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196198

July 26, 2010

Chief, Section of Administration
Surface Transportation Board
Washington, D.C. 20423

Re: *Northern Plains Resources Council's and Mark Fix's Petition to Reopen the Record and Request that the Board Prepare a Supplemental Environmental Impact Statement and Reconsider Its Final Decision Approving the Tongue River Railroad in Light of Substantial Changes in Circumstances and New Evidence that Materially Affect the Board's Prior Determination of Public Convenience and Necessity*

STB Finance Docket No. 30186, *FD 30186 Sub 1, FD 30186 Sub 2 and FD 30186 Sub 3*

Dear Administration Chief,

Enclosed please find for filing, Northern Plains Resources Council's and Mark Fix's *Petition to Reopen the Tongue River Railroad Proceedings, Preface/Summary of Argument*, and Appendix. Copies of the Appendix are included on CD due to the massive amount of documents necessary for this filing.

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Please contact our office with any questions. Thank you for your assistance in this matter.

Sincerely,

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enclosures
cc: All Parties of Record

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**SURFACE
TRANSPORTATION BOARD**

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC 20423**

**TONGUE RIVER RAILROAD
COMPANY, INC. RAIL
CONSTRUCTION AND OPERATION**

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STB FINANCE DOCKET NO. 30186

NOTICE OF APPEARANCE

Please notice the appearance of Patrick Parenteau, Esq., Environmental and Natural Resources Law Clinic, as counsel on behalf of Petitioners Northern Plains Resources Council and Mark Fix in this matter.

Dated: South Royalton, Vermont
July 26, 2010

**ENVIRONMENTAL AND NATURAL
RESOURCES LAW CLINIC**

By: 

Patrick Parenteau, Esq.
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Counsel for Petitioners

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC 20423**

**TONGUE RIVER RAILROAD
COMPANY, INC. RAIL
CONSTRUCTION AND OPERATION**

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STB FINANCE DOCKET NO. 30186

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 26, 2010 copies of *Northern Plains Resources Council's and Mark Fix's Petition to Reopen the Record and Request that the Board Prepare a Supplemental Environmental Impact Statement and Reconsider Its Final Decision Approving the Tongue River Railroad in Light of Substantial Changes in Circumstances and New Evidence that Materially Affect the Board's Prior Determination of Public Convenience and Necessity*, on behalf of Petitioners Northern Plains Resources Council and Mark Fix were served via United States Postal Service first-class mail, with adequate prepaid postage on all parties of record in this proceeding.

SIGNED and DATED at South Royalton, Vermont this 26th day of July, 2010.

ENVIRONMENTAL AND NATURAL
RESOURCES LAW CLINIC

By: Patrick Parenteau

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**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC 20423**

STB Finance Docket No. 30186 (Sub-No. 3)¹

**TONGUE RIVER RAILROAD COMPANY, INC.
RAIL CONSTRUCTION AND OPERATION**

**PETITION OF NORTHERN PLAINS RESOURCE COUNCIL AND MARK FIX TO
REOPEN THE RECORD AND REQUEST THAT THE BOARD PREPARE A
SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT AND RECONSIDER
ITS FINAL DECISION APPROVING THE TONGUE RIVER RAILROAD IN LIGHT
OF SUBSTANTIAL CHANGES IN CIRCUMSTANCES AND NEW EVIDENCE THAT
MATERIALLY AFFECT THE BOARD'S PRIOR DETERMINATION OF PUBLIC
CONVENIENCE AND NECESSITY**

PREFACE AND SUMMARY OF ARGUMENT

The Northern Plains Resource Council and Mark Fix ("NPRC"), pursuant to 49 U.S.C. § 722(c), and 49 C.F.R. §§ 1115.4, 1105.10(a)(5), respectfully requests that the Surface Transportation Board ("Board") reopen STB Finance Docket No. 30186 (Sub-Nos. 1, 2, and 3), Tongue River Railroad Company, Inc. – Construction and Operation ("TRR Approval"). Reopening is appropriate because (1) there have been substantial changes in circumstances, including the recent leasing of the Otter Creek coal tracts,² which the Board previously ruled were too speculative to warrant consideration in the supplemental EIS on the Western Alignment; (2) the emergence, since the Board's approval of the FSEIS, of a substantial body of new scientific evidence on the accelerating effects of climate change and the urgent need to

¹ This decision also embraces Finance Docket No. 30186, Tongue River R.R.—Rail Construction and Operation—In Custer, Powder River and Rosebud Counties, MT, and Finance Docket No. 30186 (Sub-No. 2), Tongue River Railroad Company—Rail Construction and Operation—Ashland to Decker, Montana.

