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Commenter: Brenda Lindlief Hall

Organization: Tongue River Water Users' Association

State: Montana

Agency: Surface Transportation Board

Initiative: Tongue River Railroad

Submission Text

Please see the attached comments of the Tongue River Water Users' Association. Thank You.

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September 23, 2015

Ken Blodgett
Docket No. 30186
Office of Environmental Analysis
Surface Transportation Board
395 E Street SW
Washington, D.C. 20423

Re: Tongue River Water Users' Association's Comments on the Proposed
Tongue River Railroad Draft EIS, Docket Number: FD_30186_0

Dear Mr. Blodgett:

On behalf of the Tongue River Water Users' Association, I write urging the Surface Transportation Board (STB) to choose the No-Action alternative for the Tongue River Railroad (TRR) Draft Environmental Impact Statement (DEIS). In our opinion, the proposed Tongue River Railroad (TRR) not only fails to serve the public convenience and necessity, it undermines the public interest in every aspect, and places an undue and unfounded burden on the people whose lives and livelihoods would be adversely affected. Constructing a railroad through some of the last remaining unspoiled areas of the United States to serve a coal mine that does not have a permit and whose owners are in dire financial straits, and to serve the coal industry whose glory days are fading fast, simply does serve the public convenience and necessity.

I. HISTORY AND INTERESTS OF THE TONGUE RIVER WATER USERS' ASSOCIATION

Although the headwaters of the Tongue River rise in Big Horn Mountains of Wyoming, the majority of the river courses through the heart of the Tongue River Valley in Montana, winding approximately 200 miles from the Montana-Wyoming border to its confluence with the Yellowstone River at Miles City. The Tongue River is the life support system that feeds this pristine, semi-arid part of Montana. Ranchers in the Tongue River Valley have relied upon the high quality waters of the Tongue River to sustain family ranches and farms for well over a century. In addition to being essential for agriculture, the Tongue River provides critical habitat

for fish and wildlife, including imperiled species.¹ Tributaries to the Tongue River such as Otter Creek are also essential to the ranchers in the area.

The Tongue River Water Users' Association (TRWUA) was formed in 1937. Its members live and own land in Montana's Big Horn, Custer, and Rosebud counties. TRWUA's members, which include the Northern Cheyenne Tribe, require the clean, high-quality waters of the Tongue River for irrigation, domestic use, livestock watering, wildlife and aquatic life sustenance, for medicinal, cultural, spiritual and religious purposes, for recreational enjoyment, and for their very survival. Since its inception, TRWUA and its members have worked diligently—and thus far successfully—to protect the high quality of the waters of the Tongue River.

But for decades, the integrity of the waters of the Tongue River (River) have been compromised by the dumping of polluted wastewater from coal mines and coalbed methane wells into the River and Tongue River Reservoir. Beginning in the early 1970s, coal mines have continuously discharged highly saline wastewater into the Reservoir. Currently, the Decker Mine owned by Decker Coal, LLC (a subsidiary of Decker Holding Company, which in turn is a subsidiary of Lighthouse Resources), operates the Decker East and Decker West coal mines. According to two Montana Pollution Discharge Elimination System (MPDES) permits granted to Decker Coal, the mines continuously discharged an average of 3,663 gallons per minute (gpm), every single day, into the Tongue River Reservoir. In addition to these continuous discharges, there are a number of outfalls that discharge intermittently to the Tongue River Reservoir.

In the 1990s, coal bed methane (CBM) developers began discharging highly saline pollutants into the Tongue River in Wyoming and Montana without MPDES discharge permits. When they finally did receive discharge permits, they were allowed to discharge untreated, highly saline and sodic wastewater directly into the Tongue River. Under just one of the CBM MPDES permits in Montana, Fidelity Exploration and Production Company was authorized to discharge 17,347,291 pounds of total dissolved solids (TDS), essentially inorganic salts, and 6,796,301 pounds of sodium per year into the River. This does not take into account other CBM

¹ The Tongue River provides important nesting habitat and a migration corridor for waterfowl and habitat for bald eagles and other wildlife. Above the Tongue River Reservoir, the Tongue River supports a major recreational fishery for smallmouth bass, sauger, and channel catfish. The lower Tongue River provides vital spawning areas for Yellowstone River sauger, a Montana species of concern, and possibly for and other species of concern. The area also provides habitat for candidate ESA species, and possibly for federally listed threatened and endangered species such as the pallid sturgeon.

discharge permits in Montana and Wyoming that have discharged many more millions of tons of salts into the Tongue River and its tributaries.

