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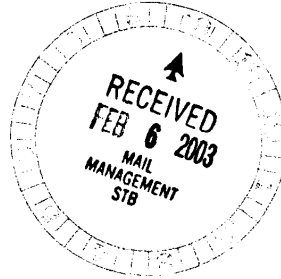
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February 5, 2003

Secretary
Surface Transportation Board
1925 K Street NW
Washington, D.C. 20423



Re: FINANCE DOCKET No. 30186 (Sub-No. 3)

Dear Secretary:

Enclosed you will find an original and ten copies of Northern Plains Resource Council Inc.'s Response in Opposition to Petition to Submit Additional Evidence. I ask that you please file this with the Board.

Thank you for your attention on this matter. Please call should you have any questions.

Very truly yours,


Jack R. Tuholske

enc.

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FEB 6 2003

Part of
Public Record

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BEFORE THE SURFACE TRANSPORTATION BOARD
OF THE UNITED STATES OF AMERICA

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FINANCE DOCKET No. 30186 (Sub-No. 3)

TONGUE RIVER RAILROAD COMPANY -- RAIL CONSTRUCTION
AND OPERATION - IN ROSEBUD AND BIG HORN COUNTIES, MONTANA

NORTHERN PLAINS RESOURCE COUNCIL INC.'s

RESPONSE IN OPPOSITION TO PETITION TO SUBMIT ADDITIONAL EVIDENCE

I. Introduction

Northern Plains Resource Council, Inc., (Northern Plains) files this Response in Opposition to the Petition for Leave to Submit Additional Evidence. This matter has essentially been pending before the Board and its predecessor for nearly two decades. Though the Tongue River Railroad Company (TRRC) has been granted two Certificates to build railroads, and now has a third application pending, not a single inch of track has been laid. Yet the farmers and ranchers of southeastern Montana that will bear the brunt of this project if it ever comes to fruition have been faced with 20+ years of uncertainty, the threat of

condemnation and lower property values resulting from the prospect of a new industrial railway running through their remote and pristine valley. It is vital that the Board view the present Petition to Submit Additional Evidence in light of the long history of the TRRC.

TRRC's Petition should be denied. In essence it seeks to add evidence on the merits of the application allowing TRRC *carte blanche* authority to submit all manner of new evidence about the economic and social value of the railroad, with limited opportunity for opponents to respond. TRRC's Petition is not based on any statute or regulation. Though the Petition appears to be based on the need to provide information about environmental impacts necessary for the on-going Supplemental Environmental Impact Statement process, in fact the categories of evidence listed by TRRC go far beyond environmental impacts.

It may well be that changed circumstances warrant receipt of additional information by the Board. Northern Plains agrees that new developments have surfaced in the years that TRRC's application has laid dormant. For example, the DME Railroad, which will provide service for part of TRRC's projected market, has been approved. As well, the State of Montana and U.S. Department of Interior have just completed an Environmental Impact Statement for coal bed methane development that will cause massive cumulative impacts in the Tongue River valley. However, such new evidence must be received according to proper procedures, and in a manner that is fair to all parties. It must be subject to cross-examination and rebuttal by all parties. TRRC's Petition does not provide the proper means to address such evidence and therefore should be denied.

II. Background

A brief discussion of the procedural history of this case is helpful. TRRC's involvement with the Board and its predecessor, the Interstate Commerce Commission (I.C.C.), dates back to 1985, when TRRC applied for a certificate to build a 79 mile rail line from the Montco mine near Ashland, Montana to Burlington Northern's main northern line near Miles City. The railroad's sole purpose was to haul coal from planned open pit coal mines. Northern Plains opposed that venture as speculative, environmentally damaging and unnecessary. Though the I.C.C. granted TRRC's application in 1986, and despite TRRC's claims of overriding public need for the railroad, the Ashland to Miles City rail line has never been built. The mines have never opened.

On June 28, 1991, TRRC applied for a second certificate to build an additional rail line extending south from Ashland to existing coal mines near Decker, Montana. This extension would also connect to the Powder River coal mines in Wyoming. This application was captioned as Sub No. 2 in the same proceeding as the original proposal. The I.C.C. initiated an extensive administrative review process that led to the preparation of a Draft, Final and Supplemental Environmental Impact Statements (EIS). Public hearings were conducted in four locations and numerous verified statements were filed concerning the proposal, including substantial expert testimony by TRRC. TRRC's proposal generated intense public interest. In addition to comments on the various EISs by state and federal wildlife and environmental agencies, hundreds of people testified or submitted comments. Over a dozen public interest groups as well as labor unions, tribal organizations and local government entities also

commented on behalf of their constituents.

The Final EIS was served April 11, 1996, in which the SEA recommended that the Board adopt a route known as the Four Mile Creek Alternative in order to minimize the devastating environmental impacts of the railroad. The Board adopted the recommendation in the Final EIS and authorized construction of the Four Mile Creek alternative. The Board's decision was served on November 6, 1997. Northern Plains, who expressed opposition to any rail route throughout the proceedings, was the only party to move for a reconsideration. When that motion was denied, on January 7, 1997, Northern Plains and three other groups filed a Petition for Review with the Ninth Circuit seeking review of the Board's decision.¹ TRRC did not appeal or otherwise protest the Board's decision. The TRRC did move to intervene in the appeal as a Respondent in support of the Board. The appeals have now been stayed for over four years as a result of the new proceedings for the "Western Alignment" discussed below.

