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November 13, 2003

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Office of Proceedings

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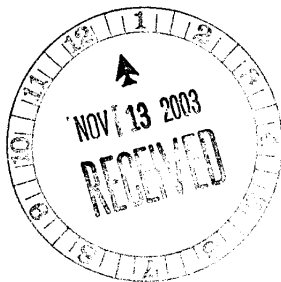
VIA HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 711
Washington, DC 20423-0001

**Re: Finance Docket No. 30186 (Sub No. 3), Tongue River Railroad
Company, Inc. - Construction and Operation - Western Alignment**

Dear Secretary Williams:

Enclosed please find an original and 10 copies of the Motion for Protective Order
Concerning Confidential Information of Tongue River Railroad Company, Inc.



Respectfully,

Betty Jo Christian
David H. Coburn
Attorneys for Tongue River Railroad
Company, Inc.

Enclosure

cc: All parties of record

WASHINGTON

PHOENIX

LOS ANGELES

LONDON

209409

EXPEDITED ACTION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 30186 (SUB-NO. 3)

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**TONGUE RIVER RAILROAD COMPANY -- CONSTRUCTION AND
OPERATION -- WESTERN ALIGNMENT**

**MOTION OF TONGUE RIVER RAILROAD COMPANY, INC. FOR
PROTECTIVE ORDER CONCERNING CONFIDENTIAL INFORMATION**



Betty Jo Christian
David H. Coburn
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Attorneys for Applicant
Tongue River Railroad Company, Inc.

November 13, 2003

EXPEDITED ACTION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 30186 (SUB-NO. 3)

**TONGUE RIVER RAILROAD COMPANY -- CONSTRUCTION AND
OPERATION -- WESTERN ALIGNMENT**

**MOTION OF TONGUE RIVER RAILROAD COMPANY, INC. FOR
PROTECTIVE ORDER CONCERNING CONFIDENTIAL INFORMATION**

Tongue River Railroad Company, Inc. ("TRRC") hereby files this Motion requesting that the Board enter a Protective Order designed to provide a procedure for protecting the confidentiality of information of a proprietary or confidential nature that may be adduced during discovery in this proceeding. TRRC files this Motion in contemplation of a deposition of its President, Mr. Mike Gustafson, noticed by the Northern Plains Resource Council, Inc. and now scheduled for November 19, 2003.¹

¹ TRRC files this motion without prejudice to any argument it may pursue that the transcript of this deposition cannot be entered into evidence in this proceeding. TRRC notes that the Board's November 10, 2003 Decision allowing the deposition to proceed left open the issue of the transcript's admissibility.

The attached Protective Order is modeled on similar orders that have been entered in other Board proceedings. It is designed to allow parties to protect from public disclosure information which a party has determined in good faith should remain confidential.

In view of the forthcoming November 19 deposition, TRRC requests that the Board act expeditiously to approve this Protective Order.

Respectfully submitted,

Betty Jo Christian DHC
Betty Jo Christian
David H. Coburn
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
202 429-3000

Attorneys for Applicant
Tongue River Railroad Company, Inc.

November 13, 2003

STB FINANCE DOCKET NO. 30186 (SUB-NO. 3)