Salts from these industrial discharges ultimately end up on agricultural fields in the Tongue River watershed, increasingly compromising the quality of the Tongue River and its tributaries, and threatening aquatic life, wildlife, crops, soils, and agricultural production in the Tongue River Valley. Sediment loads, coal dust, and other pollutants from the proposed TRR would further compromise the quality of the Tongue River and its ability to sustain agricultural production. The proposed Otter Creek coal mine that the TRR is designed to serve would also discharge extremely salty wastewater into Otter Creek, one of the major tributaries to the Tongue River. These cumulative impacts would cause extensive degradation to the Tongue River and its tributaries, it would devalue property, interfere with water rights, industrialize a pristine, rural area that is cherished by residents and visitors, and would likely cause serious economic harm from loss of agricultural production.

A 2013 study authored by Timothy Fitzgerald, professor of agricultural economics and economics at Montana State University, notes that data from 1980-2011 suggests that “annual gross agricultural revenues from the Tongue River are on the order of \$20–\$30 million. Capitalizing those revenues leads to a gross value on the order of \$250 million.” (Fitzgerald, *Timothy Prior Appropriation and Water Quality*, 2013.) Given that the DEIS acknowledges that impacts to surface waters from the TRR “would be adverse.” (Chapter 9, § 9.2) The proposed TRR, standing alone, poses significant risks to the economic revenues from agriculture in the Tongue River Valley. When combined with other sources of industrial pollutants, including the proposed Otter Creek coal mine, the risks to the River and agricultural production are increased exponentially.

All build alternatives identified in the proposed TRR DEIS will adversely impact water quality, agriculture, and the social and cultural fabric from which the rural Tongue River Valley is woven. Under any construction scenario, the proposed TRR poses substantial and unfounded threats to the residents, lands, waters, aquatic life and wildlife in the area directly affected. But these impacts are not isolated: they would reverberate throughout Montana and beyond to proposed ports in the Pacific Northwest.

TRWUA stands firmly opposed to construction of the proposed TRR. It also has grave concerns over the DEIS and the failure to adequately address all direct and cumulative impacts the proposed TRR would have on water quality, agricultural lands and production, family farms and ranches, and the myriad other resources that will be harmed by this proposal. The Tongue

River and the people who rely on it for their lives and livelihoods cannot afford additional insults to the quality of the water.

II. PURPOSE AND NEED

There is no need for the proposed TRR. Although Otter Creek Coal/Arch Coal has submitted an application to the Montana Department of Environmental Quality (MDEQ) to mine the Otter Creek tracts, no permit has been issued. Montana DEQ sent Otter Creek/Arch a deficiency letter in March of this year, requesting significant and essential information that is missing from Otter Creek's application, such as documentation of prime farmlands and information regarding the alluvial valley floor. Otter Creek has not yet responded to MDEQ's deficiency letter and has not provided the required information.

The Surface Mining Control and Reclamation Act of 1977 (SMCRA) requires, in part, that a coal mining permit can only be issued if:

(5) the proposed surface coal mining operation, if located west of the one hundredth meridian west longitude, would—

(A) **not interrupt, discontinue, or preclude farming on alluvial valley floors** that are irrigated or naturally subirrigated . . . or

(B) **not materially damage the quantity or quality of water** in surface or underground water systems that supply these valley floors

30 U.S.C. § 1260(b)(5) (emphasis added). Because Otter Creek Coal has not provided information regarding the alluvial valley floor and other essential information, it remains unknown whether a mining permit can even be issued for the proposed Otter Creek mine.

