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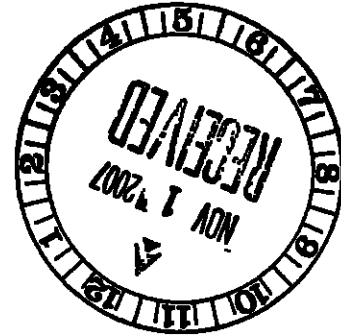
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November 1, 2007

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 October 29, 2007 Petition to Stay filed in the above proceeding by Northern Plains Resource Council and other parties.

Respectfully,

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

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Public Record

Enclosure

cc All parties of record

**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
PETITION OF NORTHERN PLAINS RESOURCE COUNCIL, ET AL. FOR STAY**



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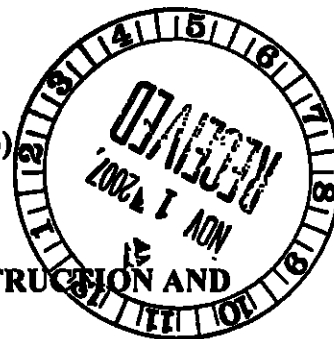
Attorneys for Tongue River Railroad
Company, Inc.

November 1, 2007

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

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OPERATION -- WESTERN ALIGNMENT**



**REPLY OF TONGUE RIVER RAILROAD COMPANY, INC. TO
PETITION OF NORTHERN PLAINS RESOURCE COUNCIL, ET AL. FOR STAY**

Tongue River Railroad Company, Inc ("TRRC") hereby replies in opposition to the October 29, 2007 joint petition for stay pending judicial review filed by Northern Plains Resource Council ("NPRC"), Native Action, Inc., Northern Cheyenne Tribe, City of Forsyth, United Transportation Union – General Committee of Adjustment and United Transportation Union – Montana State Legislative Board (jointly, "UTU") (collectively, "Petitioners") TRRC previously responded on October 25, 2007 to a series of thirteen petitions for stay filed on October 17, 2007 by a series of other persons and entities.

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 Decision is due to become effective on November 8, 2007.¹ TRRC will show below why a stay of *TRRC III* is not warranted under the four-part test applied by the Board in judging requests for stay.

¹ The Western 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 separate proceeding, *Tongue River Railroad Co – Rail Construction and Operation – Ashland to Decker, MT*, F.D. No 30186 (Sub No 2) ("*TRRC I*")

Petitioners also seek a stay of the May 9, 1986 decision issued by the Interstate Commerce Commission in the so-called *TRRC I* proceeding² (in which the ICC granted TRRC a certificate authorizing construction of an 89-mile line) and of the November 8, 1996 decision issued by the Board in *TRRC II* (authorizing TRRC to construct a 41-mile line). Their request for a stay of *TRRC I* and *TRRC II* comes much too late to be entertained. Those decisions were issued long ago and have been in effect for years. In fact, Petitioner NPRC participated in the administrative proceedings in *TRRC I* and *TRRC II*, and sought judicial review of the final ICC and STB decisions in each of those cases, yet it never sought a stay pending judicial review of either decision until now. Having failed to assert any claim of irreparable injury when the *TRRC I* and *II* decisions became effective, neither NPRC nor the other Petitioners can now -- years later and well outside the time frame for seeking a stay under the Board's rules -- be heard to claim that a stay should be issued. Moreover, the judicial review of the ICC's decision granting TRRC a certificate in *TRRC I* has already come to an end with the 1987 affirmance of that decision by the U.S. Court of Appeals for the Ninth Circuit.³

Petitioners seem to believe that the *TRRC I* and *II* decisions have somehow only now become effective with the issuance of *TRRC III*. In fact, as noted the earlier decisions have been in effect since shortly after their issuance.⁴ Thus, TRRC could have begun eminent domain proceedings along the 89-mile line approved in *TRRC I* at any time since the issuance of that

² *Tongue River Railroad Company – Rail Construction and Operation – In Custer, Powder River and Rosebud Counties, MT*, Finance Docket No. 30186 (served May 9, 1986)

³ *Northern Plains Resource Council v. ICC*, 817 F.2d 758 (9th Cir. 1987) (mem.), cert. denied, 484 U.S. 976 (1987)

⁴ *TRRC I* and *II* were re-opened in the *TRRC III* proceeding only for the limited purpose of modifying environmental conditions. The merits findings in favor of construction in those proceedings have not been re-opened.

decision in 1986 and likewise could have exercised its eminent domain rights along the *TRRC II* line since the 1996 issuance of the STB's decision in that case

In any event, Petitioners point to no actual injury, irreparable or otherwise, that the effectiveness of these decisions has caused them. Their belated concern that the effectiveness of the *TRRC III* decision will cause them irreparable injury warranting a stay is simply not credible.

