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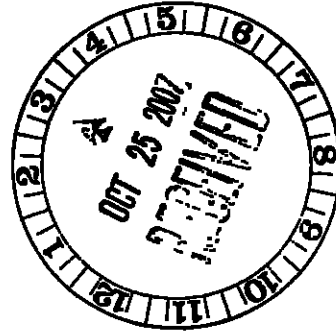
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October 25, 2007



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 for filing please find an original and 10 copies of the Reply of Tongue River Railroad Company, Inc. to the Petitions to Stay filed in the above proceeding.

Respectfully,

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

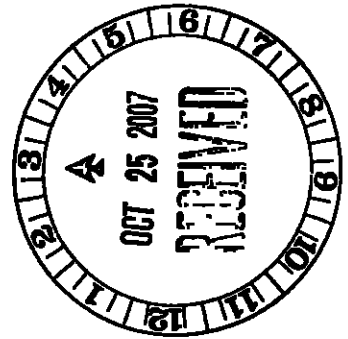
Enclosure

cc All parties of record

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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



**TONGUE RIVER RAILROAD COMPANY, INC. – CONSTRUCTION AND
OPERATION – WESTERN ALIGNMENT**

**REPLY OF TONGUE RIVER RAILROAD COMPANY, INC. TO
PETITIONS TO STAY**

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Company, Inc.

October 25, 2007

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**TONGUE RIVER RAILROAD COMPANY, INC. – CONSTRUCTION AND
OPERATION – WESTERN ALIGNMENT**

**REPLY OF TONGUE RIVER RAILROAD COMPANY, INC. TO
PETITIONS TO STAY**

Tongue River Railroad Company, Inc (“TRRC”) hereby replies in opposition to the thirteen virtually identical Petitions for Stay filed by various persons and entities on October 17, 2007.¹ The Petitioners seek to stay the October 9, 2007 Decision of the Board granting TRRC’s application in this so-called *TRRC III* proceeding to construct and operate the Western Alignment. That Alignment is a modification of the Four Mile Creek Alternative alignment that was initially approved by the Board for the southernmost 17 miles of the 41-mile line approved for construction and operation in the Board’s November 8, 1996 decision in a related proceeding, *Tongue River Railroad Co. – Rail Construction and Operation – Ashland to Decker, MT, F.D. No. 30186 (Sub No. 2) (“TRRC II”)*.

The Petitions for Stay should be denied for two fundamental reasons. First, none of the Petitioners has filed, or stated an intention to file, a petition for judicial review or administrative

¹ Petitions for Stay were filed by the following persons and entities: Alice Orr; American Prairie Foundation; Brown Cattle Company; Caribou Land & Livestock Co.; Diamond Cross Ranch LLC; FL Ranch; State Senator David Wanzencoid; Jerry Lunde; Musgrave Ranch; Powder River Basin Resource Council; S & P Land Company; Trout Unlimited, and V-C Cattle Company (collectively, “Petitioners”).

reconsideration of the Board's October 9 Decision in *TRRC III*. In the absence of such a filing, there is no basis for a stay.

Second, even if the Board were to overlook this fundamental deficiency, the Petitioners have failed to meet the well-settled four part test for a stay. Specifically, they have failed to show: (1) a strong likelihood that the Petitioners will prevail on the merits, (2) that they will suffer irreparable injury absent a stay, (3) that a stay would not substantially harm other parties, and (4) that a stay would serve the public interest.² TRRC will elaborate on these points below

REPLY ARGUMENT

Before turning to the reasons why their Petitions for Stay should be denied, TRRC notes that none of the Petitioners were actively engaged on the merits side of this proceeding. Indeed, apart from submissions made by some of the Petitioners to SEA on environmental issues, not one of the Petitioners submitted any argument on the merits in opposition to TRRC's application. In fact, two of the Petitioners (Jerry Lunde and Trout Unlimited) are not identified as parties of record to the *TRRC III* proceeding, and thus cannot now seek a stay.

Having sat on the sidelines of the merits proceeding for many years, the Petitioners cannot, at the eleventh hour, make credible claims of likelihood of success on the merits or irreparable injury. In fact, as shown below, their last minute Petitions are seriously flawed and lack any substantive merit. The Petitions accordingly should be denied

I. The Petitions for Stay Should be Denied Because the Petitioners Have Not Sought Review of the Decision They Seek to Stay

Each of the Petitions suffers from a fundamental infirmity: none of the Petitioners has filed a petition for review of the Board's October 9 Decision in any U.S. Court of Appeals. In

² See *Washington Metro. Area Transit Comm'n v Holiday Tours, Inc* , 559 F.2d 841, 843 (D.C Cir. 1977); *Northwestern Pacific Railroad Co. – Change in Operators Exemption – North Coast Railroad Authority, et al.*, STB F D No 35073 (served Sept. 7, 2007).

the absence of any petition for judicial review, the Petitioners are not entitled to the relief that they seek -- a stay pending judicial review. *See The Bay Line Railroad, LLC – Acquisition and Operation Exemption – Atlanta & St. Andrews Bay Railroad Company*, F D. 32435 (ICC served Aug. 25, 1995) (“ASAB may not seek a stay pending judicial review because ASAB has not filed a petition for review”).

