7] But the Counties never held public hearings regarding the proposed loan. At the April 2 hearing, CIB suspended its rules to allow approval of the massive loan on an expedited basis. Nothing in the record supports its determination that "bona fide public safety or health emergencies or... other compelling reasons" justified the expedited "suspend and fund" process.[8]

The CIB made its allocation of the $53 million contingent upon a finding by your office that the CIB's decision is lawful. It is not. State and federal law mandate that mineral lease funds must be used to alleviate the impacts of mineral development on Utah localities. The Counties plan to use the loan to do exactly the opposite—to build a coal-export terminal that will promote yet more mineral development, exacerbating the very impacts that the funding is supposed to alleviate. In the words of the Mineral Leasing Act, because the Terminal does not qualify as "planning," "construction or maintenance of public facilities," or "providing a public service," it cannot be financed with mineral lease funds. A contrary determination would conflict with Attorney General Opinion 92-0003, which determined that CIB could not fund private development. The loan also runs afoul of the state constitution's prohibition against aiding private enterprises—it will primarily benefit the Terminal's California developers, California Capital Investment Group, Terminal Logistics Services, and Oakland Bulk and Oversized Terminal LLC, and coal company Bowie.

Those private benefits will come at the expense of local communities and the environment. Utah's misuse of CIB funds for coal exports and other fossil fuel infrastructure will worsen the problems of fossil fuel extraction that the funds are intended to mitigate, while committing Utah and society to ever greater greenhouse gas emissions and climate disruption. Increased coal extraction, transport, and storage will pollute air and waterways, harming the health of local residents, including our members in Utah and California. Coal mining enabled by

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[5] The only description on the agenda was the request for $53 million for "Five County Infrastructure Coalition Infrastructure ~ Throughput Capacity," under the heading "Special Consideration." https://jobs.utah.gov/housing/cib/documents/040215cibagenda.pdf. *See also* April 1, 2015 email from CIB Public Information Officer to CIB Chair Gordon Walker ("I called [reporter] Brian [Maffly] back yesterday afternoon and let him know that the Five County Coalition had not yet provided the Board with the information about their special request to be on Thursday's agenda. I informed him that the Board will be informed on the details at the same time as the public at the meeting.") (Exhibit B). *But see* audio recording of April 2, 2015 CIB hearing at https://jobs.utah.gov/media/housing/cib/cib040215.mp3 (indicating that Mr. Walker and other CIB Board members were aware of the Counties' special request before the hearing and that some had personally visited the Terminal site).

[6] R990-8-3 (E) ("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").

[7] *Id.* (emphasis added).

[8] R9990-8-4(F).

the Terminal will despoil our public lands that provide refuges for wildlife and recreation. In light of the CIB decision's significant repercussions, we appreciate your careful consideration of the following analysis detailing the legal defects of the loan.

1. CIB's Loan Violates the Mineral Leasing Act's Restrictions on the Use of Federal Leasing Monies.

Funding a private coal export terminal in California with Utah's federal mineral leasing monies, to enable greater coal production in Utah, violates Congress's intent to alleviate the impacts of existing federal mineral development with those funds. The plain language of the Mineral Leasing Act, the Act's legislative history, and the Utah Attorney General's own interpretation of the Act all confirm that funding private economic development is a misuse of federal mineral leasing monies.

A. Mineral Leasing Act's Legislative History Supports Funding Only Public Projects.

The Mineral Leasing Act directs leaseholders of federal land to make royalty payments to the U.S. government for the development and production of minerals, including coal.[9] One-half of all royalty, bonuses, and mineral lease sales paid to the U.S. Treasury are returned to the state where the lease lands are located to be used:

> by such State and its subdivision, as the legislature of the State may direct giving priority to those subdivisions of the State socially and economically impacted by the development of minerals leased under this chapter, for (i) planning, (ii) construction and maintenance of public facilities and (iii) provision of public services.[10]

In short, while the state legislature may choose which localities or agencies receive royalty funds, the Act strictly limits the funds' use to planning, construction and maintenance of public facilities, and the provision of public services. While the terms "public facilities" and "public services" are not defined in the Mineral Leasing Act, they plainly do not encompass the Terminal, a purely private facility, and economic development for the benefit of Bowie, a private coal developer.

