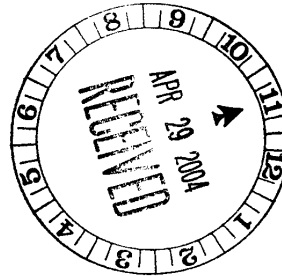


210713

CHARLES H. MONTANGE
ATTORNEY AT LAW
426 NW 162ND STREET
SEATTLE, WASHINGTON 98177

(206) 546-1936
FAX: (206) 546-3739



17 March 2004

APR 29 2004
Victoria Rutson
Chief, Section of Environmental Analysis
Surface Transportation Board (Case Control Unit)
1925 K Street, NW
Washington, D.C. 20423-0001

Re: Yakima Interurban Lines Association
-- Adverse Abandonment -- in Yakima
County, WA, AB 600

Dear Ms. Rutson:

These comments are submitted on behalf of Yakima County in response to the Environmental Assessment (EA) served February 27, 2004, in the above-captioned proceeding. There are two key deficiencies in the EA as prepared by STB: the EA represents and propagates an unlawful segmentation, and the EA fails to analyze alternatives. After discussing briefly these critical flaws, the County will comment on specific issues raised by or in the EA.

I. Segmentation

As indicated in the Protest and Comments filed by Yakima County, et al. (copy enclosed), the environmental analysis conducted by the Surface Transportation Board is legally deficient because it is based upon and propagates an unlawful segmentation of the Naches Branch. As more fully explained in the Joint Protest and Comments already filed by Yakima County, et al., in this proceeding (hereinafter referred to as "Protest and Comments"), the segment of the Naches Branch analyzed in the EA lacks logical termini or independent utility, and abandonment of the segment forecloses alternative treatment of the adjoining segments. Indeed, the Naches Branch is a dead-end Branch and abandonment of one-mile in the middle [as proposed by applicant Kershaw Sunnyside Ranches, Inc. ("Kershaw") and as analyzed in the EA] isolates the segment extending to Naches from the interstate rail network. This makes abandonment of that segment a foregone conclusion, and may even deprive STB of jurisdiction over it. As explained in the Protest and Comments, in order to avoid unlawful segmentation, the agency must analyze the impact

of abandonment of the entire Naches Branch. In this proceeding, Kershaw failed to supply environmental and historic information in its Part 1105 reports for the entire Branch, failed to give notice of a de facto abandonment of the Branch, and thus failed to provide the public and interested agencies with an opportunity for meaningful comment. Nothing in the EA served February 27, 2004, or in any additional notice or information provided by STB, cures these problems. Proceeding to authorize abandonment of what Kershaw proposes on the basis of the EA served February 27 would constitute reversible error.

Neither Kershaw nor this Board can excuse the illegal segmentation on the ground that Kershaw's interest for standing purposes (i.e., the scope of its claimed property interest) is confined to the approximate one-mile it purportedly seeks to put at issue here.¹ The transportation, environmental and historic impacts of the proposed abandonment extend to the logical termini of the transportation corridor of which the one mile Kershaw puts at issue is a part. If the impacts extend, then the analysis must extend. In other words, the abandonment authorization must apply to logical termini, not arbitrary termini. The shortest logical termini that can be defined for this transportation corridor is the ownership interest of YILA in the Naches Branch (MP 2.97 to MP 14.26). Put another way, Kershaw's interest for standing purposes does not dictate (much less dictate the ignorance of) the public interest in transportation, the environment, and historic impacts. Certainly Kershaw's interest for standing purposes does not mean STB can undertake a transportation, environmental or historic impacts analysis on the basis of an arbitrary segment with no independent utility and no logical termini, no matter by whom proposed. The agency cannot take action in ignorance of reality merely because some entity with standing proposes that it do so.

II. Alternatives

It is elementary that an agency's environmental analysis must cover reasonable alternatives. As indicated in the enclosed Protest and Comments, Washington Department of Transportation and the local governments on the Naches Branch all wish to rehabilitate the Naches Branch as currently owned by YILA, and restore freight rail operations to it. Yakima County and WSDOT have developed a plan to accomplish this end, as further set forth in the Protest and Comments, and Appendices I and IV thereto. If STB authorizes the adverse abandonment of one mile in the middle of the line, the only way to restore freight service into Naches will be by means of an alternative route around the adversely abandoned area. Since neither WSDOT

