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

**COMMENTS TO TONGUE RIVER RAILROAD
COMPANY'S SUPPLEMENTAL APPLICATION**

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INTRODUCTION AND SUMMARY OF ARGUMENT

It is time to put the Tongue River Railroad to rest once and for all. Twenty-seven years after the Interstate Commerce Commission approved a variant of the railroad, no tracks have been laid and *not one* domestic or foreign utility is on record in support of the current project. TRRC's Revised Application fails to establish the threshold legal requirement for this railroad because it does not meet the well-established test for demonstrating the railroad is in the public convenience and necessity. The application is deficient on its face and should be rejected. These comments are filed by Northern Plains Resource Council Inc., a Montana non-profit organization comprised of ranchers, farmers and conservationists interested in preserving the air, water, wildlife and agricultural values of Montana, and the Rucker Six Cattle Company, a ranch owned and operated by the McRae family that will be bisected by the proposed Tongue River Railroad.¹

The demand for Powder River Basin (PRB) coal is so low that Arch Coal, Inc., the ultimate owner of the Otter Creek mine and a major investor in the proposed Tongue River Railroad, slowed production at its existing PRB mines and reported a net loss of \$295 million in the fourth quarter of 2012. Domestic demand for coal is declining precipitously due to low natural gas prices, pollution control costs, and impending greenhouse gas regulations. As a result, many electric utilities are retiring their coal-fired power plants or converting to natural gas. Compared to other PRB coal, there is even less demand for Otter Creek and other Ashland area coal because few electric utilities are willing to accept it due to its high sodium content.²

¹ NPRC and Rucker Six Cattle Company reserve the right to submit additional comments on the PCN based on information received during discovery and through the EIS process.

² Sodium causes slagging problems at power plants. Slag is the molten ash produced in wet bottom boilers.

This already limited market is also in decline as even utilities that might potentially be willing to accept Otter Creek coal are scheduled or likely to retire in the foreseeable future. Moreover, Otter Creek and other Ashland area coal will have to compete with lower-sodium coal from existing PRB mines for the handful of remaining potential customers.

Foreign demand for Otter Creek coal is also declining. The only potential international market for Otter Creek coal is Asia. Even assuming there is sustained Asian demand for coal, TRRC cannot compete against established Indonesian and Australian coal producers that enjoy a significant transportation advantage. Also, the infrastructure necessary for shipping PRB coal to international markets at competitive prices does not exist, may never exist, or will remain significantly under-developed when TRRC is ready to begin coal transport. As TRRC admits, “it is far from certain that [west coast coal export terminal] facilities, now in the permitting phase, will be constructed”³ At the same time, transportation infrastructure in China, the market with the greatest projected increase in demand for coal, is improving and thereby making imports less competitive.

The poor demand for Otter Creek and other Ashland area coal is apparent from TRRC’s application and related filings. For example, the verified statements of an Arch Coal executive suggest that the Otter Creek coal can compete with other PRB coal mines because it is less expensive to reach the coal at Otter Creek. However, its consultant Norwest Corporation states that this advantage “will be offset by Otter Creek’s higher capital recovery / depreciation costs.”⁴

³ Letter from David Coburn, Steptoe and Johnson LLP, on behalf of TRRC to Kenneth Blodgett, Surface Transportation Board, and Alan Summerville, ICF International, Response to Information Request #1, at 3, Feb. 6, 2013.

⁴ Norwest Corporation, Otter Creek Property Summary Report, Vol. I at E-5.

Furthermore, Norwest recognizes that Otter Creek coal’s entry into the market could “destroy[] whatever price discipline, if any, currently exists.”⁵

The lack of demand is also apparent in TRRC’s revenue projections. TRRC projects \$80 million in revenue for the two years following completion of construction. However, this \$80 million figure is a pure fabrication: it comes without any basis or explanation for how it was derived and identifies the *BNSF*—the line’s operator—as the revenue source. In contrast, TRRC provided verified statements of financial experts and utilities in its applications for TRR III.

While TRRC *overstates* the potential markets for Otter Creek coal to justify the public demand and need for the rail line, it intentionally *understates* coal tonnage it would haul to avoid addressing down-line transportation impacts and environmental analysis. TRRC estimates that 3.7 loaded trains will travel on the proposed rail line per day but fails to take into account coal tonnage from the Montco mine, which is the sole reason TRRC is asking for approval of the Montco Mine Spur in its application. Adding tonnage from the Montco mine pushes the estimate above the eight-car threshold established in STB regulations at 49 C.F.R. § 1105.7(e) that require the agency to look at down-line impacts to air quality, which was used as the starting point of a down-line cumulative impacts review in *DM&E*.⁶

As a result of its deliberate misleading of the Board regarding the true nature of this project, TRRC also avoids any discussion of the significant down-line impacts from Montana all the way to the West Coast export facilities. Traffic generated by TRRC will impact towns and cities throughout the Northwest, as this coal will travel on BNSF lines that already handle

⁵ See *id.* (stating that “[c]areful effort developing a solid market strategy will be necessary to determine how best to nudge into this market without destroying whatever price discipline, if any, currently exists.”).

⁶ In *DM&E*, the STB used the eight-train threshold as a trigger for an extensive down-line impacts analysis.

substantial traffic. More community travel disruption, increased safety risks, coal dust and diesel pollution all flow directly from this project and are not in the public interest. The Verified Statements of local government officials support this point.

Finally, the third factor of the PCN test provides that the proposed construction and operation of the Tongue River rail line must be in the public interest and not unduly harm existing services. Analysis under this factor of the PCN test is not limited to direct harm to direct competitors. In particular, Ninth Circuit and STB precedent provide that environmental and social impacts form an integral part of the public interest analysis mandated by this factor of the PCN test. As demonstrated in comments by Northern Plains and others in the EIS scoping process, approving this railroad portends a host of environmental impacts in Montana, the Northwest, and for the health of the atmosphere.⁷ TRRC's assertions of public convenience and necessity are speculative and unsupported by credible data. In such circumstances, *any* environmental detriment is contrary to the public interest. Furthermore, there are material environmental and social impacts inherent in TRRC's proposal sufficient to rebut any assertion of public convenience and necessity, including permanent alienation of private property and loss of land use; health and safety concerns; and cumulative environmental and social impacts. Moreover, granting a Certificate to TRRC opens the door for condemnation proceedings that will give TRRC the authority to permanently condemn a right-of-way for this speculative and ill-conceived venture, trampling on Montana farms and ranches in the process. Authorization in the

⁷ Northern Plains requests that the Board consider and incorporate the EIS "record" to date in any decision that results from these Comments. While the STB has traditionally created a "Transportation" and an "Environmental" record, in reality they are all part of one record to deny or approve the Revised Application. The STB acknowledges that environmental concerns are part of its PCN determination, and thus the environmental record should be available to the STB as part of its consideration of the Revised Application.

face of public benefits based on mere speculation and certain, irreparable environmental and social harm is contrary to the public interest.

PROCEDURAL BACKGROUND

When TRRC first applied for a certificate of public convenience and necessity in 1981, it proposed an 89-mile route between Miles City, Montana and Ashland and Otter Creek, Montana, which the Board's predecessor, the ICC authorized in its Tongue River I decision. In 1996, the Board again approved a TRRC rail proposal, a contiguous 41-mile line from Ashland to Decker, Montana in Tongue River II. In Tongue River III in 2007 the Board approved yet another TRRC proposal to build and operate a 17.3-mile alternative route, known as the Western Alignment, to replace a portion of the route already approved. Despite three decisions authorizing TRRC to build its proposed rail line, no part of the railroad has been constructed.

Both TRR II and III were the subject of consolidated petitions for judicial review. TRR II was appealed to the Ninth Circuit in 1997. That appeal was held in abeyance following the application for TRR III. TRR II and TRR III were appealed in 2007. The petitions were consolidated and the case was finally heard in 2011. The Ninth Circuit affirmed in part, and reversed and remanded in part, the two decisions for additional environmental review. *See N. Plains Resource Council v. STB*, 668 F.3d 1067 (9th Cir. 2011). The STB determined at this time to revisit the TRR I environmental analysis because it had conducted a cumulative impacts analysis for TRR II and then applied the resultant mitigation analysis in the STB TRR III decision.

On April 19, 2012, TRRC told the Board it was no longer interested in building the Tongue River II and III portions of the rail line. Subsequently, the Board dismissed Tongue Rivers II and III and reopened Tongue River I in a decision served on June 18, 2012. As part of that decision the Board requested that TRRC file a revised application to reflect changes in

ownership and express TRRC's current plans for the proposed rail line. In addition, the Board required a new environmental review separate from the TRRC's three prior environmental reviews. Citing the passage of time since the TRR I decision and the TRRC's failure to construct its proposed railroads, the STB required a new EIS with scoping comments as a condition of reopening TRR I. Thus, TRRC submitted a fourth application to the STB requesting authority to construct and operate the Tongue River Railroad. In its October 16, 2012 revised application, TRRC proposed the same 89-mile route approved back in 1986 with minor "refinements." After reviewing the revised application, the Board determined that TRRC did not submit sufficient information on which the Board could make a determination and requested TRRC to supplement the revised application to provide a sufficient record including additional evidence and argument in support of the transportation merits of the proposal.

TRRC filed its supplemental application on December 17, 2012, which superseded the revised application. In this application, TRRC proposed a route significantly different from any route previously approved by the Board. The newly proposed Colstrip Alignment is a 42-mile route that would connect at the north end with an existing BNSF line and have the same two termini as the other proposals, one at the previously proposed Montco mine and the other at Otter Creek.

The Board accepted TRRC's supplemental application on January 4, 2013 and published notice in the Federal Register on January 9, 2013. On January 23, 2013 the Office of Environmental Analysis (OEA) requested more specific information about the potential market locations for the coal that would be transported from the mines via the rail line. In addition, the OEA asked for information about any potential shippers and plans to transport Otter Creek coal through U.S. ports. On February 6, 2013 TRRC submitted its response to the STB providing

information never before submitted to the Board regarding where the coal may be sent and estimates of coal tonnage.

In a decision served February 26, 2013 the Board extended the procedural schedule on the transportation merits of the proposed rail line and postponed the comment deadline to April 2, 2013.

I. THE BOARD SHOULD DENY TRRC’S APPLICATION BECAUSE THERE IS NO PUBLIC DEMAND AND NEED FOR THE RAIL LINE.⁸

The Board cannot authorize the construction and operation of a rail if it finds doing so would be “inconsistent with the public convenience and necessity.” 49 U.S.C. § 10901 (2011). Although Congress did not define “public convenience and necessity,” the Board developed a three-part test to aid its determination: whether (1) there is a public demand or need for the service, (2) the applicant is financially fit to undertake the construction and provide service, and (3) whether the construction project is in the public interest and will not unduly harm existing carrier services. *Norfolk Southern Corporation and Norfolk Southern Railway Company—Construction and Operation—in Indiana County, PA*, 2003 WL 21132522 (S.T.B.), at *4 (May 15, 2003). The Supplemental Application fails to provide substantial credible evidence that can be used to make this determination. Furthermore, evidence submitted with these Comments demonstrates that the public is not served by granting a Certificate to TRRC.

Even assuming *arguendo* that there is a presumption favoring approval of construction applications⁹, opponents do not have a “heavy burden of rebuttal.” *Dakota, Minnesota and*

⁸ Northern Plains Resource Council Inc., and Wally McRae/Clint McRae dba Rocker Six Cattle Company also incorporate by reference their Petition to Revoke Supplemental Application and Petition of Reconsideration, dated January 7, 2013 and January 25, 2013 respectively.

Eastern Railroad Corporation Construction into the Powder River Basin, 1998 WL 398189 (S.T.B.) at *3 (July 15, 1998). Rather, opponents need only show “credible evidence challenging the elements that make up the [PCN] determination” DM&E, 1997 WL 869567 (S.T.B.) at * 11 (Dec. 9, 1998) (internal quotations omitted). Moreover, an applicant cannot satisfy the Board’s three-part test with generalized statements and speculation. The Board requires specific information to meet the PCN requirements. *See* Dakota, Minnesota & Eastern Railroad, 1998 WL 398189 (S.T.B.) at *2 (requiring greater specificity from the applicant in support of a rail line project, asking “[f]or example, what does DM&E project as the need for additional coal hauling capacity in the future and what are the bases for those projections, including specific support from individual shippers?”).¹⁰

Here, TRRC’s application fails to satisfy the first prong of the PCN test—that there is public demand and need for the project. First, expert analysis shows that both the foreign and domestic markets for Otter Creek coal are essentially nonexistent or in rapid decline. Second, TRRC’s showing for public demand and need is entirely speculative, relies on self-serving statements from TRRC and Arch Coal executives, and fails to provide any credible information on which the Board could conclude there is a need for the Tongue River Railroad.

