

Before the  
SURFACE TRANSPORTATION BOARD

220570  
**ORIGINAL**

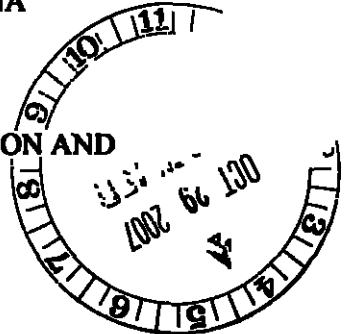
Finance Docket No. 30186 (Sub-No 2)<sup>1</sup>

**TONGUE RIVER RAILROAD CO --RAIL CONSTRUCTION  
AND OPERATION--ASHLAND TO DECKER, MONTANA**

Finance Docket No 30186 (Sub-No 3)<sup>2</sup>

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

**PETITION FOR STAY PENDING JUDICIAL REVIEW**



**JACK R. TUHOLSKE**  
P O. Box 7458  
Missoula MT 59807

**GARY RYDER**  
P.O. Box 72  
Hysham MT

**GORDON P MacDOUGALL**  
1025 Connecticut Ave., N W  
Washington DC 20036

Attorneys for Northern Plains Resource  
Council, City of Forsyth, United  
Transportation Union-General Committee of  
Adjustment (GO-386), and United  
Transportation Union Montana State  
Legislative Board.

October 29, 2007

<sup>1</sup>Embraces Finance Docket No. 30186, Tongue River R.R.--Rail Construction and  
Operation--In Custer, Powder River and Rosebud Counties, Montana and Finance Docket No.  
30186 (Sub-No 1), Tongue River Railroad Company--Issuance of Securities

<sup>2</sup>Embraces Finance Docket No. 30186, Tongue River R.R.-Rail Construction and  
Operation-In Custer, Powder River and Rosebud Counties, MT, and Finance Docket No. 30186  
(Sub-No 2), Tongue River Railroad Company-Rail Construction and Operation-Ashland to  
Decker, Montana,

**Before the  
SURFACE TRANSPORTATION BOARD**

---

**Finance Docket No 30186 (Sub-No 2)**

**TONGUE RIVER RAILROAD CO --RAIL CONSTRUCTION  
AND OPERATION--ASHLAND TO DECKER, MONTANA**

**Finance Docket No. 30186 (Sub-No 3)**

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

---

**PETITION FOR STAY PENDING JUDICIAL REVIEW**

---

**PRELIMINARY STATEMENT**

Petitioners, Northern Plains Resource Council, Inc (NPRC), Native Action, Inc , Northern Cheyenne Tribe, City of Forsyth, and United Transportation Union-General Committee of Adjustment (GO-386), with United Transportation Union-Montana State Legislative Board (UTU-GCA/MT), petition to Surface Transportation Board (STB), that STB stay the operation of its decisions in Finance Docket No 30186 (Sub-No 2), Tongue River Railroad Co.--Rail Construction and Operation--Ashland to Decker, Montana, dated October 28, 1996 (served November 8, 1996) (Tongue River II), and Finance Docket No 30186 (Sub-No 3), Tongue River Railroad Company, Inc.-Construction and Operation-Western Alignment (Tongue River III), dated October 5, 2007 (served October 9), which decisions also include modification of prior

approval decisions in Finance Docket No. 30186, Tongue River R.R.-Rail Construction and Operation-In Custer, Powder River and Rosebud Counties, MT (Tongue River I), as well as Finance Docket No 30186 (Sub-No 2) (Tongue River II), pending judicial review of the STB's approval for this major rail construction project in the U.S. Court of Appeals.

Petitions for review of Tongue River II are pending in Nos 97-70037, 97-70099, 97-70217 (USCA-9th Cir ) A Petition for review of Tongue River III has been transmitted to the same Court

This petition is submitted pursuant to 49 C F R § 1115.5(a), and is filed 10 days before the November 8, 2007, effective date for the STB's Tongue River III decision. Although the STB's decision in Tongue River II became effective in early 1997, the authority has not been exercised, as the agency acknowledges (Decision 10/9/07 at pp. 4, 6), so the agency retains full stay power<sup>3</sup>

Petitioner Northern Plains Resource Council is a Montana non-profit benefit corporation that is a party to these proceedings Filed herewith are several verified statements of Northern Plains' members supporting the stay. Northern Plains has been involved in all aspects of the review and permit process for TRR I, II and TRR III, and is a party to the pending Ninth Circuit case As set forth herein, and in comments, testimony and documents filed with the STB there are significant undisclosed and unevaluated impacts from the construction and operation of the TRR that adversely affect Northern Plains and its members

The concerns of railroad employees, as represented by Petitioners UTU-GTC/MT, is

---

<sup>3</sup>The agency also has stay power over Tongue River I, and Tongue River II, inasmuch as the STB in Tongue River III has modified its orders in Tongue River I and Tongue River II (Decision, 10/9/07, 5,35)

multi-faceted, some of which are discussed in Tongue River II, See 1 STB 818 and Tongue River III (Decision 10/9/07 at pp. 12-14, 22) As more particularly set forth in the comments and to be detailed in arguments to the Ninth Circuit, employment of train and engine crews would suffer by reason of diversion of coal traffic from Forsythe. The STB failed to consider the economics of operation of the BNSF line via Forsythe if coal traffic is diverted to the Tongue River Railroad (TRR). The transportation of Powder River coal via TRR would obviously adversely impact the operation and viability of the BNSF line via Forsythe. The STB ruled that the special employee protection would not be available to BNSF employees owing to the 1995 ICCTA amendments to 49 U.S.C. §10901 (Decision 10/9/07 at 22 n.79) Petitioners expect to prevail on the employee protection issue if TRR II and TRR III are not set aside on the merits, for as set forth herein, the governing version of §10901 is the pre-ICCTA provision of the statute, which permit the STB to impose discretionary protection under §10901, and also allow the STB to impose specific employee protection in line construction cases 49 U.S.C. §10901 (e) (1994).

The interests of the City of Forsythe are concerned with its business development and impact upon the community if rail service is downgraded in service or frequency by diversion of coal business via TRR, which might lead to abandonment. Rail employment is important to the City of Forsythe, and for these reasons, the city joins in this Petition

#### **ADMINISTRATIVE AND JUDICIAL PROCEEDINGS**

The STB's October 9 decision refers to the earlier Finance Docket No. 30186 (Sub-No. 2) Tongue River II STB decision, reported at 1 S.T.B. 809 (1996), which is pending review in the

U S Court of Appeals for the 9th Circuit, but which has been held in abeyance for over 10 years. This Tongue River II decision undergoing judicial review also embraces modification of an earlier Finance Docket No. 30186 Tongue River I decision (not printed), decided May 9, 1986).<sup>4</sup>

The three Tongue River proceedings embrace three segments of a proposed new rail construction between Miles City and Decker, MT. The first segment, Tongue River I, would construct a 89-mile rail line between Miles City and Ashland, the second, Tongue River II, would extend the remaining 41-mile distance between Ashland and Decker, via a so-called "Four Mile Creek Alternative." The third segment, Tongue River III, the so-called "Western Alignment," would be a 17.3-mile route deviation from the Four-Mile Creek Alternative between Ashland and Decker.

The instant Tongue River III application was filed after applicant Tongue River Railroad Company (TRRC), and BNSF Railway Company (BNSF), concluded upon further review of the construction project that the previously approved Four-Mile Creek Alternative (Tongue River II) is "not viable" due to "significant operating and engineering problems." TRRC in 1997 after commencement of judicial review, petitioned the STB to reopen Tongue River II so as to substitute the "Western Alignment" for the STB-approved Tongue River II route, but was unsuccessful, the STB ruling that TRRC could file a new application, which was docketed on April 27, 1998. These protestants moved the Court of Appeals to summarily vacate and set aside the STB's Tongue River II decision, but the Court on March 16, 1998 denied the motion to dismiss, held the cases in abeyance, and directed the parties to file periodic status reports pending

---

<sup>4</sup>The Court of Appeals earlier had dismissed review of Tongue I. See Decision, 10/9/07, 4 n 4

disposition of the new construction application by the STB in Tongue River III

The Court's most recent status order, issued May 9, 2007, calls for a status report by November 6, two days prior to the November 8, 2007, effective date of the STB's Tongue River III decision

This Petition is timely and appropriate because Petitioners herein are already parties to a pending case at the Ninth Circuit and Tongue River III. A Petition for Review challenging STB's October 9, 2007 decision has been transmitted to the Ninth Circuit Court of Appeals. Therefore, this Petition is a necessary precursor to seeking a stay from the Ninth Circuit

### **ARGUMENT AND REASONS FOR GRANTING A STAY**

#### **\_\_\_\_\_A. Standard of Review for Injunctive Relief.**

\_\_\_\_\_ Despite the fact that three STB proceedings have occurred regarding the TRR, this rail line is in fact one project. While administratively it has been artificially bifurcated, in the real world where the rail line will wreck havoc on individual lives for senseless and marginal "improvements" in economic efficiency, the TRR is one project. The STB should grant a stay of its decisions in Tongue River I, II, and III, pending judicial review. The traditional grounds for a stay are substantial likelihood of success on the merits, irreparable injury, lack of substantial harm to others, and consideration of the public interest. And because this matter will be adjudicated in the Ninth Circuit, this Board must apply those standards in evaluating this Petition. The touchstone inquiry in an environmental case where interim injunctive relief is sought is to determine whether, in the face of NEPA<sup>3</sup> violations, the agency will action will permit irreversible environmental impacts. A fundamental requirement of NEPA is that the agency must analyze the environmental impacts of its proposed action *before* it makes an

---

<sup>3</sup>NEPA refers to the National Environmental Policy Act, 42 U.S.C. 4321 et seq.

