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Commenter: Paul Van Tricht

Organization:

State: Montana

Agency: Surface Transportation Board

Initiative: Tongue River Railroad

Submission Text

Attached is: MOTION TO DENY ANY ROUTE FOR THE TONGUE RIVER RAILROAD THAT ADVERSELY IMPACTS THE TONGUE RIVER AMISH COMMUNITY AND FOR AN ORDER REQUIRING THE TONGUE RIVER RAILROAD TO AMEND OR REAPPLY WITH ROUTES THAT DO NOT IMPACT THE TONGUE RIVER AMISH COMMUNITY And BRIEF IN SUPPORT OF MOTION TO DENY ANY ROUTE FOR THE TONGUE RIVER RAILROAD THAT ADVERSELY IMPACTS THE TONGUE RIVER AMISH COMMUNITY AND FOR AN ORDER REQUIRING THE TONGUE RIVER RAILROAD TO AMEND OR REAPPLY WITH ROUTES THAT DO NOT IMPACT THE TONGUE RIVER AMISH COMMUNITY 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 TO DENY ANY ROUTE FOR THE TONGUE RIVER RAILROAD THAT ADVERSELY IMPACTS THE TONGUE RIVER AMISH COMMUNITY AND FOR AN ORDER REQUIRING THE TONGUE RIVER RAILROAD TO AMEND OR REAPPLY WITH ROUTES THAT DO NOT IMPACT THE TONGUE RIVER AMISH COMMUNITY

Paul J. Van Tricht, a resident of Montana, moves the Surface Transportation Board to deny any route of the adversely impacts the “Old Order” Amish Community established in the Tongue River Valley, Montana and for an Order requiring that the Tongue River Railroad amended or resubmit its application with routes that do not adversely impact that community.

This Motion is based on the 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." This Motion is supported by an accompanying brief and a co pending Motion for Judicial (Administrative) Notice of Facts Concerning the Amish Community in the Tongue River Valley, Montana and the Proposed Tongue River Railroad and a supporting brief to that Motion. (A total of four documents including this Motion.)

Dated this 3rd day of August , 2015.

/s/Paul J. Van Tricht

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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 TO DENY ANY ROUTE FOR THE TONGUE RIVER RAILROAD THAT ADVERSELY IMPACTS THE TONGUE RIVER AMISH COMMUNITY AND FOR AN ORDER REQUIRING THE TONGUE RIVER RAILROAD TO AMEND OR REAPPLY WITH ROUTES THAT DO NOT IMPACT THE TONGUE RIVER AMISH COMMUNITY**

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 TO DENY ANY ROUTE FOR
THE TONGUE RIVER RAILROAD THAT ADVERSELY IMPACTS
THE TONGUE RIVER AMISH COMMUNITY AND FOR AN
ORDER REQUIRING THE TONGUE RIVER RAILROAD TO
AMEND OR REAPPLY WITH ROUTES THAT DO NOT IMPACT
THE TONGUE RIVER AMISH COMMUNITY**

The Motion to Deny any Route for the Tongue River Railroad that Adversely Impacts the Tongue River Amish Community and for an Order Requiring that the Tongue River Railroad amend or reapply with Routes that do not impact the Tongue River Amish Community is based on 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) and is very simple.

RFRA "ensures that interests in religious freedom are protected."

It provides:

a) In General: Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

b) Exception: Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person

1. is in furtherance of a compelling governmental interest; and

2. is the least restrictive means of furthering that compelling governmental interest.

The Act applies to federal agencies such as the Surface Transportation Board. Under Sec. 5 of the RFRA “The term ‘government’ includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States,...” Sec. 6 of RFRA provides the RFRA applies to all federal laws enacted before and after the enactment of RFRA.

Therefore, the Board must give the Tongue River Amish Community, a religious community, special consideration. This federal law also applies to the religious concerns of the Northern Cheyenne Tribe.

THE AMISH WAY OF LIFE IS A UNIQUE CONSTITUTIONALLY PROTECTED “EXERCISE OF RELIGION”

First, it must be repeated that a series of decisions by the United States Supreme Court and other courts have made the Amish way of life a constitutionally protected exercise of religion. This board is not simply dealing with a group of farmers in the Tongue River Valley who share the same religion. It is necessary to drive this point home by repeating the fundamental truths about the Amish Community.