**TONGUE RIVER RAILROAD COMPANY -- CONSTRUCTION AND
OPERATION -- WESTERN ALIGNMENT**

PROTECTIVE ORDER

1. Any party responding to questions at a deposition, or producing material in discovery to another party to this proceeding, or submitting material in pleadings or evidence, that the party believes in good faith reveals proprietary or confidential information, may designate such responses and/or designate and stamp such material as "CONFIDENTIAL" (collectively "Confidential Material"), and such Confidential Material must be treated as confidential. Confidential Material, including any transcripts or copies thereof, and any data or notes derived therefrom may be disclosed only to employees, counsel, or agents of the party receiving such transcripts or material who have a need to know, handle, or review the material for purposes of this proceeding and any judicial review proceeding arising therefrom, and only where such employee, counsel, or agent has been given and has read a copy of this Protective Order, agrees to be bound by its terms, and executes the attached Undertaking for Confidential Material prior to receiving access to such materials.
2. Any party responding to questions at a deposition, or producing material in discovery to another party to this proceeding, or submitting material in pleadings or evidence, may in good faith designate such response and/or designate and stamp particular response or material as "HIGHLY CONFIDENTIAL" (collectively, "Highly Confidential Material"). Highly Confidential Material may be disclosed only to another party's outside counsel of record in this proceeding, and to those individuals working with or assisting such counsel who are not regular employees of the party and have a need to know, review, or handle the Highly Confidential Material for purposes of the proceeding, provided each such person has been given and has read a copy of this Protective Order, agrees to be bound by its terms, and executes the attached Undertaking for Highly Confidential Material prior to receiving access to such materials.
3. If during the course of a deposition any party inquires into areas that the party being deposed deems Confidential or Highly Confidential, that party shall so advise counsel for the party taking the deposition and all other counsel attending the deposition. In that event, attendance at any portion of the deposition during which the deponent testifies as to matters that are deemed by the party being deposed to be Confidential or Highly Confidential in nature, or involving materials that have been designated as Confidential or Highly Confidential under the terms of this Protective Order, shall be restricted to persons who have executed the appropriate Undertaking under this Protective Order and such

persons shall be governed by the limitations on disclosure and use of such testimony set forth in this Protective Order. All portions of deposition transcripts and/or exhibits that address, consist of or disclose testimony adduced at the deposition that a party has designated as Confidential or Highly Confidential under the terms of this paragraph, or that relate to materials that have been designated Confidential and/or Highly Confidential, shall be kept under seal and treated as Confidential and/or Highly Confidential Material in accordance with the terms of this Protective Order.

4. Each Undertaking for Confidential Material and Undertaking for Highly Confidential Material executed by a person authorized to receive access to Confidential Material or Highly Confidential Material shall be kept for the duration of this proceeding and any related court litigation or judicial appeals by the party with which such person is affiliated or associated, and a copy of each such Undertaking shall be served upon counsel of record for each party no later than 10 days after such Undertaking is executed.
5. Confidential Material and Highly Confidential Material shall be used by a receiving party solely for the purpose of this proceeding and any judicial review proceeding arising therefrom, and not for any other business, commercial, or competitive purpose.
6. Confidential Material and Highly Confidential Material that is not the receiving party's own data, information, or documents must be destroyed by the receiving party, its employees, counsel, and agents at the completion of this proceeding and any judicial review proceeding arising therefrom, except that: (1) outside counsel (but not outside consultants) for each party are permitted to retain file copies of all pleadings and evidence filed with the Board and file copies of all work product; and (2) in-house counsel for each party are permitted to retain file copies of all pleadings and evidence which they received during the course of this proceeding.
7. Confidential Material and Highly Confidential Material, if contained in any pleading or evidence filed with the Board, shall, in order to be kept confidential, be filed only in pleadings or evidence submitted in a package clearly marked on the outside "Confidential Materials Subject to Protective Order" or "Highly Confidential Materials Subject to Protective Order." See 49 CFR 1104.14.
8. In the event that a party produces material which should have been designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" and inadvertently fails to stamp the material as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL," the producing party may notify the other parties in writing within 10 days of discovery of its inadvertent failure to make the confidentiality designation. The parties who received the material without the confidentiality designation will return the non-designated portion or destroy it, as directed by the producing party, or take such other steps as the parties agree to in writing. The producing party will promptly furnish the receiving parties with properly designated material.