“irreversible and irretrievable commitment of resources” *Conner v Burford*, 848 F 2d 1441, 1446 (9th Cir. 1988); *see also N Alaska Envtl Ctr v Kempthorne*, 457 F 3d 969, 975-76 (9th Cir. 2006). The Ninth Circuit has “never allowed” new, major federal action with the potential for significant environmental effects prior to compliance with “NEPA’s requirements for full study of alternatives” *Northern Cheyenne et al v US Bureau of Land Management*, 2007 WL 2595476, at \*6, \*8 (Schroeder, C.J., dissenting, petition for rehearing pending). Such environmental impacts are by definition “irreparable” because they are likely to be “permanent or at least of long duration,” and, it has been the Court’s practice to prevent their occurrence until the government meets its NEPA obligations *High Sierra Hikers v Blackwell*, 390 F 3d 640, 642 (9th Cir. 2004) (quoting *Amoco Prod Co v Village of Gambell*, 480 U.S. 531, 545 ). That principle has been at the core of the numerous cases in which the Ninth Circuit and other courts have regularly enjoined or stayed new activities from proceeding when those activities had not been subject to a valid NEPA analysis *See, e.g., National Parks and Conservation Ass’n v Babbitt*, 241 F 3d 722, 739 (9th Cir. 2001).

And of course the long-standing equitable principle of preserving the status quo via a stay or preliminary injunction *pendente lite* applies with full force to the situation at bar. The status quo demonstrates that despite receiving approval over 27 years ago to build the rail line, TRR has not moved the project forward. The status quo is that the tranquil valley of the Tongue River remains unscarred by this speculative venture.

**B. Condemnation of private land and initiation of construction will cause irreparable harm before the legality of the TRR is determined.**

STB notes that under Montana law, once TRR is granted a certificate to operate it will

have condemnation authority. That authority vests in TRR as of November 9, 2007. As address in numerous comments by a variety of organizations and individuals, recounted in affidavits filed herein, and as will be addressed more fully before the Ninth Circuit, STB's decision to approve TRR is flawed. The decision will not withstand judicial scrutiny. But the decision will, in the interim, allow TRR to initiate condemnation proceedings and inflict the ultimate harm, loss of private property rights. The decisions should to be stayed to prevent such harm until Petitioners' claims have been fully adjudicated.

Submitted herewith are affidavits from affected landowners that demonstrate the impacts to private property should condemnation and construction proceed. For example, Rancher Mark Fix, a party to these proceedings, notes that "[M]y ranch will be severely impacted by the construction of the TRR. The route will go through my calving pasture and baby calves could get onto the railroad easement and be run over by a train. The railroad easement will separate my pastures from water and I will need to supply water to the part of the pastures that are severed from water." *Verified Statement of Mark Fix*, ¶ 4-5. Rancher Jeannie Alderson, of the Boncs Brothers Ranch, a historic ranch homesteaded by the Alderson family for decades, explains the impacts of the rail line to her family's ranching operation:

The proposed railroad route would seriously impact our livelihood as ranchers. The proposed railway would cause numerous hardships for us in our cattle business. The uncertainty this proposed railway has caused us over the past 20 or more years has made it hard to plan for the future. The proposed rail line would bisect our bull pasture where we winter our bull herd. The proposed route would render part of the pasture useless as part of it would be inaccessible to water. The right of way and this unusable portion would make the pasture too small to use as a bull pasture.

*Alderson Verified Statement* ¶ 4. While these impacts might sound minor to those unfamiliar

with ranching operations, loss of a pasture, access to water and so forth can be devastating to an operation. Those submitting verified statements would welcome the opportunity to show those making this decision how condemnation, construction and operation will harm their ranches \_\_\_\_\_Irreparable impacts extend beyond ranching operations The link between railroad operations and increased risk of wildfire is well-established. TRR lacks direct road access in many places Fire services are virtually non-existent in this remote land. Those impacts not fully addressed nor adequately mitigated in the SEIS Unchecked wildfire is a genuine concern for ranchers suffering the servitude of the narrow-minded speculators that will build this railroad

*Fix Statement ¶ 7* In Mr Fix's words:

In addition to these problems I am very concerned with fire that will be created by the trains. I have first hand knowledge of what fire can do as I had a fire on my place in the last few months .. The fire jumped the Tongue River and luckily stopped at a slough that was full of wastewater from recent irrigation. The railroad could start a fire at any time because trains operate around the clock ... There is no county road on the proposed railroad route. Response time may be too late without proper access Most of the TRR I railroad route is on the opposite side of the river from County or State roads

The STB is further directed to the verified statements of other farmers and ranchers, all members of Petitioners Northern Plains, who describe similar impacts to their operations, for further description of the harm this rail line will bring to local citizens if construction is allowed to proceed. *See Verified Statements of Tim Lohof, Nancy Carell, Art Hayes and Judy Musgraves*

The harm not only stems from the adverse physical effects of condemnation and construction, but from the unsettling threat of condemnation and resulting perpetual uncertainty for ranchers, union members and the city of Forsythe All of these parties have lived under the cloud of the TRR for years, or in some cases decades A stay will remove that threat for the interim

This harm must be balanced against harm to TRR, which has publically stated that it will not proceed with construction until it can be guaranteed leases for Montana coal *See Exhibit A*. TRR should not be permitted to have the authority to condemn private property and proceed with any ground-disturbing activities in view of the fact that it is not yet capable of building the entire rail line.

**C. The SEIS is deficient under NEPA in many respects; STB's approval of the SEIS is therefore arbitrary, capricious, and without observance of procedures required by law.**

The adverse environmental impacts of the TRR extend beyond damage to local landowners. The TRR is an unmitigated environmental disaster. Because it is one of the largest new rail projects in modern history, it will scar the landscape of the Tongue River valley in a myriad of ways. Construction and operation of the rail line will increase air pollution in a relatively pristine area. It will fragment wildlife habitat. It will cause a permanent intrusion upon the landscape. It will significantly increase sediment in the Tongue River. Cumulative impacts from the TRR, when aggregated with environmental impacts from on-going coal bed methane development, and new coal mines that are essential to the rail lines' operation, are even more significant.<sup>6</sup> These are precisely the types of adverse environmental effects that have been forestalled by the issuance of a preliminary injunction.

Moreover, Petitioners will succeed on the merits of their attack to the Supplemental

---

<sup>6</sup>The inadequacies of the SEIS discussed herein are not the only problems with the SEIS approved October 9, 2007, but are provided as examples for this filing. In proceedings before the Ninth Circuit for TRR I, II and III, Petitioners will address all of the inadequacies presented by the document. The timing of this document precludes a discussion of each and every basis for invalidating the SEIS; further, Petitioners are not required to prove success on the merits, only show a likelihood of success in relation to other equitable factors.

Environmental Impact Statement (SEIS) that was also approved by the STB. No party disputes the necessity of NEPA compliance for all segments of the TRR.<sup>7</sup> The Ninth Circuit holds that “agency action taken without observance of procedures required by law [in the context of NEPA] will be set aside.” *Metcalf v. Daily*, 214 F.3d 1135, 1141 (9<sup>th</sup> Cir. 2000). It is axiomatic that NEPA’s procedures require that all environmental impacts be adequately addressed and disclosed as part of the EIS process. *Id.* The SEIS is rife with inadequate assessments of environmental impacts. In general, STB failed to revisit its stale environmental analysis for Tongue River I and II, though the ensuing decades have revealed numerous changed circumstances and significant new information about the impacts of the projects and the assumptions upon which they were permitted.

