

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB FINANCE DOCKET NO. 30186**

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**TONGUE RIVER RAILROAD COMPANY, INC. – RAIL CONSTRUCTION  
AND OPERATION – IN CUSTER, POWDER RIVER  
AND ROSEBUD COUNTIES, MT**

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**TONGUE RIVER RAILROAD COMPANY, INC.’S REPLY TO  
NORTHERN PLAINS RESOURCE COUNCIL’S MOTION TO COMPEL**

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Dated: February 3, 2014

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Tongue River Railroad Company, Inc. (“TRRC”) hereby replies in opposition to the Motion to Compel filed by Northern Plains Resource Council (“NPRC”) on January 13, 2014. While discovery is rarely provided in construction application proceedings like this one, the Board has granted “limited discovery” in this proceeding at NPRC’s request. TRRC has satisfied its discovery obligations, investing substantial time and effort to respond to NPRC’s extremely extensive written discovery requests. TRRC also has agreed to make four persons available for deposition at NPRC’s request. Despite TRRC’s substantive interrogatory responses and significant document production, NPRC moves to compel TRRC to produce more documents and provide “more complete” interrogatory responses.

NPRC’s Motion should be seen for what it is: part of NPRC’s consistent effort to prolong this rail construction proceeding by raising one issue after another. Its Motion should be denied because the broader discovery it now seeks to compel is unnecessary to the disposition of this proceeding and would impose undue and unwarranted burdens.

## INTRODUCTION

The breadth of discovery sought by NPRC in this proceeding far exceeds the “limited discovery” that NPRC claimed it was seeking and that the Board authorized. *See* June 5, 2013 NPRC Petition at 1 (seeking “limited discovery”); Aug. 27, 2013 Decision at 3 (allowing “limited discovery”). In its motion to compel, NPRC asserts that its “discovery is narrowly tailored to matters raised in TRRC’s December 17, 2012 Supplemental Application and relevant to the Board’s determination of the public demand and need for the proposed rail line and TRRC’s financial fitness.” NPRC Motion to Compel at 1. That is simply not the case. NPRC served 126 discovery requests—consisting of 66 interrogatories (attached as Appendix A to public version of NPRC’s Motion) and 60 document requests (attached as Appendix B to public version of NPRC’s Motion)—on TRRC and did not even limit the time frame for response. In contrast, TRRC served NPRC with 6 discovery requests – one interrogatory and five document requests.<sup>1</sup>

To put NPRC’s 66 interrogatories into perspective, under the Federal Rules of Civil Procedure a party must obtain a court’s permission in order to serve more than 25 interrogatories on another party. *See* Fed. R. Civ. P. 33(a)(1). Further, many of NPRC’s 126 discovery requests were not “narrowly tailored” to the issues in this proceeding. For example, one interrogatory requested TRRC to identify “each person of yours who has access to the computer networks of Arch Coal, Inc., Otter Creek Coal, L.L.C., BNSF Railway Company, TRR Financing, L.L.C., Tongue River Holding Company, L.L.C., Dominion Terminal Associates, or Millennium Bulk Terminals – Longview, L.L.C.” *See* NPRC Interrogatory No. 59 (Appendix A to the public

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<sup>1</sup> *See* Exhibit 1 attached. NPRC agreed to produce documents in its November 12, 2013 response to these requests. However, even though those documents were promised for production in December, NPRC has not yet produced even a single document.

version of NPRC's Motion). As another example, one request for production sought "all documents related to financing the Otter Creek mine, including without limitation, any agreements to finance, provide credit support, debt or equity." *See* NPRC Request for Production No. 9 (Appendix B to public version of NPRC's Motion). A perusal of NPRC's written discovery requests (Appendices A, B to public version of NPRC's Motion) reveals their unreasonably overbroad scope.

The main focus of NPRC's Motion is to compel TRRC to expand the time period of its document production and the pool of individuals from whom TRRC produces documents. Neither request has merit. NPRC's discovery requests did not specify a time period for the document production. In its response, TRRC stated that unless otherwise noted, it would produce documents created or modified on or after June 18, 2012, the date the Board reopened this proceeding.<sup>2</sup> As explained in more detail below, TRRC's time period for production is reasonable. Regarding document custodians, TRRC—a non-operating entity which has no employees of its own<sup>3</sup>—collected and reviewed documents from the several officials at two owners of TRRC's parent, Arch Coal, Inc. ("Arch Coal") and BNSF Railway Company ("BNSF"). These officials are the persons who supplied information for use in connection with the 2012 Tongue River Railroad applications in this proceeding and who are most involved in the TRRC project. As explained in more detail below, TRRC's document collection, review, and production process was reasonable. NPRC appears to argue that because Arch Coal and BNSF

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<sup>2</sup> *See* TRRC's Responses and Objections to NPRC's First Request for Production of Documents dated Oct. 7, 2013 at 2 (General Objection No. 4). They are attached as Appendix D to the public version NPRC's Motion.

<sup>3</sup> *See* TRRC's Responses and Objections to NPRC's First Set of Interrogatories dated Oct. 7, 2013 at 39 (Response to Interrogatory 65). They are attached as Appendix C to the public version of NPRC's Motion.

are owners of the entity that owns TRRC, NPRC should be entitled to discovery from the files of Arch Coal and BNSF employees who do no work relating to, or are not primarily responsible for advancing, the Tongue River Railroad project. NPRC's position is unreasonable and should be rejected.

NPRC also seeks to compel TRRC to produce documents in response to seven document requests that TRRC objected to in their entirety and to provide "complete" answers to several specified interrogatories. As explained below, none of NPRC's challenges to TRRC's discovery responses is valid.<sup>4</sup> TRRC has satisfied its written discovery obligations and agreed to make the four officials sought to be deposed by NPRC available for such depositions.

## **I. BACKGROUND**

On December 17, 2012, TRRC filed its Supplemental Application for Construction and Operation Authority (the "TRRC Application") pursuant to 49 U.S.C. 10901, which provides that the Board "shall issue a certificate" unless it "finds that such activities are inconsistent with the public convenience and necessity."<sup>5</sup> The Application demonstrated that the TRRC line will meet a public need and do so in a manner that is sensitive to environmental impacts. NPRC, endeavoring to overcome the statutory presumption in favor of construction in Section 10901 filed an extensive set of Comments on the Application on April 2, 2013, totaling 60 pages of text with over 1,000 pages of exhibits. Other parties also filed comments. Notably, neither NPRC nor any other party suggested the need for discovery in their Comments, which addressed at length all aspects of the TRRC Application.

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<sup>4</sup> At times, NPRC makes broad, sweeping statements that the Board should order TRRC and two of its owners "to respond fully to [NPRC's] discovery requests." NPRC Motion at 23. These general statements cannot be read to broaden NPRC's Motion to apply to discovery requests that are not specifically identified in NPRC's Motion.

<sup>5</sup> As the Application states, BNSF will operate the TRRC line once constructed.

**A. NPRC Requested and the Board Allowed Only “Limited Discovery”**

On June 5, 2013, NPRC petitioned the Board to revise the procedural schedule to allow six months for “limited discovery in this matter.” June 5, 2013 NPRC Petition at 1. NPRC claimed that discovery was necessary because it had just learned that “TRRC is going to interject expert testimony to support its application, thus creating significant factual disputes.” June 5, 2013 NPRC Petition at 1. TRRC filed its Reply to Comments on June 7, 2013. The Reply was accompanied by the Statement of Seth Schwartz, TRRC’s expert witness on the market for coal who submitted a statement in response to expert reports submitted by NPRC in its Comments. Mr. Schwartz’s Statement addressed in detail the coal markets available for the coal that would be transported on the TRRC line in response to the claims of NPRC that no such markets will exist.

On June 25, 2013, TRRC filed a reply to NPRC’s petition for discovery, arguing that no discovery was necessary because Mr. Schwartz’s testimony regarding coal markets was based entirely on numerous cited public materials concerning the coal transportation market. On July 2, 2013, NPRC filed a Surreply in which it purported to seek even broader discovery than had been described in its June 5 Petition. This broader discovery pertained to the financing of the project; BNSF’s commitment to the TRRC line; and Arch Coal’s coal use projections. NPRC Surreply at 13-14.

In its August 27, 2013 Decision, the Board granted NPRC’s petition for discovery “in part” and allowed for “limited discovery.” The Board’s decision provided a 90-day period for discovery,<sup>6</sup> rather than the six months requested by NPRC, given that “some of the evidence the

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<sup>6</sup> At the request of the parties to allow additional time for TRRC’s response to the extensive discovery that NPRC had served, the Board subsequently extended the 90-day period to “January 31, 2014 or 45 days after the Board rules on any motion to compel, whichever date comes later.” November 22, 2013 Decision at 2.

