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May 1, 2008

Ms. Diana Wood
Section of Environmental Analysis
Surface Transportation Board
Case Control Unit
395 E Street, S.W.
Washington, D.C. 20423

**RE: STB Finance Docket No. 34836, Arizona Eastern Railway, Inc. –
Construction of a Line of Railroad – In Graham County, AZ**

Dear Ms. Wood:

On April 2, 2008, the Board's Section of Environmental Analysis (SEA) served a notice extending the public comment period in the above-captioned railroad construction proceeding until May 1, 2008. Petitioner Arizona Eastern Railway, Inc. ("AZER") submits these comments in response to that notice addressing issues raised by certain parties.

Overall Alignment Approach and Alternative Analysis

From the very beginning of the project, it has always been AZER's goal to work with all of the landowners and be sensitive to their needs and desires and to compensate for any land that would be required for railroad right-of-way.

Selection of the railroad right-of-way alignment required consideration of many factors including not only the assembly of land parcels and land ownership, but the length of the railroad to be built, customer needs and the potential for future service development, and the physical attributes of grades, curves, site preparation, etc. AZER has designed this project not only to limit its effect on historical, cultural and biological resources, but also to minimize the impact the railroad would

have on the flood plain and other watersheds. And then are the needs and responsibilities of the stakeholders to include and consider as the alignment selection analysis went forward: Arizona DOT (“ADOT”), the City of Safford, Graham County, the State of Arizona’s multiple agencies and authorities, and several federal agencies. The railroad is a stakeholder too.

After analyzing several different alternatives, only the recommended alternative seemed to best achieve these goals.

US70 Crossing Discussions and Long Term Planning

AZER met with ADOT, the Arizona Corporation Commission, the City of Safford and Graham County about the proposed railroad crossings planned for U.S. 70 and Airport Road. AZER is proposing that both roadway crossings be constructed to the level of protection selected and required by the Environmental Assessment (“EA”) being prepared for permitting this project by the Surface Transportation Board (“STB”). For both crossings, the Draft report required at-grade crossings with the appropriate signaling devices and signage. As part of the planning process for the U.S. 70 at-grade crossing, ADOT shared its long-term plans for U.S. 70. They include widening the road from the existing 2 lanes to a 4-lane road which would require a new bridge to be built across the San Simon River, just east of where the railroad would cross the existing highway. AZER was asked by ADOT if it would consider contributing for a portion of the costs associated with making the new structure a grade separated bridge at that time ADOT rebuilds it. This would require building the new bridge at a higher elevation with a span long enough to pass over the railroad. AZER has committed to work with ADOT to achieve this goal. ADOT has told AZER that it plans to start designing the new grade separated bridge in 2011 and could commence construction in 2014.

Private Parties: Mr. and Mrs. Christopher Claridge. Mr. and Mrs. Christopher Claridge (“the Claridges”), abutting landowners, submitted the lengthiest and most detailed comments of any of the commenting parties. Pared down to their most basic points, the Claridges requested a 60-day comment period and asserted that 1) the SEA’s draft EIS failed to address routing alternatives (i.e. routes that avoided the Claridge’s property) and failed to identify the detrimental impacts that the rail line would have on the airport (while identifying the benefit impacts), 2) the SEA’s decision to prepare an EA instead of an EIS lacked technical or legal support; 4) the SEA failed to find the Dos Pobres/San Juan Project a “connected action” to

be addressed in the SEA's EIS; 5) the SEA failed to identify the circumstances justifying the issuance of a nationwide permit or include the US Army Corps of Engineers ("USACE") in the process; and 6) the SEA failed to find that this rail line construction project presents significant impacts on biological and cultural resources, air and water quality, adjoining landowners and land uses, area hydrology (flooding), safety, and quality of life issues all of which mandate the preparation of an EIS.

The 60 day comment period

In response, AZER notes that the SEA has effectively granted the Claridges' first request by extending the initial 35-day comment period from March 31 until May 1, thus giving the public a total of 66 days in which to submit comments. This 66 day period is longer than most comment periods granted by the SEA.