⁹ Section 204(c)(3) of ICCTA provides (emphasis in original): “If the court in a suit described in paragraph (1) remands a case to the Board or the Secretary, subsequent proceedings related to such case shall proceed in accordance with applicable law and regulations as in *effect at the time of such subsequent proceedings.*” Because this is a 1981 proceeding and was in fact remanded by the Ninth Circuit, thereby triggering the current proceedings, Northern Plains preserves its argument that the standard as it existed at the time of the first application is appropriate. However it appears that the Board is proceeding under the newer standard and Northern Plains frames its arguments accordingly. Under either standard the Revised Application fails.

¹⁰ The Board recently echoed its language in *DM&E* when it issued a request to the TRRC for more specific information regarding the potential Asian and domestic markets for PRB coal TRRC claimed in its application. *Letter from STB, Office of Environmental Analysis to David H. Coburn* (Jan. 23, 2013).

A. There is No Domestic Demand for Otter Creek and Other Ashland Area Coal.

There is no domestic demand for high-sodium Otter Creek and other Ashland area coal. In its report “Declining Markets for Montana Coal” Synapse Energy Economics, Inc., a research and consulting firm specializing in energy, economic, and environmental topics, explains that “falling prices of natural gas coupled with higher mining and transportation costs for coal have eroded coal’s competitiveness, leading to less frequent dispatch of coal units and lower demand for coal.” Synapse Energy Economics, Inc., *Declining Markets for Montana Coal* [hereinafter “Synapse Report”] 1 (February 2013) – Appendix 1. Additionally, there have been discussions on the federal level about new strict environmental regulations aimed directly at coal-fired power producers, which would require substantial capital investments as well as increase operating costs for coal plants. *Id.* at 2, 21. This has led coal plants across the country to become uneconomic and announce retirement, or to switch to other sources of fuel. *Id.* Also, goals for renewable energy are becoming more prevalent and are “increasing the amount of renewables on the grid and heightening demand for natural gas as a complementary energy source due to its ability to adjust output much more quickly than coal.” *Id.* at 3. All of these factors lead to the decline in demand for coal, and thus, it is unreasonable to expect that there will be domestic demand for Otter Creek and other Ashland area coal.

TRRC states in its supplemental application, “coal production is expected to grow in the United States during the years that the TRRC line would be operational.” Supplemental Application at 20. TRRC points to the Annual Energy Outlook Early Release 2013 for support, stating that “EIA forecasts growing domestic use of coal as an energy resource beginning after 2016 and growth over current *usage* levels by several quadrillion Btu’s by 2035.” TRRC’s Response to STB’s Request for More Information at 3 (emphasis added) – Appendix 2. TRRC’s

characterization of the report is misleading and inaccurate. The report explains that “from 2016 to 2040, coal *production* grows at an average rate of 0.6 percent per share, from 20.2 quadrillion Btu to 23.5 quadrillion Btu”, not consumption. Nor does the EIA report even come close to demonstrating a demand for Montana PRB coal in the domestic U.S. market. U.S. Energy Information Administration (EIA), Annual Energy Outlook 2013 Early Release Overview 11 (2013) (emphasis added) – Appendix 3. Also, the EIA projection for modest growth in coal production is just that, a projection which may or may not come true. Obviously the rosy forecasts for PRB coal that drove the approval of TRRC I, II and III have vanished. During its analysis, Synapse looked at recent coal production trends, which present a more focused depiction of what coal production looks like nationally. In its report, Synapse states that, “in the 52 weeks ending on February 11, 2013, production declined by 8.7 percent nationally but fell by 11.4 percent in Wyoming and 21.4 percent in Montana. Synapse Report at 5 – Appendix 1.

Even if the EIA forecast does prove correct, it does not follow that because coal production will increase that demand for that coal will increase at the same rate or even that the coal proposed to be carried by the TRRC rail line will fit this projection. In fact, looking at demand for coal, Synapse reports that “Montana coal producers have suffered a greater percentage decline in demand than the national average, and nearly twice as great a decline as that of lower-sodium Wyoming coal.” *Id.* Also, according to the U.S. EIA report, “In the AEO2013 Reference case, projected coal consumption in the electric power sector in 2035 (18.5 quadrillion Btu) is 0.6 quadrillion Btu lower than in the AEO2012 Reference case (19.0 quadrillion).” *Id.* The report also explains that this reduced outlook for coal consumption is attributable to lower natural gas prices and higher coal prices. *Id.* TRRC is aware of the declining domestic demand and indicates as much when it states that the Annual Energy Outlook

2012 Report forecasts that “Western coal production will also continue to grow, as will demand, albeit at a slower rate of growth than in the past.” TRRC’s Response to STB’s Request for More Information at 3 – Appendix 2.

Indeed STB’s previous conclusions in approving TRR III about domestic coal demand based on TRRC’s over-optimistic assumptions about PRB coal have already proven to be inaccurate. The STB concluded just six years ago that “There is no question that the overall demand for PRB coal is expected to increase between now and 2025, given the growth of the domestic economy, the regulatory constraints on sulfur dioxide imposed by the Clean Air Act (which will continue to make low-sulfur coal attractive to power plants) electrical de-regulation, and the cost of coal compared to natural gas and other energy sources.” 2007 WL 3300043 (S.T.B.) at page 17. To reach those conclusions the Board relied on data supplied by TRRC over the protests of Northern Plains and others. None of those projections have panned out in six short years, and in fact all of the evidence in this record points to a continued collapse of the domestic coal market.

It is not surprising that TRRC’s supplemental application speaks of the need for export since overall, domestic demand for coal is collapsing. *See* Supplemental Application at 21. Power Consulting explains that “because of the ongoing retirement of older coal-fired electrical power plants, the lingering effects of the Great Recession, and the decline in the price of natural gas, less coal is being burned.” Power Report at 13 – Appendix 4. Synapse Energy Economics explains that “coal electric generating capacity and generation per year will decrease in the future because of environmental costs, higher costs for coal, low natural gas prices, and, in all likelihood, greenhouse gas regulations.” Synapse Report at 1- Appendix 1. The region where PRB coal is currently used is predicted by both the U.S. Energy Information Administration and

Peabody Energy to use less PRB coal in the near term and not to return to the 2010 level of demand for PRB coal consumption until 2032, fifteen years after TRRC expects the Otter Creek mine to be up and running. *See* Power Report at 13 – Appendix 4. Also, concerns about the environmental costs associated with coal use has “virtually eliminated coal as a fuel source for new electric generators in the United States and has led to the ‘early’ ‘voluntary’ retirement of a significant number of existing coal-fired generators.” *Id.* at 6.

In addition, the cost of burning coal to generate electricity is substantially higher than the costs associated with natural gas-fired electricity generation and so new power generators are using natural gas as their fuel source. *Id.* at 3. From 2002 through 2011 the total electricity generated from coal declined by 10 percent, while the total electricity generated from natural gas increased by 46 percent. Synapse Report at 7 – Appendix 1. The shift in new electrical generating capacity from coal to natural gas is a result of several factors including: improvements in the efficiency of natural gas-fired generators in converting natural gas into electricity, the lower investment costs, and the smaller modular units whose capacity additions can be better timed to meet load growth. Power Report at 4 – Appendix 4. The implementation of more efficient natural gas extraction techniques, specifically hydraulic fracturing, have enabled the extraction of large reserves of shale gas that were previously uneconomic to mine. Synapse Report at 6 – Appendix 1. According to Synapse, “for power plants that purchase their coal from higher-cost or geographically distant regions, natural gas has become more economic than coal.” *Id.* Historically, natural gas plants operated only at times of peak demand due to higher fuel costs. *Id.* As these fuel costs decline, however, natural gas plants are transitioning to operate during more hours of the year, “enabled in part by the large amount of existing, under-

utilized generating capacity at natural gas power plants.” *Id.* In some instances, coal plants are even being converted into natural gas boilers. *Id.* at 7.

1. Otter Creek and other Ashland area PRB coal will not be competitive with Wyoming and other Montana PRB coal.

Otter Creek and other Ashland area coal will not be able to compete with Wyoming PRB coal, which already supplies the majority of the PRB coal market, and other Montana PRB coal because of the transportation costs and higher sodium content of Otter Creek coal. *See* Power Report at 12 – Appendix 4. According to the Synapse report, transportation costs accounted for nearly 60 percent of the delivered cost of PRB coal in 2010. Synapse Report at 7 – Appendix 1. Because of its location relative to the national rail network, “the transportation cost of Powder River Basin coal is typically greater than the cost of coal itself, and these costs have increased significantly since 2001.” *Id.* Wyoming is better located to serve the demand of the coal market in which Otter Creek coal would be competing. The Power report explains further, “Because the Montana PRB coal lies several hundred miles north of the bulk of Wyoming’s PRB coal fields and also several hundred miles north of much of the most densely settled North Central region, it suffers from of a transportation disadvantage relative to the Wyoming PRB.” Power Report at 12 – Appendix 4.

In addition, Otter Creek coal will face higher mining costs. Synapse describes how the PRB was hit hard by skyrocketing oil and steel prices during the 2000s as a result of the mining industry’s dependence on diesel fuel to power earth-moving equipment and steel for the manufacture of mine supports. Synapse Report at 9- Appendix 1. According to Synapse, “Arch Coal’s Powder River Basin production costs have escalated at an average annual rate of nearly seven percent since 2003.” *Id.*

TRRC claims that “Otter Creek coal is expected by Arch to fare well in the competitive domestic market because of the low cost to extract that coal relative to other mines.” Blumenfeld Verified Statement at 3 – Appendix 5. This sentiment conflicts with statements made by the State of Montana’s consultant for the Otter Creek lease, Norwest Corporation, whose report TRRC submitted in its response to the STB’s request for more information. The report states that current Montana mines (Decker and Spring Creek) have been operating for many years and so are experiencing higher stripping ratios, but then goes on to state these higher costs will be offset by Otter Creek’s higher capital recovery/depreciation costs. Norwest Report at E-5 – Appendix 6. As the Power Report explains, “Montana coal has historically only been able to compete for less than one tenth of North Central market”, the prime market in which Otter Creek coal would be competing. *See* Power Report at 12 – Appendix 4. Thus, TRRC proposes to build a railroad to transport coal from a mine that would have to compete to supply less than one tenth of an already small market. Moreover, the preferred alternative now points west to Colstrip, instead of northeast as the Miles City alignment did, further adding transportation distance. These factors make domestic markets remote and speculative and unsubstantiated by any evidence in the record. Domestic markets cannot constitute a public need for Otter Creek Coal.

In addition, the sodium content of the ash of Otter Creek coal is considered high, ranging from 5.8 to 8.8 percent, which is much higher than the 1.2 percent typical of coal from the Southern Powder River Basin in Wyoming. Norwest Report at E-3 – Appendix 6; Synapse Report at 2 – Appendix 1. There is only a small market that can accept this high-sodium coal because it raises boiler and pollution control maintenance costs. Power Report at 8 – Appendix 4; Norwest Report at E-5 – Appendix 6. Thus, there are few plants within Otter Creek’s possible

competitive area that currently accept this high-sodium coal and are primarily located in the upper Midwest in Minnesota, Wisconsin, and Michigan. Synapse Report at 2 – Appendix 1. Furthermore, the demand from these plants is incredibly small as evidenced by numbers provided in the Norwest Report. *See* Norwest Report at E-5 – Appendix 6. According to the Norwest Report, “the volume of coal shipped from Montana to the high sodium-accepting power plants is only about 20 million tons per year.” *Id.* Additionally, this already small volume may be shrinking. Through July of 2005, the annual volume of coal provided to these plants was only 16.1 million tons due to intrusion of coal from the Southern PRB. *Id.* at 4-1. The power plants that can use this high-sodium coal already get their coal from Wyoming and Montana mines. *See* Power Report at 12 – Appendix 4. Thus, Otter Creek PRB coal “will be forced to either displace current Montana mines or look for new markets in which to sell their coal.” *Id.* The Norwest Report cautions that “careful effort developing a solid market strategy will be necessary to determine how best to nudge into this market without destroying whatever price discipline, if any, currently exists.” Norwest Report at E-5 – Appendix 6.

