

Before  
the  
SURFACE TRANSPORTATION BOARD

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June 5, 2013  
Part of  
Public Record

Finance Docket No.  
30186

TONGUE RIVER RAILROAD COMPANY - RAIL  
CONSTRUCTION AND OPERATION-IN CUSTER, POWDER  
RIVER AND ROSEBUD COUNTIES, MONT.

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**PETITION TO ISSUE REVISED PROCEDURAL SCHEDULE  
TO ACCOMMODATE LIMITED DISCOVERY**

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JACK R. TUHOLSKE  
Tuholske Law Office PC  
P.O. Box 7458  
Missoula MT 59807  
406 396 6415  
jtuholske@gmail.com

Attorney for Northern Plains  
Resource Council, Rocker Six  
Cattle Company

## INTRODUCTION

Petitioners Northern Plains Resource Council Inc. and Clint and Wally McRae (dba Rocker Six Cattle Company, Inc.) hereby petition the Surface Transportation Board (STB) to issue a revised Procedural Schedule to accommodate limited discovery in this matter. The Board's procedural rules provide for discovery in this contested case proceeding. Tongue River Railroad Company's (TRR) recent requested extension of time to respond Petitioners' comments stated, for the first time, that TRR is going to interject expert testimony to support its application, thus creating significant factual disputes. The Board's decision-making will be aided by allowing the parties to develop a more complete record through discovery.

Petitioners request six months to complete discovery. TRR will not be prejudiced by any delay occasioned by discovery because no final decision on TRR's Application can be made until the NEPA process is complete. Given that a draft EIS is many months away (the parties have yet to fully agree on the protocol to access land to gather baseline data), the Application will not be ripe for decision until at least 2014. On the other hand, not allowing Petitioners to fully develop a record may be prejudicial. The Board is reminded that unlike many proceedings it handles, granting a Certificate of Public Convenience and Necessity here will give the BNSF the power under Montana law to condemn thousands of acres of private

land. The affected landowners have every right to use all appropriate legal means, including discovery provided by the Board's own rules, to show that the TRR is not in the public interest.

## **ARGUMENT**

### **A. Discovery is Appropriate Under the Board's Rules.**

Under 49 C.F.R. §1114.21, parties are permitted discovery of all relevant information in contested proceedings such as this one. Relevance is broadly defined to mean "that the information sought might be able to affect the outcome of a proceeding." STB FD 35557, Reasonableness of BNSF Ry. Coal Dust Mitigation Tariff Provisions (February 27 Order), (STB served Feb. 27, 2012) citing Waterloo Ry. — Adverse Aband. — Lines of Bangor and Aroostook R.R. and Van Buren Bridge Co. in Aroostook Cnty., Me., AB 124 (Sub-No. 2), et al. (STB served Nov. 14, 2003). The Board has the authority to frame the scope of discovery and to disallow discovery that seeks irrelevant information. Diana Del Grosso et al., STB FD 35652 (STB served May 8, 2013). The Diana Del Grosso proceeding illustrates when the Board will disallow discovery. In that proceeding the petitioners sought discovery of business documents from litigation involving different parties over a different facility than the one at issue before the Board. Such clearly irrelevant material did not warrant the exercise of discovery. The Board's decision illustrates an exception to the basic rule that discovery is

permissible in all proceedings. Id. at p. 5. Here, as explained below, Petitioners will seek discovery to flesh out factual disputes based on TRR's belated submission of expert testimony, and other gaps in TRR's Revised Application. Discovery will likely yield relevant material to provide the Board a more complete record.

Discovery is appropriate here given what is at issue. Rocker Six, a petitioner herein, will be subject to several miles of condemnation of its private property should the Board approve the TRR. The magnitude of this loss, which is subject to state condemnation proceedings, constitutes a significant deprivation of property. No monetary compensation can make this family's ranch whole should it be severed by the TRR. Due Process entitles the Rocker Six to use all available legal procedures to challenge the TRR, which includes the ability to gather evidence through discovery.

