

Submission Number: *FD-30186-000120*

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Commenter: Paul Van Tricht

Organization:

State: Montana

Agency: Surface Transportation Board

Initiative: Tongue River Railroad

Submission Text

Attached is: MOTION FOR JUDICIAL (ADMINISTRATIVE) NOTICE OF FACTS CONCERNING THE AMISH COMMUNITY IN THE TONGUE RIVER VALLEY, MONTANA AND THE PROPOSED TONGUE RIVER RAILROAD and BRIEF IN SUPPORT OF MOTION FOR JUDICIAL (ADMINISTRATIVE) NOTICE OF FACTS CONCERNING THE AMISH COMMUNITY IN THE TONGUE RIVER VALLEY, MONTANA AND THE PROPOSED TONGUE RIVER RAILROAD Thank you Paul Van Tricht

SURFACE TRANSPORTATION BOARD

Docket No. FD 30186

TONGUE RIVER RAILROAD COMPANY

RAIL CONSTRUCTION AND OPERATION
IN CUSTER, POWDER RIVER
AND ROSEBUD COUNTIES, MONTANA

**MOTION FOR JUDICIAL (ADMINISTRATIVE) NOTICE OF
FACTS CONCERNING THE AMISH COMMUNITY
IN THE TONGUE RIVER VALLEY, MONTANA AND THE
PROPOSED TONGUE RIVER RAILROAD**

Paul J. Van Tricht, a resident of Montana, moves the Surface Transportation Board to take Judicial (Administrative) Notice of the following facts:

- 1) An “Old Order” Amish Community is established in the Tongue River Valley, Montana;
- 2) This Community has existed in Tongue River Valley for close to 20 years;
- 3) The preferred proposed route for the Tongue River Railroad and alternatives routes will cross the Amish Community; and
- 4) The Amish Community will be destroyed as a viable religious community if the Tongue River Railroad crosses the Amish Community.

Dated this 3rd day of August, 2015.

/s/Paul J. Van Tricht
Paul J. Van Tricht
1134 North 24th Street
Billings, Montana 59101-0219
Ph: 406-371-5350
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day of August 3rd, 2015, a copy of the document(s) entitled:

**MOTION FOR JUDICIAL (ADMINISTRATIVE) NOTICE OF
FACTS CONCERNING THE AMISH COMMUNITY
IN THE TONGUE RIVER VALLEY, MONTANA AND THE
PROPOSED TONGUE RIVER RAILROAD**

was/were mailed, postage prepaid to:

David H. Coburn, Esq.
Steptoe & Johnson LLP
1330 Connecticut Avenue, N W
Washington DC 2003

And emailed to:

David H. Coburn
dcoburn@steptoe.com

Date: August 3, 2015

/s/ Paul J. Van Tricht
Signature

SURFACE TRANSPORTATION BOARD

Docket No. FD 30186

TONGUE RIVER RAILROAD COMPANY

RAIL CONSTRUCTION AND OPERATION
IN CUSTER, POWDER RIVER
AND ROSEBUD COUNTIES, MONTANA

BRIEF IN SUPPORT OF MOTION FOR JUDICIAL (ADMINISTRATIVE) NOTICE OF FACTS CONCERNING THE AMISH COMMUNITY IN THE TONGUE RIVER VALLEY, MONTANA AND THE PROPOSED TONGUE RIVER RAILROAD

The Motion for Judicial (Administrative) Notice of Facts Concerning the Amish Community in the Tongue River Valley, Montana and the Proposed Tongue River Railroad asks the Surface Transportation Board to take notice of the following facts:

- 1) An “Old Order” Amish Community, a religious community, is established in the Tongue River Valley, Montana;
- 2) This Community has existed in Tongue River Valley for close to 20 years;
- 3) The preferred proposed route for the Tongue River Railroad and alternatives routes will cross the Amish Community; and
- 4) The Amish Community will be destroyed as a viable religious community if the Tongue River Railroad crosses the Amish Community.

THE LAW

Rule 201 of the Federal Rules of Evidence sets forth the basic standards for judicial notice of "adjudicative facts," which are facts relevant to the adjudication of the particular controversy and specific parties before the Surface Transportation Board. Rule 201[b] allows

judicial notice of adjudicative facts that are "not subject to reasonable dispute" because they are "generally known" or are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

The facts that the Surface Transportation Board is moved to take notice of precisely meet the requirements of Rule 201.