In his verified statement, Andrew Blumenfeld, the Vice President of Analysis and Strategy for Arch Coal “notes that major customers could include Detroit Edison and Minnesota Power which have facilities in the Upper Midwest and might choose to use Otter Creek coal in lieu of coal from other PRB sources.” TRRC’s Reply to Petition to Revoke the Supplemental Application at 12; Blumenfeld V.S. at 3 – Appendix 5. First, this claim is pure speculation and lacks any support. When TRRC submitted its application in 1992, it included verified statements from Detroit Edison and Midwest Energy Resources stating their likely need for coal hauled by the proposed rail line. *See* Verified Statement of Norman H. Barthlow, Manager, Fuel Supply, Detroit Edison (April 29, 1992) – Appendix 7; Verified Statement of John Ethen, President,

Midwest Energy Resources Company (April 29, 1992) – Appendix 8. In its supplemental application, TRRC provides no statements of support from power companies or export terminals stating that they will purchase or transport high sodium Otter Creek coal. Second, based on the Norwest Report, these two companies combined only own a total of five plants that accept high sodium coal: St. Clair, Bell River, Trenton Channel, Clay-Boswell, and Syl Laskin power plants. Norwest Report at 4-1 – Appendix 6. Thus, even if these two companies do contract with Otter Creek for their coal supplies, the mine will be supplying a very small market.

In addition, the number of power plants Otter Creek and other Ashland area mines could serve will soon decrease. For instance, Minnesota Power is looking to expand its fuel source options as the company explains in its 2013 Resource Plan. Minnesota Power 2013 Resource Plan 8 (Mar. 2013) – Appendix 9. On May 6, 2011, the Minnesota Public Utilities Commission directed Minnesota Power to study diversifying the sources of electricity that Minnesota Power relies on for meeting its baseload demand. In the Matter of Minnesota Power’s 2010-2024 Integrated Resource Plan, 2012 WL 4056750 (Minn.P.U.C.) *1 (Sept. 13, 2012). To comply with this order, Minnesota Power released a new Resource Plan for the period of 2013-2027. Minnesota Power 2013 Resource Plan at 4 – Appendix 9. Minnesota Power’s new resource strategy includes a major evolution, moving away from a primarily coal-based fleet to a more balanced and flexible set of resources. *Id.* at 8. Specifically, Minnesota Power is aiming for “an energy mix of approximately one-third renewable resources such as wind, wood and hydropower, one-third natural gas/other, and one-third coal for its long-term position.” *Id.* Within its Resource Plan, Minnesota Power explains that it plans to convert the Laskin Energy Center units 1 and 2 to a gas peaking facility in 2015 because it would be cheaper to convert the plant into a facility fueled by natural gas than to retrofit the facility to meet environmental

standards. *Id.* at 5. The Laskin Energy Center is included in the small list of plants that currently accept high-sodium PRB coal. *See* Norwest Report at 4-1 – Appendix 6. The conversion of these units even before Otter Creek begins production further restricts the mine’s already small domestic market by leaving only a few plants that accept high sodium coal. *See id.* Finally, Minnesota Power explains that if the company were to build a new generator to replace its older ones, it would likely select a generator fueled by natural gas. Minnesota Power 2013 Resource Plan at 9 – Appendix 9.

Minnesota Power is not the only company retiring its coal-fired power plants. In order to meet environmental standards, many coal plants will require costly retrofits and “a significant number of plants may be retired as they become too expensive to operate.” Synapse Report at 16 – Appendix 1. Adding to the decline in coal demand is the fact that significantly more coal-fired generating plants are being retired than are being built. According to the U.S. Energy Information Administration, only five new coal units were added in 2012, versus 50 coal units that were retired. *Id.* at 2. To illustrate, 288 coal-fired generating units across the U.S. were scheduled for closure as of May 31, 2012. Union of Concerned Scientists, *Ripe for Retirement the Case for Closing America’s Costliest Coal Plants* 1 (November 2012) – Appendix 10. According to the Union of Concerned Scientists report, “energy options that are abundant, cheaper, and cleaner are making it harder for dirty coal to compete.” *Id.* That report also provides that Michigan, which houses the Detroit Edison power plants TRRC suggests as potential customers for high sodium Otter Creek coal, has the greatest number of coal generators that are ready to be retired. *Id.* at 39. To determine which coal-fired generators are ripe for retirement, the Union of Concerned Scientists first “calculated the current operating costs of each coal generator by adding the cost of the coal itself (including transportation) to operations and

maintenance (O&M) costs, measured in dollars per megawatt-hour of power production.” *Id.* at 5. Second, they “identified which coal generators are currently lacking key pollution control technologies and calculated the costs of installing such controls on each generator.” *Id.* Third, they “compared the costs of operating each coal generator with--and without--these pollution controls to the cost of readily available and cleaner alternatives.” *Id.* Last, the Union of Concerned Scientists “examined the effect of several variables that could influence the economic competitiveness of the remaining operations coal fleet, including natural gas prices, the availability of federal tax credits for wind power, and a price on carbon emissions.” *Id.* After conducting this analysis, the Union of Concerned Scientists found that all of the generators of the St. Clair power plant were ready for retirement under the high estimate scenario and that all were ripe for retirement based on the carbon price. *Id.* at 8. They came to the same conclusions for Trenton Channel. *Id.*

Adding St. Clair and Trenton Channel to the plants ready for retirement, four of the five power plants that currently accept high sodium coal may be retired before the Otter Creek mine reaches full production. Additionally, the two major coal-fired electric generating stations in the Pacific Northwest are scheduled to close in the near future. Fauth V.S. at 16 – Appendix 11. Oregon and Washington “are scheduled to retire their Boardman and Centralia coal fired-power plants by 2020 and 2025, respectively.” Power Report at 13 – Appendix 4. The retirement of coal-fired power plants further constricts the market for Otter Creek coal. Thus, TRRC’s statement that most of the Otter Creek coal will be used to supply domestic demand is incorrect.

B. There is No International Demand for Otter Creek Coal.

TRRC’s financial backers are looking to Asia as the primary market for Otter Creek coal. TRRC’s focus on the Asian market is demonstrated by the circumstances surrounding the

proposed Colstrip Alignment. These circumstances are discussed at length in a report by Gerald Fauth of G.W. Fauth & Associates, whose 30 years of experience with railroad regulatory issues includes 3 ½ years at the STB as a staff advisor and Chief of Staff for an STB board member. As Fauth explains, in addition to the Colstrip Alignment, TRRC's parent companies BNSF and Arch Coal have in recent years made infrastructure investments meant to complement TRRC-directed access to Otter Creek coal reserves. First, a major outcome of the proposed Colstrip Alignment would be to reduce the rail distance and cost of shipping to west coast export terminals, which in turn serve as gateways to Asian markets. Fauth V.S. at 16 – Appendix 11. In addition, Arch Coal holds the Otter Creek coal lease and is heavily invested in a proposed high-capacity coal export terminal at the port of Longview in Washington. *Id.* at 17. The proposed terminal project is directed through Millennium Bulk Terminals-Longview, LLC, which is 38% owned by Arch, and which is served by BNSF. *Id.* BNSF, meanwhile, has recently enacted a plan to make costly improvements to its shipping capacity in the west, including the development of new access to the Port of Longview. *Id.* at 21. With TRRC-related developments so focused on Pacific export, the Asian market is the most likely destination for new supplies of PRB thermal coal. Indeed the Board acknowledged as much in its Order dated March 22, 2013 that the scope of the Final EIS would reflect down-line rail impacts associated with potentially moving such coal west for export.

The market for Asian coal is speculative and waning. Perhaps that is why TRRC has no real evidence to back its claims for export. China is the most likely Asian market for Arch and its partners. While South Korea and Japan boast stable, established economies, China's economy continues to expand. TRRC's documentation suggests that it assumes that the continued expansion of China's coal consumption will lead to increased coal imports. Recent

studies, however, demonstrate that China's rate of coal consumption does not directly drive its demand for coal imports (*See e.g.* Press Release, IHS CERA, *China's Coal Market Not the "Promised Land" for International Suppliers* (Feb. 7, 2013) <http://press.ihs.com/press-release/energy-power/chinas-coal-market-not-promised-land-international-suppliers>, *China Coal Imports to Fall with Domestic Prices, Bernstein Says*, Bloomberg News (Jan. 12, 2013), <http://www.bloomberg.com/news/2013-01-14/china-coal-imports-to-fall-with-domestic-prices-bernstein-says.html>). A range of factors indicate that, despite continued growth, China's demand for imported thermal coal will most likely decrease in coming years. The Chinese market is uncertain for three reasons: (1) by the time TRRC is able to begin international shipping, the Chinese market will have little need for new PRB coal, (2) this market are already well-served, and TRRC will not be able to compete effectively, and (3) existing North American infrastructure is not adequate to accommodate new shipments to Asia.

China's coal market therefore looks increasingly unlikely to provide a booming new market for North American coal exports. The disconnect between China's coal consumption and the speculated demand for U.S. coal imports stems from Chinese central government policy. China's central government planners have long hoped to reign in coal use. Domestic policy in China is currently directed by the Twelfth Five-Year Plan (FYP), which emphasizes increased energy efficiency and decreased GHG emissions in addition to other pollution controls. *See* IHS, *Chinese Government Plans Five Major Energy bases During 12th Five Year Plan* (Jan. 10, 2011), <http://press.ihs.com/press-release/energy-power/chinas-coal-market-not-promised-land-international-suppliers>- Appendix 12. The record levels of pollution recently experienced in Beijing have helped to strengthen the government's commitment. On March 5, 2013, China's top economic planning agency, the National Development and Reform Commission (NDRC),

announced plans to reduce carbon emissions and energy use per unit of GDP (energy intensity) by at least 3.7 percent in 2013. *China boosts energy and emissions goals after record smog*, Bloomberg News (March 5, 2013), <http://www.bloomberg.com/news/2013-03-05/china-increases-energy-efficiency-pollution-reduction-targets.html> - Appendix 13. In the same announcement, the NDRC included new targets for new wind-power and hydropower installations. *Id.*

In addition, improvements in China's energy infrastructure have led to decreased prices for domestic coal. *China Coal Imports to Fall with Domestic Prices, Bernstein Says*, Bloomberg News (Jan. 12, 2013), <http://www.bloomberg.com/news/2013-01-14/china-coal-imports-to-fall-with-domestic-prices-bernstein-says.html> - Appendix 14. This price decrease is driven primarily by improved infrastructure and access to coal sources within China's borders. *Id.* A recent study by investment analysts Bernstein & Co. asserts that China's domestic coal prices will drop continuously through 2015, and that during this time increased use of domestic coal will result in decreased demand for coal imports. *Id.* China's import market is already well-served, suggesting that a decrease in demand will allow little room for new competitors (see discussion below regarding the competitiveness of Otter Creek Coal, Patersons Securities Ltd, *Indonesian Coal Review – the short term option 7* (Jan. 16, 2012) <http://alturamining.com/files/reports/2012%2001%2016%20Indonesian%20Coal%20Review.pdf> EIA, Australia analysis brief, 2011, <http://www.eia.gov/countries/cab.cfm?fips=AS>).

This same medium- to long-term decrease in coal imports is predicted in a recent study published by the energy and business consultancy IHS CERA. The IHS analysis cites fuel diversification, moderated economic growth, and increased access to domestic coal as factors contributing to an expected decrease in China's coal imports. Press Release, IHS CERA,

China's Coal Market Not the "Promised Land" for International Suppliers (Feb. 7, 2013)

[http://press.ihs.com/press-release/energy-power/chinas-coal-market-not-promised-land-](http://press.ihs.com/press-release/energy-power/chinas-coal-market-not-promised-land-international-suppliers)

[international-suppliers](http://press.ihs.com/press-release/energy-power/chinas-coal-market-not-promised-land-international-suppliers) - Appendix 15. Over the past five years China's coal mining industries have benefited from \$250 billion in investment, and as a result China's production capacity for coal increased nearly four-fold to 4 billion tons per year, and is expected to rise further in response to demand. *Id.* The IHS study also looks at government efforts to overcome infrastructure challenges associated with transport of domestic coal. *Id.* The study states that more than 800 million metric tons of new coal-carrying railway capacity is expected to come online in the next five years, greatly facilitating the increased use of domestic thermal coal as an alternative to imported supplies. *Id.* Xiaomin Liu, associate director of IHS CERA in Beijing, cautions against any long-term plans for entering China's import market, stating that "[m]any companies that have targeted China as their strategic supply region in the long term may need to rethink that strategy Some international suppliers will be able to compete effectively, but others will struggle to find a competitive edge as China's market becomes ever more liquid." *Id.* Clearly, an attempt to develop a new resource targeted at China's coal market represents a significant gamble.