REPLY ARGUMENT

Petitioners have failed to meet the well-settled four-part test for a stay of *TRRC III* by failing to show: (1) a strong likelihood that the Petitioners will prevail on the merits of their judicial review of the Board's decision in that proceeding, (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.⁵ These same four tests apply in cases, such as this one, in which the sufficiency of a review of NEPA compliance is at issue. See *Northern Cheyenne Tribe v. Norton*, 2007 WL 2595476 (9th Cir. 2007) at *4 (reciting the four-part test and noting that "injunctive relief is not automatic")

As discussed further below, this is not a case where the denial of a stay will result in irreparable environmental damage during the period of judicial review because many more steps need to be taken by TRRC, and approvals issued by other agencies, before any construction of the rail line can begin. It is highly unlikely that those steps will be completed, and approvals all issued relative to *TRRC III*, while judicial review remains pending.

⁵ 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).

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

Petitioners claim that they will succeed on the merits because the Supplemental EIS (SEIS) issued by the STB's environmental staff relies on outdated information and is otherwise deficient in its analyses of the key environmental impacts. However, they offer no arguments that the Board or its environmental staff have not already considered, consistent with NEPA obligations, in the Draft and Final SEISs issued in *TRRC III*. This is simply a case of the Petitioners, not liking the outcome, arguing that the sufficiency of the NEPA process was somehow inadequate.

For example, Petitioners claim at page 11 of their Petition that, "the STB failed to revisit its stale environmental analysis for Tongue River I and II, though the ensuing [sic] decades have revealed numerous changed circumstances and significant new information about the impacts of the projects and the assumptions upon which they were permitted." In fact, the STB's environmental staff solicited public comment on whether there were any changes to the environment or new legal standards in place warranting updating of the thorough EISs prepared in *TRRC I and II*. It found that updating and augmenting was appropriate as to certain issues, undertook additional studies and analysis and reported its findings in the *TRRC III* Draft and Final SEISs. See Draft SEIS at 3-6 through 3-9, Final SEIS at 1-20 through 1-21, October 9 Decision at 29-30.

Petitioners claim that the cumulative impacts analysis in the Draft and Final SEISs are deficient. NPRC made this same claim in its comments on the Draft SEIS. SEA provided an extensive response and further analysis in the Final SEIS. SEA looked, for example, at the cumulative impacts of the TRRC line and coal bed methane development in the area. It also properly found that coal mine development in the area was too speculative to allow for any

further analysis beyond that already undertaken in *TRRC I* and *II* See Final SEIS at 2-27 through 2-33

Petitioners claim that the discussion of baseline conditions presented in the Draft SEIS is insufficient SEA responded to this claim in the Final SEIS, underscoring that extensive baseline data was presented, as appropriate, in the Draft SEIS See Final SEIS at 3-302 through 3-305

Petitioners argue that “[t]he STB has imposed an incorrect Congressional presumption regarding the 1980 and 1995 Amendment to the line construction provisions of 49 U S C 10901 ” Petition for Stay, at 13-16. Petitioners further argue that “[t]he 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 ” *Id* at 15 These arguments have no likelihood of success for three reasons First, the Board’s conclusion that the current post-ICCTA version of Section 10901 and its presumption in favor of rail construction is applicable to the decision in *TRRC III* is clearly correct under the plain language of the statute October 9 Decision, at 13-14 ⁶ As the Board noted in its October 9 Decision, TRRC filed its application in this proceeding in 1998, over *two years after* the enactment of ICCTA in 1995 See *id* at 13. ICCTA’s savings clause (Section 204) “provided that cases pending before the ICC at the time ICCTA was enacted be handled under the pre-ICCTA provisions of the Interstate Commerce Act ” *Id* TRRC III was not pending at the time that ICCTA was enacted, and thus the pre-ICCTA standard for rail construction applications is inapplicable to this proceeding Second, *Mid States Coalition for Progress v STB*, 345 F 3d 520, 552 (8th Cir 2003), the only Court of Appeals decision addressing ICCTA’s new licensing standard for rail construction, held that “the Board

