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June 23, 2012

Cynthia A. Brown
Chief, Office of Administration
Section of Proceedings
Surface Transportation Board
395 E Street SW
Washington DC 20423-0001

Re: FD 35631, Saratoga and North Creek Railway, LLC – Operation Exemption – Tahawus Line - APPEAL

Dear Ms. Brown:

This is a petition to the Board by Charles C. Morrison (“Morrison”), Project Coordinator, Adirondack Committee, Atlantic Chapter of the Sierra Club (“Sierra”) and Samuel H. Sage (“Sage”), President and Senior Scientist, Atlantic States Legal Foundation (“ASLF”) to appeal on several grounds the Director’s decision of June 14, 2012 in the case referenced above. Please note that we are forwarding this petition as individuals rather than on behalf of the organizations we represent, in appreciation of the fact that under the Board’s rules one must be a lawyer to be a represent organizations in the appeals process, which we are not. Also, please note that this is a verified petition, that ten copies are enclosed and that all parties have been served by Fedex.

Sincerely,

Samuel H. Sage

Samuel H. Sage, President/ Senior Scientist
ATLANTIC STATES LEGAL FOUNDATION, INC.
658 West Onondaga Street, Syracuse, N.Y., 13204-3711 (offices)
Phone: 315-475-6715

Charles C. Morrison

Charles C. Morrison, Project Coordinator
SIERRA CLUB, ATLANTIC CHAPTER, ADIRONDACK COMMITTEE
c/o 88 Court Street, Saratoga Springs, N.Y. 12866
Phone: 518-583-2212

Attachments (3)

cc: ALL PARTIES

Edwin E. Ellis, President
Saratoga and North Creek Railway, LLC
c/o Iowa Pacific Holdings, LLC
118 South Clinton Street, Suite 400
Chicago, IL 60661

FEE RECEIVED

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John D. Heffner, Esq.
Strasburger and Price
1700 K Street NW Suite 640
Washington, DC 20006

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NYS DEPARTMENT OF
CULTURE AND
PARKS

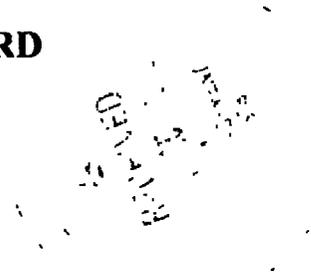
Ruth Pierpont
Deputy Commissioner for Historic Preservation
and State Historic Preservation Officer
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Najah Duvall-Gabriel
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National Historic Landmarks Program (Org. 2280)
1849 C Street NW
Washington DC 20240
202-354-2216

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



FD 35 631

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

APPEAL OF DIRECTOR'S DECISION

Submitted by:

Charles C. Morrison, Project Coordinator
Adirondack Committee, Atlantic Chapter, Sierra Club
o/o 88 Court Street, Saratoga Springs, NY 12866
(518) 583-2212

Samuel H. Sage, President and Senior Scientist
Atlantic States Legal Foundation
658 West Onondaga Street, Syracuse, NY 13204-3711
(315) 475-6715

June 23, 2012

BEFORE THE SURFACE TRANSPORTATION BOARD

FD 35631

SARATOGA AND NORTH CREEK RAILWAY, LLC OPERATION EXEMPTION TAHAWUS LINE

APPEAL OF DIRECTOR'S DECISION

There are two main points to this petition. First, we believe that a historic review is required to satisfy the requirements of Section 106 of the National Historic Preservation Act and we request time for this process to take place in consultation with the Advisory Council on Historic Preservation, a process already begun by your office and theirs. Second, we believe that it is *not in the public interest for the Saratoga and North Creek Railway ("Saratoga") to become a common carrier and, based on our justification presented below, we request that the approval of the Notice of Exemption issued by the Director of Proceedings on June 124, 2012 be withdrawn.*