² The State of Montana recently awarded coal leases to Ark Land Company ("Ark"), a subsidiary of Arch Coal Co., in the Otter Creek Basin ("Otter Creek Leases"). See Petition for further discussion.

reduce emissions of CO₂ from the burning of coal and other fossil fuels ; and (3) significant developments in the law requiring the Board to reconsider the TRR Approval in light of the potentially devastating consequences for human health and the environment from unabated climate change. Since the October 2006 FSEIS did not consider either the environmental effects of the Otter Creek leases, or the climate change effects of burning the millions of tons of coal to be transported by the TRR, a supplemental EIS must be prepared as required by NEPA, the CEQ Regulations and the Board's own rules. Further, these changed circumstances and new evidence could "materially affect" the Board's TRR Approval. Indeed, once the Board takes a "hard look" at this new evidence as required by NEPA it should conclude that construction of the TRR no longer serves the public convenience and necessity as required by 49 U.S.C. § 10901(c).

Currently there is no coal mining in the Otter Creek Basin, no rail access, and no other means of transporting coal to market. As TRRC's president, Mike Gustafson, has said: "I believe that the construction of the TRRC line is essential for the development of substantial coal resources in the Otter Creek area..."³ In short, without TRR there would be no Otter Creek mine, and without the coal mine there would be no need for TRR. In terms of NEPA law, TRR has no "independent utility" and Otter Creek is a "foreseeable consequence" of the TRR Approval and therefore must be considered in an EIS.⁴

Construction of the TRR and development of the Otter Creek mine will industrialize an agricultural area that currently enjoys clear air, clean water, native grasslands, valuable fish and wildlife habitat, quiet communities and abundant recreational opportunities. Together, the proposed railroad and coal mine would fundamentally change the character of the environment and the quality of life enjoyed by NPRC and other residents of this area. The Board has an

³ TRRC's 2003 Supplement Evidence, Supplemental Verified Statement of Mike T Gustafson at 4.

⁴ See 40 C.F.R. §§ 1508.7, 1508.8(b).

obligation to consider the full environmental, economic and social costs of the combined projects, including mitigation costs associated with the increased greenhouse gas emissions, and determine whether these costs outweigh the benefits of the TRR under 49 U.S.C. §10901(c). *See Mid-States Coalition for Progress v. STB*, 345 F.3d 520, 533 (8th Cir. 2003)(“Mid-States”).

A vast body of new scientific evidence on the effects of climate change has emerged since the Board’s approval of the FSEIS on the Western Alignment. This includes the Intergovernmental Panel on Climate Change (IPCC) “Fourth Assessment” (2007), the United States Global Research Program Report on “Climate Change Impacts in the United States” (2009), the Environmental Protection Agency’s “Endangerment Findings under the Clean Air Act”(2009) and the National Academy of Sciences multi-volume report “America’s Climate Choices” (2010). This information was not previously available, and materially affects the Board’s prior decision. NEPA law mandates that it be considered in a supplemental EIS. *Marsh v ONRC*, 490 U.S. 360, 374 (1989); *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172, 1217 (9th Cir. 2008).

Finally, no prejudice will result from reopening the record and reconsidering this decision because, despite the passage of over twenty years, and the piecemeal approval of sections of the line, no construction has begun, no financing has been arranged, no rights of way have been acquired, and the economic viability of this project remains in question.