Routing Alternatives

Regarding routing alternatives, the SEA considered 5 potential options. Each of the options including the chosen route offered advantages and disadvantages. In conducting its analysis the SEA chose the alternative that presented the fewest adverse impacts as well as the opportunity to serve the airport location should industry locate there at some future date. As the SEA noted in Section 2.0 of its report, it rejected Alternative A because it presented the largest study area and therefore the greatest number of impacts. The SEA rejected Alternatives B and C because those routings would have required crossing public lands that were unavailable or committed to incompatible land uses. The SEA rejected Alternative D because that option entailed the construction of bridges over two bodies of water instead of one. Accordingly, the SEA concluded that the last construction alternative, the chosen one, presented the fewest overall impact issues other than the fact that it crosses the Claridges' property.

The Claridges assert that the SEA's analysis was in some way deficient because it ignored the potential negative impacts associated with the chosen Alternative. The Claridges could have identified any such negative impacts in their comments; however, they did not identify any negative comments. By implication, the only negative impact is the fact that a rail line crossing their property might in some unspecified way adversely affect their ability to sell or develop their land. However, the SEA must discount this assertion in view of the many years the Claridges have owned their property and the lack of sale activity or development to date.

Environmental Impact Statement (EIS) versus Environmental Assessment (EA)

The Claridges' third argument – that the SEA is required to prepare an EIS for this project – misreads the applicable law and should be rejected out of hand. The Claridges argue that the SEA is *normally* [emphasis supplied] required to prepare an EIS because this project does not entail the construction of a connecting track on an existing railroad right-of-way or property owned by connecting railroads. However, this argument ignores both past Board precedent and the Board's regulation at 49 CFR 1105.7 *et al.*

The term "significant" for the purposes of the National Environmental Policy Act ("NEPA") requires considerations of both the context and the intensity of a project's impacts. 40 CFR 1508.27. While the project must be analyzed in terms of direct, indirect, and cumulative impacts and actions, the SEA is also required to consider the severity of the project's impacts on a variety of matters involving the environment, historic and cultural resources, and safety and the "quality of life" in a community. The fact is that every project, however major or minor, has some impacts. But the simple fact is that this project has very limited impacts as railroad construction projects go.

In that regard, the Board's environmental regulations identify a series of criteria for determining the intensity of the community impact of a railroad construction project. 49 CFR 1105.7(e). Among other matters, the regulations identify the number of train frequencies, the amount of truck traffic generated by a rail facility, whether the project will divert traffic from motor carrier to rail transportation, and whether the affected area is in an attainment or a nonattainment area. In this case the projected traffic level, one round trip per day in an attainment area is well under the Board's jurisdictional threshold. Moreover, this construction project will divert to rail about 15,000-20,000 truckloads (5,000 rail car loads) of traffic that would otherwise move by highway over U.S. Highway 70, the *only* east-west highway in the area.

The Claridges cite several other railroad construction projects entailing the preparation of an Environmental Impact Statement for the proposition that an EIS is required here. Those "precedents" are inapplicable here. The Alaska Railroad-Port MacKenzie Rail Extension case involves the construction of 30-45 miles of railroad into an area with

significant ecological impacts unlike the modest impacts here. While the Southwest Gulf Railroad and Bayport Loop cases superficially appear to be more comparable to the AZER case, they involve the construction of rail lines in populated areas that present significant environmental impacts. The Bayport Loop case involved the construction of a new rail line that crossed numerous other lines and roads, handled hazardous commodities, and significant community participation and opposition in the environmental scoping proceeding. As a general matter, it is SEA and Board policy to require a full Environmental Impact Statement only for those actions that may significantly affect the environment. 40 CFR 1105.4(f), 1105.6(a). For those actions that would not have a significant environmental impact with appropriate mitigation, the SEA and the Board will find that an Environmental Assessment is sufficient. 49 CFR 1105.4(d), 1105.6(b). Morristown & Erie Railway, Inc. Modified Rail Certificate, STB FD. No. 34054, served June 22, 2004, *aff'd sub. nom. Town of Springfield v. the Surface Transportation Board*, __ F.3d __ (D.C. Cir. 2005).

The simple fact is that the Board has frequently found that an EA is adequate to meet the requirements of NEPA. See, e.g., Itasca County Regional Rail Authority-Petition for Exemption, et al, FD No. 34992, served March 28, 2008; Pemiscot County Port Authority - Construction Exemption - Pemiscot County, MO, FD No. 34117, served May 7, 2003; Ellis County Rural Rail Transportation District-Construction and Operation Exemption-Ellis County, TX, FD No. 33731, served April 24, 2000.