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. The Tongue River Amish shun modern technology and conveniences. Transportation for the Amish is by horse and buggy. The community does 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.

In the cases involving the Amish before federal Courts, the Amish have not formally appeared but have been represented by other non-Amish groups and individuals, e.g., the National Committee for Amish Religious Freedom. Thus, there also are special rules on standing for cases involving the Amish.

THE PROPOSED ROUTE AND ALTERNATIVE ROUTES DESTROY THE AMISH COMMUNITY – A BURDEN ON THEIR EXCISE OF RELIGION

The Map and photos in the Brief in Support of the Motion for Judicial Notice show that the proposed route of the Tongue River Railroad will run through and destroy the Amish Community. The proposed route will

destroy a constitutionally protected religious community. It is difficult to imagine a greater burden on a religious community than its destruction.

THERE IS NO SHOWING OF A COMPELLING GOVERNMENTAL INTEREST

Once the burden on the exercise of religion is established the government or here the party asking for a special permit and the right to use the federal government's power of eminent domain must "demonstrate" the burden on religion is in furtherance of a compelling governmental interest. "Demonstrate" under RFRA "means meets the burden of going forward with evidence and of persuasion." The burden is not on those opposing the Tongue River Railroad. The burden is on the Tongue River Railroad.

In this case there is no direct governmental interest as such. The only governmental interest is one of promoting economic development and interstate commerce. The Draft Environmental Impact Study clearly demonstrates that the Tongue River Railroad does not support general interstate commerce. It only transports coal from the Otter Creek Coal mines to the main BNSF line or to the Colstrip Power Plants.

"The cost of Tongue River coal is competitive with other Powder River Basin coal, but is not low enough to induce new demand. Thus, Tongue River coal would compete with other Powder River Basin coal for a relatively fixed demand amount." "From 2018 to 2037, **across all cases**, on average, every ton of Tongue River coal produced would displace 0.76 ton of other Powder River Basin coal." (Appendix C, Chapter 8, Page 8 of the Draft EIS)

According to the Draft Environmental Impact Study a majority of the Otter Creek coal will be sold in an Upper Midwest market, **not** an Asian export market. The STB argues that Otter Creek coal can't compete with other PRB coal for export because of its low BTUs. (Appendix C, Chapter 8, page 19)

There simply is no "compelling governmental interest" sufficient to burden, destroy, the Tongue River Amish Community. Indeed, the Draft EIS demonstrates there is not even an economic interest in developing the Otter Creek mines and the Tongue River Railroad.

The Tongue River Railroad has not sustained its burden. It has not gone forward with evidence to show the compelling governmental interest. It has not met its burden of persuasion.

There simply is no compelling governmental or economic interest that justifies destroying the Tongue River Amish Community.

THERE IS NO SHOWING THAT THE PROPOSED ROUTE IS THE
LEAST RESTRICTIVE MEANS TO FURTHER A COMPELLING
‘GOVERNMENTAL INTEREST’

Assuming for the sake of argument that there is a compelling governmental interest in building the Tongue River Railroad that decision does not end the conflict with the RFRA because, under the RFRA the Tongue River Railroad must also demonstrate that the final route “is the least restrictive means of furthering that compelling governmental interest.”

The least restrictive means is simply a route that does not destroy the Tongue River Amish Community. The current preferred route does destroy the Tongue River Amish Community. Cursory review of the maps involved in this case shows that by altering the preferred route or by adopting another route in the area, the Tongue River Railroad line would not burden the Tongue River Amish Community.

The burden is on the Tongue River Railroad to demonstrate that its preferred route is absolutely necessary as opposed to alternate “least restrictive” routes. Again, it has not sustained its burden. Indeed, the Tongue River Railroad has not even attempted to sustain this burden of persuasion.

CONCLUSION

The current proposed preferred route for the Tongue River Railroad line and any route for the Tongue River Railroad which crosses or substantially interferes with the Tongue River Amish Community violates Religious Freedom Restoration Act. Those routes ***must be denied*** by the Surface Transportation Board and the Tongue River Railroad must be ordered to submit an amended application or a new application with routes which do not cross or interfere with the Tongue River Amish Community.

Dated this 3rd day of August, 2015.

/s/ Paul J. Van Tricht
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