BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket No. FD 36284

SEVEN COUNTY INFRASTRUCTURE COALITION –
RAIL CONSTRUCTION & OPERATION EXEMPTION –
IN UTAH, CARBON, DUCHESNE, AND UINTAH COUNTIES, UTAH

COMMENTS OF EAGLE COUNTY, COLORADO, ON DRAFT ENVIRONMENTAL IMPACT STATEMENT

Communications with respect to this pleading should be addressed to:

Allison I. Fultz
Stephen H. Kaplan
Robert W. Randall
Christian L. Alexander
Kaplan Kirsch & Rockwell LLC
1634 I St., N.W.
Suite 300
Washington, DC 20006
(202) 955-5600
afultz@kaplankirsch.com
skaplan@kaplankirsch.com
brandall@kaplankirsch.com
calexander@kaplankirsch.com

Counsel for Eagle County

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INTRODUCTION

The Board of County Commissioners of Eagle County Colorado ("Eagle County"), a political subdivision of the State of Colorado, hereby submits the following comments in response to the Uinta Basin Railway Draft Environmental Impact Statement ("DEIS"), issued by the Surface Transportation Board's ("STB" or "Board") Office of Environmental Analysis ("OEA") on October 30, 2020, in *Seven County Infrastructure Coalition—Construction and Operation—in Utah, Carbon, Duchesne, and Uintah Counties, Utah*, Finance Docket No. FD 36284. Chaffee County, Lake County, the Town of Buena Vista, the City of Salida, and Eagle River Watershed Council have authorized Eagle County to represent that they each adopt and join in these comments.

In accordance with the National Environmental Policy Act of 1969 ("NEPA"), the OEA has prepared the DEIS in order to evaluate the environmental impacts of a proposal submitted by the Seven County Infrastructure Coalition ("Coalition") to construct an approximately 85-mile rail line connecting the Uinta Basin in Utah to the national rail network ("Uinta Basin Railway" or "Project"), primarily for the purposes of shipping crude oil produced in the Uinta Basin to markets

elsewhere, and its alternatives. As one of the jurisdictions through which the DEIS projects an overwhelming majority of the shipments of crude oil are projected to pass, and whose communities are accordingly likely to bear potentially far-reaching impacts, Eagle County is a key stakeholder in the outcome of the Project and an important voice in this environmental review process. As such, Eagle County urges the OEA to address serious flaws in the DEIS, including most importantly the lack of consideration of a proposal to offer new service on a 163.1 mile long connecting line between Parkdale, Colorado, and a location known as Sage, near Dotsero, Colorado, known as the Tennessee Pass Line (Colorado, Midland and Pacific Railway Co. ("CMP"), *Verified Notice—Lease and Operation Exemption Containing Interchange Commitment—Union Pacific R.R. Co.*, STB Docket No. 36471 (Filed December 31, 2020) (the "CMP Notice of Exemption")), as well as failures to adequately state the Project's purpose and need, consider downline impacts and reasonable alternatives, evaluate environmental impacts, or propose mitigation measures. Because CMP filed its Notice of Exemption after the STB issued the DEIS, this Board must, at a minimum, publish a supplement to the DEIS to address the potential effects of the Project on the Tennessee Pass Line.

I. FACTUAL AND PROCEDURAL BACKGROUND

Eagle County, CO, is one of several western Colorado counties through which the vast majority of shipments resulting from the Project are anticipated to pass via a line owned by the Union Pacific Railroad Company ("UP") known as the Central Corridor. *See* DEIS at 2-1; 3.1-13; Colorado Department of Transportation, Colorado Freight and Passenger Rail Plain, 22, 50 (2018) ("Colorado State Rail Plan"), *available at:* https://www.codot.gov/programs/transitandrail/plans-studies-reports/statewidetransitplan/2018-colorado-freight-and-passenger-rail-plan.pdf. The Central Corridor is the only regularly used rail line to cross the Colorado Rocky Mountains, via a

route that is known as the Moffat Tunnel Subdivision, and is therefore an important route for UP and BNSF Railway ("BNSF"), which has operating rights over the Central Corridor. Colorado State Rail Plan at 22. The Central Corridor also is used to serve Amtrak's California Zephyr daily passenger service as well as seasonal ski train passenger service between Denver and Winter Park, Colorado. Colorado State Rail Plan at 21.

Eagle County, CO, is also the county in which the Tennessee Pass Line, the only east-west rail alternative in Colorado to the Moffat Tunnel Subdivision, connects to the Central Corridor near the community of Dotsero on the western border of the County. The Tennessee Pass Line is owned by UP and has not been abandoned, although it has not seen freight service in over 20 years. Colorado State Rail Plan at 50. The Tennessee Pass Line runs through the Eagle River Valley alongside a portion of the I-70 Corridor, which is home to a number of burgeoning communities that have developed substantially over the past few decades, with future growth anticipated. Colorado Department of Transportation, *I-70 Mountain Corridor Final Programmatic Environmental Impact Statement* 1-14 to 1-15 (2011), *available at:* https://www.codot.gov/projects/i-70-old-mountaincorridor/final-peis/final-peis-file-download.html. The alpine character of the area, with stunning vistas and rugged terrain, also creates challenges in the operation and maintenance of transportation infrastructure. *Id*. at 1-1. On its eastern end the Tennessee Pass Line joins BNSF/UP mainlines at Pueblo, CO.

On October 30, 2020, OEA issued the DEIS for the Project, which is a proposal to construct an approximately 85-mile long rail line connecting two termini in the Uinta Basin near South Myton Bench, Utah, and Leland Bench, Utah to the national rail network via an existing line at Kyune, Utah. DEIS at 1-1. The Project has been submitted for STB review by the Coalition, an independent political subdivision of the State of Utah composed of member counties Carbon,

Daggett, Duchesne, Emery, San Juan, Sevier, and Uintah Counties. DEIS at S-2. The Coalition does not propose to operate the Uinta Basin Railway itself, but rather intends to contract with an existing rail carrier, the Rio Grande Pacific Corporation ("RGPC"), to provide common carrier rail service. DEIS at S-2, 1-1. The stated purpose of the Project is "to provide common carrier rail service connecting the Basin to the interstate common carrier rail network using a route that would provide shippers with a viable alternative to trucking." DEIS at 1-3.

On December 9, 2020, in response to requests from a number of parties for extension of the comment period, the STB extended the initial 45-day public comment period for the DEIS, originally requiring submissions due by December 14, 2020, to January 28, 2021. *Notice*, Docket No. FD 36284 (Service Date Dec. 9, 2020). In light of the December 31, 2020, filings by RGPC and its subsidiary and the apparent connections between the Uinta Basin Railway and the proposed operations on the Tennessee Pass Line, described further below, Eagle County filed a Motion for Extension of Time and Petition for Reconsideration of the STB's regulatory process for the Uinta Basin Railway proposal on January 25, 2020. The Board further extended the deadline for comment to February 12, 2021, in response to Eagle County's request. *Notice*, Docket No. FD 36284 (Service Date January 28, 2021).

On December 31, 2020, CMP, a wholly-owned subsidiary of the RGPC, submitted a Notice of Exemption announcing that CMP would be entering into a lease with UP for the majority of the Tennessee Pass rail line between Parkdale and Sage, Colorado, and that it had filed for common-carrier authority to operate. Verified Notice of Exemption, *Rio Grande Pacific Corp.—Continuance in Control Exemption—Colorado, Midland & Pacific Ry. Co.*, STB Docket No. FD 36470 (filed Dec. 31, 2020) (the "RGP Notice of Exemption"); *see also* the CMP Notice. In its

press release announcing the lease with UP, CMP stated that it intended to explore development opportunities for freight rail services originating or terminating on the Tennessee Pass Line.[1]

II. LEGAL BACKGROUND

NEPA is "our basic national charter for protection of the environment." *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1131 (quoting former 40 C.F.R. § 1500.1(a) (2019)).[2] NEPA is intended to ensure that Federal agencies consider the environmental impacts of their actions in the decision-making process concerning proposed federal actions. "For any proposed major federal action . . . NEPA requires the agency to prepare an [EIS]." *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2004). An EIS must provide "full and fair discussion of significant environmental impacts and [] inform decision makers and the public of reasonable alternatives that would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1 (2020). Specifically, an EIS must include details on the environmental impact of a proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, and alternatives to the proposed action. 42 U.S.C. § 4332(2)(C)(i)-(iii). Environmental impacts that must be covered in an EIS include reasonably foreseeable environmental trends and planned actions in the area. 49 C.F.R. § 1502.15. Reasonably foreseeable impacts are those that are "sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision." *Mid States Coalition for Progress v. STB*, 345 F.3d 520, 549 (8th Cir. 2003). The fact that the specifics of a reasonably foreseeable impact are not

[1] *See* https://rgpc.com/wp-content/uploads/2021/01/TN-Pass-press-release-final-CMP.pdf.
[2] As discussed in this section, new NEPA regulations were promulgated in 2020. Hereinafter, where a NEPA regulation is not dated or is dated 2020, it refers to the current regulations.

known with precision does not mean that they may be ignored when the nature of the effect is reasonably foreseeable. *Id.* 345 F.3d at 549-50.

