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January 19, 2012

E-FILING

Ms. Cynthia A. Brown
Chief of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings

JAN 19 2012

Part of
Public Record

RE: FD 35559, Saratoga and North Creek Railway, LLC
-Operation Exemption-Tahawus Line

Dear Ms. Brown:

I am writing on behalf of Saratoga and North Creek Railway, LLC ("Saratoga") in response to the letter filed with the Board on January 10, 2012, by Friends of the Upper Hudson Rail Trail, Inc. (hereinafter "Upper Hudson"). For the purpose of insuring a more complete record, Saratoga requests leave from the Board to respond to Upper Hudson's comments insofar as they represent a misunderstanding of the law on the creation of rail trails under the National Trails Act ("NTA").

Upper Hudson is concerned that an opportunity to rail bank the Tahawus Line might in its words be "lost inadvertently" at such time as the Line is abandoned at some future date. Upper Hudson believes that abandonment is "inevitable" because the portion of the line on state land is on a temporary right-of-way ending in 2062. Should the line be abandoned, Upper Hudson avers the right-of-way will revert to the underlying owners. Additionally, Upper Hudson challenges the assertion that Saratoga made in footnote 2 in its October 25 notice of exemption (NOE) that the Tahawus Line was industry-owned spur trackage exempt from Board regulation, that it has never been operated in common carrier

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service, and that Saratoga did not need Board acquisition authority as the property is outside the Board's jurisdiction.¹

Upper Hudson is mistaken in its belief that the Tahawus Line would have been eligible for designation as a rail trail under the NTA. Section 1247(d) and the Board's regulations at 49 CFR §1152.29 presuppose that the Line to be considered for rail trail conversion has been the subject of abandonment approval by the Board. Indeed, section (a) of that regulation begins, "[i]f any state, political subdivision, or qualified private organization is interested in acquiring or using a right-of-way of a rail line proposed to be *abandoned* [emphasis supplied] for interim trail use and rail banking pursuant to 16 U.S.C. 1247(d)..." Insofar as the subject line was never subject to Board entry jurisdiction until Saratoga acquired it, it could not have been subject to Board abandonment jurisdiction. Assuming that the Board grants Saratoga's appeal of the Acting Director's decision rejecting its NOE and issues the requested exemption, the Tahawus Line will now be under the Board's jurisdiction under sections 10901-10907. While Saratoga has no plans to seek abandonment authority for the Tahawus Line, it would be a candidate for conversion to rail trail status under the NTA should Saratoga ever seek abandonment authority at some future date.

Moreover, Upper Hudson is wrong in asserting that the Tahawus Line was not exempt from Board acquisition jurisdiction during the time that NL Industries owned it. The Interstate Commerce Commission's 1994 decision in *Hanson* held that railroad trackage owned by a rail customer was private track outside the agency's acquisition jurisdiction despite its length (40 miles) and the fact that a common carrier railroad (the Santa Fe) provided service over it. The only difference between the private track in *Hanson* and the Tahawus Line is that the subject line is 10 miles shorter than the one in *Hanson* and was operated by a different carrier [the Delaware & Hudson Railway] until that carrier terminated operations over it around 1989. Should Saratoga be successful in its effort to obtain an exemption under 49 U.S.C. §10902 and 49 CFR §1150.41, the Tahawus Line will become a regulated line of railroad subject to the Board's jurisdiction.

¹ While Saratoga had characterized the track as exempt under 49 U.S.C. §10906 prior to its acquisition, it probably would have been more accurately described as "private trackage." But private trackage is still outside Board regulation under 49 U.S.C. §§10901-10907. Hanson Natural Resources Company – Non-Common Carrier Status – Petition for A Declaratory Order, FD 32248, ICC served Dec. 5, 1994 (hereafter *Hanson*)...

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Finally at page 3 of his letter, Dr. Curtiss M. Austin, Upper Hudson's President, makes the following statement that he ascribes to Andrea Ferster, general counsel of Rails-to-Trails Conservancy, and also Todd Cecil, VP for Real Estate of Saratoga's parent company, Iowa Pacific Holdings, LLC:

“[e]veryone we have talked to about the legal nature of this corridor – people familiar with the relevant facts and laws – has told us that it should be regarded as nonexempt.”

Although Saratoga cannot vouch for whether Ms. Ferster may or may not have said that, it asserts that Mr. Cecil never made such a comment. Saratoga attaches to this letter an affidavit from Mr. Cecil to that effect.

Respectfully submitted,



John D. Heffner

Attachment

cc: all parties

**VERIFIED STATEMENT
OF TODD CECIL**

Todd Cecil, being duly sworn, deposes and states as follows:

1. My name is Todd Cecil. I am Vice President-Real Estate, Iowa Pacific Holdings, LLC, a short line railroad holding company that through its wholly-owned subsidiary Permian Basin Railways, Inc., presently controls six common carrier short line railroads operating in the United States. One of these subsidiaries is the Saratoga and North Creek Railway, LLC (“Saratoga”), a class III short line railroad operating in northern New York State.
2. I am familiar with the efforts by Saratoga to obtain authority from the Surface Transportation Board (“STB”) to operate a line of railroad known as the “Tahawus Line” in STB docket FD 35559 and am authorized to speak on my company’s behalf.
3. On January 10, 2012, the Friends of the Upper Hudson Rail Trail, Inc. (“Upper Hudson”), filed comments in this proceeding with the STB.
4. At the end of those comments, Upper Hudson’s President, a Dr. Curtiss M. Austin, attributed to me the following statement:

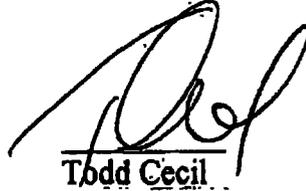
“[e]veryone we have talked to about the legal nature of this corridor – people familiar with the relevant facts and laws – has told us that it should be regarded as nonexempt.”

5. For the record, I made no such statement. Furthermore, no such statement can, to the best of my knowledge, be attributable to any employee of Saratoga, Iowa Pacific Holdings, or Permian Basin Railways.

VERIFICATION

Pursuant to 28 U.S.C. 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed: January 19, 2012



Todd Cecil

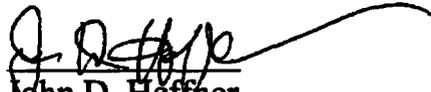
**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35559

**SARATOGA AND NORTH CREEK RAILWAY, LLC
—OPERATION EXEMPTION—
TAHAWUS LINE**

CERTIFICATE OF SERVICE

I hereby certify that I mailed a copy of the “Response of Saratoga And North Creek Railway, LLC, to the Friends of the Upper Hudson Rail Trail, Inc.” in the above-captioned proceeding by first class United States Mail and/or electronic transmission to all parties on the Board’s service list on January 20, 2012:


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