Specific inadequacies in the areas that STB did evaluate abound. For example, the discussion of cumulative air quality impacts in the Supplemental Draft EIS (SDEIS) at pages 6-18 to 6-21 fails to assess cumulative impacts from coal bed methane development, though Montana’s Programmatic EIS predicted serious air quality problems in the Tongue River airshed.<sup>8</sup> The SEIS fails to address the cumulative impacts posed by increased coal development from mines in Montana, even though the TRR claims that its viability will require the development of those resources. These impacts will include the development of new mines (Otter

---

<sup>7</sup>While the TRR is ancient by measure of unfulfilled administrative approvals, having received its first permit over 20 years ago, TRR I does not predate NEPA, which took effect in 1970. All duties under NEPA, including the requirement to supplement an existing EIS, remain

<sup>8</sup>Furthermore, the Programmatic EIS was declared unlawful by the District Court for the state of Montana, a determination that was upheld by the Ninth Circuit in *Northern Cheyenne Tribe, supra*. Thus it is legally dubious that the TRR SEIS can rely on any information from that invalidated document.

Creek) and the negative effects on existing mines who will be at a competitive disadvantage if TRR makes Wyoming coal cheaper for customers that were previously supplied by the Decker mine. STB's conclusion that there will be no cumulative impacts on wildlife from TRR and coal bed methane development is contrary to Montana's Programmatic FEIS that found significant cumulative impacts from coal bed methane on wildlife. *See Programmatic FEIS at pages 4-171-182*. The SEIS brushes those impacts aside in a few short sentences. *See SDEIS at 6-13-14*. The lack of cumulative impact analysis for coal bed methane, changes in coal development and construction of the TRR holds true for cumulative effects on soil, traffic, water quality, and economics (jobs and development patterns in southeastern Montana). The lack of cumulative impacts from coal development in the Otter Creek area, which could result in a significant industrialization of a rural area with profound environmental impacts, as not reasonably foreseeable, is legally untenable given the TRR's public representations that the rail line could not be built without the development of Otter Creek. *See Exhibit A*.

Further, as set forth in comments by Northern Plains Resource Council dated December 4, 2005, the SEIS lacks an adequate disclosure of baseline conditions as part of the affected environment discussion. Further, the SEIS failed to consider adequate alternatives for the entire rail line, though the SEIS purported to consider impacts for the whole rail line. As well, the SEIS contains numerous conclusory statements of no impacts without adequately providing the scientific basis for such statements. NEPA requires disclosure of all data upon which decisions are based. *See generally Idaho Sporting Congress v. Thomas*, 137 F.3d, 137 F.3d 1146, 1149 (9<sup>th</sup> Cir. 1997). Finally, socio-economic impacts to the local ranching communities, City of Forsythe, and other areas that will be affected by the TRR and cumulative impacts in conjunction with

shifts in the coal and transportation markets occasioned by development of TRR are not adequately addressed either. The record, when it is filed, will demonstrate that these issues were raised before the STB, but the agency persisted in its faulty NEPA compliance

**D. The STB has imposed an incorrect Congressional presumption regarding the 1980 and 1995 Amendment to the line construction provisions of 49 U.S.C. 10901.**

1. Statutory framework. The STB feels it is under a Congressional mandate to promote new rail construction,<sup>9</sup> and this view permeates both Tongue River I and Tongue River II. The STB is wrong. Congress legislated a level playing field for regulating rail entry under the public convenience and necessity. The STB in Tongue River I claims that certain changed wording in 49 U.S.C. § 10901, brought about by Staggers Rail Act of 1980, was intended to express a desire by Congress to facilitate entry into the rail industry. The change asserted by the STB for this view is that under a provision of the 1980 Staggers Act amendment to §10901, the agency was required to find the public convenience or necessity requires or permits the construction, whereas the prior language, adopted four years earlier, by the so-called 4-R Act, formulated the issue whether the public convenience and necessity required or would be enhanced by the construction. Tongue River I 1 S T B at 812-28. The language differences were not meaningful. In both 1976 and 1980, the term "required," is the standard, and "enhanced" or "permitted" as alternatives are not material.

However, the STB in Tongue River III, claims that further changes in §10901, brought

---

<sup>9</sup>Fortunately for Petitioners, TRR apparently does not share the STB's zeal for new rail construction based upon the powers of free market enterprise. TRR has failed to move the project forward despite receiving its first permit over 20 years ago. In the spirit of free-market capitalism, TRR now wants guaranteed government coal leases from the state of Montana. See *Exhibit A*.

about by ICCTA legislation in 1995, served to reinforce a "statutory presumption" that new rail lines should be approved (Decision 10/9/07 at pp 13-14). The STB asserts the amended language of §10901(c) that line construction should be approved "unless...inconsistent with the public convenience and necessity," reflects a statutory presumption for approval of new construction (Decision 10/9/07, *ibid.*).

The STB's notion that Congress decreed that new rail construction should be facilitated, with a statutory presumption in its favor, is not an exercise of agency discretion or interpretation, subject to Chevron. Instead, since the STB believes that its facilitation and statutory presumption come from Congress, its wrongful interpretation is not subject to judicial deference, but to Court review. See *Peter Pan Bus Lines v. Fed. Motor Carrier Safety*, 471 F.3d 1350, 1352 (D.C. Cir. 2006), and citations therein.

The Transportation Act of 1920 conferred rail construction and abandonment authority upon the former ICC, with a statutory of "required by the public convenience and necessity" (PC&N) for construction, and "permitted" by PC&N for abandonments. This language remained unchanged until the "4-R" and "Staggers" acts. But the negative PC&N statutory language of ICCTA did not create a standard to facilitate construction or to create a pro-construction statutory presumption.

We appreciate that the reviewing court in *DM&E*<sup>10</sup>, *Md. States Coal Progress v. Surface Transp. Bd.* 345 F.3d 520, 552 (8th Cir. 2003), recited the STB's contention on "statutory presumption," but this was unchallenged by the parties. We do not believe this non-litigated STB

---

<sup>10</sup>Dakota, MN & Eastern RR-Construction-Powder River Basin 3 S.T.B. 847, 862-65 (1998).

contention will bar a fresh review by the 9th Circuit and certainly the Ninth Circuit will not be bound by any statements made by other courts in the DME case . It is noteworthy that review of DM&E was primarily focused on environmental issues.

2. Specific findings The STB found in Tongue River II that the case was not governed by the 1995 ICCTA version of §10901, since the TRRC application was filed prior to enactment, and thus subject to the savings clause *See* 1 S.T B at 809 n 2. However, the decision's reliance upon a Congressional intent to facilitate railroad construction, rather than the accepted neutral balancing of interests, suggests the Ninth Circuit Court will set aside, and remand for agency consideration on neutral grounds. The STB's findings in Tongue River III are tainted by its "statutory presumption" for approval of line construction, indicating a strong likelihood of Court remand In an apparent attempt to avoid such a result, the STB blandly states that it would approve the Western Alignment even under pre-ICCTA standards <sup>11</sup> (Decision. 10/9/07, 14) However, STB did not render subsidiary findings in Tongue River III under the pre-ICCTA standards and, of course, the STB's pre-ICCTA standard is erroneous, as it is designed to tip the scales in favor of rail construction

A major deficiency of the STB's actual findings in contrast with traditional construction cases, is the neglect to see the construction as alternate routes for BNSF traffic, i e. the Tongue River route between Decker and Miles City via Ashland, versus, the BNSF route between the same points via Forsyth

---

<sup>11</sup>The STB's statement that it would approve Tongue River III even under pre-ICCTA is a key unsupported assumption, particularly since the Western Alignment was a modification of a pre-1995 application, indeed, TRRC and BNSF sought to bring the Western Alignment under the pre-ICCTA application, but the STB countered with as "new" post-ICCTA application. (Decision 10/9/07 at pp 13-14)

**3. Invalidity of Tongue River II.** The STB's decision in TRR II authorizes construction of the Four Mile Creek Alternative, a rail line between Ashland and Decker. Yet the Four Mile Creek Alternative is invalid and has already been rejected by TRR and BNSF, showing that STB's approval of TRR II is arbitrary. Petitioners present a strong case on the merits of TRR II before the Ninth Circuit, and believe that TRR II will be set aside, thus negating the decision in TRR III. When TRR II is vacated, TRR will be nothing more than a railroad to nowhere.

**E. The STB's build/no build analysis is likely to be ruled invalid.**

The STB ruled that the no-build alternative would be construction and operation of the Four Mile Creek Alternative, so that TRRC already has authority to construct and operate a rail line from Miles City to Decker under Tongue River II, if the STB were to deny the Western Alignment in Tongue River III. (Decision, 10/9/07 at p. 11).

It is highly likely the STB's reasoning will be found arbitrary and capricious. The Four Mile Creek Alternative is not viable, by the very evidence of TRRC and BNSF. The Tongue River II authority as granted by the STB, insofar as it includes the Four Mile Creek Alternative, is not a rational alternative. Indeed, the impracticality of the route from a railroad operating standpoint, was the cause for the April 27, 1998 application in Tongue River III.

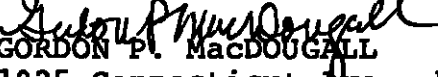
**CONCLUSION AND REQUEST FOR STAY**

\_\_\_\_ Based on the foregoing, Petitioners herein request that the STB issue a stay of the certificate to TRR to build Tongue River I, II and III, pending final adjudication of the STB's decision.