Legislative history affirms that private, for-profit projects are not among the intended uses of Mineral Leasing Act royalty funds. In 1975, to counter the threat of another Middle East oil embargo, Secretary of Interior Thomas Kleppe announced that the U.S. would encourage federal coal leasing.[11] To address the burdens on local communities that would result from increased coal mining, Senator Lee Metcalf introduced the Federal Coal Leasing Amendments Act of 1975 (FCLAA).[12] The bill amended the Mineral Leasing Act to increase the royalties

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[9] 30 U.S.C. §§ 181–195 (1988) (as amended).

[10] 30 U.S.C.A. § 191(a) (West 2014).

[11] FLOOR STATEMENTS ON S. 391 BY SENATOR METCALF [From the Congressional Record, June 21, 1976], Federal Coal Leasing Amendments Act of 1975, published in FEDERAL COAL LEASING POLICIES AND REGULATIONS, Prepared at the Request of Henry M. Jackson, Chairman COMMITTEE ON ENERGY AND NATURAL RESOURCES UNITED STATES, JANUARY 1978, Publication No. 95-77, available at https://archive.org/stream/coalleasi00unit#page/n0/mode/2up.

leaseholders must pay to the federal government.[13] The Amendments also increased the percentage of revenues transferred to the states.[14]

In his statements on FCLAA on the Senate Floor on June 21, 1976, Senator Metcalf stated:

> Western States with Federal coal reserves stand in dire need of monetary assistance for planning and creating *public facilities and services* demanded by the thousands of workers who will be attracted to jobs in the coal mines and related processing and power generating plants .... We must avoid burdening the coal-producing regions with the social and environmental costs associated with coal development. By increasing the royalty rate to a minimum of 12.5 percent and by insuring that the States get a 50-percent cut of the revenues from leased minerals. S. 391 would help to spread the load.[15]

In their June 24, 1976 letter urging President Ford to sign S. 391, Senator Metcalf and Representative Patsy Mink stated:

> The western coal-producing States must deal with the problems of population influx triggered by Federal coal development. For these States, new financial resources provided by S. 391 could spell the difference between a chaotic disintegration of traditional rural lifestyles, and the orderly transition to urban and semi-urban living patterns.[16]

The legislative history shows that the intent of the Mineral Leasing Act and its subsequent amendments is to assist with the public facilities and services needed in mining communities, not to provide private services in non-coal producing areas.

B. Utah Attorney General Opinion 92-003 Also Affirms that Mineral Royalties Must Be Used Only for Public Projects in Mine-Impacted Areas.

In accord with the MLA's legislative history, the Utah Attorney General (AG) concluded in 1992 that royalty payments and other revenues from federal leases are for the purpose of alleviating the burden that increased coal mining will have on local and rural communities.[17] Pertinent to the current Oakland terminal funding issue, Utah AG Opinion 92-003 Use of Mineral Lease Monies for Economic Development (Opinion 92-003) specifically addressed whether the CIB could make loans for economic development projects.[18] The AG concluded that

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[13] Federal Coal Leasing Amendments Act of 1975 (FCLAA), Pub L. 94–377 (S 391), 90 Stat. 1083 (August 4, 1976).

[14] *Id.*

[15] FLOOR STATEMENTS ON S. 391 BY SENATOR METCALF [From the Congressional Record, June 21, 1976]. at 114 (emphasis added), Federal Coal Leasing Amendments Act of 1975, published in FEDERAL COAL LEASING POLICIES AND REGULATIONS, Prepared at the Request of Henry M. Jackson, Chairman COMMITTEE ON ENERGY AND NATURAL RESOURCES UNITED STATES, JANUARY 1978, Publication No. 95-77, available at https://archive.org/stream/coalleasi00unit#page/n0/mode/2up.

[16] *Id.* at 122.

[17] UT Atty. Gen. 92-003 (February 24. 1993), available at http://le.utah.gov/audit/08_13rpt.pdf., pp. 49-55.

[18] *Id.*

it could not.[19]

In reaching this conclusion, Opinion 92-003 examined four statutes passed in 1976 amending or clarifying the Mineral Leasing Act of 1920. First, FCLAA, as discussed above, in addition to increasing the amount of revenues from leased minerals and percentage transferred to the states, also expanded eligible uses for funds beyond the construction of public roads and support of public schools.[20] The House Report accompanying FCLAA noted:

> The current restrictions on the manner in which monies return to the States from the sale of Federal leases within their boarders [sic] are onerous. When an area is newly opened to large scale mining, local governmental entities must assume the responsibility of providing *public services* needed for new communities *including schools, roads, hospitals, sewers, police protection, and other public facilities* as well as adequate local planning for the development of the community. Since Section 35 of the Mineral Lease Act of 1920 ... currently provides the monies returned to the states available only for schools and roads, it is difficult for affected areas to meet the needs of their new inhabitants ...
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> The additional 12 ½ percent that will go to the states is not earmarked for schools and roads, and may be spent by the state for planning, public facilities and public services, giving priority to those communities impacted by the mineral development.[21]

