

233203

BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings
October 16, 2012
Part of
-----Public Record

STB FINANCE DOCKET NO. 30186

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

REVISED APPLICATION FOR CONSTRUCTION AND OPERATION AUTHORITY

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.

October, 2012

TABLE OF CONTENTS

	<u>Page</u>
OVERVIEW (Section 1150.2)	2
(a) A brief narrative description of the proposal.	2
(b) The full name and address of applicant(s).	5
INFORMATION ABOUT APPLICANT(S) (Section 1150.3)	5
(a) The name, address, and phone number of the representative to receive correspondence concerning this application	5
(b) Facts showing that applicant is either a common carrier by railroad or has been organized to implement the proposal for which approval is being sought.	5
(c) A statement indicating whether the rail line will be operated by applicant. If not, the operator which has been selected must join in the application, and provide all information required for an applicant. If the operator has not yet been selected, state who is being considered.	6
(d) A statement indicating whether applicant is affiliated by stock ownership or otherwise with any industry to be served by the line. If so, provide details about the nature and extent of the affiliation.	6
(e) Date and place of organization, applicable State statutes, and a brief description of the nature and objectives of the organization.	7
(f) If a corporation, submit:	7
(1) A list of officers, directors, and 10 principal stockholders of the corporation and their respective holdings. A statement whether any of these officers, directors or major shareholders control other regulated carriers. Also a list of entities, corporation(s), individual(s), or group(s) who control applicant, the extent of control, and whether any of them control other common carriers.	7
(2) As exhibit A, any resolution of the stockholders or directors authorizing the proposal.	10
INFORMATION ABOUT THE PROPOSAL (Section 1150.4)	10
(a) A description of the proposal and the significant terms and conditions, including consideration to be paid (monetary or otherwise). As exhibit B, copies of all relevant agreements.	10
(b) Details about the amount of traffic and a general description of commodities.	14
(c) The purposes of the proposal and an explanation of why the public convenience and necessity require or permit the proposal.	14
A. Environmental Advantages	16
B. Economic Advantages	17

TABLE OF CONTENTS

Page

C. Operating Advantages 18

(d) As exhibit C, a map which clearly delineates the area to be served including origins, termini and stations, and cities, counties and States. The map should also delineate principal highways, rail routes and any possible interchange points with other railroads. If alternative routes are proposed for construction, the map should clearly indicate each route.18

(e) A list of the counties and cities to be served under the proposal, and whether there is other rail service available to them. The names of the railroads with which the line would connect, and the proposed connecting points; the volume of traffic estimated to be interchanged; and a description of the principal terms of agreements with carriers covering operation, interchange of traffic, division of rates, or trackage rights.18

(f) The time schedule for consummation or completion of the proposal.19

(g) If a new line is proposed for construction:19

(1) The approximate area to be served by the line. 19

(2) The nature or type of existing and prospective industries (e.g., agriculture, manufacturing, mining, warehousing, forestry) in the area, with general information about the age, size, growth potential and projected rail use of these industries. 19

(3) Whether the construction will cross another rail line and the name of the railroad(s) owning the line(s) to be crossed. If the crossing will be accomplished with the permission of the railroad(s), include supporting agreements. If a Board determination under 49 U.S.C. 10901 (d) (l) will be sought, include such requests. 20

OPERATIONAL DATA (SECTION 1150.5) 21

As exhibit D, an operating plan, including traffic projection studies; a schedule of the operations; information about the crews to be used and where employees will be obtained; the rolling stock requirements and where it will be obtained; information about the operating experience and record of the proposed operator unless it is an operating railroad; any significant change in patterns of service; any associated discontinuance or abandonments; and expected operating economics. 21

FINANCIAL INFORMATION (SECTION 1150.6) 21

(a) The manner in which applicant proposes to finance construction or acquisition, the kind and amount of securities to be issued, the approximate terms of their sale and total fixed charges, the extent to which funds for financing are now available, and whether any of the securities issued will be underwritten by industries to be served by the proposed line. Explain how the fixed charges will be met.21

(b) As exhibit E, a recent balance sheet. As exhibit F, an income statement for the latest available calendar year prior to filing the application.22

TABLE OF CONTENTS

	<u>Page</u>
(c) A present value determination of the full costs of the proposal. If construction is proposed, the costs for each year of such construction (in a short narrative or by chart).	22
(d) A statement of projected net income for 2 years, based upon traffic projections. Where construction is contemplated, the statement should represent the 2 years following completion of construction.	22
ENVIRONMENTAL AND ENERGY DATA (Section 1150.7)	22
As exhibit H, information and data prepared under 49 C.F.R. Part 1105, and the "Revision of the Nat'l Guidelines Environmental Policy Act of 1969," 363 I.C.C. 653 (1980), and in accordance with "Implementation of the Energy Policy and Conservation Act of 1975," 49 CFR Part 1106.	22
ADDITIONAL SUPPORT (SECTION 1150.8)	23
Any additional facts or reasons to show that the public convenience and necessity require or permit approval of this application. The Board may require additional information to be filed where appropriate.	23
NOTICE (Section 1150.9)	24
A summary of the proposal which will be used to provide notice under § 1150.10 (f).	24
CONCLUSION	24

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 30186

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

REVISED APPLICATION FOR CONSTRUCTION AND OPERATION AUTHORITY

Pursuant to the Surface Transportation Board’s (“STB” or “Board”) decision served June 18, 2012 reopening the above-referenced docket (hereafter “June 18 Decision”), Tongue River Railroad Company, Inc. (“TRRC”) hereby submits its Revised Application for Construction and Operation Authority (“Revised Application”), under 49 U.S.C. § 10901 and 49 C.F.R. § 1150.1-.10. This Revised Application describes the railroad that TRRC intends to construct and operate in Custer, Powder River, and Rosebud Counties, Montana.¹

Specifically, TRRC intends to construct and operate a rail line between Miles City, MT and Ashland/Otter Creek, MT previously authorized by the Board’s predecessor – the Interstate Commerce Commission (“ICC”) – in 1986,² as modified by refinements to that rail line (“Refinements”) that are described in this Revised Application. Most of the Refinements proposed in this Revised Application were already considered by the Board in the TRRC III

¹ The June 18 Decision required that TRRC await the issuance by the Board of a service list before filing this Revised Application. That service list was issued on September 20, 2012, and a copy of this Revised Application is being served on the parties of record identified on that service list.

² Finance Docket No. 30186, *Tongue River R.R. – Rail Construction and Operation – In Custer, Power River and Rosebud Counties, MT* (ICC served May 9, 1986) (hereafter “1986 Decision”).

proceeding.³ TRRC does not intend to construct the rail lines south of Terminus Points 1 & 2 (located south of Ashland, MT) that were the subject of its applications in the TRRC II⁴ and TRRC III proceedings. As the expected operator of the rail line, BNSF Railway Company (“BNSF”) joins in this revised application. TRRC submits the following information as required by 49 C.F.R. Part 1150 and contemplated by the Board’s June 18 Decision:

OVERVIEW (Section 1150.2)

(a) A brief narrative description of the proposal.