NPRC Parties seek is publicly available and . . . these commenters have already submitted a [Surreply] to TRRC’s June 7 filing.” Aug. 27, 2013 Decision at 3.<sup>7</sup>

**B. NPRC’s Discovery Requests and TRRC’s Responses**

On September 12 and 13, 2013, NPRC served 66 interrogatories and 60 document requests on TRRC.<sup>8</sup> Neither NPRC’s interrogatories nor NPRC’s document requests specified the time period for which NPRC was requesting the information or documents.

On October 7, 2013, TRRC served its responses and objections to NPRC’s interrogatories and document requests. Subject to objections, TRRC provided substantive responses to 53 of NPRC’s 66 interrogatories,<sup>9</sup> and TRRC agreed to produce documents in response (or stated no responsive documents existed) to 41 of NPRC’s 60 document requests.<sup>10</sup> In its discovery responses, TRRC stated that the time period for its document production would be documents created or modified on or after June 18, 2012, the date the Board reopened this proceeding.<sup>11</sup>

**C. TRRC’s Collection, Review, and Production of Documents**

TRRC, which is proposing to construct a rail line that would be operated by BNSF, has officers and directors but no employees of its own at this stage. *See* TRRC’s Resp. to Interrog.

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<sup>7</sup> NPRC incorrectly suggests that the Board “recognized” four issues raised by NPRC as legitimate topics for discovery. *See* NPRC Motion at 6. The Board did no such thing. In the background section of its Decision, the Board simply identified the issues that NPRC claimed to need discovery on in NPRC’s pleadings. *See* Aug. 27, 2013 Decision at 2-3.

<sup>8</sup> *See* Appendices A, B to public version of NPRC’s Motion.

<sup>9</sup> TRRC objected and did not provide a substantive response to Interrogatory Nos. 11, 12, 24, 25, 26, 40, 41, 43, 59, 60, 62, 63, 64. *See* Appendix C to public version of NPRC Motion.

<sup>10</sup> TRRC objected and did not agree to produce documents in response to RFP Nos. 5, 9, 18, 22-27, 30-31, 42-49. *See* Appendix D to public version of NPRC Motion.

<sup>11</sup> *See* TRRC Resps. to NPRC’s Interrogs. at Gen. Objection No. 4 (Appendix C to public version of NPRC Motion); TRRC Resps. to NPRC’s Doc. Reqs. at Gen. Objection No. 4 (Appendix D to public version of NPRC Motion).

No. 65 (Appendix C to public version of NPRC Motion). Rather, certain employees of BNSF and Arch Coal have supplied information for use in connection with the TRRC project.

Accordingly, in order to respond to TRRC's discovery requests, TRRC collected information and documents from those key individuals at BNSF and Arch Coal to respond to NPRC's discovery requests.

Certain TRRC interrogatory responses were verified by Andrew Blumenfeld, Vice President Analysis and Strategy, Arch Coal, Inc., as the responses pertain to Arch Coal, Inc. acting as part owner of the parent company of TRRC, and certain interrogatory responses were verified by Scott Castleberry, Director Economic Analysis, Coal Marketing for BNSF Railway Company, as the responses pertain to BNSF acting as part owner of the parent company of TRRC.<sup>12</sup>

TRRC collected potentially responsive documents from eleven persons at BNSF and Arch Coal, including Mr. Blumenfeld, Mr. Castleberry, and other officials who have supplied information for use in connection with the TRRC project. Those eleven officials are:

- Stevan B. Bobb, former President of the Tongue River Railroad Company, Inc. and Group Vice President, Coal Marketing for BNSF;
- Stephen Branscum, former President of the Tongue River Railroad Company, Inc. and Group Vice President, Coal Marketing for BNSF<sup>13</sup>;
- Scott Castleberry, Director Economic Analysis, Coal Marketing for BNSF;
- Two BNSF employees with responsibilities relating to the engineering of the Tongue River rail line;
- Two BNSF employees with responsibilities relating to the preparation of the income statement for Tongue River railroad (Exhibit G to the Application);

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<sup>12</sup> See December 6, 2013 letter from TRRC attorney David Coburn including Blumenfeld and Castleberry verifications, attached as Exhibit 2 hereto.

<sup>13</sup> Mr. Branscum very recently retired from BNSF and TRRC. Mr. George Duggan, Group Vice President, Coal Marketing for BNSF, is set to be named President of TRRC.

- Two BNSF employees who communicated with electric utilities, Montana associations, and politicians regarding TRRC's 2012 Applications;
- Andrew Blumenfeld, Vice President Analysis and Strategy, Arch Coal, Inc., and;
- William M. Rowlands, President of Otter Creek Coal, LLC, an operating subsidiary of Arch Coal.

These individuals provided physical and electronic documents to TRRC's counsel. Arch Coal custodians and some BNSF custodians applied search terms to identify their potentially responsive electronic documents. In accordance with TRRC's objections, TRRC's counsel spent almost 350 hours collecting and then reviewing the collected documents for responsiveness to NPRC's discovery requests, confidentiality, and privilege. This does not include the substantial number of hours that TRRC's counsel spent preparing written responses to NPRC's discovery requests. Based on this review, TRRC produced 342 documents in TIFF image format. TRRC's production totaled 6,462 pages. TRRC also produced 11 Excel spreadsheets in native file format.

In addition to responding to interrogatories and producing documents, TRRC also agreed to make available for deposition the four people (Messrs. Bobb, Castleberry, Blumenfeld and Rowlands) that NPRC requested to depose. These depositions, which had been previously scheduled, will be re-scheduled after NPRC's Motion is resolved.

#### **D. Meet-and-Confer Process**

From October 2013 through January 13, 2014, counsel for TRRC and NPRC engaged in dialogue in an attempt to narrow and resolve discovery disputes between the parties. On January 13, 2014, NPRC informed TRRC that NPRC had rejected TRRC's most recent offer to resolve outstanding discovery disputes and that NPRC would be filing its motion to compel.

## II. ARGUMENT

### A. NPRC is Only Entitled to “Limited Discovery”

While NPRC claims at one point that it sought “limited discovery,” *see* NPRC Motion at 6, its Motion to Compel for the most part reads otherwise, suggesting that NPRC believes it has virtually unlimited rights to seek discovery from TRRC and two owners of its parent, BNSF and Arch Coal. Quoting 49 C.F.R. § 1114.21(a)(1), NPRC states that it is “entitled to discovery ‘regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding.’” NPRC Motion at 11. While NPRC acknowledges that the law requires a “balancing of the relevance of the information sought against the burden of producing that information,”<sup>14</sup> it dismisses the burden, claiming it “should be minor for companies that are apparently ‘prepared to spend considerable resources’ to construct the Tongue River Railroad.”<sup>15</sup>

NPRC is wrong; by its measure there would be virtually no limit on discovery merely because of the high cost of building a rail line. As explained below, TRRC has already undertaken a significant effort to respond to NPRC’s onerous discovery requests. The substantial additional burden that would be imposed on TRRC if NPRC’s motion to compel were granted vastly outweighs the relevance of the information sought, particularly in light of the fact that the Board has authorized “limited discovery” here. Nowhere does NPRC grapple with the

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<sup>14</sup> NPRC Motion at 12 (citing *Reasonableness of BNSF Ry. Co. Coal Dust Mitigation Tariff Provisions*, STB Finance Docket No. 35557, 2012 WL 278133 at \*4 (June 21, 2012)).

<sup>15</sup> NPRC Motion at 12. With respect to burden, NPRC also asserts that it anticipates that the TRRC Parties will argue that the burden placed on Arch Coal and BNSF to respond to discovery is overly burdensome as they are nonparties to this proceeding. *Id.* NPRC is mistaken. As explained above, to respond to NPRC’s discovery requests TRRC already has searched the files of eleven individuals at Arch Coal and BNSF who have supplied information for use in connection with the TRRC project. TRRC’s burden argument is not focused on the non-party status of BNSF and Arch Coal. Instead, it is focused on the burden associated with vastly expanding the temporal scope of the production and expanding the pool of individuals from whom potentially responsive information must be collected to those persons not responsible to any meaningful degree for the TRRC project.

fact that the Board authorized only “limited discovery” over a much shorter time period than NPRC requested because “some of the evidence the NPRC Parties seek is publicly available and . . . these commenters have already submitted a response to TRRC’s June 7 filing.” Aug. 27, 2013 Decision at 3. Nor does NPRC acknowledge that discovery is unusual in rail construction proceedings.