Congress rejected the U.S. Department of Interior's request that all restrictions on state use of the monies be deleted in their entirety, and as a result FCLAA earmarked 12 ½ percent of mineral lease revenues to planning, construction and maintenance of public facilities, and provision of public services.[22]

Second, AG Opinion 92-003 examined the "operative" section returning mineral lease monies to the state, found in the Land and Water Conservation Fund Act of 1965 (LWCFA).[23] LWCFA amended the Mineral Leasing Act to allow the entire 50 percent of mineral lease monies to be returned to the state for the expanded uses.[24] While increasing the percentage returned, the LWCFA explicitly required that monies be used only for "planning, construction and maintenance of public facilities" and "provision of public services."[25]

Third, AG Opinion 92-003 reviewed the Public Lands and Local Government Funds Act (PL & LGFA),[26] which provided local governments with federal funds proportionate to federal acreage within their boundaries, less the amount received under the Mineral Leasing Act and other statutes.[27] This funding scheme again points to a common purpose for these federal

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[19] *Id.*
[20] *See* FCLAA, Pub. L. 94-377, 90 Stat. 1083, 1089, § 9(a) (1976).
[21] H.R. Rep. No. 681, 94th Cong., 2d Sess. 19-20 (1976) (emphasis added).
[22] *See* 90 Stat. at 1089, § 9(a).
[23] Pub. L. No. 94-422, 90 Stat. 1313, 1323 (1976).
[24] 90 Stat. at 1323, § 301 (amending Section 35 of the MLA to allow "all monies paid to any State... may be used...for planning, construction, and maintenance of public facilities, and provision of public services ....").
[25] *Id.*
[26] P.L. 94-565, 90 Stat. 2662 (1976).
[27] *Id.*

funds—offsetting the toll that federal-land activities exact on local government services:

> [T]oo many of the revenue sharing provisions restrict the use of funds to only a few governmental services—most often the construction and maintenance of roads and schools. Yet, local governments are called upon to provide many other services to the federal lands or as a direct or indirect result of activities on the Federal lands. *These services include law enforcement; search rescue and emergency; public health; sewage disposal; library; hospital; recreation and other general local government services.*[28]

Finally, AG Opinion 92-003 examined the legislative history of the Federal Land Policy and Management Act of 1976 (FLPMA).[29] The legislative report similarly affirmed the FCLAA's intent to expand the use of mineral lease monies for the alleviation of the social and economic impacts of mineral development on local governments.[30]

AG Opinion 92-003 concluded that the federal legislative history shows Congress's intent to restrict mineral lease monies to projects benefitting local communities:

> Congress recognized that local communities need the funds to assist them in building governmental infrastructure and *providing local government services* during the boom and bust cycles that accompany natural resources development. By *restricting* the use of the funds to planning, constriction [sic] and maintenance of public facilities, and to the provision of public services, Congress provided a source of *funding for traditional local government services that are impacted*, such as law enforcement, public health, and governmental facilities.[31]

Clarifying what it meant by "public facilities" and "public services," Congress pointed out examples throughout 1976 in the floor discussions[32] and included: schools, roads, hospitals, sewers, law enforcement; search rescue and emergency; public health; sewage disposal; libraries; recreation and other general local government services.[33] These examples are all traditional local governmental services.[34] Notably absent in the list of examples are investments in private, for-profit, and out-of-state projects in non-mining areas.

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[28] S. Rep. No. 1262, 94th Cong., 2d Sess. 9 (1976) (emphasis added).
[29] Pub. L. No. 94-579 317, 90 Stat. 2743, 2770-71 (1976); *see also* 30 U.S.C. § 191(a).
[30] *See* S. Rep. No. 1262, 94th Cong., 2d Sess. 9.
[31] UT Atty. Gen. 92-003 (February 24, 1993), available at http://le.utah.gov/audit/08_13rpt.pdf., at 55.
[32] *See*, e.g., H.R. Rep. No. 681, 94th Cong., 2d Sess. 19-20 (1976).
[33] *Id.*; S. Rep. No. 1262, 94th Cong., 2d Sess. 9 (1976).
[34] In addition, regulations governing the Energy Impacted Area Development Assistance Program, which assists areas impacted by coal and uranium development in acquiring sites for public facilities and public services, define "public facilities" and "public services" as follows:

> q. Public facilities. Installations open to the public and used for the public welfare. This includes but is not limited to: hospitals, clinics, firehouses, parks, recreation areas, sewer plants, water plants, community centers, libraries, city or town halls, jailhouses, courthouses, and schoolhouses.
> r. Public services. The provision to the public of services such as: health care, fire and police protection, recreation, etc.