A. COUNCIL ON ENVIRONMENTAL QUALITY NEPA REGULATIONS

The Council on Environmental Quality ("CEQ") first promulgated regulations governing the implementation of NEPA in 1978. *See* 40 C.F.R. §§ 1500-1508. In July 2020, the CEQ adopted comprehensive revisions to these regulations. 85 Fed. Reg. 43,304 (July 16, 2020). On January 20, 2021, President Biden signed Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." 86 Fed. Reg. 7037 (Jan. 25, 2021). Simultaneously, President Biden announced a list of agency actions that heads of agencies would review in accordance with Executive Order 13990, which included, *inter alia*, CEQ's July 2020 NEPA regulations.[3]

While the relevant portions of CEQ's July 2020 NEPA regulations do not conflict with its NEPA regulations that preceded those revisions, i.e. it is possible for the STB to comply with both versions, we note that the July 2020 regulations appear to be narrower in some respects. Given the uncertainty around the status of CEQ's current interpretation of NEPA, we urge OEA to ensure that the DEIS comports with both the pre-2020 NEPA regulations and those NEPA regulations adopted in July 2020. Inasmuch as CEQ's pre-2020 NEPA regulations were based upon and implemented statute, and inasmuch as federal court decisions interpreting those regulations were also grounded in statute, they are still good law and should guide OEA's preparation of the EIS for the Uinta Basin Railway.

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[3] *See* https://web.archive.org/web/20210120151809/https:/buildbackbetter.gov/press-releases/fact-sheet-list-of-agency-actions-for-review/

B. STB'S NEPA REGULATIONS

The STB has also adopted its own regulations governing how NEPA applies to railroad construction projects. 49 C.F.R. Part 1105. Under these regulations, the OEA generally prepares an EIS for new railroad construction proposals. 49 C.F.R. § 1105.6(a). The STB invites public comment on the scope of the environmental review and on the DEIS. 49 C.F.R. § 1105.10(a). The FEIS should discuss the comments received on the DEIS and note any changes made in response to them. *Id.* When determining whether to authorize a construction project, the STB considers the environmental record, which includes the FEIS and any comments and responses concerning environmental issues. *Id.* § 1105.10(f).

III. COMMENTS

A. THE FEDERAL RAILROAD ADMINISTRATION AND PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION MUST BE COOPERATING AGENCIES.

Under NEPA, a "cooperating agency" means any Federal agency, other than a lead agency, that has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposed project or project alternative." 40 C.F.R. § 1508.5. The lead agency is required to "[r]equest the participation of each cooperating agency in the NEPA process at the earliest possible time." 40 C.F.R. § 1501.6(a)(1). An agency may also request the lead agency to designate it a cooperating agency. *Id.* § 1501.6. In this instance, the knowledge arising from the Federal Railroad Administration's ("FRA") general rail safety expertise and the Pipeline and Hazardous Materials Safety Administration's ("PHMSA") regulation of hazardous materials shipments is essential to a thorough analysis of potential risks and anticipated impacts in connection with the Project.

Between 1992 and 1998, the Central Corridor was among the locations in Utah and Colorado that experienced seven derailments that caused releases of diesel fuel, taconite, and

sulfuric acid into rivers adjacent to the railroad serious enough to trigger enforcement of the Clean Water Act.[4] UP entered into a consent decree with the U.S. Department of Justice in 2000 that required the railroad to pay $800,000 in fines and institute a number of operating safety measures, including the "implementation of a comprehensive rock fall hazard mitigation project".[5]

Given the history of wrecks and spills in the Central Corridor, the proposed shipment of crude oil from the Project presents elevated risks and potential impacts to communities along the line in the event of a derailment or other accident. The DEIS identifies the potential for 40% increased risk of rail-related accidents along UP's Central Corridor. DEIS at 3.2-6. In a 2018 report to Congress comparing the shipment of crude oil by rail, truck, and pipeline, PHMSA noted that the safety record of crude oil shipments by rail between 2007 and 2016 was highly variable, with rail in some years involving almost 900% more crude oil spills than either pipeline or truck shipments.[6] PHMSA noted that variability of rail's safety record for crude oil spills was driven by "high-impact incidents."[7] In other words, when things go wrong with shipments of crude oil by rail, they go dramatically wrong. Accordingly, the Project does not consist solely of the construction of rail facilities and generalized operations, but expressly involves the shipment of a commodity whose handling is governed by a specific and specialized regulatory regime.[8]

The expertise of these sister U.S. Department of Transportation agencies will aid in the thorough evaluation of risks and potential impacts of the Project and will not be duplicative or redundant with the STB's role as lead agency. For instance, "Congress vested the FRA with

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[4] U.S. Dept. of Justice, Press Release, June 8, 2000, available at: https://www.justice.gov/archive/opa/pr/2000/June/328enrd.htm.
[5] *U.S. v. Southern Pac. Transp. Co*., Notice of Lodging of Consent Decree Under the Sections 309(b) and 311(b) of the Clean Water Act, 65 Fed. Reg. 38,574 (Dep't of Justice, June 21, 2000).
[6] PHMSA, Report to Congress – Shipping Crude Oil by Truck, Rail and Pipeline (March 19, 2019), at 7, Fig. 3. Available at: https://www.phmsa.dot.gov/news/report-congress-shipping-crude-oil-truck-rail-and-pipeline.
[7] *Id*.
[8] 49 C.F.R. part 174.

primary authority over national rail safety policy and assigned the [Surface Transportation Board] the duty to . . . [assess] individual railway proposals subject to its authority." *Tyrrell v. Norfolk S. Ry. Co.*, 248 F.3d 517, 523 (6th Cir. 2001). Although the DEIS reflects that OEA "sent consultation letters to agencies soliciting their input, comments, ideas, and concerns" of a generic nature (DEIS at 5-2), Table 5.1 of the DEIS lists FRA, but not PHMSA, among the agencies contacted, and does not reflect the affirmative outreach to those two agencies as their respective expertise would demand in accordance with the CEQ regulations.

B. THE PROJECT'S DEIS FAILS TO CONSIDER NEW PROPOSED OPERATIONS OVER THE TENNESSEE PASS LINE, EITHER AS A CONNECTED ACTION OR IN ITS DOWNLINE IMPACT ANALYSIS

CMP's recent Notice of Exemption to conduct freight service on the Tennessee Pass Line in Colorado demonstrates that the proposal to provide new service on the Tennessee Pass Line and the Uinta Basin Railway are connected actions, and they must be analyzed together in a Supplemental DEIS. Despite the assertions of CMP's parent, RGP, that it does not currently plan to ship crude oil over the Tennessee Pass Line (Seven County Infrastructure Coalition, Comment, STB Docket No. FD 36284 – STB OEA Document Number EI-27080 (Filed January 26, 2021), Verified Statement of Mark W. Hemphill), the Coalition also observes in that filing that the Tennessee Pass Line has not been abandoned, and therefore remains part of the national freight rail network. The Coalition does not rule out what future operations CMP may conduct on the Tennessee Pass Line.

According to the DEIS, if the STB authorizes the proposed construction and operation of the Uinta Basin Railway, RGPC would operate and maintain the line. DEIS at 2-1. Further, OEA states that RGPC is intended to be included when the DEIS refers to the Coalition. DEIS at 1-1 n. 1, 2-1 n. 1. Accordingly, RGPC is the party that will be subject to a common carrier obligation and is effectively an applicant in this proceeding.

On December 31, 2020, RGPC announced that its wholly owned subsidiary, CMP, had entered into a lease with Union Pacific Railroad for the majority of the Tennessee Pass Line between Parkdale and Sage, Colorado, and that it had filed for common-carrier authority to operate with the STB. RGP Notice of Exemption. In its press release announcing the lease with UP, CMP stated that it intended to explore development opportunities for freight rail services originating or terminating on the Tennessee Pass Line.[9] While the same release states that RGPC had no plans to carry crude oil from Utah over the Tennessee Pass Line, it appears this was included only to address speculation and community concern; nothing in the RGPC Notice of Exemption or CMP Notice of Exemption precludes transport of oil and, as a common carrier, RGPC would be required to provide rail service to any shipper upon reasonable request.

1. The proposal to reinstitute freight rail service on the Tennessee Pass Line is a federal action that must be considered connected and evaluated together with the Project for the purposes of NEPA

The Tennessee Pass rail line is connected to the Uinta Basin Railway for the purposes of NEPA analysis. CEQ regulations provide that an agency must consider connected actions in determining the scope and significance of a federal action. 40 C.F.R. §§ 1501.3(b), 1501.9(e)(1). Actions are connected if they are "closely related," 40 C.F.R. § 1501.9(e)(1). CMP is a wholly owned subsidiary of RGPC, a real party in interest in the instant STB proceeding, and a physical connection between the Uinta Basin Railway line and the Tennessee Pass line in Colorado could be readily established. Moreover, the Tennessee Pass line would connect the Project line with the most likely markets for the crude oil that is expected to be transported from the Uinta Basin, and would serve as an alternative route to the line that has been identified as likely to be used for the

[9] *See* https://rgpc.com/wp-content/uploads/2021/01/TN-Pass-press-release-final-CMP.pdf.

vast majority of daily shipments expected to result from the Project. The Uinta Basin Railway and the Tennessee Pass line are interrelated parts of a larger action -- a rail network in Utah and Colorado for the transport of freight -- and they depend on this larger action for their justification. *Id.* § 1501.9(e)(1)(iii).

CMP's lease with UP and related STB proceeding to transport freight over the Tennessee Pass Line represent fundamental changes in the scope of the "project" to be analyzed in the Uinta Basin Railway EIS. The introduction of freight service on the Tennessee Pass Line – including, potentially, oil from the Uinta Basin – presents a significant new circumstance that raises new environmental concerns about the impacts of the Uinta Basin Railway. Transport of crude oil over the remote, steep, winding, and mountainous Tennessee Pass Line would introduce risks associated with accidents, including spills or releases in or near sensitive areas such as a river, wetland, important wildlife habitat area, or recreational sites.