By this Revised Application, TRRC is seeking authority to modify the rail line between Miles City, MT and Ashland/Otter Creek, MT that was previously approved by the ICC in 1986. See 1986 Decision. The rail line approved in 1986 splits into two branches just south of Ashland, MT and has two Terminus Points – (1) Terminus Point #1 continues southwest and terminates at the previously proposed Montco Mine location (“Montco Mine Spur”), and (2) Terminus Point #2 continues south from the Ashland area along the Otter Creek (“Otter Creek Spur”).

The Refinements to the approved rail line address rail operational considerations that were raised subsequent to the 1986 Decision. They generally entail a straightening and shortening of the rail alignment approved in 1986. Except as set forth herein, all of the facts and findings relied upon by the Board, including the environmental report, are largely unchanged

³ The TRRC III proceeding is Finance Docket No. 30186 (Sub-No. 3), *Tongue River Railroad Company, Inc. – Construction and Operation – Western Alignment*.

⁴ The TRRC II proceeding is Finance Docket No. 30186 (Sub-No. 2), *Tongue River Railroad Company – Rail Construction and Operations – Ashland to Decker, Montana*.

from the 1986 Decision and, accordingly, should be considered as incorporated by reference for purposes of this application.⁵

Most of the Refinements to the authorized rail line that TRRC seeks authority to construct and operate were considered in the TRRC III proceeding. In this Revised Application, TRRC is proposing a few additional Refinements to the authorized rail line that were not considered in the TRRC III proceeding. The new Refinements are very minor curve adjustments near the Miles City Fish Hatchery that move the rail centerline further from the facilities of the Hatchery and adjustments along the Otter Creek Spur.

The principal purpose of the Tongue River Railroad project is to transport low sulfur, sub-bituminous coal, from proposed mine sites in Rosebud and Powder River Counties, Montana, including proposed mines in the Otter Creek area. 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 controlled by Ark. Otter Creek Coal, LLC (“Otter Creek Coal”), an indirect wholly owned subsidiary of Arch and an affiliate of Ark, has already sought and obtained a prospecting permit from the Montana Department of Environmental Quality (“MDEQ”) for the Otter Creek area.⁶ In July 2012, Otter Creek Coal filed a mine permit application with MDEQ seeking authority to develop and operate a mine in the Otter Creek area. *See Rowlands VS at 2.*

⁵ Cf. *Somerset Railway Corp. – Construction – Niagara County, N.Y.*, 366 I.C.C. 144 (1982).

⁶ *See Verified Statement of William M. Rowlands, President of Otter Creek Coal (hereafter “Rowlands VS”).* The verified statements of William Rowlands and Stevan Bobb, President of Tongue River Railroad Company, Inc., (hereafter “Bobb VS”) are included in Appendix A.

As approved by the ICC in the 1986 Decision, the overall TRRC rail line begins southwest of Miles City. It extends south to a point near the town of Ashland, Montana. The line divides, with the main line proceeding up the Tongue River Valley to the previously proposed Montco Mine at Terminus Point 1, and the other branch extends up the Otter Creek drainage (Terminus Point 2).

As TRRC explained in the TRRC III proceeding, the Refinements to the 1986 approved TRRC rail line straighten and generally shorten the rail line by approximately six miles. A more complete description of the proposed Refinements to the authorized TRRC rail line is provided in Section 1150.4(a) below and the September 5, 1998 *Analysis of Potential Changed Circumstances Related to the Environment and Proposed Action along the Original 89 Miles of the Tongue River Railroad approved in 1986* by Radian International LLC., et al. (hereafter “1998 Radian Report”) which was previously filed with the Board in the TRRC III proceeding as Exhibit 2 to the Reply of Tongue River Railroad to Comments on the Scope of the Supplement to the Final Environmental Impact Statement filed on September 8, 1998 in Finance Docket 30186 (Sub-No. 3).

Due to its shorter length, the TRRC rail line, as refined, will require less land to be acquired for the right-of-way, will have reduced curvature in the route, will result in a rail line that is farther from the Tongue River with attendant environmental, social and economic benefits, will result in fewer at grade crossings, and will result in less encroachment of the Miles City fish hatchery facilities. The TRRC rail line, as refined, will result in a greater volume of earth work but the increased earth work will provide for greater stability and less erosion potential. *See* 1998 Radian Report at 11-1 to 11-8.

(b) **The full name and address of applicant(s).**

TRRC's full name and address is:

Tongue River Railroad Company, Inc.
1302 24th Street West, #315
Billings, MT 59102

INFORMATION ABOUT APPLICANT(S) (Section 1150.3)

(a) **The name, address, and phone number of the representative to receive correspondence concerning this application**

Correspondence relating to this Revised Application should be directed to the following representative of TRRC:

David H. Coburn
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-8063
(202) 261-0565 (FAX)
dcoburn@steptoe.com

(b) **Facts showing that applicant is either a common carrier by railroad or has been organized to implement the proposal for which approval is being sought.**

The Tongue River Railroad Company, Inc. is a corporation that was formed to construct the rail line previously approved by the Board and its predecessor in the 1986 Decision, the 1996 TRRC II Decision and the 2007 TRRC III Decision.⁷ TRRC no longer seeks to construct the rail line from Terminus Point 1 to Decker, Montana authorized in the 1996 TRRC II Decision and the 2007 TRRC III Decision.

⁷ The 1996 TRRC II Decision authorized TRRC to construct a rail line south of Ashland, MT to Decker, MT. *See* Finance Docket No. 30186 (Sub-No. 2), *Tongue River Railroad Co. – Rail Construction and Operation – Ashland to Decker, Montana* (served Nov. 8, 1996). The 2007 TRRC III Decision authorized TRRC to construct the rail line from Ashland, to Decker, MT via the Western Alignment rather than the Four Mile Creek Alternative. *See* Finance Docket No. 30186 (Sub-No. 3), *Tongue River Railroad Company, Inc. – Construction and Operation – Western Alignment* (served Oct. 9, 2007).

A copy of the Certificate of Incorporation of Tongue River Railroad Company, Inc. was filed on May 1, 2003 as Exhibit 1 to the Supplemental Verified Statement of Mike T. Gustafson included with the Supplemental Evidence of Tongue River Railroad Company in Finance Docket No. 30186 (Sub-No. 3). For the Board's convenience, a copy of the Certificate of Incorporation is also attached hereto as Exhibit B.

As the previously filed Certificate of Incorporation reveals, TRRC was organized, among other things, to design, plan, conduct engineering studies of, arrange financing for, and obtain all necessary federal, state, and local permits and authorizations for the construction and the operation of, to secure rights-of-way for and to construct, equip and operate railroads. TRRC intends to be a common carrier that transports coal and any other commodities that it is reasonably requested to transport by shippers that locate on its rail line.