In granting AZER's EIS waiver request, the SEA found, among other things, that the proposed right-of-way alignment would cross only two public roads (U.S. Highway 70 and Airport Road) with an average daily traffic volume of 5,900 and 425 vehicles, respectively; that the existing land use is largely agricultural; that the projected traffic is two daily trains or 730 trains per year with no diversions of existing traffic to or from other systems or modes; that there would be no significant impact on local or regional air quality; that there would be minimal impacts on flora and fauna and AZER would comply with any permit conditions issued by the USACE; that while the preferred alignment would cross 100-year flood zones at five locations, AZER's bridge would be designed and sized to comply with the requirements of the Graham County Engineer to minimize any flood-related impacts; and that the SEA did consult and is continuing to consult with other state and federal agencies and has not to date identified any significant

issues during the agency consultation process. Accordingly, there is no need for an EIS.

The rail construction project and the Dos Pobres/San Juan Mine Project as connected actions

There is no basis for finding that the construction of the subject rail line is a connected action with the construction of the mine. Although the new mine being constructed by FCX Freeport McMoran Copper and Gold, Inc.¹ will utilize Petitioner's rail service, they are not connected actions because each can exist independent of the other. The Dos Pobres/San Juan mine facility is substantially complete and in operation well before the commencement of rail service. Accordingly, that facility will initially rely on motor carrier service for its transportation needs until the railroad is ready for service. While truck is inferior to rail transportation from the perspectives of cost, energy consummation, and emissions, it is an adequate and feasible way to handle Freeport's transportation needs until rail service becomes available. The STB does not analyze the direct impacts of a customer facility proposed to be served by a new rail line where the line and the facility are otherwise independent of each other. Vaughn RR Co.- Construction Exemption-Nicholas and Fayette Counties, WV, ICC FD No. 32322 (served Nov. 4, 1993).

There is no need for the issuance of a nationwide permit or the Army Corps of Engineers should be a cooperating agency

Whether or not there is a need for issuance of a nationwide permit is an issue that will be examined in discussions between AZER's own environmental consultant (WestLand Resources, Inc.), the US Fish & Wildlife Service, and the USACE. As to whether the USACE should be a cooperating agency, the USACE was invited to participate in this project as a cooperating agency and declined to do so.

The SEA's analyses of resource impacts are conclusory and inadequate

Finally, the Claridges devote the remainder of their presentation to a discussion of how the SEA's analysis of this project is deficient in numerous respects including, among others, biological and cultural resources, air and water quality, visual resources, noise, potential for flooding, safety and traffic impacts.

¹ Formerly Phelps-Dodge

As a preliminary matter, the Claridges erroneously maintain that the SEA should have considered impacts associated with increased traffic on AZER's mainline. Although the Board has licensing authority over the construction of new rail lines, that approval power does not extend to proposals to rebuild or increase traffic on existing rail lines. Dakota, Minnesota & Eastern Railroad Corporation Construction into the Powder River Basin, FD No. 33407, January 30, 2002. However, the Board in that case did perform an environmental analysis of the increased amount of traffic that would move over the existing DM&E railroad system should the construction approved there be completed. But there is a significant difference between the DM&E case and this proceeding insofar as that applicant proposed to move *thirty-seven daily coal trains* [emphasis supplied] versus Petitioner's plan to handle one daily round trip of about 30 rail cars.

In other respects, the amount of rail traffic to be generated by this line is not sufficient to trigger the SEA's jurisdictional thresholds for certain environmental impacts. For example, under the Board's environmental regulations at 49 CFR 1105.7, the applicant is required to provide information on and the SEA is required to review impacts on transportation systems, land use, energy consumption, air and noise impacts, safety, biological resources, and water quality. Insofar as air and noise impacts are concerned, the construction and operation of this rail does not even meet the SEA's minimum thresholds for the agency to grant relief. Because this part of Arizona is in an attainment area, the applicable air quality standard is an increase of rail traffic of at least 100% or an increase of at least eight trains per day on any segment of rail line affected by the construction proposal, an increase in rail yard activity of at least 100%, or an average increase in truck traffic of more than 10% or 50 trucks per day. AZER anticipates operating but one round trip per day seven days per week over the subject line to be constructed. Once the train reached AZER's mainline, this traffic will be incorporated into AZER's existing rail line. The increase in train traffic will be less than 100%. Moreover, handling the mine's traffic by train instead of truck will have the result of decreasing, not increasing the amount of truck traffic over area roads.