9. If any party intends to use Confidential Material and/or Highly Confidential Material at hearings in this proceeding, or in any judicial review proceeding arising therefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such Confidential Material and/or Highly Confidential Material to any Administrative Law Judge, the Board, or the court, with a written request that the Administrative Law Judge, the Board, or the court: (a) restrict attendance at the hearings during discussion of such Confidential and/or Highly Confidential Material; and (b) restrict access to the portion of the record or briefs reflecting discussion of such Confidential and/or Highly Confidential Material in accordance with the terms of this Protective Order.
10. Except for this proceeding, the parties agree that if a party is required by law or order of a governmental or judicial body to release Confidential or Highly Confidential Material produced by the other party or copies or notes thereof as to which it obtained access pursuant to this Protective Order, the party so required shall notify the producing party in writing within 3 working days of the determination that the Confidential Material, Highly Confidential Material, or copies or notes are to be released or within 3 working days prior to such release, whichever is soonest, to permit the producing party to contest the release.
11. All parties must comply with all of the provisions stated in this Protective Order unless good cause, as determined by the Board, or by an Administrative Law Judge in a decision from which no appeal is taken, warrants suspension of any of the provisions herein.
12. Information that is publicly available or obtained outside of this proceeding from a person with a right to disclose it shall not be subject to this Protective Order even if the same information is produced and designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" in this proceeding.
13. A "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" designation may be removed by consent of a party who asserts the confidential, proprietary, or commercially sensitive interest, or, absent such consent, by appropriate decision of the Board, or of an Administrative Law Judge from which no appeal is taken, upon application of a party seeking to remove such designation.

**UNDERTAKING
CONFIDENTIAL MATERIAL**

I, _____, have read the Protective Order served on _____, 2003, governing the production of confidential documents in STB Docket No. 30186 (Sub No. 3), understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any confidential data or information obtained pursuant to this Undertaking for any purposes other than the preparation and presentation of evidence and argument in STB Docket No. 30186 (Sub No. 3) or any judicial review proceeding arising therefrom. I further agree not to disclose any confidential data or information obtained under this Protective Order to any person who is not also bound by the terms of the Order and has not executed an Undertaking in the form hereof. At the conclusion of this proceeding and any judicial review proceeding arising therefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel (but not outside consultants) may retain file copies of its work product and of pleadings and evidence filed with the Board, and in-house counsel may retain file copies of all pleadings and evidence containing confidential material it received during the course of this proceeding. I further understand that a party may retain its own confidential material.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that a party which asserts the confidential interest shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach. I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Dated: _____

**UNDERTAKING
HIGHLY CONFIDENTIAL MATERIAL**

As outside [counsel] [consultant] for _____, for which I am acting in this proceeding, I have read the Protective Order served on _____, 2003, governing the production of confidential documents in STB Docket No. 30186 (Sub No. 3), understand the same, and agree to be bound by its terms. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any documents designated "HIGHLY CONFIDENTIAL," that I will limit my use of those documents and the information they contain to the preparation and presentation of evidence and argument in STB Docket No. 30186 (Sub No. 3) and any judicial review proceeding arising therefrom, that I will take all necessary steps to ensure that said documents and information will be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said documents or information by personnel of my client, its subsidiaries, affiliates, or owners, except as otherwise provided in the Protective Order, and that at the conclusion of this proceeding and any judicial review proceeding arising therefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel (but not outside consultants) may retain file copies of its work product and of any pleadings and evidence filed with the Board. I further understand that I must destroy all notes or other documents containing such highly confidential information received from the other party in compliance with the terms of the Protective Order. Under no circumstances will I permit access to documents designated "HIGHLY CONFIDENTIAL" by, or disclose any information contained therein to, any persons or entities for which I am not acting in this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that a party which asserts the highly confidential interest shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach. I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

OUTSIDE [COUNSEL][CONSULTANT]

Dated: _____

CERTIFICATE OF SERVICE

I hereby certify that I have this 13th day of November 2003 served a copy of the foregoing Motion for Protective Order by facsimile on counsel for Northern Plains Resource Council, Inc. and by first class mail on all other parties of record.



David H. Coburn