Dated: South Royalton, Vermont
July 26, 2010

Respectfully submitted,

ENVIRONMENTAL AND NATURAL
RESOURCES LAW CLINIC

By: Patrick Parenteau

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Counsel for Petitioners

I, Patrick Parenteau, declare under penalty of perjury that the
foregoing is true and correct. Further, I certify that I am qualified and
authorized to file this pleading.

Executed on July 26, 2010

By: Patrick Parenteau

Patrick Parenteau, Esq.
Counsel for Petitioners

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC 20423**

STB Finance Docket No. 30186 (Sub-No. 3)¹

**TONGUE RIVER RAILROAD COMPANY, INC.
RAIL CONSTRUCTION AND OPERATION**

**PETITION OF NORTHERN PLAINS RESOURCE COUNCIL AND MARK FIX TO
REOPEN THE RECORD AND REQUEST THAT THE BOARD PREPARE A
SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT AND RECONSIDER
ITS FINAL DECISION APPROVING THE TONGUE RIVER RAILROAD IN LIGHT
OF SUBSTANTIAL CHANGES IN CIRCUMSTANCES AND NEW EVIDENCE THAT
MATERIALLY AFFECT THE BOARD'S PRIOR DETERMINATION OF PUBLIC
CONVENIENCE AND NECESSITY**

INTRODUCTION

The Northern Plains Resource Council and Mark Fix, both parties to these proceedings (collectively "Northern Plains), pursuant to 49 U.S.C. § 722(c), and 49 C.F.R. §§ 1115.4, 1105.10(a)(5), respectfully requests that the Surface Transportation Board ("Board") reopen *Tongue River Railroad Company, Inc. – Construction and Operation*, STB Finance Docket Nos. 30186, 30186 (Sub-No. 2), and 30186 (Sub-No. 3) ("TRR Approval"). Reopening is appropriate because (1) there have been substantial changes in circumstances, including the recent leasing of the Otter Creek coal tracts, which the Board previously ruled were too speculative to warrant consideration in the supplemental EIS on the Western Alignment; (2) the emergence, since the Board's approval of the FSEIS, of a substantial body of new scientific evidence on the accelerating effects of climate change and the urgent need to reduce emissions of CO₂ from the

¹ This decision, and consequently this Petition, also embraces *Tongue River R.R.—Rail Construction and Operation—In Custer, Powder River and Rosebud Counties, MT*, STB Finance Docket No. 30186 (Service Date May 9, 1986), and *Tongue River R.R. Company—Rail Construction and Operation—Ashland to Decker, MT*, STB Finance Docket No. 30186 (Sub-No. 2) (Service Date Dec. 1, 1997).

burning of coal and other fossil fuels ; and (3) significant developments in the law requiring the Board to reconsider the TRR Approval in light of the potentially devastating consequences for human health and the environment from unabated climate change.

Since the October 2006 FSEIS did not consider either the environmental effects of the Otter Creek leases, which would lead to development of the largest new coal mine in North America, or the climate change effects of burning the millions of tons of coal to be transported by the TRR, a supplemental EIS must be prepared as required by NEPA, the CEQ Regulations, and the Board's own rules. The Otter Creek mine and TRR are interdependent actions that must be considered together in a supplemental EIS. Further, these changed circumstances and new evidence could "materially affect" the Board's TRR Approval. Once the Board takes a "hard look" at this new evidence as required by NEPA it should conclude that construction of the TRR no longer serves the public convenience and necessity as required by 49 U.S.C. § 10901(c). Alternatively, the Board must consider whether additional mitigation is warranted to deal with the cumulative effects of these interconnected actions.

No prejudice will result from reopening the record and reconsidering this decision because, despite the passage of over twenty years, and the piecemeal approval of sections of the line, no construction has begun, no financing has been arranged, no rights of way have been acquired, and the economic viability of this project remains in question. Thus, the Board has the opportunity to re-evaluate this project and make a more informed public interest determination in light of the scientific imperative of limiting greenhouse gas emissions.