- (c) **A statement indicating whether the rail line will be operated by applicant. If not, the operator which has been selected must join in the application, and provide all information required for an applicant. If the operator has not yet been selected, state who is being considered.**

BNSF is expected to operate over TRRC's rail line pursuant to an agreement that has yet to be reached. TRRC will promptly inform the Board when a final agreement is reached with BNSF.

- (d) **A statement indicating whether applicant is affiliated by stock ownership or otherwise with any industry to be served by the line. If so, provide details about the nature and extent of the affiliation.**

The only stockholder of Tongue River Railroad Company, Inc. is Tongue River Holding Company, LLC ("TRR Holding"), a Delaware limited liability company. Arch holds a 34.68% membership interest in TRRC Holding. BNSF, the expected operator, also holds a 34.68% membership interest in TRRC Holding. Ark has leased the Otter Creek coal tracts from the State

of Montana and Great Northern Properties Limited Partnership (“GNP”). Coal produced from those Otter Creek coal tracts is to be served by the TRRC rail line.

(e) **Date and place of organization, applicable State statutes, and a brief description of the nature and objectives of the organization.**

TRRC was incorporated in the State of Delaware on September 4, 1998 pursuant to Delaware General Corporation Law. Prior to that, TRRC was registered as a Montana limited liability partnership with the Office of the Secretary of the State of Montana on June 19, 1981, under Document 283235, according to the provisions of the Montana Limited Partnership Act, Title 35, Chapter 12, *MCA*, 1981, and, to the extent applicable, of the Montana Uniform Partnership Act, Title 35, Chapter 10, *MCA*, 1981.

This corporation was organized to project, design, plan, conduct engineering studies of, arrange financing for, and obtain all applicable federal, state, and local permits and authorizations for the construction and the operation of, to secure rights-of-way for, and to construct, equip and operate railroads.

BNSF, the expected operator, was originally incorporated in the State of Delaware under the name Great Northern Pacific & Burlington Lines, Inc. on January 13, 1961 pursuant to General Corporation Law of Delaware. The purpose of the corporation was to engage in any lawful act or activity for which corporations organized under the General Corporation Law of the State of Delaware as the same existed at the time of incorporation or might be thereafter amended.

(f) **If a corporation, submit:**

- (1) **A list of officers, directors, and 10 principal stockholders of the corporation and their respective holdings. A statement whether any of these officers, directors or major shareholders control other regulated carriers. Also a list of entities, corporation(s), individual(s), or group(s) who control applicant, the extent of control, and whether any of them control other common carriers.**

The officers and directors of Tongue River Railroad Company, Inc. are:

Stevan B. Bobb	President
Julie A. Piggott	Vice President – Finance
C. Alec Vincent	Treasurer
Robert M. Criswell	Secretary

Stevan B. Bobb	Director
Ken Cochran	Director

The sole shareholder of Tongue River Railroad Company, Inc. is TRR Holding, a Delaware limited liability company, in which BNSF Railway Company, Arch Coal, Inc., and TRR Financing, LLC (“TRR Financing”)(also Delaware limited liability), each own approximately a one-third, more or less, interest.

None of TRRC’s officers, directors, or its sole stockholder, TRR Holding, control other regulated carriers. No entities that control applicant control other common carriers. However, within the next several days, BNSF expects to submit an application to the STB seeking authority to acquire control of TRRC under 49 U.S.C. § 11323(a) (3).

The officers and directors of BNSF, the expected operator, are:

Matthew K. Rose	Chairman and Chief Executive Officer
Carl R. Ice	President and Chief Operating Officer
Gregory C. Fox	Executive Vice President – Operations
Thomas N. Hund	Executive Vice President and Chief Financial Officer
John P. Lanigan, Jr.	Executive Vice President and Chief Marketing Officer
Roger Nober	Executive Vice President - Law and Secretary
John O. Ambler	Vice President – Corporate Relations
Paul B. Anderson	Vice President – Marketing Support
Michael R. Annis	Vice President - Tax
Paul W. Bischler	Vice President and Chief Sourcing Officer
Stevan B. Bobb	Group Vice President – Coal
Stephen G. Branscum	Group Vice President – Consumer Products
Rollin D. Bredenberg	Vice President – Capacity Planning and Operations Research

M. Rizwan Chand	Vice President and Chief Human Resources Officer
Frederick G. (Fritz) Draper	Vice President - Business Unit Operations
George Duggan	Vice President – Coal Marketing
Kathryn M. Farmer	Vice President Domestic Intermodal Marketing
John J. Fleps	Vice President – Labor Relations
David L. Freeman	Vice President – Transportation
David L. Garin	Group Vice President - Industrial Products
Amy C. Hawkins	Vice President – Government Affairs
Kevin Kaufman	Group Vice President – Agricultural Products
Robert W. Lease	Vice President – Service Design and Performance
John D. Lovenburg	Vice President – Environmental
Frederick R. Malesa	Vice President International Intermodal Marketing
Jo-ann M. Olsovsky	Vice President – Technology Services and Chief Information Officer
Julie A. Piggott	Vice President – Planning & Studies and Controller
Rob M. Reilly	Regional Vice President – Operations
Chris A. Roberts	Vice President – Mechanical and Value Engineering
Mark A. Schulze	Vice President – Safety, Training and Operations Support
Sanford C. Sexhus	Vice President – Engineering
Charles W. Shewmake	Vice President and General Counsel
Michael C. Shircliff	Regional Vice President – Operations
Denis J. Smith	Vice President – Industrial Products Marketing
Jon Stevens	Assistant Vice President and Assistant Controller
David W. Stropes	Vice President – Corporate Audit Services
C. Alec Vincent	Assistant Vice President – Finance and Treasurer
Richard E. Weicher	Vice President and General Counsel – Regulatory
Thomas G. Williams	Vice President – Industrial Products Sales
Dean H. Wise	Vice President – Network Strategy
Jeffrey B. Wright	Regional Vice President – Operations
Judy K. Carter	Assistant Secretary
Peter M. Lee	Assistant Secretary
Beth A. Miller	Assistant Treasurer
Vickie J. Popejoy	Assistant Secretary

Jeffrey T. Williams Assistant Secretary
Patricia Zbichorski Assistant Secretary
Kurt A. Geringer Vice President (limited authority)

Matthew K. Rose Director
Carl R. Ice Director
Gregory C. Fox Director
Thomas N. Hund Director
John P. Lanigan, Jr. Director
Roger Nober Director

(2) As exhibit A, any resolution of the stockholders or directors authorizing the proposal.

See Exhibit A attached.

Section 1150.3, Paragraphs 2(g), 2(h), 2(i) and 2(j) are inapplicable.

INFORMATION ABOUT THE PROPOSAL (Section 1150.4)

(a) A description of the proposal and the significant terms and conditions, including consideration to be paid (monetary or otherwise). As exhibit B, copies of all relevant agreements.

