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N-4 State Grazing Board

**P.O. Box 461
Panaca, Nevada 89042**

July 11, 2008

Hon. Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

Re. Finance Docket No. 35106: Dept of Energy Application for a Certificate of Public Convenience and Necessity for the Caliente Rail Alignment
Comments of N-4 State Grazing Board

Dear Secretary Quinlan

The N-4 State Grazing Board respectfully submits the following comments on the Finance Docket No. 35106 DOE Application for Certificate of Public Convenience and Necessity (CPC&N) for the proposed Caliente Rail Alignment (CRA). We reference your decisions dated April 11, May 30, and June 13, 2008 in this response.

We recognize you will be considering a very broad range of details pertaining to this project. If this Caliente Rail Line is built and operated, the N-4 State Grazing Board recommends that all impacts be mitigated and all parties, both private property owners and permitted public land users must be kept whole through various means. Please consider where the Caliente Rail Alignment (CRA) crosses private property and recognize that some of the private parcel not actually under the rail line may be left partially, if not totally, unable to continue its historic, current, and most productive land uses. Any such loss must be recognized and mitigated.

You are invited to consider the report prepared by Lincoln County in November 2007 entitled *"Proposed DOE Caliente Rail Corridor, Lincoln County, Nevada: An Analysis of Impacts and Alternatives, With Recommended Mitigations"* (emphasis added). We will call this report the 2007 Lincoln County Report for the purposes of these comments. A hard copy of this report has been furnished to you by Lincoln County Commissioners. This report is available on the Internet at <http://www.lcnop.com/transportation.html>. We would be pleased to deliver a hard copy to you for your work, just notify us of your wishes.

The N-4 State Grazing Board requests the STB to condition the DOE requested CPC&N with a broad range of measures intended to avoid, minimize, mitigate, and compensate, when appropriate, the potential impacts of building this CRA.

These measures should include

- * Maintain all current Access to public land
- * Achieve No Net Loss of animal unit months (AUMs) on affected public land grazing allotments
- * Develop and implement mitigation plans before any land disturbance activity
- * Assure Funding adequate to plan, implement, and monitor and make changes to mitigations
- * Reduce unanticipated impacts by making sure all direct and indirect impacts have been fully identified
- * Make sure the required mitigation measures address direct, indirect and unanticipated impacts
- * Establish a system of collaboration to identify, evaluate, implement and monitor the mitigation measures, and plan a method to make appropriate changes in the mitigation measures as those changes become apparent during the construction, operation, and closure activities associated with CRA.
- * Involve affected public land users, or their designated representatives, within the processes
- * Prepare revised Allotment Management Plans (AMP) for the construction period, and additional revised AMP for operation of the CRA

While our focus is the Agriculture industry and its related issues, we recognize the importance of keeping the integrity of our community and culture. We are all integral parts of the greater whole, that is our beloved Rural Nevada. We call your attention to the subjects discussed with you in a letter approved by Lincoln County Commissioners on July 7, 2008. They detailed information regarding Land Use, Grazing, Agriculture, and Community Character, Noxious and Invasive Weeds, Private Land and Water Property Rights, Rail Safety, Radiation Exposure, Emergency Management, Socioeconomic Conditions and Fiscal Impacts, Air Quality, Noise, and General Monitoring and Enforcement.

1. Land Use: Grazing, Agriculture, and Community Character

The DOE's analysis of the proposed rail line's effects on grazing allotments is totally inadequate. While some may think of this part of Nevada as barren and unproductive, Lincoln County is home to 66 ranching operations on publicly managed land that supports nearly 15,000 cattle and sheep. For the past 150 years, ranching has made up the basic backbone of our local economy and defines our way of life and culture in Eastern Nevada. We pride ourselves in being the "practicing environmentalists", making preservation and improvement of the land, forage, and water resources our every day priorities.