**B. The Board Should Deny NPRC’s Request to Compel TRRC to Produce Documents Created on or After July 1, 2010 (Two Years Earlier than the June 18, 2012 Start Date Used by TRRC) in Response to Coal Market Requests.**

As noted above, NPRC’s document requests were not constrained by any time period. In order to narrow NPRC’s document requests to a reasonable time frame, TRRC stated in its October 7, 2013 response that it would produce documents created or modified on or after June 18, 2012, the date of the Board’s decision reopening this proceeding.<sup>16</sup> In its Motion to Compel, NPRC argues that TRRC should be compelled to produce documents created or modified after July 1, 2010 with respect to RFP Nos. 1-4, 6-8, 11-13, 15-17, 19-21, and 28-29. NPRC summarizes these document requests as “relat[ing] to demand, markets, and competitiveness of Otter Creek coal; market conditions that could delay or prevent development of Otter Creek or reduce production levels below capacity; export terminal capacity; and revenue projections for the Tongue River Railroad.” NPRC Motion at 13. There is already substantial information, including expert reports, in the parties’ comments regarding the likely market for coal that will be transported by the Tongue River Railroad when it is constructed several years from now. In addition, TRRC has produced documents that were created or modified on or after June 18, 2012 regarding the Otter Creek and Montana Powder River Basin (“PRB”) coal market from internal BNSF and Arch Coal files in response to NPRC’s discovery requests.

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<sup>16</sup> Oct. 7, 2013 TRRC Resp. to NPRC Doc. Requests at Gen. Objection No. 4 (Appendix D to the public version of NPRC’s Motion).

NPRC's request to push back the start date for production to July 1, 2010 and, thereby, require TRRC to produce an additional two years of documents responsive to the coal market requests should be denied as being unduly burdensome. The burden associated with such production would far outweigh the relevance of the earlier information. Given the volatility of coal market, internal information dating back to July 2010 is too outdated to have much relevance to the question whether there is a need for the TRRC project, which is the core question that NPRC seeks to explore. The Tongue River rail line will be built if, as the owners believe, there will be a demand for Otter Creek coal in the coming years. Market forecasts and related documents from 2010 through June 2012 are not likely to be relevant to any issue that the Board needs to address in this case.

NPRC claims it needs to expand the time period in part because TRRC did not produce as many documents as NPRC expected regarding demand for the coal. *See* NPRC Motion at 13-15. In fact, as NPRC acknowledges, TRRC produced Arch Coal's own highly confidential quarterly forecasts of the domestic market for coal and export market for coal prepared from mid-2012 through the most recent 2013 quarter available at the time of production. Despite receiving Arch Coal's internal projections of coal demand, NPRC complains that it did not receive documents discussing or interpreting those coal forecasts or more emails discussing the coal market.<sup>17</sup> However, Arch Coal's internal coal demand projections are self-explanatory (*see, e.g.* sample Arch Coal domestic coal demand projection and export coal demand projection attached as

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<sup>17</sup> NPRC requests the Board to require TRRC to produce a privilege log to the extent that TRRC is withholding coal demand documents on the basis of privilege. NPRC Motion at 15 n.6. TRRC did not withhold such documents on the basis of privilege so NPRC's request is moot. In any event, "the Board does not routinely require the production of a privilege log," *Ballard Terminal Railroad Company, L.L.C.—Acquis. & Op. Exemption—Woodinville Subdiv.*, FD 35731, 2013 WL 4498193, at \*4 (STB served Aug. 22, 2013), and NPRC's Motion does not explain why a privilege log is warranted in this case.

Exhibit 3). Moreover, as explained above, TRRC followed a reasonable discovery protocol in collecting, reviewing and producing documents responsive to unobjected to requests, and no documents discussing or interpreting the coal forecasts were located in the review.

Requiring TRRC to collect, review and produce coal demand documents from the earlier time period July 1, 2010 through June 17, 2012 would be very burdensome. As explained above, TRRC's counsel spent almost 350 hours collecting and then reviewing for responsiveness, privilege, and confidentiality documents that were created or modified during a 16 month period from June 18, 2012 through October 2013 (when TRRC collected the documents). It would likely require TRRC counsel to expend at least that number of hours to collect and review documents created or modified during an additional 24-month period. This significant burden outweighs the limited relevance the documents from that earlier time period would have given the volatility of the coal market in recent years.

NPRC also claims that relevant documents are likely to exist back to July 1, 2010 because that "period represents Northern Plains' conservative estimate of the period when Arch Coal and BNSF analyzed market conditions and committed to invest in the proposed line." NPRC Motion at 15. Setting aside the limited relevance of any such 2010 or 2011 analyses for the reasons described above, the Board should not allow NPRC to seek an expanded time period as a matter of fairness. NPRC could have estimated when Arch Coal and BNSF committed to invest in the proposed line before serving its September 2013 discovery requests. Indeed, Arch Coal and BNSF's July 1, 2011 investment in the Tongue River railroad was a matter of public knowledge when it happened.<sup>18</sup> However, NPRC did not propose this July 1, 2010 start date in

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<sup>18</sup> See, e.g., Amended Four Month Quarterly Report of Tongue River Railroad Company, Inc. (filed in this docket August 29, 2011). This document is attached as Exhibit 4.

its discovery requests, nor did it propose that start date when it began to meet-and-confer with BNSF following service of BNSF's October 7 discovery responses. Nor did it even propound a document request or interrogatory focused on, or inquiring about, the decision by BNSF and Arch Coal to invest in the TRRC project. It is too late now for NPRC to push back the date of the responses or open new lines of inquiry for its written discovery.

**C. The Board Should Deny NPRC's Request That TRRC Collect Documents from Additional Custodians for Documents in Response to NPRC's Coal Market Requests.**

As explained above, TRRC collected electronic and paper documents from eleven BNSF and Arch Coal officials who have supplied information for use in connection with the TRRC project. Nevertheless, NPRC seeks to compel TRRC to produce documents from the files of other unspecified "individuals or departments likely to have responsive information" relating to the coal market requests identified in the preceding section. *See* NPRC Motion at 16.<sup>19</sup> While NPRC claims it cannot identify particular employees because "TRRC Parties would not identify anyone who was or is responsible for relevant matters at Arch Coal and BNSF,"<sup>20</sup> NPRC suggests that Arch Coal employees whose names appear on some produced emails may be appropriate additional custodians because they appear to have some responsibility for assessing PRB coal demand. NPRC Motion at 14. In fact, as Mr. Blumenfeld testifies in the accompanying declaration, the Arch Coal employees whose names appear on those emails are not likely to have discrete documents responsive to the coal market requests other than those

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<sup>19</sup> Those coal market requests are RFP Nos. 1-4, 6-8, 11-13, 15-17, 19-21, and 28-29. *See* NPRC Motion at 13.

<sup>20</sup> NPRC Motion at 15. As explained below, contrary to NPRC's claims, BNSF and Arch Coal fully responded to NPRC's interrogatories.

already produced from the files of others.<sup>21</sup> Further, Andy Blumenfeld, whose files have already been searched and who will be deposed by NPRC counsel, is the Arch Coal employee most likely to have documents responsive to those coal market requests. *See* Blumenfeld Declaration at 2.

NPRC's reliance on *Entergy Servs., Inc.*, STB Docket No. 42104, 2008 WL 2091414 (S.T.B. served May 19, 2008) to support its request to compel TRRC to expand the number of custodians whose files will be searched for coal market documents is misplaced. In that case, the Board ordered Union Pacific to search for certain categories of requested records in the files of "individual employees or departments likely to have responsive information." *Id.* at \*4. This is precisely what TRRC has done here. TRRC identified eleven BNSF and Arch Coal employees who it believed were likely to have responsive information due to the fact that they are the employees at BNSF and Arch Coal who have supplied information for use in connection with the TRRC project. The Board's decision in *Entergy Servs., Inc.*, does not support NPRC's claim that TRRC must go further and engage in a burdensome search of records of additional BNSF and Arch Coal employees who have not been involved with the Tongue River Railroad project.

**D. The Board Should Deny NPRC's Request to Compel TRRC to Produce Documents in Response to Several Document Requests that TRRC Objected to in their Entirety.**

NPRC seeks to compel TRRC to produce documents in response to seven document requests to which TRRC made outright objections. *See* NPRC Motion at 16-19 (seeking to compel production of documents responsive to RFP Nos. 18, 22, 31, and 46-49). For the reasons set forth below, NPRC's motion as to these requests should be denied.