Regarding noise impacts, the regulation requires analysis *if* [emphasis supplied] any of the impacts in 49 CFR 1105.7(e) (5) (i) is surpassed. But as noted above, those thresholds have not been met.

Other Private Property Considerations

Regarding locating the railroad on privately held lands, specifically the Claridge properties and the Anderson properties, the alignment was developed to minimize the total number of acres affecting their lands, oriented to run parallel to property lines to minimize the severance of any parcels, preserve for the landowners acreage that has the greatest future potential for development, and to engineer the design of the railroad to be as floodplain neutral as possible, i.e., that it neither improves nor worsens flooding conditions on any adjacent properties the railroad would use. Additionally, AZER has mentioned to both property owners, that if they so desire, AZER could help find rail-served developments for their properties and AZER remains committed to working with them to explore this concept further if they would like to do so.

Addressing specific comments regarding the design of the railroad alignment, some explanation is appropriate. The five hundred foot wide corridor was studied in detail only for the purpose of performing the environmental analysis. The railroad right-of-way will be much narrower, with some exceptions, requiring a strip of land no more than about 50' wide for its operating and maintenance needs and in many locations, narrower than that. When during the detailed engineering design state of the project any wells, utilities, or other key structures are identified that are likely to be in the railroad right-of-way, they will be, to the greatest extent practicable, avoided by the final alignment or be relocated.

Based on hydrology studies, it was determined that the Gila River bridge should span about 1,500 linear feet. This length provides for spanning the 800 foot (plus or minus) wide river bank-to-bank distance, but also for about 700 feet across the flood plain to the south to allow for the free flow of the Gila River should there be a flood event. Pier distances for the bridge are calculated to be about 100 feet pier-to-pier to create the smallest possible footprint for the bridge and therefore to minimize flow interference.

Building a railroad embankment on the south bank of the Gila River to have the railroad cross the river one mile to the West is not practicable because it would inhibit the natural flow of a Gila River flood event. Additionally, a bridge at that location would be about the same length as the proposed bridge to minimize flow interference on the flood plain, would

require significantly more land to be acquired, require more earth work (i.e., cuts and fills), sever additional parcels of land on the north and south sides of the river, and increase the overall length of the railroad alignment.

AZER's comments regarding the SEA mitigation measures

AZER has reviewed the SEA's proposed mitigation measures in Sec. 6.0 of the EA and has the following responses:

Transportation/traffic safety item 1. The third line of the SEA's comment refers to completion before construction work within the roadway occurs. AZER believes this is a typo with the correction work being railway or railroad instead of roadway.

Transportation/traffic safety item 2.2

AZER has already responded to the requirement that the construction of at-grade road crossings shall be subject to the review and approval of the Arizona Corporation Commission.

Land Use Agricultural Resources items 8 and 9

AZER has already committed to working with farmers and other property owners to remedy actual damage to property caused by the railroad construction and to negotiating with affected property owners to minimize severance impacts.

Historic properties item 12.2

This provision is open-ended. AZER is agreeable to any reasonable conditions sought by the SHPO in the section 106 consultation process.

Applicable requirements of other agencies item 17

AZER believes this requirement pertaining to a floodplain development permit is unclear.

Applicable requirements of other agencies items 20, 20.1 through 20.3

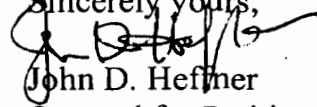
The reference in item 20.1 to an unnamed viaduct is vague. AZER's construction shall adhere to railroad industry (AREMA) construction standards and well as best engineering practices and shall comply with applicable FRA safety requirements.

Biological resources item 35

AZER shall comply with all reasonable measures required by the U.S. Fish and Wildlife Service.

In conclusion, the SEA properly found that this project presents no adverse impacts for the following environmental topic areas: community and socio-economics, environmental justice, utilities and public services, visual and aesthetic impacts, noise and vibration, and biological resource impacts.

AZER believes that the SEA has properly reviewed and analyzed this rail construction project under the National Environmental Policy Act and related regulations. It urges the SEA to publish a Final Environmental Assessment finding that the project does not present any significant environmental impacts once appropriate mitigation measures are imposed.

Sincerely yours,

John D. Heffner
Counsel for Petitioner

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