⁶ Several of the Petitioners argued in 2003 that the pre-ICCTA construction standard applies to this case At that time, the Board correctly rejected that contention See *Tongue River R R Co -Construction and Operation-Western Alignment*, STB Finance Docket No. 30186 (Sub-No 3), slip op. at 5 (served May 19, 2003)

correctly maintains that there is a statutory presumption that rail construction is to be approved.” Petitioners offer no persuasive reason to believe that the Ninth Circuit would take a different view. Third, the October 9 Decision plainly recites that the Board would approve the TRRC application even if it applied the pre-ICCTA standard and employed no presumption in favor of the Proposal. October 9 Decision at 14. The Board’s alternative finding eliminates any likelihood that Petitioners will succeed in their statutory standard argument.

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

In support of their claims of irreparable injury, Petitioners argue that the condemnation of land needed for TRRC’s right of way, and construction of the TRRC line, will cause irreparable injury. They offer eight verified statements of landowners, each of whom claims to be a member of NPRC. No witnesses are offered by any of the other Petitioners. In fact, the Petition is utterly silent about any irreparable injury that might be suffered by Northern Cheyenne Tribe or Native Action, Inc. The Petition is also vague, at best, about how UTU and City of Forsyth would suffer irreparable harm, suggesting only that union members could lose jobs on BNSF if traffic is diverted to the TRRC line and that Forsyth will somehow suffer from the consequent loss of rail employment. But these unsubstantiated concerns are based on the notion that the Western Alignment will be up and running during the period of judicial review, the period for which they seek a stay. That is, at best, a highly unlikely event. It will take considerable time before the pre-construction surveys of habitat, wetlands and cultural resources required by the Board-imposed mitigation measures are completed relative to the Western Alignment⁷; the secondary

⁷ See, e.g., October 9 Decision at Appendix B, setting forth Mitigation Measures Nos. 23 (pre-construction stream surveys), 26 (pre-construction habitat data reconnaissance, which must be conducted only during specified times of the year), 34 (pre-construction aquatic resource sampling); 38 (pre-construction geo-technical investigation); Final SEIS at Appendix C, setting forth Programmatic Agreement requiring extensive pre-construction cultural resources surveys.

permits or other approvals/agreements needed by TRRC from the Corps of Engineers and Bureau of Land Management and various state agencies are obtained⁸; the right-of-way acquired through negotiation or eminent domain if negotiations do not work, and construction actually undertaken. Since each of these pre-conditions to actually operating a railroad will take some time to complete, it is virtually certain that there will be no diversion of traffic from BNSF onto the TRRC line during the period of judicial review. Thus, UTU and Forsyth have not demonstrated the irreparable injury to their interests that would warrant a stay.

The irreparable injury claims of the NPRC witnesses are somewhat more detailed, but no more persuasive. These claims are not unlike those of the prior thirteen petitioners, and in fact some of the persons offering supporting verified statements are among the group of thirteen who earlier sought a stay in this proceeding. In judging the claims of the NPRC witnesses, the Board should consider that six of the eight witnesses do not live along the Western Alignment. Witnesses Hayes, Valentine, Lohof, and Alderson live or own property along portions of the 41-mile *TRRC II* alignment other than the Western Alignment, while witnesses McRae and Fix live or own property along the 89-mile *TRRC I* alignment. Thus, only two witnesses might be directly impacted by the Western Alignment, the only matter at issue in *TRRC III*.

The claims of the Petitioners and their witnesses fall into two general categories. First, concern is expressed about the possibility of condemnation of property, which is claimed to be an irreparable injury. The possibility of condemnation is of course speculative as each landowner whose land may be needed for right-of-way will be given an opportunity to negotiate

⁸ See, e.g., October 9 Decision at Appendix B, setting forth Mitigation Measures Nos. 22 (requiring TRRC to obtain Corps of Engineers wetlands permit before beginning construction), 55 (requiring that TRRC enter an agreement with the Montana Department of Transportation) and 86 (requiring consultation and coordination with Montana Department of Fish, Wildlife and Parks). TRRC will also require easements from the Bureau of Land Management, U.S. Department of Agriculture and other agencies to cross public lands.

right-of-way acquisition for the required property interest to TRRC. Were eminent domain invoked, however, any “injury” resulting from the exercise of that right is hardly irreparable, since the parties whose land is taken will be paid just compensation for the interest taken, *i.e.*, the injury is compensable in damages and thus by definition not irreparable. *See East Tennessee Natural Gas Co. v. Sage*, 361 F.3d 808, 829 (4th Cir. 2004) (rejecting irreparable injury claim arising from taking of property in view of the just compensation required to be paid under the Fifth Amendment, noting further that the loss of land to be used for the common good is part of the burden of citizenship); *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”).

