

December 6, 2004

Phil and Denise Wood
Diamond Cross Ranch
P.O. Box 518
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Surface Transportation Board
Case Control Unit
Washington, DC 20423
Attn: Kenneth Blodgett
STB Docket No. FD 30186 (Sub-No. 3)

Re: Denise and Phil Wood & Walter and Victoria Bales Comments on STB's Tongue River III DSEIS

Dear Mr. Blodgett:

Thank you for the opportunity to review and provide comments to the Draft Supplemental Environmental Impact Statement (SEIS) concerning the construction and operation of the proposed Tongue River Railroad - Western Alignment.

We manage the Diamond Cross Ranch property affected by the proposed Tongue River Railroad where at minimum, 25,000 acres of our land will be negatively affected by the Proposed Action. The Proposed Alternative would sever a substantial amount of that acreage. We have lived in the area for 20 years and rely on the ranch for our family's continued livelihood. The environmental well-being and natural resources in the Tongue River Valley are vital to our ranch and to the community, and we believe that the Proposed Action will damage both.

During the public comment meeting held in Ashland, Mt on November 17, we mistakenly spoke in support of the "no action alternative", misunderstanding its intended meaning. We did not have enough time to thoroughly study the DSEIS. Upon further review, we understand that there is no true "no action alternative." To clear up the confusion, we reiterate that there is simply no need for a railroad to come through Tongue River Basin and we do not support either alternative both of which include a railroad. One of the failings of the DSEIS illustrated by this confusion is the lack of a true "no action alternative."

We are deeply concerned about the effects that the Proposed Western Alignment described in the Tongue River III Draft Supplemental Environmental Impact Statement (DSEIS) and the proposed realignment to the Tongue River I and Tongue River II projects will have on

the environment of the Tongue River Basin and the related communities including our ranch. This letter serves as an expression of our concern both about Tongue River III and the sufficiency of the DSEIS in reviewing all relevant matters, including the re-opening of only portions of Tongue River I and II as well as the Coal Bed Methane development slated for our area. The impact of recent Coal Bed Methane Development to the Tongue River Basin most definitely needs to be considered as it has already caused degradation to the quality of the river water and poses a serious threat to the health of our soils and crops as well. Relying on EIS' completed in 1986 and 1996 as the basis for some of the Board's actions have provided incomplete data at best.

We are also deeply concerned about the lack of enforceable measures included in this DSEIS. Allowing the railroad to move ahead without an in-depth study of the environmental and economic impacts of all synchronous development in our area, as well as the lack of any enforcement mechanisms if the railroad does not undertake the actions recommended by the Board are unacceptable in our view. The Tongue River has been considered a very pristine river with trout, as well as other fish species, in abundance. Recent data suggests that due to the discharge of Coal Bed Methane wastewater, fish and other aquatic wildlife are diminishing. Your DSEIS did not take into account any impacts regarding Coal Bed Methane, which in our view is unacceptable.

Understanding that the Board is committed to ensuring the safety and environmental soundness and our quality of life and livelihoods, we respectfully urge the Board to complete a new environmental analysis of the entire line and all other synchronous development, before any action, including this Proposed Action, be approved by the board. We also respectfully urge the Board to strengthen their oversight of the railroad to include tangible enforcement mechanisms to ensure that the Board's recommended mitigation measures are met to the letter of the law.

I. THE PROPOSED ACTION NEGATIVELY AFFECTS THE TONGUE RIVER AND THE TONGUE RIVER RESERVOIR.

We rely on the water of the Tongue River and Tongue River Reservoir for irrigation and other ranch uses, including that of the health and well being of our livestock. The Proposed Action would actually bring the rail line closer to the River than of the originally approved Tongue River II route. The increase in sedimentation in the river as a result of the Western Alignment could impair the water used on this ranch. The new route would increase the number of non-perennial stream crossings, nearly double the volume of earth moved (by seven million cubic yards) and double the potential increase in sediment load (tons/year) in the Tongue River.
DSEIS xxi.

This river water is vital for our irrigated crops. We use millions of gallons of water every year from the Tongue River for our hay crops. Combined with the degradation of the water due to Coal Bed Methane development, the increase in sediment load to the Tongue River from the railroad would seriously threaten our ability to produce hay, increasing, (perhaps even doubling) our operating costs, since we would be forced to buy hay. Another factor we're very concerned about would be the loss of valuable irrigated crop land taken up by the railroad right-of-way. We estimate that the loss of hay ground due to the right-of-way will cost us hundreds of thousands of dollars each year.