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<sup>21</sup> *See* Declaration of Andrew Blumenfeld dated January 31, 2014 at 1-2 (hereafter "Blumenfeld Declaration").

**1. RFP No. 18 (all documents related to past, present, or future estimated costs of shipping Otter Creek coal to domestic and international customers)**

NPRC claims that estimated shipping costs are relevant “because it is a critical aspect of determining where Otter Creek coal may compete, if at all.” NPRC Motion at 16. TRRC stands by its objection that RFP No. 18 is overly broad, unduly burdensome and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence concerning TRRC’s December 2012 Application because such shipping costs in the abstract have little to no relevance in evaluating the competitiveness of Otter Creek coal. Further, since TRRC agreed to produce documents responsive to other NPRC requests that more directly sought information relating to the competitiveness of Otter Creek coal (*see, e.g.*, response to NPRC RFP Nos. 1-4), the burden of producing documents responsive to RFP No. 18 outweighs the minimal relevance of documents responsive to this request.

**2. RFP No. 22 (all documents related to the competitiveness of coal as affected by natural gas, environmental regulations on coal, and the decommissioning of power plants)**

NPRC’s RFP No. 22 is so broad that it seeks documents that relate to the competitiveness of *any* coal (not just coal to be served by the Tongue River Railroad) as affected by natural gas, etc. For example, it seeks the production of documents from Arch Coal custodians related to the competitiveness of Arch Coal’s Appalachian coal as affected by natural gas, environmental regulations, and the decommissioning of power plants. Information regarding Appalachian coal has no relevance to this proceeding and would be very burdensome to collect, review and produce. Further, even responsive information regarding PRB coal would have little to no relevance in this proceeding because there is no dispute between NPRC and TRRC as to whether the competitiveness of PRB coal is affected by natural gas, environmental regulations, and the decommissioning of power plants. TRRC agrees that those factors do affect the competitiveness

of PRB coal. Seth Schwartz, TRRC's expert, took those factors into account in analyzing the market for coal that would be transported by the Tongue River Railroad, including Otter Creek coal.<sup>22</sup>

NPRC now claims that information responsive to this request is relevant to the issue whether coal transported by the Tongue River Railroad "will be exported at all and, if so, where it will be exported." NPRC Motion at 17. It is a stretch to claim that this request seeks information relevant to the export of coal transported by the Tongue River Railroad. In any event, TRRC agreed to produce documents in response to NPRC's requests directly relating to the export of such coal (*see* TRRC's Response to RFPs 1, 3, 4, 13, 19, 20, 29). Any negligible relevance of information in documents responsive to this request would be far outweighed by the burden associated with collecting and reviewing such documents. The Board should deny NPRC's motion to compel TRRC to produce documents responsive to this request.

**3. RFP No. 31 (all documents related to projected revenue, expenses, and profits for the Otter Creek mine)**

NPRC claims it seeks *all documents* related to Arch Coal's projected revenues, expenses, and profits for the Otter Creek mine in order to assist in determining "whether the mine [will open] and, if it does open, whether it is likely to produce coal at levels sufficient to sustain the Tongue River Railroad." NPRC Motion at 17. It also claims this information is relevant to the issue of "Arch Coal's willingness to finance TRRC . . ." *Id.* NPRC's claims are not well-taken. This proceeding involves a rail construction application, not a mine permit application. The proposal to develop the Otter Creek mine is not under review by the Board. Thus, TRRC appropriately objected to producing information from the files of Arch Coal that do not relate directly to the TRRC project and the issues before the Board.

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<sup>22</sup> *See, e.g.* Verified Statement of Seth Schwartz dated June 6, 2013 at 2-17. This verified statement is included with TRRC's Reply Comments filed in this docket on June 7, 2013.

Further, in response to other requests, TRRC has produced information relating to the issues that NPRC claims this document request is designed to address. TRRC has produced Otter Creek mine tonnage forecasts in response to NPRC's RFP 11 and it has provided TRRC income statements in Exhibit G which show the expected income of the railroad during the first two years of operation. Given the marginal relevance of the additional Otter Creek mine information NPRC seeks in RPF 31, the burden of producing it, and the fact that NPRC already has received information more directly related to the issues they claim this request is designed to address, the Board should deny NPRC's request to compel TRRC to respond to RFP No. 31.

**4. RFP No. 46 (all documents related to policies and procedures for authorizing expenditures of TRRC's funds)**

NPRC claims it seeks *all documents related to* policies and procedures for authorizing expenditures of TRRC's funds because these policies and procedures are relevant for determining the circumstances under which the Tongue River Railroad will or will not be constructed and the responsible individuals. NPRC Motion at 18. Again, this request seeks information that is, at most, only tangentially related to the issues identified by NPRC. The marginal relevance of the information responsive to this request is vastly outweighed by the burden associated with producing responsive documents, particularly given the breadth of the request which seeks "all documents" relating to the specified policies and procedures. Moreover, NPRC is free to inquire about these matters from the officials it seeks to depose.

Further, TRRC already provided information regarding the policies and procedures for authorizing expenditures of TRRC's funds in response to other NPRC requests. Specifically, TRRC has produced an agreement between Arch Coal, BNSF, TRR Financing, LLC, and TRRC (hereafter "LLC Agreement") that, among other things, contains responsive policies and

procedures.<sup>23</sup> Further, TRRC already has addressed the question of who has responsibility for securing financing for construction of the Tongue River in response to another more direct question asking for the identify of such persons.<sup>24</sup> Nevertheless, to eliminate this dispute, TRRC is willing to produce BNSF's policies and procedures for authorizing expenditures of funds that would apply to the Tongue River Railroad project.

**5. RFP No. 47 (all documents related to policies or procedures for requesting additional funds or capital for TRRC from TRRC's parent company or the owners of TRRC's parent)**

NPRC claims it seeks *all documents related to* policies and procedures for requesting additional funds or capital for TRRC from TRRC's parent company or owners of TRRC's parent because such documents supposedly are relevant to the "limitations TRRC's owners place on additional financing for the Tongue River Railroad." NPRC Motion at 18. It is unclear how any such limitations are relevant to the issues in this proceeding. In any event, any marginal relevance of the information responsive to this request is outweighed by the burden associated with producing responsive documents, particularly given the breadth of the request which seeks "all documents" relating to policies and procedures and the fact that TRRC already has produced the LLC Agreement described above. For these reasons, the Board should deny NPRC's request to compel TRRC to respond to RFP No. 47.

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<sup>23</sup> See LLC Agreement (Exhibit A to Highly Confidential version of NPRC's Motion). NPRC requests the Board to compel TRRC to produce an unredacted version of the LLC Agreement and other documents that were similarly redacted without a claim of privilege. See NPRC Motion at 3 n.2. In the LLC Agreement and a limited number of other documents, TRRC redacted certain nonresponsive, highly sensitive information, such as the fee that BNSF receives for providing certain engineering services for the Tongue River Railroad. Given the sensitivity of this information and the fact that it is not responsive to NPRC's requests (it just happens to appear in a document that has other information responsive to the requests), there is no reason to require TRRC to produce unredacted versions of these documents.

<sup>24</sup> See TRRC Response to Int. 18 (Appendix C to public version of NPRC's Motion). TRRC explained that no one has yet been assigned that responsibility given that the construction will not begin until sometime in the future.

**6. RFP No. 48 (all documents related to funds or capital TRRC requested or received from TRRC's parent company or the owners of TRRC's parent)**

NPRC asserts that it seeks *all documents relating to* funds or capital TRRC requested or received from TRRC's parent company or the owners of TRRC's parent because they are relevant to "the commitment of TRRC's owners to the proposed rail line." NPRC Motion at 18. The commitment of the owners to the proposed rail line has been amply demonstrated by the significant investment they have made in the project, in supporting the application, and in responding to NPRC's massive discovery requests. Any marginal relevance that the information responsive to this request has relating to the commitment of the owners is vastly outweighed by the burden associated with producing responsive documents, particularly given the breadth of the request which seeks "all documents" relating to policies and procedures. For these reasons, the Board should deny NPRC's request to compel TRRC to respond to RFP No. 48.