Respectfully submitted,

  
JACK R. TUHOLSKE  
P.O. Box 7458  
Missoula MT 59807

  
GARY RYDER  
P.O. Box 72  
Hysham MT

  
GORDON P. MacDOUGALL  
1025 Connecticut Ave., N.W.  
Washington DC 20036

Attorneys for Northern Plains Resource  
Council, City of Forsyth, United  
Transportation Union-General Committee  
of Adjustment (GO-386), and United  
Transportation Union-Montana State  
Legislative Board.

October 29, 2007

CERTIFICATE OF SERVICE

I hereby certify-I have served a copy of the foregoing upon . . . . .  
all parties of record in F.D. No. 30186 (Sub-No. 2), and F.D. No.  
30186 (Sub-No. 3), by first class mail postage-prepaid, and by personal  
service upon Washington, DC counsel for Tongue River Railroad Company.  
Washington DC  
Gordon P. MacDougall



Story available at <http://www.billingsgazette.net/articles/2007/10/20/news/state/22-railpermit.txt>

Published on Saturday October 20, 2007  
Last modified on 10/20/2007 at 12:43 am

## Rail permit holder seeks state coal

By JIM GRANSBERY  
Of The Gazette Staff

Deep seams of coal underlie the prairies of the Great Northern Plains. Some are more valued than others, some not at all. Some are being mined while other sites remain in perpetual potential.

A long-term effort to develop the more desirable coal under the rangeland of Eastern Montana is stymied by a triangle of common yet competing interests at a time when the political/economic trend is shading against further use of even the cleanest-burning varieties of the fossil fuel.

Continuing a quest that began in the early 1980s, the owner of a permit to build a railroad that would haul low-sulfur, high-heat coal from southeastern Montana has asked the state to prepare a lease bid for more than 300 million tons of state-owned coal.

### Fair-market value

Montana's governor is reluctant to do so, arguing that it is not the state's responsibility to fund a railroad, but rather to get the best, or fair-market, value for the state-owned coal.

At the same time, the owner of privately owned coal interlocking the state's is not sure he wants to give away the value of his coal by premature leasing.

The owner of the proposed railroad argues that he cannot get financing for a railroad without coal to market.

The Tongue River Railroad "is a slow-moving train," Gov. Brian Schweitzer said. "It has had a permit for 25 years. There was no state-owned coal then, why wasn't coal leased from others?" What is now state-owned was federal coal until 2002.

### Railroad worth

"With no railroad, no infrastructure, it is worth maybe 10 to 20 cents a ton," he said. "With the understanding there is actual railroad service, it is worth \$1 a ton. Why do we have to be the impetus to start?"

Mike Gustafson, owner of Wesco Resources and the holder of the permit to build the Tongue River Railroad said, "I cannot negotiate a railway without coal to sell. Transportation rates are

based on recovery of capitalization "

He added that the state's 15 percent coal severance tax is based on the price of the coal at the mine. The state levies the tax against the contract price per ton. For example, if the coal is sold to an electric utility at \$10 a ton, the state gets \$1.50 for each ton sold.

Gustafson argues that the State Land Board's fiduciary responsibility also lies in developing the coal rather than leaving it in the ground. Because the proceeds of a lease and royalties on the coal would go to the school trust fund, development of the Otter Creek Tracts near Ashland would provide substantial income for Montana's public schools.

The Otter Creek Tracts were transferred from federal to state ownership in April 2002 as part of a deal when development of a gold mine near Yellowstone Park was pre-empted.

To compensate Montana for the loss of the economic development of the Crown Butte mine, the state received 537 million tons of federal coal in three tracts just inside the western border of Powder River County in southeastern Montana.

A lease prepared by the state would be open to competitive bid by any entity that wanted, and had the wherewithal, to buy and mine the coal.

Wesco submitted a request for a lease bid to Otter Creek tracts 1 and 2 in January. The request is to the Montana Department of Natural Resources and Conservation, which serves as the technical arm of the State Land Board. The board would have to approve any leases to the coal in the Otter Creek Tracts because it constitutionally manages them as school trust lands. The State Land Board includes the governor, attorney general, state auditor, secretary of state and superintendent of public instruction.

Otter Creek tracts 1 and 2 have an estimated 333 million tons of state-owned coal. Alternate sections in the area, owned by Great Northern Properties, have another 435 million tons in the two tracts.

Chuck Kerr, president of Great Northern Properties of Houston, which owns the interlocking sections, said this week that meeting the interests of the state, Great Northern and the Tongue River Railroad is "difficult and frustrating."

"The pieces of the puzzle of the fractionated ownership should be aligned," he said.

The coal "should be leased to someone who has the wherewithal to extract the resource, the ability to open a new mine," he said. "This is not for the faint of heart."

Both Great Northern and the state want to maximize the value of the coal to their shareholders, Kerr said. Great Northern owns more than 40 coal sites in Montana and North Dakota and is the largest private holder of coal reserves - 20 billion tons - in the United States.

"I don't know what the answer is," Kerr said. "Mike wants access to coal. We want access to a railroad. When you lease the coal to Mike, the leverage goes to him."

Kerr also reacted strongly to suggestions that Great Northern was unwilling to put its coal up for lease in Otter Creek area.

"That is hogwash," he said "Being painted as a stick-in-the-mud is absolutely incorrect

"It is a matter of timing," Kerr said "We paid for that coal and there is no need to give it away We are unwilling to transfer leverage to others "

In 2003, Great Northern signed a coordination agreement with the state that any leasing of the Otter Creek Tracts and/or Great Northern coal in the area would be coordinated between the two

"We can work with the state," Kerr said "I am not sure we can with Mike "

Kerr added that it would take at least a year for a lease bid to be prepared. Mine development would take another three to five years Coal draglines are not available right now, he said, so it could take seven to 10 years for a mine and railroad to be completed

"We are not going to give value away," he said "We are patient and won't be rushed and there is other coal to develop in Montana "

Developing Montana's coal has been a high priority with Schweitzer, who has touted the state's clean-coal reserves in national and regional forums for the past 2½ years No new coal production has come online during that time.

"The governor does not propose specific developments," Schweitzer said "The Air Force proposed a coal-to-liquids plant at Malmstrom Air Force Base "

"My job is to show them (potential developers) all the assets," he said "I am not a socialist or a communist I am geographically neutral The Otter Creek Tracts are not the only coal in the state "

Although it has not applied for a permit, Great Northern is proceeding with putting together an application for a coal generating plant with a wind generating auxiliary on Nelson Creek west of Circle It owns contiguous blocks of lignite coal in the area

The site is near the western edge of McCone County just east of state Highway 24 and north of Highway 200

Kerr said his company is "working real hard on the details and every angle that needs to be addressed" before submitting a permit application with the state

Earlier this week, a U.S. Department of Energy report revealed that at least 16 coal-fired generating proposals nationwide have been scrapped, and another three dozen have been delayed as concerns over global warming and higher construction costs have caused utilities to back away.

Gustafson's lease bid request is before the Department of Natural Resource and Conservation, but it is in abeyance until the DNRC completes a financial analysis of the coal's value.

In a presentation to the state in May, Gustafson said he provided a detailed financial analysis

from Global Energy Decisions of Boulder, Colo.

The forecast of production taxes and royalties associated with a mine developed at Otter Creek predicted \$53.7 million in 2018 to state coffers based on the mining of 20 million tons annually. If the 20-million-ton mark is hit by 2015, the taxes and royalties would produce \$52.3 million a year to the state, increasing in each year to 2025. Over that period of 11 years the forecast predicted more than \$700 million to the state.

Gustafson is pushing the state to verify those figures or hire some company to do so.

As for capital to finance an 89-mile railroad and a mine, dubbed Phase I, Gustafson said a cost estimate two years ago pegged the railroad from the mine site just southeast of Ashland to Miles City at \$285 million to \$300 million. The mine would require another \$350 million to develop, he said. Rights of way have yet to be negotiated.

Wesco has had a permit to build the Tongue River Railroad since the early 1980s. Since its inception, the proposed railroad has faced continuous opposition from farmers and ranchers along the Tongue River and the Northern Cheyenne Tribe.

Copyright © The Billings Gazette, a division of Lee Enterprises



Story available at <http://www.billingsgazette.net/articles/2007/10/13/news/state/21-railroad.txt>

Published on Saturday, October 13, 2007  
Last modified on 10/13/2007 at 2:27 am

## Railroad owner aims to make deal for leasing coal

**By JIM GRANSBERY**  
**Of The Gazette Staff**

While the Tongue River Railroad now has federal approval to build the 117 miles from near Decker to Miles City, what its owner needs is a coal lease and money to build a mine and track north from Ashland.

"The whole project is contingent on getting coal leases in the Otter Creek Tracts," said Mike Gustafson, president of Wesco Resources and owner of the Tongue River Railroad.