The State of Montana, recognizing the present water quality problems of the Tongue River, has assigned TMDLs to prevent further deterioration of water quality and to improve the hydrology of the Basin. Despite the recognition that the Tongue River watershed needs improvement, the SEA recommends approval of a project that it concludes would "increase sediment loads and suspended solids due to (1) active construction in waterways during installation of bridges and culverts; (2) changes in surface water patterns and shallow aquifer flow patterns due to topographic and drainage-pattern changes (e.g. cut and fill and the crossing of drainages); and (3) the temporary effects of water consumption for dust suppression." DSEIS 4-108.

The Western Alignment would clearly threaten the Tongue River. The SEA concedes that the Proposed Action would increase sedimentation, increase the potential for toxic spills, and cause slumping on the canyon walls. DSEIS 4-99, 4-105 – 4-108. By choosing the Proposed Action, which travels along the Tongue River, the STB has endangered the river. The DSEIS suggests that the construction of the Western Alignment will require substantially more water use during the peak irrigation season (a season during which the River already has a low water level) than the alternative actions. DSEIS 4-115. While the SEA concludes that this will not affect water availability, the DSEIS does not contemplate the change in water quality during this period nor does it provide any site-specific analysis as to flow levels at various points along the river. In fact, while the SEA acknowledges that the Western Alignment crosses more non-perennial streams than other alternatives it provides no analysis as to how the project will affect those streams. DSEIS 4-28. Before approving the Proposed Action, we respectfully request that the Board require a site-specific survey of the impacts of the proposed Western Alignment on the feeder non-perennial, ephemeral and intermittent streams it will cross.

We are also concerned that the DSEIS does not adequately evaluate the changes in the water quality and drainage in the Tongue River Basin since the Tongue River I and II EISs were completed. It appears that the extent of the analysis is a notation that the new alignment will be further from the river and thus "the proposed Tongue River I and Tongue River II alignment would not affect the normal variations in stream flows that occur in the Tongue River Valley and

that no mitigation is required to address variations in stream flows.” DSEIS 5-15. The effects of site-specific location changes in alignment should be evaluated before approval – while distance on a map may appear to indicate less of an impact, this is not necessarily indicative of the change’s impact to the Tongue River. Site-specific hydrology corresponding with the changes in the alignment must be addressed. Before approving the Proposed Action, we respectfully request that the Board require a site-specific survey of the impacts of the entire Tongue River Railroad project on the Tongue River and Reservoir.

The DSEIS assumes away many of the potential harms, which are not quantified or specified, by offering mitigation measures to protect the river. It is hard to understand how the DSEIS can make such assumptions, based on little to no quantitative research. It is also hard to understand how the Board can be assured these mitigation measures will ensure that the railroad will ensure the safe conduct of the environment and our lands when these mitigation measures have no enforcement mechanisms included in them. It is also hard to understand how the SEA assumes that the mitigation measures will be effective without specifying how they will be effective. The language of the Mitigation Measures is clearly unenforceable in it’s current state. Mitigation Measure 49 is described as a mechanism to protect non-perennial streams at railroad crossings by the installation of culverts. SEA states, “if imposed and implemented, this mitigation measure would ensure that the impacts resulting from the construction of culverts... would not be significant.” DSEIS 4-114. Not only is there no analysis as to how this would be effective, the plain text indicates that implementation and enforcement is questionable.

While cognizant of the many mitigation measures that the SEA lists in the DSEIS, we are concerned that no mechanism to enforce the mitigation measures exists. Even if enforced, there is little discussion in the DSEIS of the efficacy of the mitigation measures with respect to the ensuring that the River remains clean. Without more research, data and analysis on the impact of the Western Alignment to Tongue River Basin, or on the efficacy and impact of the mitigation measures it appears inappropriate to approve the Proposed Action. Before approving the Proposed Action, we request that the Board require analysis which quantifies and specifies the site-specific environmental damage to the river, and describes the enforcement mechanism for the various mitigation measures and how those mitigation measures will work given the specific hydrology of the Tongue River Basin.