**7. RFP No. 49 (all documents related to actions TRRC is prohibited from taking without authorization from TRRC's parent company or the owners of TRRC's parent)**

NPRC claims it seeks *all documents related to* actions TRRC is prohibited from taking without authorization from TRRC's parent company or owners of TRRC's parent because such documents supposedly are relevant to "limitations TRRC's owners have placed on TRRC that would prevent the Tongue River Railroad project from moving forward." NPRC Motion at 19. Any marginal relevance that the information responsive to this request would have on whether the rail project would move forward is outweighed by the burden associated with producing responsive documents, particularly given the breadth of the request which seeks "all documents" and the fact that TRRC already has produced the LLC Agreement described above which sets forth, among other things, the TRRC actions that require approval from TRRC's parent company

or the owners of TRRC's parent.<sup>25</sup> For these reasons, the Board should deny NPRC's request to compel TRRC to respond to RFP No. 48.<sup>26</sup>

**E. The Board Should Deny TRRC's Request to Compel TRRC to Produce Information about PRB Coal Generally in Response to Certain Coal Market Requests.**

This proceeding seeks the Board's authorization to construct and operate the Tongue River Railroad, a railroad that will transport coal Otter Creek coal and perhaps other Ashland area coal from the Montana Powder River Basin. The Tongue River Railroad will not transport Wyoming Powder River Basin coal. Nevertheless, several of NPRC's discovery requests relating to the market for coal were not limited to seeking information about coal that would be transported by the Tongue River Railroad. Rather these requests more broadly requested the production of information about Powder River Basin coal generally, including Wyoming Powder River Basin coal. TRRC objected to these requests as being overbroad to the extent they were seeking information about coal that would not be transported by the Tongue River Railroad but TRRC agreed to produce responsive, non-privileged documents regarding Montana PRB coal generally and Otter Creek coal specifically.<sup>27</sup>

NPRC moves to compel TRRC to produce information about Wyoming PRB coal as well as Montana PRB coal in response to RFP Nos. 1, 4, 16, and 17. RFP No. 1 seeks "all documents describing or analyzing domestic or international demand for Powder River Basin (PRB) coal,

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<sup>25</sup> See LLC Agreement, Article 6.1(c) (Exhibit A to Highly Confidential version of NPRC's Motion).

<sup>26</sup> In this section of its motion, NPRC also claims that TRRC asked the Board to delay action for budgeting reasons on the Environmental Impact Statement being prepared by the Board's Office of Environmental Analysis and a third party contractor. NPRC Motion at 19. While NPRC claims that this request casts doubt on the willingness of the TRRC owners to fund the project, it does nothing of the kind. The brief delay referenced was merely to allow time for an updated budgeting authorization to be approved, which it was.

<sup>27</sup> See TRRC Response to RFP 4, 16, 17 (Appendix D to public version of NPRC's Motion).

including without limitation Otter Creek coal.”<sup>28</sup> RFP No. 4 seeks “all documents related to the ability of PRB coal, including Otter Creek coal, to compete on a delivered price basis with Indonesian and Australian thermal coal in China, South Korea or Japan.” RFP No. 16 seeks “all documents related to any power plant that places limitations on or rejects coal from the PRB due to its sodium content.” RFP No. 17 seeks “all documents related to limits on the marketability of PRB coal due to its sodium content.”

TRRC has produced documents responsive to RFP Nos. 4, 16, and 17 that relate to Montana’s Powder River Basin coal or Otter Creek coal specifically. Given that Wyoming PRB coal will not be transported by the Tongue River Railroad, TRRC believes that documents regarding Wyoming PRB coal are of limited relevance with respect to the coal market issues in this case. Moreover, the limited relevance of Wyoming PRB coal information is outweighed by the burden of requiring the production of such information. The Board should deny NPRC’s request to compel TRRC to produce information about Wyoming PRB coal or PRB coal generally in response to RFP Nos. 4, 16, 17.

**F. The Board Should Deny NPRC’s Broad, Vague Request for an Order Compelling TRRC to Produce “Other Responsive Documents.”**

In Part I(D) of its Motion, NPRC asserts that “[t]he limited documents produced to date demonstrate that other responsive documents exist.” NPRC Motion at 20. For example, NPRC cites to a reference in {

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<sup>28</sup> With respect to RFP No. 1, there is no dispute between the parties since TRRC agreed to produce documents regarding PRB coal generally in response to that request. *See* TRRC Response to RFP No. 1 (TRRC will produce non-privileged documents . . . “describing or analyzing domestic or international demand for Powder River Basin (PRB) coal generally or demand for a particular type of PRB coal that will be served by the Tongue River Railroad . . .”) (Appendix D to public version of NPRC’s Motion). Consistent with this response, TRRC will produce documents relating to PRB coal generally, including Wyoming PRB coal, that are responsive to RFP No. 1.

}. NPRC also infers the existence of other purportedly responsive documents based on statements in documents in TRRC's production. Based on this "evidence", NPRC seeks an order from the Board compelling TRRC "to produce these and other responsive and relevant documents." NPRC Motion at 21.

First, NPRC's assertion that "other responsive documents exist" and should have been in the production is mistaken. Some of the supposedly "missing" documents are not within the scope of the documents that TRRC agreed to produce and it is far from clear that others even exist. For example, TRRC should not have expected to see a pre-2011 { } because it predates the June 18, 2012 start date for TRRC's production.

In any event, the {

} -- has no

bearing on any issues in this proceeding.

NPRC also points to a statement in a produced document that {

} as supposed evidence that there must be a written marketing analysis relating to that tonnage figure. However, the statement does not cite to any written marketing analysis and there is no reason to conclude that one even exists. Similarly, NPRC points to cited sources in a PowerPoint presentation and complains that the sources themselves were not produced along with the presentation. There is no reason to believe the author of the PowerPoint kept a copy of the cited sources after preparing the PowerPoint.

In addition, NPRC's reasoning is based on faulty logic. A producing party identifies the individuals from whom it will collect documents, reviews the collected documents for responsiveness and privilege, and produces non-privileged responsive documents. There is no

obligation on the part of the producing party to review the produced documents to determine whether they reference other documents and then confirm any referenced documents have themselves been collected and produced. Otherwise, a party's document collection, review and production process would never end. Yet, in the "limited discovery" context of this proceeding, that is exactly what NPRC is arguing TRRC should have done. NPRC refers to an {  
 } as evidence that "significant amounts of information have been withheld." NPRC Motion at 20. The presentation, which is Exhibit F to the highly confidential version of NPRC's Motion, cites information sources and makes various statements. NPRC complains that TRRC's production is inadequate because TRRC has not produced all cited information sources or uncited supporting documentation, which NPRC assumes exists, for every statement in the PowerPoint. Under NPRC's faulty reasoning, TRRC must collect and produce these documents even if they are not contained in the files of the custodians searched by TRRC. No party has such a discovery obligation, particularly in a setting where only "limited discovery" has been allowed.

For the reasons explained above, TRRC's document collection, review, and production process was reasonable. There is no basis to make TRRC search for and produce additional documents merely because they are referenced in a produced document or because NPRC surmises that a document exists.

**G. TRRC Has Adequately Responded to Interrogatory Numbers 3-10, 42, and 49.**

NPRC seeks an order overruling TRRC's objections regarding Interrogatory Nos. 3-10, 42, and 49 and compelling TRRC to provide "complete and non-evasive answers" to these interrogatories. NPRC Motion at 21. In fact, TRRC has provided substantive responses to every

one of these interrogatories. As a result and for the reasons stated below, the Board should deny NPRC's request.

**1. Interrogatory Nos. 3-10 (seeking the identity of persons with various responsibilities relating to Otter Creek Coal or the Tongue River Railroad)**

NPRC's Interrogatory Nos. 3-10 seek the identity of persons with various responsibilities relating to Otter Creek Coal or the Tongue River Railroad. Subject to objections, TRRC responded to each of these interrogatories. In response to Interrogatories Nos. 3-5, TRRC provided the name of a person at Arch Coal or BNSF with responsibilities relating to the specified activities.<sup>29</sup> Nevertheless, NPRC claims that TRRC's responses are deficient because TRRC did not use the word "responsible." *See* NPRC Motion at 13. The Board should reject NPRC's quibbling. TRRC adequately identified individuals in response to Interrogatory Nos. 3, 4, 5.

In response to Interrogatory Nos. 6-10, TRRC explained that because it will be years before the Otter Creek mine opens, no one yet has the responsibility to engage in the specified activities.<sup>30</sup> The Board should deny NPRC's motion to compel with respect to these interrogatories since TRRC has already provided a substantive response to each of them and all of those responses were verified by Mr. Blumenfeld, an Arch Coal employee. *See* Exhibit 2.