The Revised Application seeks Board authorization to modify the alignment of the rail line between Miles City, MT and Ashland/Otter Creek, MT that was previously approved by the ICC in the 1986 Decision. The 1986 Decision approved two alignments at Miles City and Ashland. *See* 1986 Decision at 14. Specifically, as approved in the 1986 Decision, the TRRC rail line:

will follow the Tongue River Valley between Miles City and two points south of Ashland. The line will connect with BN at Miles City... The second option (the so-called BN option) would connect TRRC and BN at Branum Lake near the Miles City Fish Hatchery, owned by the Montana Department of Fish, Wildlife and Parks.

From Miles City, the line will proceed south along the west side of the Tongue River, crossing the United States Department of Agriculture Livestock and Range Research Station (LARRS). Ten miles north of Ashland, the line will cross the river and continue south. Near Ashland, the line will split into two branches. One branch will continue south along Otter Creek and terminate 7.7

miles south of Ashland. The other branch will follow one of two alignments in or around Ashland, continue southwest and terminate at the Montco Mine (Montco) 8.9 miles south of Ashland. These two alignments are: (1) the Ashland southeastern alignment, which would route the line along the eastern edge of Ashland and continue between Otter Creek and the Tongue River to Montco; and (2) the Ashland northeastern alignment, which would route the line through Ashland along the Tongue River and terminate at Montco.

1986 Decision at 1-2. As further explained below, the proposed refinements to the approved rail line would shorten the rail line, including the length of the spurs. *See* maps attached hereto in Exhibit C.

The current project would follow the so-called BN Option at Miles City and the Ashland southeastern alignment around Ashland with some proposed Refinements. Most of TRRC's proposed Refinements to the authorized Miles City, MT to Ashland, MT rail line were considered in the TRRC III proceeding and are described in detail in Chapter 11 and Appendix A of the 1998 Radian Report. TRRC also is proposing a few additional refinements to the 1986 approved rail line in this Revised Application that are located at the Miles City Fish Hatchery and along the Otter Creek Spur. The proposed Refinements to the approved rail line generally straighten the approved rail line, shortening it by approximately six miles, and decreasing the curvature of the rail line. In addition, these Refinements generally take the TRRC rail line further away from the Tongue River.

The locations of the proposed Refinements to the approved rail line that were considered in the TRRC III proceeding are (1) at Milepost 0.0 to Milepost 1.1 by the Miles City Fish Hatchery, where the proposed Refinement utilizes a "wye" track to connect the Tongue River

rail line to BNSF at Miles City;⁸ (2) from Milepost 17.4 to 19.1 where the proposed Refinement reduces curvature and distance, and moves the rail line away from potentially irrigated farmland; (3) from Milepost 20.6 to 22.9 where the proposed Refinement reduces curvature, shortens distance, removes the alignment from a floodplain, and increases the distance from the Tongue River; (4) Milepost 25.3 near Yank Creek which reduces curvature and avoids direct impact to a large stock pond; (5) Milepost 37.5 near HS School which reduces curvature, avoids the need to realign the county road, and increases the distance of the rail line from a school and irrigated farmland; and (6) Milepost 41.0 where for several miles near the Custer/Rosebud County Line, the proposed Refinement parallels the approved rail line but is located further away from the river which reduces curvature, avoids irrigated pasture and increases the distance of the rail line from the river.⁹ In addition as described more fully in the attached verified statement of Stevan Bobb, TRRC proposes the following additional refinements that were not presented in the TRRC III proceeding: (7) at Milepost 0.0 to 1.1, further refine the geometry of the “WYE” connection of the Tongue River Railroad with the BNSF mainline at Miles City, MT. These refinements slightly adjust the radius of the curves that connect with the BNSF mainline and shift the centerline of the Tongue River Railroad by about 50 to 60 feet farther from the facilities at the Miles City Fish Hatchery; and (8) from Milepost 69.9 to Terminus Point #2 refine the proposed centerline along the Otter Creek Spur based upon more detailed analysis. *See also* maps attached here at Exhibit C.

⁸ See Draft Supplemental Environmental Impact Statement, Finance Docket No. 30186 (Sub-No. 3), *Tongue River Railroad Company, Inc. – Construction and Operation – Western Alignment*, at 5-6 (served Oct. 15, 2004) (hereafter “TRRC III DEIS”).

⁹ See 1998 Radian Report at 11-2 to 11-3. The mileposts presented here may differ somewhat from those in the Radian Report because they are based upon more recent engineering studies.

The proposed Refinements result in a variance that is generally no more than one-quarter mile from the alignment of the approved rail line. However, there are three locations along the approved rail line (identified above as Refinement nos. (2), (3), (6)) where the preliminary centerline of the proposed Refinements differ from the preliminary centerline of the approved rail line by 0.5 miles or more. *See* 1998 Radian Report at 11-2 to 11-3.

The proposed Refinements reduce the length of the alignment of the approved TRRC line between Miles City and the two Terminus Points south of Ashland by approximately six rail miles. This reduction in the length of the line, as well as the elimination of curvature and placement of the rail line further from the Tongue River and the facilities at the Miles City Fish Hatchery, will result in economic, environmental and operating benefits as described in Section 1150.4(c).

The TRRC rail line will be a single track facility constructed of continuous-welded rail, and will be built and maintained to Class 3 standards. The rail will be placed on a prepared grade and will occupy a minimum right-of-way (“ROW”) of 200 feet. As refined, the TRRC rail line design includes locations for two passing sidings, each with 8,500 feet clear length. The sidings will be constructed as volumes warrant. One of the sidings will be near Milepost 27 and the other siding will be near Milepost 46. *See* maps attached here at Exhibit C. Number 20 electric powered switches will be used to permit route diversion at speeds up to 40 MPH. In addition to the passing sidings, approximately six set-out tracks between 500 and 4,000 feet in length (between clearance points), constructed of continuous-welded rail, will provide for temporary storage of cars requiring repair and for storage and clearing of maintenance equipment.

The estimated construction cost (in 2012 dollars) of the TRRC rail line, as refined, is approximately \$490 million. The estimate includes all costs associated with excavation, major structure installation, construction reclamation, track installation, signals and communications system, and railroad infrastructure. A break-out of the costs is contained in Appendix B.

(b) Details about the amount of traffic and a general description of commodities.

The primary commodity to be transported over the TRRC rail line will be coal moving from proposed Otter Creek coal mines and other mines that might be developed in the future in the Ashland area. The coal reserves subject to the leases between Ark and the State of Montana and the lease between Ark and GNP in the Otter Creek Area near Ashland contain approximately 1.5 billion tons of low sulfur, sub-bituminous coal. *See* Rowlands VS at 2. Construction of the TRRC line will provide, for the first time, rail service to one of the largest remaining undeveloped reserves of low sulfur, sub-bituminous coal in the United States. *Id.* As explained in the attached Verified Statement of William M. Rowlands at 3, TRRC anticipates that, at full production, approximately 20 million tons of coal will be moved over the TRRC line from Otter Creek Coal's planned mine in the Otter Creek area. When the mine is at full production, coal tonnage hauled will result in approximately 26 round trips per week on a 7-day weekly schedule.