II. THE PROPOSED ACTION ECONOMICALLY HARMS OUR AREA AND NEGATIVELY AFFECTS THE SAFETY OF THE LOCAL RESIDENTS

As a resident of the Tongue River Basin we are also concerned about the effects of the Railroad on our community. Many of the properties in the region, ours included, are used for agricultural purposes including grazing of cattle. The Railroad will sever our property, which

makes grazing cattle difficult, as we must herd the cattle through a tunnel underneath the railroad. Mitigation Measure 3, DSEIS. This process is time consuming and dangerous to the cattle. We also rely heavily on Mother Nature to guide the timing of any large herd gathers and moving herd from pasture to pasture. This requires several horseback riders and we could have a cow herd that numbers into the hundreds at one time that we are trying to maneuver across a railroad crossing. There is no way for us to predict how long this project will take. Passage across a railroad whether over the railroad or through an underpass is time consuming and dangerous. The DSEIS acknowledges this outright [4-61] under "Rangeland" where it notes, "Ranchers have noted that cattle may be reluctant to use cattle passes constructed across or under the railroad, especially those that are used infrequently." But the DSEIS seriously underestimates the true impact when it says, "this situation could increase herding time between pastures, but would not constitute a significant impact," we adamantly disagree with this assumption. For those of us who make our livelihood in this area, we know this to be an incredibly large problem that will need to be directly addressed by the Board.

Every day in this business is different and there is no way to change Mother Nature. We have to work with her. We are involved in different aspects of cattle and herd management during the different seasons. Calving takes place in the early spring and the best pastures for calving are usually the meadows, or those that are easily accessed during this time of year. These baby calves are the lifeblood of our business. If the train kills our calves, what will we do? If a calf is born and needs some nurturing to survive, time is of the essence. If we have to wait any time at all for a train to pass by when we are bringing a baby calf to the house or corrals close by, it may die. We simply cannot run a cattle ranch around a railroad that is intended to pass through our pastures 14 times a day. Cattle, and particularly calves, will be spooked by trains traveling on the railroad whether they are crossing over the railroad or under the railroad.

Again, there is apparently no recourse for landowners if the railroad decides against building a cattle tunnel. Before approving the Proposed Action, we respectfully request that the Board require an analysis of the effect of severing rancher's grazing lands and include enforcement mechanisms and official recourse for us if the railroad does not undertake the actions requested by the Board.

Fencing is another critical issue for any rancher, especially for us. While the DSEIS does briefly mention the initial fence construction, [4-61], there is no mention of maintenance whatsoever. Fence maintenance is a huge factor for our ranch, and currently requires at least one full-time employee who does nothing but maintain fences. The Board should explicitly require the railroad to pay for and maintain all fences, including both labor and supplies. It is unacceptable to think that I should have to pay for or maintain such a fence, nor should the

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Board allow the railroad to push off costs and fees for anything that is incurred as a result of the railroad.

We also continue to be deeply concerned that the SEA's analysis of the economic effect of the railroad to be short sighted and unbalanced. The DSEIS is very thorough in its analysis of how building the railroad will benefit the railroad company and increase employment in Sheridan, Wyoming. It is, however, utterly void of analysis of the negative economic effects the Proposed Action will have on the local community, ranchers, farmers and residents like me near the railroad. I respectfully request that the Board do an in-depth analysis on what the economic harm will be to the ranchers and others in the area by the railroad before it is finally concluded by the Board that it will be a boon to our area. We also are aware that coal in the Decker Coal field is running out. How can this railroad be a boon for our area when the coal that it is intended to transport will come mostly from Wyoming?

