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FD-34886

October 24, 2008

Ms. Sherry Barrett  
US Fish & Wildlife Service  
Arizona Ecological Services Field Office  
2321 West Royal Palm Road, Suite 103  
Phoenix, AZ 85021-4951

Subject: Arizona Eastern Railway (AZER) Letter of Complaint

Dear Ms. Barrett:

I am writing an official letter of complaint on behalf of the Arizona Eastern Railway Company ("AZER"), petitioner before the federal Surface Transportation Board (STB) for authority to construct a new line of railroad in Graham County, AZ.

My purpose in writing is to express my client's disappointment and extreme frustration at the amount of time your office has needed to fulfill its responsibilities in connection with this matter. I personally share that sense of disappointment and frustration.

As you may be aware, AZER is a small entrepreneur-owned short line railroad regulated by the STB. As relevant here, AZER has applied to the STB for permission to construct about 12 miles of new railroad near Safford in Graham County, AZ, to haul copper concentrate, sulfuric acid, and other products to or from a newly constructed mine near Safford. Part of the STB's approval process entails compliance with the National Environmental Policy Act (NEPA) and other federal environmental legislation. Board approval requires AZER's project to undergo a biological assessment under the Endangered Species Act and for your agency to issue a Biological Opinion. Completion of that work is one of the last two things required before the STB's Section of Environmental Analysis can issue its Final

Environmental Assessment (finding that this matter will not have a significant impact on the environment). Moreover, the STB cannot approve this otherwise unopposed project on its merits until it issues the Final EA.

Accordingly, AZER was very disappointed to receive your letter dated October 10, 2008, copy enclosed, requesting an additional 60 days to complete this project. Originally, USFWS had been advised about the project when the applicant started the project in August 2006. The DRAFT EA was sent to you by the STB in early March 2008, and concluded, after extensive study and consultations, that there were no threatened species or habits present. It took a full two months, until May, for your agency to tell us that it wanted to perform a full-scale consultation and it would take about another 90 days for the first report to come out and perhaps 30 days more to finish up the work. Eventually, after some initial delays and numerous inquiries, your agency promised that the biological opinion would be finished on September 24, 2008. That date came and went without any hint of a delay. We now learn that you need additional time and we don't know when this process will conclude or even the reasons for delay other than a very nebulous "work-load considerations."

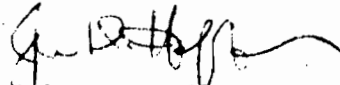
In fact, we don't know how much work has even been done, nor if even any work has been done. There has been little to no fruitful communication between your agency and our consultants about the status of the project. So we are asking, what is the proportionality of the amount of time required to evaluate a project compared to the size of the project? It seems our project takes about the same amount of time to evaluate by your agency as building a new Hoover Dam would take. Where is the transparency? We were never advised about how the work was proceeding, what the percentage complete status was, and if any additional information was needed until the very last day. This is not a good way to work and build trust with anyone, much less an applicant doing their level best effort to comply with federal requirements.

I can't emphasize to you enough the additional financial and emotional costs your agency's delay has caused for my client. There are literally hundreds of jobs at stake related to this project, each of which has families trying to make it through these very challenging economic times. Every agency save yours has met its fiduciary responsibilities and completed their required tasks on time. The way we calculate it, your agency, without regard to proportionality of the task, without transparency of the process or

financial impact on the applicant, other than you can by law, has extended the permitting time for this project by about 6-7 months. We think this is a serious breach of the public trust.

Please call me at your earliest opportunity at (202) 296-3334 to develop a plan and hard dates for expeditiously finishing this task. There are reputations and jobs at stake here.

Sincerely yours,



John D. Heffner

Enclosure

cc: Edwin Ellis  
Jeff Barker, AZER  
Diana Wood, STB  
Victoria Rutson, STB  
Steven Spangle  
Kim Otero  
Mark Cochran  
Scott Steinwert  
John Cook

Note to the File Regarding the Attached Letter of Complaint  
FD-34836, Arizona Eastern Railway  
November 10, 2008

The Section of Environmental Analysis acknowledges the attached October 24, 2008 complaint to the U.S. Fish and Wildlife Service (USFWS), but notes that the issue for which the complaint was written was resolved on October 27, 2008 when USFWS issued a Biological Opinion on the proposed rail line construction case. This completes the formal consultation process under Section 7 of the Endangered Species Act.