**2. Interrogatory No. 42 (asking TRRC to identify all documents relating to the possibility of selling the Otter Creek mine)**

In Interrogatory No. 42, NPRC seeks the identity of all documents relating to the possibility of selling the Otter Creek mine. TRRC objected to this request on relevance and burden grounds but stated it is not aware of any documents or communications relating to the

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<sup>29</sup> TRRC Responses to Int. Nos. 3-5 at 7-8 (Appendix C to public version of NPRC's Motion).

<sup>30</sup> TRRC Responses to Int. Nos. 6-10 at 8-13 (Appendix C to public version of NPRC's Motion).

possibility of selling the Otter Creek mine.<sup>31</sup> This interrogatory response was verified by Mr. Blumenfeld of Arch Coal. *See* Exhibit 2. NPRC asks the Board to compel TRRC to provide more complete information based on information contained within the files of Arch Coal and/or BNSF. NPRC Motion at 21-22.

This proceeding involves a rail construction application, not a mine permit application. The Otter Creek mine is not under review here. Interrogatory No. 42 seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence concerning TRRC's December 2012 Application so the Board should deny NPRC's request to compel any further response.

**3. Interrogatory No. 49 (seeking information about actions taken to identify potential customers for Otter Creek coal)**

Interrogatory No. 49 seeks a description “in as much detail as possible [of] anything you have done to identify potential customers for Otter Creek coal.” TRRC's verified response states, *inter alia*, that “no one at TRRC has been assigned the responsibility of identifying potential customers for Otter Creek coal;” “Arch Coal has not identified specific customers for Otter Creek coal” yet; and “Arch Coal is familiar and, in some instances, has business relationships with most of the potential domestic customers for Montana PRB coal in the United States.”<sup>32</sup> In its Motion, NPRC erroneously infers that “[i]f Arch Coal is ‘familiar’ and has ‘business relationships’ with ‘potential domestic customers’ . . . it clearly has done something to identify potential customers for Otter Creek coal.” NPRC Motion at 22. Once again, NPRC's speculative inferences are unfounded. TRRC's response to Interrogatory No. 49 is based on the general knowledge of Mr. Blumenfeld, an Arch Coal employee, rather than on any specific

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<sup>31</sup> TRRC Response to Int. No. 42 (Appendix C to public version of NPRC's Motion).

<sup>32</sup> TRRC Response to Int. No. 49 at 32 (Appendix C to public version of NPRC's Motion).

actions taken by Arch Coal. The fact that Arch Coal is familiar with and has business relationships with entities that could be potential domestic customers for Otter Creek coal does not mean that Arch Coal has taken specific actions to identify potential customers. Arch Coal has not taken specific actions to identify potential customers because it is premature to do so given that the Otter Creek mine and Tongue River Railroad will not be permitted or become operational for several years. *See* Blumenfeld Declaration at 2.<sup>33</sup> TRRC has fully responded to NPRC's Interrogatory No. 49 and that response was verified by an Arch Coal employee. *See* Exhibit 2. NPRC's motion to compel a further response should be denied.

### CONCLUSION

For the reasons stated above, TRRC requests that the Board deny NPRC's Motion to Compel.

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<sup>33</sup> NPRC also incorrectly claims that TRRC's response to Interrogatory No. 49 is evasive in light of TRRC's February 6, 2013 response to an information request in the environmental proceeding. In the February 6, 2013 response, TRRC relied on EIA data to identify the specific utilities to which Montana coal has been transported between 2007 and 2012, and TRRC stated that "Arch anticipates that these same utilities in the Upper Midwest states will remain the largest potential domestic customers for the Otter Creek coal, as well as the Centralia units in Washington, one of which is scheduled to remain operational through 2025." Feb. 6, 2013 Coburn Letter to Blodgett, Attachment at 2. TRRC's February 6, 2013 response does not reflect that any specific actions have been taken to identify potential customers for Otter Creek coal. Indeed, in the same response TRRC stated, consistent with its discovery responses, that "Arch is neither actively marketing the coal to be produced at the Otter Creek mine nor able to do so given the long lead time until the mine and railroad are developed." *Id.* at 1.

Respectfully submitted,



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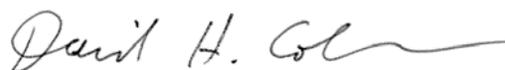
Betty Jo Christian  
David H. Coburn  
Linda S. Stein  
STEPTOE & JOHNSON LLP  
1330 Connecticut Avenue, NW  
Washington, DC 20036  
(202) 429-3000

Attorneys for Applicant  
Tongue River Railroad Company, Inc.

Feb. 3, 2014

**CERTIFICATE OF SERVICE**

I hereby certify that on this third day of February 2014, I have caused a copy of the foregoing Reply to Northern Plains Resource Council's Motion to Compel to be served by first-class mail, postage prepaid, on each of the parties of record in STB Finance Docket No. 30186.

A handwritten signature in cursive script that reads "David H. Coburn". The signature is written in black ink and has a long, sweeping horizontal flourish at the end.

---

David H. Coburn

**VERIFIED STATEMENT  
OF  
ANDREW BLUMENFELD**

**(REDACTED)**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB FINANCE DOCKET NO. 30186**  
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**TONGUE RIVER RAILROAD COMPANY, INC. – RAIL CONSTRUCTION  
AND OPERATION – IN CUSTER, POWDER RIVER AND  
ROSEBUD COUNTIES, MT**

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**VERIFIED STATEMENT OF ANDREW BLUMENFELD  
IN SUPPORT OF TONGUE RIVER RAILROAD COMPANY, INC.’S  
REPLY TO NORTHERN PLAINS RESOURCE COUNCIL’S MOTION TO COMPEL**  
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My name is Andrew Blumenfeld. I am Vice President of Analysis and Strategy for Arch Coal, Inc. (“Arch Coal”). My business address is One CityPlace Drive, Suite 300, St. Louis, MO 63141. I am generally familiar with the Tongue River Railroad project and in my capacity with Arch Coal have the requisite knowledge and experience to address issues related to the Tongue River Railroad project that are the subject to NPRC’s discovery requests. In response to the discovery requests, I have supplied information to Tongue River Railroad Company, Inc. (“TRRC”) regarding the demand for Otter Creek coal. I am familiar with available capacity for exporting coal from U.S. or Canadian export terminals.

I am providing this verified statement in support of TRRC’s Reply to Northern Plains Resource Council’s (“NPRC”) January 13, 2014 Motion to Compel.

On page 14 of its Motion to Compel, NPRC cites to two emails written by me and suggests that the recipients of the emails are other Arch Coal employees who “likely have responsibility for assessing demand for PRB coal, including Otter Creek coal.” The two emails that NPRC cites to are attached as Exhibit B and Exhibit C to the Highly Confidential version of

NPRC's motion. The nine Arch Coal employees whose names appear on those emails ( {

}) are not likely to

have discrete documents relating to market demand for Powder River Basin coal, including Otter Creek coal, other than documents that already exist in my files. Two of the individuals, {

}, are no longer employees of Arch Coal. I am the Arch Coal employee most likely to have documents relating to such market demand.

I reviewed and verified the response to Interrogatory 49 which asks “[d]escribe in as much detail as possible anything you have done to identify potential customers for Otter Creek coal. Where applicable, your response should include, but not be limited to, the identity of potential customers, tonnage, prices, quality of coal, and method and cost of shipment.” The response provides in part “TRRC understands that Arch Coal has not identified specific customers for Otter Creek coal because the Otter Creek mine is not expected to be operational for several years.” The response further explains that Arch Coal is familiar with and has business relationships with entities that are potential domestic or international customers for Otter Creek coal. However, Arch Coal has not taken specific actions to identify those potential customers because it is premature to do so given that the Otter Creek mine and Tongue River Railroad will not be permitted or become operational for several years.

VERIFICATION

I, Andrew Blumenfeld, hereby verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and belief.

  
Andrew Blumenfeld

Dated this 3<sup>rd</sup> day of January, 2014.

# **EXHIBIT 1**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB FINANCE DOCKET NO. 30186**

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**TONGUE RIVER RAILROAD COMPANY, INC. – RAIL CONSTRUCTION  
AND OPERATION – IN CUSTER, POWDER RIVER  
AND ROSEBUD COUNTIES, MT**

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**TONGUE RIVER RAILROAD COMPANY, INC.’S FIRST SET OF  
INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS  
DIRECTED TO NORTHERN PLAINS RESOURCE COUNCIL**

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Applicant Tongue River Railroad Company, Inc. (“TRRC”), pursuant to 49 C.F.R. §§ 1114.26 and 1114.30, submits the following First Set of Interrogatories and Requests for Production of Documents to Northern Plains Resource Council (“NPRC”). TRRC requests that NPRC serve its written objections and answers by November 12, 2013, and that NPRC produce copies of responsive documents at the offices of Steptoe & Johnson LLP on a rolling basis.

