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July 19, 2013

VIA E-Mail

Mr. Alan Summerville
Project Manager
ICF, Jones and Stokes
9300 Lee Highway
Fairfax, VA 22031

Re: Tongue River Railroad – Summary of Miles City Fish Hatchery Discussions

Dear Alan:

This will respond to your request for information on the events surrounding Tongue River Railroad Company's dealings in recent years with the Montana Department of Fish, Wildlife and Parks ("MFWP") concerning the Miles City Fish Hatchery ("MCFH"). As you know, in the *TRRC I* proceeding, the ICC approved an alignment for the TRRC line that traversed through a portion of MCFH property. In the *TRRC III* proceeding, the railroad presented a modified alignment through a corner of the MCFH property. The STB's final decision in *TRRC III*, issued October 9, 2007, approved that modified routing through the MCFH. The TRRC line approved in *TRRC III* would intersect with the BNSF Forsyth Subdivision just north of the MCFH property. This same alignment is now being considered as one of the alternatives (known as the Tongue River Alternative) in the current, re-opened *TRRC I* proceeding. The Tongue River Road Alternative, also under consideration, would likewise traverse the MCFH along the same routing. Other alternatives under consideration, including TRRC's preferred Colstrip Alternative, would not.

The rail alignment approved in *TRRC III* was made subject to five MCFH-specific mitigation measures adopted in the October 9, 2007 final decision in *TRRC III*. These were Mitigation Measures 84 (concerning protection of water pipes); 85 (weed control); 86 (providing for a six month period of further consultation between the parties, subject to extensions, with respect to any outstanding issues and a process for resolution by OEA of any impasse); 87 (providing that TRRC must adhere to the reasonable terms of any easement agreement reached allowing the line to cross MCFH property) and 92 (requiring implementation of the vibration work plan prepared by Womack & Associates, dated April 13, 2006).

This letter will focus on the discussions between TRRC and the MFWP subsequent to the STB's October 2007 final decision in *TRRC III*.¹ Most of those discussions were undertaken in consequence of Mitigation Measure 86, which required the parties to consult on outstanding issues. We will first present a broad overview of the discussions, and then offer a more detailed discussion.

Overview of Post TRRC III Consultations. Post-TRRC III decision consultations were held between TRRC and MFWP staff officials over a period of months following the STB's October 2007 decision. Those consultations resulted in a 2008 Draft Grant of Easement and Right of Way Agreement ("Agreement") that was reached between TRRC and the MFWP staff. That Agreement, which was designed to authorize TRRC to cross MCFH property, addressed each of the issues relating to TRRC construction and operation that had been raised by MFWP staff. The Agreement, however, has not yet been formally approved by the MFWP Commission, a body appointed by the Governor of Montana which oversees the MFWP and which is charged with approving MFWP agreements of this nature. While efforts were underway to put the Agreement on the agenda of the MFWP Commission for a vote at one of its periodic (generally, monthly) meetings, the December 29, 2011 decision by the U.S. Court of Appeals for the Ninth Circuit remanding *TRRC III* to the STB intervened. While the court decision itself did not address MCFH issues, the remand of the proceeding resulted in a hold on the efforts to obtain approval of the Agreement by the MFWP Commission pending further decisions by TRRC and STB on next steps.

With the reopening of *TRRC I* by the STB's decision served June 18, 2012, and the subsequent decision of TRRC to pursue as its preferred alternative a different alignment for the rail line via Colstrip, efforts to obtain approval of the Agreement have remained on hold in recent months.