As illustrated on page 3-61 of the DOE's Draft Rail Alignment EIS¹, DOE's preferred rail alignment affects at least 15 public land grazing allotments within Lincoln County, often cutting the allotment in half (see also Figure 4-1 of the Lincoln County sponsored report entitled *Proposed DOE-Caliente Rail Corridor, Lincoln County, Nevada. An Analysis of Impacts & Alternatives, With Recommended Mitigation*, November 30, 2007 which is available at <http://www.lcnop.com/transportation.html>) Lincoln County is concerned that the DOE NEPA analysis does not accurately reflect how grazing allotments are actually utilized. The DOE has narrowly defined the potential region of land use influence as only the "footprints of construction and operations support facilities," or the "nominal width of the construction right-of-way," and "the locations of construction and operations support facilities outside the nominal width of the construction right-of-way." Rail Alignment DEIS at 3-3, 3-36. Far from being a "conservative" assumption, as asserted by the DOE, limiting the region of influence to the rail footprint completely ignores how grazing is conducted and obscures the numerous significant impacts to grazing allotments. In fact, as the County's detailed assessment demonstrates, all affected grazing operations, including land and water property rights, will be profoundly harmed and, even with implementation of mitigation, a number of grazing operations may be forced out of business.

The Taylor Grazing Act requires ownership of "base property" in order to receive a permit to graze domestic livestock on public land. Base property can be either land based, which requires private ownership of and/or access to a commensurate amount of private land, or water based, which requires ownership of and/or access to rights to quantities of water required to sustain the number of livestock for which a grazing permit is sought. The movement of livestock for forage and water is an essential element of ranching operations and the maintenance of a healthy range, and varies considerably between allotments. Additionally, livestock become conditioned to a given area's terrain and resources and animals familiar with a given area are more efficient grazers. Construction and operation of the rail will have numerous effects on grazing operations including creating barriers to livestock movement, separating pasture areas from water sources, opening holes in existing fences, frightening animals away from water sources due to construction noise, and other impacts. If construction and operation of the railroad affects access to an allotment's base property (*i.e.*, private land resources in land base allotments, or water resources in water base allotments), ranchers may not be able to utilize those resources, resulting in a loss of "animal unit months," or AUMs, or even jeopardizing the entire grazing permit.

The proposed Caliente Rail Alignment will cross various parcels of private irrigated parcels and numerous public land grazing allotments permitted by the Bureau of Land Management (BLM). Each allotment is one component of a range livestock operation developed to balance the availability of public and private land, feed sources, and water. The rail alignment will disrupt livestock movements between springs and other water and feed sources. Infrastructure required by the BLM and put in at significant cost by ranchers, such as

¹ DOE submitted with its application two draft environmental impact statements, which were released for public comment in October 2007: (1) Draft Supplemental Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada—Nevada Rail Transportation Corridor, DOE/EIS-0250F-S2D ("Rail Corridor DSFIS"), and (2) Draft Environmental Impact Statement for a Rail Alignment for the Construction and Operation of a Railroad in Nevada to a Geologic Repository at Yucca Mountain, Nye County, Nevada, DOE/EIS-0369D ("Rail Alignment DEIS").

fences, water pipelines, vegetative manipulations and seedings, access roads, and trails, will be crossed and damaged by the construction and operation of the rail line. In addition to the obvious direct losses in forage, where the rail alignment crosses currently irrigated agricultural fields, the ability to effectively irrigate the remaining land will be challenged. The unmitigated loss of any resource to these agricultural operations will serve to render the balance of the enterprise less feasible and, depending upon the nature of the loss, infeasible.

A summary of likely impacts include: loss of functionality for existing fencing and other rangeland improvements, destruction of capital improvements such as corrals and chutes, destruction or loss of functionality of water sources, stockwaters, and pipelines, loss or restriction of access to and within allotments, temporary and permanent loss of forage, fragmentation of allotments, loss or restriction of livestock movement and distribution within allotments; establishment of invasive species; establishment of noxious weeds, increased probability of fire starts; short-term deferment or loss of grazing rights due to construction, and long-term deferment or loss of grazing rights due to operations. None of these impacts are disclosed in the DOE's application, and no mitigation was proposed.

