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Via Hand Delivery

Mr. Kenneth H. Blodgett
Environmental Protection Specialist
Section of Environmental Analysis
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423

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

Dear Mr. Blodgett:

We are writing on behalf of the Tongue River Railroad Company, Inc. (TRRC) to provide comments on the Draft Supplemental Environmental Impact Statement (DSEIS) in the above-referenced proceeding. Generally, TRRC supports the DSEIS and agrees with the conclusions set forth in that document. TRRC offers these comments regarding (a) its views on the benefits of the Western Alignment; (b) specific mitigation measures in Chapter 7 of the DSEIS; and (c) information that TRRC believes needs to be clarified or corrected in the informational section of the DSEIS.

A. The Western Alignment Remains TRRC's Preferred Route

The DSEIS concludes that TRRC could construct its rail line along either the Four Mile Creek Alternative or the Western Alignment. The DSEIS also acknowledges, however, that the latter route, which is 12 miles shorter, has the substantial advantages of reduced fuel usage and reduced potential for accidents due to its flatter grades. In addition, the DSEIS also correctly concludes that the Western Alignment would require fewer at-grade highway crossings and fewer acres for the right of way, impact fewer property owners, affect significantly fewer wetlands, and affect fewer noise receptors. Further, the DSEIS concludes that with mitigation

the Western Alignment will be environmentally preferable to the Four Mile Creek Alternative, notwithstanding the greater amount of earthwork required for the Western Alignment.

The DSEIS's conclusions regarding the benefits of the Western Alignment dovetail with the evidence of the transportation advantages of that routing submitted by TRRC in its April 1998 Application in the *TRRC III* proceeding. In particular, the Verified Statements of Larry A. Parker (BNSF Director of Asset Management) and David Mahle (BNSF Director of Capacity Planning), submitted with the *TRRC III* Application, address the substantial operating advantages of the Western Alignment as compared to the Four Mile Creek Alternative. Mr. Parker, for example, describes the lower maintenance costs that would be associated with the Western Alignment and the consistency of that Alignment with BNSF's policy concerning grades on lines transporting heavy coal traffic. Mr. Mahle details the significant operational cost savings that would be associated with the Western Alignment. In addition, the Verified Statement of TRRC witness Robert Leilich, also submitted with the *TRRC III* Application, addresses the significant cost and operational advantages of the Western Alignment.

In view of the advantages described in its Application, and confirmed in the DSEIS, TRRC presently intends to construct its line over the Western Alignment should the STB approve its pending application in *TRRC III*.

B. Comments on the Proposed Mitigation Measures

Proposed Mitigation Measure 2:

On page 7-11, lines 6-15 (Mitigation Measure 2), the DSEIS addresses right-of-way (ROW) fencing to control livestock and provides that the Task Force must approve the type of fencing. TRRC believes that it is important that greater weight be given to the individual landowner's preference for the type of fencing to be installed along the ROW. While the mitigation measure attempts to do this through Task Force consideration of landowner concerns on a case-by-case basis, as noted below in TRRC's comment on Proposed Mitigation Measure 14, the contemplated Task Force should not have general approval authority over TRRC implementation measures, including fencing. TRRC understands the importance of the individual landowner's views on fencing and will consult with landowners on these matters.

Proposed Mitigation Measure 14 (and Proposed Measures 2, 18, 20, 25, 26, 29, 31, 32, 34, and 35 to the extent that these measures address the operation of the Multi-agency/Railroad Task Force):

TRRC is concerned with the scope of the Task Force apparently contemplated by the DSEIS, as described in Mitigation Measure 14 and related measures noted above, and

recommends that SEA modify its Task Force-related measures as described in these comments below. See DSEIS at pp. 4-69--4-70 and 7-12--7-13.

In *TRRC II*, the STB adopted a mitigation measure requiring that TRRC “participate as a member of an informal Multi-agency/Railroad Task Force (Task Force), which will advise, assist and coordinate with TRRC in accomplishing the mitigation measures set forth in the Mitigation Plan in the DEIS addressing aquatic and terrestrial ecology.” See Finance Docket No. 30186 (Sub No. 2), *Tongue River Railroad Company -- Rail Construction and Operation -- Ashland to Decker, Montana* (“*TRRC II*”) (served Nov. 5, 1996) at Appendix B, p. 4. In that same decision, the STB explained that in addition to the above “supervisory” functions, the Task Force “will be available to deal with the unanticipated [terrestrial and aquatic] environmental issues that can arise as this particular project is implemented and construction begins, specifically including issues related to the concerns of landowners and Native Americans.” Further, the Task Force was authorized to “consult” with interested parties on these matters. In a subsequent TRRC II decision rejecting the petition of the Northern Plains Resource Council to be a member of the Task Force, the Board again described the Task Force’s purpose “to advise, assist, and coordinate with” TRRC in the implementation of mitigation measures related to aquatic and terrestrial matters. See *TRRC II* (served December 31, 1996) at 2.

