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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
May 7, 2012

STB Finance Docket No. 30186 (Sub 3)¹

Part of
Public Record

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

**TONGUE RIVER RAILROAD COMPANY, INC.'S REPLY TO PETITION OF
NORTHERN PLAINS RESOURCE COUNCIL AND MARK FIX TO REOPEN BASED
ON REMAND AND REQUEST FOR PROCEDURAL SCHEDULE**

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May 7, 2012

¹ This filing also embraces Finance Docket No. 30186, *Tongue River Railroad – Rail Construction and Operation – In Custer, Powder River and Rosebud Counties (TRRC I)* and Finance Docket No. 30186 (Sub No. 2), *Tongue River Railroad Company—Rail Construction and Operation—Ashland to Decker, Montana. (TRRC II)*.

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Tongue River Railroad Company, Inc. (“TRRC”) hereby responds in opposition to the April 17, 2012 Petition to Reopen Based on Remand and Request for a Procedural Schedule (“NPRC Petition”) filed by Northern Plains Resource Council and Mark Fix (jointly, “NPRC”). In its Petition, NPRC sets forth its views on how the Board might proceed to address this matter in light of the partial remand in the *TRRC II* and *TRRC III* proceedings ordered by the U.S. Court of Appeals for the Ninth Circuit in *N. Plains Res. Council v. STB, et al.*, 668 F.3d 1067 (9th Cir., 2011) (“*Northern Plains*”). NPRC also sets forth a proposed schedule. In response to the NPRC Petition, TRRC states as follows:

1. **Reopening of TRRC I is Not Warranted.** The NPRC Petition was prepared and filed prior to the submission to the Board of the April 19, 2012 Statement of Intent filed by TRRC. In that Statement, TRRC described its intention not to construct the rail lines initially planned for south of Ashland that had been proposed in *TRRC II* and *TRRC III* and instead to

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move forward to construct only the Miles City-Ashland/Otter Creek rail line that had been approved in *TRRC I* (the “TRRC Line”), an administratively final proceeding that was not before the Court in the *Northern Plains* case. TRRC also described its intention to submit an amended *TRRC III* application in which it will seek Board approval of the refinements to the TRRC Line that had been considered in *TRRC III* (“Refinements”). Thus, to the extent that the NPRC Petition addresses the need for further Board review of any rail line south of Ashland/Otter Creek, it does not reflect the current status of TRRC’s construction plans. Moreover, NPRC has offered no reason why the *TRRC I* proceeding needs to be reopened.

Further, NPRC’s contention that the Board should continue to process its pending petition for reconsideration of the June 15, 2011 denial of NPRC’s July 26, 2010 Petition to Reopen is without merit. As explained in TRRC’s April 19 Statement, NPRC’s petition for reconsideration (and the underlying petition to reopen) are mooted by TRRC’s decision not to construct any lines south of Ashland and by TRRC’s suggestion that the Board prepare a supplemental EIS in *TRCC III* which will address, among other points, the cumulative impacts of the Otter Creek mine development and the TRRC Line, which is the primary issue on which NPRC’s earlier petition is largely based.²

2. **Scope of Supplemental Environmental Review.** NPRC describes the deficiencies found by the Ninth Circuit with the environmental review undertaken by the Board in *TRRC II* and *TRRC III*, and argues that the Board needs to undertake further environmental review to cure those deficiencies. Apart from NPRC’s suggestion that any further environmental review include the lines that had been proposed south of Ashland, TRRC does not disagree with

² Further, NPRC is free to raise the additional issues that it has raised in its 2010 Petition to Reopen during the scoping process on the supplemental EIS required by the *Northern Plains* decision.

NPRC's suggestion that any supplemental environmental review focus on the points raised by *Northern Plains* -- further cumulative impact studies of the TRRC Line and the Otter Creek mine project; further cumulative impact analysis of the TRRC Line and CBM projects in the area of that Line, including an appropriate water quality analysis; and additional baseline surveys, including on-the-ground surveys of the right-of-way in order to meet the Court's requirements. However, NPRC's further contention that the STB needs to address the alternative route considered in connection with the initial *TRRC III* application is no longer pertinent in light of TRRC's subsequent announced intention not to construct the 17-mile line that was initially the subject of the *TRRC III* application.

3. **NPRC's Proposed Schedule Should Not Be Adopted.** NPRC sets forth a proposed schedule for handling the proceeding, including public hearings in Ashland, Billings and Miles City no sooner than 15 days after a Draft Supplemental EIS is issued. NPRC's proposed schedule, which confusingly mixes together a schedule for the merits and the environmental phases of this proceeding, should not be adopted.

For the merits side of the proceeding, TRRC submits that the Board's rules that set forth the time frames for handling an application for construction of a line should govern with respect to the amended application that TRRC intends to file. *See* 49 CFR 1150.10 (providing time frames for the filing of comments on applications and replies to such comments). With respect to the environmental side of the proceeding, TRRC submits that a schedule can best be fashioned once the scoping process has been finalized

In addition, NPRC's proposed schedule is inexplicably prolonged. For example, NPRC offers no explanation as to why environmental scoping comments would not be due for 240 days from the date initiating the Supplemental EIS process. Further, TRRC is confident that the

Board can complete a focused Draft Supplemental EIS that addresses the discrete issues raised by the Ninth Circuit and the Refinements in much less than the 2 years contemplated by the NPRC schedule.³

Respectfully submitted,



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³ Further, with respect to the merits of the proceeding, NPRC assumes that it will conduct depositions and written discovery. However, discovery of this nature is not contemplated by the Board's rules governing construction applications. Nor is it warranted given the narrow focus of the merits of TRRC's proposal to build a Line already approved by the Board along a modestly modified right-of-way. However, TRRC agrees with NPRC that the Board should develop a new service list for the proceeding.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of May 2012, a copy of the foregoing document was served via first class mail, postage prepaid, on all parties of record.

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

David H. Coburn