7 C.F.R. § 1948.53; *see also* 42 C.F.R. § 124.153 (public facility must be owned by a unit of the state, local government, or quasi-public corporation).

As the Attorney General's opinion correctly notes, had Congress adopted the Interior Department's suggestion to remove all restrictions on use of the funds, then economic development would be an appropriate program to fund.[35] Congress chose instead to restrict the use of the funds to assist local communities in providing traditional local governmental services and facilities that may be impacted by resource development.[36] The Attorney General concluded that grants and loans "merely" for economic development are not authorized under the state and federal acts.[37]

Here, the $53 million loan approved by the CIB defies these authorities and instead directs money to prohibited uses. If this loan is approved, CIB funds will support building an out-of-state marine export terminal located in an area that does not mine coal, leased to and operated by a private corporation, for the gain of privately held out-of-state coal mining companies. While proponents allege that a byproduct of the funds may be more royalties for the CIB to dole out, along with jobs and revenue for the Counties, the core of the $53 million loan will benefit private businesses, specifically Bowie.[38] *See* pp. __ below. This is expressly forbidden by the Mineral Leasing Act, as the AG concluded thirteen years ago.

None of CIB's loan will be used for the Mineral Leasing Act's intended purpose, i.e., alleviating the burden of coal mining's impacts on local communities. None of it will be used to construct public facilities or provide public services for the residents of the Counties impacted by coal mining. Instead of alleviating the burdens of coal mining on residents in the most impacted communities, these funds will be used to create *new* burdens that come with increased coal mining. It would be the complete antithesis of Congress's intent, and a direct reversal of the Utah Attorney General's prior determination, to provide these funds to non-coal mining states.

II. Utah's Community Impact Alleviation Statute Similarly Forbids Financing of Private Development with CIB Funds.

CIB's loan to finance the Terminal similarly violates Utah's Community Impact Alleviation (CIA) statute, which directs the use and allocation of monies Utah receives under the federal Mineral Leasing Act.[39] Under this statute, the Utah legislature created the Permanent Community Impact Fund (Impact Fund), which allocates 32.5 percent of all mineral lease revenues annually, including royalty and bonus payments that it receives from the federal government.[40] These revenue payments are administered by CIB.[41]

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[35] UT Atty. Gen. 92-003 (February 24, 1993), available at http://le.utah.gov/audit/08_13rpt.pdf., at 54.
[36] *Id.*
[37] *Id.* at 55.
[38] When asked to explain why the Counties would be willing to borrow $53 million from the CIB, the Counties responded that the Terminal would provide "more avenues for our products, our energy products," a financial return to the Counties in the form of loan interest, and "the production of coal, potash ... would also bring additional revenues into CIB, for additional funding, so with paying the loan back, it would also be creating more money for CIB with that mineral lease funds." CIB Meeting Audio at 3:23:06–3:26:39 (Apr. 2, 2015) *available at* https://jobs.utah.gov/housing/cib/cib.html.
[39] Utah Code § 35A-8-301, *et seq.*
[40] Utah Code § 35A-8-303(2); *see also* Utah Code § 59-21-2(2)(d).
[41] Utah Code §§ 35A-8-303, 59-21-2(2)(d).

The Legislature mandated that the use of CIB funds be strictly limited to projects consistent with the purposes and limitations of the Mineral Leasing Act. The CIA statute declares:

> 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*....[42]

The CIA refers to the Mineral Leasing Act's mandate that revenue allocated to the Impact Fund "shall be used in a manner consistent with ... the Leasing Act," "for loans, grants, or both to state agencies or subdivisions that are socially or economically impacted by the leasing of minerals under the Leasing Act."[43] Grants and loans from leasing revenue funds may only be used for "(i) planning; (ii) construction and maintenance of public facilities; and (iii) provision of public services."[44]

CIB's administrative rules define "Public Facilities and Services" to mean "public infrastructure or services traditionally provided by local governmental entities."[45] The Rules provide that "all applicants must demonstrate that the facilities or services provided will be available and *open to the general public* and that the proposed funding assistance is *not merely a device to pass along low interest government financing to the private sector.*"[46] AG Opinion 92-003 has interpreted "public facilities" to be "publicly owned and operated,"[47] or one that "the public has a right to use that cannot be denied at the pleasure of the owner, based on Utah Supreme Court precedent.[48]