"A contract for coal is collateral for a railroad, and we cannot get a contract without coal," he said.

Wesco submitted a request for a lease bid to Otter Creek Tracts 1 and 2 in January. The request is to the Montana Department of Natural Resources and Conservation, the technical arm of the State Land Board. The board has to approve any leases to the coal in the Otter Creek Tracts because it manages them as school trust lands. The State Land Board includes the governor, attorney general, state auditor, secretary of state and superintendent of public instruction.

"The DNRC needs to make a recommendation to the land board," Gustafson said.

Mary Sexton, director of the DNRC, said Friday afternoon that the department, which completed an evaluation of the coal reserves a year ago, has not acted on Wesco's lease request because it is doing a financial analysis of the coal's value and discussing options for leasing with Great Northern Properties, which owns alternate sections in the area.

While a competitive bid should reflect the value of the coal, Sexton said, the state wants to make sure it does not undervalue it and that it gets the best deal for the school trust.

Two previous requests by Wesco for lease bids were returned as premature, pending the state evaluation of the coal reserves.

The Otter Creek Tracts were transferred from federal to state ownership in April 2002 as part of a deal when development of a gold mine near Yellowstone Park was pre-empted.

To compensate for the loss of the economic development of the Crown Butte mine, Montana

received 537 million tons of federal coal in three tracts just inside the western border of Powder River County in southeastern Montana. The nearest town is Ashland, in Rosebud County.

A lease prepared by the state would be open to competitive bidding by any entity that wanted and had the wherewithal to buy and mine the coal.

As for capital to finance an 89-mile railroad and a mine, dubbed Phase I, Gustafson said a cost estimate two years ago pegged the railroad from the mine site just southeast of Ashland to Miles City at \$285 million to \$300 million. The mine would require another \$350 million to develop, he said. Rights of way have yet to be negotiated. To build the railroad from the Spring Creek Mine near Decker to Miles City would cost an estimated \$550 million, Gustafson said.

Wesco has had a permit to build the railroad since the early 1980s. Since its inception, the proposed railroad has faced opposition from farmers and ranchers along the Tongue River and the Northern Cheyenne Tribe.

Gustafson said present legal challenges to the line apply to Phase 2, and he expects challenges to Phase 3, which the U.S. Surface Transportation Board approved earlier this week. That 17-mile phase included a realignment of the path of the railroad from a diversion to the west to one along the river.

"We need a lease of a minimum of Tracts 1 and 2," Gustafson said. "We need that scale to procure long-term coal contracts."

Otter Creek Tracts 1 and 2 have an estimated 333 million tons of state-owned coal. Alternate sections in the area, owned by Great Northern Properties, have 435 million tons in the two tracts.

As for financing, Gustafson said he is shopping for funds from a well-capitalized firm with a strong balance sheet and for a mining company that can open and operate the mine.

He said he spent two days in Denver this week discussing financing with a bank that he declined to name.

Gustafson said the state should move toward development of the Otter Creek coal because of its benefits to state revenues and coal royalties to the state's school trust fund, which provides money to public schools K-12, as well as jobs and economic development to southeastern Montana.

Copyright © The Billings Gazette, a division of Lee Enterprises



Story available at <http://www.billingsgazette.net/articles/2007/10/10/news/state/17-rail.txt>

Published on Wednesday, October 10, 2007

Last modified on 10/10/2007 at 6:54 am

## Federal board OKs final segment of Tongue River Railroad

By **MATTHEW BROWN**  
Associated Press

Federal officials on Tuesday announced approval of the final stretch of a long-delayed \$341 million rail line that could open southeastern Montana's vast but largely untapped coal fields to more intensive development.

The Tongue River Railroad, first proposed in 1983, would run 130 miles from Miles City to Decker - into the heart of the coal-rich Powder River Basin along the Montana-Wyoming border. Area landowners have fiercely fought the proposed line, fearing it could industrialize a rural area now dominated by agriculture.

Permits from state and federal agencies are still needed, and rights of way through private and public property must be secured before the line can be built. Also, an unresolved 1998 federal lawsuit hangs over the project, meaning the line could get tied up in court before construction begins.

But a railroad attorney said Tuesday's federal go-ahead was crucial and will allow the Tongue River Railroad Co. to start lining up a customer base that can deliver a steady supply of coal. That could include the state of Montana, which has a roughly 40 percent stake in a 1.4 billion-ton coal tract located off the proposed line in the Otter Creek area.

"This is the biggest piece of the puzzle that had to fall into place," company attorney David Coburn said of the Surface Transportation Board announcement.

The transportation board's Tuesday announcement involved a 17-mile stretch of the line near Decker that had not been included in prior approvals. Other sections had been approved in 1986 and 1996.

Environmental hurdles, litigation and financing difficulties had delayed further progress on the project.

About 40 percent of the nation's coal is mined from the Powder River Basin, but most of that comes out of Wyoming. Montana last year produced about 40 million tons of coal - less than 4 percent of the nation's total.

Exploitation of Montana's sizable reserves has been hobbled by a lack of rail access and

opposition from ranchers and other landowners, concerned the large amounts of water used in the mining process would quickly deplete underground aquifers

The plaintiffs in the pending federal lawsuit, the Northern Plains Resource Council and the Northern Cheyenne Tribe, argued that the rail line's potential environmental damage was not fully addressed in prior studies of the project

"We've been fighting the Tongue River Railroad for probably 30 years," said Northern Plains Chairman Mark Fix, whose ranch along the Tongue River would be bisected by the line. "It's a bad idea. It goes through our ranches and it cuts our pastures off from the river so the cows can't get to the river for water "

Fix said 50 to 60 landowners would be affected by the project Under Montana law, private land could be involuntarily condemned to make way for the new line.

Victoria Rutson, chief of the Surface Transportation Board's environmental analysis section, said a task force of state and federal agencies would be set up to monitor construction of the line and minimize environmental damage.

State officials looking to develop the Otter Creek coal tracts near Ashland have closely tracked the rail line's progress Mary Sexton, director of the Department of Natural Resources and Conservation said leasing the state's tracts for development was contingent on the railroad's success

She said her agency has a "fiduciary responsibility" to maximize state revenue from its coal reserves

Great Northern Properties also owns a large share of the Otter Creek tracts

The new rail line could boost Montana coal production by about 12 million tons annually over the next decade, according to testimony presented by Tongue River Railroad to the Surface Transportation Board The coal would be destined for Midwestern power plants

To make the project economically viable, the railroad also projects hauling 12 million to 16 million tons of Wyoming coal annually The new line would offer a shortcut for coal cars coming out of Wyoming along the Burlington Northern Santa Fe railroad, trimming 320 miles off the circuitous route now used by BNSF

That could give pause to state policymakers if the more accessible Wyoming coal undercuts Montana's market, said Evan Barrett, an economic development aide to Montana Gov Brian Schweitzer

"If the facts were to show the movement of Wyoming coal would be harmful to Montana's interests, both in terms of coal production and state revenues, obviously that would be a serious concern," Barrett said

A BNSF spokesman, Pat Hialte, said Tuesday that the railroad offered "an opportunity to develop portions of Montana's extensive coal reserves that today are not accessible to the marketplace "

Hlatte declined to comment on how much Wyoming coal the company might ship along the Tongue River line.

Copyright © The Billings Gazette, a division of Lee Enterprises.

**BEFORE THE SURFACE TRANSPORTATION BOARD  
OF THE UNITED STATES OF AMERICA**

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

**TONGUE RIVER RAILROAD COMPANY, INC. -- ACQUISITION  
AND OPERATION EXEMPTION -- TONGUE RIVER RAILROAD COMPANY**

**VERIFIED STATEMENT OF WILLIAM R MUSGRAVE**

**Affiant being first duly sworn, deposes and says**

- 1 My name is William R Musgrave I reside three miles below the Tongue River Dam in Big Horn County Montana.**
- 2. I am a landowner with real property located near the Tongue River Railroad I am opposed to the Surface Transportation Board's (STB's) approval of the railroad as represented by its October 9, 2007, decision and earlier decisions approving other aspects of the project**
- 3 I am a member of Northern Plains Resource Council Inc., and support their involvement in this matter, including any future Petition for Judicial Review Through Northern Plains, I have also participated in the administrative proceedings for this and other previous sections of the railroad.**
- 4 When first approached by the TRRC in November of 1989, I was an active rancher with land that would have been bisected by the TRR Since that time, I have retired and sold the portion of my ranch that would be crossed by the TRR I do, however, still reside within a short distance of the proposed tracks and am opposed to the TRR for the reasons stated in paragraph 5**
- 5 The Tongue River Railroad will create numerous environmental impacts that adversely affect me and my family. The railroad will have significant impacts on the water quality, air quality, wildlife, noise and social and economic fabric of southeastern Montana where I reside.**
- 6 I believe that the approval of the railroad is unlawful for failing to comply with all applicable laws and regulations However, the STB's approval of the Western Alignment (TRR III) means that the TRR is now free to build the entire project causing the environmental impacts that are part of the basis for my objections In addition, TRR has the right to commence eminent domain proceedings and condemn my neighbor's private property for the rail line**
- 7. The environmental impacts of the project and the potential for condemnation of property are irreversible and irreparable effects Because the STB's approval may well prove to be unlawful, STB should stay the permit that has been granted to TRR pending the**

outcome of all administrative and legal challenges. I therefore support the petition for a stay of the permit filed on behalf of Northern Plains and other organizations to preserve the status quo until the merits of this decision can be decided in a court of law.