Petitioners endeavor to overcome this fatal defect in their filings by claiming to seek a stay of the October 9 Decision pending the judicial review by the U.S. Court of Appeals for the Ninth Circuit of the Board’s November 1996 decision in *TRRC II*.³ However, they offer no legal basis for staying a decision in one proceeding pending judicial review of a Board decision in another proceeding, even where the two cases are related. The purpose of a stay is to prevent a decision from becoming effective while that decision is being reviewed, not while some other decision is under review. Thus, if the October 9 Decision in *TRRC III* is to be stayed, it must be on the basis of a showing that the *TRRC III* decision is likely to be overturned on the merits and that the other criteria for stay have been met. Here, no such showing is offered, and even more fundamentally, the Petitioners have not sought review of the *TRRC III* decision.

Further undermining Petitioners’ request for a stay pending judicial review of *TRRC II* is the fact that none of them sought judicial review of the Board’s decision in *TRRC II* or a stay of that decision. The parties that did seek such review (Northern Plains Resource Council, Native Action Inc. and United Transportation Union – General Committee) also did not seek a stay of

³ *See Northern Plains Resource Council, et al v. Surface Transportation Board, et al*, No. 97-70037 (9th Cir., filed January 10, 1997). The *TRRC II* judicial review proceeding arises from petitions for review filed by three parties – Northern Plains Resource Council, Native Action Inc. and United Transportation Union – General Committee. The petitions for review have been consolidated, and also have been on hold pending the outcome of the Board’s proceeding in *TRRC III*. *TRRC* has intervened in the judicial review proceeding in support of the Board. None of the Petitioners is a party in that judicial review proceeding.

the *TRRC II* decision, and these parties to the *TRRC II* judicial review proceeding are notably *not* among the group now seeking a stay of *TRRC III*. In these circumstances, there is no jurisprudential basis on which the Petitioners are entitled to seek a stay of *TRRC III* pending other parties' judicial review of *TRRC II*. See *Northwestern Pacific Railroad Co – Change in Operators Exemption – North Coast Railroad Authority, et al.*, STB F.D. No. 35073 (served Sept. 7, 2007) at 1 (noting that one of the standards for issuing a stay is, “whether there is a strong likelihood that *petitioner* will prevail on the merits”) (emphasis supplied).

Should the Board nonetheless entertain these Petitions despite these fundamental flaws, it should deny the Petitions on the grounds that the four criteria for a stay have not been met, as shown next.

II. The Petitioners Have Failed to Meet the Standards for A Stay

A. Petitioners Have Failed to Show a Likelihood of Success on the Merits

Petitioners endeavor to demonstrate likelihood of success on the merits by claiming that the different set of parties who sought judicial review of the *TRRC II* decision are likely to succeed in their efforts to overturn the *TRRC II* decision, which (they claim) would effectively void the Board's decision in *TRRC III*. For numerous reasons, this argument is patently insufficient to demonstrate any likelihood of success on the merits. First, since Petitioners seek a stay of *TRRC III*, it is their burden to show that there is a likelihood that they will succeed on the merits of a challenge to *TRRC III*, not some other case. They offer no such showing, and as noted have not even brought, or even suggested that they will bring, a challenge to *TRRC III*. Nor could the Petitioners show a likelihood of success on the merits of such a challenge. The Board's October 9 Decision applied the correct statutory standard under 49 U.S.C. 10901(c) to *TRRC*'s application and was rationally based on the relevant facts and legal principles, both in

terms of the transportation analysis and the environmental analysis. Petitioners make no serious effort to show otherwise.

Second, for the reasons stated above, Petitioners cannot rely on a pending challenge to *TRRC II* to obtain a stay of the Board's decision in *TRRC III*. Petitions to stay the November 8, 1996 decision in *TRRC II* were due on November 18, 1996, ten days after the issuance of that decision. Having failed to timely seek a stay of the *TRRC II* decision a decade ago, Petitioners cannot now rely on a claimed likelihood of success on the merits of the pending appeal in that case.