In such circumstances, OEA must prepare a Supplemental DEIS. The duty to prepare a Supplemental DEIS is based on the need to facilitate informed decision making. *S. Utah Wilderness Alliance v. Norton*, 301 F. 3d 1217, 1238 (10th Cir. 2002), *rev'd on other grounds and remanded*, 542 U.S. 55 (2004). A supplement is required where there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(d)(1)(ii).[10]

[10] STB's regulations implementing NEPA provide that an EIS "*may* be supplemented" in the face of significant new and relevant information, *see* 49 C.F.R. § 1510(a)(5), whereas CEQ's regulations make supplementation mandatory in circumstances where there is significant new information relevant to environmental concerns. *Compare* 49 C.F.R. § 1510(a)(5) *with* 40 C.F.R. § 1502.9(d)(1)(ii). Where an agency's regulations conflict with NEPA and the implementing regulations promulgated by the CEQ, CEQ's regulations are controlling. *Sierra Club v. U.S. Dept. of Agriculture*, 777 F. Supp. 2d 44, 68 (D.D.C. 2011).

While failure to issue a supplemental EIS is not unlawful if the relevant environmental impacts have already been considered in the NEPA process, *Friends of Marolt Park v. U.S. Dept. of Transp.*, 382 F. 3d 1088, 1097 (10th Cir. 2004), that is not the case here. The DEIS for the Project considers downline impacts in Colorado only in the Moffat Tunnel Subdivision, and the Tennessee Pass Line is not mentioned at all. Indeed, the Tennessee Pass Line could conceivably serve as an alternative to the UP's Moffat Tunnel Subdivision to Denver, which under the DEIS is currently expected to carry the vast majority of increased rail traffic caused by the Project. See the Map attached as **Exhibit A** to these Comments, showing the relationship between the Project, the Tennessee Pass Line, the connection both lines share to the UP Central Corridor, and the surrounding freight rail network. Consideration of the Tennessee Pass Line proposal in conjunction with the Uinta Basin Railway is necessary to prevent OEA from conducting piecemeal environmental reviews that will not result in an understanding of the full impacts of the rail system additions being contemplated. *See, e.g., W. Chi. V. United States Nuclear Regulatory Com.*, 701 F. 2d 632, 650 (7th Cir. 1983) ("piecemealing" allows an agency to evade NEPA requirements "by segmenting an overall plan into smaller parts involving action with less significant environmental effects"). This is contrary to the intent of NEPA to provide a comprehensive, full understanding of a proposal's impact prior to approving a project. *See, e.g., Citizens Comm. To Save Our Canyons v. United States Forest Serv.*, 297 F. 3d 1012, 1028 (10th Cir. 2002) ("One of the primary reasons for requiring an agency to evaluate connected actions in a single EIS is to prevent agencies from minimizing the potential environmental consequences of a proposed action (and thus short-circuiting NEPA review) by segmenting or isolating an individual action that, by itself, may not have a significant environmental impact.").

Accordingly, OEA must prepare a Supplemental DEIS that analyzes the impacts of re-introducing service on the Tennessee Pass line along with the other impacts of the Uinta Basin Railway identified in the DEIS.

2. Even if not a connected action, opening of the Tennessee Pass Line must be considered as part of the downline impacts of the Project

Even if the introduction of new service along the Tennessee Pass Line did not constitute a "connected action," it would nevertheless need to be considered in the downline impact analysis. The DEIS defines the "downline study area" as "segments of existing rail lines outside of the Uinta Basin that could experience an increase in rail traffic above OEA's thresholds at 49 C.F.R. § 1105.7(e)(5) if the proposed rail line were constructed." DEIS at 3.2-1.

As discussed above, the OEA analyzed potential markets and rail routes in order to identify rail lines over which downline impacts should be assessed. This assessment did not anticipate the introduction of new service over the Tennessee Pass Line, although it has not been abandoned. However, RGPR's and CMP's recent filings regarding renewed operations over the Tennessee Pass Line, combined with the strategic connection that the Tennessee Pass Line makes between the Project and the most likely markets for Uinta Basin-sourced crude oil, make consideration of the downline impacts to the area and communities adjacent to the Tennessee Pass Line necessary in order to consider all reasonably foreseeable impacts caused by the Project.

The need to evaluate impacts is particularly the important here given the general absence of service along this line for more than 20 years, the growth of development in the area that may increase the severity of safety risks and impacts, and the often-difficult access and challenging terrain of the route. The Board's environmental regulations at 49 C.F.R. § 1105.7(e)(3) require the assessment of impacts a project may have on land use patterns in affected communities, including:

> (i) Based on consultation with local and/or regional planning agencies and/or a review of the official planning documents prepared by such agencies, state

whether the proposed action is consistent with existing land use plans. Describe any inconsistencies.

(ii) Based on consultation with the U.S. Soil Conservation Service, state the effect of the proposed action on any prime agricultural land.

The terrain through which the Tennessee Pass Line travels is characterized by rangelands and a narrow mountain river valley. Communities along the line have experienced significant development since the line was last active in the mid-1990s and many are laid out longitudinally in parallel with the river and rail line because of the topographic limitations imposed by steep canyon sides. Examples of development that a Supplemental DEIS must take into account include:

- The Town of Minturn has developed and is expanding a significant network of trails. *See* the Town of Minturn 2009 Community Plan at 21-22, available at: https://www.minturn.org/sites/g/files/vyhlif3486/f/uploads/2009communityplan.pdf
- The rail line runs through the downtown Avon, which has been developed as a pedestrian and bicycle zone that is a significant focus of resident and visitor activity. See the Town of Avon's website at: https://www.avon.org/2038/Free-Spaces-to-Explore.
- The Town of Buena Vista is bisected by the rail line, and any slow or stopped trains that block at-grade crossings would hamper emergency response.
- In general, the re-introduction of freight rail service will drive additional expense and impose the administrative burden on municipalities of training local first responders to address rail-related accidents and incidents.

C. THE DEIS'S EXISTING DOWNLINE IMPACT ANALYSIS IS INSUFFICIENT

Among other requirements for environmental reporting, the STB's environmental regulations require rail construction proposals to "[d]escribe the effects, including indirect or downline impacts, of the new or diverted traffic over the line if the thresholds governing energy, noise and air impacts in §§ 1105.7(e)(4), (5), or (6) are met." 49 C.F.R. § 1105.7(e)(11)(v).

The threshold for energy according to 49 C.F.R. § 1105.7(e)(4) is: "If the proposed action will cause diversions from rail to motor carriage of more than: (A) 1,000 rail carloads a year; or (B) An average of 50 rail carloads per mile per year for any part of the affected line, quantify the

resulting net change in energy consumption and show the data and methodology used to arrive at the figure given." *Id.* § 1105.7(e)(4)(iv).

The threshold for air according to § 1105.7(e)(5) is (as is relevant here):

- "If the proposed action will result in . . . [a]n increase in rail traffic of at least 100 percent (measured in gross ton miles annually) or an increase of at least eight trains a day on any segment of the rail line affected by the proposal," *Id.* § 1105.7(e)(5)(i); or
- "If the proposed action affects a class I or nonattainment area under the Clean Air Act, and will result in . . . [a]n increase in rail traffic of at least 50 percent (measured in gross ton miles annually) or an increase of at least three trains a day on any segment of rail line." *Id.* § 1105.7(e)(5)(ii).
- However, these regulations also provide that for new construction of a line or reinstitution of service over a previously abandoned line, only the train car threshold (not the percentage threshold) applies. *Id.* §§ 1105.7(e)(5)(i)(C), 1105.7(e)(5)(ii)(C).

The threshold for noise according to § 1105.7(e)(6) is: "If any of the thresholds identified in [§ 1105.7(e)(5)(i), i.e. the air quality threshold] are surpassed, state whether the proposed action will cause (i) An incremental increase in noise levels of three decibels Ldn or more; or (ii) An increase to a noise level of 65 decibels Ldn or greater." § 1105.7(e)(6).

The DEIS states that "to assess the potential impacts of increased rail traffic on main lines outside of the immediate Project area, OEA defined a downline study area that extends from the proposed connection near Kyune to the northern, eastern, and southern edges of the Denver Metro/North Front Range air quality nonattainment area." DEIS at S-11. For the downline study area, the DEIS identifies that "[t]he impacts from the additional traffic on these main lines could include air quality impacts associated with locomotive exhaust, increased wayside noise, increased risk of accidents at at-grade road crossings, and increased vehicular delay at road crossings." *Id.* However, in the DEIS the OEA states that it "does not expect that downline impacts would be significant." *Id.* The downline study area, based expressly on the threshold levels in 49 C.F.R. § 1105.7(e)(5), were applied in the DEIS to analyze downline impacts related to roadway vehicle

safety and delay (DEIS at 3.1.-1 to 3.1-2), and rail operations safety (DEIS at 3.2-1), in addition to air quality (DEIS at 3.7-3).