¹ More aptly, Kershaw is arbitrarily and unlawfully seeking to limit the issues to the one-mile in question, when the issues are actually much broader.

nor Yakima County have sufficient funds to pay for such a re-route as part of their plan for line acquisition and rehabilitation, such a re-route may only be implemented if Kershaw will pay for it. In addition, Kershaw must demonstrate that the re-route is environmentally acceptable. In short, if this Board wishes to proceed on the theory that only one-mile is at issue, then it must ensure that the line can and will be reconstructed at that break through resources supplied by Kershaw. To summarize so this is absolutely clear, if STB wishes to proceed with the segmentation Kershaw has proposed, the agency must de-segmentize the project by conditioning any adverse abandonment on (1) Kershaw posting a bond sufficient to ensure that the land acquisition and construction costs for a new re-route of the railroad are covered, and (2) Kershaw demonstrating that the new route is environmentally acceptable.² Yakima County believes the least expensive potential re-route is along State Route 12, between the Kershaw buildings and the highway. This re-route is set forth in the map attached as Exhibit A. The re-route would place the railroad directly across from the water treatment facility employed by City of Yakima. The proximity of the re-route to the river and the water treatment center raises some concerns, and in addition Kershaw may object to the location because of its impact on access to Kershaw's buildings. For example, although Kershaw's attorneys recently proposed this re-route for purposes of a trail if the County would forego rail use, they appear to wish to preclude any rail use. See Letter attached as Exhibit B.³

Since abandonment of the one mile segment is an unlawful segmentation unless some connection to the remainder of the line is maintained, it follows that STB must analyze alternative routes if the agency is seriously entertaining granting an adverse abandonment of the segment purportedly put at issue by Kershaw. Otherwise, the agency has to treat the proposed abandonment as an abandonment of the entire Naches Branch from MP 2.97 to MP 14.26. In any event, the re-route is an alternative to abandonment which this Board should analyze from

² STB's power to condition an abandonment authorization on an adverse applicant's posting of a bond cannot be doubted. Conrail v. ICC, 29 F.3d 706 (D.C. Cir. 1994).

³ Yakima County does not agree with the various arguments or conclusions presented in the letter, and files it only to indicate apparent recognition on the part of Kershaw of the re-route alternative, although Kershaw seems to oppose a rail re-route.

an environmental perspective in the circumstances.⁴

III. Other Concerns

1. The EA at page one ("Description of Concerns") attributes many factual claims to Kershaw concerning the "line." The "line" that is described appears to be the entire Naches Branch. There appears to have been no independent examination by the agency of the Naches Branch. We will focus on a couple of the agency's remarks based on what Kershaw stated in its filings. BNSF did transfer the line to YILA in 1999. However, at the time, the County was interested in acquiring the line. BNSF decided to deal with YILA in the interests of speed. Although Kershaw paints a picture of dis-use of the line and implies lack of interest in it, in actual fact WsDOT loaned approximately \$500,000 to YILA for rehabilitation purposes. Whether due to bad luck or management decisions, YILA was unable to accomplish the task of rehabilitation. That does not mean that WsDOT or Yakima County or key shippers have lost interest in the Naches Branch. Subject to appropriations and appropriate contractual arrangements (and the County's acquisition of YILA's interests), WsDOT is prepared to expend an estimated \$200,000 to settle private liens against the line, and an additional estimated \$300,000 for rehabilitation. As indicated in the verified statements (especially Appendices I and IV of the Protest and Comments), these amounts are judged adequate by WsDOT to allow acquisition and rehabilitation by the County without liability on the County for additional funding for those purposes. The County has received confirmation from Toppenish, Simcoe and Western Railroad (which operates another County-owned line) that it is interested in operating the Naches Branch should the County acquire it. The County is interested in acquisition of the Naches Branch in order to provide freight service to lumber industry-related shippers on the line. The County also has an interest in maintaining the Branch for other compatible public purposes, including safeguarding public utilities, allowing trail use, and allowing possible excursion rail use. The corridor is well-suited for all these purposes. See Protest and Comments, supra. The distance between Naches and Yakima is appropriate for excursion (dinner) train use; Yakima is an important wine-producing region which attracts tourism; Naches is a gateway to Mt. Rainier; and the rail corridor would allow extension of the existing trail network from City of Yakima.

⁴ Yakima County notes that there are utilities located in the existing Naches Branch railroad corridor. The utilities may have to be re-routed as well, and the costs of the re-route logically should also be borne by Kershaw since the re-route, if undertaken, is involuntary on the part of both the railroad and the utilities.