Detailed Description of Post TRRC III Consultations. In response primarily to MFWP's concerns that train-caused sound and vibration could adversely affect pallid sturgeon raised at the MCFH, as well as MCFH infrastructure and operations, the STB's October 9, 2007 final decision in *TRRC III* included Mitigation Measures 86 and 92, which provided as follows:

***Mitigation Measure 86 (MCFH Continuing Consultation).** TRRC shall continue to make itself available to consult with Montana Department of Fish, Wildlife and Parks (MTDFWP) to reach consensus on any remaining issues concerning the environmental effects on the Miles City Fish Hatchery from railroad construction and operations, for a period of up to six months after the effective date of the Board's final decision in Tongue River III. TRRC shall use its best efforts to achieve resolution of any outstanding issues during that period. If no resolution is achieved during that period, the requirement for continued consultation shall cease unless both TRRC and the hatchery agree that the*

¹ There was a considerable amount of communication between MFWP and TRRC prior to the TRRC III decision. We will not address those communications here, but can provide information about them should you be interested.

period should be extended and so advise the Board in writing. At the end of the consultation period (whether extended by mutual agreement or not), TRRC shall advise the Board of its positions in writing. MTDFWP also shall be invited to provide its position, and either TRRC or MTDFWP (or both) may request that the Board develop a condition designed to mitigate any remaining concerns of MTDFWP related to the environmental effects on the hatchery that the Board determines warrant mitigation.

Mitigation Measure 92 (Miles City Fish Hatchery). As agreed to by TRRC, TRRC shall implement the work plan entitled, “Revised Work Plan for High Resolution Vibration Monitoring, Evaluation of Potential Effects of Tongue River Railroad Construction and Operation, and Potential Mitigation at Miles City Fish Hatchery” prepared by Womack & Associates, dated April 13, 2006.

On December 12, 2007, TRRC submitted its final "Miles City State Fish Hatchery High Resolution Acoustical Study" Report to MFWP. The Study was undertaken and the Report on the study prepared by Womack & Associates, Inc., Wilson Ihrig Associates and Shannon & Wilson, Inc. The Report concluded that existing sound pressure levels in the tanks where pallid sturgeon are raised are higher than introduced levels from either the existing BNSF line or the proposed TRRC line were the latter line to cross MCFH property along the then preferred alignment. The Report further concluded that ambient vibration in the tanks at the MCFH caused by factors unrelated to railroads in the tanks at the MCFH is far greater than the vibration that may result from rail construction and operations.

On March 13, 2008, MFWP wrote to TRRC providing the agency's review of the above-referenced Acoustical Vibration Study Report. While MFWP found some discrepancies in the findings, MFWP set forth its expectation that discussions could resolve additional issues and that further discussions toward an easement agreement were warranted. On March 31, 2008, TRRC wrote back to MFWP concerning certain issues that had been raised by MFWP in its March 13 letter, including water pipe protection, coordination of construction with MCFH management, and herbicide use. TRRC pointed out that these issues had been previously addressed in a plan presented to MFWP that had been the subject of discussions and agreement in 2004. TRRC also proposed that the parties meet in April 2008 to discuss other outstanding issues. On April 29, 2008, TRRC wrote to MFWP concerning the conditions to be proposed in connection with the issuance of an easement and to propose a 30-day extension of the 6-month time frame contemplated by STB Mitigation Measure number 86. The parties agreed to extend the timeframe for 30 days, until June 8, 2008.

In May 2008, MFWP transmitted a preliminary draft of an easement agreement between MFWP and TRRC. The draft was designed to initiate discussions on the agreement's terms. MFWP also agreed to an extension for resolving issues to July 1, 2008. On June 19, 2008, TRRC wrote to MFWP providing comments to the preliminary draft easement agreement and attaching a mark-up of that draft. TRRC also proposed to extend the consultation period to July 31, 2008.

On July 23, 2008, MFWP and TRRC representatives met in Helena to discuss and revise the draft easement agreement. For MFWP, the meeting was attended by MFWP officials Mike Rhodes and Bob Snyder, together with MFWP attorney Rebecca Dockter. Following the meeting, a redlined version of the draft agreement was circulated. A further redline was circulated in late August 2008. The parties continued informal discussions on the draft agreement, resulting in TRRC proposed edits that were circulated in late September 2008.