I swear upon my oath that the foregoing statements are true and correct to the best of my knowledge

Further Affiant Sayeth Naught.

Dated this 25<sup>th</sup> day of October 2007

William R. Musgrave

**BEFORE THE SURFACE TRANSPORTATION BOARD  
OF THE UNITED STATES OF AMERICA**

**FINANCE DOCKET No 30186 (Sub No 3)**

**TONGUE RIVER RAILROAD COMPANY, INC -- ACQUISITION  
AND OPERATION EXEMPTION -- TONGUE RIVER RAILROAD COMPANY**

**VERIFIED STATEMENT OF ART HAYES JR**

**Affiant being first duly sworn, deposes and says**

- 1 My name is Art Hayes Jr I reside at the R Bar Ranch at Birney, Montana**
- 2 I am a landowner with real property located along the Tongue River Railroad I am opposed to the Surface Transportation Board's (STB's) approval of the railroad as represented by its October 9, 2007 decision and earlier decisions approving other aspects of the project My property is located along the proposed railroad**
- 3 I am a member of Northern Plains Resource Council Inc , and support their involvement in this matter, including any future Petition for Judicial Review. Through Northern Plains I have also participated in the administrative proceedings for this and other previous sections of the railroad**
- 4. I am the president of The Brown Cattle Co , a ranching business that supports myself and my wife and our two sons and their families This ranch is a long and narrow ranch along the Tongue River and Hanging Woman Creek It is situated between the Northern Cheyenne Indian Reservation and the Custer National Forest The Tongue River Railroad would cut the ranch in half for its entire length The railroad eliminates an irrigated meadow The railroad will divide our pastures, leaving them without access and separating cattle from water sources There will be no compensation for the financial loss of future production on these eliminated and divided lands**
- 5 The Tongue River Railroad will create numerous environmental impacts that adversely affect myself and my ranching operation In addition to those described in paragraph 4 of this affidavit, the railroad will have significant impacts on the water quality, air quality, wildlife, noise and social and economic fabric of southeastern Montana where I reside Along the length of our ranch the Tongue River Railroad will cut off wildlife from established routes to water and feed**
- 6 I believe that the approval of the railroad is unlawful for failing to comply with all applicable laws and regulations However, the STB's approval of the Western Alignment (TRR III) means that the TRR is now free to build the entire project**

- causing the environmental impacts that are part of the basis for my objections. In addition, TRR has the right to commence eminent domain proceedings and condemn my private property for the rail line.
- 7 The environmental impacts of the project and the potential for condemnation of my property are irreversible and irreparable effects. Because the STB's approval may well prove to be unlawful, STB should stay the permit that has been granted to TRR pending the outcome of all administrative and legal challenges. I therefore support the petition for a stay of the permit filed on behalf of Northern Plains and other organizations to preserve the status quo until the merits of this decision can be decided in a court of law.

I swear upon my oath that the foregoing statements are true and correct to the best of my knowledge.

Further Affiant Sayeth Naught

Dated this 25<sup>th</sup> day of October, 2007

Chad Hager

**BEFORE THE SURFACE TRANSPORTATION BOARD  
OF THE UNITED STATES OF AMERICA**

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

**TONGUE RIVER RAILROAD COMPANY, INC -- ACQUISITION  
AND OPERATION EXEMPTION -- TONGUE RIVER RAILROAD COMPANY**

**VERIFIED STATEMENT OF Christine and Stephen Valentine**

**Affiant being first duly sworn, deposes and says:**

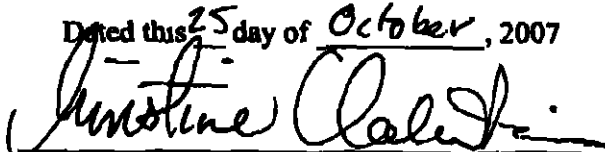
- 1 My name is Christine Valentine. I reside at 4562 Tongue River Road, Birney, MT. 59012 I am a landowner with real property located along the Tongue River Railroad I am opposed to the Surface Transportation Board's (STB's) approval of the railroad as represented by its October 9, 2007 decision and earlier decisions approving other aspects of the project. My property is located along the proposed railroad.**
- 2. I am a member of Northern Plains Resource Council Inc., and support their involvement in this matter, including any future Petition for Judicial Review. Through Northern Plains R C I have also participated in the administrative proceedings for this and other previous sections of the railroad.**
- 3 Our way of life will be affected by the TRR in the way outlined below:**
  - the exact route of the TRR is not known at this time. The TRR has a one-mile right-of- way which may or may not, according where it is built, cross our land. In all probability it will cross the end of our current driveway and interfere with access to our house from the county road. Depending on where the TRR is built, and whether the county road is relocated near our driveway, we may need to cross the railroad each time we leave the property**
  - thirty years ago, we chose to live in the current location because of the peaceful, and quiet nature of the property and the view from our house that overlooks the Tongue River valley all the way to the Big Horn Mountains. The railroad will change that completely Noise will be a factor in our daily life, plus dust, and a higher possibility of fire that will raise our insurance rates. The TRR will permanently alter the views along this scenic stretch of river valley. All the above will devalue the property for resale purposes**

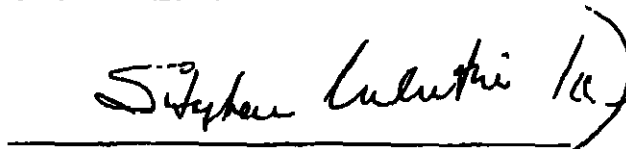
- 4 The Tongue River Railroad will create numerous environmental impacts that adversely affect us. In addition to those described in paragraph 4 of this affidavit, the railroad will have significant impacts on the water quality, air quality, wildlife, noise and social and economic fabric of southeastern Montana where I reside.
- 5 I believe that the approval of the railroad is unlawful for failing to comply with all applicable laws and regulations. However, the STB's approval of the Western Alignment (TRR III) means that the TRR is now free to build the entire project causing the environmental impacts that are part of the basis for my objections. In addition, TRR has the right to commence eminent domain proceedings and condemn my private property for the rail line.
6. The environmental impacts of the project and the potential for condemnation of my property are irreversible and irreparable effects. Because the STB's approval may well prove to be unlawful, STB should stay the permit that has been granted to TRR pending the outcome of all administrative and legal challenges. I therefore support the petition for a stay of the permit filed on behalf of Northern Plains and other organizations to preserve the status quo until the merits of this decision can be decided in a court of law.

I swear upon my oath that the foregoing statements are true and correct to the best of my knowledge.

Further Affiant Sayeth Naught.

Dated this 25 day of October, 2007

  
Christine Valentine

  
Stephen Valentine III

**BEFORE THE SURFACE TRANSPORTATION BOARD  
OF THE UNITED STATES OF AMERICA**

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

**TONGUE RIVER RAILROAD COMPANY, INC. -- ACQUISITION  
AND OPERATION EXEMPTION -- TONGUE RIVER RAILROAD COMPANY**

**VERIFIED STATEMENT OF Nancy Carrel**

**Affiant being first duly sworn, deposes and says**

- 1. My name is Nancy Carrel. I reside at The FL Ranch, in Burney, Montana.**
- 2 I am a landowner with real property located along the Tongue River Railroad I am opposed to the Surface Transportation Board's (STB's) approval of the railroad as represented by its October 9, 2007 decision and earlier decisions approving other aspects of the project. My property is located along the proposed railroad.**
- 3. I am a member of Northern Plains Resource Council Inc , and support their involvement in this matter, including any future Petition for Judicial Review. Through Northern Plains I have also participated in the administrative proceedings for this and other previous sections of the railroad.**
- 4. The proposed Tongue River Railroad will either go through our ranch or close to it. Depending on which route is built (TRR II or TRRIII) important pastures would become useless We would not be able to take cattle across the railroad or be able to access our summer pasture Our cattle operation would be extremely difficult, if not impossible, as we do not have a large amount of land and need to utilize all of it**

**We are gravely concerned about the extreme fire danger that a railroad would present. Our country is very dry, there is always a fire hazard under the best of circumstances, and there would be no fire protection at all. Railroads consistently cause fires in other dry areas such as ours**

**The construction phase of a railroad would have serious impact Our road could not possibly accommodate such activity. There would be a huge amount of traffic, as the construction workers and equipment would have to come from a considerable distance away.**

5. The Tongue River Railroad will create numerous environmental impacts that adversely affect myself and my ranching operation. In addition to those described in paragraph 4 of this affidavit, the railroad will have significant impacts on the water quality, air quality, wildlife, noise and social and economic fabric of southeastern Montana where I reside.