Appendix C to the DEIS provides how the OEA identified the study area for its downline impact analysis. Appendix C first notes the STB's environmental regulations provided at § 1105.7(e) and provides that OEA determined that the eight- and three-train thresholds for air impacts and the noise thresholds in § 1105.7(e)(6) were applicable to the Project. The OEA further provides that, "[b]ased on its experience applying the thresholds for air and noise on freight rail construction and operation projects, OEA has determined that these thresholds should also apply to freight rail safety and grade-crossing safety and delay." DEIS App. C, at C-1. In determining which potential downline routes might be affected, and therefore must be analyzed, Appendix C provides that:

> There are many factors that determine possible destinations for loaded crude oil trains originating in the Basin and the routes those trains could take within the national (downline) freight rail network to reach those destinations. The possible destinations and routes then determine where the estimated increase in rail traffic could warrant analysis based on the Board's thresholds. OEA determined the downline study area by first considering the likely destinations for crude oil that would be transported by the proposed rail line. OEA then considered potential routing to those destinations and where the estimated project-related rail traffic would exceed the analysis thresholds.

After analyzing the feasibility and market dynamics of a number of refineries with actual or potential rail connections between them and the Uinta Basin Railway, OEA concluded that "a reasonable estimated distribution of destinations for Uinta Basin-sourced crude oil transported on the proposed rail line would be 50 percent to Houston/Port Arthur, 35 percent to Louisiana Gulf Coast, 10 percent to Puget Sound, and 5 percent to PADD 2 refineries in Kansas and Oklahoma." DEIS App. C, at C-3 to C-4.

The OEA then estimated the most likely routing between the Uinta Basin and these destinations on UP and BNSF Railway lines using a routing program and calculated the number

of additional trains per day expected on each route for both low and high estimates. DEIS App. C, at C-4. It concluded that the overwhelming majority of rail traffic from Kyune to Denver would travel along UP's Central Corridor via the Moffat Tunnel Subdivision, and that the regulatory threshold for air quality would be exceeded along this route and within the metropolitan Denver area. DEIS App. C, at C-5 to C-6.[11] Furthermore, for Uinta Basin-related traffic from Denver to Houston/Port Arthur and Louisiana, the high traffic scenario exceeded three trains a day, and nearly met the three train threshold for the low rail traffic scenario. DEIS App. C Table C-4, at C-5. In fact, OEA calculated that the total average trains per day reaching Houston/Port Arthur in the high traffic scenario would be 5.26 trains, and likewise the average daily trains for the Louisiana destination under the high traffic scenario would be 3.68 trains, both above the three-train threshold. *Id.*

The OEA states that because Denver is a nonattainment area (i.e. the three train threshold applies there), and because of uncertainty associated with the estimated distribution of rail traffic out of Denver, it set the downline study area for the Project as the boundaries of the Denver Metro/North Front Range air quality nonattainment area. DEIS App. C, at C-5.

1. The downline impact analysis inappropriately omits consideration of other hazardous or dangerous commodities and of the uniquely hazardous character of crude oil shipments

In addition to conventional crude oil, the Coalition admits that other commodities, including natural gas and coal, may also be shipped over the constructed rail line to other markets. DEIS at 2-1. Indeed, in addition to some of the largest oil shale deposits in the world, the Uinta Basin is also home to some of the largest natural gas fields in Utah, as well as marginal coal

[11] The DEIS does not expressly identify the route as the Central Corridor or the Moffat Tunnel Subdivision, but the map on page C-6 of Appendix C and the OEA's description reflects this.

deposits. *See* Michael D Vanden Berg, Utah's Energy Landscape, Circular 121, Utah Geological Survey, Utah Department of Natural Resources, 16, 29, 34 (2016), available at: https://ugspub.nr.utah.gov/publications/circular/c-121.pdf.

However, although shipment of these commodities is expressly contemplated, the DEIS analysis of downline impacts focuses exclusively on oil shipments, based on the assertions of the Coalition that the primary commodity expected to be transported over the constructed rail lines will be crude oil. DEIS at 2-1; App. C, at C-1. Accordingly, expected shipping routes for crude oil have informed the downline study area, excluding routes that are likely to serve markets for other commodities, including oil shale, natural gas, coal, and other mineral deposits. *Id.* For instance, the OEA's analysis eliminated westward routes from consideration under its downline impact analysis due to its market analysis for crude oil, even though West Coast ports may very well serve as the logical rail destination for expanding international markets for other commodities such as natural gas.

Many of the additional non-oil commodities that are explicitly identified as potentially transported have particular impacts that cannot be properly assessed by merely looking at the shipment of oil. To take but two examples, the unique and dangerous aspects of coal (e.g. impacts of fugitive coal dust and combustion) and natural gas (e.g. vaporization and flammability) require specific consideration. *See* PHMSA, *Risk Assessment of Surface Transport of Liquid Natural Gas, Final Report*, 92 (March 20, 2019), *available at*: https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/research-and-development/hazmat/reports/71651/fr2-phmsa-hmtrns16-oncall-20mar2019-v3.pdf (noting the particular difficulty in cleaning up an LNG incident); Robert Kotchenruther, *Fugitive Dust from*

Coal Trains. Factors Effecting Emissions & Estimating PM2. 5, EPA Region 10, NW–AIRQUEST (2013).

Changing market factors and transportation dynamics, as well as the effects of induced demand, discussed below at Section III.E, suggest that even if current expected volumes of non-oil shipments are low, they may not remain that way. This is particularly so considering the significance of resources in the Uinta Basin and the long-term presence and operability of rail infrastructure.

Yet no explanation is provided for why the impacts from shipment of these other commodities, which are clearly reasonably foreseeable, are not or should not be considered in assessing downline impacts. The complete reliance on oil shipments in considering downline impacts reflects the same sort of shortcut analysis used in applying air quality standards to rail safety impacts, discussed further below at III.C.2.

2. The threshold for assessing air quality issues is inadequate to analyze safety issues particular to shipping oil

The OEA states that "[b]ased on its experience applying the thresholds for air and noise on freight rail construction and operation projects, OEA has determined that these thresholds should also apply to freight rail and safety and grade-crossing safety and delay." DEIS App. C, at C-1. Unless OEA "describes its basis for applying the standard under which it has arrived at this conclusion, supported by plausible explanation," there is no basis for determining whether the decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See Ober v. Whitman*, 243 F.3d 1190, 1195 (9th Cir. 2001). A review of STB decisions indicates no explanation of why OEA could use the threshold for air for freight rail and safety and grade-crossing safety and delay.

Even if OEA may have applied these thresholds for safety-related issues in other cases, simply relying on prior use is not sufficient because "[e]ach project is different, and the agency is required to rationally explain its decision in the context of project-specific effects." *Northern Plains Resource Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1078 (9th Cir 2011). The particularly hazardous nature of crude oil makes air quality standards inadequate for analyzing the safety issues presented by these trains throughout their trip from the Uinta Basin to their likely destinations, including Houston/Port Arthur, Louisiana, Puget Sound, Kansas, and Oklahoma. DEIS App. C, at C-3 to C-4. As the Congressional Research Service recently noted, "[u]nit trains of crude oil concentrate a large amount of potentially environmentally harmful and flammable material, increasing the probability that, should an accident occur, large fires and explosions could result." John Frattelli et al., *U.S. Rail Transportation of Crude Oil: Background and Issues for Congress*, Congressional Research Service, 12 (2014), *available at:* https://fas.org/sgp/crs/misc/R43390.pdf. The risks involved with crude oil accidents are arguably less about volume of oil and more about where a spill occurs; a spill near a sensitive ecosystem, such as a river, will have a greater impact and cost more to clean up than a larger spill in a less sensitive area. *Id.* at. 11.

OEA attempts to downplay the downline safety risks of the Project by focusing on the "waxy" semisolid character of Uinta Basin crude oil at room temperatures, which makes it potentially easier to contain event of a spill. DEIS at 3.3-29. However "cleanup friendly" it may be compared to other crude oils, waxy crude remains a highly flammable commodity whose dangers should not be underestimated or considered through the rubric of an air quality standard. Furthermore, waxy crude presents its own unique logistical challenges and impacts, including, for instance, the need to heat it at various stages to enhance its fluidity.

Accordingly, it is therefore in error to use air quality limits completely unconnected to the risks associated with waxy crude oil to establish the standard for evaluating the downline impacts envisioned under the Project.

3. The OEA incorrectly limits analysis to contiguous rail segments where an applicable regulatory threshold is reached, rather than to anticipated routes serving a project that has reached the applicable regulatory threshold(s)

OEA does not explain why it does not consider *all* downline impacts for the entire journey to expected refining destinations, rather than focus only on individual segments over which the increase in traffic is expected to exceed the regulatory threshold provided in the STB's regulations for air quality impacts. In its methodology, OEA apparently limited the scope of the downline study area by only including contiguous[12] segments of rail connected to the Project that were themselves expected to see an increase of traffic. DEIS App. C. at C-1. However, the STB's regulations require rail construction proposals to "describe the downline impacts if the thresholds governing energy, noise and air impacts in § 1105.7(e)(4), (5), or (6) are met." 49 C.F.R. § 1105.7(e)(11)(v). The regulations do not limit the evaluation of downline impacts only to segments where thresholds are met; rather they logically require downline impacts to be considered when the thresholds are met *by the project*. Otherwise, it would be possible to completely discount all downline impacts if routes connecting to the Project were numerous enough to diffuse the average number of trips per route. This would certainly undermine the purpose of 49 C.F.R. § 1105.7(e)(11)(v).

[12] As discussed below, OEA does not mention or explain why only contiguous segments of rail line that meet the regulatory thresholds are included in the downline study area, even though OEA's own analysis indicates that this threshold may be met in other areas of the country as a result of the project.

Here, according to the proponent's and OEA's own analysis, the regulatory thresholds are met by the Project, both on the line to be constructed and on existing segments, particularly the segments between Kyune and Denver. No explanation is given as to why it is appropriate to completely ignore downline impacts over the great majority of the routes that the project-generated traffic would use; rather doing so would conflict with the requirement of 49 C.F.R. § 1105.7(e)(11)(v) to "describe the effects . . . of the new or diverted traffic over the line."