Additionally, although the DEIS notes that there could possibly be additional mines at Poker Jim-O'Dell Creek, and Canyon Creek if the TRR is constructed, given the topography of those areas, given the dramatic decline in the demand for coal both in the United States and abroad, given the precarious financial condition of Arch Coal and other major coal producers,² it is highly unlikely these additional areas would ever be mined. Moreover, Montco, LLP's permit for the Poker Jim-O'Dell Creek coal tracts was revoked in 1997 for failure to commence mining, and this year Montco, LLP filed an application for release of its bond for those tracts. Apparently Montco has no interest in mining those areas. And to the best of TRWUA's knowledge, the Canyon Creek coal tract is not leased, and given its location, it is highly unlikely it will ever be mined.

² Arch Coal is carrying a debt load of approximately \$5.1 billion compared to about a \$74 million stock market value. See <http://www.cnn.com/2015/09/22/reuters-america-arch-coal-needs-to-burn-more-coal-than-cash-to-avoid-chapter-11.html>. Last viewed 09/23/2015

In the end, there is simply no mine for the TRR to serve. And based on Arch Coal's faltering financial condition, the dramatically declining demand for coal, and the siting of the proposed Otter Creek mine and other mines, there may never be a mine for the TRR to serve. Constructing a railroad for a nonexistent mine is not only inconsistent with the public convenience and necessity, but is antithetical to it. It will cause irreparable damage to water resources, agricultural land and production, family farms and ranches, and will destroy the rural character of the area and culturally important resources.

III. WATER QUALITY AND WATER RIGHTS

A. Surface Water

Under all alternatives, the surface water quality of the Tongue River, its tributaries, and wetlands will be adversely impacted. This is openly acknowledged throughout the DEIS. Section 9.2.3.2 discusses surface water quality and notes that five surface waters in the Tongue River watershed are impaired and on Montana's § 303(d) list: the Tongue River, the Tongue River Reservoir, Hanging Woman Creek, Pumpkin Creek, and Otter Creek. Table 9.2-1 lists "Probable Source[s] of Impairment." Interestingly, this information does not appear to be on the Montana Department of Environmental Quality's 303(d) website. And conspicuously, despite over forty (40) years of continuous, highly saline and sodic wastewater discharges from Decker and other coal mines, and despite well over a decade of CBM companies discharging millions of tons of salts into the Tongue River and its tributaries both in Wyoming and Montana, these are not listed as probable sources of impairment. This information, along with an explanation of how and from where OEA derived its information regarding probable sources of impairment, should be included in Table 9.2-1.

In the end, however, the DEIS plainly acknowledges that construction of the proposed TRR will "result in both physical and chemical alteration to surface waters crossed by or adjacent to the build alternatives," through "sediment transport and deposition, modification of channel configuration and morphology, changes in streamflow characteristics (e.g. volume, velocity), and surface water withdrawals during construction." (DEIS, 9.2-13.) And as noted in the DEIS:

Even with implementation of OEA's recommended mitigation measures and TRRC's voluntary measures, **construction and operation of the proposed rail line would cause unavoidable impacts on surface waters.** These impacts include changes to natural drainage and altered hydraulics around surface water crossings, changes to channel morphology, potential for debris jams and water backup, increased channel scour and erosion, and increased turbidity, sediment loads, and concentration of pollutants during construction. **OEA concludes that these impacts would be adverse.**

(DEIS, 9.2-25, 26) (Emphasis added). Construction and operation of the proposed TRR would adversely impact waters that are the lifeblood of the people in the area from the Wyoming border to Miles City, Montana.

B. Groundwater

Construction and operation of the proposed TRR will adversely affect precious groundwater that farmers and ranchers rely on for stockwater, domestic wells, and wildlife sustenance. All build alternatives will adversely impact groundwater. The impacts include water quality degradation, disruption of groundwater balances, and permanent loss of groundwater wells within the right-of-way. (DEIS, 9.3-1.) OEA concluded that these impacts would be “negligible.” (*Id.*) But in this semi-arid part of Montana, *any* loss and degradation of water is *significant*. TRWUA and others have been fighting to protect their water quality and water rights for years.