The EA makes statements about zoning and land use along the Naches Branch which are not correct. Although portions of the line abut or go through "valley rural" zoning, the actual zoning is mixed. Even in the segment proposed for abandonment by Kershaw, the zoning appears to be valley rural on one side and agricultural on the other. See Exhibit C (County Zoning Map). See also Exhibit D (County Landuse Designations). In addition, the zoning classification along the rail lines allows industrial uses, as noted by the Yakima County Development Association ("New Vision") in its letter dated March 8, 2004, found at Appendix III of the Protest and Comments.

The claim that there are no structures more than 50 years old on the line is wrong, if by line one means (as the description on page one implies) the entire Naches Branch. Based on informal conversations with Washington State Historic Preservation Officer (SHPO), the depot in Naches would appear to be eligible for inclusion in the National Register of Historic Places. De facto abandonment of the line into Naches will adversely affect the historic setting of an historic depot. This is an adverse impact for purposes of a Section 106 analysis, and is totally missed in the EA. If the Board expands the proceeding to encompass the entire line, Yakima County will supply additional information relating to environmental and historic impacts for the proceeding as appropriately expanded to encompass logical termini.

2. While the EA at page 1 describes the entire line, the environmental review at pages 2-3 was (unlawfully) restricted to the approximately one mile bounded by Kershaw property. US EPA properly noted that the adverse abandonment would limit future rail opportunities on the balance of the Branch (further establishing the unlawful segmentation). Department of Ecology, according to the EA, does not believe construction permits will be required or water quality will be impacted. The necessity for construction permits or water impacts depends in part on whether the re-route alternative is elected by the applicant (Kershaw). This demonstrates that the environmental notice served on Ecology was as deficient as that delivered on the other agencies to which notice was required. As to historic impacts, SHPO stated it could not make a determination based on the information supplied. Yakima County understands that SHPO believes that loss of the one mile segment put at issue by Kershaw impacts the entire line (i.e., SHPO in essence concurs that Kershaw is proposing and STB is considering licensing an unlawful segmentation). Yakima County is pleased that SHPO concurs with Yakima County's position.

The condition proposed by the Section on Environmental Analysis (SEA) to deal with SHPO's concerns is a combination of knee-jerk, misplaced, and ineffective. SEA's condition is the typical 106 condition imposed on railroad applicants whose proposals impact or may impact historic sites, or potentially historic sites, and for which studies and analysis cannot be

completed prior to abandonment authorization. The condition purports to preclude the applicant from taking steps to alter the historic integrity of the right of way pending completion of the Section 106 process. This condition is virtually totally inapposite and meaningless when applied in the context of an adverse abandonment sought by an adjoining landowner, as here. Given that Kershaw is an adjoining landowner (not the railroad), the only "step" that Kershaw can lawfully take -- regardless of the condition which SEA proposes that STB impose -- in terms of altering the historic integrity of the right of way is to continue to pursue the adverse abandonment application. Kershaw does not own the structures on the right of way, nor the right of way itself (leaving aside Kershaw's claim to the underlying fee), and thus cannot "alter" the right of way in any way other than to cause it to be authorized for abandonment. At that point, Kershaw presumably will take the position that YILA's purported railroad easement automatically extinguishes, by operation of law. This automatic extinguishment is what alters the historic integrity of the corridor and any structures on it.⁵ Thus, the only way for SEA's condition to have any meaning at all is if it is intended to bar Kershaw from pursuing the adverse abandonment. We doubt that is what SEA intended. SEA appears without thought to have simply suggested its standard condition which it believes precludes a railroad from removing track structures pending completion of Section 106 analysis. As noted, this condition does not work in the context of an adverse abandonment to accomplish anything that protects the historic integrity of the right of way.

In all events, the SEA proposed condition does absolutely nothing to foster compliance with Section 106, and neither Kershaw nor STB to date have come close to complying with Section 106 in this proceeding. Allowing any abandonment without compliance with Section 106, or in a fashion that irreparably impacts the corridor without compliance with Section 106, is reversible error.