Although many of these impacts cannot be fully mitigated, required mitigation measures for impacts to the agricultural sector in Lincoln County include:

1.1 Maintenance of existing fencing. The Caliente Rail Corridor will cross existing pasture and allotment fences. Sections of the fence will need to be removed to allow for construction activities. Once there is a hole in the fence it is ineffective. Therefore, the integrity of the pasture or allotment is lost, livestock will trespass onto other allotments or be lost. Without some form of mitigation this would render many allotments useless until construction is complete (4-10 years).

1.2 Right-of-way fencing. Some allotments rely on fencing to manage livestock. The rail line and access roads would punch holes through existing fences, rendering the entire fence ineffective, resulting in the loss of livestock. The operational right-of-way will result in a hole in every allotment or pasture fence that it crosses unless some form of mitigation is completed. Typically railroads will fence the right-of-way and tie into allotment or pasture fences to ensure no holes are left. If the right-of-way was fenced it would have to be done in such a manner as to allow wildlife crossing while preventing a breach from livestock.

1.3 Construction Area Temporary Fencing/Delineation. The very most important mitigation action during construction is the absolute minimization of disturbance. The construction and operational footprint should be kept as small as is feasible. An important mitigation would be temporary fencing or other delineation of the immediate areas of authorized construction disturbance to avoid any larger than necessary land disturbance.

1.4 Soil Surveys and Stockpiling and Application of Topsoil - application of top soil for Revegetation Purposes. Soils are critical for rehabilitation efforts, particularly in regards to plant communities. Detailed soils surveys should be completed ahead of any ground disturbing activities. Another essential mitigation would be the requirement to identify suitable growth medium or topsoil and stockpile the topsoil from construction disturbed areas. Once construction is completed, the topsoil could be used as growth medium and be redistributed as

near as possible to original location and reseeded with native and adaptive plant species in order to minimize erosion and the potential for invasive or noxious weed

1.5 In-road cattle guards and gates at exiting fence crossings. Access road(s) associated with the rail would provide another means by which livestock could cross through existing fences. If the right-of-way is not fenced, or if the access roads are outside of such a fence then the only way to prevent a breach is to install a cattle guard or gates. Cattle guards are preferred as they require less maintenance, and minimize the chance of passers-by leaving gates open. It is standard practice to install a gate next to each cattle guard in order to allow passage of livestock when needed or for access by large or tracked equipment in order to prevent damage to the cattle guard

1.6 Relocation of Existing Infrastructure and Range Improvements. Corrals, chutes and other range improvements that would be directly within the construction or operations corridor would have to be relocated, or else they would be completely lost.

1.7 Livestock and wildlife crossings or underpasses The rail and associated access road(s) will severely impact movement of livestock, wildlife and wild horses. The likelihood of collision increases with the height of the cuts and fills, and the number of obstacles such as roads, fences, and sidings. Train speed is also a major factor associated with collisions. If the right-of-way is fenced it will be imperative to construct the fence to wildlife specifications. Crossings most likely underpasses, will need to be constructed to maintain free, safe movement of livestock, wildlife, and wild horses. Without adequate crossings livestock could lose access to portions of the impacted allotments. This would have a significant impact on the allotment grazing system and could well result in the loss of AUMs. The location and specifications for the underpasses will need to be coordinated with allotment permittees and appropriate agency personnel. If the right-of-way is not fenced, at-grade crossings consisting of earthen ramps would be required in areas of cut and fill. If these mitigation actions are not taken there will be significant detrimental effects to livestock operators, wildlife and wild horses along the entire corridor.

1.8 Water rights and water base property Water rights held by grazing permittees are considered to be private property rights under State of Nevada Water Law. Those allotments that are water based have an added layer of private property ownership under the Taylor Grazing Act. As such, potential impacts must be mitigated. Direct impacts may result from construction or operation of the rail, however, significant indirect impacts could occur as a result of pumping by DOE for construction water. DOE should be responsible for contracting an impartial third-party representative to monitor all existing privately held water rights or water base properties. Monitoring should be conducted prior to construction, and continue until groundwater pumping is complete.

