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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB Finance Docket No. 30186 (Sub 3)<sup>1</sup>**

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

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**TONGUE RIVER RAILROAD COMPANY, INC.'S STATEMENT OF INTENT  
REGARDING THE TONGUE RIVER RAILROAD COMPANY RAIL LINE**

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April 19, 2012

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<sup>1</sup> This filing also embraces Finance Docket No. 30186 (Sub No. 2), *Tongue River Railroad Company—Rail Construction and Operation—Ashland to Decker, Montana. (TRRC II)*.

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Tongue River Railroad Company, Inc. (“TRRC”) hereby offers its suggestions to the Board concerning how the Board should proceed to handle the TRRC rail construction and operation proceeding in light of the partial remand of the *TRRC II* and *TRRC III* decisions by the U.S. Court of Appeals for the Ninth Circuit in *Northern Plains Resource Council, et al. v Surface Transportation Board*, 668 F.3d 1067 (9th Cir. 2011) (“*Northern Plains*”). The Court’s mandate in that case was issued on March 2, 2012, thus terminating the jurisdiction of the Ninth Circuit over this matter.

By this filing, TRRC provides notice to the Board that it no longer intends to construct the rail lines south of Ashland, MT that were the subject of its applications in the *TRRC II* and *TRRC III* proceedings. Rather, TRRC intends to focus its future activities on construction of the approximately 80-mile line between Miles City, MT and Ashland/Otter Creek previously

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authorized by the Board, as modified by the refinements to that rail line (“Refinements”) considered in the *TRRC III* proceeding.<sup>2</sup>

Specifically, TRRC hereby notifies the Board of its intention to file the following:

1. A notice of withdrawal of its application to construct the TRRC II line, which had been planned as a 41-mile southern extension of the TRRC I line, the notice to be effective as of the date of the filing of the Amended Application in the *TRRC III* proceeding described below and indicating that the authority to construct the 41-mile extension is no longer requested;
2. An amendment of its application to construct the TRRC III line to re-focus that application so that it will no longer seek authority to construct the southernmost 17 miles of the TRRC II line (the so-called Western Alignment), but rather will only seek whatever approval may be needed for the Refinements that were considered by the Board in the *TRRC III* proceeding, as well as to provide updated information on TRRC’s ownership, traffic forecasts, financial projections, and updates on other relevant matters.

TRRC intends to file the notice of withdrawal of the *TRRC II* application and the amendment to the *TRRC III* application as promptly as possible in the coming weeks.

Because the *TRRC II* and *TRRC III* applications will be withdrawn or amended as noted above, the only matters still requiring Board action are (1) the consideration of the Refinements that the Board had considered during the course of the *TRRC III* proceeding and (2) the imposition of mitigation measures to address the construction and operation of the Miles City-Ashland/Otter Creek line (“the Line”). The Refinements, which include a new alignment for the Line in the vicinity of the Miles City Fish Hatchery, were addressed during the course of the environmental review performed in the *TRRC III* Supplemental EIS (“SEIS”) and were embraced in the Board’s final decision issued in that proceeding on October 9, 2007 (“October 9 Decision”). The Board also imposed in its October 9 Decision updated and revised mitigation

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<sup>2</sup> 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 (ICC May 1, 1986) (*TRRC I*). For the convenience of the Board a map showing the TRRC I, TRRC II and TRRC III lines is attached.

measures to be applied along the entire line that TRRC was then planning to construct from Miles City to Decker (“TRRC Mitigation Measures”), including the Miles City to Ashland/Otter Creek Line.

In light of the December 29, 2011 decision of the U.S. Court of Appeals for the Ninth Circuit in *Northern Plains* partially remanding the October 9 Decision in *TRRC III*, Board approval of the Refinements and the TRRC Mitigation Measures has been vacated. The amended application in *TRRC III* that TRRC will file will provide the means for the Board to re-address these and other relevant matters in a manner that will satisfy the requirements of the Ninth Circuit relative to NEPA compliance and allow TRRC to move forward with its project. TRRC therefore will request that the Board approve that amended application following satisfaction of its NEPA obligations through completion of an appropriate additional supplement to the *TRRC III* SEIS. TRRC urges that the new supplemental EIS be prepared consistent with the views of the Ninth Circuit in its *Northern Plains* decision to the extent that elements of that decision are relevant to the Line.