(c) The purposes of the proposal and an explanation of why the public convenience and necessity require or permit the proposal.¹⁰

TRRC's purpose in submitting this Revised Application is to receive Board authority to modify the rail line between Miles City, MT and Terminus Points 1 & 2 that was approved in 1986 by the ICC. Most of the Refinements that TRRC proposes to the approved rail line were considered in the TRRC III proceeding. A few additional minor refinements to the 1986

¹⁰ As discussed below, the language of 49 C.F.R. § 1150.4(c) does not reflect the applicable statutory standard as modified by the Interstate Commerce Commission Termination Act of 1995.

approved rail line are being proposed in this Revised Application. The new refinements are at the Miles City Fish Hatchery and along the Otter Creek Spur.

The ICC previously determined that the construction and operation of the approved rail line was consistent with the public convenience and necessity. Specifically, in approving the rail line in 1986, the ICC stated “[w]e adopt the reasoning and conclusions of the initial decision finding that the construction, operation, and financing of the subject line by TRRC meet appropriate public interest standards in 49 U.S.C. 10901 and 11301. The evidence of record shows a need for rail transportation to serve coal mines in the Tongue River Valley. This is a provident and necessary expenditure that will give shippers new rail service to their benefit and to the benefit of the public as well.” 1986 Decision at 10.

That ICC determination remains in place. As explained above, there are plans to develop a mine in the Otter Creek area. Ark, a subsidiary of Arch, has leased Otter Creek coal tracts from the State of Montana and GNP. Otter Creek Coal, an affiliate of Ark, has already obtained a prospecting permit from the MDEQ and filed a mine permit application with the MDEQ to construct and operate a mine in the Otter Creek area. *See Rowlands VS at 2.*

The Interstate Commerce Commission Termination Act of 1995 (“ICCTA”) amended the governing public convenience and necessity statutory provision in 49 U.S.C. § 10901(c) so that the Board now must approve a construction application unless it finds that the construction is “inconsistent with the public convenience and necessity.” As acknowledged in the Final Environmental Impact Statement issued in the TRRC III proceeding, the current public convenience and necessity standard is “more lenient” than the previous standard that applied

when the Miles City to Terminus Points 1 & 2 rail line was approved in 1986.¹¹ Under the current standard, “there is now a presumption that rail construction is to be approved.”¹²

However, the proposed rail line, as refined, meets either standard.

The same justifications provided at the time that the line was first approved continue to exist for the Miles City to Terminus Points 1 & 2 rail line as TRRC proposes to refine it. *See* Bobb VS at 5. Indeed, the rail line as modified by the proposed Refinements presents environmental, economic and operating advantages over the rail line approved in 1986. Specifically, the proposed refinements would reduce the length of the approved TRRC line between Miles City and the two Terminus Points south of Ashland by approximately six rail miles. This reduction in the length of the line, as well as the elimination of curvature and placement of the rail line further from the Tongue River, will result in economic, environmental and operating benefits. It is clear that construction of the approved rail line from Miles City to Terminus Points 1 & 2, as refined, meets the governing public convenience and necessity standard.

A. Environmental Advantages

The rail line, as refined, has environmental advantages over the rail line approved in 1986. As the Board’s Section of Environmental Analysis (“SEA”) acknowledged in the TRRC III proceeding, as a general matter, the proposed refinements “would reduce the overall length of the rail line approved in Tongue River I, and would also move the rail line farther from the Tongue River Valley floor where prime farmlands occur [and, thus,] would reduce the proposed

¹¹ *See* Final Supplemental Environmental Impact Statement, Finance Docket No. 30186 (Sub-No. 3), *Tongue River Railroad Company, Inc. – Construction and Operation – Western Alignment*, at I-5 (hereafter “TRRC III FEIS”). Under the prior law in effect in 1986, Board approval of a construction application could be granted only if the Commission found that “present or future public convenience and necessity require[d] or permit[ted]” it.

¹² TRRC III DEIS at I-5.

rail line's effect on agricultural lands."¹³ More specifically, the rail line, as refined, is six miles shorter than the approved rail line and has less curvature thus lowering operating costs and resulting in improved velocity. Fuel usage and air emissions will be reduced as well. *See* Bobb VS at 3.

Moreover, the rail line, as refined, will require fewer acres of land to be acquired for the railroad right-of-way. Comparing the rail line, as refined, to the rail line approved in 1986, the six-mile shortening of the line will result in at least 145 fewer acres of right-of-way required.¹⁴ As a result, fewer acres of vegetation and wildlife habitat will be lost if the rail line, as refined, is constructed in lieu of the rail line approved in 1986. *Id.* at 3-4.

In addition, as the SEA found in the TRRC III draft EIS, the rail line, as refined, locates the line further west of the Tongue River.¹⁵ Thus, impacts to the river valley will be reduced.

B. Economic Advantages

Approval to construct and operate the rail line subject to the proposed refinements will result in a rail line that has less curvature and one that is approximately six miles shorter than the rail line as approved in 1986. As SEA found in the TRRC III DEIS, this will reduce the energy expenditures associated with the operation of the rail line, as refined.¹⁶ The economic benefits to TRRC that will result include annual reductions in locomotive maintenance costs, car maintenance costs, fuel costs, and mainline track maintenance. These benefits are estimated to yield cost savings in comparison to the costs associated with the rail line approved in 1986 in

¹³ *See* TRRC III DEIS at 5-5.

¹⁴ The 145 acre figure is derived as follows: the six mile reduction in rail line is multiplied by the average 200 foot right-of-way.

¹⁵ TRRC III DEIS at 5-5.

¹⁶ TRRC III DEIS at 5-27.

each year of operation. In addition, the rail line, as approved, will offer significant track maintenance savings due to its fewer curves. *See* Bobb VS at 4.

C. Operating Advantages

Approval of the proposed Refinements to the approved rail line also will yield significant operating advantages. Operating unit coal trains over the rail line, as refined, will be more efficient than over the rail line approved in 1986 because the new route is shorter and contains fewer curves. In fact, there is some question whether unit coal trains that would be expected to operate over the TRRC line once it is constructed could efficiently operate over the alignment with sharper curves that was approved in 1986, when shorter trains were envisioned. *See* Bobb VS at 4.

- (d) **As exhibit C, a map which clearly delineates the area to be served including origins, termini and stations, and cities, counties and States. The map should also delineate principal highways, rail routes and any possible interchange points with other railroads. If alternative routes are proposed for construction, the map should clearly indicate each route.**

Exhibit C, attached hereto, includes a map of the rail line from Miles City to the two Terminus Points, Terminus Points 1 & 2, as modified by the proposed Refinements that TRRC seeks authority to construct in this Revised Application, and aerial views and schematics showing the location of the proposed Refinements to the approved rail line.