Essentially, we have a serious disagreement with STB's Director of Proceedings and with Saratoga as to whether or not a historic review is required under Section 106 of National Historic Preservation Act ("NHPA"). Under 36 CFR Part 800 "Protection of Historic Properties," the implementing regulations for the NHPA, Section 800.2(b)(2) on assistance from the federal Advisory Council on Historic Preservation ("ACHP") provides that "...participants in the Section 106 process may seek advice, guidance and assistance from the Council on the application of this part to specific undertakings, including the resolution of disagreements. whether or not the Council is formally involved in the review of the undertaking If questions arise regarding the conduct of the section 106 process, participants are encouraged to obtain the Council's advice on completing the process."

We have consulted with the ACHP staff and, as attached, there has been an initial exchange of correspondence between Charlene D. Vaughn, Assistant Director, Federal Permitting, Licensing and Assistance Section, ACHP on June 19, 2012 and Victoria Rutson, Director, Office of Environmental Analysis, STB on June 22, 2012. This exchange has been preliminary, Ms. Vaughn initially asking for more information about the STB's action and about compliance with Section 106 of the National Historic Preservation Act and Ms. Rutson summarizing

the Director's decision of June 14, 2012 as well as forwarding Saratoga's May 17, 2012 Notice of Exemption and ASLF/Sierra's June 4, 2004 protest petition.

Now that this investigatory process has begun in accordance with Section 800.2(b)(2) we request that Board provide time to let it run its course to find out whether a historic review is needed or not. We believe that Section 106 of this federal law requires a historic review in this instance despite Saratoga's contentions to the contrary.

Adirondack Forest Preserve – a National Historic Landmark on the National Register of Historic Places

The Adirondack Forest Preserve, now comprising 46% of the 6.0 million-acre Adirondack Park, the largest wilderness area east of the Mississippi River, was designated as a National Historic Landmark in 1963 by Interior Secretary Stewart Udall under the 1935 National Preservation Act. Only about 2,000 sites, areas or districts were so designated under this program. When the 1966 National Historic Preservation Act was passed, all of the National Historic Landmarks designated earlier were carried along with it and placed on the new National Register of Historic Places and given the protection of Section 106, requiring historic review of the impacts of certain federal actions.

Among all State lands in the nation, none are given greater protection by a state than those of New York's Forest Preserve. The Preserve was established in 1885 by act of State law and in 1894 the New York State Constitution was amended to include the "forever wild" provision, in what is now Article 14: *"Section 1. The lands of the State, now owned or hereafter acquired, constituting the Forest Preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed."*

Even deadwood may not be picked up from the floor of the Forest Preserve after a blowdown, Article 14 gave early recognition to the ecological benefits of wilderness, giving great conservation meaning to the 1894 action.

Exceptions to this constitutional law can only be accommodated by amending the constitution, a process purposefully made difficult by requiring passage of a law enacted by the Legislature and the Governor in each of two successive two-year sessions of the Legislature, followed by a statewide referendum in the first general election thereafter. There is a list of these amendments right in Section 1 of Article 14, but only a very small percentage of those proposed in the past 118 years has passed.

New York's Forest Preserve was the model for the 1964 National Wilderness Act. It is managed by a State Land Master Plan sets use standards for unit areas of the Preserve that are classified as Wilderness, Primitive, Wild Forest, Canoe Areas, State Administrative Areas, Historic areas, etc. Various uses are allowed or prohibited under each classification. The State is still acquiring Forest Preserve lands, so this category of State land, nearing 3.0 million acres, is still growing.

We want to note that although only 220 acres of Forest Preserve land are involved in the 100-foot wide ROW of the Tahawus rail spur over 13 miles of its 30-mile length, the Article 14 violation of the State Constitution that occurred in 1942 when the Secretary of the Army ordered the easements for the spur to be taken by eminent domain, this violation was important enough to warrant direct communication between Governor Herbert Lehman and (former NYS Governor) President Franklin D. Roosevelt and to subsequently cause the State to go to federal court to fight the taking, not for the duration of the war but rather for the 15-year term after the war.

