

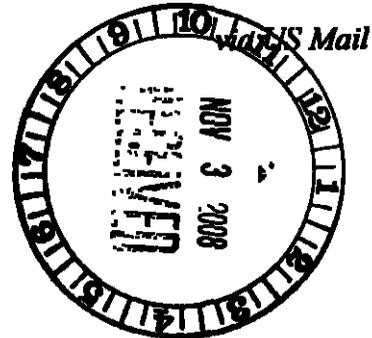
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**CALIENTE HOT SPRINGS RESORT LLC**

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October 23, 2008

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



**RE: Motion for Leave to File Response and  
Response to Reply of United States Department of Energy.  
Finance Docket No. 35106, *United States Department of Energy – Rail  
Construction and Operation – Caliente Rail Line in Lincoln, Nye and Esmeralda  
Counties, Nevada.***

Dear Acting Secretary Quinlan:

Enclosed herewith for filing are the original and 10 copies of each: (i) above reference Motion; and (ii) above referenced Response for filing in the above referenced matter.

Also enclosed is an electronic version of the Motion and the Response on data cd.

Sincerely,

John H. Huston

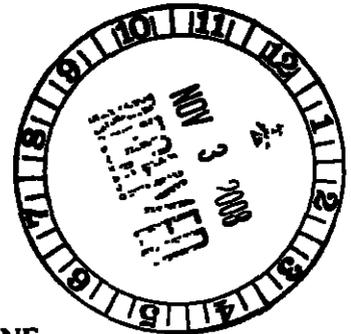
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BEFORE THE  
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35106

UNITED STATES DEPARTMENT OF ENERGY - RAIL  
CONSTRUCTION AND OPERATION - CALIENTE RAIL LINE  
IN LINCOLN, NYE, AND ESMERALDA COUNTIES, NEVADA

CALIENTE HOT SPRINGS RESORT LLC'S  
MOTION FOR LEAVE TO FILE RESPONSE



ENTERED  
Office of Proceedings

NOV 3 - 2008

Part of  
Public Record

Caliente Hot Springs Resort LLC ("CHS") respectfully moves for leave to respond to the Reply filed by the United States Department of Energy ("DOE") on October 8, 2008.<sup>1</sup> This relief is appropriate because the Reply: (i) adopts an entirely new position that conflicts with DOE's prior statements in its Application and elsewhere regarding the use of dedicated trains in serving the proposed Yucca Mountain repository; and (ii) adopts a new position with regard to impacts to wetlands and documents and argues a previously undisclosed "deal" ("New EPA Deal") with the U.S. Environmental Protection Agency ("EPA"), the terms of which are illogical and constitute a "bastardization" of public policy and are against the public interest. CHS had no opportunity to address either of DOE's new positions or DOE's New EPA Deal before DOE revealed them in its Reply. Thus, fairness and due process require that CHS be permitted to respond briefly, and to request clarification of DOE's new positions and the New EPA Deal.

Concerning the issue of dedicated trains in serving the proposed Yucca Mountain repository, CHS agrees entirely with Norfolk Southern Corp. ("Norfolk Southern") as stated in Norfolk Southern's *Motion for Leave to File a Response in this matter and also with Norfolk Southern's Response to Reply of the United States Department of Energy*, both dated October 10, 2008.

<sup>1</sup> U.S. Dep't of Energy Reply to CSX Transportation, Inc. 's Motion for Leave to File Response to Reply of the U.S. Dep't of Energy to Comments on Its Application for a Certificate of Public Convenience and Necessity, at 6 (filed October 8, 2008) ("Reply").

Concerning the issue of wetlands and the New EPA Deal, in its Application (at 38), DOE incorporated its *Draft Nevada Rail Corridor SEIS* (“DSEIS”) and *Draft Rail Alignment EIS* (DEIS”). DOE later filed in this matter DOE’s *Final Environmental Impact Statement* (“FSEIS”) 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-0250-F-S2], its *Final Environmental Impact Statement* (“FEIS”) for *Construction and Operation of a Railroad in Nevada to a Geologic Repository at Yucca Mountain, Nye County, Nevada* [DOE/EIS-0369] and, later, after the period for Responses to the Application had expired, its *Record of Decision* (“ROD”) relating thereto and dated October 6, 2008.

In its Reply dated August 29, 2008 (at 33; see also Appendix D), DOE discloses, for the first time, the New EPA Deal, apparently dated and documented by means of a letter of August 11, 2008 from Susan E. Bromm, Acting Director, Office of Federal Activities, U.S. Environmental Protection Agency, to Dr. Jane Summerson, EIS Document Manager, Regulatory Authority Office, Office of Civilian Radioactive Waste Management, DOE, whereby DOE and EPA agreed that the Caliente rail alignment, with the Caliente alternative segment, was acceptable in terms of environmental impacts upon condition of 3:1 riparian habitat mitigation participation by DOE. At 4 of Ms. Bromm’s letter, she states: “Regarding the Rail Alignment final EIS, EPA supports the conclusions of the *Floodplain and Wetlands Assessment* contained in Appendix F, **provided that DOE provides adequate compensatory mitigation for wetlands losses, as discussed above. It is our understanding, based on our July 16, 2008, conference call, that DOE will provide a more detailed compensatory mitigation plan in the Record of Decision (ROD) [emphasis added]**”. The ROD contains no such “more detailed compensatory mitigation plan” by DOE.