As envisioned in the *TRRC II* proceeding, therefore, the Task Force was an “informal” body assigned to “advise, assist and coordinate” with TRRC, and others, on relevant aquatic and terrestrial mitigation measures. See *TRRC II* DEIS at p. A-15, Measure A.9.1. The Task Force was not, by contrast, designed as an entity empowered to formally approve or disapprove specific TRRC plans for implementation of the STB’s terrestrial and aquatic mitigation conditions before each of those measures can be implemented.

That advance approval function, however, is exactly the very different, and substantially more expansive, role that is now proposed to be assigned to the Task Force in the *TRRC III* DSEIS. No explanation is offered in the DSEIS as to why this change in the Task Force’s role from that approved by the Board in *TRRC II* is being contemplated, and TRRC submits that there is no good reason for this change.

As apparently envisioned in the DSEIS, the Task Force will need to approve, in advance of implementation, numerous specific mitigation implementation steps. Specifically, the Task Force will be called upon to approve: Fencing options provided by TRRC (Measure 2); TRRC’s field search schedule for identifying plant species of concern (Measure 18); TRRC’s revegetation plans (Measure 20); alternative mitigation if those revegetation plans do not succeed (Measure 20), work plans related to revegetation (Measure 20); plans to minimize harm to species of concern (Measure 25); plans to minimize impacts on the black-tailed prairie dog and black-footed ferret, among several other species (Measure 26); plans relative to the possible habitat destruction/compensation (Measure 29); plans for implementing a lost wildlife compensation and monitoring program (Measure 31); preparation of surveys of pronghorn antelope and possible

development of alternative mitigation (Measure 32); plans for river crossing and riprap area mitigation (Measure 34) and plans for other aquatic resource mitigation (Measure 35).

Of substantial concern to TRRC is the possibility that the proposed requirement for Task Force pre-implementation approval of each of the above-identified steps could unduly delay the rail construction process. TRRC appreciates and understands SEA's interest in providing an opportunity for the interested agencies that compose the Task Force to have some oversight over the matters at issue, but the requirement that TRRC obtain a consensus (or at least a majority) view for each of these many matters from agencies that do not always share common goals or missions is a recipe for more delay. The sheer number of matters that the Task Force has been assigned to approve offers broad opportunities for the approval process envisioned by the DSEIS to become overwhelmed.

Moreover, while TRRC understands that Measure 14 contemplates that the Board will make final decisions in the event that the Task Force is unable to do so, the lack of time deadlines for Task Force deliberations or for Board decision making is incompatible with the parallel need to develop and adhere to construction schedules, particularly given the short annual construction season in Southeast Montana. It is not difficult to envision that merely convening Task Force meetings or conference calls to address each of the many tasks assigned to the Task Force could consume precious weeks. In addition, in the event that the Task Force cannot make a decision, it is not clear which entity at the Board will serve as the ultimate decision maker. TRRC doubts that SEA intends that the entire Board will be burdened with making decisions on specific TRRC mitigation implementation plans. TRRC assumes that such decisions will rest with the Chief of SEA – but the DSEIS neither makes this clear nor imposes any deadlines for action.

Further, the composition of the Task Force appears open to question since Measure 14 contemplates that “other interested parties may be invited to participate [presumably on the Task Force] as appropriate.” TRRC is concerned that, unless clarified, this language could spawn future debates about Task Force composition as private parties and organizations opposed to the TRRC rail line seek a seat at the table to approve or disapprove plans to implement the mitigation measures spelled out in the DSEIS.

To avoid the types of problems that TRRC has noted above, TRRC submits that SEA should modify Measure 14 and the related measures identified above as follows:

Rather than serve as a forum for pre-approval of TRRC's specific mitigation implementation plans and procedures, the Task Force should be given an opportunity to review TRRC's terrestrial and aquatic implementation plans (and related surveys and other data collected as required by the proposed DSEIS measures), which would have to be submitted by TRRC to the Task Force in advance. TRRC should be authorized to implement those plans

following submission to the Task Force unless, within 10 days following their submission, any Task Force member raises an issue or concern in writing. In the event that such an issue or concern is raised, the Task Force should be convened (by meeting or conference call) within 5 days thereafter to consult with TRRC on the issue. If the matter is not resolved by the Task Force at its meeting or during a further 5 day consultation period that might (if needed) follow the initial Task Force meeting on the issue, then the Chief of SEA should make a final decision within 10 days thereafter.