## **I. STATUS OF THE LINE**

The Board’s approval to construct the approximately 80- mile Line between Miles City, MT and Ashland/Otter Creek, MT is administratively final, the Board’s predecessor having issued a final decision approving construction of that line on May 1, 1986. The Ninth Circuit so recognized in its *Northern Plains* decision, where it determined that, “The issuance of the TRRC I application is not before us in this litigation.” 668 F.3d at 1073.<sup>3</sup> Construction of the Line is

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<sup>3</sup> Judicial review of the *TRRC I* decision was completed in 1987. See *N. Plains Res. Council v. ICC*, 817 F.2d 758 (9<sup>th</sup> Cir. 1987).

not dependent on the southern extension of the line south from Ashland to Decker considered in *TRRC II* and *TRRC III*.

Nonetheless, the Line has not been built to date because the Ashland/Otter Creek coal resources which the line is primarily designed to serve have not been commercially available for development. That situation has now changed. As the Board is aware, in March 2010, the Otter Creek coal tracts were leased by the State of Montana to Ark Land Company (“Ark”), a subsidiary of Arch Coal, Inc. (“Arch”). Those coal resources have been aggregated with other coal resources on adjoining coal tracts now also controlled by Ark, making the Otter Creek area ripe for coal mine development. Following a mine permitting process that will be undertaken through the Montana Department of Environmental Quality (“MDEQ”), the Otter Creek area is likely to begin producing coal ready for rail transport within the next several years. As the Board is already aware from submissions made in connection with the Petition to Reopen filed in this proceeding by Northern Plains Resource Council (“NPRC Petition”) and the replies TRRC has filed thereto, Ark has already sought and obtained a prospecting permit from MDEQ for the Otter Creek area.

Ark’s plans to develop the Otter Creek tracts give rise to the need to move forward toward construction of the Line as quickly as possible, and the new owners of TRRC are committed to that goal. In order to construct the Line, however, TRRC requires Board action, following appropriate environmental review, on the Refinements that were proposed and considered in the *TRRC III* proceeding.<sup>4</sup> It also bears note that TRRC also requires permits from other agencies that are relying on the environmental review prepared by the Board to satisfy their

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<sup>4</sup> Those Refinements were proposed by TRRC in 1998 in order to address rail operational considerations that were raised after the *TRRC I* proceeding was completed. The Refinements generally entail a straightening and shortening of the alignment approved in the *TRRC I* proceeding.

obligations under NEPA and under Montana's environmental review statute, including the U.S. Army Corps of Engineers, the Bureau of Land Management and Montana state agencies.

## **II. PROPOSED STEPS FORWARD**

TRRC's amended application in the *TRRC III* proceeding will include relevant information on the Refinements, including information on the coal resources that will provide the source of the traffic for the Line, the volume of traffic anticipated to be transported over the Line and the anticipated number of trains per day that will operate over the Line.<sup>5</sup> The information in the forthcoming amended application will provide the Board's environmental staff and third party contractor with the facts they will need to prepare a thorough supplemental environmental review of the Refinements, and the other matters relevant to TRRC's current construction plans.