Introduction

The **Amish** are a group of traditionalist Christian church fellowships, closely related to but distinct from Mennonite churches, with which they share Swiss Anabaptist origins. The Amish are known for simple living, plain dress simple living , and reluctance to adopt many conveniences of modern technology. The history of the Amish church began with a schism in Switzerland within a group of Swiss and Alsatian Anabaptists in 1693 led by Jakob Ammann. Those who followed Ammann became known as Amish.

The Amish, most of whom live in the United States, follow simple customs and refuse to take oaths, vote, or perform military service. They shun modern technology and conveniences. Transportation for the Amish is by horse and buggy. They do not have electricity or telephones in their homes. The men usually wear beards and pants with buttons instead of zippers. The women wear white head coverings and plain dresses, usually without buttons—they use straight pins to fasten the clothing.

The Amish believe that James 1:27 "...and to keep oneself unspotted from the world" means to stay away from things the "world" does—like driving autos, having a TV, going to movies, wearing make-up, and the enjoying the conveniences of electricity and phones.

The Amish are recognized by federal courts as a separate distinct religious group and their beliefs and life style have been protected by the U.S. Supreme Court. See e.g., **Wisconsin v. Yoder**, 406 U.S. 205 (1972), in which the U.S. Supreme Court found that Amish children could not be placed under compulsory education past 8th grade. The parents' fundamental right to freedom of religion outweighed the state's interest in educating its children.

In ***Wisconsin v. Yoder***, the U.S., Supreme Court found that the Amish way of life is one of deep religious convictions that stems from the Bible. Their way of life is determined by their religion, which involves their rejection of worldly goods and their living in the Biblical simplicity. ***The Amish way of life is a constitutionally protected religious belief.***

The Amish generally will not take part in government proceedings such as this one based on those religious beliefs. The Amish do not believe in going to court to settle disputes but instead follow the biblical command to "turn the other cheek." Thus, the Amish are at a profound disadvantage when it comes to defending themselves in courts or before administrative bodies such as the Surface Transportation Board..

It is hoped that the Surface Transportation Board and the Tongue River Railroad are above using the religious beliefs of the Amish against the Amish. ***To ignore the plight of the Tongue River Amish community because that community will not, based on their religious beliefs, plead their case before the Surface Transportation Board is in and of itself a violation of the federal Religious Freedom Restoration Act of 1993***, Pub. L. No. 103-141, 107 Stat. 1488 (November 16, 1993), codified at [42 U.S.C.](#) § 2000bb through [42 U.S.C.](#) § 2000bb-4 (also known as **RFRA**), a federal law that "ensures that interests in religious freedom are protected."

THE STAFF OF THE SURFACE TRANSPORTATION BOARD
KNOWS THESE FACTS ARE TRUE BECAUSE THEY HAVE SEEN
AND VISITED WITH THE AMISH COMMUNITY

“Commenters requested that the EIS analyze any disproportionate adverse impacts on low-income residents of the Northern Cheyenne Reservation, as well as the Amish Community in the project area.” P. 21 of the Final Scoping Study for the Tongue River Railroad.

There is no mention of the Amish Community in the EIS.

The files of the Surface Transportation Board reflect that the staff of the Board have informally visited the Amish Community and should know the facts that the Board is requested to take Judicial (Administrative) Notice. Knowledge to the staff must be imputed to the Board itself.

Members of the Amish Community have observed many of the Board's hearings but, because of their religious beliefs, not formally taken part.

NEWSPAPER ACCOUNTS PUBLISHED IN MONTANA SHOW THESE FACTS CANNOT BE REASONABLY QUESTIONED

The following article was widely published in Montana newspapers.

“Amish community concerned over planned Tongue River railroad”

February 11, 2013 9:59 am • [By JOHN S. ADAMS Great Falls Tribune](#)

COLSTRIP (AP) — David Borntreger and his family moved from Missouri to a remote corner of southeastern Montana in 1997 to escape the increasing pressures of the modern world.

Borntreger, his brother, Levi, and their families are members of a small Amish settlement about 120 miles east of Billings.

They raise cattle and sheep on their farm along the banks of the Tongue River. Their children attend school in two small schoolhouses. The Amish don't use electricity, so they construct their buildings without the aid of power tools, and they work the land with horse-drawn implements.

"We came west because it's not as thickly populated," David Borntreger said. "Besides having a liking to go to the West, we thought it would be a good opportunity here to have our children grow up on agriculture land. We were hoping we could have a lifestyle from agriculture."

Now that simple lifestyle is threatened by a proposed railroad owned by a coal giant and two of the world's wealthiest men.