In addition, TRRC submits that (as contemplated in the DSEIS) SEA could call a meeting of the Task Force on its own initiative to discuss an issue of concern arising from TRRC's actions in implementing terrestrial or aquatic mitigation measures. In the event that such a meeting is called, the same time frames set forth above should apply -- 5 days to convene the meeting or conference call; 5 days to consult as needed and 10 days for a decision by SEA.

This proposed procedure is fully consistent with the advisory and consultative role assigned to the Task Force by the Board in *TRRC II*, and should fully accommodate the interests of the different Task Force members in overseeing TRRC's efforts. Further, by ensuring that decisions are efficiently reached within a 30 day period, greater predictability will be added to the procedure.

Further, consistent with the Board's December 31, 1996 decision in *TRRC II* holding that the Task Force is not open to additional, non-agency members, SEA should clarify that while the Task Force members can consult with other interested persons, the actual membership of the Task Force is fixed and limited to the agencies specified in the DEIS. This clarification will remove any doubt on that issue, and thereby avoid a replay of issues already decided by the Board.

Proposed Mitigation Measure 16:

TRRC is prepared to retain a third-party contractor, at TRRC's expense, as specified in this proposed measure at p. 7-13 of the DSEIS. However, TRRC requests that SEA clarify that: (1) before the third-party contractor is given any assignments by SEA relative to this project that TRRC be consulted to determine if the matter can be resolved without the need for any action on the part of the contractor and (2) if any action by the third party contractor is deemed warranted by SEA following such consultation, that the third party contractor submit for TRRC's approval a budget for the requested work.

Proposed Mitigation Measure 17:

TRRC is prepared to submit periodic reports to SEA on the status of implementation of the various environmental conditions set forth in the DSEIS in Measure 17 at p. 7-13. This

proposed measure, however, calls for “no less than quarterly” reports, whereas TRRC is already under an obligation by virtue of the November 8, 1996 Board decision issued in *TRRC II* to submit reports to the Board (and serve such reports on all parties of record) every four months on the status of its efforts. See *TRRC II* Decision at 25. Rather than be burdened by two sets of reporting requirements, TRRC submits that this mitigation measure be revised so that TRRC is authorized to meld the environmental implementation status reports into its pre-existing four month reporting obligation. In that way, a single report can be submitted to the Board and SEA, and served on all the parties of record.

Proposed Mitigation Measure 29:

As explained at page 4-81, Mitigation Measure 29 (at page 7-20 of the DSEIS) discusses the protection of habitat for State Species of Concern. However, the text of the mitigation measure does not clearly indicate that it is applicable to State Species of Concern. Therefore the first sentence should be revised as follows to tie the measure to the discussion on State Species of Concern in on pages 4-81 to 4-84: “Active habitats for State Species of Concern such as nests, brooding locations, and migratory corridors, etc., shall not be destroyed during construction of the railroad.” The same change is also applicable to the discussion on page 4-84, lines 22-24.

Proposed Mitigation Measure 31:

Mitigation Measure 31, at pages 7-20--7-21 of the DSEIS, discusses the compensation program for lost wildlife habitat. While TRRC agrees with the concept of a compensation program for lost wildlife habitat, the wording in the DSEIS needs to be clarified with respect to the ROW negotiations with private landowners. As drafted the mitigation measure could be interpreted as requiring TRRC to encompass the compensation program in each ROW acquisition. In practice, this will not be feasible. For example, in some cases it likely will be practicable to purchase “cutoff” land for donation; however, in other situations the landowner may not be willing to sell such land. In other circumstances, TRRC may have to address the compensation issues through land in the vicinity of the line, but not immediately adjacent to it. TRRC should be free to work with wildlife managers to develop a compensation program using all available tools. Therefore, TRRC proposes that subsection (1) of Mitigation Measure 31 be removed from Mitigation Measure 31 and that the subsection be made a stand-alone mitigation measure that is not directly tied to ROW negotiations with private landowners.

In addition, subsection (2) of Mitigation Measure 31 should be revised to make clear that the proposed mitigation is contingent on the relevant landowner agreeing to any construction of ponds adjacent to the grade. TRRC thus suggests that the first sentence of subsection (2) be revised to read: “If the landowner agrees and where practicable, TRRC shall construct ponds adjacent to the railroad grade, or use railroad grade as a dam.”