Montana Water Law and Water Rights

Like most western states, Montana follows the doctrine of prior appropriation for water rights: first in time, first in right. Under this system, the first person to put the water to a beneficial use has a senior right to the use of the water. The Montana Constitution recognizes, and holds inviolable, water rights in existence prior to ratification of the Constitution: “All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.” Montana Constitution, Article IX, Section 3. Saying the loss of water wells is negligible is inflammatory to the people whose lives depend on the water, and flies in the face of Montana water law. Under long-established Montana law, a water right is a property right. Loss of water means loss of property, loss of real property values, loss of livestock, loss of wildlife, and much more. No rancher in this part of Montana can afford to lose groundwater wells or have groundwater contaminated. And replacement wells would not have the same value as they would not have the same priority date as the original wells: they would instead be junior to many, if not most, others. The Mitigation and Unavoidable Environmental Consequences section fails to note that groundwater wells will be permanently lost, and merely states that mitigation measures would require TRRC to “replace each active well removed from the right-of-way as possible” (DEIS, 9.3-15.) There is nothing *requiring* that replacement wells be drilled and no mention of loss of priority or the value lost. And in many cases, a replacement well may not be possible and the location may not be accessible.

Another important issue the DEIS fails to discuss is the connectivity between ground and surface waters. In many areas, groundwater recharges the surface waters of the Tongue River,

and other surface waters. There is discussion of recharge and infiltration, but no discussion of the connectivity between ground and surface water and the fact that groundwater recharges surface waters. Groundwater recharge of surface waters, including impacts on surface water rights and degradation of surface water if groundwater is contaminated, needs to be addressed.

C. Wetlands

As with surface and ground waters, wetlands will be adversely affected by all build alternatives. It is well recognized that wetlands are ecologically significant and essential. Wetlands help stabilize river levels, they filter and purify surface waters, accept water during storms and when water levels are high, recharge groundwater, and provide critical habitat for wildlife. The DEIS on one hand states that the wetland functional assessment did not result in the identification of . . . wetland[s] that would be considered extremely rare, completely undisturbed, or difficult to replace. (DEIS, 9.5-14.) But then the Impacts Common to All Build Alternatives discussion states “[c]onstruction impacts would result in the **permanent loss or alteration of certain wetlands** and would affect wetland functions . . . **All impacts on wetlands from construction of the proposed rail line would be adverse . . .**” (Emphasis added) (DEIS, 9.5-15.) The two foregoing statements conflict. Permanent loss of wetlands, by definition, means they would be not only difficult, but impossible, to replace. The impacts to wetlands noted in the DEIS include: reduced wetland habitat, compromised wetland quality function and degraded wetland water quality; decreased stormwater and floodwater storage capacity, and; pollution to wetlands during construction and maintenance, and from operation of the proposed railroad. (DEIS 9.5-14 to 9.5-18.)

Under all build scenarios, wetlands would be significantly, adversely affected. The DEIS also states: “[i]mpacts to wetlands adjacent to the right-of-way cannot be quantified.” All build alternatives would adversely affect important wetlands. **Even with recommended mitigation measures, the proposed TRR will cause unavoidable and adverse impacts to wetlands.** (Emphasis added) (DEIS, 9.5-26.) And again, as noted above, the DEIS acknowledges that there would be permanent loss of wetlands, which provide critical habitat and perform essential functions in protecting water quality and protecting against flooding.

D. Coal Dust Impacts on Water Quality

The Office of Environmental Analysis (OEA) concludes that impacts from coal dust on surface waters would be “negligible” and “below screening levels” for constituents in coal dust, but also notes there could be “minor nuisance impacts” in some locations (S-13). But *any* coal dust would negatively impact the surface waters of the River, especially given that some of the

waters are already impaired due to sediments and other pollutants that are in coal dust, and given that the Tongue River has already been subjected to years of industrial pollutant loads from coal mining and CBM development. The River cannot tolerate additional pollutant loads of barium, mercury, lead, arsenic, or any other pollutants from coal dust, soil erosion, and other sources from construction of the proposed TRR or coal mining at Otter Creek.