4. The scope of the downline study area does not include analysis of segments of rail line outside of Utah and Colorado that may or will likely exceed the regulatory thresholds that OEA uses

Even if OEA were correct in the manner in which it applied the regulatory thresholds to define the downline impact study area, the resulting study area does not reflect OEA's own methodology. In establishing the downline study area OEA relies on the thresholds provided in 49 C.F.R. § 1105.7(e)(5) relating to air impacts, i.e. an increase in eight trains a day on average, or three trains a day on average in air quality non-attainment areas. *See* DEIS at 3.1.-1 to 3.1-2; 3.2-1; 3.7-3; App. C, at C-1). Nothing in the threshold or methodology suggests that segments of rail line, yards, or terminals that meet the threshold but are non-contiguous with other lines that meet the threshold, should be excluded.

OEA does not mention or explain why segments of rail lines outside of Utah and Colorado that may meet the regulatory thresholds are not included in the downline study area, even though OEA's own analysis indicates that the increased traffic may result in exceeding the threshold there. OEA's analysis clearly establishes the expectation that Uinta Basin crude oil will likely end up in only a few places, mostly in Houston/Port Arthur and Louisiana. Although OEA does not share the specific routing data it used, the routes owned by the two railroads analyzed (BNSF and UP), and the incentive to route efficiently, would suggest that much or all of this traffic would likely take the same limited number of routes and pass through the same yards, some of which may be

within nonattainment areas. Not considering the impacts in these areas, let alone not including them in the downline study area, is irrational.

For instance, the greater Houston metropolitan area, through which traffic between Houston and the Uinta Basin is expected to be the greatest, and through which through traffic to Louisiana appears likely to travel, is identified as a nonattainment area. *See* EPA, Green Book, https://www3.epa.gov/airquality/greenbook/map/mapnpoll.pdf (EPA Green Book) (visited Jan. 21, 2021); Texas Department of Transportation, Texas Non-Attainment Areas, https://gis-txdot.opendata.arcgis.com/datasets/texas-nonattainment-areas (visited Jan. 21, 2021). Areas in Kansas and Louisiana through which Uinta Basin-related trains might travel may also qualify under the established regulatory air thresholds for non-attainment areas. *See* EPA Green Book.

OEA estimates in the high rail traffic scenarios that 5.26 additional trains per day on average will travel between Houston/Port Arthur and Uinta Basin, and that 3.68 additional trains per day on average will travel between Uinta Basin and Louisiana. DEIS, App. C, Table C-4, at C-5. Averaging the high and low rail traffic scenarios for traffic to Houston/Port Arthur also results in an average that exceeds the threshold for nonattainment areas (3.55 trains per day on average), indicating that the range of expected increased traffic to this destination is above the regulatory threshold OEA uses. OEA does not even mention these expected exceedances, let alone explain why they would not qualify to be included in the downline study area.

5. The OEA incorrectly excludes multiple routes that in aggregate would meet the regulatory thresholds that OEA uses to identify the scope of the downline impacts

Even if specific routes east of the Denver metropolitan area individually would not experience expected increases in traffic that would reach the regulatory threshold cited by OEA, OEA's data clearly shows that in the aggregate routes to some of the destinations for traffic would exceed thresholds under the high rail traffic scenario. Specifically, Houston/Port Arthur and

Louisiana would see 5.26 and 3.68 more trains per day on average, respectively, under the high rail traffic scenario. Combined, these two destinations would also see 3.13 more trains per day on average under the low rail traffic scenario, and 8.94 more trains per day on average under the high rail traffic scenario. These increases would all exceed the threshold for nonattainment areas, such as the Houston metropolitan area, and the combined high rail traffic scenario would exceed the eight trains per day threshold applicable for all rail lines in aggregate along all of the potential routes to Houston. OEA does not explain how the aggregate impact of these trains would not result in comparable impacts that should be taken into account as downline impacts. This is particularly the case with rail-related accidents, which will still have the same likelihood of occurring whether they are calculated along one or several lines. Increased downline impacts do not vanish or decrease merely because there are two or three routes to the same destination, rather than one.

D. THE PROJECT DEIS'S STATED PURPOSE AND NEED IS UNSUPPORTED

An environmental impact statement must include a discussion of the purpose of and need for the proposed action. 40 C.F.R. § 1502.13. When reviewing an application for authorization, the agency is to base the purpose and need on the goals of the applicant and the agency's authority. *Id.*

In the DEIS, OEA states that the purpose of the Project is "to provide common carrier rail service connecting the Basin to the interstate common carrier rail network using a route that would provide shippers with a viable alternative to trucking." DEIS at 1-3. The Project is needed, according to the Coalition, because freight from the Uinta Basin can only move into and out of the basin on one of two two-lane highways (U.S. Highways 191 and 40). *Id.* The DEIS states that the Project is to "provide customers in the Basin with multi-modal options for the movement of freight to and from the Basin; promote a safe and efficient system of freight transportation in and out of

the Basin; further the development of a sound rail transportation system; and foster sound economic conditions in transportation and effective competition and coordination between differing modes of transportation." *Id.* Based on these assertions, OEA states that the Coalition's stated purposes "appear to be consistent with" the public convenience and necessity standard contained in 49 U.S.C. § 10901(c) and the Rail transportation Policy contained in 49 U.S.C. § 10101.

1. Purpose and need conclusions are unsupported in the record

OEA fails adequately to justify its statement of the purpose and need for the Project. In particular, the alleged need for the Project – to provide an alternative means to transport crude oil from the Basin to markets across the United States – is unsupported. While an agency may not completely ignore a project proponent's stated objectives, *Colo Envtl. Coalition v. Dombeck*, 185 F. 3d 1162, 1175 (10th Cir. 1999), it also may not simply accept a proponent's stated objectives. *Id.* Rather, an agency must develop its own purpose and need based on the agency's independent review of the underlying problem or opportunity, informed by the goals of the applicant and the agency's authority. 40 C.F.R. § 1502.13.

Here, OEA fails to provide a justification for its acceptance of the asserted need for alternative transportation modes into and from the Uinta Basin. OEA does not analyze whether opportunities for highway transport of crude oil from the Uinta Basin are currently inadequate, whether a pipeline exists or might be constructed to transport crude oil from the Basin, or whether markets exist for any increased crude oil that development of this proposed rail line might facilitate or make more likely. On the contrary, OEA seems simply to accept that the absence of a railroad in this area demonstrates the need for one.

2. The DEIS suggests without support that the public convenience and necessity supports the purpose and need of the Project

OEA states that the Coalition's purpose appears to be consistent with the public convenience and necessity contained in 49 U.S.C. § 10901 and the Rail Transportation Policy contained in 49 U.S.C. § 10101, without explaining how the public convenience and necessity analysis actually fits into the Project's purpose and need.

In authorizing construction of a rail line, the STB is required to grant authorization unless it would be inconsistent with the public convenience and necessity. 49 U.S.C. § 10901(c). *See also Alaska Survival v. STB*, 705 F.3d 1073, 1085 (9th Cir. 2013). To determine public convenience and necessity, the STB looks at a "variety of circumstances" surrounding the proposed action. *Northern Plains*, 668 F.3d at 1078. In the context of an authorization to construct or operate a rail line, the factors commonly cited by the STB have been "whether: (1) the applicant is financially fit to undertake the construction and provide service; (2) there is a public demand or need for the proposed service; and (3) the construction project is in the public interest and will not unduly harm existing services. Public convenience and necessity is also evaluated in light of the rail transportation policy of 49 U.S.C. § 10101." *Dakota, Minnesota and Eastern R.R. Corp. Construction Into the Powder River Basin*, STB Finance Docket No. 33407, slip op. at 16 (Service Date Dec. 10, 1998). *See also Northern Plains*, 668 F.3d at 1092. While the statutory language has been read to emphasize the interests of private parties, particularly shippers, some broader consideration of the public interest must still be considered. *See Alaska Survival*, 705 F.3d at 1085. Exemption from the application process under 49 U.S.C. § 10502 requires a finding, in part, that the procedures are not necessary to carry out the rail transportation policy set forth in 49 U.S.C. § 10101.

Aside from quoting the policy statements provided in 49 U.S.C. § 10101 and noting the benefit to certain shippers, the DEIS contains no analysis or assessment of the public convenience and necessity. DEIS at 1-3 to 1-4. In fact, several of the federal policy objectives in Section 10101, such as promotion of a safe, efficient, and competitive rail transportation system, may be hindered by limitations in the economic situation or market positioning of the Project proposal. 49 U.S.C. § 10101(3), (4), (5). The Project's consequences will likely also detract rather than encourage and promote energy conservation, 49 U.S.C. § 10101(14), while there is also serious concern that construction and operation will be to the detriment of public health and safety, 49 U.S.C. § 10101(8).