The Oakland project fails each of these provisions and definitions. First, a marine terminal in California is not "public infrastructure" of the type traditionally provided by local governmental entities in Utah.[49] The Utah Code reveals no indication of a local government's authority to provide for shipping terminals (marine or otherwise), let alone infrastructure over 900 miles away in another state. Second, the marine terminal would not be "publicly operated," nor would it be available or open to the general public. Terminal Logistics Solutions (TLS), a private company, would develop and operate the Terminal to serve private shippers of bulk goods. Utah's control of half the Terminal's throughput capacity under a 66-year lease is designed to serve select shippers, namely Bowie.[50] Bowie—a company headquartered in

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[42] *Id.* § 35A-8-301(1) (emphasis added); *see also id.* § 35A-8-307(5)(a) (impact board "may condition its approval on whatever assurances [it] considers necessary *to ensure that proceeds of the loan or grant will be used in accordance with the Leasing Act and this part*" [emphasis added]).

[43] Utah Code § 35A-8-303(5); *see also* § 35A-8-307(1)(b)(i) (criteria for awarding loans or grants made from federal mineral lease revenue must be consistent with foregoing section's requirements).

[44] Utah Code § 35A-8-305(1)(a).

[45] Utah Admin. Code r. R990-8.

[46] *Id.* at (J) (emphasis added).

[47] *See* UT Atty. Gen. 92-003 (February 24, 1993) (citing Utah Atty. Gen. Informal Opinion No. 84-80 (December 3, 1984)), available at http://le.utah.gov/audit/08_13rpt.pdf, at 54.

[48] *Id.*; *Union Pac. R.R. v. Public Serv. Comm'n.*, 116 Utah 526, 533 [211 P.2d 851, 855]; *see also Garkane Power Co. Inc. v. Public Service Commission of Utah*, 98 Utah 466, 100 P.2d 571, 573, 132 A.L.R. 1490.

[49] *Ramirez v. Ogden City*, 3 Utah 2d 102, 279 P.2d 463, 47 A.L.R.2d 539 (furnishing a project for the general public good, and in governmental capacity, includes maintenance and operation of public schools, hospitals, public charities, public parks or recreational facilities).

[50] *See* section 3 below.

Kentucky that operates Utah mines—will gain guaranteed cheap access to overseas coal markets without any investment on its part. Indeed, this whole arrangement seems to be nothing more than a "device to pass along low interest government financing to the private sector."[51] The Counties have assumed substantial financial risk that would otherwise fall on TLS, California Capital Investment Group (CCIG), Oakland Bulk Oversize Terminal LLC, or Bowie.

Most egregiously, the funds would not be "used for the alleviation of social, economic, and public finance impacts resulting from the development of natural resources," as required by the CIA.[52] The development of a California coal export terminal would not and could not mitigate coal mining impacts, but would instead exacerbate existing burdens of coal mining on local communities.[53]

CIB's $53 million loan to the Counties violates Utah's Community Impact Alleviation statute and its own rules by financing a private enterprise's declining mining operations in Utah and a private developer's scheme in Oakland, California.

III. CIB's Loan Violates Utah Law Which Mandates the Use of CIB Funds in Utah.

The purpose and intent of the CIA statute and implementing regulations require that federal royalty monies generated from lands in Utah be spent in Utah.

First, the CIA statute's avowed purpose is to authorize the use of state funds to address the use of mining impacts "of natural resources *in this state*."[54] Funding development of a cargo terminal in California does not meet this goal.

Second, the CIB must comply with law requiring agencies, "[b]efore expending any state funds or approving any undertaking," to "take into account the effect of the expenditure or undertaking on any historic property" and (unless exempted), "provide the state historic preservation officer with a written evaluation of the expenditure's or undertaking's effect on the historic property."[55] To fulfill that responsibility, "the Board requires all applicants provide the Board's staff with a detailed description of the proposed project attached to the application."[56] The Board and its staff are then obligated to consult with the State Historic Preservation Office about the project if it "may have potential historic preservation concerns."[57] The purpose of the applicable law and regulation is plainly to permit the Utah preservation office to protect historic properties in Utah, not to require consultation with the California (or any other) historic preservation office. Thus, the law is premised on the assumption that projects will be developed

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[51] Utah Admin. Code r. R990-8(J).