The case went against the State in the Northern District of New York and in the Appellate Court (2 to 1) and then the State appealed twice without success, each time on different grounds, to the U/S. Supreme Court. The case ended, unsuccessfully, in 1946. The violation of Article 14 continues to this day, which is the fundamental reason for this petition.

The STB decision of June 14, 2012 concerning the present case, FD 35631, raises a question about the railroad being in use in 1963 when the NHL for the Forest Preserve was established, arguing that with STB's approval of common carrier status for Saratoga on the Tahawus spur there will be no change in use from that in 1963, when railway use did not prevent the NHL designation and or harm it in any way once it was established and therefore resumption of railway use should not harm it now. This argument misses the point. The reason that the Forest Preserve was designated as an NHL was because its level of protection under the State Constitution is unique among all state-owned land in the nation. When the Preserve was designated in 1963 the part of it involving the Tahawus spur was already being harmed by the Constitutional violation just discussed.

However, it must be kept in mind there are now nearly 3 0 million acres in the Adirondack Forest Preserve. The controversy over the Article 14 violation on these 220 acres in the ROW would not have prevented designation. In fact, the designation, covering the entire Preserve and the protection it carries, gives greater impetus to removal of this particular ongoing blemish on this NHL that is caused by this rail spur and its easements. Because the blemish of the NHL that is the violation should not be continued, STB should not have a hand in continuing it by awarding common carrier status to Saratoga.

Implications for Forest Preserve NHL of STB's Decision on Saratoga's Operational Exemption

Saratoga's Notice of Exemption ("NOE") makes a critical misstatement when it contends that no historic review under 49 CFR 1105.8(b)(1) is needed because this transaction involves only a change of operators and if the line is abandoned at some time in the future then STB approval will be required at that time, including an environmental and historic review. This misstatement has been carried over into STB's decision. The fundamental error is that much more is involved here than merely a change of "operators." Clearly what might happen in the future with regard to abandonment and STB requirements has nothing to do with whether or not environmental and historic review is required for STB approval of common carrier status for Saratoga in FD 35631.

Yes, there obviously was a change of "owners" as a result of the purchase last November 4 of the Tahawus spur from NL Industries but there was not been a simple change of "operators" because Saratoga has yet to operate this spur, and NL Industries had not "operated" it for railway purposes since 1989 when all rolling stock was removed. In fact, there have been huge gaps through the years in operating this spur. Mining of ilmenite ore, a "strategic material of the WWII emergency," which was the only reason for the construction of this spur in 1942, stopped in 1982. The railroad was operated only sporadically throughout the 1980s, including in the 1986 period when NL Industries was taken over by Texas conglomerate, Valhi/Kronos Worldwide. It has been established beyond dispute in the verified November 14, 2011 protest letter of Protect the Adirondacks! ("PROTECT") in the FD 35559 case and in the verified June 4, 2012 protest petition of ASLF/Sierra in the present proceeding that the rolling stock was removed in mid-1989 and the line has not been operated for railway purposes from that day to this, for 23 years. The right-of-way ("ROW") has grown over with trees and brush and the ties, roadbed and bridges have significantly deteriorated. Considerably more down-time will be needed for rehab work before rail operations can begin again.

Saratoga carefully neglected to mention that throughout its existence, from 1942 to the present, this private spur has been subject only to State transportation law on abandonment and other matters, not federal law. State abandonment law (Section 18 of NYS Transportation Law) governed this spur until the Director's June 14, 2012 decision in this case, at which point it came under federal STB jurisdiction for the first time. Section 18 says that if a railroad is disused for two years or more it is deemed to be abandoned and that an expression of intent to abandon is tantamount to abandonment. NYSDOT, in its letter of January 5, 2005 to the Open Space Institute states that this spur is deemed to be abandoned under Section 18. Other readily available letters and documents say the same.