TRRC is prepared to cooperate with NPRC to facilitate the expeditious and cost-efficient production of information responsive to these discovery requests. TRRC requests that NPRC promptly contact TRRC’s undersigned counsel should NPRC have any questions regarding the meaning or scope of any of these discovery requests, the nature of the information and documents responsive to them, or the procedure for producing responsive material.

## **DEFINITIONS**

1. "TRRC" refers to Tongue River Railroad Company, Inc.

2. "Communication" means the transmittal or exchange of information of any kind in any form, including oral, written, or electronic form, with another Person, whether Person to Person, in a group, in a meeting, by telephone, letter, telefax, electronic mail, text message, or otherwise, and including without limitation any printed, typed, handwritten, or other readable document, and any tape recording, correspondence, memorandum, report, contract, diary, logbook, minutes, note, study, analysis, survey, and forecast.

3. "Document(s)" is used in the broadest sense permitted by 49 C.F.R. § 1114.30 and should be interpreted to include all writings and records of every type in Your possession, custody or control, or known by You to exist including but not limited to: electronically stored information, electronic mail, testimony and exhibits, contracts, drafts, agreements, memoranda, correspondence, letters, reports (including drafts, preliminary, intermediate, and final reports), surveys, analyses (as defined above), evaluations, studies (including economic and market studies), summaries, comparisons, tabulations, work papers, statistical records, proposals, outlines, charts, books, pamphlets, periodicals, published material, magazines, newspapers, advertisements, brochures, blueprints, graphs, telegrams, photographs, maps, bulletins, corporate or other minutes, notes, diaries, log sheets, calendars, appointment books, address books, schedules, ledgers, journals, transcripts, microfilm, microfiche, computer tapes, computer discs, computer data and printouts, data compilations, mechanical and electrical recordings, telephone and telegraphic communications, data sheets or data processing cards, speeches, and all other records, tables, written, electronic, or otherwise, and drafts of any of the above; including every copy of a document that contains handwritten or other notations or that otherwise does not

exactly duplicate the original or any other copy and any attachments or appendices to any document.

4. “Person” means natural persons, corporations, institutions, partnerships, firms, joint ventures, associations, political subdivisions, organizations, or other entities of any kind.

5. “Refer or relate to” means information that contains, describes, discusses, embodies, comments upon, identifies, incorporates, explains, contradicts, supports, regards, evidences, evaluates, summarizes, constitutes, comprises, or otherwise pertains to the subject matter of the request.

6. “You” and “Your” refer to NPRC, as well as any of its employees, officers, directors, and attorneys.

#### **INSTRUCTIONS**

1. Unless otherwise indicated, TRRC’s requests for production seek documents that were either: (i) created, modified or acquired on or after June 18, 2012, or (ii) relied upon in any filings made by NPRC on or after June 18, 2012 in this proceeding.

2. You are required to produce documents in Your possession, custody, or control.

3. “And”/“Or” shall be construed disjunctively or conjunctively as necessary in order to bring within the scope of each interrogatory or request for production all information and documents which might otherwise be construed as outside the scope of the interrogatory or request for production.

4. References to the singular shall be construed to be plural, and references to the plural shall be singular, as necessary in order to bring within the scope of each interrogatory or request for production all information and documents which might otherwise be construed to be outside the scope of the interrogatory or request for production.

5. If any document called for by these requests for production is available in electronic format, please produce the document or information as TIFF images, in a format that is compatible with Concordance 10.

6. If You for any reason (including the assertion of privilege), withhold documents or information responsive to any of these interrogatories or requests for production, You should produce documents or information for any part of the interrogatory or request which is not alleged to be objectionable or protected.

7. "Identify" as used herein with respect to a report or testimony shall be read to require a statement of all of the following information regarding the document:

- (a) Agency in which submitted;
- (b) Date; and
- (c) Docket No. of Proceeding in which submitted.

### **INTERROGATORIES**

1. Please identify all reports or testimony submitted by Synapse Energy Economics, Inc. to any state or federal public utilities commission, other regulatory agency or legislative body on or after October 1, 2009.

### **REQUESTS FOR PRODUCTION**

1. Please produce all documents relating to domestic or international demand for Otter Creek coal or other Ashland area coal.

2. Please produce all documents relating to export of Otter Creek coal, other Ashland area coal, or Montana PRB coal, including but not limited to the capacity to export such coal at United States and Canadian export terminals.

3. Please produce all documents relating to the retirement of coal-fired plants in the United States that could burn Otter Creek coal or other Ashland area coal.

4. Please produce all documents relating to whether Otter Creek coal or other Ashland area PRB coal can compete with Wyoming and other Montana PRB coal, including but not limited to documents that concern factors such as the sodium content of that coal, the cost of producing Otter Creek coal and the strip ratios for Otter Creek coal.

5. Please produce all communications and correspondence between You and any federal agency, Montana state or local government or other government agency relating to requests for information relating to TRRC or the Tongue River Railroad, including any documents that NPRC has received through Freedom of Information Act or other requests for access to government materials.

Respectfully submitted,



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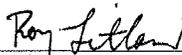
David H. Coburn  
Linda S. Stein  
Roy E. Litland

STEPTOE & JOHNSON LLP  
1330 Connecticut Avenue, NW  
Washington, DC 20036-1795  
(202) 429-3000

Attorneys for Applicant  
Tongue River Railroad Company, Inc.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 28th day of October 2013, I caused a copy of the foregoing to be served by first-class mail, postage prepaid, upon all parties of record in this proceeding.

  
\_\_\_\_\_  
Roy E. Litland

# **EXHIBIT 2**

David H. Coburn  
202 429 8063  
dcoburn@steptoe.com

1330 Connecticut Avenue, NW  
Washington, DC 20036-1795  
202 429 3000 main  
www.steptoe.com



December 6, 2013

VIA Overnight Mail

Kenneth J. Rumelt, Esq.  
Environmental and Natural Resources Law Clinic  
Vermont Law School  
PO Box 96, 164 Chelsea Street  
South Royalton, VT 05068  
krumelt@vermontlaw.edu

Re: **Tongue River Railroad Discovery**  
**STB Finance Docket No. 30186**

Dear Ken:

Enclosed is a disc containing Tongue River Railroad Company, Inc.'s ("TRRC") fourth document production to NPRC. The documents on the disc are Bates numbered TRR-006318 through TRR-006462. The disc includes highly confidential and confidential materials subject to the Board's Protective Order.

Also, below is an updated list of TRRC's officers and directors:

Stephen G. Branscum	President
Julie A. Piggott	Vice President -- Finance
C. Alec Vincent	Treasurer
Robert M. Criswell	Secretary
Stephen G. Branscum	Director
Ken Cochran	Director

Finally, we have enclosed updated verification pages of Andrew Blumenfeld and Scott Castleberry regarding TRRC's October 7, 2013 Responses to NPRC's First Set of Interrogatories.

Kenneth J. Rumelt, Esq.  
December 6, 2013  
Page 2



Please do not hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "David H. Coburn". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

David H. Coburn  
Linda S. Stein  
*Counsel for Tongue River Railroad Company, Inc.*

Enclosures (3)

cc (without disc):

Jack R. Tuholske  
PO Box 7548  
Missoula, MT 59807  
jtuholske@gmail.com

## VERIFICATION

I, Andrew Blumenfeld, Vice President Analysis and Strategy, Arch Coal, Inc., hereby verify under penalty of perjury of the laws of the United States that the facts stated in the foregoing responses of Tongue River Railroad Company, Inc. to Northern Plains Resource Council's Interrogatory Numbers 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 30, 31, 32, 34, 36, 40, 41, 42, 49, 50, 57, and 61 are true and correct to the best of my knowledge and belief only as it pertains to Arch Coal, Inc. acting as part owner of the parent company of Tongue River Railroad Company, Inc., and subject to the objections and qualifications included in such responses.