More specifically, in order to satisfy its NEPA obligations relative to the amended *TRRC III* application, TRRC submits that the Board should undertake a second supplemental EIS in the *TRRC III* proceeding that addresses the Refinements as well as those matters identified by the *Northern Plains* decision as warranting further review and that are relevant to TRRC's current plans. This would include developing and reviewing updated and adequate baseline data for the area where the Line is proposed to be constructed, further assessing the cumulative impacts of the construction of the Line together with planned mining at Otter Creek, and further assessing cumulative impacts of the Line and any planned coal bed methane development in the relevant geographic area over a longer time period, as per the Ninth Circuit's instructions. Further, the Board can assess in the new supplement the appropriate mitigation measures for construction and

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<sup>5</sup> The anticipated volume of traffic and number of trains will be reduced (and thus impacts reduced) relative to what was considered in *TRRC III* because the Spring Creek/Decker traffic, and through traffic, assumed in that proceeding will not be available to the Line.

operation of the Line in view of the fact that the mitigation measures approved for the Line in *TRRC III* are no longer in place by virtue of the *Northern Plains* remand.

TRRC urges the Board to promptly issue a notice of its intention to undertake supplemental environmental review to address the Refinements and the issues relevant to the Line identified in *Northern Plains*, and to issue a scoping notice relative thereto. Such a scoping notice should be built around the points identified as warranting further review by the Court.

### **III. THE PENDING PETITION FOR RECONSIDERATION OF THE BOARD'S DENIAL OF THE PETITION TO REOPEN**

NPRC and Mark Fix filed the NPRC Petition on July 26, 2010 seeking reopening of all three TRRC proceedings. The NPRC Petition argued that reopening and supplemental environmental review of rail/Otter Creek cumulative impacts were warranted by the leasing of the Otter Creek tracts, by the need to conduct a further greenhouse gas impact assessment and by new data on climate change impacts. The Board denied reopening by decision served June 15, 2011. NPRC thereupon filed a petition for reconsideration on July 25, 2011. TRRC opposed both the original Petition and the petition for reconsideration, which remains pending.

In light of TRRC's forthcoming withdrawal of its proposals to build any rail line south of Ashland/Otter Creek, we submit that NPRC's petition for reconsideration is moot as to such proposed rail construction. TRRC also submits that if the Board issues a notice of intent to prepare a further supplemental EIS in response to the amended application that TRRC intends to file in the *TRRC III* proceeding (covering the Refinements and other matters as discussed above), this would moot the NPRC Petition as to the *TRRC I* proceeding as well. A supplemental cumulative impacts analysis focused on combined rail/Otter Creek impacts would address the key element of the NPRC Petition, and the other issues raised in the Petition could be addressed initially during the course of scoping. The Board thus need not reopen the

administratively final *TRRC I* proceeding, but rather can respond to the concerns raised in the NPRC Petition context of reviewing the environmental impacts of the amended application that TRRC will file in the *TRRC III* proceeding.

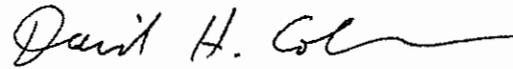
All appropriate issues can be addressed in detail during the scoping process that will occur at the outset of the proposed supplemental environmental review. NPRC will have ample opportunity to raise any specific concerns, including those raised in its Petition, in the context of the supplemental environmental review described here, rendering unnecessary any further Board action on NPRC's request for reconsideration of the denial of reopening.

#### **IV. CONCLUSION**

TRRC urges the Board to move forward promptly in this proceeding. As noted above, the Otter Creek tracts have been leased to Ark for coal development and permitting for a mine at Otter Creek is moving forward. Development of the railroad to serve the mine requires completion of any further environmental and permitting work as soon as practicable. TRRC therefore urges the Board to promptly issue an order setting forth its intention to initiate a

supplemental environmental review process in the *TRRC III* proceeding as soon as possible after the filing of TRRC's amended application in that proceeding.<sup>6</sup>