E. Tongue River Flows

The DEIS states there is little variability in the flows of the Tongue River. That statement is patently inaccurate. In May 2015, the flows into the Tongue River spiked from about 450 CFS to 4,000 CFS between May 24 and about May 26. While the Tongue River Dam allows flows to be more closely regulated, flows can vary dramatically in a very short period of time. This should be clarified and accounted for in all build alternatives and in the cumulative effects analysis.

F. Cumulative Impacts on Water Resources is Unknown

The DEIS acknowledges there will be adverse cumulative impacts on surface water resources from past, present, and reasonably foreseeable projects. (DEIS, 18-33.) The OEA also states that construction of the TRR when combined with other past, present, and reasonably foreseeable projects would result in “minor” adverse cumulative impacts on groundwater. (DEIS, 18-36.) But while making this sweeping statement minimizing the cumulative impacts on groundwater resources, the DEIS notes that as many as 425 existing groundwater wells will either be impaired or destroyed by existing coal mines and the Colstrip Power Plant, and that the construction of the Colstrip Alternative and Colstrip East Alternatives would “permanently close 11 and 9 well, respectively, would require an estimated 297.2 and 390.4 million gallons of water, respectively.” (DEIS, 18-34.) Additionally, under the Decker and Decker East Alternatives, one groundwater well each would be permanently closed. (*Id.*) “Additional wells would be closed in the area near the coal mines. The Decker Alternative would close one groundwater well within 5 miles of the Spring Creek and Decker Mines The Colstrip Alternatives would close three groundwater wells within 5 miles of the Rosebud Mine and Colstrip Power Plant.” (*Id.*) Loss of water wells in this region of Montana is not “minimal.” And as discussed above in the Water Law and Water Rights section, *any* loss of water for the people in this area is significant.

There will plainly be adverse cumulative impacts on groundwater from the TRR and the Otter Creek Mine. The DEIS states: “[b]ecause the proposed rail line is proposed to be completed by 2018, **cumulative groundwater impacts would combine with impacts from**

construction and operation of the proposed Otter Creek Mine.” (*Id.* (emphasis added).) The DEIS states “[b]oth the Otter Creek Mine and the proposed railroad would involve closing wells.” Two wells would be closed under the Tongue River East, Colstrip East, Tongue River Road East, and Moon Creek East Alternatives within 5 miles of the Otter Creek Mine. And under the Tongue River, Colstrip, Tongue River Road, and Moon Creek Alternative, one groundwater well within 5 miles of the proposed Otter Creek Mine would be closed.

And while we appreciate the cumulative impacts discussion, it is significantly deficient. In particular, impacts on water resources from the proposed Otter Creek Mine remain unknown. Even the Montana Department of Environmental Quality (MDEQ) does not know what the impacts on groundwater and other water resources will be from the proposed Otter Creek Mine. In March of this year, MDEQ sent Otter Creek Coal a letter notifying it of numerous deficiencies in its mine application. Otter Creek has not yet responded. Otter Creek has not submitted requested information regarding the alluvial valley floor determination for the Otter Creek Mine, information regarding how it will handle post-mine drainage, and other critical information regarding water resources and mining impacts on water resources. To adequately address cumulative impacts on ground and surface waters, OEA needs to first obtain all water quality/quantity information from Otter Creek/Arch Coal.

Further, under the Land management and Energy development cumulative effects analyses for groundwater, the DEIS states “[a]ny build alternative would contribute to cumulative impacts by disrupting water balances and degrading water quality.” And the Construction projects section states any of the Tongue River, Colstrip, Tongue River Road, or Moon Creek Alternatives “would contribute to cumulative impacts related to Tongue River Road paving by altering infiltration and recharge characteristics.” (DEIS 18-35, 36.) But again, OEA concludes, despite the noted cumulative impacts, that the cumulative impacts from the TRR and other past, present, and reasonably foreseeable projects and actions would result in minor adverse cumulative impacts on groundwater.” (DEIS, 18-36.) Again, because there is so much missing information regarding the Otter Creek Mine and its impacts on water resources, the cumulative effects cannot be fully known until Otter Creek Coal provides the information.