Previous IHS studies explain China's planned infrastructure improvements in detail. In one analysis published in January, 2011, IHS discussed an announcement that five new "energy bases" would be developed in western provinces as part of overall efforts to meet 12th Five-Year Plan energy efficiency targets. IHS, *Chinese Government Plans Five Major Energy Bases During 12th Five-Year Plan* (Jan. 10, 2011), <http://www.ihs.com/products/global-insight/industry-economic-report.aspx?id=1065928704> – Appendix 12. This analysis argues that the new energy bases are intended to increase access to western coalfields in addition to more

efficient use of those resources, while at the same time laying groundwork for the development of renewable energy sources including wind, solar and hydropower. *Id.* While the long-range impact of China's new energy policies may be difficult to predict, they point to new patterns in coal consumption and domestic coal production that render China's coal import market increasingly uncertain.

Already, some signs point to a decline in China's appetite for imported thermal coal. In March 2012, prices for sub-bituminous thermal coal from Indonesia, China's biggest supplier, decreased to \$39.62 per metric ton from \$42.93 per ton in one week. *Indonesia low-grade coal prices seen falling on China supply*, Bloomberg News, Jakarta Globe (March 15, 2013), <http://www.thejakartaglobe.com/business/indonesia-low-grade-coal-prices-seen-falling-on-china-supply/579981> - Appendix 16. This decrease in price resulted from increased coal stockpiles in China, where prices for thermal coal have concurrently declined. *Id.* Also in March, thermal coal fell to 625 Yuan per metric ton, down 5 yuan from the previous week, according to the China Coal Transport and Distribution Association. *China coal price falls to three-year low as inventories rise*, Bloomberg News (March 11, 2013), <http://www.bloomberg.com/news/2013-03-11/china-coal-price-falls-to-three-year-low-as-inventories-rise.html> - Appendix 17. According to data compiled by Bloomberg, this constitutes the lowest price for coal in China since 2009. *Id.* This price decline stems from growing coal stockpiles and a recent decline in electrical generation in China. *Id.* In view of this evidence TRRC's role in future Chinese coal markets is too speculative to support a claim of public need. Otter Creek coal cannot compete with coal from Indonesia and Australia.

Even if there is a current demand in China, and even if TRRC were to move PRB coal to export now, rather than years from now when China's import market will most likely be in

decline, it is unlikely that Montana coal would prove competitive. Even as coal imports in China increased from 104 metric tons (Mt) in 2009 to 133 Mt in 2010, the market share commanded by U.S. exports declined. See Keisuke Sadamori, *IEA Medium-term Coal Market Report 2012*, *Slide presentation*, slide 9 (Dec. 12, 2012)

http://www.iea.org/newsroomandevents/speeches/121218MCMR2012_presentation_KSK.pdf –

Appendix 18. At the same time, imports from Indonesia increased. *Id.* As Indonesian coal exports have increased in recent years, the industry has avoided infrastructure bottlenecks because most operations maintain a dedicated coal logistics chain instead of relying on third-party transport and other infrastructure elements. Patersons Securities Ltd, *Indonesian Coal Review – the short term option 7* (Jan. 16, 2012)

<http://alturamining.com/files/reports/2012%20001%2016%20Indonesian%20Coal%20Review.pdf>

- Appendix 19. This situation, in addition to Indonesian coal's current optimization for the China trade, gives Indonesia a competitive advantage over other countries exporting seaborne thermal coal. *Id.*

Australia is also a major supplier of thermal coal for the Chinese market. In 2010, Australia exported roughly 322 million Mt of coal, nearly all of it bound for Asian markets. EIA, Australia analysis brief, 2011, <http://www.eia.gov/countries/cab.cfm?fips=AS> – Appendix 20. Australia's coal exports flow from nine major coal ports and export terminals, with a combined handling capacity of 400 million Mt. *Id.* Additional port projects are at various stages of development. *Id.* TRRC must demonstrate that it can compete with the thermal coal market share commanded by Australia and Indonesia, whose export facilities are already maximized for competition in China and other Asian markets.

1. U.S. Infrastructure is Not Aligned for Exporting Otter Creek Coal to Asia.

Asian markets are out of reach. As Power Consulting explains, Arch Coal's export plans require expanded west coast terminal capacity. Thomas Power and Donovan Power, Power Consulting, Inc., *Changes in the Market for Montana Powder River Basin Coal between 1986 and 2012* [hereinafter "Power Report"] 18-19 (November 2012) – Appendix 4. All of the proposed export terminals in Washington and Oregon are being protested by a wide range of community leaders, politicians, and citizen groups who don't want their communities to be the focal point of coal impacts. See Appendices 61 and 62.

As a result Arch Coal, the current leaseholder of the Otter Creek tracts and TRRC partner, has purchased a 38% ownership of Millennium Bulk Terminals-Longview, LLC, the owner of a bulk terminal in Washington State that is currently planning infrastructure improvements to facilitate coal shipments. *Id.* at 18. The EIS process for the improved terminal is still under way, and the project has received a great deal of local opposition, rendering its future uncertain. Arch Coal is also invested in the planned Gateway Pacific terminal, also in Washington State and also facing local opposition. TRRC openly admitted the uncertainty of its future access to planned terminals in Washington State in its February 6, 2013 response to the STB's request for additional information regarding shipping and markets for Otter Creek coal. Letter from David Coburn to Kenneth Blodgett, Surface Transportation Board 3 (Feb. 6, 2012) – Appendix 2. In the same letter, TRRC also claims that Otter Creek coal might be exported via British Columbia's Westshore terminals, but does not provide information demonstrating available capacity for additional PRB coal. *Id.* However, the Westshore terminals already operate near capacity. Power Report at 18-19 – Appendix 4.

Recent plans to increase Westshore’s capacity from 27 million tons to 30 million tons has resulted in significant local opposition, indicating that steps toward additional capacity for new PRB coal are not going smoothly. Dan Testa, *Former Mont. Gov. Brian Schweitzer calls most Wash. Coal export plans “dead.”*, SNL Energy (Jan. 17, 2013), <http://www.snl.com/Interactivex/article.aspx?CdId=A-16755419-12584> – Appendix 21.¹¹

In addition, the west coast has a cautionary history of building underused coal terminals. In the 1980s, the City of Portland committed to a 25-year lease with Pacific Coal, with the Port of Portland building a \$25 million terminal for coal export. Eric de Place, *Gambling on Coal, and Losing, the history of west coast coal terminals*, Sightline Daily (Sept. 12, 2011), <http://daily.sightline.org/2011/09/12/gambling-on-coal-and-losing> – Appendix 22. When Asian demand did not perform according to forecasts, the new terminal failed financially. *Id.* Similarly, in 1997 the City of Los Angeles completed a new coal export terminal under a partnership with PRB developer Peabody Coal, which by 2003 was already in danger of bankruptcy due to underperforming export markets. Patrick McGeevy, *L.A. Weighs Costly Exit From Coal Terminal*, LA Times (Jun. 14, 2003), <http://articles.latimes.com/2003/jun/14/local/me-coal14> – Appendix 23. In 2006, due to the terminal’s poor performance, the City pulled out of its deal with coal developers. Patrick McGeevy, *LA to pay \$28 million to settle port suit*, LA Times (Dec. 14, 2006), <http://articles.latimes.com/2006/dec/14/local/me-settle14> – Appendix 24. The settlement required that the City pay \$28 million to Oxbow Carbon & Mineral Inc. and Los Angeles Export Terminal Inc., who alleged that the City had unfairly blocked expansion of the operation. *Id.*

¹¹ Indeed the pronouncement by former Governor Schweitzer, the Governor who approved and championed Otter Creek, that export is “dead” is most telling, and represents a strong indictment against any public need for TRRC.

With recent history filled with examples of financially disastrous terminal projects on the west coast, TRRC's expectation of export services is highly tenuous.

2. Otter Creek Coal Cannot Compete in the Dwindling Markets for Steam Coal in Europe, Japan, and South Korea.

Europe, long a destination for coal from the eastern U.S., does not present a likely market for western coal. The most recent estimates from the IEA predict that European demand for coal imports will decrease significantly by 2015, beginning their decline well before the TRRC rail line is scheduled to begin full operation. Keisuke Sadamori, *IEA Medium-term Coal Market Report 2012*, (Dec. 12, 2012) slide 6,

http://www.iea.org/newsroomandevents/speeches/121218MCMR2012_presentation_KSK.pdf –

Appendix 25. In addition, coal from the western states is under-represented in European coal imports, due to a lack of capacity for shipping western coal to Atlantic ports. EIA, *Today in Energy: Europe and Asia are the leading destinations for US coal exports in 2012* (Nov. 15, 2012), <http://www.eia.gov/todayinenergy/detail.cfm?id=8790> – Appendix 26. Also, international competition is strong. In Europe, coal from western states has yet to find a secure foothold in a market dominated by coal from the eastern U.S. *Id.*

TRRC cites Wisconsin's Superior terminal as a likely port for shipping to Europe, but does not provide evidence to support the likelihood of this claim. In 2011, the Superior terminal operated at a capacity of 13,745,634 tons transshipped. Midwest Energy Resources Company, <http://www.midwestenergy.com/> (follow "Terminal Activity" menu, then follow "Tonnage Totals by Year" hyperlink) – Appendix 27. This represented a sharp decline from 18,813,310 tons the previous year. *Id.* In order to establish public need for TRR-born coal, TRRC must provide evidence showing that this decrease in shipping does not reflect a lack of demand or capacity. In addition, the Superior terminal has an existing contract with Cloud Peak Energy

(CPE), a provider of higher-grade PRB coal. Midwest Energy Resources Company, <http://www.midwestenergy.com/> (follow “Services Provided” tab) – Appendix 28. Due to a lack of supporting data from TRRC, this Board has no evidence in this record regarding whether the terminal has the demonstrated need or capacity for yet more PRB coal (especially where that coal is of lower quality and commands lower prices), or indeed whether the CPE contract allows for new competitors from the PRB region.

The market demand for new PRB coal in the South Korean and Japanese markets is also highly speculative. It is unlikely that these two markets will strongly influence future developments in the Pacific coal trade. Eric de Place and John Kriese, Sightline Institute, *US Coal Exports and Uncertainty in Asian Markets 5* (Oct. 2012), http://www.beyondtoxics.org/wp-content/uploads/2012/10/Sightline_US_CoalExports_and_Uncertainty_inAsianMarkets_Oct2012.pdf – Appendix 29. Both countries boast economies that are already well developed, resulting in coal imports, particularly imports of PRB-type thermal coal, that have grown more slowly than China’s in recent years. *Id.* New clean-energy policies have also reigned in coal imports. *Id.* In addition, both countries have well-established relationships with existing coal exporters. *Id.* TRRC has presented no data to support its claim that it will be able to compete in this potentially saturated market when it begins operations several years from now.

Korea already sources the majority of its coal supply from Australia and Indonesia. EIA, *South Korea Analysis Brief* 11 (Jan. 17, 2013),

http://www.eia.gov/countries/analysisbriefs/South_Korea/south_korea.pdf – Appendix 30.

Meanwhile, Japan sources the majority of its coal imports from Australia. EIA, *Japan Analysis Brief* (Jun. 4, 2012), <http://www.eia.gov/countries/cab.cfm?fips=JA> – Appendix 31. TRRC

must therefore demonstrate that there is room in these two established markets for substantially increased coal imports from the western U.S.

3. TRRC's Support for International Demand and Need is Purely Speculative.

TRRC's claims regarding the availability of ready markets for Otter Creek coal are consistently speculative and unfounded, beginning with the initial application and continuing through following documentation. Most recently, in its response to the STB's January 23, 2013 request for additional information regarding the projected market for PRB coal, TRRC stated that European, South Korean, Japanese, and Chinese markets are likely destinations for PRB coal. David H. Coburn, Letter in response to STB request for information, (Feb. 6, 2013) – Appendix 2. A bald statement from TRRC's counsel is not credible, objective evidence that STB can use to justify a PCN determination. It is purely speculative that TRRC will be able to rely on these markets. Rapidly improved access to domestic coal in China will most likely decrease demand for imports in the near future, leaving little room for expansion in a market already heavily served by Indonesian and Australian imports. In its response to the STB's request for additional information, TRRC offers data detailing export statistics for South Korea, China and Japan, but provided no data to support their assumption that these markets will continue to grow or fail to decline. Granting TRRC a Certificate to build the railroad, and with it the legal right under Montana law to condemn private property, based on speculation is not in the public interest.

