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December 22, 2009

VIA FEDERAL EXPRESS

Chairman Shane D. Colton
Department of Fish, Wildlife and Parks Commission
c/o Edmiston & Colton
310 Grand Avenue
Billings, MT 59101

Re: Tongue River Railroad Company, Inc.

Dear Chairman Colton:

Thank you for your December 7, 2009 letter responding to my letter urging Commission consideration of the Tongue River Railroad Company, Inc. ("TRRC") easement agreement. While I was disappointed that there is one outstanding issue of concern to you, I believe that this one issue is adequately addressed, as I will explain below.

The issue you have raised is the timing of the effectiveness of the easement. Specifically, you have asked why the current version of the easement agreement forwarded with my November 24 letter did not include certain terms proposed by former Commission Chairman Doherty that would provide that the easement would become effective only upon the submission of an affidavit by TRRC attesting that TRRC has acquired all permits for crossing state and federal lands and all right-of-way agreements or judicial orders allowing construction across all privately owned lands for the entire line.

TRRC has explained on several occasions why this proposed language is unacceptable, and the Department's attorney has, also on several occasions, expressed her understanding of TRRC's position. TRRC and the Department staff agreed to alternative language which accomplishes the same purpose as former Chairman Doherty's proposed language, namely, terms under which the easement agreement will not become effective

until TRRC has entered a contract to construct its rail line between Miles City and Ashland. As TRRC has previously explained, TRRC would not enter such a contract unless it acquired all or virtually all of the property on which its line would be constructed, and had attained the requisite financing to move forward.

There are several reasons why TRRC favors the above approach, and why it should be acceptable to the Commission. First, TRRC already has approval from the federal Surface Transportation Board to construct its line along the studied and approved corridor. Under federal law, such approval preempts any local law that might impede such construction. Thus, TRRC is confident that it will be able to attain, either through negotiation, permitting or as a last resort, eminent domain proceedings, all of the right-of-way needed for the approved route.

Second, TRRC needs to negotiate multiple agreements with the various landowners and governmental entities along the approved corridor. It cannot agree to link the acquisition and effective date of one specific easement with the acquisition of other easements. If this term is included in the agreement with FWP, other landowners would likely insist on similar terms. The ability of TRRC to acquire the necessary easements would be hopelessly muddled by these interconnected conditions precedent. TRRC is committed to engaging in independent, good faith negotiations with each landowner, and in fact is obligated by STB-imposed mitigation conditions to negotiate compensation with each landowner for direct or indirect losses of agricultural land and to take certain other steps to mitigate impacts to landowners. If each landowner were to insist on a provision such as that proposed by former Chairman Doherty, it would greatly diminish the likelihood that negotiated agreements will be concluded with each, and increase the incentive for litigation.

Third, TRRC's proposal, as indicated, accomplishes the goal sought to be accomplished by former Chairman Doherty's proposal by ensuring that TRRC will not commence construction at the Miles City Fish Hatchery until it is undertaking construction along all or virtually all of its entire line. To reiterate, TRRC would not enter a construction contract for the line unless it was prepared to launch construction along the entire line, and had the financing in place to do so. Under the terms that have been proposed, the easement would not become effective until such a contract was entered and the Department so advised.

Fourth, the easement agreement also provides other protections for the Department in terms of when construction might begin. The agreement states expressly that, "It is the intent of the Grantor and Grantee that the construction of the line across the Easement shall be generally proximate in time to the construction of other portions of the Grantee line from Miles City to the coal resources in the Ashland, Northern Cheyenne Reservation, and Otter Creek areas." The agreement further provides as follows: "Grantee shall not commence construction on Grantor's property until such time as the

Grantee has (1) provided the Grantor with Grantee's comprehensive engineering and design plans for construction of the Grantee line between Miles City and the Ashland area and consulted with respect to the portion of the plans that relate to the hatchery property as provided in Section B.1.(B) of this Grant; (2) provided the Grantor with a timeline for the construction of the Grantee line between Miles City and the Ashland area and consulted with respect to such plans as provided in Section B.1 (C) of this Grant, and (3) entered into a construction contract to construct the entire Grantee line from Miles City to the coal resources in the Ashland, Northern Cheyenne Reservation, and Otter Creek areas."

In light of your letter and in the interest of moving this matter forward, TRRC is prepared to provide one further protection to the Department on this issue. Specifically, TRRC will agree to revise the draft easement agreement to assume the additional obligation of providing the Department with a report on the status of its right-of-way acquisition efforts on the Miles City to Ashland line, both for public and private property, at the time that it notifies the Department that it has entered a construction contract. The easement would not become effective until this status report is provided. We believe that this additional pre-condition to the effectiveness of the easement agreement, coupled with the existing terms of the agreement, should fully protect the Department's interests.

Finally, we note that at its December 21, 2009 meeting, the Montana Land Board voted 4-1 to move forward with the leasing of state lands in the Otter Creek area near Ashland. The Governor, Attorney General, Secretary of State and the State Auditor all voted in favor of leasing these tracts for the development of their substantial coal resources. The Montana Land Board has established a 45-day period for submittal of bid proposals as well as established a minimum bid level. This decision follows the November 2009 announcement that Arch Coal, Inc., one of the largest coal firms in the United States, will lease from Great Northern Properties other Otter Creek area tracts are interspersed with the state-owned lands. Consistent with the STB's directive to endeavor to resolve the issues that were separating TRRC and the Department, the Commission should now move expeditiously to approve the easement agreement so that bidders on the Otter Creek tracts can take the Commission's action into account.

We look forward to hearing from you so that this matter can be addressed by the Commission as soon as possible and hopefully at its January meeting.

Sincerely,



David H. Coburn
Attorney for Tongue River Railroad
Company, Inc.

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