Rather than considering the public convenience and necessity standard, OEA attempts to boot the issue over to the Board, stating that "[w]hile the Board will ultimately determine whether to authorize or deny the petition, the Coalition's stated purposes appear to be consistent with the PC&N contained in § 10901 and the Rail Transportation Policy contained in § 10101." DEIS at 1-3. Yet in its January 5, 2021 decision granting exemption status and "preliminarily" determining the "transportation merits" of the proposed construction, the Board suggests the opposite, stating that "[t]he decision issued today is a preliminary determination that does not prejudge the Board's final decision, nor diminish the agency's environmental review process concerning the proposed Line's construction." *Seven County Infrastructure Coalition—Rail Construction & Operation Exemption—In Utah, Carbon, Duchesne, and Uintah Counties, Utah*, STB Docket No. FD 36284, slip op. at 10 (Service Date Jan. 5, 2021). Unfortunately, the Board's January 5th decision does exactly that by suggesting that the Board's public convenience and necessity standard has been met without engaging in by far the most important public engagement component that is part of the approval process. As a result, the OEA and the full Board can each refer to the other while

neither actually does the work of considering the public interest component that both federal statute and the STB's own precedent states is required. Two incomplete and insufficient analyses of the public convenience and necessity do not add up to a complete and sufficient analysis under this standard.

E. THE PROJECT'S DEIS FAILS TO ANALYZE THE INCREASED RISK OF CATACLYSMIC WILDFIRE IN THE PROJECT AREA AND IN DROUGHT-RAVAGED FORESTS ADJACENT TO DOWNLINE RIGHTS-OF-WAY

The DEIS fails to adequately assess the potential consequences that the increased risk of fire due to the additional shipments of highly flammable commodities such as crude oil will have on impacted communities and ecosystems, particularly those downline of the Project.

Focusing predominantly on wildfires caused by regular railroad operations—e.g., exhaust sparks and hot brake shoe fragments—the analysis in the DEIS completely omits consideration of ignition due to the primary commodity proposed to be shipped, crude oil, which is highly flammable. *See* DEIS at 3.4-38 - 39. Given that the DEIS itself projects a collision or derailment to occur *within the project area alone* every 3-10 years, DEIS at 3.2-4, and accidents along certain downline routes every 2-4 years, DEIS at 3.2-6, it is unreasonable to fail to consider the potential risk and effect of wildfires caused by the contents of the commodities to be shipped in addition to regular railroad operations.

Furthermore, in its analysis of wildfire risks due to the Project the OEA also focuses primarily on the probability of accidents without considering their potential severity. OEA's conclusion that the risk of fire from train accidents is "very low" is based largely on low probabilities relative to other sources of wildfire. *See* DEIS at 3.4-39. For instance, the DEIS states that "[o]f all the wildfires with a reported cause, approximately 0.5 percent and 0.2 percent of the fires in the lower 48 states and Utah, respectively, were caused by railroads." DEIS at 3.4-13. Although the percentage of wildfires caused by railroads may appear small in comparison to the

many causes of such blazes, this statistic fails to measure the size and impact of rail-caused wildfires in remote regions where firefighting crews may have difficulty gaining access. Additionally, the Project would introduce a new causal risk of wildfire to an area where such hazards currently do not exist.

The potential impact of catastrophic fires and explosions caused by crude-by-rail shipments is far from unforeseeable. In 2013, the blaze and explosions from an oil train derailment in Lac Megantic, Canada, left 47 people dead, 2000 people forced from their homes, and much of the downtown core destroyed.[13] In 2014-2015, the Pipeline and Hazardous Materials Safety Administration ("PHMSA") embarked on a rulemaking process regarding safety measures for shipping high-hazard flammable trains precisely because of this risk. *See, e.g.*, *Notice of proposed rulemaking*, 79 Fed. Reg. 45,015 (Sept. 30, 2014). In doing so, PHMSA noted that "[t]he growing reliance on trains to transport large volumes of flammable liquids poses a significant risk to life, property, and the environment. These significant risks have been highlighted by the recent instances of trains carrying crude oil that derailed in Casselton, North Dakota; Aliceville, Alabama; and Lac-Megantic, Quebec, Canada." *Id.* 79 Fed. Reg. at 45,016.

In terms of geographic scope, there is no discussion of increased fire risk in downline routes through Colorado in Appendix C, "Downline Analysis Study Area and Train Characteristics", or serious consideration anywhere in the DEIS regarding the downline impact of wildfires. The assumed route to Denver over the UP Moffat Tunnel Subdivision runs adjacent to hundreds of thousands of acres of public lands, including the Colorado National Monument near Grand Junction, the White River National Forest from Palisade through Glenwood Canyon to Dotsero,

[13] https://www.tsb.gc.ca/eng/rapports-reports/rail/2013/r13d0054/r13d0054-r-es.html.

and the Medicine Bow-Routt and Arapaho Roosevelt National Forests to the East. In 2020, Colorado's historic wildfires ravaged many of these areas.

- The Pine Gulch Fire, (north of Grand Junction) was at the time the largest fire in Colorado history, burning 139,000 acres.[14]
- Surpassing the Pine Gulch Fire in size was the East Troublesome Fire, (adjacent to the UP ROW near Grandby) which, when fully contained on November 30, had burned a total of 193,812 acres.[15]

- The Grizzly Creek Fire that surrounded the UP ROW in Glenwood Canyon burned 323,631 acres, closed Interstate 70 through the canyon, and forced rerouting of freight and Amtrak rail traffic north over UP's Wyoming route between Denver and Salt Lake City.[16]

In total, the suppression costs for all fires during the 2020 Colorado fire season amounted to well over $200 million.[17] The lack of consideration in the DEIS evaluating how the Project will exacerbate the risk of wildfire, and the ensuing costs to local communities who are most directly affected, is glaring.

The mitigation measures for wildfire in the DEIS are likewise inadequate. OEA concludes that the probability of a major rail accident that could cause a fire would be low if the mitigation measures set forth in the Draft EIS are implemented. OEA recommends requiring the Coalition develop and implement a wildfire management plan in consultation with appropriate state and local agencies, including local fire departments. "The plan should incorporate specific information about operations, equipment, and personnel on the rail line that might be of use in case a fire occurs and should evaluate and include, as appropriate, site-specific techniques for fire prevention and

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[14] *"Pine Gulch Fire Information - InciWeb the Incident Information System"*. https://inciweb.nwcg.gov/incident/6906/

[15] "East Troublesome Fire Information – InciWeb Incident Information System", https://inciweb.nwcg.gov/incident/7242/.

[16] See https://inciweb.nwcg.gov/incident/6942/. https://www.postindependent.com/news/amtrak-union-pacific-divert-trains-from-glenwood-springs-while-grizzly-creek-fire-rages-in-canyon/. https://www.thedenverchannel.com/news/wildfire/train-service-resumes-in-area-struck-by-grizzly-creek-fire

[17] Victoria Carodine, *How 2020 Has Affected the Way We Should Manage Forest Fires*, 5280, https://www.5280.com/2020/12/how-2020-has-affected-the-way-we-should-manage-forest-fires/ (Dec. 15, 2020)

suppression. If OEA's recommended mitigation is implemented, OEA concludes that the impacts of wildfire on vegetation would not be significant." DEIS at 3.4-39.

The DEIS's mitigation measures do not take into account the increased risk of wildfire based on climate change. The DEIS ignores the reality that any such response plan may not prevent a fire from spreading quickly under the current high drought conditions in Colorado and Utah, conditions that are predicted to persist and increase due to climate change. In Colorado and Utah, like in other Western states, wildfires over the past few decades have become larger and more frequent, and global climate model projections indicate an increase in the frequency and severity of heatwaves, drought, and wildfires due to climate change warming. *See* Amber Childress et al., Colorado Climate Change Vulnerability Study, A Report by the University of Colorado Boulder and Colorado State University to the Colorado Energy Office, at 14, 32-33 (2015), *available at:* https://wwa.colorado.edu/climate/co2015vulnerability/co_vulnerability_report_2015_final.pdf; Colorado Department of Public Safety, 2018-2023 Colorado Hazard Mitigation Plan, at 3-238, 3-306 (2018), *available at*: https://www.colorado.gov/pacific/mars/atom/151586;Utah Department of Public Safety, Division of Emergency Management, 2019 Utah State Hazard Mitigation Plan, at 268 (2019) ("Utah SHMP"), *available at:* https://hazards.utah.gov/wp-content/uploads/Utah-State-Hazard-Mitigation-Plan-2019.pdf.; U.S. Environmental Protection Agency, *What Climate Change Means for Colorado*, EPA 430-F-16-008, at 1 (Aug. 2016), *available at:* https://19january2017snapshot.epa.gov/sites/production/files/2016-09/documents/climate-change-co.pdf. Increased wildfires will significantly impact ecosystems and communities both directly and indirectly through their impact on water quality and supply. Childress *et al*., *supra*, at 33, 67, 69. Increased risks of wildfire, heatwaves, and other climate-related impacts also increase

the risk of damage to infrastructure, including rail lines and associated facilities. Childress *et al*., at 119; Utah SHMP at 246.

The DEIS acknowledges the general threat of wildfire but fails to meaningfully or adequately apply this information through analysis. The Discussion of "Wildfire Ecology" within the Project area (DEIS at 3.4-13-15) generally recognizes that Utah suffers from increasing risk of catastrophic wildfires, with an estimate of 800 to 1,000 wildfires every summer, and in 2017 consuming over 200,000 acres in the state. The DEIS states: "In Utah, firefighters suppress 95 percent of wildfires on initial attack, but adverse weather and topography, heavy fuel loads, and urban development all combine to create catastrophic wildfire conditions in the state (Utah Division of Emergency Management 2019)." DEIS 3.4-13. OEA also recognizes that the impacts of fire can last many years. "Forest fires along portions of US 191 and Argyle Canyon Road in 2019 have left behind hillsides with few shrubs, little herbaceous vegetation, and charred trunks. Once the forest begins to regrow, *over many years*, these areas would provide a partial visual buffer from the proposed rail line." DEIS at 3.12-8 (Emphasis added). However, the DEIS fails to consider the foreseeable implications of these statements or connect them to other data included in the DEIS. For instance, likelihood of drought and wildfire will likely further postpone any regrowth, while the acknowledged vulnerability of the Project area to landslides (see DEIS at 3.57 to 3.5-8) will be exacerbated by the lack of vegetation. Similarly, climate-related considerations addressed in the DEIS are largely limited to air quality assessment, notwithstanding the predicted effect that such warming will have on wildfire risks. *See* DEIS at 3.7-1, 3.15-27.