On October 3, 2008, the parties held a conference call to discuss several edits to the draft easement agreement. Another call was held on October 7, 2008, resulting in an agreement among the parties ready to present to the MFWP Commissioners. The agreement addressed a full range of issues of interest to the Department. Notably, it imposed substantial obligations on TRRC relative to its assumption of liability and indemnification for any property or other losses; clean-up of any spills; and responsibility for avoidance of MCFH resources and for restoration of any MCFH property disturbed by construction of the line. In addition, the agreement provided the MFWP with assurances that it would have an opportunity to review and address TRRC's engineering plans, and the timing of planned construction, prior to construction. The agreement also provided that construction on MCFH property can occur only at a time that is proximate to the construction of other portions of the line. The agreement provided for the payment by TRRC for the easement it would be granted based on an appraisal to be paid for by TRRC. The agreement also addressed the issues of future abandonment of the line (giving the right to seek abandonment in the event of non-use of the line for 24 consecutive months) and dispute resolution in Montana courts or the STB, as appropriate. Also, the agreement provided for periodic review of the required minimum amount of insurance that TRRC must maintain for MFWP's benefit. The agreement did not address any further vibration or sound monitoring.

With the agreement crafted to the satisfaction of TRRC and MFWP staff officials, in October 2008, MFWP began to prepare an Environmental Assessment ("EA") related to the easement agreement. We understand that this EA was needed as a pre-condition to formal approval of the agreement by the MFWP Commission. A Draft EA was released for a 30-day public comment on November 7, 2008. The public comment period was subsequently extended through December 21, 2008. On November 20, 2008, MFWP staff held a public meeting in Miles City to accept public comment on the EA.

In January 2009, MFWP attorney Rebecca Dockter submitted a memorandum to the MFWP Commissioners setting forth reasons for the MFWP Commission to move forward to approve the Easement Agreement with TRRC. On January 15, 2009, the Commission held a non-voting working group meeting to discuss the Agreement.

On February 16, 2009, TRRC wrote to then MFWP Commission Chairman Colton recapping the easement agreement negotiations and the issues addressed in the Easement Agreement. TRRC offered to work with the Commission to address any further concerns and encouraged the Commission to approve the easement at its March 2009 meeting.

On February 18, 2009, the MFWP Acting Director Joe Maurier wrote to TRRC

informing TRRC that the Easement Agreement would not be considered at the March meeting because a new director and two new Commission members would need time to consider the Agreement. TRRC responded through a March 9, 2009 letter from its counsel to Mr. Maurier encouraging the MFWP Commission to place the easement agreement on the Commission's April meeting agenda and offering to address any remaining issues.

On March 26, 2009, MFWP Acting Director Maurier wrote to TRRC to advise that the Agreement would not be placed on the April Commission agenda, and that it would not be considered any earlier than May to allow time for the new Commissioners to fully understand the TRRC project. On April 17, 2009, OEA Director Rutson, acting in response to an April 10, 2009 status report prepared by TRRC, wrote to MFWP Acting Director Maurier encouraging MFWP to place the Agreement on the next Commission meeting agenda. TRRC counsel subsequently provided to MFWP counsel a proposed insurance escalation provision to be added to the Agreement in order to meet concerns expressed by a MFWP Commissioner about insurance coverage.

The MFWP Commission met on May 14, 2009 and decided to defer action on the Agreement until the July 2009 Commission meeting in order to allow time to address comments (prepared by former Commission Chairman Doherty) on the Agreement. Those comments were conveyed to TRRC during the May 14, 2009 Commission meeting. Central among the comments was a proposal that the Agreement not become effective until TRRC's rights to build its line across all other property along the entire TRRC line had been acquired.

On June 3, 2009, MFWP staff and TRRC representatives met to discuss the above-referenced Commission comments. A further telephone conference was held on June 16, 2009 among these representatives of both parties, and an agreement was reached addressing the comments. The revised Agreement established several additional pre-conditions to the effectiveness of the Agreement alternative to that proposed by former Chairman Doherty, including that the Agreement would not become effective until TRRC had entered a contract to construct the Miles City-Ashland section of the line.

On July 2, 2009, MFWP attorney Becky Dockter wrote a memorandum to the MFWP Commission discussing amendments to the Easement Agreement made in response to the comments of former Commissioner Doherty, and recommending approval of the Agreement. On July 7, 2009, the MFWP Commission held a working session to discuss any remaining issues related to Agreement in advance of a formal meeting held the following day. At the MFWP Commission formal meeting, the TRRC Agreement was on the agenda for a final vote. While the Agreement was discussed, the Commission again deferred a vote on the Agreement pending resolution of further issues.