6. I believe that the approval of the railroad is unlawful for failing to comply with all applicable laws and regulations. However, the STB's approval of the Western Alignment (TRR III) means that the TRR is now free to build the entire project causing the environmental impacts that are part of the basis for my objections. In addition, TRR has the right to commence eminent domain proceedings and condemn my private property for the rail line.

7. The environmental impacts of the project and the potential for condemnation of my property are irreversible and irreparable effects. Because the STB's approval may well prove to be unlawful, STB should stay the permit that has been granted to TRR pending the outcome of all administrative and legal challenges. I therefore support the petition for a stay of the permit filed on behalf of Northern Plains and other organizations to preserve the status quo until the merits of this decision can be decided in a court of law.

I swear upon my oath that the foregoing statements are true and correct to the best of my knowledge.

Further Affiant Sayeth Naught.

Dated this 25 day of October, 2007

Nancy W. Carrel

**BEFORE THE SURFACE TRANSPORTATION BOARD  
OF THE UNITED STATES OF AMERICA**

**FINANCE DOCKET No 30186 (Sub No 3)**

**TONGUE RIVER RAILROAD COMPANY, INC. -- ACQUISITION  
AND OPERATION EXEMPTION -- TONGUE RIVER RAILROAD COMPANY**

**VERIFIED STATEMENT OF CLINT MCRAE**

**Affiant being first duly sworn, deposes and says:**

- 1 My name is Clint McRae. I reside at 3633 Rosebud Creek Road, Forsyth, Montana**
- 2. I am a landowner with real property located along the Tongue River Railroad I am opposed to the Surface Transportation Board's (STB's) approval of the railroad as represented by its October 9, 2007 decision and earlier decisions approving other aspects of the project. My property is located along the proposed railroad.**
- 3. I am a member of Northern Plains Resource Council Inc , and support their involvement in this matter, including any future Petition for Judicial Review. Through Northern Plains I have also participated in the administrative proceedings for this and other previous sections of the railroad.**
- 4. The proposed Tongue River Railroad would sever our summer pasture grass from a major water source. We would have grass on one side of the tracks, and water on the other. The cattle passes proposed by the railroad are not sufficient for cattle movement, and the railroad was not willing to negotiate more suitable crossings. Currently, we rest and rotate pastures, which involve simply opening a gate. Cattle naturally migrate through the gate to fresh pasture. If the railroad is built, we will be forced to move cattle across railroad tracks horseback, an added burden and labor. Several years ago, we negotiated a bridge with the with the county so our cattle would not be a hazard on the county road, but still be able to access Tongue River or a livestock well for water. We want to maintain this route for cattle, and need a suitable crossing under the railroad. The TRR is not willing to negotiate a reasonable crossing. We also need vehicle crossings to maintain access to our summer ground. We were told we could have these crossings where needed, but we would assume the liability for them. We participate in a state hunting program that allows free hunting on private land. We would be liable for the safety of every hunter that crossed the tracks. Fire is another concern. Railroads in this country start many fires. Many times, a railroad is placed along a highway, the road protects train caused fires on one side. This is not the case with this railroad. Crossings are very important to access a fire, and in rough country where the railroad is proposed, access will be severely limited, resulting in loss of grass, fence, and timber. Railroads are**

notorious for spreading noxious weeds from the railroad right of way across the ROW fence into private land. Noxious weed control is extremely expensive and time consuming, landowners should not be expected to bear this cost from a problem they did not create. This railroad project has been a cloud over our family operation for nearly 30 years. If built, it would create a significant amount of added labor, would increase our liability insurance to extreme levels, would threaten the basic product we raise which is grass and timber, negatively impact our property values, and be a monumental pain in the neck to operate a ranch around. I have talked to many landowners who operate around railroads, and have not ONCE heard anything positive. My father is 72 years old and is slowing down. I am trying to operate this ranch as efficiently as I can with a minimum amount of labor. This railroad would unnecessarily disrupt day to day operations and create an unreasonable amount of added problems. If this railroad was truly based on need, it would have been built 30 years ago. It is nothing more than a speculative shortcut to existing coal mines that already have rail service.

5. The Tongue River Railroad will create numerous environmental impacts that adversely affect myself and my ranching operation. In addition to those described in paragraph 4 of this affidavit, the railroad will have significant impacts on the water quality, air quality, wildlife, noise and social and economic fabric of southeastern Montana where I reside.
6. I believe that the approval of the railroad is unlawful for failing to comply with all applicable laws and regulations. However, the STB's approval of the Western Alignment (TRR III) means that the TRR is now free to build the entire project causing the environmental impacts that are part of the basis for my objections. In addition, TRR has the right to commence eminent domain proceedings and condemn my private property for the rail line.
7. The environmental impacts of the project and the potential for condemnation of my property are irreversible and irreparable effects. Because the STB's approval may well prove to be unlawful, STB should stay the permit that has been granted to TRR pending the outcome of all administrative and legal challenges. I therefore support the petition for a stay of the permit filed on behalf of Northern Plains and other organizations to preserve the status quo until the merits of this decision can be decided in a court of law.

I swear upon my oath that the foregoing statements are true and correct to the best of my knowledge.

Further Affiant Sayeth Naught

Dated this 24th day of October 2007

Clinton J. H/S Ro

**BEFORE THE SURFACE TRANSPORTATION BOARD  
OF THE UNITED STATES OF AMERICA**

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

**TONGUE RIVER RAILROAD COMPANY, INC -- ACQUISITION  
AND OPERATION EXEMPTION -- TONGUE RIVER RAILROAD COMPANY**

**VERIFIED STATEMENT OF TIM LOHOF**

**Affiant being first duly sworn, deposes and says**

**1 My name is Tim Lohof. I reside at the Quarter Circle U Ranch, Birney, Montana**

**2 I am a landowner with real property located along the Tongue River Railroad. I am opposed to the Surface Transportation Board's (STB's) approval of the railroad as represented by its October 9, 2007 decision and earlier decisions approving other aspects of the project. My property is located along the proposed railroad.**

**3 I am a member of Northern Plains Resource Council Inc, and support their involvement in this matter, including any future Petition for Judicial Review. Through Northern Plains I have also participated in the administrative proceedings for this and other previous sections of the railroad.**

**4 The proposed railroad route would seriously impact our livelihood as ranchers. The proposed railway would cause numerous hardships for us in our cattle business. Bisecting our pastures will cause increased expense and time when we move our cattle and may make access to water sources impractical. Possible placement of the rail line within the allotted corridor of 3,000 feet would put the railway in our hay meadows. This is our main source of winter feed for our cattle operation and could not be replaced. Loss of grass from railroad caused fires could leave us with little or no summer pasture. Also, the Wolf Mountain (Battle Butte) Battlefield is located on our property. We have worked hard to get this listed on the National Historic Register. This site retains its historical integrity and the proposed railroad would cross this important historical site. Further mitigation measures need to be developed before this project proceeds.**

**5 The Tongue River Railroad will create numerous environmental impacts that adversely affect myself and my ranching operation. In addition to those described in paragraph 4 of this affidavit, the railroad will have significant impacts on the water quality, air quality, wildlife, noise and social and economic fabric of southeastern Montana where I reside.**

**6 I believe that the approval of the railroad is unlawful for failing to comply with all applicable laws and regulations. However, the STB's approval of the Western Alignment (TRR III) means that the TRR is now free to build the entire project causing the environmental impacts that are part of the basis for my objections. In addition, TRR has the right to commence eminent domain proceedings and condemn my private property for the rail line.**

**7 The environmental impacts of the project and the potential for condemnation of my property are irreversible and irreparable effects. Because the STB's approval may well prove to be unlawful, STB should stay the permit that has been granted to TRR.**

pending the outcome of all administrative and legal challenges I therefore support the petition for a stay of the permit filed on behalf of Northern Plains and other organizations to preserve the status quo until the merits of this decision can be decided in a court of law

I swear upon my oath that the foregoing statements are true and correct to the best of my knowledge

Further Affiant Sayeth Naught.