I. The Standards for Reopening the Record and Supplementing the EIS Are Substantially the Same.

The Board has broad statutory authority to reopen a proceeding and reconsider any action of the Board at any time because of "material error, substantially changed circumstances, or new

evidence.” 49 U.S.C. § 722(c). Board regulations also provide that “A person at any time may file a petition to reopen any administratively final action of the Board pursuant to the requirements of § 1115.3 (c) and (d) of this part.” 49 CFR § 1115.4. The Board may grant the petition to reopen if the petitioner shows that “[t]he prior action will be *affected materially* because of new evidence or changed circumstances.” 49 C.F.R. § 1115.3(b)(1). See *Pioneer Industrial Railway – Alternative Rail Service - Central Illinois Railroad Company*, STB Finance Docket No. 34917 (Service Date Jan. 12, 2007) (granting petition to reopen because of changed circumstances and new evidence that “cast doubt on the representation we had previously relied on”) at 8. Further, the CEQ regulations, which are binding on the Board,² require supplementation “where necessary and appropriate to address substantial changes in the proposed action or significant new and relevant circumstances or information.” 49 C.F.R. § 1105.10(a)(5); 40 C.F.R. § 1502.9(c)(1). In the seminal case *Marsh v ONRC*, the U.S. Supreme Court held that “NEPA does require that agencies take a “hard look” at the environmental effects of their planned action, *even after a proposal has received initial approval.*” 490 U.S. 360, 372 (1989)(“Marsh”)(emphasis added). The Court further ruled that the decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance:

If there remains “major Federal actio[n]” to occur, and if the new information is sufficient to show that the remaining action will “affec[t] the quality of the human environment” in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared. *Id.* at 374

As discussed below, the Board retains ongoing authority over the TRRC and the changed circumstances and new evidence are sufficient to show that the quality of the human environment will be affected in ways that have not previously been considered by the Board.

² The Supreme Court has ruled that “CEQ’s interpretation of NEPA is entitled to substantial deference.” *Andrus v Sierra Club*, 442 U.S. 347, 358 (1979).

II. The Otter Creek Coal Leases Represent a Substantial Change in Circumstances that Warrants Reopening the Record and Requires the Preparation of a Supplemental EIS.

A. Otter Creek and TRR are “Connected Actions” that Have Opened the Door to a Massive New Coal Mine in Southeastern Montana.

The State of Montana recently awarded coal leases³ to Ark Land Company (“Ark”), a subsidiary of Arch Coal Co., in the Otter Creek Basin (“Otter Creek Leases”). These leases are binding contracts. The leases cover 9,543 acres⁴ containing over 500 million tons of coal.⁵ Ark also has rights to mine coal on the intervening tracts in Otter Creek.⁶ The coal deposits in the combined tracts exceed 1.3 billion tons.⁷ If fully developed this would become one of the largest new coal mines in North America. Currently there is no coal mining in the Otter Creek Basin, no rail access, and no other feasible means of transporting coal to market. As TRRC’s president, Mike Gustafson, has said: “I believe that the construction of the TRRC line is essential for the development of substantial coal resources in the Otter Creek area....”⁸ In short, without TRR there would be no Otter Creek mine, and without the coal mine there would be no need for TRR.⁹ Thus, these two projects are “connected actions” within the meaning of the CEQ

³ The leases took effect on March 18, 2010. See Exhibit A in Appendix.

⁴ See Minutes of Montana Land Board Meeting, Otter Creek Leasing, Mar. 18, 2010, at http://dnrc.mt.gov/About_Us/meetings.asp#lb.

⁵ See Mike Dennison, *Arch Coal Bids \$86 Million on Otter Creek Coal*, BILLINGS GAZETTE, Mar. 16, 2010, at http://billingsgazette.com/news/state-and-regional/montana/article_dce4ac8a-3163-11df-b2f7-001cc4c002e0.html.

⁶ See *id.* (“The state-owned coal is interspersed with 730 million tons of coal owned by Great Northern Properties, which agreed last November to lease its coal to Arch for 10 cents a ton.”); Matthew Brown, *Company Wants State to Lease Coal: Schweitzer Adviser Says Private Owner of Second Tract Should Be Involved*, ASSOCIATED PRESS, Mar. 31, 2008.