[52] Utah Code § 35A-8-301(1).

[53] Ironically, the CIB raised all of the above legal concerns in its recent reconsideration of an in-state power line project's request for $1.8 million that it had previously approved in a "suspend and fund" expedited process. As a result, construction may not begin unless questions concerning the project's eligibility for CIB funding are resolved in the applicant's favor. *See* CIB September 3, 2015 meeting minutes, available at https://jobs.utah.gov/housing/cib/documents/090315cibminutes.pdf.

[54] *Id.* § 35A-8-301(1) (emphasis added); *see also* R990-8-5(A), (D) (requiring applicant counties to compile list of anticipated capital needs for "local capital improvements" and limiting funding to listed projects).

[55] UT Code Ann. § 9-8-404(1)(a).

[56] R990-8-3(H).

[57] *Id.*

in Utah, not in another state. Funding the Terminal would violate Utah law by funding an out-of-state project.

IV. CIB's Loan Violates the Utah Constitution's Prohibition on Using Public Funds to Aid Private Parties.

Using mineral lease monies to aid a private business is also unconstitutional under state law. Article VI, section 29 of the Utah Constitution provides: "The Legislature may not authorize the State, or any county, city, town, school district, or other political subdivision of the State to lend its credit or subscribe to stock or bonds *in aid of any . . . private individual or corporate enterprise or undertaking . . . .*"[58] This provision reflects a policy of "preventing government from in any way using public assets for private purposes," as reinforced by the Utah Supreme Court.[59] CIB's loan violates article VI, section 29 in several ways such as providing a state guarantee for private debt, expending public funds for private purposes, and aiding a private company by purchase of stocks or bonds.

a. The state may not lend its credit to guarantee another's debt.

First, the state may not lend its credit in aid of a private undertaking, i.e., it "is not empowered to become a surety or guarantor of another's debt."[60] But the Counties appear to be doing just that by borrowing $53 million from CIB in order to help finance Terminal Logistics Solutions' development of the Terminal. If the investment does not succeed, the Counties will be responsible for repaying the loan to CIB with taxpayers' money.

CIB concurred with this characterization of the arrangement. In an August 6, 2015 meeting between CIB staff, State Senator Jim Debakis, and Oakland community activists Lora Jo Foo and Aaron Reaven, CIB stated that if Terminal Logistics Solution could not repay the Counties for the financing, the Counties would have to repay the loan by increasing taxes or issuing bonds.[61] Essentially, the Counties would be *guaranteeing* $53 million in financing for the Terminal, a private venture.[62] While technically, the Counties would be directly in debt to CIB, the outcome is no different than if TLS had borrowed directly from CIB, and the Counties were secondarily on the hook as its guarantor. In either case, the Counties and the taxpayers living in them would be liable for the developer's default.[63] Thus, the Counties' taxpayers would not

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[58] Utah Const., art. VI, § 29 (emphasis added).

[59] *Salt Lake Cty. Comm'n. v. Salt Lake Co. Atty.*, (Utah 1999) 985 P.2d 899, 909.

[60] Utah Const., art. VI, § 29; *see also Utah Tech. Fin. Corp. v. Wilkinson*, 723 P.2d 406, 412 (Utah 1986) (analyzing state constitutional prohibition on lending state's credit in aid of a private undertaking).

[61] Pers. Comm. with Lora Jo Foo.

[62] *Cf. County Allen v. Tooele City.*, 445 P.2d 994, 995-96 (Utah 1968) (county bond to finance industrial plant was not lending of credit where bond was only payable out of rental income from plant and "no resort can be had against the County or its taxpayers").

[63] In limited circumstances, Utah Code § 17-50-303(4)(b) allows counties to appropriate money for a private enterprise if it receives "value" in return, although this provision is necessarily subject to the constitutional restriction that private benefits must be incidental to a dominant public purpose and the principle that public funds or property "may not be disposed of other than in good faith and for an adequate consideration." *Cf. Mun. Bldg. Auth. v. Lowder*, 711 P.2d 273, 282 (Utah 1985) (citation omitted); *Price Dev. Co. v. Orem City*, 995 P.2d 1237, 1247 (Utah 2000) ("For any disposition of public money or property to pass legal muster, it must be shown that the public entity has received fair market value in exchange...."). Further, the county must have adopted criteria for determining what value is received for the money appropriated; conduct a study on the value received; and post

only lose out on public service improvements that the $53 million could have otherwise funded, but they would also be stuck with the Terminal's bill.

b. Public funds cannot be expended for private purposes.