- (e) **A list of the counties and cities to be served under the proposal, and whether there is other rail service available to them. The names of the railroads with which the line would connect, and the proposed connecting points; the volume of traffic estimated to be interchanged; and a description of the principal terms of agreements with carriers covering operation, interchange of traffic, division of rates, or trackage rights.**

The rail line, as refined, would serve the following counties and communities, all of which are located in the State of Montana and were identified in TRRC's original application for the Miles City to Ashland/Otter Creek rail line that was approved in the 1986 Decision:

Counties

- Custer County
- Rosebud County
- Powder River County

Communities

- Miles City
- Ashland

Miles City in Custer County currently has rail service. Miles City is served by BNSF's mainline. Rosebud County also benefits from rail service by means of a BNSF branch line to Colstrip. The community of Ashland and Powder River County currently do not have rail service.

The TRRC rail line, as refined, would connect with BNSF at Miles City, MT. Based on projected mine production, TRRC could interchange an average of seven trains per day with BNSF in the initial full year of operations. TRRC and BNSF have not yet reached an agreement regarding BNSF's operation of the TRRC rail line.

(f) The time schedule for consummation or completion of the proposal.

Construction of the TRRC approved rail line from Miles City to Ashland/Otter Creek, as refined, should take approximately 24 months over three years, assuming a construction season of eight months per year. TRRC anticipates that the rail line could be constructed and ready for transportation by the time that coal will begin to be produced from the Otter Creek mines which is subject to the completion of permitting and a myriad of other factors including, without limitation, market conditions and general business considerations.

(g) If a new line is proposed for construction:

- (1) The approximate area to be served by the line.**
- (2) The nature or type of existing and prospective industries (e.g., agriculture, manufacturing, mining, warehousing, forestry) in the area, with general**

information about the age, size, growth potential and projected rail use of these industries.

- (3) Whether the construction will cross another rail line and the name of the railroad(s) owning the line(s) to be crossed. If the crossing will be accomplished with the permission of the railroad(s), include supporting agreements. If a Board determination under 49 U.S.C. 10901 (d) (l) will be sought, include such requests.**

(1) The TRRC rail line, as refined, would serve an estimated 1,000 square mile area, which includes Custer, Rosebud, and Powder River Counties in Montana. Although the TRRC would be a common carrier railroad for all commodities, the greatest potential use of rail service is for the movement of coal. The TRRC rail line will serve the Otter Creek coal area leased by Ark which contains an approximately 1.5 billion ton coal reserve of low sulfur, sub-bituminous coal.¹⁷ In addition, TRRC has the potential to transport additional coal from the considerable coal resources that are located between Miles City and the two Terminus Points and will serve any mines developed in that area. However, at present, there are no known mine projects other than the Otter Creek mine in that area.

(2) At present, the area to be traversed by the rail line, as refined, is used primarily for livestock grazing and to raise dry-land crops, such as wheat, barley, and oats. Some of the land is irrigated, which permits the production of alfalfa and hay. It is not known at this time whether these industries will utilize rail transportation.

A new mine is expected to be developed by Otter Creek Coal in the near future in the Otter Creek area. This mine will be served by the TRRC. Output from Otter Creek Coal's planned mine is predicted to be 20 million tons annually when the mine is at full production. *See Rowlands VS at 2-3.* It is not known at this time whether other industries will locate in the area

¹⁷ *See Rowlands VS at 2.*

served by the TRRC line, but TRRC will hold itself out as a common carrier to transport for any shipper upon reasonable request.

- (3) The rail line, as refined, will not cross another rail line.

OPERATIONAL DATA (SECTION 1150.5)

As exhibit D, an operating plan, including traffic projection studies; a schedule of the operations; information about the crews to be used and where employees will be obtained; the rolling stock requirements and where it will be obtained; information about the operating experience and record of the proposed operator unless it is an operating railroad; any significant change in patterns of service; any associated discontinuance or abandonments; and expected operating economics.

Exhibit D, attached hereto, contains an Operating Plan that sets out in general terms the expected operating plan if BNSF operates the TRRC rail line. As previously noted, the operations over the TRRC line are expected to be conducted by BNSF, under an agreement with TRRC. No agreement with respect to potential BNSF operations has yet been reached. Nevertheless, BNSF's general plans for operations over the TRRC line, in the event of such an agreement, are set forth in the Operating Plan.

No associated discontinuances or abandonments are expected in connection with the construction of the approved TRRC rail line from Miles City to Ashland/Otter Creek as TRRC proposes to modify that rail line.

FINANCIAL INFORMATION (SECTION 1150.6)

- (a) **The manner in which applicant proposes to finance construction or acquisition, the kind and amount of securities to be issued, the approximate terms of their sale and total fixed charges, the extent to which funds for financing are now available, and whether any of the securities issued will be underwritten by industries to be served by the proposed line. Explain how the fixed charges will be met.**

Construction of the Tongue River Railroad will most likely be financed pursuant to one of the following options:

1. 100% equity contributions from some or all of the members of its sole shareholder, TRR Holding.
2. Guarantee by the some or all of the members of its sole shareholder, TRR Holding, of long-term debt privately placed by TRRC.
3. Combination of either 1 or 2 above.

(b) **As exhibit E, a recent balance sheet. As exhibit F, an income statement for the latest available calendar year prior to filing the application.**

Attached hereto are Exhibit E, a recent balance sheet for TRRC as of December 31, 2011 and for BNSF, the expected operator, as of December 31, 2011, and Exhibit F, an income statement for TRRC as of December 31, 2011 and for BNSF, the expected operator, as of December 31, 2011, the latest available calendar year prior to filing the Revised Application.

(c) **A present value determination of the full costs of the proposal. If construction is proposed, the costs for each year of such construction (in a short narrative or by chart).**

The present value cost of constructing the TRRC rail line, as refined, is approximately \$490 million. A chart breaking out the projected construction costs by year is presented in Appendix B.

(d) **A statement of projected net income for 2 years, based upon traffic projections. Where construction is contemplated, the statement should represent the 2 years following completion of construction.**

See attached Exhibit G.

ENVIRONMENTAL AND ENERGY DATA (Section 1150.7)

As exhibit H, information and data prepared under 49 C.F.R. Part 1105, and the "Revision of the Nat'l Guidelines Environmental Policy Act of 1969," 363 I.C.C. 653 (1980), and in accordance with "Implementation of the Energy Policy and Conservation Act of 1975," 49 CFR Part 1106.

Pursuant to 49 C.F.R § 1150.7, TRRC incorporates by reference as Exhibit H (1) the draft Environmental Impact Statement ("EIS") served in this docket on July 15, 1983, (2) the

supplement to the draft EIS served in this docket on January 19, 1984, (3) the Final Environmental Impact Statement served in this docket on August 23, 1985 for the rail line approved in the 1986 Decision, (4) the 1998 Radian Report which analyzes the environmental impacts associated with the proposed Refinements to the rail line approved in 1986 that were considered in the TRRC III proceeding, and (5) the draft EIS from the TRRC III proceeding served on October 15, 2004 and the final EIS from the TRRC III proceeding served on October 13, 2006, to the extent that they evaluate proposed refinements to the 1986 approved rail line. In addition, TRRC is retaining a third party contractor pursuant to 49 C.F.R. § 1105.10(d) to work with the Board's Office of Environmental Analysis in preparing additional necessary environmental documentation as required by NEPA in connection with TRRC's Revised Application.