Proposed Mitigation Measure 42:

Proposed Mitigation Measure 42 at p. 7-26 of the DSEIS contemplates that TRRC must conduct a soil survey along the alignment, presumably in order to produce data relevant to potential erosion and slumping impacts. TRRC believes that some or all of the relevant soil data may be available from local conservation districts. TRRC therefore requests that this measure be modified to allow such data to be collected by TRRC from such districts or other sources in lieu of conducting its own soil surveys where the data is otherwise already available. In that regard, TRRC notes that it will be collecting such data for purposes of final engineering and design as well.

Proposed Mitigation Measure 49:

On page 7-27, Mitigation Measure 49, the DSEIS requires TRRC to “ensure that all culverts and other drainage structures installed at non-perennial stream crossings during construction of this line comply with the design criteria of the American Railway Engineering and Maintenance of Way Association, established in the year 2000. This means that at a minimum, culverts shall be designed to discharge a 25-year flood without static head at entrance and a 100-year flood using the available head at entrance, the head to two feet below base of rail, or the head depth of 1.5 times the culvert diameter/rise, whichever is less. Additionally, TRRC shall incorporate the culverts into the existing grade of the streambed to avoid, to the maximum extent possible, changing the character of the streambed and impacting migrating amphibians and reptiles.” The mitigation measure fails to recognize that the design criteria of the American Railway Engineering and Maintenance of Way Association (AREMA) are only recommended guidelines for culvert design. The AREMA manual recognizes that culvert design is not an exact science, but rather is based on an engineer’s interpretation of field data and hydrology and influenced by personal judgment based on the engineer’s experience in a given locale. While the AREMA manual recommends a design approach, the manual recognizes that the final decision regarding the appropriate method for sizing culverts is the responsibility of the design engineer and that other methods may be more appropriate for a given individual situation.

TRRC’s criteria for culvert sizing are based on the Montana Department of Transportation Hydraulics Manual, Chapter 7, Hydrology, October 1995. According to these criteria, culverts must satisfy the following criteria: no railroad/roadway overtopping; no backwater damage to adjacent property; minimum 24” CMP under all railroad facilities; and Maximum Allowable Headwater as follows:

Pipe Size (D)	Allowable Headwater @	Allowable Headwater @
	Design Flow	100-year Flow
< or = 42”	< 3.0 D	< 4.0 D

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48" – 108"	< 1.5 D	< D + 5'
> or = 120"	< D + 2'	< D + 4'

Mitigation Measure 49 should be revised to reflect that the AREMA design criteria are recognized as guidelines. The final design of culvert sizing should be determined by the project engineer based on the best available on-site information in order to meet applicable culvert sizing criteria for the specific area.

C. Clarifications and Corrections of Informational Sections

On page 1-3, lines 10-11, the DSEIS incorrectly states that the Western Alignment would be located approximately 320 feet west of the Diamond Cross LLC Ranch Headquarters. The Western Alignment would be located 2,700 feet west of the Diamond Cross LLC Ranch Headquarters. The Four Mile Creek Alternative alignment would be located approximately 300 feet south of the ranch headquarters.

On page 4-55, lines 42-44, the DSEIS discusses the subdivision development informally known as Cormorant Estates, where four cabins are located. The Western Alignment would not be visible from these cabins. The closest cabin is approximately 1250 feet from the alignment centerline, the next closest 1500 feet, and the remaining two cabins are approximately 2000 to 2200 feet from the alignment. There are three cabins on Boat House Point, which is located on the south side of Cormorant Bay. These cabins are approximately 5000 to 5200 feet from the proposed Western Alignment. The Western Alignment would not be visible from these cabins sites either. Three cabins are located on the north side of Cormorant Bay and just west of the Tongue River Dam spillway. These cabins are in excess of 3000 feet east of the Western Alignment. Portions of the Western Alignment may be visible from two of the three cabins.

On page 4-118, lines 11-12, the DSEIS should be clarified regarding the relationship of the railroad to the Crow Indian Reservation. At its closest point, the Four Mile Creek Alternative is approximately four miles east of the Crow Indian Reservation boundary. The Western Alignment, at its closest point, is approximately nine miles east of the Crow Indian Reservation boundary.

On page Pg 4-160, line 30, the DSEIS incorrectly states that the Western Alignment would be "over 500 feet" west of the Tongue River Dam abutment. The Western Alignment in fact would be over 5000 feet from the dam abutment.

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TRRC appreciates the opportunity to submit these comments and looks forward to the issuance of a Final SEIS in this proceeding.

Sincerely,

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

Betty Jo Christian
David H. Coburn
Sara Beth Watson

Attorneys for Tongue River Railroad Company, Inc.