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March 18, 2011

Mr. Kenneth Blodgett
Office of Environmental Analysis
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423

Re: **Tongue River Railroad Company, Inc. - Finance Docket 31086 (Sub-No. 3) -
Construction and Operation of the Western Alignment**

Dear Mr. Blodgett:

Tongue River Railroad Company, Inc. hereby submits this comment in response to the Board's February 1, 2011 Notice soliciting comments in connection with the Programmatic Agreement ("PA") process. The PA for the Tongue River Railroad project dates from July 2005. It would have expired by its own terms on November 1, 2010 but for the extension agreed to by all signatories prior to that date extending its effectiveness through September 1, 2011. The extension was agreed to in order to allow an opportunity for any updating or revision to the PA that may be appropriate. No construction has been undertaken since the PA was first entered and, although TRRC continues active efforts to develop its project, no construction will occur before a new PA is entered on or by September 1, 2011.

The 15-page PA that is the subject of these Comments was carefully and thoroughly negotiated by the signatories to it, following consultation with interested federal agencies, the Montana SHPO, the STB, TRRC and the ACHP. The PA sets forth a series of detailed measures designed to identify and protect cultural resources that may be impacted by construction of the TRRC line. While we will not here provide a detailed description of all of the elements of the PA given the Board's familiarity with them, it is certainly reasonable to conclude that the PA is thorough and expansive in the procedures that it specifies for identifying, documenting, and, as necessary, treating and preserving cultural resources that cannot be avoided.

The PA requires, for example, that TRRC retain a qualified Cultural Resources Use Permittee who holds the permits required to prepare an Identification Plan. It also sets forth a process for treatment and preservation of Native American (as well as Non-Native American)

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resources and for consultation with the signatory and concurring parties, including the interested Native American tribes. It also provides that representatives of the Native American tribes will be invited to participate in processes designed to ensure the identification and protection of traditional religious and culturally significant resources. Provisions for public participation are also set forth in the PA.

The PA was negotiated against a background in which the Board's environmental staff and contractors carefully reviewed the impacts of the TRRC project on cultural resources in the impacted area and undertook extensive consultations with interested agencies and Native American tribes. A review of the *Tongue River II* and *III* EISs underscores the care with which the Board executed its responsibilities under Section 106 of the National Historic Preservation Act, including the Board's extensive outreach to the Northern Cheyenne and Crow Tribes. See, e.g., *Tongue River III* DSEIS at 4-123 to 4-124; *Tongue River III* FSEIS at 1-23, 2-21. The specific communications with the tribes are summarized at Appendix M to the Draft SEIS in the *Tongue River III* proceeding, which identifies a total of 44 written communication and 91 telephonic communications between the Board's staff or contractor and Native American representatives. TRRC understands that there have been additional consultations since then. As noted, the PA provides for extensive additional opportunities for consultation and other involvement by the Northern Cheyenne and Crow tribes in advance of construction and once construction begins.

The PA was more than adequate as a means of addressing any later-discovered cultural resources when it was first crafted and signed, and it remains so. Moreover, neither the National Historic Preservation Act nor the implementing ACHP regulations have been modified since the PA was entered. Neither has there been any change either to the standards under which those regulations are implemented or in the propriety of the use of a PA as a means of addressing cultural resources that might not be known until later in the process.

Concerning Wolf Mountains, this site was listed on the National Register of Historic Places and was under BLM jurisdiction at the time that the PA was entered. The site was studied in the EISs in this proceeding. See, e.g., *Tongue River III* Draft SEIS at 4-126, 5-19 and Appendix H; *Tongue River III* Final SEIS at 2-18 through 2-21; 3-170. The BLM agreed to the PA as a form of mitigation for impacts that the TRRC might have on the site. The PA will require, for example, the preparation of a Treatment Plan that addresses the adverse impacts of the rail line on historic properties, including Wolf Mountains.

The site's subsequent designation as an NHL occurred approximately two years after the Final EIS was issued and one year after the Board's October 2007 final decision in this proceeding. However, the recognition of the historical importance of the site has already been taken into account through the EIS and Section 106 processes. The impacts to the site have been considered and a determination made by the Board that there would be an adverse visual

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impact to the site. TRRC has already moved the rail alignment farther away from the battle site (albeit within the NHL boundaries) so that the alignment is now on the other side of the existing road that traverses the battlefield and farther from the site of the historic military encampments and other culturally sensitive areas.

In addition, a feasibility study of alternatives that would route the TRRC line around the battlefield boundaries has previously been undertaken. See *Tongue River III* Final SEIS at Appendix I, reporting on the alternatives study undertaken by TRRC in coordination with its consultant, Mission Engineering. The study showed that the two alternatives reviewed, one skirting the battlefield to the north and the other to the south, were not feasible due largely to grade concerns. In that regard, the terrain on either side of the site is steep, requiring that tens of millions of cubic yards of excavation would be needed to meet the design criteria for the railroad. Other adverse environmental and engineering impacts listed in the *Tongue River III* Final SEIS at pages 2-20 through 2-21 were also identified, including the following:

- A more circuitous alignment;
- Grade and curvature demands that are inconsistent with the project engineering criteria and with safe rail operations;
- Significantly more disruption to the landscape;
- Increased amount of total private and federal land disturbance by a minimum of 40 acres, 14 acres of this being irrigated farm land, based on an assessment of the amount of land that would be disturbed in connection with the cuts and fills described above;
- Increased likelihood of derailments due to increased curves and grades;
- Greater air quality impacts associated with train operations due to increased fuel consumption resulting from greater length of the line;
- Significantly greater construction expense; and
- Higher operating (largely, fuel and labor) and maintenance costs.

These and other factors that render avoidance of the battlefield infeasible for the many reasons stated in the study remain unchanged. Thus, the conclusion in the Final EIS in this proceeding that there are no feasible alternatives remains sound. (It also bears note Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303, does not apply to STB decisions).

In recognition of the new status of the site as an NHL, TRRC submits that the PA should be revised during this review/renewal process in order to (a) acknowledge in its recitals the new NHL status of that battlefield and (b) provide in the body of the PA for appropriate consultation with NPS (as well as the Northern Cheyenne and Crow tribes) with respect to Wolf Mountains cultural resources that might be impacted on that site by TRRC construction.

Once updated to incorporate NPS as a signatory and to provide NPS an opportunity to participate in the consultation contemplated by the PA, the PA will remain (as it was when

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BLM signed it in 2005) an appropriate means of addressing and mitigating TRRC impacts to the Wolf Mountains site. Moreover, as noted, the re-alignment of the rail line in 1998 moves it away from the main area of heavy fighting and other culturally sensitive locations at the site.

TRRC is prepared to work closely with the STB, NPS and other signatory and concurring parties to help progress this PA review process toward the end of signing a revised PA by or before September 1, 2011.

Sincerely,

A handwritten signature in dark ink, appearing to read "David H. Coburn", followed by a long horizontal flourish.

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



Tongue River PA

Coburn, David

to:

'Kenneth.Blodgett@stb.dot.gov'

03/18/2011 04:22 PM

Show Details

1 Attachment



TR-Letter.PDF

Ken -- Please find attached the comments of Tongue River Railroad Company, Inc. on the PA issue.

Regards. David Coburn/Attorney for TRRC

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