The PROTECT protest letter of November 14, 2011 and the ASLF/Sierra protest petition of June 4, 2012, both referenced above, also advise that under New York State's common law on easements, if an easement is abandoned, it ceases to exist and it is considered to be legally extinguished or terminated, whereupon the partial interest in real property reverts to the fee title owner, in this case about 40 owners of private land in the ROW over 17 miles and the State of New York for the Adirondack Forest Preserve over 13 miles. At the top of page 5 in the ASLF/Sierra letter two supporting cases are cited.

If our abandonment, termination, reversion scenario is correct, which probably will be tested in State court if the case can be brought (see comments below on federal preemption), it means that the easements are gone and Saratoga bought only the rails last November 4, which are now illegally occupying the State Forest Preserve and private land in the ROW. Further, this makes Saratoga's title to the property highly suspect. This is the real property part of the present case that the Board determined in FD-35559 should be resolved in State court because it is not within the Board's jurisdiction to resolve it. We agree with that determination and have asked the State Attorney General to pursue the illegal occupancy case. Again, see comments below as to whether State court action might be precluded by federal preemption.

We believe that the requirement under Section 106 for historic review with respect to the impact of the STB decision on the Adirondack Forest Preserve NHL is quite a different and separate matter than the need for environmental (impact) review. In the Director's decision of June 14, 2012 in this case, there is a reliance on Saratoga's statements that it is exempt from environmental review because one train per day, five days a week would have a minimal environmental impact on air quality, being below STB thresholds. This statement by Saratoga is highly debatable. Keeping in mind that there have been no operations on this spur since 1989, one train a day represents a 100% increase in traffic and northern railyard activity.

For example, in addition Section 18 of State Transportation Law being preempted by federal law if federal jurisdiction is approved by STB at the bottom of page 4 in its joint protest petition of June 4, 2012 in the present proceeding, ASLF/Sierra points out that Adirondack Park Agency ("APA") regulations (9NYCRR573.6(f)) which apply state that a use of land, like a railroad, is considered to be abandoned after 5 years of disuse and a permit from APA is required for reactivation of an abandoned use. This administrative law also will be precluded by federal jurisdiction.

The action by STB's Director approving common carrier status for Saratoga will significantly impact the Forest Preserve as a National Historic Landmark on the National Register of Historic Places. If the NOE is upheld by the Board it will make this spur a part of the national railway system and place it under federal jurisdiction. The fact is that federal law, including that for abandonment and other railway matters, can preempt not only State statutory law but also State constitutional law such as that embodied in Article 14 which gives this NHL its extraordinary protection and is the reason for its designation. Common carrier status would also give Saratoga

the power of eminent domain over Forest Preserve land adjoining the ROW. This could cause further violation of Article 14 and this NHL.

The STB has stated in its decision in FD 35559 that the real property controversy represented by the Forest Preserve abandonment, termination and reversion issues discussed above should be resolved in State court. We agree but that will never happen if this spur becomes a part of the national railway system and subject to federal jurisdiction that supersedes State law on abandonment, common law on easements and other matters that would be central to such case in State court. Saratoga will use federal jurisdiction to its own ends. In effect, a case in State court would be moot as a result of federal jurisdiction. The People of the State of New York, collectively the owners of the State Forest Preserve, then will effectively be deprived of their property if the Board upholds the Director's decision. We believe that it is in the public interest in this situation for the Board to rescind Saratoga's approval.

Since the "Tahawus Line" has been a private industrial spur Saratoga all these years Saratoga can operate on it without any approval from STB whatsoever, as soon as the tracks and roadbed are in good enough condition to do so. Meanwhile, resolution of the real property issues could proceed in State court under State law

VERIFICATION

I, Charles C. Morrison, Project Coordinator for the Adirondack Committee of the Atlantic Chapter of the Sierra Club declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge. Further, I certify that I am qualified and authorized to file this pleading.

