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Vicki Rutson/STB
11/24/2009 08:07 PM

To Kenneth Blodgett/STB, Evelyn Kitay/STB
cc
bcc
Subject Fw: Tongue River Railroad

FD 30186-3

From: "Coburn, David" [DCoburn@steptoe.com]
Sent: 11/24/2009 03:37 PM MST
To: "'Vicki Rutson (RutsonV@stb.dot.gov)'" <RutsonV@stb.dot.gov>
Subject: Tongue River Railroad

Vicki -- You should have received by overnight mail a letter that I dispatched yesterday to the Montana Department of Fish, Wildlife and Parks Commission concerning the long-delayed easement agreement. The easement agreement, also attached to the letter, has dropped into a black hole at the Commission, resulting in no discernable forward progress since the summer. On TRRC's part, we have now responded to each issue that has been raised by the Commissioners with TRRC concerning the agreement. We had been attempting to speak to the Chairman of the Commission about these issues, but for a long time we were unable to reach him and, when we did, we were unable to gain a commitment to move forward toward Commission approval, which is needed under the procedures of the Department. We thus have written the letter (a copy of which is attached for your convenience) forwarding the easement agreement as we have revised it to meet the outstanding concerns. We have also requested Commission action at its January meeting, which presents the next available option for Commission approval.

As I have reported previously, it appears that political concerns are acting as a constraint against the Commissioners taking action on the easement agreement. I am far from certain that such concerns will not continue to rule the day, leaving us in a stalemate -- despite the condition in the STB's final decision that required us to use best efforts to resolve this matter by May 2008. I will let you know if our letter has any positive impact, but may be seeking your views as to how best to move matters forward if the Commission fails to act.

FYI, matters are moving forward on other fronts. The Land Board (composed of the Governor and other state officials) has scheduled a meeting on leasing the state-owned coal lands for December 21. An appraisal and other pre-decision efforts have already been completed and the matter is now ripe for Land Board decision. See link to attached editorial from Billings Gazette.

http://billingsgazette.com/news/opinion/editorial/gazette-opinion/article_495973b8-d4b8-11de-9d7e-001cc4c03286.html

Further, as reported in the attached news release that I have linked, Arch Coal, Inc. (a major coal developer) has recently entered into a lease through a subsidiary with Great Northern Properties for the GNP coal lands in the Otter Creek area. The properties leased by Arch form a checkerboard with state-owned coal lands. The leasing of these

GNP properties, coupled with a State of Montana lease that is hopefully forthcoming soon, totaling 1.2 billion tons of coal, will allow for the development of coal mines in the Ashland area. Obviously, these developments bode well for construction of the TRRC line on which the coal developed in these areas will depend.

<http://news.archcoal.com/releasedetail.cfm?ReleaseID=424012>

I will keep you updated.

Regards. David

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November 23, 2009

VIA FEDERAL EXPRESS

Chairman Shane D. Colton
Department of Fish, Wildlife and Parks Commission
c/o Edmiston & Colton
310 Grand Avenue
Billings, MT 59101

Re: Tongue River Railroad Company, Inc.

Dear Chairman Colton:

In the interest of advancing the Commission's consideration of the Tongue River Railroad Company, Inc. easement, we have attached a revised version of the easement agreement allowing the Tongue River Railroad Company, Inc. rail line to cross approximately 25 acres of Miles City Fish Hatchery property. This revised agreement: (1) incorporates all of the changes previously discussed with the Commission and Department's staff (based on our discussion of former Chairman Doherty's comments); (2) provides in a revised section A.1 that evidence of the appraisal for the Hatchery property will not be used as precedent in any land acquisition negotiation or eminent domain proceeding associated with the acquisition of property for the TRRC line and (3) includes a new section B.1 that addresses concerns about when the easement will become effective.

On this last point, as you will see section B.1 provides that the easement will not become effective until TRRC has presented the Department with evidence that it has entered into a construction contract or contracts providing for the construction of the rail line between Miles City and Ashland. The other provisions of the agreement that limit when construction could commence and that allow the Department to review construction plans and schedules remain in place. See section B.2.

We have attached both a clean version of the agreement and a version showing the changes made to the last draft of the agreement seen by the Commission. The exhibits to the easement agreement are also attached. We have also attached the September 10, 2009 letter from the U.S. Fish and Wildlife Service addressed to

Department counsel confirming that an easement agreement will not violate any terms under which U.S.F.W.S. transferred the Hatchery to state control or the terms of the Biological Opinion issued by USFWS finding that the construction and operation of the TRRC line is not likely to adversely affect the pallid sturgeon. The USFWS letter thus addresses, and resolves, another issue raised by the Commission in prior discussions.

The only other outstanding issue was the insurance question. We have retained in the agreement the insurance escalator provision previously discussed, which provides for an escalation of the initial \$25 million in coverage every five years based on the consumer price index. As we have previously explained, we have once again confirmed upon discussions with experts in the area, a bond is not available and thus not a credible alternative. Further, any such bond, even if it were available, would not offer any greater protection than the Department already has under the robust indemnification and insurance provisions of the agreement, as we have previously explained. In other words, the Department would have to make a claim under a bond just as it would under an insurance policy. Nonetheless, as you know, in addition to the indemnification and insurance obligations undertaken by TRRC in the agreement, TRRC also has agreed in the easement that it will promptly clean up and remediate any spill caused by a collision or derailment.

With the above-described changes we have made to the agreement, and all of the other changes we have made to accommodate Commission concerns, coupled with the USFWS letter, we believe that the agreement is ready to be presented for final approval to the Commission at its January meeting. (We understand that the December agenda is already quite full, and otherwise would request that it be placed on the agenda for that meeting.) We thus ask that the easement agreement be placed on the agenda of the January meeting and look forward to your confirmation that this will happen. Further, we understand that the Department staff may be moving forward to complete the environmental review process by preparing the necessary final documentation and trust that that process will be completed in the near future.

We look forward to hearing from you on these matters at your earliest convenience. I am sure you would agree that this matter has remained unaddressed for too long and that it is time now to move forward toward a final affirmative decision.

Sincerely,



David H. Coburn
Attorney for Tongue River Railroad
Company, Inc.

Chairman Shane D. Colton
November 23, 2009
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cc: Commissioner Doll
Commissioner Moody
Commissioner Ream
Commissioner Vermillion
Joseph Maurier
Becky Dockter, Esq.
Victoria Rutson, STB
John Crist, Esq.
Tom Ebzery, Esq.
Mike Gustafson, TRRC