C. TRRC's Record Evidence Demonstrating Demand and Need Is Purely Speculative.

The STB cannot make a decision based on non-record or post hoc explanations; instead the Board must take a hard look at the complete record before it to make a determination. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). Under judicial

review, courts insist that an agency examine the relevant data and articulate a satisfactory explanation for its action. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009).

TRRC has made inconsistent statements about the destination for its coal and failed to provide detailed information about where the coal is going, therefore the STB has an inadequate record upon which to base a decision and must reject the proposed rail line.

Throughout the documents TRRC has submitted in support of its rail line, TRRC has provided several theories as to where the coal from the Otter Creek and other Ashland area mines may be shipped. In its supplemental application, TRRC states that the coal its rail line would transport could move east or west for domestic use or export including export to Asia. Rowlands Verified Statement at 4 – Appendix 32. In its reply to NPRC’s petition to revoke, TRRC claims that “whether there is a robust market for coal that the TRRC line will transport in Asia . . . or whether the coal may be used in a combination of domestic and export markets . . . is not particularly relevant in terms of the transportation merits of the proposal.” TRRC’s Reply to NPRC Petition to Revoke the Supplemental Application at 10 – Appendix 33. However, TRRC ignores the fact that there must be *some* market for Otter Creek coal to justify the Tongue River Railroad. In its response to the STB’s request for more information, TRRC claims that the coal could be exported to Europe and that it may also be exported to Asia including South Korea and China. TRRC’s Response to the STB’s Request for More Information 2-3 – Appendix 2. With so many vague, different, and unsupported claims, it is clear that TRRC cannot establish any public need or convenience to be served by the TRRC rail line. A “Field of Dreams” theory—build it and they will come—is not in the public interest because it requires the public to endure the environmental and social impacts of condemning a right of way and constructing a new railroad that has no proven need.

In its January 23, 2013 letter requesting more information, the STB agreed that TRRC did not submit sufficient information as to where the coal may be shipped. *See* Letter from Victoria Rutson, Director, Office of Environmental Analysis, to David H. Coburn, Steptoe & Johnson LLP (Jan. 23, 2013) – Appendix 34. In its letter, the STB asks TRRC to “provide more specific information about the potential market locations for the coal that would be transported from the mines identified in the supplemental application via the Tongue River Railroad.” *Id.* at 1. In response to the STB’s letter, TRRC alleges that because the Otter Creek coal will not be mined until 2017 at the earliest, “predictions as to exactly where that coal will be sold and shipped cannot be made at this time.” TRRC’s Response to the STB’s Request for More Information at 2 – Appendix 2. The response then lists several potential destinations including electric utilities in Michigan, Minnesota, and Washington, Canada, Europe, South Korea, Japan, and China, but again provides no specific information about actual demand for Montana PRB coal. *Id.* at 2-3. This wide range of possible markets emphasizes the speculative nature of TRRC’s application.

These unsubstantiated claims of markets are a far cry from the evidence TRRC provided in TRRC II and TRRC III. In those applications, TRRC submitted numerous verified statements supporting the need for the railroad to transport coal that was at that time in demand. For example, when TRRC submitted its application in 1992, it included verified statements from Detroit Edison and Midwest Energy Resources stating their support for the proposed rail line. *See* Verified Statement of Norman H. Barthlow, Manager, Fuel Supply, Detroit Edison (April 29, 1992) – Appendix 7; Verified Statement of John Ethen, President, Midwest Energy Resources Company (April 29, 1992) – Appendix 8. The 1992 application also included a verified statement from Roger McDaniel, a then Senior Vice President of in the Utility/Project Finance Group of the Lehman Brothers Division of Shearson Lehman Brothers Inc., which explained

how the proposed rail line would be financially viable. None of these supporting materials were included in TRRC's latest application.

II. THE BOARD SHOULD DENY THE APPLICATION BECAUSE TRRC IS NOT FINANCIALLY FIT TO CONSTRUCT AND OPERATE THE PROPOSED RAIL LINE.

As often cited by the courts, “the purpose of the financial fitness test . . . is not to protect the carrier or its investors; rather, it is to protect existing shippers from a carrier’s proposed actions that could have an adverse impact on the carrier’s ability to continue to serve those shippers without detriment to either service or rates.” *Dakota, Minnesota & E. R.R. Corp. Constr. into the Powder River Basin*, 3 S.T.B. 847 (S.T.B. 1998); *see also, Illinois Cent. R. Co. v. Norfolk & W. Ry. Co.*, 385 U.S. 57, 67 (1966); *Texas & Pac. Ry. v. Gulf, Etc., Ry.*, 270 U.S. 266, 277-78 (1925); *Texas and New Orleans R.R. Co. v. The North Side Belt Ry. Co.*, 276 U.S. 475 (1928). Additionally, the STB has said that, “in assessing the financial viability of the proposal to construct a rail line, we consider both the resources that would be required to build the line and those needed to *maintain and operate* the line.” *Norfolk S. Corp.* (emphasis added). Therefore, a complete financial fitness analysis of any proposed rail line cannot stop at the initial capital investments needed to finance the construction of the railway, because vital to the ultimate financial viability of any railroad is there being a demand for the good that is being transported on the line. If there is no demand for the good, there is no need to continue to maintain and operate the line and the resources expended to construct the line will be in waste.

Applicants of a proposed rail line with no existing service often try to argue that since they currently provide no carrier service, there is no way their financial decision could jeopardize their obligation to serve their present customers. Therefore, the financial fitness test is irrelevant because the “purpose” of the financial fitness analysis is to protect existing shippers, not

proposed investors. Great Salt Lake and S. R.R., L.L.C.-Constr. and Operation-in Tooele County, Ut, 33824, 2000 WL 1844695 (S.T.B. Dec. 13, 2000). However, the philosophy of “letting the financial market itself . . . ultimately determine if the project is economically viable”¹² has been curtailed by the Supreme Court:

Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers, is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources, and that the burden of waste may fall upon the public; that competition between carriers may result in harm to the public, as well as in benefit; and that, when railroads inflict injuries upon its rival, it may be the public which ultimately bears the loss.

Texas & P. Ry. Co. v. Gulf, C. & S.F. Ry. Co., 270 U.S. 266, 277 (1926) (emphasis added). This case, while dated, is cited by the Ninth Circuit in *N. Plains Resource Council, Inc.*, reaffirming that the Board must weigh a company’s assertion that building the railroad is a financially sound project against the harm not only to existing carriers, but also the harm to affected communities should the project not be as lucrative as anticipated. *N. Plains Resource Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1093 (9th Cir. 2011). Communities disrupted by unnecessary and wasteful railroads suffer just as much as financial balance sheets when railroads turn out to be less profitable than the company assured the Board it would be.

In cases where the Board deemed the applicant to be financially fit, applicants have supplied financial projections that were more than mere speculation. *See e.g.* *Norfolk S. Corp. and Norfolk S. Ry. Co.-Constr. and Operation-in Indiana County, Pa*, 33928, 2003 WL

¹² Great Salt Lake and S. R.R., L.L.C.-Constr. and Operation-in Tooele County, Ut, 33824, 2000 WL 1844695 (S.T.B. Dec. 13, 2000) (citing *Tongue River R.R. Co.-Rail Constr. and Operation-Ashland to Decker, Montana*, 1 S.T.B. 829 (S.T.B. 1996).

21132522 (S.T.B.); Dakota, Minnesota & E. R.R. Corp. Constr. into the Powder River Basin, 3 S.T.B. 847 (S.T.B. 1998). In *Norfolk Southern*, the applicant was able to show the Board it had the capital to build the proposed line and “that [it would] recover the costs of the construction through revenues received pursuant to an existing 10-year contract covering deliveries to the only current customer on the proposed line, [and] that the rates charged to that customer are protected during the term of the contract. . . .” *Norfolk S. Corp.* at 4. In *DM&E*, the applicant supplied specific, detailed financial projections, including both optimistic and pessimistic financial projections based on various factors, including the comparative tonnage revenue and income projections, overall market forecasts and market share forecasts. *DM&E* (1998) at 12.

Finally, “a determination [of financial fitness] could change after completion of the environmental review process, if, for example, it turns out the cost of any environmental mitigation we [the Board] impose would be so high that the project ultimately would not be financially viable.” *DM&E* (1998) at 12.

A. TRRC Failed to Provide Any Evidence on Which the Board Could Determine the Applicant is Financially Fit.

In order for the Board to determine that a proposed project is a financially sound investment, the applicant needs to provide reasonable future projected earnings based on concrete data, reasonable expectations and detailed analysis demonstrating to the Board the project will not be constructed in waste. *DM&E* (1998) at 12. TRRC only provided a single table of projected income statements for the two years following completion of construction in 2017 dollars. Supplemental Application at Exhibit G. TRRC projects annual revenues of \$80 million in the first two years following completion of construction. *Id.* TRRC provided no information on how these numbers were calculated and therefore, there is no reasonable way the Board could determine that the project is a financially sound investment.

The critical information missing from the application is a customer for Otter Creek coal. As illustrated above, there are no viable markets for Otter Creek coal and *not one* utility is on record in the supplemental application in support of the project. Consequently, TRRC's projections are nothing more than guesswork; there is simply nothing backing up its claims.

The *Norfolk* and *DM&E* cases illustrate the kind and level of detailed information an applicant must provide for the board to determine the applicant's financial fitness. In *Norfolk*, the applicant was able to show it was financing the rail line out of its current capital budget and that it would be able to recoup the initial investment costs and turn a profit through its ten-year contract with Reliant Energy Keystone Generating Plant. *Norfolk S. Corp* at 4. In contrast, here TRRC states that "[n]o contracts have been *negotiated* or signed to date." Letter from Victoria Rutson to David H. Coburn at 4 (emphasis added) – Appendix 34.

Because TRRC has no long-term contracts or any evidence that there is a market for Otter Creek coal, TRRC failed to provide information necessary for the Board to determine its financial fitness. The *DM&E* decision provides the most detailed analysis of an applicant putting forth the requisite information for a finding of financial fitness. *DM&E* developed five separate revenue and profit projections, representing the best and worst case scenarios, looking at potential tonnage forecasts and applied them to differing average netbacks per ton-mile projections to calculate four potential revenue streams. *DM&E* (1998) at 12. *DM&E* was able to show that under the best-case scenario, by 2007 *DM&E* would generate \$268 million and under the worst-case scenario, it would still generate \$46.9 million by 2007. *DM&E* (1998) at 13. TRRC was unable to provide any information on tonnage or market share forecasts it relied on in reaching its conclusion that total revenue for the two years after construction would be

\$160 million because at this time, TRRC does not know who if anyone will be buying Otter Creek coal.

In a previous application, TRRC submitted a verified statement from Roger McDaniel, then Senior Vice President in the Utility/Project Finance Group of Lehman Brothers. Verified Statement of Roger McDaniel 1 – Appendix 35. Lehman Brothers was retained to “assist TRRC’s management in devising a financing plan for construction and operation of the proposed Tongue River Railroad,” and Mr. McDaniel asserted, “[t]he Tongue River Railroad would be an attractive investment opportunity for commercial and institutional lenders.” *Id.* at 4, 7. Additionally, TRRC used Vincent J. deSostoa of Corporate Strategies Inc. (“CSI”) to conduct financial studies on the profitability of the TRRC rail line. Verified Statement of Vincent J. deSostoa at 1 – Appendix 36. Specifically, CSI used a complex computerized tool called “Short Line Planner,” which was developed “to help potential and existing operators make more informed decisions regarding financial planning, investments, operations, and marketing strategies.” *Id.* at 11. The model factors in a series of categories, including “traffic projections, revenue assumptions per carload, operating and maintenance equipment plans. . . general administrative costs factors, and debt structure and loan amortization plans, equity structure by year,” among others to demonstrate to the Board it has done its due diligence in assessing the financial fitness of the rail line. In TRRC’s current application before the Board, TRRC has provided nothing comparable to these statements and instead relies solely on self-serving financial projections.

TRRC’s earlier application also included verified statements of interest from Midwest Energy Resources, Inc. Company and The Detroit Edison Company. Verified Statement of Norman H. Barthlow, Manager, Fuel Supply, Detroit Edison (April 29, 1992) – Appendix 7;

Verified Statement of John Ethen, President, Midwest Energy Resources Company (April 29, 1992) – Appendix 8. All of these documents were absent in this application, highlighting the lack of marketability of this coal and the highly speculative nature of this project.