Executed on December 4, 2013

  
\_\_\_\_\_  
Andrew Blumenfeld

## VERIFICATION

I, Scott Castleberry, Director Economic Analysis, Coal Marketing for BNSF Railway Company, hereby verify under penalty of perjury of the laws of the United States that the facts stated in the foregoing responses of Tongue River Railroad Company, Inc. to Northern Plains Resource Council's Interrogatory Numbers 1, 2, 4, 18, 19, 20, 21, 22, 23, 27, 30, 31, 35, 44, 51, 52, 53, 54, 55, 56, 57, 61, 65, and 66 are true and correct to the best of my knowledge and belief only as it pertains to BNSF Railway Company acting as part owner of the parent company of Tongue River Railroad Company, Inc., and subject to the objections and qualifications included in such responses.

Executed on December 5, 2013

  
\_\_\_\_\_  
Scott Castleberry

# **EXHIBIT 3**

**(REDACTED IN ITS ENTIRETY)**

# **EXHIBIT 4**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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

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**TONGUE RIVER RAILROAD COMPANY, INC. --  
CONSTRUCTION AND OPERATION – ASHLAND TO DECKER, MONTANA**

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**AMENDED FOUR MONTH REPORT OF  
TONGUE RIVER RAILROAD COMPANY, INC.**

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(202) 429-3000

Attorneys for Tongue River Railroad  
Company, Inc.

August 29, 2011

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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

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**TONGUE RIVER RAILROAD COMPANY, INC. --  
CONSTRUCTION AND OPERATION – ASHLAND TO DECKER, MONTANA**

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**AMENDED FOUR MONTH REPORT OF  
TONGUE RIVER RAILROAD COMPANY, INC.**

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Tongue River Railroad Company, Inc. (“TRRC”) hereby submits this amended four month report, updating the status report that it submitted to the Board on July 8, 2011 with respect to various related proceedings and the transaction reported previously.<sup>1</sup>

The Surface Transportation Board (“Board”) served its decision in STB Finance Docket No. 30186 (Sub-No. 3) on October 9, 2007 granting the application of Tongue River Railroad Company, Inc. (“TRRC”) to construct and operate a 17.3-mile rail line known as the Western Alignment in Rosebud and Big Horn Counties, Montana. The decision became effective on November 8, 2007.

Certain parties sought judicial review of the Board’s decision by filing petitions for review in the U.S. Court of Appeals for the Ninth Circuit. Briefs have been filed and the case was orally argued before the Court on July 11, 2011. A decision remains pending.

Northern Plains Resource Council (“NPRC”) and Mark Fix filed a Petition to Reopen the Board’s decisions in Finance Docket Nos. 30186, 30186 (Sub No. 2) and 30186 (Sub No. 3) on

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<sup>1</sup> The submission of status reports every four months is required by the Board’s November 8, 1996 order in Finance Docket No. 30186 (Sub No. 2).

July, 26, 2010. The Petition was opposed by TRRC. On June 15, 2011, the Board issued a decision denying the Petition to Reopen. On July 25, 2011, NPRC and Mr. Fix jointly filed a Petition for Reconsideration of the STB's June 15 decision denying their Petition to Reopen. On August 25, 2011, TRRC filed a reply in opposition to the Petition for Reconsideration. A decision on the Petition for Reconsideration remains pending.

TRRC has continued to engage in the Programmatic Agreement process with the Board. A meeting was held in Rapid City, South Dakota, on June 21 – 23, 2011. An additional meeting originally planned for early August has been delayed until a date to be determined.

On July 1, 2011, all of the stock of Tongue River Railroad Company, Inc. was sold to Tongue River Holding Company, LLC ("TRR Holding"), a Delaware limited liability company, in which BNSF Railway Company holds a 33⅓ % membership interest; Arch Coal, Inc. holds a 33⅓ % membership interest; and TRR Financing, LLC ("TRR Financing"), a Delaware limited liability company controlled by Mr. Forrest E. Mars, Jr., holds a 33⅓ % membership interest. Under the terms of the agreement between the owners establishing TRR Holding, the approval of TRR Financing (or its designee, successors or assigns) is required before any construction or certain pre-construction activities for the TRRC line may take place in the area defined by red shading on the attached map. This approval right remains in place regardless of whether TRR

Financing remains an owner of TRR Holding, and will remain binding on any new owners or successors of TRR Holding.

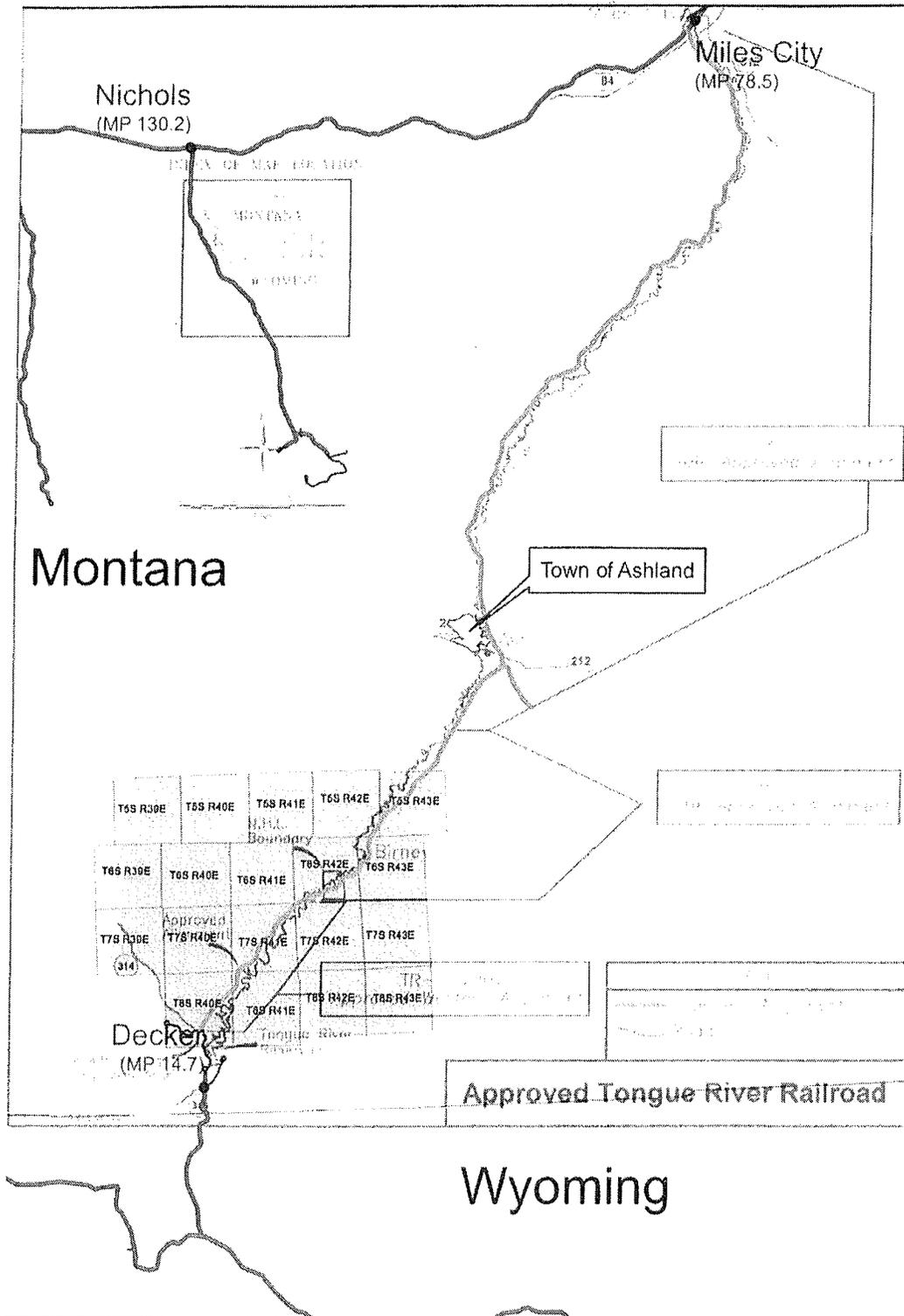
Respectfully,



Betty Jo Christian  
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(202) 429-3000

Attorneys for Tongue River Railroad  
Company, Inc.

August 29, 2011

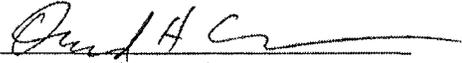


### Legend

- OTHER RR
- INDUSTRY
- BNSF RAILWAY
- ALIGNMENT

**CERTIFICATE OF SERVICE**

I hereby certify that on this 29<sup>th</sup> day of August, 2011, a copy of the foregoing document was served via first class mail, postage prepaid, on all parties of record.

A handwritten signature in black ink, appearing to read "David H. Coburn", written over a horizontal line.

David H. Coburn