3. In respect to the conclusions expressed at page 3, the EA asserts that "as currently proposed" the licensing action will not significantly affect the quality of the human environment. Since the applicant has not supplied, nor the agency collected, information on the impact of the abandonment

⁵ Kershaw claims that the railroad interest abutting Kershaw's property is merely an easement. If this Board grants an adverse abandonment, then Kershaw will presumably take the position that the railroad easement interest as a matter of law has automatically extinguished. In short, Kershaw need do nothing other than pursue the adverse abandonment to a successful conclusion to irreparably and adversely alter the historic integrity of the rail corridor. In effect, it will be STB destroying the integrity of the right of way, not Kershaw.

of the entire Naches Branch as owned by YILA, there is no basis for the conclusion expressed by the agency.

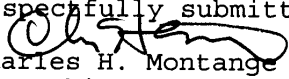
For the agency to maintain that an environmental analysis restricted to a one mile segment in the middle of a dead-end branch is not an unlawful segmentation, the agency must provide for a re-route of the line around the abandonment (otherwise there is an obvious de facto abandonment of at least the isolated remnant of this line into Naches). Yet the EA fails even to mention any re-route alternative in its brief discussion of alternatives in the last paragraph on page 3. That alternative will require new construction and should not be ignored. The likely re-route is adjacent to a highway but across from a water treatment facility and a river, and immediately in front of a house. There may be environmental impacts to it.

4. The right of way is suitable for public use, and the County as part of the Protest and Comments (Appendix I, Ex. E) has filed a "statement of willingness" seeking railbanking (trail use). As manifest in the Protest and Comments (App. II, ¶5), YILA consents to railbanking.

5. As indicated in the Protest and Comments, this adverse abandonment proceeding must be dismissed as an unlawful segmentation, or, alternatively, STB must modify it to apply to the entire Naches Branch as owned by YILA. The County supports such a modification, as consistent with the WSDOT/County plan to place the line in County ownership and manage its rehabilitation. The notice previously circulated by Kershaw is inadequate for that purpose, for although it describes the Naches Branch as owned by YILA, it has been treated by STB as only putting at issue the one mile segment crossing the Kershaw property. As indicated in the enclosed Protest and Comments, the County is prepared to provide notice (including newspaper publication for three weeks) should the Board employ its powers to modify this proceeding. But the point remains that Kershaw's notices are inadequate to advise the public and interested agencies of the logical termini of this abandonment and must be redone. Similarly, the EA is deficient for parallel reasons. Thus, the existing notice as well as the EA served February 27, 2004 are inadequate for any purpose other than dismissal of this proceeding, and must be modified, revised, and re-issued for comment to support even the action requested by Kershaw. Re-doing the whole affair to apply to a line with logical termini is thus a necessity if this proceeding is not to be dismissed (whether or not the proceeding is formally modified by this agency to apply to the entire Naches Branch as owned by YILA). The only logical alternative to dismissal or modification, is to condition any grant of relief on Kershaw's demonstrating an environmentally sound re-route over the break it proposes, and

Kershaw's bonding the full cost associated with the re-route.⁶

Respectfully submitted,


Charles H. Montange
for Yakima County

Attachments (3)

cc. Service List (w/att.)
Yakima County

Service List
(by U.S. Mail)

1. Sarah Wixson
Veikanje, Moore & Shore
405 East Lincoln Avenue
Yakima, WA 98901 (for Kershaw)
2. Jeanne A. Cushman
Office of the Attorney General
Transportation and Public Construction Div.
905 Plum Street, Bldg. 3
P.O. Box 40113
Olympia, WA 98504-0113 (for WsDOT)
3. Mark Laughlin and Heidi Evatt
Fraser, Stryker, et al.
500 Energy Plaza
409 S.17th St.
Omaha, NE 68102 (Level Three)
4. Paul Edmondson
313 North Third St.
P.O. Box 384
Yakima, WA 98901 (YILA)
5. Ray Paoletta
City Attorney
City of Yakima Legal Dept.
200 South Third St.
Yakima, WA 98901-2830
6. Gregory S. Lighty
Halverson Applegate P.S.
311 North Fourth St.
P.O. 22730
Yakima, WA 98907-2715 (Naches)

⁶ The County and WsDOT estimated those costs well in excess of \$1 million (see Protest and Comment) and did not include costs associated with the involuntary relocation of utilities, which also arguably should be borne by the adverse applicant since the re-route is at the applicant's behest, and not due to action initiated by the railroad.