⁷ See Mike Dennison, *Land Board approves Otter Creek coal lease*, BILLINGS GAZETTE, Mar. 18, 2010.

⁸ TRRC’s 2003 Supplement Evidence, Supplemental Verified Statement of Mike T Gustafson at 4.

⁹ See *Leases would clear way for Tongue River Railroad*, TRAINS MAGAZINE, Nov. 17, 2009 (“The state of Montana is considering leasing its coal-rich Otter Creek tracts near Ashland, Mont., a move that would require construction of a long-planned rail line, the *Wall Street Journal* has reported. The Tongue River Railroad, proposed in 1981, would be required to serve mines in the region, which currently has no rail access.... Federal regulators approved construction of the line in three phases, but the railroad’s owner, Wesco Resources, has been waiting for the promise of coal mines in the region. The mines are part of the Powder River Basin coalfields, but due to a lack of rail access, much of the coal in southeastern Montana remains untapped.”).

Regulations. 40 C.F.R. § 1508.25(a).¹⁰ In *Thomas v Peterson*, 753 F.2d 758, 759 (9th Cir. 1985), the Ninth Circuit construed this provision to require the Forest Service to consider the combined effects of an access road and timber harvest because: “It is clear that the timber sales cannot proceed without the road, and the road would not be built but for the contemplated timber sales.” The same is true here: Otter Creek cannot proceed without TRR, and TRR could not be built without Otter Creek.¹¹

These connected actions will industrialize an agricultural area that currently enjoys clear air, clean water, native grasslands, valuable fish and wildlife habitat, quiet communities and abundant recreational opportunities. Together, the proposed railroad and coal mine would fundamentally change the character of the environment and the quality of life enjoyed by Northern Plains members and other residents of this area. The Board should reopen the proceeding to address the impacts of the Otter Creek mine in a supplemental EIS and reconsider its approval decision based on the best available scientific and economic evidence. As the Board has previously recognized, reopening is appropriate where a change in circumstances is not speculative and could lead to a “different result.” *Cf. Montezuma Grain Co., LLP v. STB*, 339 F.3d 535, 541 (7th Cir. 2003). The Board has an obligation to consider the full environmental, economic, and social costs of the combined projects, including mitigation costs associated with

¹⁰ The Regulations define “connected actions” as actions that “(i) Automatically trigger other actions which may require environmental impact statements (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously or (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.” 40 C.F.R. § 1508.25(a).

¹¹ See TRR I FEIS (Aug. 23, 1985) at 1.2.3.2 (“Substantial amounts of strippable coal exist in the vicinity of the proposed rail line....A means of transporting the coal would be requisite to the opening of other mines in the area. Therefore, the construction of the proposed rail line is directly related to the feasibility of developing new surface coal mines in the project area.”)(emphasis added); *Tongue River Railroad Co., Inc. – Construction and Operation - Western Alignment*, STB Finance Docket No. 30186 (Sub-No. 3) (Service Date Oct. 9, 2007)(“TRR III Approval Decision”) at 20 (“Moreover, the TRRC line will facilitate opening up mines in the Ashland area to replenish the dwindling supply of NPRB coal from the Decker mines, and this is a need that DM&E cannot fulfill.”); TRR III Approval Decision at 23 (“[I]t is clear today that, without this line, it would be difficult for Montana mines to bring their coal to market. The mines around Decker are being depleted, and new mines around Ashland must be developed to meet the demand for NPRB coal from Montana. The proposed line will hasten the development of these mines by creating a practical way of getting coal from Ashland-area mines to market.”).

the increased greenhouse gas emissions, and determine whether these costs outweigh the benefits of the TRR under 49 U.S.C. §10901(c). *See Mid-States Coalition for Progress v. STB*, 345 F.3d 520, 533 (8th Cir. 2003)(“Mid-States”)(Board must “determine whether its original public convenience and necessity conclusion is still warranted after taking into account the potential environmental effects of the project and the cost of any necessary environmental mitigation.”).