Third, the actions of the Ninth Circuit in *TRRC II* on which Petitioners rely suggest nothing at all about likelihood of success by the parties seeking review of *TRRC II* (even if that were relevant to the pending Petitions for stay, which it is not). The first Ninth Circuit action cited by Petitioners -- acceptance of the petitions for review -- says nothing at all about the merits. Under the statutes under which parties may seek judicial review of Board decisions, courts of appeals have jurisdiction to accept any petition for review that is timely filed in the proper venue and not procedurally defective in some respect. See 28 U.S.C. §§ 2321, 2344, 2347.

The next Ninth Circuit action cited by Petitioners -- denial of Respondents' Motion to Dismiss -- also does not speak to the merits. Respondents STB and United States had filed a motion to dismiss one of the petitions for review as untimely and another pending proof that standing requirements were met. By order entered April 7, 1997, the Ninth Circuit, acting through an Appellate Commissioner, denied the motions but found that the issues raised are not "so unsubstantial as not to need further argument", and advised that the parties are free to renew

the arguments on brief. This is hardly a sign that the parties seeking judicial review are likely to succeed on the merits.

Finally, the third sign of likely success to which Petitioners point -- the fact that the Ninth Circuit has kept the petitions for review in *TRRC II* on hold for over a decade pending the issuance of a decision in *TRRC III* -- also has nothing whatever to do with the merits. Rather, the Court merely decided to hold in abeyance its review of *TRRC II* while the *TRRC III* proceeding remained pending at the STB. In doing so, the Court did not speak to the merits of the judicial review proceeding.⁴

B. Petitioners Will Not Suffer Irreparable Harm in the Absence of a Stay

Petitioners offer no proof that they will suffer irreparable harm in the absence of a stay, and in fact they will not. Each of the Petitioners claims that TRRC could begin site testing and other preparatory work on the Western Alignment or could initiate eminent domain proceedings and construction, with some non-specified adverse results that they claim could not be reversed if the Court were to rule for the Petitioners in *TRRC II* or if the Western Alignment were never built. These generalized concerns do not demonstrate irreparable injury.

If TRRC did conduct site testing, it is not clear how this would cause any irreparable harm. Testing is just that, and would not prevent any party from continued productive use of its

⁴ The Petition for Stay filed by State Senator Wanzenreid identifies, in the irreparable harm section of that petition, certain grounds on which the *TRRC III* decision might be challenged. Specifically, the Senator claims that the environmental review completed in *TRRC III* fails to adequately account for the cumulative impacts of coal bed methane development. That is simply not the case. The Draft and Final Supplemental EIS's account for such development in detail. See Draft Supplement at Chapter 6; Final Supplement at 2-27 through 2-33. The Senator also argues that SEA relied on old data about the Tongue River Valley, but in fact in updating the environmental work done in *TRRC I* and *TRRC II*, SEA sought comments on, and took into account, all changes in the Valley in recent years. See Final Supplement at 2-6; 2-2-10 through 2-11. Contrary to another claim made by the Senator, SEA also took into account cumulative air quality impacts. See Final Supplement at 2-34 through 2-59.

land or otherwise adversely impact the environment. If TRRC took property through the exercise of eminent domain, the owner of the property taken would be paid just compensation under Montana's eminent domain statute. Therefore, by definition any loss of that property would not be irreparable, but rather would be compensated through the payment of money in either an agreed amount or an amount fixed pursuant to the procedures set forth in Montana's eminent domain statute. *See* MCA § 70-30-302. *See also McKenzie v City of Chicago*, 118 F.3d 552, 556 (7th Cir. 1997) (recognizing that a taking of property is not an irreparable injury because "money damages are a constitutionally adequate substitute for real property.")

As to Petitioners' concerns about any irreparable damage resulting from possible construction by TRRC, it bears noting that such construction could not commence until (a) secondary permitting is completed (e.g., a U S Army Corps of Engineers permit obtained, together with permits and authorizations from certain other federal and state agencies) and (b) numerous mitigation measures are satisfied, including the cultural resources survey contemplated by the Programmatic Agreement, stream surveys and habitat surveys. It is at best speculative as to whether this further permitting and other work will be completed before the judicial review proceeding is completed. Further, the Board has imposed 92 mitigation measures designed to reduce or eliminate any adverse environmental impacts from the construction and operation of the TRRC line. Petitioners fail to explain why these measures would not address their concerns.