Second, "[c]losely related to the prohibition against the lending of the state's credit ... is the principle of law that public funds cannot be expended for private purposes."[64] The "fundamental test" to determine if funds are for a private purpose is to ask whether the challenged transaction "is designed to promote the public interest, as opposed to the furtherance of the advantage of individuals."[65]

The Oakland terminal funding is designed to benefit private parties, namely Bowie, TLS, CCIG, Oakland Bulk Oversize Terminal LLC, and BMO Capital. The facilities would be closed to the public and operated mainly for the benefit of shareholders. While private benefits that are "incidental to a dominant public purpose" do not detract "from the constitutionality of the [expenditure]," the purpose of this proposed project puts private benefits front and center. [66]

Ample public information confirms the private project beneficiaries:

- In a news article which first broke the story about the terminal, Sevier County Economic Development Director Malcolm Nash stated that expanding into international markets and "[t]he purchase of Sufco by Bowie [Resources] is what's driving all of this [i.e., the $53 million loan]."[67]

- "[Nash] said that Bowie is interested in expanding its coal shipping capacity to international markets, which would make the coal industry in Utah viable over a longer period of time."[68] Indeed, statements by a Sevier County Commissioner at the April 2 hearing strongly suggest that the Counties hope the loan will keep the county's highest property tax payers—its "energy producers"—in business.[69]

- Shortly after the news broke that the $53 million loan was aimed at international coal exports via Oakland, the Counties' project advisor Jeff Holt e-mailed about the ensuing panic: "I have had four calls of distress this morning from Bowie, and one from [Terminal Logistics Solutions] .... They all think this means the terminal project may be dead ... Bowie thinks this appears to have seriously imperiled the project." "Phil Tagami (CCIG's CEO) had been pleased at the low profile that was bumping along to date on the terminal and it looked for a few days like it would just roll into production with no serious discussion."[70]

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notice and hold a public hearing on the proposed transaction. Utah Code § 17-50-303(4)(c), (d). The Counties do not appear to have followed these procedures.

[64] *Utah Tech. Fin. Corp. v. Wilkinson*, 723 P.2d at 412.

[65] *Tribe v. Salt Lake City Corp.*, (Utah 1975) 540 P.2d 499, 504.

[66] *Utah Housing Finance Agency v. Smart*, (Utah 1977) 561 P.2d 1052, 1055.

[67] *The Richfield Reaper* (April 7, 2015), available at: http://www.richfieldreaper.com/news/local/article_e1312110-dd67-11e4-b956-3ff480cc1929.html (Exhibit C).

[68] *Id.*; *see also id.* ("If the project comes to fruition, it could help keep Sufco and other coal mines in the state viable for decades to come, as well as provide an additional revenue stream to the partner counties.").

[69] *See* CIB April 2, 2015 hearing (starting at 3:20), available at https://jobs.utah.gov/housing/cib/cib.html.

- According to Mr. Holt's presentation to the CIB, part of the $53 million loan would be to finance "Project Expenses of approximately $3mm - [legal, expert studies on terminal and bulk markets, some engineering, ***strategic advisory fees***]." This strategic advisory fee suggests that Mr. Holt and BMO Capital are private financial beneficiaries of this transaction.[71]

These statements by the Counties' representative confirm that this project is driven by Bowie, CCIG and TLS' private interests in coal mining and terminal operations and improperly designed for the "furtherance of the advantage of [these private parties]."[72]

c. Utah's Constitution forbids aiding a private enterprise through subscription of stocks or bonds

Third, article VI, section 29 of Utah's Constitution forbids the state from subscribing to stocks or bonds in aid of a private enterprise. While the details of the Counties' financial arrangement with the developer are far from clear and were given little scrutiny at the April 2 hearing, the Counties' statements at the hearing raise serious questions whether they are unlawfully subscribing to stocks or bonds.

One County representative described the Counties as acquiring "equity" in the Terminal as a result of the $53 million financing.[73] Mr. Holt, the Counties' project advisor, noted that the Counties would earn a "return" on their investment, suggesting that the Counties' financing amounts to a subscription of stocks or bonds.[74] This is an improper use of public funds.