F. THE PROJECT'S DEIS FAILS TO CONSIDER THE INCREASE IN ENVIRONMENTAL IMPACTS RESULTING FROM THE INCREASED FOSSIL FUEL EXTRACTION AND CONSUMPTION THAT WILL RESULT FROM THE PROJECT

NEPA requires consideration of connected actions, which includes actions that are interdependent parts of a larger action and depend on the larger action for their justification. 40 C.F.R. § 1501.9(e)(1)(iii). The pre-2020 NEPA regulations also require the consideration of reasonably foreseeable "indirect effects," which "may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density, or growth rate, and related effects on air and water and other natural systems, including ecosystems." 40 C.F.R. § 1508.8(b) (2019). While express reference to "indirect effects" is not included in CEQ's 2020 NEPA regulations, CEQ has noted that the elimination of this phrase was merely intended to simplify analysis by avoiding unnecessary categorizations, in order to focus on effects "that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action." 85 Fed. Reg. 43,343. This may include effects both direct and indirect—notably, the CEQ declined in its 2020 changes to affirmatively state that consideration of indirect effects is not required. 85 Fed. Reg. at 43,344.

Here, the growth inducing effects leading to reasonably foreseeable impacts are clear from the Project description. The Project will result in the establishment of common carriage service, which is by law required to serve all shippers upon reasonable request, 49 U.S.C. § 11101(a), and is generally open to all commodities and products, *Union Pacific R.R. Co.—Petition for Declaratory Order*, STB Finance Docket No. 35219, slip op. at 3 (Service Date June 11, 2009), including those such as crude oil, coal, natural gas.

The Uinta Basin is home to significant crude oil fields, oil shale deposits, and natural gas fields, as well as some coal deposits in the area. *See* Vanden Berg, *supra*, 16, 22, 29, 34. While

various factors, such as specific commodity characteristics, infrastructure needs, and market fluctuations may affect the likelihood of transport of these commodities on rail over the proposed rail line (as is the case with crude oil as well as coal, natural gas, and other commodities), it would be unreasonable to conclude that construction of durable long-term transportation infrastructure such as a rail line would *not* induce additional exploitation of natural resources in the Uinta Basin.

The Project's proponents are clearly looking to proactively expand access to markets for resources sourced from within their jurisdictions, a consequence of which would inevitably accelerate resource extraction. This is reflected in the Project proposal itself as well as in other potentially unrelated activities by Coalition members. For instance, members of the Seven County Coalition (including Carbon, Emery and Sevier Counties) appear to have sought to support development of a rail-marine intermodal terminal in Oakland, California, to export coal to China using the same state funding vehicle that is now supporting development of the Uinta Basin Railway. *See* Robin Kaizer-Schatzlein, *Lawsuit over proposed fossil fuel railway in Utah moves forward*, High Country News, Dec. 15, 2020, https://www.hcn.org/articles/energy-industry-lawsuit-over-proposed-fossil-fuel-railway-in-utah-moves-forward; Brian Maffly, *Utah coal: California, here it comes – and not everyone is happy*, The Salt Lake Tribune, Apr. 27, 2015, https://archive.sltrib.com/article.php?id=2425141&itype=CMSID. While not strictly connected to the Project, such activity clearly indicates the foreseeable inducement of increased extraction in the Uinta Basin beyond the current levels that serve as the basis for analysis under the DEIS. This reasonably foreseeable consequence of the Project must be considered in the DEIS.

Given that the Uinta Basin has coal deposits and large natural gas fields, and that the Coalition notes that these commodities may be another commodity that is shipped (DEIS at 2-1),

OEA should consider the additional natural gas and coal-related impacts that construction of the rail line could induce. This requires reassessment of the downline study area.

G. THE PROJECT'S DEIS FAILS TO CONTAIN ADEQUATE MITIGATION FOR ANTICIPATED GREENHOUSE GAS EMISSIONS

Although some federal case law originally questioned the need to evaluate climate impacts under NEPA, jurisprudence has become increasingly settled that such impacts must be included in NEPA analyses. NEPA also requires an agency to "include appropriate mitigation measures not already included in the proposed action or alternatives." 40 C.F.R. §§ 1502.14(e).

While NEPA requires consideration and discussion of mitigation measures, it does not have a "substantive requirement that a complete mitigation plan be actually formulated and adopted." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351-53 (1989). Nonetheless, the Tenth Circuit has held that a discussion of mitigation measures "must be reasonably complete in order to properly evaluate the severity of the adverse effects of a proposed project prior to making a final decision." *Colorado Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1173 (10th Cir. 1999) (internal quotation marks and citations omitted). The CEQ has made clear in a guidance document that even where an impact is not considered "significant," mitigation measures must still be identified:

> "The mitigation measures discussed in an EIS must cover the range of impacts of the proposal. … Mitigation measures must be considered even for impacts that by themselves would not be considered 'significant.' Once the proposal itself is considered as a whole to have significant effects, all of its specific effects on the environment (whether or not "significant") must be considered, and mitigation measures must be developed where it is feasible to do so."[18]

[18] Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,031 (Mar. 23, 1981).

In the DEIS, OEA estimates the reasonably foreseeable greenhouse gas ("GHG") emissions that would result from implementation of the Project, both during the construction phase and the operations phase. Anticipated GHG emissions during constructions range from 208,697 metric tons of total CO2 equivalent for the Indian Canyon alternative to 289,737 CO2e for the Wells Draw Alternative. DEIS at 3.7-19. GHG emissions during rail operations for the preferred alternative, Whitmore Park, are estimated to range from 44,476 CO2e at the low-rail traffic scenario to 131,169 CO2e at the high-rail traffic scenario. *Id.* at 3.7-21. The DEIS seeks to explain away the significance of these emissions by stating that they represent a small percentage of existing emissions. It notes that the Wells Draw alternative could result in up to 211,621 metric tons of CO2e per year under the high rail traffic scenario, "which represents approximately 5 percent of GHG emissions in the regional study area, 1 percent of statewide GHG emissions, and 0.0004 percent of global GHG emissions." *Id.*

To address these GHG emissions, OEA is "recommending mitigation measures requiring the Coalition consider actions that would reduce GHG emissions during rail construction and operations," *id.*, including:

> AQ-MM-4. The Coalition shall require its contractors to use diesel fuel that contains a minimum biodiesel content of 5 percent (B5 blend). If B5 is not available from local fuel suppliers, the Coalition shall use fuel with the highest biodiesel content that is available to reduce greenhouse gas emissions.
>
> AQ-MM-5. The Coalition shall consider procuring alternative engine and fuel technologies, e.g., hybrid-electric diesel equipment, for construction and operation of the rail line to reduce greenhouse gas emissions.
>
> AQ-MM-6. The Coalition shall evaluate the feasibility of installing solar and wind microgeneration technologies on site offices, lodgings, and other project-related facilities to reduce the use of grid or privately generated electricity to reduce greenhouse gas emissions. As part of its evaluation, the Coalition shall consider the suitability of site conditions and location of solar and wind generation and the technical and economic feasibility of supplementing site electricity demands with renewable power.

DEIS at 4-14. These mitigation measures are inadequate to address the GHG emissions anticipated because they are largely optional and procedural and are therefore unlikely to reduce GHG emissions. While AQ-MM-4 appears reasonably fashioned to reduce GHG emissions by directing the Coalition to require its contractors to use diesel fuel containing a minimum biodiesel content of 5%, that direction is excused if such fuel is not available from local suppliers. AQ-MM-5 is even less likely to result in GHG-emissions reductions, inasmuch as it only directs the Coalition to "consider" using hybrid-electric diesel equipment for construction and operation activities. Similarly, AQ-MM-6 directs the Coalition only to "evaluate" the use of solar and wind microgeneration technologies at project facilities, and to "consider" site conditions in its evaluation.

The DEIS should be revised to require the Coalition to take concrete steps to mitigate the foreseeable GHG emissions of the Uinta Basin Railway; directing the Coalition to evaluate and consider actions is inadequate. NEPA requires a "reasonably complete discussion of possible mitigation measures," such that fair evaluation of the environmental consequences of the alternatives is possible. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989). Here, an analysis of the effectiveness of the mitigation measures is not only missing – it's impossible. One cannot reasonably say what actions the Coalitions' "consideration" of alternative fuel or engine technologies or "evaluation" of installing solar or wind technologies might yield, let alone what the mitigative effect of such technologies on GHG emissions or climate impacts might be. Such general and vague mitigation measures do not satisfy NEPA's "hard look" requirement. *See Neighbors of Cuddy Mountain v. U. S. Forest Service*, 137 F.3d 1372, 1381 (9th Cir. 1998) (NEPA violated where the mitigation measures were "so general that it would be

impossible to determine where, how, and when they would be used and how effective they would be").