June 23, 2012

Charles C. Morrison

CERIFICATION OF SERVICE

I, Charles C. Morrison, Project Coordinator for the Adirondack Committee of the Atlantic Chapter of the Sierra Club, hereby certify that I have served all parties of record in this proceeding with this document by ~~Fedex~~ ^{UPS}.

June 23, 2012

Charles C. Morrison



SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Environmental Analysis

June 22, 2012

Charlene Dwin Vaughn, AICP
Assistant Director, FPLAS Section
Advisory Council on Historic Preservation
Office of Federal Agency Programs
1100 Pennsylvania Avenue, NW, Suite 803
Washington, DC 20004

Re: Docket No. FD 35631, Saratoga and North Creek Railway, LLC—Operation Exemption—Tahawus Line

Dear Ms. Vaughn:

I have received your letter dated June 19, 2012, inquiring about the steps the Surface Transportation Board has taken to comply with the requirements of Section 106 and its implementing regulations. You note that you have been contacted by the Sierra Club, who emailed you about the above-referenced proceeding.

First, I would like to summarize the proceeding filed with the Board. On May 17, 2012, the Saratoga and North Creek Railway (Saratoga) filed a notice of exemption to operate as a common carrier railroad 30 miles of existing trackage known as the "Tahawus Line." The notice filed by Saratoga would, in essence, authorize the substitution of one operator of a rail line for another. It would result in construction of no new rail line, no salvage activities, and no rail line abandonment. It would simply allow Saratoga, a common carrier, to operate trains over the existing Tahawus Line, which has been used for rail freight service in the past.¹

When Saratoga filed for an operation exemption, it stated that its transaction is exempt from the Board's environmental reporting requirements because it planned on operating no more than one train per day, five days per week—well below the Board's thresholds for environmental review (generally 3 or 8 trains per day depending on the air quality of the region). See 49 C.F.R. § 1105.6(c)(2)(i). Saratoga also asserted that the transaction is exempt from historic review under 49 C.F.R. § 1105.8(b)(1) because the action before the Board involves only a change in operators and further Board approval (including an environmental and historic review) would be required prior to any abandonment of the Tahawus Line.

¹ The rail line was constructed during World War II to move products from a mine needed for war material. Rail service continued over the Tahawus Line until the late 1980s.

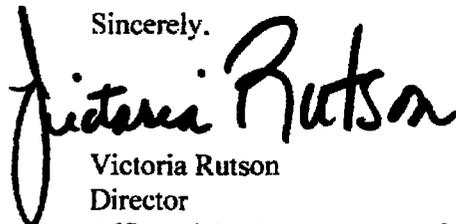
The Sierra Club filed a petition to reject Saratoga's notice of exemption on June 4, 2012 (attached). As relevant here, the Sierra Club argued that 13 miles of the 30 mile-long Tahawus Line are located on a National Historic Landmark, and that as such, an environmental and historic review should be required (Petition at 6). The petition provided no specifics on the potential impacts that could result. In particular, the petition failed to address the fact that the landmark at issue here was established in 1963, when there was active rail service on this trackage. Accordingly, there will be no change in use that was not understood and performed at the time this property was designated as a landmark.

The Board issued a decision on June 15, 2012 (attached) denying Sierra Club's petition to reject. As a result, Saratoga's authority to operate over the Tahawus Line became effective on June 16, 2012. In reaching its decision, the Board addressed the issues raised by Sierra Club's petition. Regarding Sierra Club's environmental and historic arguments, the Board concluded that Sierra Club had failed to demonstrate that an environmental or historic review by the Board was warranted in this case because the transaction only involves a change in operators on a rail line. The Board also noted that Saratoga's proposal has garnered strong support within the State, including the New York State Department of Environmental Conservation, the New York State Department of Transportation, the Honorable Charles Schumer, the Honorable Kirsten E. Gillibrand, and the Intercounty Legislative Committee of the Adirondacks, among others.