ADDITIONAL SUPPORT (SECTION 1150.8)

Any additional facts or reasons to show that the public convenience and necessity require or permit approval of this application. The Board may require additional information to be filed where appropriate.

The purpose of this Revised Application is to obtain authorization to construct and operate a rail line between Miles City, MT and Terminus Points 1 & 2, south of Ashland, MT, previously-approved by the Board's predecessor in 1986, as modified by some Refinements to that rail line, most of which were already considered by the Board in the TRRC III proceeding. The proposed Refinements to the previously-approved line create a route that will permit more efficient, economical operations while resulting in less environmental impact than the route already approved. This would be a win-win situation in any circumstance.¹⁸ The Board has indicated that it

¹⁸ As previously noted, since the time the Board's regulations were published, Congress has amended the Interstate Commerce Act to provide that it is no longer necessary for an applicant to prove that a rail construction proposal is required or permitted by the public convenience and

“intends to expedite this case to the extent possible” in its decision served June 18, 2012 reopening this docket and requiring TRRC to file this revised application.

Letters of support for this Revised Application from the Montana Coal Council, Western Environmental Trade Association, and Montana Chamber of Commerce are included in Appendix C.

NOTICE (Section 1150.9)

A summary of the proposal which will be used to provide notice under § 1150.10 (f).

Pursuant to 49 C.F.R § 1150.9, attached hereto as Exhibit I is a summary of the proposal in the Revised Application which will be used to provide notice under § 1150.10(f). The summary will be published in a newspaper of general circulation in each county in which the line will be located within two weeks after the filing of the Revised Application.

CONCLUSION

For the reasons stated herein, TRRC respectfully requests that the Board grant it authority to construct and operate over a rail line between Miles City, MT and Terminus Points 1 & 2

necessity. As amended, the statute now requires that a construction application be approved unless opposing parties prove that it would be inconsistent with the public convenience and necessity. *See* 49 U.S.C. § 10901(c).

south of Ashland, MT previously authorized by the ICC in 1986, as modified by the Refinements to that rail line specified in this Revised Application.

Respectfully submitted,



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

Attorneys for Applicant
Tongue River Railroad Company, Inc.

Dated: October 16, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of October, 2012, a true and correct copy of the foregoing Revised Application for Construction and Operation Authority was served by first class mail, postage prepaid, on all parties of record in Surface Transportation Board Finance Docket No. 30186, and on the following persons required by 49 C.F.R. §1150.10(e)

The Hon. Brian D. Schweitzer
Office of the Governor
Montana State Capitol Building.
P.O. Box 200801
Helena MT 59620-0801

Tim Reardon, Director
Montana Department of Transportation
2701 Prospect Avenue
PO Box 201001
Helena MT 59620-1001

Travis Kavulla, Chairman
State of Montana
Public Service Commission
1701 Prospect Avenue
P.O. Box 202601
Helena, MT 59620-2601

and on the following:

Richard J. Anderson
6707 Moon Creek Rd.
Miles City, MT 59301

John A. Beardsley
2488 Hwy. 59 South
Miles City, MT 59301

Barbara J. Braided Hair
P.O. Box 661
Lame Deer, MT 59043

Otto C. Braided Hair, Jr.
P.O. Box 661
Lame Deer, MT 59043

David W. Brockpahler
Ball Ranch Co. LLC
1850 Lake Drive West
Chanhassen, MN 55317

Dru Burk
Ball Ranch Co. LLC
263 Road 253
Ismay, MT 59336

Nancy W. Carrel
29 Red Bluff Loop
Birney, MT 59012

Sharon Dinstel
P.O. Box 2484
Colstrip, MT 59323

Del Dinstel
P.O. Box 2484
Colstrip, MT 59323

Conrad Fisher
Tribal Historic Preservation Officer
600 Cheyenne Ave.
P.O. Box 128
Lame Deer, MT 59043

Thomas M. France
240 N. Higgins, Suite 2
Missoula, MT 59802

Greg Hallsten
Montana Department of Environmental
Quality
P.O. Box 200901
Helena, MT 59620

Terry J. Hanson
P.O. Box 578
Miles City, MT 59301

Les & Donna Hirsch
1840 Tongue River Rd.
Miles City, MT 59301

Beth Kaeding
669 Stonegate Drive
Bozeman, MT 59715

Gordon MacDougall
1025 Connecticut Avenue, N.W.
Suite 919
Washington, DC 20036

Doug McRae
3952 Rosebud Cr. Rd.
Forsyth, MT 59327

Maurice Felton
Felton Angus Ranch Inc.
591 Brandenburg Rd.
Miles City, MT 59301

Mark Fix
584 Tongue River Road
Miles City, MT 59301

Nick Goldar
4472 Hwy. 39
Forsyth, MT 59327

John Hamilton
Cedar Hills Ranch
7207 Tongue River Rd.
Miles City, MT 59301

Raymond Harwood
7100 Moon Creek Rd.
Miles City, MT 59401

Derf Johnson
Montana Environmental Information Center
P.O. Box 1184
Helena, MT 59624

Adriann M. Killsnight
Blackbirdwoman Consulting
P.O. Box 1232
Lame Deer, MT 59043

Clint McRae
633 Rosebud Court Road
Forsyth, MT 59327

Bart Mihailovich
Spokane Riverkeeper
35 West Main Avenue, Suite 300
Spokane, WA 99201

Paul E. Miller, Jr.
Carroll Companies, Inc.
1640 Old Hwy. 421 South
Boone, NC 28607

Eileen Morris
1323 Jamie Street
Billings, MT 59105

Gary L. Ochsner
1577 Hwy. 59 S.
Miles City, MT 59301

Jeff & Susan Perla
P.O. Box 69
Shepherd, MT 59079

Siamak Samsam
5522 N. Sundown Drive
Tucson, AZ 85718

Brad Sauer
442 Hwy. 39
Forsyth, MT 59327

Nathaniel Shoaff
Sierra Club Environmental Law Program
85 Second St., Second Floor
San Francisco, CA 94105

Jack R. Tuholske
P.O. Box 7548
Missoula, MT 59807

Curtis Yarlott
St. Labre Indian School
P.O. Box 77
Ashland, MT 59003

Jeanie Alderson
Bones Brothers Ranch
P.O. Box 505
Birney, MT 59012

Roger Muggli
322 Wytlenhove Lane
Miles City, MT 59301

Alice Orr
9270 Tongue River Road
Birney, MT 59012

Terry Punt
Bones Brothers Ranch
P.O. Box 505
Birney, MT 59012

Lana Sangmeister
Western Organization of Resource Councils
220 27th Street, Suite B
Billings, MT 59101

Kyle Shaw
2142 Tongue River Road
Miles City, MT 59301

Ben Stuckart
Spokane City Council President
808 W. Spokane Falls Blvd.
Spokane, WA 99201

Christine Valentine
P.O. Box 547
Birney, MT 59012



Keith Decker

EXHIBIT A

WRITTEN CONSENT TO ACTION
BY THE BOARD OF DIRECTORS
OF
TONGUE RIVER RAILROAD COMPANY, INC.