H. THE DEIS FAILS TO ADEQUATELY CONSIDER REASONABLE ALTERNATIVES SUCH AS A PIPELINE

Federal agencies must "study, develop, and describe appropriate alternatives to recommended courses of action." 42 U.S.C. § 4332(2)(E). CEQ Regulations require that an EIS shall "[e]valuate reasonable alternatives to the proposed action, and, for alternatives that the agency eliminated from detailed study, briefly discuss the reasons for their elimination." 40 C.F.R. § 1502.14(a). Reasonable alternatives are those that constitute "a reasonable range of alternatives that are technically and economically feasible, meet the purpose and need for the proposed action, and, where applicable, meet the goals of the applicant." 40 C.F.R. § 1508.1(z). Each reasonable alternative discussed must be "considered in detail, including the proposed action, so that reviewers may evaluate their comparative merits." 40 C.F.R. § 1502.14(b). "[A]n EIS need not include every available alternative where the consideration of a spectrum of alternatives allows for the selection of any alternative within that spectrum." 85 Fed. Reg. at 43,330.

As discussed *supra* at Section III.D.1, there is no adequate basis provided in support of the purpose and need of the Project beyond the stated desire of the Coalition. To the extent a purpose and need is demonstrated in the DEIS, it reflects providing oil extraction companies located in "an isolated geographical region" with an alternative to trucking oil to outside markets. DEIS at 1-3. Although the DEIS discusses other shippers besides oil producers, the Coalition's assertions reflect that the overwhelming majority of shipments would be for crude oil and oil extraction-related materials, and the proposed alternatives are only evaluated in terms of the shipment of crude oil. DEIS at 1-3 to 1-4.

To address this purpose and need, the DEIS considered three action alternatives involving the construction of rail lines—the Indian Canyon Alternative, the Wells Draw Alternative, and the Whitmore Park Alternative—which the DEIS states were developed over the course of several years of analysis by the Utah Department of Transportation (UDOT), the Coalition, and OEA. DEIS, at S-5. All other alternatives explored similarly involved the construction of rail lines. DEIS at 2-2.

The DEIS fails to demonstrate consideration of the full spectrum of potentially reasonable alternatives. Most glaringly, and perhaps reflecting the failure to include other key federal agencies with jurisdiction such as PHMSA, the DEIS does not even mention, let alone consider, a pipeline alternative to transporting crude oil by rail. DEIS at 2-2. This is so even though elsewhere in the DEIS's impact analysis there are references to crude oil and natural gas pipelines that run through the area. DEIS at 3.5-18.

There is nothing in the DEIS's stated purpose and need for the Project that suggests that a pipeline alternative would not be a reasonable alternative to consider even at a preliminary stage. While the proposed rail line is expected to ship other products and commodities besides oil, the overwhelming majority of shipments will be crude oil. The statements of the Coalition, if taken at face value, make clear that the economic feasibility is centered on transporting oil alone. Accordingly, it is reasonable to consider a pipeline as a transportation alternative.

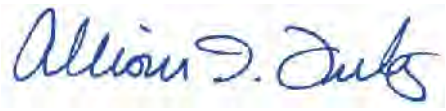
Indeed, it appears that the Coalition and others have in fact considered a pipeline alternative in the past, making its absence in the DEIS alternatives analysis even more curious. For instance, in 2017 the Coalition published an oil pipeline study analyzing the prospects for such a pipeline. *See* Seven County Infrastructure Coalition, *Uinta Basin Oil Pipeline Study, Final Report* (2017), *available at:*

https://scicutah.org/storage/app/uploads/public/5d0/27e/9ad/5d027e9ad1453049115378.pdf. In addition, in 2014 a company with an oil refinery in Salt Lake City initiated a study regarding connecting the Uinta Basin to Salt Lake City via a pipeline specially designed to accommodate the waxy character of crude produced from the Uinta Basin. *See Uinta-Wasatch-Cache National Forest; Utah; Uinta Express Pipeline Project*, 79 Fed. Reg. 4657 (Jan. 29, 2014) (US Forest Service notice of intent to prepare an environmental impact statement). The prospects identified in these evaluations and their comparison with rail alternatives are unknown because the DEIS does not make the comparison, even though a pipeline appears to meet the purpose and need of the Project.

CONCLUSION

For the reasons set forth above, Eagle County and its allied jurisdictions respectfully request that OEA issue a Supplemental DEIS to include FRA and PHMSA as cooperating agencies, analyze the potential impacts of the Project on the Tennessee Pass Line, and rectify areas of insufficient analysis.

Respectfully submitted,



Allison I. Fultz
Stephen H. Kaplan
Robert W. Randall
Christian L. Alexander
Kaplan Kirsch & Rockwell LLC
1634 I St., N.W.
Suite 300
Washington, DC 20006
(202) 955-5600
afultz@kaplankirsch.com
skaplan@kaplankirsch.com
brandall@kaplankirsch.com
calexander@kaplankirsch.com

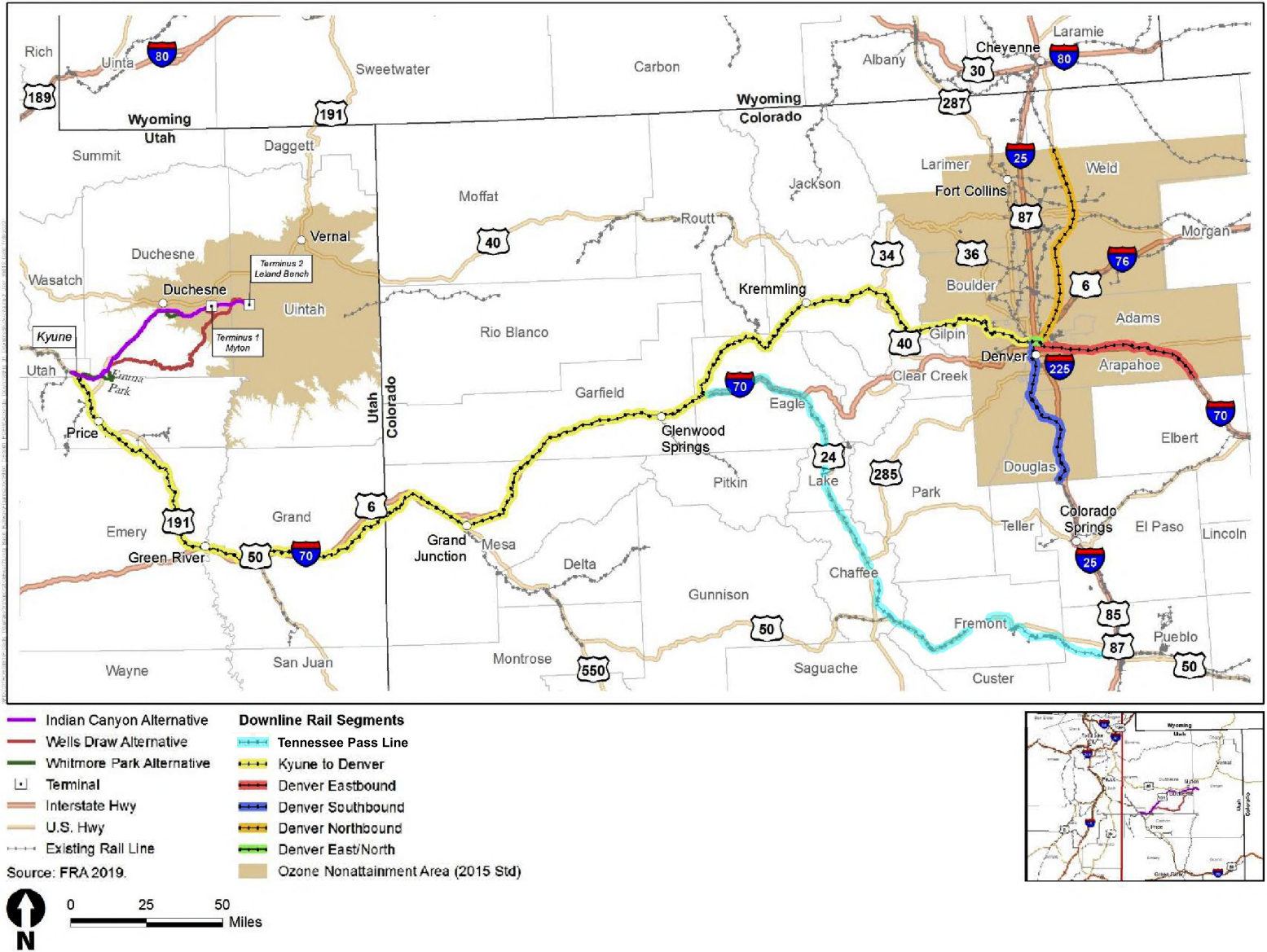
Counsel for Eagle County

February 12, 2021

Exhibit A

MAP – UINTA BASIN LINE AND TENNESSEE PASS LINE

[Attached hereto]



- Indian Canyon Alternative
- Wells Draw Alternative
- Whitmore Park Alternative
- Terminal
- Interstate Hwy
- U.S. Hwy
- Existing Rail Line

Source: FRA 2019.

Downline Rail Segments

- Tennessee Pass Line
- Kyune to Denver
- Denver Eastbound
- Denver Southbound
- Denver Northbound
- Denver East/North
- Ozone Nonattainment Area (2015 Std)

N

0 25 50 Miles

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of February, 2021, I caused a copy of the foregoing Comments of Eagle County on the Draft Environmental Impact Statement in Seven County Infrastructure Coalition – Rail Construction & Operation Exemption – In Utah, Carbon, Duchesne, and Uintah Counties, Utah, STB Docket No. FD 36284, to be served on all parties of record by e-mail.

Allison I. Fultz