In a July 15, 2009 conversation between TRRC's counsel and Ms. Dockter the following issues requiring further discussion were identified: (1) timing of construction through the MCFH; (2) sufficiency of insurance; (3) a proposal that the MCFH appraisal not serve as a precedent for other appraisals; (4) the sufficiency of the review of alternative routes to avoid the MCFH; and (5)

confirmation that the MCFH property would not revert to USFWS in the event that an agreement is executed provision an easement for TRRC.

On August 6, 2009, MFWP wrote to USFWS requesting confirmation that should the TRRC easement be granted, the MCFH land will not revert back to USFWS and that grant monies will not have to be repaid. We understand that in September 2009, USFWS wrote to MFWP agreeing to the Easement Agreement, provided that MFWP continues to maintain hatchery operations and that mitigation measures adopted by STB are enforced.

During September and October, 2009, TRRC endeavored to re-initiate discussions with the Commissioners on the Easement Agreement, but the Commission signaled that it would not continue discussions and directed its staff to stop work on finalizing the EA or any other efforts concerning the TRRC Agreement. In late October 2009, TRRC counsel was advised by Chairman Colton that the Agreement will not be considered by the Commission in the immediately foreseeable months.

During November and December 2009, there was an exchange of correspondence between TRRC and Chairman Colton concerning certain terms of the Agreement. TRRC further explained why it could not agree to former Chairman Doherty's proposal that the easement not become effective until all other property rights were secured. However, TRRC did agree to certain other revisions to the Agreement regarding the effective date of the easement and the use of the Agreement as precedent for other land valuations. On December 22, 2009, TRRC wrote to Chairman Colton detailing the revisions it agreed to make to the Agreement to address the effective date issue.

On February 4, 2010, TRRC wrote to OEA Director Rutson summarizing the status of discussions with MFWP on the MCFH easement. TRRC requested OEA's views and assistance in achieving MFWP Commission approval of the Agreement. On March 4, 2010, OEA wrote to TRRC acknowledging the receipt of documents regarding the MCFH easement negotiations and noting that it appears an impasse has been reached and that OEA assistance has been requested.

In March 2010, there were communications between OEA, MFWP and TRRC in which it was agreed that TRRC should work with MFWP Acting Director Maurier to address the Agreement effective date issue. TRRC met with MFWP Director and legal counsel on July 13, 2010 and reached agreement on final revisions to the Easement Agreement pending drafting by counsel. In early September 2010, MFWP counsel provided a revised draft Agreement incorporating the provisions agreed to at the July 13th meeting.

Final agreement among the parties was reached in October 2010. However, the Agreement was not thereafter submitted for approval by the MFWP Commission.

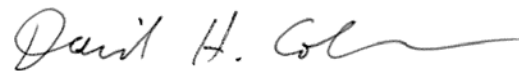
Although there were some communications with the MFWP staff in late 2010, 2011 and 2012, there have been no sustained discussions on the Agreement in recent months. Once TRRC

decided to identify the Colstrip Alternative as its preferred route in its December 2012 Supplemental Application, there have been no further discussions with MFWP staff or Commissioners.

As the above summary indicates, MFWP has not in recent years expressed to TRRC in any post-TRRC III consultations any concerns about train-caused vibration, sound or other operational impacts. TRRC understands that those concerns have been addressed by the studies referenced above. Rather, the major issues raised by MFWP have concerned the effective date of the easement, the sufficiency of insurance and other issues not associated with train operations. Each of these and other issues has been fully addressed, as discussed above, in the Agreement that TRRC reached with MFWP staff.

We would be pleased to provide copies of any of the above-referenced materials should you require such copies. We also look forward to answering any questions that you might have.

Sincerely,

A handwritten signature in black ink, appearing to read "David H. Coburn", with a long, sweeping horizontal line extending to the right.

David H. Coburn