There is inherent risk in any business venture and what often makes companies successful is embracing substantial risk in anticipation of a big payout should the venture turn out profitable. However, as the Supreme Court realized in *Texas & P. Ry. Co. v. Gulf*, it is the communities affected by a wasteful railroad that ultimately suffer the biggest loss when companies make unwise financial decisions. *Texas & P. Ry. Co. v. Gulf, C. & S.F. Ry. Co.*, 270 U.S. 266, 277 (1926). Thus, the duty falls on the Board to take a thorough look at the revenue projections put forth by the applicant to insure the harm does not fall on the public should those projections be unrealistically optimistic. Vital to any revenue projection is for there to be a willing purchaser, but TRRC has failed to show there is any viable market for this coal. The Board cannot be assured communities will not be disrupted by needless construction without TRRC providing concrete evidence that there will be a willing purchaser of its coal after construction of the rail line.

B. By failing to provide any financial data on Arch Coal, Inc., the applicant failed to show it has adequate resources available to maintain and operate the mine, and therefore also failed to meet the financial fitness prong of the public convenience and necessity standard.

TRRC estimates that the cost of construction of the railroad will total \$416 million and provides 2011 balance sheets and income statements for TRRC and BNSF as well as balance sheets and income statements for Tongue River Railroad Company, Inc. in 2010 and 2011 as “proof” that they are financially able to finance the construction of the railroad. Supplemental Application at Appendix B and Exhibits E and F. This information is inadequate and fails to provide the Board with the relevant information required to make a decision of financial fitness.

First, the law is clear that applicants must provide information showing they are financially able to construct the railroad *and* operate and maintain the railroad. Norfolk S. Corp. (emphasis added). A projection of \$416 million to construct the line spread over three years says nothing about the resources required to maintain and operate the line after construction. In fact, in *Mid States Coalition v. STB*, the applicants were able to demonstrate to the Board that not only would the projected revenues cover the cost of construction and operation of the rail line, but also that the excess revenues generated from the proposed rail line could actually be used to rehabilitate existing lines that were deteriorating. *Mid States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d 520 (8th Cir. 2003).

Second, according to TRRC's supplemental application, the only stockholder of Tongue River Railway Company, Inc. is Tongue River Holding Company, LLC, in which Arch Coal, Inc. owns a 34.68% membership interest and BNSF also holds a 34.68% membership interest. Supplemental Application at 13. The remaining 30.64% is owned by TRR Financing, LLC. *Id.* Furthermore, the applicants submitted to the Board that the TRRC rail line will be financed either by 100% equity contributions from some or all of the members of its sole shareholder (i.e. BNSF and Arch Coal, Inc.) or by guarantee by some or all of the members of its sole shareholder, or a combination of both those options. *Id.* at 31. Because Arch Coal, Inc. holds a one-third membership interest in TRR Holding, Inc., which is TRRC's sole shareholder, any relevant inquiry into the financial viability of this project requires the Board to evaluate Arch Coal, Inc.'s financial fitness. Furthermore, nothing in the application indicates what each individual member company will do should one member not be able to make the financial obligations promised before construction begins.

In the fourth quarter of 2012, Arch Coal, Inc. posted a net *loss* of \$295 million dollars. *Arch Coal, Inc. Reports fourth Quarter and Full Year 2012 Results*, Yahoo! Finance (Feb. 5, 2013) <http://finance.yahoo.com/news/arch-coal-inc-reports-fourth-124500359.html> – Appendix 37. In fact, Arch Coal, Inc. has reported four straight quarterly adjusted losses. Sonja Elmquist, *Arch Coal Loss Wider Than Expected As Sales Volumes Fall*, Bloomberg (Feb. 5, 2013), <http://www.bloomberg.com/news/2013-02-05/arch-coal-loss-wider-than-expected-as-sales-volumes-fall.html> - Appendix 38. Adjusted for “sales contract amortization, goodwill and intangible asset impairment charges, other non-operating expenses and the related tax impacts of these items, Arch’s fourth quarter 2012 adjusted net loss was \$89 million.” *Id.*

Arch Coal, Inc.’s Executive Vice President and Chief Operating Officer, Paul Lang, told top investors in Arch Coal, Inc.’s fourth quarter report teleconference, “In our largest volume region, the Powder River Basin, our case costs in 2012 were up 7% year-over-year while our sales volume declined 11%.” *Arch Coal’s CEO Discusses Q4 2012 Results-Earnings Call Transcript*, Seeking Alpha (Feb. 5, 2013), http://seekingalpha.com/article/1157721-arch-coal-s-ceo-discusses-q4-2012-results-earnings-call-transcript?source=email_rt_article_title – Appendix 39. Arch Coal Inc.’s President and Chief Executive Officer, John Eaves also explained that not only were costs in the Powder River Basin up, but also sales were down. “According to recent industry data the U.S. coal industry reduced production by nearly 80 million tons in 2012. PRB [the Powder River Basin] led the way with 38 million tons of volume reductions....” *Id.* In order to try and stop the losses flowing out of the Powder River Basin, Arch Coal, Inc. has taken remediation measures to cut the costs of operation. In fact, currently in the Powder River Basin mines, “two draglines and eight shovels as well as their related support equipment” are sitting idle. *Id.* With equipment sitting idle, increased operations costs, and the huge financial hit Arch

Coal, Inc. suffered last year, it seems particularly financially imprudent to now operate a new mine in the Powder River Basin.

Adding to the financial instability of the project, Otter Creak Coal, LLC is a subsidiary company of Arch Coal, Inc. and all of the coal that will be transported on the TRRC rail line will come from the Otter Creak Mine, located in Rosebud and Powder River Counties, Montana. Supplemental Application at 6. The coal mined from Otter Creak will be transported on the TRRC rail line to Colstrip, Montana, to meet up with national rail networks. *Id.* at 7. The problem with this business structure is two-fold. First, if there are no willing purchasers of high sodium Otter Creak Coal, there is no feasible way to restructure the railroad to still make the business venture profitable. Based on the two termini points, no other product or good could subsequently be transported on this line to somehow save the rail line from being wasteful. Second, unlike TRRC, Arch Coal, Inc. is the sole owner of Otter Creak, LLC and there are no other member investors to help carry the financial burden of making the Otter Creak mine profitable. Arch Coal, Inc. has already made substantial financial contributions to a project that, for decades, has yet to be built. *Fauth V.S.* at 8-9 – Appendix 11. For example, in 2009, Arch paid \$73.1 million dollars for a lease agreement with Great Northern Properties Limited Partnership for its Otter Creak coal tracks and in 2010 Arch paid \$85.8 million for a lease of the State of Montana's Otter Creak tracks. *Id.* These substantial investments combined with Arch Coal Inc.'s 2012 fourth quarter loss raises serious concerns as to whether Arch Coal, Inc. could weather another financial hit should the Otter Creak mine turn out to be a poor investment.

Arch Coal, Inc. is not the only party with problematic financing. The TRRC 2010 and 2011 income statements and balance sheets show the company at present is undercapitalized. Supplemental Application at Exhibits E and F. TRRC tries to qualify these documents, noting in

the heading that Tongue River Company, Inc. is a “development stage company.” Supplemental Application at Appendix B and Exhibits E and F. However, the limited financing of TRRC only highlights the speculative nature of this project.

On an overall market level analysis, projections from financial insiders highlight the volatility of the coal market, and coal industries are not immune from financial bankruptcy. Patriot Coal was the “canary in the coalmine” when it went bankrupt in 2012. Kofi Bofah, *The War on Coal: Sell Arch Coal*, Seeing Alpha (Nov. 20, 2012), http://seekingalpha.com/article/1019831-the-war-on-coal-sell-arch-coal?source=email_rt_mc_focus_2 - Appendix 40. According to Bofah, the “war on coal” arises because of “declining coal prices, booming natural gas production, and alternative energy solutions.” *Id.* Stock prices for most American coal companies saw a steady decline in 2012 and coal mining companies have had to lay off workers to pare down costs. Power Report at 7-8 – Appendix 4. Arch Coal, Inc. stock ended the year trading around \$5 per share, significantly down from 2011 when it was trading for about \$65 per share and \$119 per share in 2008. *Id.* at 8.

C. Environmental Mitigation Measures Will Substantially Affect the Financial Viability of the Tongue River Railroad.

Finally, even if the Board determines financial fitness during the public convenience and necessity stage of the application process, that determination could change after the full environmental, safety, landowner and community protection mitigation costs are calculated into the total project costs. DM&E (1998) at 12. Environmental mitigation measures touch various aspects of conservation, requiring the application to adequately protect resources such as land use, air and noise quality, and water, biological, and cultural resources. Norfolk S. Corp. and Norfolk S. Ry. Co.-Constr. and Operation-in Indiana County, Pa, 33928, 2003 WL 21132522

(S.T.B.). Accordingly, environmental mitigation costs should not be viewed as an after-thought, trifle amounts added to the initial capital investment cost. *Id.* Indeed STB's approval of TRR III was conditioned on 92 separate Mitigation Measures that were formally ordered by this Board. *See TRRC III Appendix B* at pp. 37-62. Factoring in full mitigation costs to a proposed project can substantially alter the financial viability of the project and given the huge disruption to local communities the rail line will cause, this project has the potential to have significant mitigation costs.

III. THE TONGUE RIVER RAILROAD IS NOT IN THE PUBLIC INTEREST.

The Board will not approve a project that is not in the public interest or will unduly harm existing services. *N. Plains Res. Council Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1092-93 (9th Cir. 2011); Tongue River Railroad Construction – Western Alignment (served October 9, 2007), 2007 WL 2936132 (S.T.B.) (2007) FD No. 30186 Sub. No.3. The Board considers the environmental and safety impacts in determining whether a project is in the public interest. *See Alaska R.R. Corp. Constr. & Operation Exemption – Rail Line Between N. Pole & Delta Junction, AK*, Fed. Carr. Cas. P 37331 (I.C.C.), 2010 WL 24954 at * 8 (stating “[i]n a rail construction case, we weigh environmental concerns against transportation concerns in evaluating the public interest.”); *see also Tongue River R.R. Co., Inc. – Constr. and Operation – W. Alignment*, 2007 WL 2936132 (S.T.B.) at *21 (stating “[i]n evaluating the public interest, safety and environmental impacts are weighed against transportation concerns.”); *see also DM&E*, 3 S.T.B. 847, 1998 WL 869567, at n.3 (Dec. 9, 1998) (“It is possible that in our final analysis we could determine that, due to possible adverse environmental impacts, the public interest dictates that the application be denied even though the criteria of section 10901 have otherwise been met.”).

The PCN test, unlike NEPA, mandates a *substantive* analysis of the environmental concerns by weighing environmental concerns, among others, against the transportation benefits to determine whether or not the proposed rail line is ultimately in the public interest. *See e.g.*, Joint Brief of Respondent at 97, N. Plains Res. Council, Inc. v. Surface Transportation Board, No. 97-70037 (9th Cir. Nov. 19, 2010), at 97, in which Board stated:

The statute shows that the public interest and the PCN are essentially synonymous. Congress in §10901 requires the Board, before approving an application, to find it “necessary in the public interest.” Accordingly, both the agency and the courts have used the term PCN and public interest interchangeably *The Board also weighs safety, community, and environmental interests against transportation benefits in evaluating the public interest.*

(emphasis added). The NEPA process ensures that the Board has available to it all relevant environmental information necessary to conduct the substantive public interest analysis mandated by the PCN test. To this end, the Board may not issue a final determination under 49 U.S.C. §10901 until all environmental issues have been resolved. 49 C.F.R. §1105.10(f) (2011). However, while the Board is prohibited from approving a final determination without fully considering environmental impacts, it may—and should—deny an application before completing its environmental review when existing evidence sufficiently demonstrates that the project is not in the public interest.

A. The Tongue River Railroad is Not in the Public Interest Because It Will Create Significant Negative Environmental and Socioeconomic Impacts.