The proposed line would bisect their land and cause immeasurable disruption to farm and ranching operations, the Borntregers said.

The proposed Tongue River Railroad would open Montana's vast Otter Creek Coal Tracts — located some 15 miles to the south of the Borntregers' farm — to strip mining.

According to the project's supporters, the railroad would haul an estimated 20 million tons of coal annually from Arch Coal Inc.'s planned mine near the Northern Cheyenne Indian Reservation to Midwest power plants.

The Tongue River Railroad Co. is owned by billionaire investor Warren Buffett's BNSF Railway Co., Arch Coal and billionaire candy bar magnet Forrest Mars Jr.

Mars, a landowner along one of the previous Tongue River routes, bought a third of the railroad in 2011 after fighting it for years. The proposed route that once crossed his land is now off the table.

Critics say domestic demand for coal is dwindling, and they fear the newest proposal, called the "Colstrip Alternative," is aimed at shipping Otter Creek coal to export terminals on the West Coast bound for Asian markets. Arch Coal owns the Otter Creek coal leases, one-third of the railroad and 38 percent of a proposed Longview, Ore., coal export terminal.

BNSF spokeswoman Suann Lundsberg said the Colstrip Alternative is now the railroad company's preferred route because it's shorter and would have less of an impact on the Tongue River Valley and would affect fewer landowners.

Lundsberg said she couldn't comment on the destination for Otter Creek coal because the railroad doesn't decide where freight goes.

"That's a decision that is made by the company who is shipping the coal," Lundsberg said.

In this case that company is Arch Coal, one of the railroad's co-owners. Arch Coal spokeswoman Kim Link referred questions to Lundsberg.

Landowners along the route could face condemnation if the plan is approved, but Lundsberg said it's premature to talk about eminent domain.

Nonetheless, landowners are concerned about the future of their property.

"I don't think we ought to sacrifice my ground or my neighbors' ground so some corporation can make a profit by shipping coal to Asia," said Clint McRae, one of the Borntreger's neighbors.

McRae's great-grandfather homesteaded the valley 135 years ago, and the McRaes have been fighting the railroad for more than 30 years. The latest proposal would cross approximately nine miles of McRae's ranch, which he said would make it difficult and costly to move cattle and fight fires. Last summer a wildfire burned more than 200,000 acres in Rosebud and Powder River counties, including nearly 8,000 acres of McRae's ranch.

"We lost a lot of ground last year with that fire," McRae said. "We can't cross railroad tracks with a firefighting engine. If we can't get across those tracks, we're going to lose a lot more."

The federal Surface Transportation Board is conducting an environmental review of the proposed railroad. Last fall, the agency held 10 public "scoping" meetings to provide information on the project and to solicit public comments. The Borntreger's said at the time of the meetings they were unaware the company planned to cross their land. They received a letter from a surveying company a month after the

final meeting that contained an aerial photo of their property. A red line on the photo shows the proposed Colstrip Alternative rail route less than 100 feet from Levi Bornltreger's back door.

"I was at that meeting, and at the time they had the railroad drawing showing it went right on past here," Levi Bornltreger said. "After the meeting, we got a letter from the surveyors showing it going right through my hay barn. We can't live that close to a railroad."

The Bornltregers said one of their biggest concerns is the impact the railroad and the upstream coal mines would have on the Tongue River. They rely on clean water from the river to irrigate their crops. They harvest ice from the river in the winter that they sometimes use as late into the year as September.

Salt water from upstream coal bed methane drilling has already degraded their crops, David Bornltreger said.

"If they put in that coal mine, it's going to contaminate the Tongue River even more," he said. "If we don't have irrigation, we're dry farmers. We'd get maybe one crop of hay a year. With irrigating, we get up to seven ton per acre."

McRae said he noticed the Colstrip Alternative on a map the STB provided to the public at one of the public meetings last fall, but he said the map wasn't detailed enough for him to be able to provide any substantive comments on the proposed route. At that time, the Colstrip Alternative wasn't designated as the company's preferred alternative.

According to Lundsberg, on Dec. 17 — after the last scoping meeting — the railroad filed a revised permit application with the STB designating the Colstrip Alternative as the preferred route.

McRae said the railroad must have known at the time of the September scoping meetings that the Colstrip Alternative was to be the preferred alternative.

"We started getting these maps a few weeks after the scoping hearing showing our property line and the proposed rail line," McRae said. "This is information they should have given us prior to those scoping hearings. My neighbor and I had no idea this is what they were planning."