The Board’s decision in *Arizona Elec. Power Coop., Inc. v. Burlington N. & S.F. Ry.*, STB Finance Docket Nos. 41185, 42077 (Service Date May 12, 2003) (*Arizona Electric Power*) is particularly instructive. In that case, the Board reopened a rate proceeding based on substantially changed circumstances that came to light four years after the prior decision. The petitioner presented evidence that the McKinley mine would deplete its coal reserves sooner than originally anticipated, and this possibility had been “rejected as speculative” in the Board’s prior decisions in this matter. *Id.* at 4. In granting the petition to reopen, the Board stated that “[w]hat was speculative then is no longer so.” *Id.*

Here the Board also previously ruled that the environmental impacts of the Otter Creek coal mine were too speculative to consider in the supplemental EIS prepared for the Western Alignment:¹² “there was no need to modify the analysis of increased coal production in the Ashland/Birney/Otter Creek area beyond what was discussed in the Tongue River I and in Tongue River II proceedings because *there are currently no proposals under review for leasing of the Otter Creek tracts*”¹³ The issuance of the Otter Creek Leases and aggressive efforts to develop the mine nullify the Board’s prior determination.¹⁴ Thus, “what was speculative is no

¹² *See Tongue River Railroad Co., Inc. – Construction and Operation - Western Alignment*, STB Finance Docket No. 30186 (Sub-No. 3) (Service Date Oct. 9, 2007)(“TRR III Approval Decision”) at 30.

¹³ *Id.* (emphasis added).

¹⁴ *See Tom Lutey, Arch Coal Says It Will Be Aggressive*, BILLINGS GAZETTE, July 13, 2010, at http://billingsgazette.com/news/state-and-regional/montana/article_f55b329c-8efc-11df-b64a-001cc4c03286.html (“New Otter Creek coal developers say they’re five years away from opening the mine that, after decades of dead ends, many doubted would ever exist. Arch Coal, which now controls roughly 1.5 billion tons of Otter Creek coal in

longer so.” *Arizona Electric Power* at 4. Therefore “reopening is appropriate because the changed circumstance relates to a specifically identified and contested assumption in the Board’s earlier decision.” *Id.*

B. Alternatively, the Indirect and Cumulative Effects of Otter Creek Mine are “Reasonably Foreseeable” Consequences of TRR that must be considered in a Supplemental EIS

Even if Otter Creek and TRR are not deemed to be connected actions as defined in 40 C.F.R. § 1508.25(a), the Board must nevertheless consider the impacts of Otter Creek as indirect and cumulative effects of TRR. CEQ defines “indirect effects” as impacts that are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.8(b). An impact is reasonably foreseeable if it is “sufficiently likely to occur that a person of ordinary prudence would take into account in reaching a decision.” *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992). Therefore, indirect impacts are those that result when two actions are related and the occurrence of a second action is reasonably foreseeable even if the second action is a non-federal action. In *Sierra Club v. USDOE*, 255 F. Supp. 2d 1177, 1184 (D. Colo. 2002), the court ruled that DOE was required to consider the secondary consequences of granting a road easement to serve a private mining operation. The court held that “the indirect and cumulative effects of the Easement include the mine because the mine is a ‘reasonably foreseeable future action.’” *Id.* at 1185. The court explained that “[b]ut for the road, the mining company could not access the mine site.” *Id.* at 1184. Further, the court stated: “The fact that a private company will undertake the mining is irrelevant under NEPA regulations. It is

southeastern Montana, has appointed a Montana director and plans to aggressively pursue the state permitting required to open the mine. CEO Steve Leer said optimistically that the company could be producing coal by the middle of the decade.”).

also not pertinent when the mining company will begin operations, as long as action is 'still reasonably foreseeable.'" *Id.* at 1185.

