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**ENVIRONMENTAL
DOCUMENT**

January 7, 2002



The Honorable Linda Morgan
 Chairman
 Surface Transportation Board
 1925 K Street NW
 Washington, DC 20423-0001

ENTERED
 Office of the Secretary

VIA FACSIMILE (202) 565-9021
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MAR 28 2002

Part of
 Public Record

Dear Chairman Morgan:

We object to Mayo Foundation's "Petition to Provide for Submission of Comments Concerning the EIS". EIS consideration by the STB is not and never has been subject to formal notice and service. Mayo's attempt to rewrite STB and EIS NEPA procedure should be rejected. Post-FEIS comments submitted have been on file in the STB's public records room, as is the well-established STB policy. They are open to the public, and consistently monitored by competent counsel.

It is the responsibility of Mayo's counsel to understand and follow the established STB procedure. Their failure to do so or decision not to send comments is not cause for reopening this case. This is yet another in a series of attempts to further delay a process that has dragged on for years, only slightly more advanced than Mayo's recent efforts to invoke the September terrorism acts as an excuse to further delay this project.

Mayo correctly noted that the Final EIS emphasized in unequivocal terms that there would be no formal additional comment period. But that does not mean and never has meant that the public is not permitted to send letters, nor does it require the Board to considering or reject any comments made in those letters. The longstanding and obvious legal distinction is that the Board *must* consider comments submitted during a formal comment period. It has the *discretion* to consider or reject comments submitted outside a formal comment period. Mayo also correctly noted that, as is the case in virtually every proceeding of enough consequence to warrant an EIS, additional comments were submitted by parties who both support and oppose this project. Any STB or EIS practitioner recognizes that this is not unusual, and that the agencies are free to consider these comments as they see fit -- consistent with the law and established precedent. There is nothing that prevented Mayo from making any constructive comments it desired, as was done by many others. Most noteworthy is the fact that most of the post-FEIS comments were from project opponents. Indeed, Mayo itself obviously had such

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comments filed in this case via an extensive 16-page letter dated December 21, 2001 under signature of Senator Dayton. We have no objections to those submissions to the extent they do not single out DM&E for treatment different than received by Class I railroads and are consistent with established law and STB precedent. Obviously, that is a decision to be made by the Board members. Reopening this case is not "a matter of fundamental fairness" as Mayo's counsel suggests. It is a more a matter of whether or not Mayo counsel understands established procedure or is trying to change it. The Board should summarily reject this unsupportable petition to confuse the well-established distinction between *mandatory* versus *discretionary* consideration by the relevant agency in making its EIS-related decisions in these cases.

Nothing in the additional comments submitted by opponents or supporters warrants yet another extension of time. The Board is free to consider or ignore any comments submitted outside of a formal comment process. But you should not be discouraged from relying on any you may deem meritorious in your own independent consideration of the staff recommendations submitted in the FEIS document.

Mayo's demand for an addition comment period is frivolous and should be rejected. It neither requires nor warrants a response. Thank you for your consideration.

Sincerely,

Handwritten signature of Kevin V. Schieffer in cursive, followed by a forward slash and the initials 'cld'.

Kevin V. Schieffer
President and Chief Executive Officer

KVS/cld (j:\kvs\word\lmorgan2.doc)

cc: The Honorable Wayne Burkes, Vice Chairman