Lundsberg said the STB has been studying the Colstrip Alternative since the original proposal in the 1980s, but it wasn't until Dec. 17 that the Tongue River Railroad filed a revised application with the STB identifying that route as railroad's preferred route.

"Those maps have always been available at the STB's website," Lundsberg said.

The Borntregeres point out that they don't have access to any websites. They don't have or use electricity, much less computers and the Internet. The only communication they have with the outside world is a single community telephone in a shack at the end of a long dirt driveway leading into their property.

"With the lifestyle we live, we have no need for a phone in the home," Levi Borntreger said. "I go out there maybe twice a week to check and see if there are any messages on the voice mail."

David Borntreger said the land they have now is sufficient to support the Amish families' simple lifestyle. If the railroad is built, that would change.

"It would be different if the track was here and then we moved to it," David said. "We moved to this area for the peace and quiet. That will all change if this railroad comes."

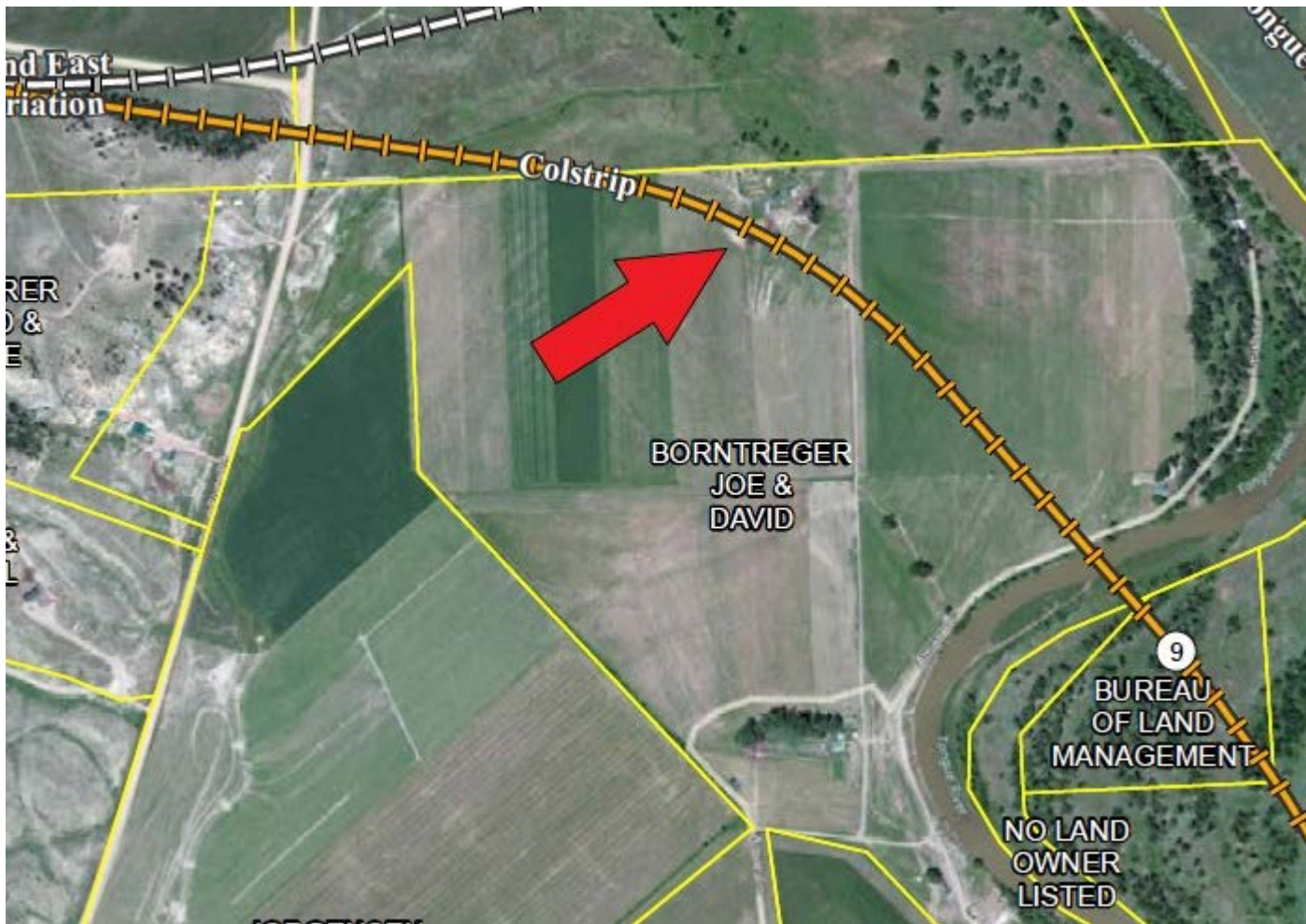
Lundsberg said it's too early in the process to know the precise routing of any of the proposed routes.