DATED AS OF OCTOBER 4, 2012

The undersigned, being all of the directors of

TONGUE RIVER RAILROAD COMPANY, INC.,

a Delaware corporation (the "*Corporation*"), hereby waive all notice of the time, place or purpose of a meeting, consent by electronic transmission to adoption of the following resolutions as being the action of the board of directors of the Corporation (the "*Board of Directors*") pursuant to the applicable provisions of the General Corporation Law of the State of Delaware, as amended, do hereby consent that the following resolutions be, and they hereby are, adopted as of the date first written above; are and shall be of the same force and effect as if they were adopted at a duly held meeting of the Board of Directors; and direct that this Written Consent to Action be filed with the minutes of the proceedings of the Board of Directors:

WHEREAS, the Corporation was incorporated in the State of Delaware on September 4, 1998;

WHEREAS, the Certificate of Incorporation of the Corporation (the "*Certificate of Incorporation*") provides, among other things, that the purpose of the Corporation is, among others, "to project, design, plan, conduct engineering studies of, arrange financing for and obtain all applicable federal, state and local permits and authorizations for the construction and operation, of, to secure rights of way for, and to construct, equip and operate railroads";

WHEREAS, the Corporation previously expressed its intention to construct and operate a rail line (the "*Tongue River Railroad*") between Miles City, MT and two terminus points south of Ashland, MT, which are Terminus Point #1, which continues southwest and terminates at the previously proposed Montco Mine location, and Terminus Point #2, which continues south along the Otter Creek;

WHEREAS, the Tongue River Railroad was previously authorized by the Interstate Commerce Commission ("*ICC*") in a final decision issued in 1986 in the so-called TRRC I proceeding (Finance Docket No. 30186), wherein the ICC found that the construction and

operation of the Tongue River Railroad was consistent with the public convenience and necessity;

WHEREAS, the Corporation is preparing for filing with the Surface Transportation Board ("STB") a Revised Application in the TRRC I proceeding to seek approval to make certain modifications to the Tongue River Railroad alignment previously approved by the ICC in order to straighten and shorten the rail line and allow for more efficient operations;

WHEREAS, the Corporation intends also to seek from other governmental agencies all permits required to construct the ICC-approved Tongue River Railroad along the modified alignment;

WHEREAS, the Corporation does not intend to construct any rail line south of Terminus Points #1 and #2 (located south of Ashland, MT) that was the subject of its applications to the STB in the so-called TRRC II and TRRC III proceedings, which proceedings have now been terminated; and

WHEREAS, the Board of Directors wishes to ratify and confirm the Corporation's authority to obtain all federal, state and local permits required for the design, construction and operation of the Tongue River Railroad, as provided by its Certificate of Incorporation.

NOW, THEREFORE, BE IT RESOLVED, that the Board of Directors hereby ratifies and confirms the Corporation's authority to obtain all federal, state and local permits required for the design, construction and operation of the Tongue River Railroad, as provided by its Certificate of Incorporation;

RESOLVED FURTHER, that the Board of Directors hereby ratifies, confirms and adopts the actions of the officers of the Corporation taken prior to the date hereof in connection with the pursuit of, and authorizes the officers of the Corporation to continue to pursue, the federal, state and local permits required for the design, construction and operation of the Tongue River Railroad;

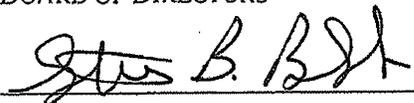
RESOLVED FURTHER, that the Board of Directors hereby authorizes the officers of the Corporation to (a) sign, execute, certify to, verify, acknowledge, deliver, accept, file and record any and all instruments and documents and (b) take, or cause to be taken, any and all actions in the name and on behalf of the Corporation or otherwise, as in such officer's judgment shall be necessary or appropriate to effect the purposes of the foregoing resolutions;

RESOLVED FURTHER, that any and all actions heretofore taken or caused to be taken by, and any and all certificates, agreements, documents and other instruments heretofore executed, acknowledged or delivered by, any officer or officers of the Corporation, in the name and on behalf of the Corporation, in connection with or related to any of the matters authorized or contemplated by the foregoing resolutions, be and each hereby is, ratified, confirmed, adopted, approved and authorized; and

RESOLVED FURTHER, that this Written Consent to Action may be executed in one or more and on separate counterparts, and all of such counterparts will be considered one and the same document.

IN WITNESS WHEREOF, the undersigned, being all of the directors of the Corporation, have affixed their signatures hereunto as of the date first written above, in acknowledgment of their consent to the adoption of the resolutions hereinabove set forth.

BOARD OF DIRECTORS



Stevan B. Bobb, Director

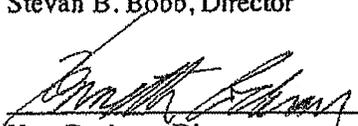
Ken Cochran, Director

RESOLVED FURTHER, that this Written Consent to Action may be executed in one or more and on separate counterparts, and all of such counterparts will be considered one and the same document.

IN WITNESS WHEREOF, the undersigned, being all of the directors of the Corporation, have affixed their signatures hereunto as of the date first written above, in acknowledgment of their consent to the adoption of the resolutions hereinabove set forth.

BOARD OF DIRECTORS

Stevan B. Bobb, Director



Ken Cochran, Director

EXHIBIT B

CERTIFICATE OF INCORPORATION
OF
TONGUE RIVER RAILROAD COMPANY, INC.

To form a corporation pursuant to the Delaware General Corporation Law, the undersigned hereby certifies as follows:

ARTICLE 1.

The name of this corporation is Tongue River Railroad Company, Inc.

ARTICLE 2.

The purpose of this corporation is to engage in any lawful act or activity for which corporations may be organized under the Delaware General Corporation Law, including, without limitation, to project, design, plan, conduct engineering studies of, arrange financing for and obtain all applicable federal, state and local permits and authorizations for the construction and operation of, to secure rights-of-way for, and to construct, equip and operate railroads.

ARTICLE 3.

The corporation shall have perpetual duration.

ARTICLE 4.

The registered office of this corporation in Delaware is 1209 Orange Street, Wilmington, New Castle County, Delaware 19801, and the name of its registered agent is The Corporation Trust Company.

ARTICLE 5.

The total number of shares of stock which this corporation is authorized to issue is 50,000 shares of nonassessable common stock with a par value of \$1.00 per share.

ARTICLE 6.

In furtherance, and not in limitation of the powers conferred by statute, the board of directors is expressly authorized to make, amend, alter, change, add to or repeal bylaws of this corporation, without any action on the part of the stockholders. The bylaws made by the directors may be amended, altered, changed, added to or repealed by the stockholders. Any specific provision in the bylaws regarding amendment thereof shall be controlling.