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October 30, 2023

**VIA E-MAIL**

Ms. Danielle Gosselin  
Director, Office of Environmental Analysis  
Surface Transportation Board  
395 E Street, N.W.  
Washington, D.C. 20423

RE: STB Docket No. FD 36616, *Savage Tooele Railroad Company –  
Construction and Operation Exemption – Line of Railroad in Tooele  
County, Utah*

Dear Ms. Gosselin:

The Savage Tooele Railroad Company (“STR”), petitioner in this proceeding, hereby submits its comments on the Draft Environmental Assessment (“Draft EA”) issued by the Office of Environmental Analysis (“OEA”) on September 29, 2023. In general, STR believes that OEA has accurately described the purpose and need of the proposed rail construction and that OEA has identified and appropriately reviewed the potential environmental impacts of the project. STR stands ready to comply with the voluntary mitigation measures it submitted to OEA, and generally does not object to OEA’s additional recommendations.

This being said, STR requests that OEA clarify the meaning and scope of one mitigation measure it has proposed in order to ensure that the recommendation is consistent with applicable law. Specifically, as the Draft EA describes, the project will entail the re-establishment of two road crossings at State Route 138 and Erda Way that existed when the Union Pacific Railroad Company owned and operated the rail line prior to abandoning it in the 1980s. STR has agreed to no fewer than ten (10) detailed voluntary mitigation measures to ensure that any impacts to the communities and vehicle traffic levels both during construction of and subsequent train operations over the crossings will be minimized to the maximum extent possible. These measures include multiple commitments by STR to consult with the Utah Department of Transportation (“UDOT”) and local city and county officials on a variety of matters, and an agreement to abide by reasonable requirements regarding the two crossings. Examples include:

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1. **VM-Grade Crossing – 01** - STR will consult with appropriate federal, state, and local transportation agencies to determine the final design of the at-grade crossing warning devices. Warning devices on public roadways will be subject to review and approval, depending on location, by the Utah Department of Transportation, City of Erda, and Tooele County. STR will follow standard safety designs for each at-grade crossing for proposed warning devices and signs;
2. **VM-Grade Crossing-02.** Prior to construction of road crossings, when reasonably practical, STR and its contractor(s) will consult with local transportation officials regarding construction phasing and temporary traffic control. STR's contractor(s) will be responsible for local agency coordination of construction schedules, detours, and temporary traffic control, as well as obtainment of necessary temporary traffic control permits from the City of Erda and Tooele County. As appropriate, STR's contractor(s) will maintain egress or traffic routing to allow for passage of emergency and other vehicles;
3. **VM-Grade Crossing-04.** Prior to project-related construction, STR will consult with UDOT and applicable road authority regarding roadway safety and user expectations, which includes items such as pavement markings, signing, delineators, and active warning devices for vehicles, pedestrians, and bicyclists at proposed at-grade crossings; and
4. **VM-Grade Crossing-08.** STR will obtain and abide by the reasonable requirements of applicable permits and approvals for any project-related construction activities within UDOT rights-of way or state highways where UDOT has jurisdiction and off-system roads that are maintained by UDOT.

In the Draft EA, however, OEA has gone a step further than the foregoing and related mitigation measures and recommended that the Board condition its approval of the project on an additional mitigation measure “requiring STR to consult and comply with the UDOT grade crossing requirements.” Draft EA at S-6 (emphasis added)(although this statement is repeated in multiple locations in the Draft EA). Specifically, the Draft EA contains **MM-Grade Crossing-01**, which states:

STR shall consult with and comply with the UDOT requirements for creating new rail/roadway crossings at SR 138 and Erda Way. Specifically, STR shall comply with UDOT Administrative Rule R930-5, and specifically R930-5-7.6, which addresses the requirements for new crossings.” Draft EA, Page 4-6 (emphasis supplied).

As written, the **MM-Crossing-01**, and all the other references to it in the Draft EA, would place no conditions on such compliance. STR respectfully asserts that this is a step too far legally. Specifically, the Board's conditioning approval of a railroad construction project on an unequivocal requirement that the applicant comply with every aspect of a state or local law and

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agency's procedures would be contrary to the well-established precedent governing the Board's broad preemptive authority over state laws under 49 U.S.C. §10501(b). Under such precedent, state laws and regulations that are not categorically preempted (such as laws that would regulate rail transportation directly or that could be used to deny a railroads' ability to conduct railroad operations), may still be preempted if "they would have the effect of unreasonably burdening or interfering with rail transportation at present or in the future." Docket No. FD 36104, *The City of Ozark, Ark. – Petition for Declaratory Order* (served July 28, 2017) at 3-4 (Case involving the reinstitution of an at-grade rail crossing, citations to additional crossing decisions omitted).

This well-established rule applies to all state laws and regulations affecting railroad operations, including those governing road crossings, which, for the most part, emanate from the states' reserved power to protect public health and safety. For such laws and regulations, Board has made it clear that "localities retain their reserved police powers to protect the public health and safety so long as their actions do not unreasonably burden interstate commerce or the Board's regulatory programs." Docket No. FD 35949, *Petition of Norfolk Southern Railway Company for Expedited Declaratory Order* (served February 25, 2016) at 4 (citations omitted).

Actions that can fall into this category include attempts by state and local entities to impose onerous conditions on the granting of state permits. See, e.g., *Joint Petition for Declaratory Order – Boston and Maine Corporation and Town of Ayer, MA* (served May 2, 2001) ("Boston and Maine") (rules applied where town attempted to impose 36 conditions on a construction and operation permit); and *Green Mountain Railroad Corp. – Petition for Declaratory Order* (served May 28, 2002) (Board advised parties of the principles in case where the State of Vermont attempted to place 27 onerous conditions on a railroad's construction permit).

Consequently, to the extent that any permitting or other requirements imposed on STR by UDOT as a condition for reinstating the two former crossings would unreasonably interfere with STR's construction and/or its future operation of the proposed line of railroad, such requirements are subject to being preempted by 49 U.S.C. §10501(b). A mitigation condition unconditionally requiring STR to comply with UDOT's, regulations, terms and procedures would be contrary to this well-established principle.

Stated another way, conditioning approval of STR's project on such unconditional compliance would give UDOT the ability to veto a federal rail construction project the STB finds to be in the public interest by denying the crossing permits or imposing permitting conditions that would make the project infeasible or uneconomic.

As demonstrated in its voluntary mitigation measures and interactions to date with OEA UDOT, and the local communities, STR is fully committed to continue consulting with UDOT and the local communities to ensure the two crossings are reinstated in a manner that minimizes disruptions, traffic delays and safety hazards during construction and operation of the railroad line. STR is amenable to whatever reasonable and appropriate permitting requirements and conditions UDOT might place on the reinstitution of the two crossings. However, STR respectfully requests that OEA revise the Draft EA to either withdraw **MM-Grade Crossing 01** or revise it (and all

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other mentions of STR's unconditional compliance with UDOT's requirements for crossings) to clarify that STR's compliance with UDOT's requirements concerning reinstatement of the two crossings is at all times subject to the well-established rules governing preemption of state laws and regulations by §10501(b) discussed hereinabove.

Please don't hesitate to contact me if you have any questions or desire additional information.

Sincerely,

A handwritten signature in blue ink that reads "Thomas W. Wilcox". The signature is written in a cursive, flowing style.

*Attorney for Savage Tooele Railroad*

Cc: Ms. Andrea E. Poole