"The routing is subject to change based on survey and engineering work that is required as part of the environmental process," Lundsberg said.

The Surface Transportation Board is reviewing the input it received during the scoping process and will issue a Final Scope of Study once it is completed.

AS SHOWN BY THE FOLLOWING PHOTOGRAPH FROM THE FILE OF THE SURFACE TRANSPORTION BOARD THE PROPOSED ROUTE WILL DESTROY THE AMISH COMMUNITY.

Here is a portion of the map of the proposed route of the Tongue River Railroad.



Joe and David Borntreger are members of the Amish Community.

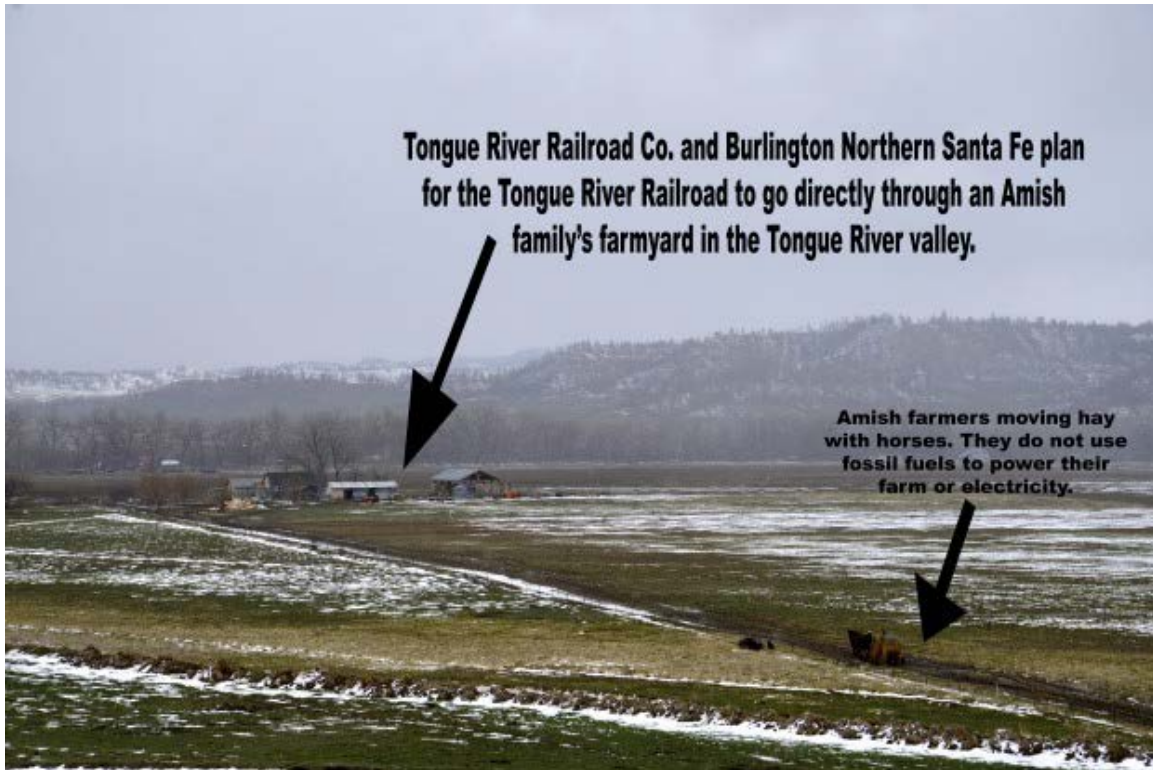


Photo of Effect of Tongue River Railroad on Amish Community.

These photos show that the proposed route of the Tongue River Railroad will run through and destroy the Amish Community. It will destroy a constitutionally protected religious community.

CONCLUSION

The entire record of this case clearly supports the Surface Transportation Board taking Judicial Notice of the following facts:

- 1) An “Old Order” Amish Community, a religious community, is established in the Tongue River Valley, Montana;
- 2) This Community has existed in Tongue River Valley for close to 20 years;

- 3) The preferred proposed route for the Tongue River Railroad and alternatives routes will cross the Amish Community; and
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Dated this 3rd day of August, 2015.

/s/ Paul J. Van Tricht

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And emailed to:

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Date: August 3, 2015

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Signature