Additionally, OEA does not address connectivity between the ground and surface waters. We do know, however, that there is significant connectivity between ground and surface water in the area. This is an issue that must be addressed. Based on the unknown amounts of water that would be produced by the Otter Creek Mine, not having an alluvial valley floor determination, not knowing how much wastewater would be produced at the mine, and not knowing how Otter

Creek will deal with post-mine wastewater, it is impossible to accurately address cumulative impacts on both ground and surface waters.

In sum, although the DEIS plainly acknowledges that there will be adverse impacts to all water resources, it fails to adequately address the cumulative impacts on water resources. At this time, given the plethora of missing information regarding the mine, an accurate cumulative effects analysis is impossible.

IV. ADDITIONAL ADVERSE IMPACTS

A. Condemnation of Private Lands

Condemnation of private lands, demolition of capital improvements on those lands, including homes and other buildings, separating contiguous properties, displacing roads, closing water wells, and other extremely adverse impacts are acknowledged in the DEIS. Even with mitigation measures, these extreme impacts are unwarranted, because, as noted numerous times above, there is not permitted mine for the proposed TRR to serve. Moreover, the demand for coal is rapidly diminishing, Arch Coal is steeped in staggering debt, and the public is increasingly calling for cleaner technology than coal.

B. Train Traffic, Safety Issues, Noise and Vibration, and Air Quality

The DEIS states that if the TRR is built, 7.4 trains per day: 3.7 each direction, would be expected. (Q&A-3.) It further states that if additional mines are built and new ports constructed in the Pacific Northwest, then OEA predicts that by 2030 rail traffic could reach 18.6 trains per day if one of the northern route alternatives is built, and could reach 26.7 trains per day if one of the southern routes is chosen and built. (Q&A-3.) And while OEA states that most of the Tongue River coal would go to the Midwest rather than to the Pacific Northwest for export to China because of its lower energy content, there is little to support this supposition. As noted previously, Arch Coal, the company that holds the Otter Creek Mine leases and is attempting to develop the mine, holds a 38% interest in one of the proposed Pacific Northwest ports, Millennium Bulk Terminals-Longview, and is attempting to turn it into a major coal export facility. In a seemingly inconsistent statement, however, OEA says that even if some of the Tongue River coal could be exported to China and new mines are developed, the total volume of train traffic would not increase even if the proposed TRR were constructed. But even if the Tongue River coal would be sent to the Midwest, there would nonetheless be increased train traffic—in fact there would be train traffic where there has previously *never* been any. This would pose a significant burden on residents and visitors to area. Noise; vibration; fracturing of ranchlands; destruction of homes and other capital improvements; railroad crossing safety issues

for people, livestock, and wildlife: air pollution; adverse socioeconomic impacts; and a host of other adverse impacts would result from construction of the proposed TRR and cumulative impacts from the Otter Creek Mine.

CONCLUSION

The risks to this sensitive and pristine area of Montana from building the Tongue River Railroad and the proposed Otter Creek Mine it would ostensibly serve are too great and far outweigh any projected benefits to the public. There is too little information available regarding the impacts of the proposed Otter Creek coal mine on water resources to conduct a thorough cumulative effects analysis or to determine whether the Otter Creek mine can even be lawfully permitted. In short, there is no public convenience or necessity for the proposed Tongue River Railroad.

The Tongue River Water Users' Association respectfully urges the Surface Transportation Board to choose the No-Action Alternative. Thank you for this opportunity to comment.

Sincerely,

A handwritten signature in black ink that reads "Brenda Lindlief Hall". The signature is fluid and cursive, with a long horizontal line extending from the left side of the name.

Brenda Lindlief Hall
Legal Counsel for
Tongue River Water Users' Association

c: Art Hayes, Jr., President, Tongue River Water Users' Ass'n
Board of Directors, Tongue River Water Users' Ass'n