1.9 Relocation of all water sources, stockwaters and wildlife guzzlers within one mile of the construction right-of-way Livestock, wildlife and wild horses congregate around water sources given the dry, hot nature of the environment. Any water sources, including stockwaters and guzzlers within a mile of the rail will result in a higher probability of train collisions with livestock, wildlife and wild horses. Appropriate rail crossings will also be needed near water sources and in some cases the development of new water sources may be the

most appropriate mitigation. DOE should coordinate with grazing permittees and appropriate agency personnel to discuss the establishment of new water sources or the relocation of any water sources within a mile of the proposed rail, and the need for rail crossings in these areas. Without mitigation there will be significant impacts to livestock, wildlife and wild horses due to a loss of, or danger associated with water accessibility

1.10 Protection of existing waterlines. The proposed rail line would cross many existing waterlines used for grazing operations, many of which are used to convey water to which the permittee holds water rights or that serves as base property for the allotment (see Figure 4.4 in the accompanying Lincoln County sponsored report entitled *Proposed DOE Caliente Rail Corridor, Lincoln County, Nevada An Analysis of Impacts & Alternatives. With Recommended Mitigation*, November 30, 2007 available at <http://www.lcnop.com/transportation.html>) These lines must be maintained during construction and operations of the rail line. Permittees must be allowed to perform routine maintenance on these pipelines over the life of the rail. As discussed above and in more depth in the accompanying 2007 Lincoln County Report, if these pipelines were severed grazing operations would be significantly impacted and possibly rendered useless

1.11 Reimbursement for lost livestock The DOE should commit to implement all possible measures to minimize livestock loss due to train collisions, including right-of-way fencing with proper maintenance, appropriate crossing structures, and relocation of water sources within a mile of the track, and reduced train speeds. In any event, Nevada is an open-range state and any loss of livestock due to train operations must be reimbursed with a fair market price. See, e.g., NRS § 705.120

1.12 Reimbursement for lost or deferred Animal Unit Months (AUMs) and Capital Costs. Grazing on many allotments will be constrained or may be infeasible during construction of the rail line. Construction activities likely will have a significant impact on operations due to disturbance, limited access, and restricted or altered livestock movement and utilization patterns. Construction will result in a temporary loss of forage, which may result in a long-term loss of forage due to the nature of the climate and soils if not properly restored and maintained. The operational footprint will result in a long-term loss of forage, primarily in key grazing areas of gentle terrain and key forage species. Permittees will incur increased operational and capital costs to reshape their grazing operations around a new obstruction. Interim Grazing Management Plans will need to be developed for impacted allotments prior to construction, and new or revised Allotment Management Plans will be necessary once rail operations begin to enable the permittee to cope and keep operating with the modified and restricted circumstances. Mitigation will be essential in the form of opening new water sources to better distribute livestock to areas not disturbed by the construction activities. Additional feed will need to be developed, either on public land or the grazing operator's private land, in the form of vegetative manipulation and supplementation, to provide forage necessary to continue operations. Without some form of impact mitigation, many grazing operations will be simply infeasible.

1.13 Replacement/Provision of fence and waterline maintenance trail crossings Many allotments possess waterlines and fence lines with associated maintenance trails. These trails are critical to allotment operations. The rail line would cross many of these trails,

and have a profound impact on operations, requiring mitigation, such as the provision of crossings. Replacement fencing either temporary or permanent will be required prior to removal or breach of any existing fencing.

1.14 Design and Installation of alternative irrigation systems. The balance of currently irrigated fields crossed by the Caliente Rail Alignment may require design and installation of alternative irrigation systems to enable continued effective irrigation of the balance of agricultural fields crossed by the rail line. Because Nevada water law requires that water permitted for irrigation use by the Nevada State Engineer be used or the water right is subject to forfeiture, it is imperative that the balance of currently irrigated lands within partially impacted parcels be made irrigable. In the event that the subject fields can no longer be feasibly irrigated, property rights would be lost. DOE must compensate the owner for loss of use of the entire parcel as well as the loss of uses of related water.