The second category of injury pending judicial review claimed by NPRC and its witnesses is injury that they claim will result from the construction or operation of the TRRC line. Again, for the Board to credit such claims of injury, it would have to assume that the Western Alignment will be constructed and operations be conducted before the period of judicial review is over. That is at best highly unlikely, and indeed almost inconceivable given the pre-conditions to construction noted above.

However, even if one makes a leap of logic and assumes that the line approved in *TRRC III* were constructed and operated during the period of judicial review, the witnesses have not shown irreparable injury that would warrant a stay. In fact, they altogether ignore the 92 detailed mitigation measures imposed by the STB to address the very environmental concerns that they raise. Some witnesses, for example, assume that the railroad will make it impossible for their cattle to cross the line. The Board specifically addressed that issue in its October 9 Decision at

27, observing that Mitigation Measure 3 requires TRRC to install cattle passes at points to be negotiated with landowners

Other witnesses raise concerns about fire dangers caused by the TRRC line. Again, they overlook altogether the Mitigation Measure (No. 9), which requires that TRRC maintain a wildfire suppression plan and employ state-of-the-art fire prevention and suppression techniques as may be appropriate. Mitigation Measures 10 (fire prevention), 11 (fire suppression) and 12 (fire access road) also address this concern.

Other witnesses raise concerns about air quality, water quality and noise. Each of these issues were extensively studied and the impacts identified in the SEIS documents. Extensive mitigation measures addressed to these issues were recommended in the Final SEIS and imposed by the Board in the October 9 Decision. See Mitigation Measures 43 (addressing water quality), 69 through 73 (air quality measures, including dust suppression measures) and 74 through 80 (noise and vibration).

Witness Fix -- whose property is located along the line previously approved in *TRRC I* -- raises several other issues. He expresses concern about additional sediment in the Tongue River and its impact on fish in the River. The Board, however, was not unmindful of these issues, which were studied in depth in the environmental documents. Further, there is an extensive set of mitigation measures that has been imposed to address these matters. See Mitigation Measure Nos. 34 -35 and 43 through 51.

Witness Fix also raises concerns about noxious weeds. He fails to note that this issue is addressed in detail in Mitigation Measure No. 21.

Witness Fix also raises concerns about the risk of derailments in the area and about the impact of rail construction or operation on the viability of a private bridge on his property.

These concerns are too nebulous to warrant a stay. Further, any damage caused by any derailment or any bridge degradation are compensable in money damages, and thus not irreparable.

Finally, Witness Fix is concerned about the loss of value to his property. Such a concern is highly speculative (he does not indicate that his property is on the market). As to the property that may be bought or taken by TRRC, he will be paid just compensation.

C. TRRC Would Be Injured by a Stay

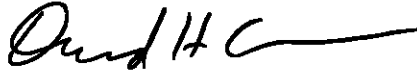
Petitioners claim that TRRC would not be harmed by a stay. That is not true. TRRC intends to move forward with secondary permitting, pre-construction surveys and other efforts relative to the eventual construction of the Western Alignment. To the extent that a stay would impair TRRC's ability to proceed with pre-construction work, it would place TRRC's pre-construction efforts on the Western Alignment on a different time frame than its like efforts relative to the remainder of its line, as to which there is no stay. This could unduly delay the project and increase its costs, with no offsetting benefit to the public or TRRC. And there is no prospect for any monetary compensation for such delays.

Finally, the public interest here favors the denial of a stay, since the Board found that the Western Alignment will provide "significant transportation and other public benefits." October 9 Decision at 33.

CONCLUSION

For all of the reasons stated above, the NPRC, et al. Petition to Stay should be denied

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David H. Coburn", with a long horizontal flourish extending to the right.

Betty Jo Christian

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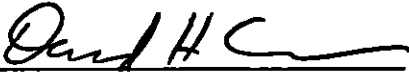
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**Attorneys for Tongue River Railroad
Company, Inc**

November 1, 2007

CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of November 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, or more expeditious means



David H Coburn