Some of the Petitioners offer additional claims of irreparable harm, but these too are not even close to the mark. Brown Cattle Co claims that proposed refinements to the line approved in *TRRC II* "would have a severe negative impact on the Petitioner" which was "improperly excluded" from the Board's consideration in the *TRRC II* decision. Apart from the fact that Brown Cattle is about ten years too late in seeking a stay of *TRRC II*, it has failed to specify the

alleged severe negative impact or why it would not be ameliorated by the 92 mitigation conditions approved by the Board in *TRRC III*

Petitioners Senator Wanzenreid, Diamond Cross Ranch, S&P Land Company and V-C Cattle Company (and its apparent partner Caribou Land & Livestock Co.) appear to claim that failure to issue a stay will result in the loss of utility for tens of thousands of acres of prime ranchland, the loss of clean water from the Tongue River and Tongue River Reservoir, the loss of livestock and the loss of hay ground. However, they offer no specific facts to back up these allegations. The TRRC line, as noted, will not be built until further permitting and studies are completed. The impacts of the line, once built, to land use, agriculture, livestock, and water resources were considered and assessed by SEA in the EISs issued in the *TRRC* proceedings, and mitigated as needed. In fact, SEA responded specifically and in substantial detail to the arguments of Petitioner Diamond Cross Ranch at pages 3-399 through 3-416 of the Final EIS, pointing out the various mitigation measures that were recommended (and subsequently adopted by the Board) to address the concerns of this party.⁵

Petitioners William R. and Judith Ann Musgrave claim that their home is about one mile from Western Alignment. They claim that they will suffer “the negative impacts of noise, increased traffic, air and water pollution, weeds and the destruction of natural beauty of the area they have made their home.” SEA thoroughly analyzed each of these impacts and responded specifically to the concerns of the Musgraves at pages 3-459 through 3-462 of the Final EIS.

⁵ Senator Wanzenreid, S&P Land Company and V-C Cattle Company/Caribou Land & Livestock Co, it bears note, each failed to bring their concerns to the attention of SEA or the Board in *TRRC III* prior to filing their Petitions for Stay. They should not now be heard to claim irreparable injury, having failed to bring their concerns to the table during the course of the proceeding.

Petitioner Powder River Basin Resource Council (PRBRC) raises many of the same issues noted above, claiming (without any supporting facts or evidence) that the TRRC will result in erosion leading to a degradation of water quality, loss of land for hay production, and loss of protection of irrigation water from increased coalbed methane production that it claims the construction of the railroad would facilitate. These issues have been addressed by SEA in detail. It also bears note that PRBRC is coming to the game very late, having failed to share its concerns at any previous point with SEA or the Board.

Petitioner Trout Unlimited (which is not a party of record in *TRRC III*) complains about what it claims is SEA's failure to properly assess the impact of the railroad on water quality and the Total Maximum Daily Load (TMDL) of sediment permitted in the River. These amorphous claims do not warrant a stay. In any event, SEA thoroughly responded to this commenter at page 3-450 through 3-458 of the Final EIS.

C. TRRC Would Be Injured by a Stay

Petitioners claim that other parties will not be substantially harmed by a stay, pointing to the fact that no portion of the TRRC line has been built after many years of proceedings and that a stay would only last "a few months." In making these points, Petitioners only demonstrate why no stay is warranted – none has been in effect for the last ten years during the pendency of the *TRRC II* judicial review proceeding and there has been no claim that irreparable injury has resulted to any party during that period. Further, a stay at this time would harm TRRC, as it could be unable, for a period likely to exceed a few months, to implement the Board's environmental mitigation conditions or to advance the ball toward eventual construction of the Western Alignment. Such delay would, at the least, prove costly to TRRC and its investors.

D. The Public Interest Does Not Support a Stay

Petitioners argue that the public interest in a “slow and deliberate process” warrant a stay while the *TRRC II* judicial review proceeding moves forward. That process, however, can move forward without a stay; as noted above, no party sought a stay of *TRRC II*. By contrast, the Board’s October 9 Decision in *TRRC III* found that construction of the Western Alignment is in the public interest. At page 33 of that Decision, the Board stated that, “Here, the potential environmental impacts do not warrant disapproving the Tongue River III proposal in view of the significant transportation and other public benefits associated with this project and the fact that the Western Alignment, as conditioned, will generally have less of an impact on the environment than the previously approved Four Mile Creek Alternative.” In the face of these conclusions, it is clear that the public interest does not warrant a stay.

CONCLUSION

For all of the reasons stated above, the Petitions to Stay should be denied.

Respectfully submitted,



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October 25, 2007

CERTIFICATE OF SERVICE

I hereby certify that I have this 25th day of October 2007 served a copy of the foregoing Reply to Petitions for Stay on all parties of record and on all Petitioners for Stay by first class mail, postage prepaid.



David H. Coburn