1.15 Provision of alternative access to isolated parcels. To provide access for the safe movement of farm equipment to fields and pastures which otherwise would have to operate on public highways, as a result of road closures during and following construction and during operation of the Caliente Rail Alignment, DOE shall provide or develop appropriate alternative access to these fields and pastures. Alternatives for access could include development of frontage roads adjacent to yard boundaries, agreements for farmers to coordinate with the yard master to cross through the yard, if rail operations and safety conditions permit, or development of additional access roads. DOE should be required to plan and implement appropriate mitigation and monitoring measures if additional access roads are built. Providing alternative access to these isolated parcels will create a need for more maintenance of existing fencing and require additional new fencing to facilitate continuing operations. Allowing new access ways into these isolated parcels will require additional road maintenance operations.

1.16 Provision of construction schedule to agricultural producers. DOE must provide its project-related construction schedule to affected farmers and ranchers to allow them to determine whether they should continue to crop or graze in right-of-way areas or discontinue such activities due to impending construction and reconstruction activities. Notification should also be made to Lincoln County officials, Lincoln County Sheriff, local ambulance services and EMS providers, and other public officials to facilitate safety and medical services as needed to the construction operations.

1.17 Establish Community Liaison to coordinate with impacted parties. As a condition to the issuance of the Certificate of Convenience and Public Necessity, and prior to initiation of construction or reconstruction activities related to this project, DOE should establish community liaisons to consult with affected communities, farmers, ranchers, businesses, landowners, and agencies, develop cooperative solutions to local concerns, be available for public meetings, conduct periodic public outreach; and assist communities and other entities in establishing quiet zones. Such assistance may include coordination with the Federal Railroad Administration (FRA) for identification of appropriate supplemental and alternative safety measures at grade crossings where quiet zones are desired, identifying potential sources of funding, providing assistance preparing funding applications and grant requests, and coordinating with representatives of potential lending organizations. The Community

Liaison(s) shall have access to DOE's upper management DOE shall provide the name and phone number of the Community Liaison(s) to County Commissioners and other appropriate local officials in each local jurisdiction through which the new rail line passes The Community Liaison also must have authority to provide information on anticipated train schedules to farmers and ranchers to facilitate movement of equipment or livestock from one side of the rail line to the other

1.18 Development and implementation of mitigation policy and action plan As set forth in greater detail in the referenced 2007 Lincoln County Report, each allotment and grazing operation is operated differently. DOE, the BLM, landowners, grazing permittees, appropriate state grazing boards and Lincoln County must work cooperatively to develop a Land Use Mitigation Policy and Plan addressing areas of concern, including.

- Direct and indirect land and forage loss
- Displacement of capital and range improvements (wells, windmills, corrals, outbuildings, irrigation systems, etc)
- Noxious weed control
- Fencing – right-of-way and existing allotment boundary fencing
- Livestock casualty and loss
- Fire prevention and suppression
- Fire casualty
- Construction-related impacts
- Property takings
- Compensation
- Access to and within grazing allotments and public lands
- Interim Allotment Management Plans for Construction
- New or Revised Allotment Management Plans for Operations
- Water rights including points of diversion, places of use and conveyance

1.19 Standard for repair/replacement of range improvements. Any damage to existing range improvements caused by construction activities must be repaired using material that meets or exceeds the quality of the existing improvement If damage occurs, the BLM, livestock operator and Lincoln County must be notified immediately If damage occurs during active livestock grazing, repairs should be made within 24 hours In addition, where required, tortoise fencing would be approximately 18 to 24 inches high, consisting of welded mesh attached to small stakes so cattle should be able to move over it.