Exhibit A

Exhibit B

Velikanje Moore & Shore, P.S.

attorneys at law

VMS

John S. Moore
Morris G. Shore
George F. Velikanje
Alan D. Campbell
James C. Carmody
Carter L. Fjeld

J. Jay Carroll
Mark E. Fickes
Douglas L. Federspiel
Brendan V. Monahan
Kevan T. Montoya
Nancy L. Livingston

Metiner G. Kimel
Travis W. Misfeldt
Garon K. Jones
James S. Elliott
Sarah L. Wixson

March 9, 2004

Gregory S. Lighty
Halverson & Applegate, P.S.
311 N. 4th Street
Yakima, WA 98901

Raymond L. Paoella
City Attorney
200 South Third Street
Yakima, WA 98901-2830

✓ Charles H. Montange
426 N.W. 162nd Street
Seattle, WA 98177

RE: *Kershaw Sunnyside Ranches, Inc.*

Gentlemen:

I represent Kershaw Sunnyside Ranches ("Kershaw"). We are proceeding before the Surface Transportation Board in order to have that portion of the Naches line rail line which passes through the Kershaw property declared abandoned. As you are aware, this line has received little attention since it was acquired by Yakima Interurban Lines Association in 1999 and has not carried rail service since 1996. An April 2001, study by Wilbur Smith Associates reflects a total estimated costs to rehabilitate the line in excess of \$2 million. According to Yakima Interurban Line Association's operation manager, Jerry Henderson, the railroad is "well over a million dollars in debt." There are currently \$750,000 in liens against the line.

In March 2003, the Washington Department of Transportation indicated an estimated profit for the Naches line of \$132 annually. This estimate did not address the costs associated with bringing the line up to FRA standards or the liens currently on the line. Given the current financial condition of the line and its projected revenues, restored rail service does not seem likely. Although there have been negotiations, no one has come up with a viable plan for the Naches line.

There must be a realistic plan for the Naches line. Kershaw believes that a recreational trail that runs from Yakima to Naches would benefit the community. As part of any trail use application, a third party must accept financial responsibility, including any taxes,

March 9, 2004

Page 2

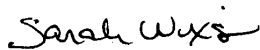
legal liability and management costs. Therefore, the design and location of any trail will be important in determining insurance costs and minimizing the risk of legal liability should an accident occur. However, the line is currently located between a busy warehouse and an existing orchard. There are safety concerns in allowing the public access across the line in its current location due to the type of equipment used in warehouse operations as well as possible exposures to pesticide and herbicides.

Therefore, if you would be willing to focus your efforts on a recreational trail, rather than continued rail service, Kershaw would donate land adjacent to the highway for this purpose. As demonstrated in Pierce County, Skagit County and the Seattle-Puget Sound area, projects of this kind, when opposed, can result in significant litigation and significant expense. Kershaw is willing to work a compromise with State and local governments in order expedite a recreational trail. However, State and local governments insist upon pursuing restored rail service, we will litigate this matter to the fullest extent of our resources and abilities.

We would like to set up a meeting.

Sincerely,

VELIKANJE, MOORE & SHORE, P.S.



Sarah L. Wixson

SLW/17343ce

cc: Robert Kershaw

Exhibit C

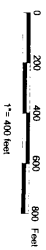


YAKIMA COUNTY
GEOGRAPHIC INFORMATION SERVICES

Proposed Right-of-Way
Kenshaw Property

2002 Ortho-photo mosaic
taken 7/31 & 8/1

Parcel Lot lines are for visual display
only. Do not use for legal purposes.



Copyright (C) 2004 Yakima County
This map is derived from several databases. The
County cannot accept any liability for the
accuracy or completeness of the data.
Therefore there are no warranties for this product.

File date: Mar 5, 2004, .mxd

Exhibit D

GEOGRAPHIC INFORMATION SERVICES

Forest Watershed
Agriculture

-
- Remote/Extremely Limited
- Mountain Rural
- Valley Rural
- Rural Transitional
- Rural Settlement
- Highway Commercial
- Mining
- Planned Development (Ord. 8-1974)
- Suburban Residential
- Single Family Residential
- Two-Family Residential
- Multi-Family Residential
- Professional Business
- Local Business
- Historical Business
- Commercial
- Small Convenience Center
- Large Convenience Center
- Central Business District
- CBD Support
- Industrial
- Light Industrial
- Heavy Industrial
- Federal Land/Indian Trust
- Yakama Nation Closed Area
- Railroad
- City Limits
- Cowiche Canyon Trail
- Greenway Path



Copyright (C) 2004 Yakima County
This map was derived from several databases. The
County cannot accept responsibility for any errors.
Therefore, there are no warranties for this product.