On July 17, 1997, TRRC filed a Petition to Reopen the final administrative decision of the Board pursuant to 49 C.F.R. §§ 1115.3(c) and 1115.4. The essence of the Petition was that TRRC believed the permitted route, the Four Mile Creek alternative, was not acceptable from an engineering and operating standpoint, and that a new route, the "Western Alignment," must be considered. The Petition was denied. TRRC then filed a new application for the Western Alignment, now docketed as Sub-No. 3 in this proceeding. TRRC also Petitioned in advance to have a procedural schedule set in advance of the application, a Petition that the

¹A total of three separate appeals were filed by Northern Plains, Northern Cheyenne Tribe and the United Transportation Union. All three appeals were consolidated under *Northern Plains v. Surface Transportation Board*, No. 97 - 70037.

Board properly denied by decision served March 24, 1998.

A new environmental analysis was initiated, and the parties submitted filings during 1999. However, due to the apparent lack of interest in the entire project by the business community, further work on the EIS was suspended. Apparently a meeting occurred on December 19, 2002, with SEA members, TRRC and possibly others regarding the railroad. Northern Plains was not informed of the meeting. From this meeting it appears that work on the environmental analysis has resumed.

On January 17, 2003 TRRC filed a Petition for Leave to File Supplemental Evidence. For the reasons set forth below the Petition should be denied.

III. Argument

TRRC's Petition is essentially an attempt to amend its application to submit extensive new documentation about issues which affect the merits of the Board's determination. TRRC has not followed any established procedure to amend its application or raise new evidentiary matters. Instead TRRC appears to be using the revitalized environmental review process as an excuse to add materials to the record that have nothing to do with environmental impacts.

A cursory review of the categories of evidence that TRRC wants to be able to submit to the Board demonstrates that TRRC is amending its own application to further bolster its arguments about the public need for the railroad. Though TRRC has not provided any of the evidence it seeks to submit, the categories have nothing to do with the on-going environmental review and everything to do with the need for, and viability of the proposed railroad. TRRC seeks to add evidence about the transfer of federal minerals, updated tonnage forecasts,

financial forecasts, revised construction costs, TRRC's business structure and financing, new statements from Montana officials and effects of the recently authorized DME Railroad. Petition at pp. 3-4. Though TRRC hedges its Petition with the proclamation that none of the "key elements underlying its application have changed in any meaningful way," Petition at p. 4, the breadth of the evidence that may be proffered could be profound. Of course because TRRC has not included the proposed new evidence with its Petition, neither the Board nor any other party knows precisely what the new evidence will entail. What is clear is that the broad categories of new evidence appear to address all of the elements of TRRC's initial application and amount to a new application.

TRRC's only cited authority for its Petition is 49 C.F.R. 1117.1. Petition at p. 1. That "catch-all" regulation cannot be construed to address a situation where an applicant attempts to provide what may amount to significant revisions in an application that has been pending for 4 years. It would be poor precedent to allow such broad leave to file new evidence in the manner sought by TRRC based upon this regulation, and indeed TRRC did not point to any prior decisions of the Board based on this regulation.²

In requesting that the Board deny the Petition, Northern Plains wants to make clear that relevant information may indeed have emerged since 1998. The Board is under a continuing obligation to consider new circumstances as they relate to environmental consequences under

²TRRC cites to Finance Docket No. 33388, CSX Corp et al - Control, Conrail Inc. et al., Decision No. 198 (served September 19, 2001). Assuming that TRRC was referencing the cases on page 6 n.9 and not at page 8 as stated in the Petition at page 4, TRRC's rationale does not support the instant Petition. In the CSX decision, the additional evidence considered by the Board merely concerned a few statements made by corporate officials before Congress that were relied upon as "extra-record" evidence. Here TRRC seeks to broadly supplement the record with information that goes to the heart of its application.

the National Environmental Policy Act (NEPA). The SEA must consider, for example, the new information revealed in the EIS's for coal bed methane just released by the government. See e.g. Friends of the Clearwater v. U.S. Forest Service, 222 F.3d 552, 557 (9th Cir. 2000). Northern Plains does not want its opposition to this Petition to be construed to mean that the Board's obligations under NEPA should not be fulfilled. If TRRC's Petition were solely focused on environmental impact information needed for the SEIS, then Northern Plains would not oppose the Petition. But that is not the case.

TRRC's Petition is directed at information going to the merits of its application. The appropriate response would be to dismiss the current application and direct TRRC to file a new application for Sub-No. 3 with the new information, and begin the proceedings anew. However, if the Board determines that supplemental evidence can be submitted, any new information should be submitted as part of an amended application, which in turn would be subject to all of the normal procedures for an application. Those procedures would include publishing notice for interested persons to respond, the opportunity for discovery to test the veracity of the new information, the opportunity to develop and submit rebuttal testimony, and if necessary, hold a hearing on the additional evidence.

Finally, Northern Plains notes that TRRC has had months - perhaps years - to develop the new information. If the Board does grant the Petition and grants TRRC leave to file additional evidence, Northern Plain requests that the Board grant adequate time (minimum 4 months) to prepare responses to the information. The type of information that TRRC asks to submit, tonnage forecasts, financing information, market information and the like, is

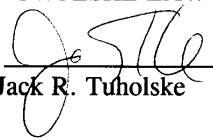
sophisticated and will likely require consultation with experts and significant research to develop rebuttal testimony.

IV. Conclusion

Based on the foregoing, Northern Plains respectfully requests that the Board deny the Petition. In the alternative, Northern Plains requests that if the Board grants the Petition, that the Board provide notice to the public of the new information, and provide adequate time, no less than 4 months, for any interested party to provide a response to the information.

Dated this 5th day of February, 2003.

TUHOLSKE LAW OFFICE P.C.

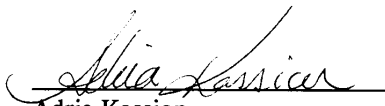


Jack R. Tuholske

Attorney for Northern Plains

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of February, 2003, I deposited a true and correct copy of the foregoing in the United States mail, postage prepaid, to all parties of record.



Adria Kassion