Further, the Counties will purportedly control 49% of the Terminal's throughput for 66 years, suggesting a private-public partnership in the terminal's operation. Whether public benefits may result from this control is immaterial: "The state is foreclosed from subscribing, even though the legislature may determine that public benefits will flow therefrom."[75] Nonetheless, the ultimate purpose of this throughput control is clearly to aid Bowie and other private parties, in violation of article VI's overarching "aim[] at preventing government from in any way using public assets for private purposes."[76]

* * *

For the foregoing reasons, the CIB's approval of the $53 million loan to the Counties violates the Mineral Leasing Act, the Utah Community Impact Alleviation statute, and article VI, section 29 of the state constitution. Your office should follow its well-reasoned analyses in Opinion 92-003 and declare the CIB's loan to the Counties unlawful. We also request that you

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[70] *See* April 8, 2015 e-mail from Jeff Holt to Counties (Exhibit D).
[71] Counties' April 2, 2015 presentation to CIB (Exhibit A).
[72] *See Tribe v. Salt Lake City Corp.*, 540 P.2d at 504; *see also Richfield Reaper* (noting terminal's high costs result from Bowie's "insist[ence] that the facility be completely covered"); Exhibit C (March 2015 Carbon County e-mail providing contact information for parties involved in the Terminal project "such as Bowie and the port").
[73] CIB April 2, 2015 hearing (starting at __), available at https://jobs.utah.gov/housing/cib/cib.html.
[74] *See id.* (starting at __); Exhibit E (Counties' April 28, 2015 loan application noting: "We will be investing in the terminal with a guarantee of 4 million metric tons throughput and a preferred return on investment.").
[75] *Utah Tech. Fin. Corp.*, 723 P.2d at 414 (invalidating statute permitting state's purchase of stocks in emerging businesses to aid their development).
[76] *Salt Lake County Comm'n. v. Salt Lake Co. Atty.*, 985 P.2d at 909.

investigate whether conflict of interest and ethics laws were followed in this transaction, given Mr. Holt's private interest in this transaction.

Once your review of this matter is complete, we request that you provide a copy of your final decision, including any legal analysis and supporting documents, to:

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Thank you for your attention to this matter.

Sincerely,

Wendy Park
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Jessica Yarnall Loarie
Staff Attorney, Sierra Club Law Program

Aaron Paul
Staff Attorney, Grand Canyon Trust

Ted Zukoski
Staff Attorney, Earthjustice

cc: Gordon D. Walker, CIB Chairman
Richard K. Ellis, State Treasurer, CIB Board Member
Claudia Jarrett, Sanpete County Board Chair, CIB Board Member
Jae Potter, Carbon County Commissioner, CIB Board Member
Garth Ogden, Sevier County Board Chairman
Ethan Migliori, Emery County Board Chairman

OBOTCAN PROVIDEJOBS WITHOUT COAL

Many other commodities can be shipped from OBOT (Oakland Bulk and Oversized Terminal).

There are 15,000 commodities that can be shipped from OBOT. Jerry Bridges, the terminal operator, mentioned soda ash, pot ash, borax and sodium concentrate as other possibilities—there are many, many more. And OBOT can handle oversized items such as tractors, bulldozers, machinery, pipes and pumps. Shipping these large items creates far more jobs than coal exports.

Construction jobs will be the same whatever the facility exports.

The construction of a terminal for coal and a multi-purpose facility for other dry bulk or oversized goods requires the same number of construction workers. There are only minor design differences between these types of terminal. So there will be no loss of construction jobs if coal is banned.

The developer did not initially plan to rely on coal exports.

When the developer entered into contracts with the city, he promised that he would not export coal from OBOT.He believed that OBOT would be viable and profitable without coal. Nothing has changed today that would alter his belief except for the $53 million that Utah counties are dangling in front of him.

Other West Coast ports ship little or no coal.

Looking at other ports on the West Coast, we find that coal is a small proportion of the commodities they ship. Coal accounts for only 0.15% of the total value of exports from Los Angeles area ports and 0.8%of the total value of exports from the San Francisco area (shipped through Richmond). The ports in the Seattle and San Diego areas do not export coal at all. Like these ports, OBOT can be viable without coal.

Coal exports are not going to provide jobs for long.

The U.S. coal industry is looking for overseas markets because U.S. markets are disappearing. But overseas markets are also drying up. Demand for coal in China has been falling for the past two years. India is also reducing its demand for coal exports. Many financial analysts are concerned that coal is a risky investment. As one wrote, "It is a shrinking industry with little upside potential." This means that jobs linked to coal exports are not jobs we can count on.

Let's use OBOT for commodities that create jobs for the long run.

For more details and sources of these facts, go to: http://www.sunflower-alliance.org/oakland_fossil_fuel_resistance_campaign.

Contact NO Coal in Oakland at coalfreeoakland@gmail.com.

Labor donated