The Mitigation Plan adopted by the ICC in 1985 in relation to TRR I, set out a comprehensive list of environmental impacts inherent in all railroad construction and operation projects. Such impacts include: reconstruction of wells, construction of cattle and equipment passes, and grade crossings; decreased productivity of ranches; loss of agricultural land due to inclusion in the right of way requiring direct compensation; indirect land loss due to severance of

parcels; displacement of capital improvements such as fences, wells, corrals and irrigation systems, and springs; increased demand for community services during construction; increases in vehicular traffic on local public roads or highways during construction with greater inconvenience and increased likelihood of accidents; traffic delays at crossings that are not grade separated; air quality impacts from the introduction of air pollutants in the form of the products of combustion generated by construction equipment and railroad engines; generation of increased quantities of fugitive dust into the air as a result of de-vegetation, earth moving, general equipment operation, wind and increased vehicular traffic on unpaved roadways; public safety concerns relating to derailments, fuel spills, other toxic material spills and catastrophic events; prevention and suppression of railroad caused wildfire; wildlife disturbances on land adjoining the construction site; reclamation and noxious weed control to aid prevention of erosion, limitation of air pollution by fugitive dust, contribution to the stability of the railroad grade, and providing wild life habitat. Master Mitigation Policy and Plan for the Proposed Tongue River Railroad Project 1985 – Appendix 41. Approval of the TRRC will give the railroad eminent domain powers that will allow TRRC to condemn private property, the ultimate insult to farmers and ranchers, so that TRRC and Arch Coal can try to make money.

Under the present circumstances, the proposed rail line will industrialize an agricultural area that currently enjoys stable family-owned farms and ranches, clean air, clean water, native grasslands, valuable fish and wildlife habitat, quiet communities, and abundant recreational opportunities. The proposed rail line will fundamentally change the character of the environment and the quality of life enjoyed by ranchers and residents in the areas affected, including down-line populations affected by cumulative impacts associated with the rail line. We set out below

just *some* of the environmental and social impacts inherent in the proposed rail line. For a more detailed list see NPRC's Scoping Comments – Appendices 42, 43.

Authorization of the proposed rail line will result in a permanent alienation of private property by severing ranches and agricultural lands through eminent domain. As a result, land use will be impacted, including but not limited to access restrictions and barriers to live stock movement; loss of recreational opportunities and enjoyment of land, including on state trust lands; and disruption farming and ranching operations. Such impacts on land use are likely to affect the landowners' agricultural income and economic well-being. Isolated ranch families, low-income residents in Ashland, many Northern Cheyenne tribal members, and the Amish communities are likely to be disproportionately impacted by the construction and operation of the rail line. Many properties will also suffer diminution of property values as a consequence of the railroad bisecting the land, and will suffer the ultimate injury, the actual loss of real property through condemnation proceedings. Where the financial feasibility and public need for the railroad is entirely speculative, and there is no credible evidence of public benefit as is the case with TRRC's proposal, any permanent alienation or diminution in value of private property, and loss of land use, is clearly against the public interest.

Authorization of the proposed rail line will also cause significant health and safety issues for the affected communities. The increased train traffic will in turn increase the amount of airborne pollutants (particulate matter) from diesel engines as well as from coal dust. BNSF has acknowledged that 500 pounds of coal can be lost in the form of dust from each rail car, stating, "the amount of dust that escapes from PRB trains is surprisingly large". *See* Columbia Riverkeeper website – Appendix 44, <http://columbiariverkeeper.org/our-work/coal-export/> ("even Burlington Northern Santa Fe (BNSF) acknowledges that coal trains spill a lot of dust.

BNSF's studies show that 500 pounds of coal can be lost in the form of dust from each rail car. Each 100-car train, therefore, may spill 50,000 pounds of coal dust into our rivers and towns. BNSF's website stated that "the amount of dust that escapes from PRB [Powder River Basin] trains is surprisingly large." BNSF has removed this page from its website, but our allies at the Sightline Institute captured the image in the amusing post titled "At Least The Website Is Clean."); Eric de Place (Aug. 10, 2011), *At Least the Website is Clean*, <http://daily.sightline.org/2011/08/10/at-least-the-website-is-clean/> - Appendix 45; Greenpeace, *Point of No Return, The massive climate threats we must avoid*, January 2013 at 44, http://www.greenpeace.org/australia/PageFiles/480942/Point_Of_No_Return.pdf - Appendix 46 ("According to the railway company BNSF, which is planning to haul Powder River Basin coal to the Pacific Northwest, the 'amount of coal dust that escapes from PRB coal trains is surprisingly large. (...) BNSF has done studies indicating that from [200 to 900 kilograms] of coal can escape from a single loaded coal car. (...) In many areas, a thick layer of black coal dust can be observed along the railroad right of way and in between the tracks"). Medical studies have shown a clear link between both diesel air pollutants and coal dust and disease. Such health impacts will be compounded by the cumulative increase in traffic that will result when mines in addition to Otter Creek are developed and even more so *if* PRB coal is shipped for export. *See*, Northern Plains Resource Council Scoping Comments at 23 – Appendix 42.

The proposed rail line will also compromise safety in the affected communities. 49 U.S.C. §10101(8) (2011) sets out specific national policy "to operate transportation facilities and equipment without detriment to the public health and safety." In *Indiana & Ohio Ry. Co.*, in which the Board declined to authorize construction due to safety and environmental concerns, the Board agreed that this policy is a statement of the public interest which is used as a guideline

in determining whether the public convenience and necessity require or permit construction of a new line. *Id.* at 788. The Board went on to state, “The construction of a rail line may pose a significant risk to public safety, both in the building of the line and the subsequent operation over it. Thus, it is entirely appropriate to factor public safety concerns into our §10901 analysis of whether the public convenience and necessity require or permit construction of a line.” *Id.*

For example, Ben Stuckart, President of the Spokane, Washington City Council notes that Arch coal, a co-owner of TRRC has stated that the coal is slated for export to Asian markets, and will necessarily be routed through the BNSF main line through Spokane. Spokane has many at-grade crossings that will cause serious disruption to city life and business. Overpasses are already heavily used. The increased traffic will add to pollution from existing railroads. *See* letter of Ben Stuckart dated March 23, 2013 – Appendix 47. None of these effects were addressed by TRRC in its application.

Spokane is of course not the only community that will be impacted by hauling PRB coal via TRRC to export markets. Cities all along the main line, from Billings, through Missoula, and all the way to the West Coast export locations have all expressed concerns pertaining to increased air pollution, added safety hazards, increased traffic congestion and disruption of local communities. *See* additional letters from City of Sumner, Washington – Appendix 48; Missoula, Montana – Appendix 49; Helena, Montana – Appendix 50; and Livingston, Montana – Appendix 51. To protect public health and safety, the STB must require BNSF to mitigate these impacts, added costs which cast further doubt on the viability of this operation.

B. TRRC Claims the Montco Mine Spur is Economically Justified, Yet Failed to Include Montco and other Ashland-Area Coal Production in its Tonnage Estimates.

If the STB accepts TRRC's speculative arguments that there is a market for Montana Powder River Basin coal, then the Board needs to look at the complete down-line cumulative environmental impacts of moving the coal from the Otter Creek mine in Montana to export facilities in the Pacific Northwest. In its analysis of these down-line impacts, the STB must include the impacts that would result from coal mined at the Montco and other potential Ashland area mines, even though these estimates were not included in TRRC's application.

STB regulations require that the applicant state whether the proposed action will result in either an increase in rail traffic of at least 100 percent or an increase of at least eight trains a day on any segment of rail line affected by the proposal. 49 CFR § 1105.7(e)(5) (2012). Thus, if the Board accepts that Otter Creek coal will be shipped for either domestic or export use, then it must consider the environmental impacts, particularly the impacts to air quality, of both the transport of this coal to market as well as the burning of this coal and the climate change implications.

TRRC underestimates the volume of coal it will transport in order to avoid this down-line impacts analysis. In its supplemental application, TRRC estimates that 3.7 trains per day would travel on the Tongue River Railroad. *See* Bobb Verified Statement at 5 – Appendix 52. In its request for more information, the STB acknowledged this intentional understatement of the number of trains that would use the rail line each day and requested that TRRC supply the maximum number of trains, not the average. STB Request for More Information at 2 – Appendix 34. In its response, TRRC states, “the predicted 3.7 average number of loaded trains per day was based on the assumption that the Otter Creek mine will reach its anticipated maximum production level of 20 million tons of coal per year.” TRRC's Response to the STB's

Request for More Information at 5 – Appendix 2. This coal tonnage estimate is based solely on the tonnage given by Arch Coal, Inc. in its mine application and fails to take into account coal tonnage from the Montco mine, justifying that the Otter Creek mine is currently the only mine proposed. *See* TRRC’s Reply to NPRC Petition to Revoke at 13 – Appendix 33. Additionally, TRRC states, “no entity has publicly stated that it has any current plans to develop the prior Montco Mine site in Ashland.” *Id.* at 14. TRRC alleges, “Precise estimates of how much coal might be transported [from the Montco Mine] are difficult to make, however, given the absence of more specific facts about the size and number of mines that might be developed, and the timing of such development.” V.S. Stevan Bobb at 4 – Appendix 52.

TRRC’s proposed rail line extends to Terminus 1, the previously proposed Montco mine location. *See* Supplemental Application at 7. In its reply to the STB’s request for information, TRRC acknowledges that the Montco reserves are “known to be substantial.” TRRC’s Response to the STB’s Request for More Information at 4 – Appendix 2. TRRC’s response goes on to state, “Based on that knowledge and the reasonable assumption that coal developers may emerge to develop one or more mines in the area that would be served by Terminus #1, TRRC believes that there is an economic justification for the Montco Mine spur.” *Id.* If there are substantial reserves and TRRC believes that the rail line may service these mines, TRRC must include these mines’ production capacities in its tonnage estimation when calculating the number of trains that would use the trail line daily. In a 1996 decision, STB stated, “TRR would still be able to serve the Montco mine, a mine site with an estimated coal production capacity of 38 million tons.” STB FD 30186 (Sub-No.2), Tongue River Railroad Co.—Rail Construction and Operation—Ashland to Decker, Montana, served November 6, 1996, 1 STB 809 at 14. Adding this number to the 20 million tons estimate from the Otter Creek Mine, it is clear that TRRC’s 3.7 loaded cars

a day figure is a gross underestimate. Additionally, in documents submitted by TRRC, which appear to be the DEIS from TRRIII, estimated train trips/day are included and the lowest proposed number is 8. TRRC's Reply to NPRC Petition to Revoke at Appendix A – Appendix 33.

In addition to Montco, there are significant coal resources on the Northern Cheyenne Reservation that are available for development and lie in close proximity to the TRR spur to Montco. The potential for this coal to also move along TRR further underscores the fact that more than 8 trains per day could originate from this project.

Not only does the eight-train/day standard established in STB regulations require the Board to look at down-line impacts, STB precedent also requires this analysis. In *DM&E*, the Board's Section on Environmental Analysis conducted an extensive down-line impacts analysis. A down-line analysis for TRRC's proposed rail line will reveal that the communities all along the route from Montana to Washington will be substantially impacted by the project. In contrast to the increased train traffic of DM&E where many of the impacts were to be distributed over a wide geographic area due to multiple coal markets, the down-line impacts of TRRC's rail line will be concentrated along BNSF's main line to the West Coast. Communities like Spokane Washington, Sand Point, Idaho, Billings, Montana and many others may be ill equipped to handle the significant increase in train traffic.

C. The transportation merits and public benefit associated with the proposed rail line are speculative and unsupported by credible data.

Section IIA of these comments clearly demonstrates the highly speculative nature of TRRC's assertions of public convenience and necessity, assertions unsupported by any credible evidence. In such circumstances, *any* environmental detriment is contrary to the public interest. A proper balancing of the public interest, including environmental concerns, dictates that the rail

line proposed by TRRC is inconsistent with the public convenience and necessity, and accordingly, the STB must decline the application.

The assertions of public benefit put forward by the applicant that the rail line will have less environmental impacts than the route approved by the ICC in 1986 in the TRR I proceeding, and that the proposed rail line will have a significant economic benefit for Montanans and is supported by the people of Montana is based on flawed logic and inappropriate evidence.

TRRC purports to evaluate environmental impacts relative to the public interest based entirely on the environmental impact statement prepared in relation to the TRR I proceeding (“TRR I EIS”). Supplemental Application at 2, 4, 22-25. With respect to TRR II and TRR III, the Ninth Circuit condemned the STB’s reliance on the TRR I EIS as stale and inappropriate for the purposes of analyzing environmental impacts under the NEPA process. *N. Plains Res. Council Inc.*, 668 F.3d at 1085 - 1087. Reliance on the TRR I EIS is equally inappropriate for the purposes of establishing public interest under the PCN test. Moreover, the TRR I EIS fails to consider the cumulative environmental impacts associated with the proposed rail line. The Ninth Circuit was explicit that the STB must consider the cumulative environmental effects of the proposed rail line, including an analysis of past, present and future projects. *Id.* at 1076 – 1077. We note that in its decision dated February 26, 2013, the STB stated that the TRR I EIS will not form the basis of its environmental review of the proposed rail line under NEPA. *Tongue River Railroad Company, Inc. – Rail construction and Operation – In Cluster, Powder River and Rosebud Counties, Mont.* STB (Feb. 26, 2013) at 6. The STB must also disregard all those parts of the supplemental application that rely on the TRR I EIS to assert public benefit or lack of public detriment for the purposes of the PCN analysis.