The railroad brings a number of dangers with it as well. Railroad lines, as the SEA acknowledges, spread noxious weeds to the lands they cross, (which we spend thousands on each year spraying to attempt to eradicate) and are more likely to start wildfires along their path. DSEIS 4-65. The State of Montana Water Resource Division has also noted their concern for this issue in their filing as well. STB Docket No. FD 30186 (Sub-No.3) November 30, 2004 filing. The DSEIS addresses the wildfire issue by describing potential mitigation measures but does not quantify the risk of wildfires, which we understand to be great. Mitigation Measure 9-13, SDEIS. In fact, the SEA only provides percentage risks of fires compared to other sources of fire, but does not provide the needed analysis for accurate public evaluation – how many fires can the Tongue River Basin expect as a result of the Proposed Action? DSEIS 4-65. The region has been struck by a deep drought which makes wildfires, including railroad initiated fires, much more dangerous. The SEA suggests that the average railroad fire consumes 90 acres as if this were not a significant risk. *Id.* A 90-acre burn can be a tremendous loss to a rancher and is an extreme danger to cattle. The DSEIS fails to evaluate whether local conditions suggest larger or smaller fires or whether the 90-acre size is appropriate for the Basin. Even a small fire is unacceptable. We have frequent strikes of lightning on our ranch and have lost several thousand acres within a few days due to lightning caused fires. Our experience suggests that the average wildfire started by the railroad will be close to 900 acres than 90 acres. Mother Nature herself is a force to be reckoned with when it comes to fire hazards. We certainly don't need to add a man-caused hazard to our challenges. Before approving the Proposed Action, we respectfully request that the Board require an analysis of the actual likelihood of fire and noxious weeds by this railroad in this canyon and to require an explanation of how the mitigation measures will actually prevent fire and the spread of noxious weeds.

Another significant concern is the risk that the increased railroad crossings bring to the community. With trains rumbling across roads (both public and private) more than once an hour, delays are inevitable. This is particularly troublesome with regard to emergency vehicles and is an additional burden on the state and local community to provide the critical service to our area. The SEA acknowledges this concern but suggests that the delays may be minor. Yet, time resulting from these delays can be the difference between life and death, (human or animal) in an emergency situation. We live and work 50-70 miles from the nearest town. In an emergency situation we must travel over unpaved roads for much of the trip. At these distances and under these conditions delay in emergency response is simply deadly. Moreover, there will be an increase in traffic during construction of the railroad, as numerous workers will be traveling on local roads. The mitigation measures clearly have not taken into consideration the health and welfare of those of us who have lived in this area for generations and are completely inadequate. The SEA suggests that "contractors will be asked to provide central transportation to the work site" and that speed limits would be strictly enforced. DSEIS 4-88, 4-129. Yet, there is no discussion of how these measures will be enforced.

Moreover, the environmental justice analysis lacks a thorough discussion about how low-income local residents are hurt proportionately more by the Proposed Action. Also missing from the DSEIS is how the high level of airborne dust and particulate matter as a result of the Western Alignment will affect the health of cattle, wildlife and humans to which this community's livelihood and quality of life is tied.

III. STB'S ANALYSIS OF THE ENVIRONMENTAL IMPACTS OF THE WESTERN ALIGNMENT VIOLATES THE NATIONAL ENVIRONMENTAL PROTECTION ACT.

The analysis of environmental impacts of the Proposed Action in the DSEIS is inadequate as it fails to take the requisite "hard look" at the Proposed Action's effect on the environment, Tongue River ranches and the Tongue River community. It appears that the DSEIS relies heavily on the Tongue River I and Tongue River II EISs to discuss potential impacts, but only addresses effects of realignment in Tongue River I or Tongue River II and the proposed Western Alignment in general terms. NEPA requires more than general statements. *Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1379-80 (9th Cir. 1998). Moreover, the DSEIS suggests that the fishery analysis is self-avowedly incomplete – the DSEIS must do more than identify potential environmental impacts, it must establish the magnitude and intensity of the impact. *National Parks & Conservation Association v. Babbitt*, 241 F.3d 722, 743 (9th Cir. 2001).

SEA's reliance on the 1986 and 1996 Tongue River I and II proposals is inappropriate. The analysis in the underlying environmental impact statements for Tongue River I and Tongue River II proposals, which were relied upon by the STB in the present DSEIS, is clearly outdated. Concluding that virtually nothing had changed since 1986, SEA conducted only a "focused review" of its prior EISs and addressed only changes in the proposed project. *See, e.g.*, DSEIS at 3-6 to 3-7; DSEIS at 3-9. Yet, SEA's conclusion that nothing has changed appears unreasonable and contrary to the facts. It is hard to understand how the SEA can assume that environmental conditions have not changed in the 10-20 years since the original EISs were completed, especially with the recent Coal Bed Methane Development. SEA offers only conclusory statements in support of its reliance on the previous EISs. *See* DSEIS at 3-7 ("SEA's analysis of environmental circumstances and environmental regulations and laws determined that little has changed since the EIS was prepared for Tongue River I."). The DSEIS should be supported by evidence that the agency has made the necessary environmental analysis. *See* 40 C.F.R. § 1502.1; *Citizens Against Toxic Sprays, Inc. v. Bergeland*, 428 F. Supp. 908 (D. Ore. 1977). The Tongue River III comparison between current conditions and conditions at the time of each of the previous EISs focuses chiefly on aerial photography comparisons, website searches and agency discussions as well as extremely limited site visits and does not adequately evaluate potential differences. *See, e.g.*, DSEIS at 3-6 to 3-7; 3-9.