DOE states further in its Reply (at 34): “DOE would implement a wetlands compensatory mitigation plan that would meet the requirements of the Environmental Protection Agency (“EPA”) for mitigating losses of aquatic resources.” This circularity between DOE and EPA is not helpful and fails to meet any standard of disclosure required pursuant to the National Environmental Protection Act (“NEPA”).

DOE's Application and Reply appear to have been pasted together "on the fly" and environmental and wetlands issues associated with the Caliente alternative segment "papered over" by DOE and EPA in haste so that DOE could provide documentation of EPA approval to STB after expiration of the period for filing of Responses. In fact, DOE has no habitat restoration plan and failed to provide or disclose such plan in the ROD, even as EPA conditioned and expected.

It appears that, in a nearly conspiratorial late-inning effort, DOE has managed to enlist EPA's support for DOE's Caliente Alternative Segment (which would fill wetlands) over DOE's Eccles Alternative Segment (which would not) in exchange for what amounts to a "pay-off". The pay-off to EPA is DOE's commitment to provide rehabilitation of 3 acres of riparian habitat somewhere downstream for every acre of wetlands damaged and eliminated by DOE along the Caliente Alternative Segment. The STB might ask: "Where precisely are the riparian areas that are to be "rehabilitated"? Who damaged the riparian areas that EPA wants DOE to rehabilitate? Did the damage occur naturally or did the damage result from the construction activities of any private person or common carrier?"

Parties to STB proceedings generally may not adopt wholly new positions or arguments in reply or rebuttal.<sup>2</sup> The Board often allows supplemental filings when new positions or arguments are presented for the first time in a reply or rebuttal filing.<sup>3</sup>

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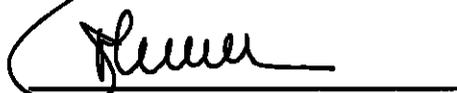
<sup>2</sup> See ICC Docket No. AB-167 (Sub-No. 970N), *Conrail Abandonment in Chicago, IL - In Re Offer of Fin. Assistance*, 1987 WL 98398 at \*4 (served May 5, 1987) (declining to consider argument first raised on rebuttal); STB Docket No. AB-55 (Sub-No. 618), *CSX Transp. Discontinuance - At Memphis, in Shelby Cty., TN* (served Oct. 28, 2002) (refusing to consider additional cost evidence submitted in rebuttal).

<sup>3</sup> See, e.g., STB Docket No. 42083, *Granite State Concrete Co., Inc. and Milford-Bennington R. Co. v. Boston and Maine Corp. and Springfield Terminal R. Co.* (served September 15, 2003) (allowing surreply in response to new evidence and argument); STB Fin. Docket No. 33407, *Dakota, Minnesota & E. R.R. Corp. - Constr. into the Powder River Basin*, slip op. at 1 (served Nov. 3, 1998) (supplemental evidence allowed in response to new evidence presented in reply filing); STB Fin. Docket No. 33995, *SF&L Ry., Inc. - Acquisition & Operation Exemption - Toledo, Peoria & W. Ry. Corp. Between La Harpe & Peoria, IL*, (served Feb. 1, 2002) (granting leave to file surrebuttal statement to respond to "new arguments" in reply statement); see STB Fin. Docket No. 34335, *Keokuk Junction Ry. Co. - Feeder Line Acquisition-Line of Toledo, Peoria & W. Ry. Corp. Between La Harpe & Hollis, IL*, slip op. at 5 (served Feb. 7, 2005).

**In this case, DOE could and should have provided information concerning its negotiations and discussions with EPA or asked the STB to postpone the deadline for Responses to the Application until after the Application was amended with the ROD and the New EPA Deal. By fundamentally altering its position in its last evidentiary filing, DOE effectively precluded other parties from addressing DOE's position on wetlands impacts, specifically with regard to the Caliente and Eccles Alternative Segments.**

**In order to redress this unfairness and to insure that the process, especially with regard to health and environmental disclosures required by federal law, is both fair and honest, the Board should accept CHS' brief response and request for clarification (filed herewith). No prejudice or harm to any party would result. Moreover, accepting CHS's response for filing would provide a more complete evidentiary record, and would help to avoid the confusion and potentially reversible error that would otherwise result from DOE's contradictory submissions. For these reasons, CHS respectfully requests leave to file the accompanying response.**

**Respectfully submitted,**



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### **Certificate of Service**

I, John H. Huston, hereby certify that this 17 day of October 2008: (i) the original and ten (10) true and correct copies of the attached CALIENTE HOT SPRINGS RESORT LLC'S MOTION FOR LEAVE TO FILE RESPONSE, along with a data cd containing an electronic version of such Comments, were delivered to the Surface Transportation Board by deposit in first-class U.S. mail, postage prepaid, addressed to:

Hon. Charles D. Nottingham, Chairman  
Hon. Anne K. Quinlan, Acting Secretary  
Surface Transportation Board  
395 E Street, S.W.  
Washington, D.C. 20423-001

and, (ii) one (1) true and correct copy of the attached Comments was delivered to each of the counsel of record and others identified below, by (a) deposit in first-class U.S. mail, postage prepaid, addressed as shown below, or (b) e-mail addressed as shown below:

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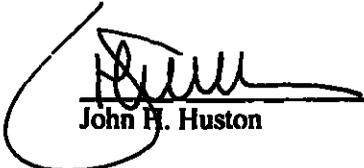
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