1.20 Fire Prevention. Many of the plants located near the proposed rail line are susceptible to fire. Moreover, in seasons with high rainfall, combustible growth and the threat of wildfires are increasing Once burned, it may be difficult or impossible to reestablish a community of native vegetation To minimize the loss of vegetation due to wildfire, prior to initiating any construction activities related to this project, DOE must be required, in consultation with the Natural Resource Conservation Service, local grazing organizations,

appropriate State of Nevada and Federal agencies, and local fire and emergency response departments, to develop an adequate plan for fire prevention and suppression and subsequent land restoration, including natural habitats, during construction and operation of the new rail line. DOE's plan must ensure that all rail infrastructure be selected and procured, and operated with the best technology and operational practices to reduce the threat of wildfires caused by the railroad. For instance, locomotives should be equipped with functioning spark arresters on exhaust stacks, fire extinguishers suitable for flammable liquid fires, and low-spark brake shoes.

1.21 Minimize indirect Off Highway Vehicle (OHV) use impacts in the project area

The construction of the rail alignment and associated access roads will facilitate and encourage OHV use, whose use can be destructive to vegetation. DOE must fund the provision of additional rangers to monitor improper OHV use in the rail project area. DOE should be required to fund appropriate mitigation measures and monitoring to alleviate the identified adverse and indirect OHV impacts to the project area.

1.22 Location of construction camps closely coordinated with local government. To minimize adverse and maximize beneficial impacts associated with DOE planned construction materials and man camps in Lincoln County, the location and post-construction disposition of these camps should be closely coordinated with the County.

1.23 Minimize land disturbance and water usage. The use of above-ground water storage tanks with standpipes to reduce the level of disturbance and conserve water by minimizing leakage and evaporation should be required. This is of key importance to grazing allotments.

1.24 Minimize visual impacts to surrounding lands. DOE should be required to design the staging yard and related facilities and structures in a manner that blends with the natural environment and fits with the local architecture. DOE should be required to place native vegetation on berms around the staging yard and construction camps to soften the visual impact to adjacent lands. DOE should adopt a protocol to minimize cuts and fills and areas that will be cleared of vegetation during construction. This is very important to being able to maintain operations of the agriculture industry.

1.25 Avoid or compensate impacts to privately held water resources. If it is determined that withdrawing groundwater for construction and dust control will have a detrimental effect on any existing water right in Lincoln County, DOE should be required to avoid this impact by trucking in the water from another more abundant source. DOE should be required to provide funds to the impacted allotments and communities in Lincoln County to upgrade and improve their water systems including wells, pumps, and storage capabilities to off-set the additional demands that will be made by new permanent and temporary residents, servicing the staging yard and related facilities and construction camps, and servicing additional through traffic. DOE should be required to consider leasing unused water rights from existing willing right-holders rather than seeking new water permits and the construction and pumping of new wells which may adversely impact existing water rights.

Conclusion

We are necessarily concerned that the appropriate mitigation measures be designed, funded and implemented by DOE as soon as possible. For so many of these impacts, getting the mitigations done BEFORE any land disturbing activities begin will be absolutely essential to make sure that the consequences of construction are effectively avoided or minimized. This could very well require that the mitigation be planned, provide a stable funding source, and implementation be done up to four years prior to the actual start of construction on the rail line and related rail yards and support camps and facilities. We recognize the inability of DOE to commit funding because their funding source is year-to-year by Congressional action. Considering the current trend to under fund the requests by OCRWM, the N-4 Board remains concerned that DOE will not be able to pay for the necessary mitigation measures and monitoring. We respectfully ask you to put conditions to the requested CPC&N that requires sufficient funding be set aside for early planning, design and implementation of the identified mitigation actions.

The N-4 State Grazing Board thanks the Surface Transportation Board for this opportunity to submit these comments for your consideration. We would welcome the chance to meet with STB staff and/or contribute information to you in any related hearings that discuss impacts and mitigations. Should you have any questions regarding these comments, please feel free to contact our Certified Range Specialist and Consultant, John McLain at 775-883-1600, or Connie Simkins at 775-728-4682 or email at ninescattle@yahoo.com or cell 775-962-1333.

Sincerely,

A handwritten signature in black ink, reading "Merlin R. Flake". The signature is fluid and cursive, with a long horizontal stroke at the end.

Merlin R. Flake, Chairman
N-4 State Grazing Board