Furthermore, the fact that one alternative may have fewer environmental impacts than another alternative does not therefore mean that that alternative represents environmental “advantage” or “benefit”, as suggested by the applicant at pages 22 – 25 of the supplemental application. In circumstances such as the present, where there is no more than speculative and unsubstantiated assertions of transportation and other public benefits, it may well be that neither alternative is ultimately in the public interest. TRRC’s logic here is inherently flawed.

TRRC also asserts that the proposed rail line is in the public interest because it will benefit the Montana economy. Supplemental Application at 19 – 20. TRRC purports to support this assertion by reference to a study prepared by the University of Montana’s Bureau of Business & Economic Research titled “The Impact of Otter Creek Coal Development on the Montana Economy” (hereafter “Montana Study” – Appendix 53) and three letters of support from community organizations, attached to the supplemental application at Appendix C. The Montana Study examines just one aspect of the public interest, short-term economic gains from the mine. It does not consider the other elements inherent in a public interest analysis, including environmental, community and social impacts, and is therefore not demonstrative of the public interest. Further, TRRC fails to acknowledge that the Montana Study is based on information and data provided by the applicant’s affiliates, Otter Creek Coal, LLC and BNSF Railway, both of whom have a vested interest in the proposed rail line. Montana Study at 2 (“The authors of this study would like to acknowledge the cooperation and support from Otter Creek Coal, LLC as well as BNSF Railway who provided helpful information for this report”). The Montana Study also references extremely outdated and stale environmental analyses and reports. *See* Montana Report at 44 – Appendix 53. For the above reasons, reliance on the Montana Study lacks credibility and must be disregarded. The letters of recommendation, to the extent that they

form and support their opinion based on the Montana Report, must also be disregarded. The applicant fails to provide any credible support for its assertion that the proposed rail line is in the public interest.

D. There are material environmental and social impacts inherent in the proposed rail line sufficient to rebut the PCN.

In contrast to TRRC's speculative and unsupported assertions of public benefit, there are significant material environmental and social impacts inherent in the proposed rail line sufficient to rebut the PCN. As set forth in the scoping comments of Northern Plains and others, the cumulative impacts from this project at the local, state and regional level are enormous.

IV. If the Board accepts TRRC's speculative support for demand and need, then it must consider down-line environmental impacts.

If the Board accepts TRRC's speculative assertions that there is a market for Otter Creek coal, then it must consider down-line environmental impacts such as climate change and global warming.

In addition to the direct environmental impacts associated with the proposed rail line, set out above, the proposed rail line will cause substantial cumulative environmental and social impacts through coal bed methane developments, oil and gas development, mining operations (including Otter Creek, Montco and other potential PRB coal mines), and the final consumption of coal which will contribute significantly to global warming and climate change. Northern Plains Resource Council Scoping Comments at 18 – 28 – Appendix 42. In *Mid-States Coalition for Progress*, the Eighth Circuit held that the STB could not approve the building of a rail line without first examining the effects that may occur as a result of the reasonably foreseeable increase in coal consumption; stating degradation in air quality is something that must be considered if it is “reasonably foreseeable” 345 F.3d 520, 549 (2003). While the extent of the

degradation in air quality may be speculative at this moment, the nature of the effect is not and, thus, must be taken into account.

The sole purpose of the proposed rail line is to ship Montana coal to coal fired power plants and coal export ports for final consumption. With respect to the Otter Creek coal strip mine in particular, the proposed mine and the proposed rail line are integrally connected; one does not exist without the other. Northern Plains Resource Council Scoping Comments at 19 – Appendix 42. Accordingly, the Board must consider the environmental impacts associated with mining and burning Montana coal in determining the public interest under §10901.

Burning coal emits sulfur dioxide, nitrogen oxide, and heavy metals such as mercury and arsenic, and acid gases such as hydrogen chloride, which have been linked to acid rain, smog, and health issues. See U.S. Energy Information Administration, *Energy in Brief: What is the role of coal in the United States?* (July 18, 2012),

http://www.eia.gov/energy_in_brief/article/role_coal_us.cfm - Appendix 54. The proposed rail line will also have a significant impact on carbon dioxide emissions and global warming.

According to the U.S. Global Change Research Program (2009) (available at

<http://nca2009.globalchange.gov/global-climate-change> - Appendix 55), “The global warming observed over the past 50 years is due primarily to human-induced emissions of heat-trapping gases. These emissions come from the burning of fossil fuels (coal, oil, and gas), with additional contributions from the clearing of forests and agricultural activities.” See NPRC Scoping

Comments at 25-26 – Appendix 42. The Department of Energy’s Energy Information Administration has calculated carbon dioxide emissions from Montana subbituminous coal to be 213.4 pounds of CO₂ per million Btu. *Carbon Dioxide Emission Factors for Coal*, August 1994 (Quarterly Coal Report, DOE/EIA-0121(94/IQ), August 1994), Table FE4 – Appendix 56. If

TRRC's estimates are correct and the TRR rail line ships 20 million tons of coal per year from the Otter Creek mine, approval of the TRR rail line will contribute almost 77 billion pounds of carbon emissions per year just from the Otter Creek mine. [20 million tons multiplied by 18 million (1 ton = 18 million Btu), then multiply that figure by 213.4 to get pounds of CO₂.] While the exact extent of the degradation in air quality may be speculative at this moment, the nature of the effect is not and, thus, must be taken into account.

Further, if the Board accepts that Otter Creek coal is destined for export markets, as TRRC speculates, the STB must examine the full down-line environmental and social impacts associated with such exports. *N. Plains Res. Council Inc.*, 668 F.3d at 1076 (holding that cumulative impacts must be properly taken into account). The opening of new coal export terminals in Washington and Oregon will have enormous impacts on the commerce and communities in Montana. There are multiple proposed terminals on the West Coast currently under environmental review, including Coyote Island Terminal and Boardman, Oregon, and the Cherry Point Terminal at Bellingham, Washington, or in pre-scoping stages, such as the Longview, Washington, port. If built, the Cherry Point and Longview ports together would be able to handle nearly 100 million tons of coal. Collectively, these projects would transform the region with traffic and rail congestion. The effects of the port proposals extend far beyond the ports themselves and will result in systemic impacts on the entire rail transportation system of the region extending from southeast Montana and northeast Wyoming all of the way through central, northern, and western Montana; Idaho; Oregon; and Washington. In July 2012, the Western Organization of Resource Councils (WORC) released a report, *Heavy Traffic Ahead: The Impacts Associated with the Expected Increase in Railroad Export Coal Movements from Powder River Basin Origins to Existing Proposed Pacific Northwest Export Coal Terminals*,

prepared by rail transportation consultants Terry Whiteside and Gerald Fauth, III, and transportation attorney Richard Streeter. <http://www.heavyrafficahead.org> – Appendix 57. That report concluded that the west-bound movement of coal is likely to disrupt the frequency and reliability of inbound and outbound shipments of containerized traffic and that traffic would likely experience diversion to California and Canadian ports; that export grain railroad traffic would be adversely affected by the reduction of rail capacity; that many areas along the routes would require major upgrading and expansion of existing tracks and related infrastructure; and that the majority of the burden of costs associated with necessary improvements would fall on state and local governments, not the market participants (such as TRRC).

It is not surprising, then, that further development of Western coal reserves has been met with strong political opposition. In a recent letter to the Chairwoman for the Council on Environmental Quality, the Governors of Oregon and Washington expressed joint concern over further investment in coal generation and the infrastructure to transport coal for export markets, stating:

Coal is the major source of global greenhouse gas emissions, and its share is increasing rapidly. Increasing levels of greenhouse gases and other pollutants resulting from the burning of coal, including pollutants other than CO₂, are imposing direct costs on people, businesses and communities in the U.S., and around the world. These costs include the public health costs of increased atmospheric deposition of mercury in drinking water sources, as well as costs resulting from ocean acidification, rising sea levels, wildfires, and shrinking snow packs that are key sources of water for the western U.S....Given that the cumulative total of coal exports from Oregon and Washington could result in CO₂ emissions on the order of 240 *million* tons per year, well above the significance level described in the draft [Council on Environmental Quality] guidance – it is hard to conceive that the federal government would ignore the inevitable consequences of coal leasing and coal export. We believe the decision to continue and expand coal leasing from federal lands and authorize the export of that coal are likely to lead to long term investments in coal

generation in Asia, with air quality and climate change impacts in the United States that dwarf those of almost any other action the federal government could take in the foreseeable future.

Letter to the Chairwoman for the Council on Environmental Quality, the Governors of Oregon and Washington – Appendix 61.

Finally, further development of the Powder River Basin coal reserves, and associated developments including the proposed Tongue River Railroad, is contrary to current National policy to reduce Greenhouse Gas Emissions. For example, at the 16th Session of the United Nations Framework Convention on Climate Change held in Cancun in 2010, the United States formally committed to keep global warming less than two degrees Celsius above pre-industrial levels. United Nations Framework Convention on Climate Change, *Report to the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010, Addendum, Part Two: Action taken by the Conference of the Parties at its sixteenth Session*, <http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf> - Appendix 58. The International Energy Agency stated in its World Energy Outlook 2012 that no more than one-third of proven reserves of fossil fuels can be consumed prior to 2050 if the world is to achieve the 2 degree Celsius goal, and that almost two-thirds of these carbon reserves are related to coal. International Energy Agency, *World Energy Outlook 2012, Executive Summary* at 3 – Appendix 59. Further development of the Powder River Basin coal reserves would be inconsistent with America's commitment.

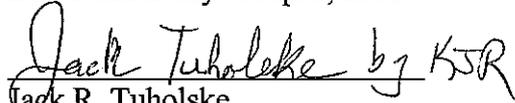
Most recently, President Obama is reported to be preparing a set of new guidelines requiring federal agencies to consider the impact on global warming before approving major projects. The guidelines will require consideration of both the increase in greenhouse gases and a project's vulnerability to flooding, drought or other extreme weather that might result from

global warming. See Mark Drajem, *Obama Will Use Nixon-Era Law to Fight Climate Change*, Bloomberg (March 15, 2013), <http://bloomberg.com/news> – Appendix 60. The White House’s proposed guidelines are consistent with a series of legal and policy developments in the past decade relating to the regulation of greenhouse gas emissions and assessment of federal actions that may affect climate change. For example: The Supreme Court’s decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007) acknowledging the emerging scientific consensus on the dangers posed by climate change and holding that CO₂ and other greenhouse gases are “air pollutants” under the Clean Air Act; the United States Global Research Program Report, *Global Climate Change Impacts in the United States*, documents the impacts of global climate change, including the increased likelihood of more frequent and more intense heat waves, more wildfires, degraded air quality, more heavy downpours and flooding, increased drought, greater sea level rise, more intense storms, harm to water sources, harm to agriculture, harm to wildlife and ecosystems, and ocean acidification; EPA adopted the nation’s first carbon emission regulation establishing fuel-economy standards for mobile sources starting with cars and light trucks; EPA adopted the “Tailoring Rule” subjecting stationary sources such as coal-fired power plants to regulate greenhouse gas emissions if they emit greenhouse gas emissions of at least 100,000 tons per year; and in 2010 the National Academy of Sciences published a report, *America’s Climate Choice*, that details the impacts already underway in the United States, as well as policies and actions necessary to mitigate and adapt to climate change, including the use of existing agency authorities to reduce reliance on fossil fuels. Northern Plains Resource Council Scoping Comments at 26 – Appendix 42. See e.g. <http://www.whitehouse.gov/energy/climate-change>, (the Whitehouse’s website setting out the Whitehouse’s approach to addressing climate change).

CONCLUSION AND REQUEST FOR RELIEF

Northern Plains Resource Council, Inc. and Wally McRae/Clint McRae dba Rocker Six Cattle Company hereby request that the Board decline to issue TRRC a certificate of public convenience and necessity under 49 U.S.C. § 10901 because TRRC has failed to show that there is both a public demand and need for the proposed rail line and that the rail line is in the public interest.

Dated this 2 day of April, 2013

 by KJR

Jack R. Tuholske

Attorney for Northern Plains and Rocker Six Cattle Company

Certificate of Service

I certify that the foregoing has been served by U.S. mail on all parties of record on this

2nd day of April, 2013.