In sum, in response to Sierra Club's questions, the Board has determined that the undertaking—the substitution of one operator for another on the Tahawus Line—is exempt from historic review under the Board's environmental rules. It is the Board's opinion that this fulfills the agency's responsibilities under Section 106.

If you have any questions or require additional information regarding this proceeding, please do not hesitate to call me at (202) 245-0295.

Sincerely,



Victoria Rutson
Director
Office of Environmental Analysis

Enclosures

Cc: Charles C. Morrison
Najah Duvall-Gabriel

COPY

June 19, 2012

Ms. Victoria Rutson
Federal Preservation Office
Surface Transportation Board
395 E Street SW
Washington DC 20423

Ref: *Saratoga and North Creek Railway-Operation Exemption-Tahawus Line, New York*

Dear Ms. Rutson:

The Advisory Council on Historic Preservation (ACHP) was recently contacted by the Sierra Club regarding the Surface Transportation Board's (STB's) compliance with the requirements of Section 106 of the National Historic Preservation Act (NHPA) for the referenced action. (see enclosed) Unfortunately the ACHP is unable to respond to this issue without adequate background information. Accordingly, we are contacting STB to inquire about steps it has taken to comply with the requirements of Section 106 and the implementing regulations, "Protection of Historic Properties" (36CFR Part 800) for this action.

Based on the emails we received from the Sierra Club, there was a proposed action before the STB involving the Adirondack Forest [P]reserve, a National Historic Landmark (NHL). We do not have a record of being notified by STB of an undertaking potentially affecting this NHL. Therefore, in order for the ACHP to better understand STB's strategy in managing this action, it would be helpful if you could clarify whether STB has defined this Federal action as an undertaking.

We obviously have limited information about this matter, therefore, STB is probably in the best situation to respond to the citizen inquiries. Once STB has prepared a response to the Sierra Club please copy us on your proposed explanation of proposed next steps to fulfill the requirements of Section 106.

We thank you in advance for your assistance with this matter and look forward to hearing from you soon. If you have any questions, please contact Ms. Naja Duvall-Gabriel of our staff at (202) 606-8585 or via email at . We appreciate your attention to this matter.

Sincerely,

Charlene Dwin Vaughn, AICP
Assistant Director, FPLAS Section
Office of Federal Agency Programs

Enclosure

B



State of New York
Department of Transportation
Albany, N.Y. 12232
<http://www.dot.state.ny.us>

Joseph H. Boardman
Commissioner

George E. Pataki
Governor

January 5, 2005

Mr. Joseph J. Martens, President
Open Space Institute
307 Hamilton Street
Albany, N.Y. 12210

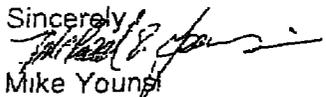
Re: Tanawus Railroad
From MP NC0.00-TO-MP NC29.71

Dear Mr. Martens:

I am writing in response to your December 14, 2004 letter addressed to John W. Earl in the Economic Development Section regarding the Tanawus Railroad.

Upon review, the referenced 29 mile (MP- NC 0.00 to NC 29.71) railroad ROW which stretches from the Hamlet of North Creek, Warren County to the abandoned Tanawus mine site in Newcomb, Essex County, is deemed to be abandoned for railroad transportation purposes. In accordance with the provisions of Section 18 of New York State Department of Transportation Law, since the subject property will be used as a transportation corridor and public access for recreation purposes, it is exempt from preferential rights of acquisition, and no release is required at this time. Should a subsequent sale of the property for non-transportation purposes occur, a Department review would be required again at that time.

Please feel free to contact me if you have any questions. I can be reached at 457-4763, or e-mail me at mvounsi@dot.state.ny.us

Sincerely,

Mike Young
Economic Development Section

cc: R. Seymour, Real Estate Division, POD - 41, MC 3320
T. Thompson, Region 1, Regional Railroad coordinator