Dated this 25 day of October, 2007

Tim Lohof

**BEFORE THE SURFACE TRANSPORTATION BOARD  
OF THE UNITED STATES OF AMERICA**

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

**TONGUE RIVER RAILROAD COMPANY, INC -- ACQUISITION  
AND OPERATION EXEMPTION -- TONGUE RIVER RAILROAD COMPANY**

**VERIFIED STATEMENT OF BONES BROTHERS RANCH**

**Affiant being first duly sworn, deposes and says:**

**1. My name is Jeanie Alderson I reside at the Bones Brothers Ranch, Birney, Montana.**

**2 I am a landowner with real property located along the Tongue River Railroad I am opposed to the Surface Transportation Board's (STB's) approval of the railroad as represented by its October 9, 2007 decision and earlier decisions approving other aspects of the project. My property is located along the proposed railroad**

**3 I am a member of Northern Plains Resource Council Inc , and support their involvement in this matter, including any future Petition for Judicial Review. Through Northern Plains I have also participated in the administrative proceedings for this and other previous sections of the railroad.**

**4 The proposed railroad route would seriously impact our livelihood as ranchers. The proposed railway would cause numerous hardships for us in our cattle business The uncertainty this proposed railway has caused us over the past 20 or more years has made it hard to plan for the future The proposed rail line would bisect our bull pasture where we winter our bull herd. The proposed route would render part of the pasture useless as part of it would be inaccessible to water. The right of way and this unusable portion would make the pasture too small to use as a bull pasture and we will have to find another place to winter our bulls We have been fortunate to be able to keep our bulls there during the winter because it is located a few miles from where we winter the cow herd. This distance is important to keep the bulls from impregnating the cows at the wrong time of year. Further mitigation measures need to be developed before this project proceeds.**

**5 The Tongue River Railroad will create numerous environmental impacts that adversely affect myself and my ranching operation In addition to those described in paragraph 4 of this affidavit, the railroad will have significant impacts on the water quality, air quality, wildlife, noise and social and economic fabric of southeastern Montana where I reside.**

**6 I believe that the approval of the railroad is unlawful for failing to comply with all applicable laws and regulations However, the STB's approval of the Western Alignment (TRR III) means that the TRR is now free to build the entire project causing the environmental impacts that are part of the basis for my objections. In addition, TRR has the right to commence eminent domain proceedings and condemn my private property for the rail line.**

**7 The environmental impacts of the project and the potential for condemnation of my property are irreversible and irreparable effects Because the STB's approval may**

well prove to be unlawful, STB should stay the permit that has been granted to TRR pending the outcome of all administrative and legal challenges. I therefore support the petition for a stay of the permit filed on behalf of Northern Plains and other organizations to preserve the status quo until the merits of this decision can be decided in a court of law.

I swear upon my oath that the foregoing statements are true and correct to the best of my knowledge.

Further Affiant Sayeth Naught

Dated this 25 day of October, 2007

Jeanie C. A. Vorn

**BEFORE THE SURFACE TRANSPORTATION BOARD  
OF THE UNITED STATES OF AMERICA**

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

**TONGUE RIVER RAILROAD COMPANY, INC -- ACQUISITION  
AND OPERATION EXEMPTION -- TONGUE RIVER RAILROAD COMPANY**

**VERIFIED STATEMENT OF MARK FIX**

**Affiant being first duly sworn, deposes and says.**

- 1. My name is Mark Fix. I reside at LLC 32 Box 4196 Miles City, Montana 59301.**
- 2. I am a landowner with real property located along the Tongue River Railroad (TRR). I would be crossed by about 3 miles of the TRR. I am opposed to the Surface Transportation Board's (STB's) approval of the railroad as represented by its October 9, 2007 decision and earlier decisions approving other aspects of the project. My property is located along the proposed TRR I route**
- 3. I am the chairman of Northern Plains Resource Council Inc, and support their involvement in this matter, including any future Petition for Judicial Review Through Northern Plains I have also participated in the administrative proceedings for this and other previous sections of the railroad**
- 4. My ranch will be severely impacted by the construction of the TRR. The route will go through my calving pasture and baby calves could get onto the railroad easement and be run over by a train.**
- 5. The railroad easement will separate my pastures from water and I will need to supply water to the part of the pastures that are severed from water. In addition to drilling water wells I will have to pay for installation of electricity to run the pumps or invest in solar powered pumps to provide water to my cattle**
- 6. The railroad easement will create problems in moving livestock to work them. I will have to build new corrals or improve existing facilities to do additional work on my cattle. I usually bring my cattle to the house to work them in the fall. The railroad right of way will make it very difficult and time consuming to bring the cattle home. I will have to move cattle through a culvert and it may require that I hire extra help and extra expense to me because cows don't move through structures like that willingly**
- 7. In addition to these problems I am very concerned with fire that will be created by the trains. I have first hand knowledge of what fire can do as I had a fire on my place in the last few months. It was started by lightning and it burned about 9 sections (5760 acres) on the neighbors place and then proceeded onto my place**

and burned about 4 sections (2560 acres) on my place. The fire jumped the Tongue River and luckily stopped at a slough that was full of wastewater from recent irrigation. The railroad could start a fire at any time because trains operate around the clock. The firemen that fought the fires used my private bridge to get across the Tongue River to fight the fire. There is no county road on the proposed railroad route. Response time may be too late without proper access. Most of the TRR I railroad route is on the opposite side of the river from County or State roads. I am still repairing fence damaged during that fire. I am also concerned about the costs to repair easement fences that are burned by rail fires.

8. There was a new upstream bypass to the Tongue and Yellowstone diversion dam that was opened this fall. This will allow over 40 new species of fish to come into my stretch of the river. The Pallid Sturgeon is one of those 40 species. The fish have been restricted from this stretch of the river for over 120 years. If 20,000 tons of sediment come down the river during construction and 5 to 10,000 tons every year after that, to meet these fish that are coming upstream, they may be decimated. I may not be able to enjoy the enhancement of this fishery. No analysis has been done on the amount of sediment that will be added to the river by TRR II and TRR I.
9. In addition to the harm to the fishery I am also concerned with the water quality for irrigation. I irrigate about 250 acres of land on my ranch. The coal bed methane (CBM) sodic discharges upstream could harm my crops and soil. The additions of the salts in the sediments created by TRR could destroy my irrigated ground. No Total Maximum Daily Loads (TMDL's) have been done on the Tongue River. We have salinity standards on the Tongue River and I believe the cumulative affects of the CBM discharges plus the sediment load from TRR will destroy my irrigated land. The increased sediment load may cause premature failure of my irrigation pumps as well.
10. I am also concerned about the possibility of a derailment of the railroad on my land. The Burlington Northern Railroad derailed in downtown Miles City just a few years ago.
11. I am also concerned about the spread of noxious weeds and the costs I will acquire eradicating them. Railroad traffic will be a constant source of new weeds and unless there is some method of washing each and every train car at the border, there will be no way to deal with the noxious weed problem. Noxious weeds on my place will seriously devalue my ranch.
12. I am also concerned about the premature degradation of my private bridge across the Tongue River. There will be additional traffic during construction and operation of the railroad, if no county or state road is available on the other side of the river. Heavy loads may cause my bridge to prematurely fail. It could take lots of money to keep my bridge in an operational status. This is a private bridge and is not subject to inspections like those performed on the public bridges such as the one that collapsed in Minneapolis. I may be subject to liability if my bridge collapses.
13. I am also concerned about the devaluation of my property. Having a railroad across my land will devalue it. The State of Montana recently purchased a neighbors ranch for about \$5 million. The last time TRR representatives were

trying to obtain an easement they only offered another neighbor \$100 per acre for only the portion of land crossed by the railroad. The neighbor had about 40 acres of land in the easement. This will in no way compensate us for the expenses we will incur in the future dealing with a railroad in our backyard. Further, a ranch with a railroad running through it, especially a railroad that parallels the river is worth much less than a ranch without a railroad running through. The total ranch value, not just the impacted acres from the right of way, is enormously impacted in a negative way. The land the State of Montana purchased was valued well above \$100 per acre. The right of condemnation that TRR holds keeps them from negotiating with landowners. We have no power to negotiate a better deal. We either have to take the deal or they will condemn us.

- 14 The Tongue River Railroad will create numerous environmental impacts that adversely affect myself and my ranching operation. In addition to those described in paragraph 4 through 13 of this affidavit, the railroad will have significant impacts on the water quality, air quality, wildlife, noise and social and economic fabric of southeastern Montana where I reside.
- 15 I believe that the approval of the railroad is unlawful for failing to comply with all applicable laws and regulations. However, the STB's approval of the Western Alignment (LRK III) means that the TRR is now free to build the entire project causing the environmental impacts that are part of the basis for my objections. In addition, TRR has the right to commence eminent domain proceedings and condemn my private property for the rail line.
- 16 The environmental impacts of the project and the potential for condemnation of my property are irreversible and irreparable effects. Because the STB's approval may well prove to be unlawful, STB should stay the permit that has been granted to TRR pending the outcome of all administrative and legal challenges. I therefore support the petition for a stay of the permit filed on behalf of Northern Plains and other organizations to preserve the status quo until the merits of this decision can be decided in a court of law.

I swear upon my oath that the foregoing statements are true and correct to the best of my knowledge.

Further Affiant Sayeth Naught.

Dated this 26 day of OCTOBER, 2007.

Mark Fix