**B. TRR's Belated Efforts to Interject Expert Testimony Supporting its Application will Create Significant Factual Disputes that Should be Tested Through Discovery.**

TRR's approach to its evidentiary burden of establishing a public need has been rather cavalier. TRR initially argued that it has a right to build the TRR because "market forces are coalescing" around this project, and "industry players are prepared to dedicate resources." STB FD 30186, Tongue River Railroad Company –Rail Construction and Operation- In Custer, Powder River, and

Rosebud Counties, Mont., *Revised Application* (filed Dec. 17, 2012) at p. 21. This “Field of Dreams” approach (build it and they will come) ignores the burden that Congress imposed to justify new railroads in the *public’s* convenience, not industry’s speculative ventures. Without offering competent evidence, TRR also opined that unspecified domestic and international markets will want Montana’s high-sodium coal. *See e.g. Revised Application* at p. 20 (“some portion of the Otter Creek coal may find markets overseas . . . through ports along the Atlantic, Pacific, Great Lakes, or Gulf Coast”).

The Board then prodded TRR for its incomplete and vague application. The Board ordered TRR to “supplement its application to provide a sufficient record for the Board’s review.” *Decision* (dated Oct. 31, 2012) at p. 3. The Board clarified that it was going to again review the transportation merits of the ever-changing nature of the entire project. *Id.* TRR failed to provide any hard data to establish a public need and benefit for this railroad. *See* Letter from Victoria Rutson, Director, OEA, STB, to David H. Coburn, Steptoe & Johnson LLP (Jan. 23, 2012).

In comments on TRR’s application, and in other filings before the Board, Petitioners established that the TRR is not in the public interest because there is no demand for Montana Powder River Basin coal, and even if there were demand, the negative consequences of the railroad far outweigh any societal benefits.

Petitioners do not casually fling these arguments at TRR; rather Petitioners have repeatedly filed expert reports, verified statements and credible economic information to support their arguments. *See e.g. Petitioner's Comments on TRR Application* (filed Apr. 2, 2013) (Appendix 1, Report of Synapse Consulting; Appendix 4, Report of Dr. Thomas Power); *Verified Statement of Gerald Fauth filed Jan. 7, 2013*. Petitioners have also participated in the nascent NEPA process by filing detailed scoping comments. These efforts are all geared towards creating an adequate record before the Board.

TRR provided little hard data or expert testimony to establish its burden of showing public necessity. Now, months after supposedly completing its application, TRR has hired an expert to rebut Petitioners' experts. *TRR Petition for Extension of Time* (filed Apr. 22, 2013) at p. 2. TRR is trying to backdoor its failure to carry its evidentiary burden by creating a record after the public has had the opportunity to comment on the application. TRR's new expert reports will create contested issues of fact that lie at the heart of the dispute over whether the construction of this new railroad is truly in the public interest. Discovery constitutes the most appropriate means to test the credulity of TRR's experts.

**C. Discovery Will Not Prejudice TRR or Unduly Delay these Proceedings.**

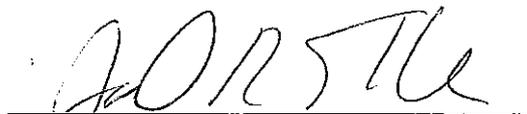
TRR will complain that discovery will unduly delay and prejudice these proceedings. However, a six-month discovery period will not delay final

resolution of TRR's application. The Board cannot make a final decision in this matter until the Final Environmental Impact Statement is approved and a Record of Decision is signed. That process will take many months, or even years to complete.

The NEPA process is in its infancy. The Board has received scoping comments. A draft EIS is under preparation. However, to date TRR's contractor has not even negotiated an access agreement with the landowners, though such discussions are in process. It is inconceivable that the Final EIS and Record of Decision will be complete before 2014. Discovery will be finished long before the Board has to make a final decision. Therefore, TRR will suffer no delay or prejudice from discovery.

Based on the forgoing, Petitioners respectfully request that the Board issue a revised Procedural Schedule that includes a six-month discovery period commencing the date of the Board's order.

Submitted this 5<sup>th</sup> day of June, 2013.



Jack R. Tuholske  
Attorney for the Petitioners

**Certification of Service**

I certify that the foregoing has been served by U.S. mail on all parties of record on this 5<sup>th</sup> day of June, 2013.