Respectfully submitted,



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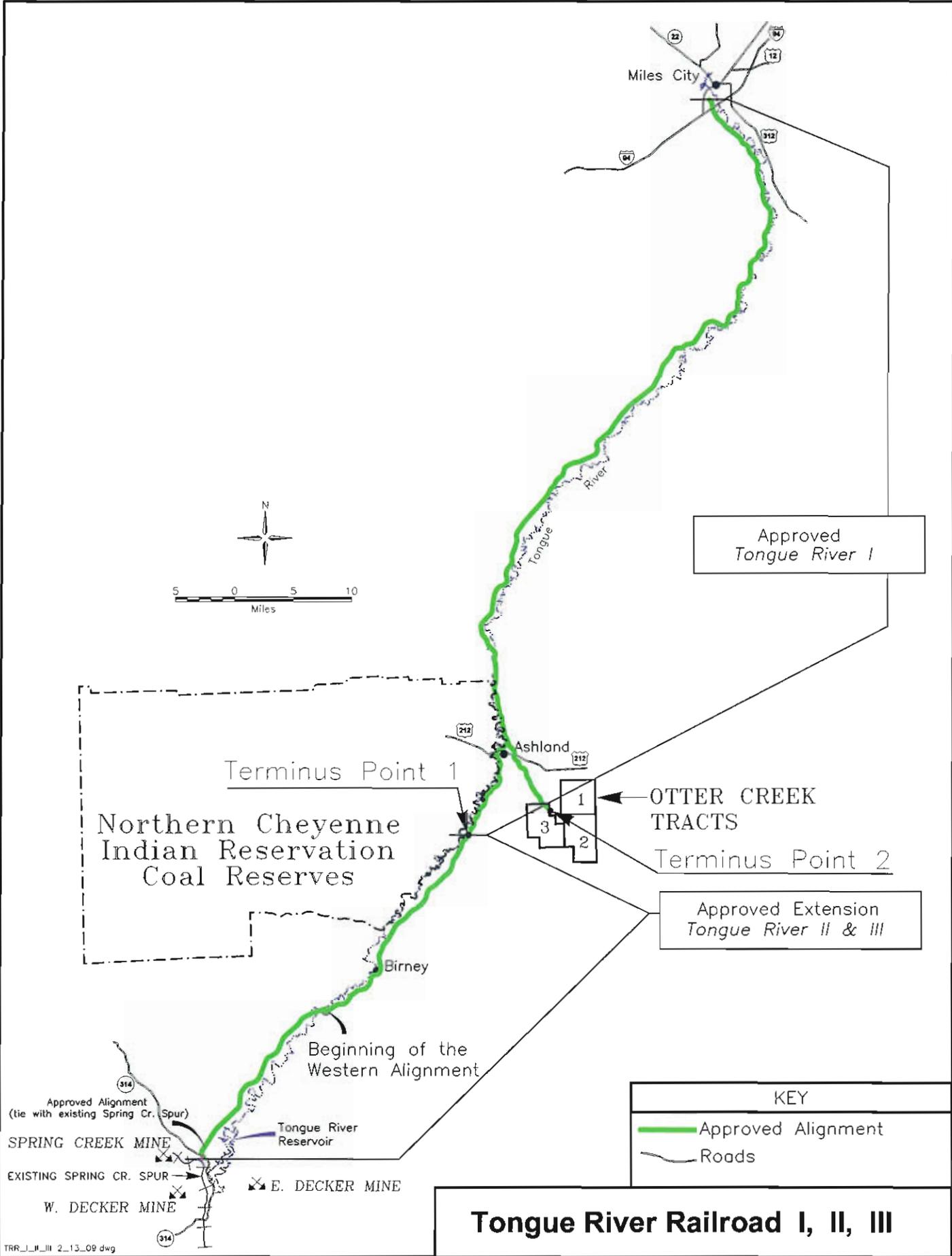
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April 19, 2012

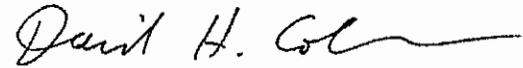
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<sup>6</sup> TRRC will respond shortly to NPRC's recently-filed "Petition to Reopen Based on Remand and Request for a Procedural Schedule".



**CERTIFICATE OF SERVICE**

I hereby certify that on this 19<sup>th</sup> day of April 2012, a copy of the foregoing document was served via first class mail, postage prepaid, on all parties of record.

A handwritten signature in cursive script, reading "David H. Coburn". The signature is written in black ink and is positioned above a horizontal line.

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David H. Coburn