SEA's reliance on Tongue River I and Tongue River II has led it to ignore or fail to adequately discuss:

- New baseline conditions. *See, e.g.*, 40 C.F.R. § 1502.15; *Half Moon Bay Fisherman's Marketing Ass'n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988).
- "Reasonably foreseeable development," which also has changed dramatically since 1986. *See, e.g.*, 40 C.F.R. §§ 1508.7; 1508.8; 1502.1.
- Changes in current area activities, resulting in changes to direct, indirect and cumulative impacts. *See, e.g.*, 40 C.F.R. §§ 1508.8; 1508.7, 1502.1.
- Changes in the environment and resources subject to the project's impacts (e.g., changes in endangered, threatened and sensitive species, changes in air and water quality, etc.). *See, e.g.*, 40 C.F.R. §§ 1508.8; 1508.7, 1502.1.
- A "no action alternative." The DSEIS does not separately address the no action alternative but relies completely on the old EISs in violation of NEPA. *See* 40 C.F.R. § 1502.14(d).

These issues should be fully addressed in the DSEIS. Without this information it is difficult for the public to fully and fairly evaluate the proposed action and the analysis of the DSEIS.

Despite the DSEIS' reliance on the Tongue River I and Tongue River II EISs, the DSEIS is silent on why a proposal nearly identical to the present Proposed Action was rejected in Tongue River II in favor of the Four Mile alternative. It cannot be because conditions have changed since that EIS was prepared – the SEA suggests a new analysis of the entire line is not needed precisely because environmental conditions have not changed. There is no analysis as to why the economic reasons touted by the SEA as justification for the Western Alignment were absent in 1996 when it rejected the railroads preferred alternative – a proposal nearly identical to the Western Alignment. The SEA has not provided any explanation on this obvious contradiction and it is difficult to understand why they have completely avoided this issue in an apparently arbitrary manner.

By evaluating the proposed railroad in three stages, the SEA has effectively segmented the project in violation of NEPA. SEA conducted three separate EISs, at three very different times, covering separate areas and aspects of the project. Because SEA failed to update the old EISs or cumulatively analyze the impacts of the three segments of the project, SEA's analysis contravenes NEPA's requirements. Indeed, the wisdom of the prohibition against segmenting is evident here. In the present situation, the project has changed dramatically over 20 years with no systematic evaluation of the entire project. If STB does approve the Proposed Action, the Tongue River Railroad will have been effectively approved without a systematic environmental review and is in direct violation of NEPA requirements.

NEPA requires the government agency conducting the environmental review to fully evaluate and quantify the effects of mitigation measures. Not only is that analysis absent from the DSEIS, the DSEIS is silent as to enforcement mechanism other than the goodwill of those constructing the railroad. NEPA requires more. See, e.g., *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1380-81 (9th Cir. 1998); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989). Without this mitigation analysis, the public will not have adequate tools to evaluate the project.

As expressed above, we have serious reservations about the impact of the Proposed Action on the Tongue River Basin environment, our ranch and our community. The analysis provided in the DSEIS appears perfunctory and overly limited in scope, leading, in our opinion, to a DSEIS that violates the spirit and letter of NEPA. We respectfully request that the Board require a complete study and analysis of the concerns we have raised and require that a new environmental impact study be conducted on the entire railroad line factoring in intended Coal Bed Methane Development, in order to adequately understand the true impacts of the railroad in our community.

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We thank the Board for its review and response of these issues as well as the Board's concern and focus that the impacts of the railroad on a community that we have lived in for 20 years be addressed in a clear and focused manner. There are many complex issues associated with this proceeding, and we appreciate the Board's understanding of the depth and breadth of these impacts.

Regards,

A handwritten signature in cursive script, appearing to read "Phil Wood" with a large "D" below it, possibly representing "Denise".

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