Similarly, CEQ regulations define cumulative impact as the "impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency... or person undertakes such other actions. 40 C.F.R. § 1508.7; *see also Resources. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1306 (9th Cir. 1994). "Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." *Id.*

The decision in *Border Power Plant Working Group v. Department of Energy*, 260 F. Supp. 2d 997, 1013-14 (S.D. Cal. 2003) ("Border Power") is instructive. There the issue was whether the Department of Energy (DOE) was required to consider the indirect effects of a Mexican power plant that would send power to the US via a DOE transmission line. *Id.* Specifically, the Court ascertained whether the power plants and transmission lines would exist in the "absence of the other." *Id.* at 1014. Although the power plants themselves were not within the scope of DOE's proposed action the Court found that NEPA and the CEQ Regulations may "still require consideration of the operation of the power plants if such operation constitutes an 'adverse environmental effect' of the granting of the permit to construct and operate the transmission lines." *Id.* at 1011. The Court held that because the power plants and transmission lines were two links in the same chain, "the emissions resulting from the [power plants] are effects of the transmission lines that must be analyzed under NEPA." *Id.* at 1017. The court reasoned that an agency may only "limit the scope of its NEPA review to the activities specifically authorized by the federal action where the private and federal portions of the project could exist independently of each other." *Border Power*, 260 F. Supp. 2d at 1015. Similarly,

here TRR and the Otter Creek coal mine could not exist independently of each other. At a minimum, Otter Creek is a “foreseeable consequence” of the Board’s approval of the TRR project and therefore must be considered in an EIS.¹⁵ The Board has stated from the beginning that the purpose of the TRRC line is to provide access to the Otter Creek coal deposits. *See* TRR I FEIS Purpose and Need Statement at 1 (“The purpose of the proposed line is to provide a means of transporting to market coal from the Ashland/Birney/Otter Creek areas of southeastern Montana.”); ICC’s Supplemental NOI to prepare an EIS – April 16, 1981 (“This line would provide access to potential future mine sites along Otter Creek.”).

The facts here are even stronger than they were in *Border Power*. The two projects at issue here are not only in the same country but in the same watershed. Further, the economic rationale for building TRR depends on coal mining in Otter Creek. Just as the transmission lines in *Border Power* were the infrastructure needed to move electricity over the border to U.S. markets, here the TRR is the infrastructure needed to move the coal from Otter Creek to the power plants in the Upper Midwest. Just as the air quality and other environmental impacts of the Mexican coal plants had to be considered in *Border Power* so too must the impacts of Otter Creek Leases be considered here. Importantly, for the reasons discussed below in Section III, the court in *Border Power* specifically faulted DOE for failing to consider the impacts of carbon dioxide emissions from the Mexican plants. *See id.* at 1029, 1033.

Additionally, the Otter Creek mining tracts contain alluvial valley floors (AVFs), defined by the State of Montana as “the unconsolidated stream-laid deposits holding streams where water

¹⁵ *See* 40 C.F.R. §§ 1508.7, 1508.8(b); *Sierra Club v. U.S. Dept. of Energy*, 255 F. Supp. 2d 1177, 1184-85 (D. Colo. 2002); *Part of Astoria, Oregon v. Hodel*, 595 F.2d 467, 480 (9th Cir.1979) (holding that the agency must consider the environmental impacts of both the supply of federal power and the construction of a private magnesium plant that would use that power); *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1433 (C.D.Cal.1985) (holding that the agency had to consider the environmental impacts of both the federal stabilization of a river bank and the private housing that would be built as a result).

availability is sufficient for subirrigation or flood irrigation agricultural activities.” Montana Code Annotated 82-4-203 (3)(a)(2009). The economic appraisal prepared for the Montana Land Board discusses potential AVFs on five separate Logical Mining Units within the Otter Creek Tracts, containing a total of 167 million tons of coal.¹⁶ Even though the State of Montana has primary responsibility for mapping AVFs and for regulating coal mining to protect them, the Board has an independent obligation under NEPA to consider the available information on the extent of AVFs in Otter Creek and take into account the potential negative impacts on these critical resources.

III. New and Material Evidence on Climate Change that was not previously available to the Board Warrants reopening of the Record and Supplementation of the EIS.

A. The Duty to Consider New Evidence

Federal agencies have “a continuing duty to gather and evaluate new information relevant to the environmental impacts of its actions.” *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1023 (9th Cir. 1980). “This continuing duty is especially relevant where the original EIS covers a series of actions continuing over a decade.” *Southern Oregon Citizens Against Toxic Sprays, Inc. v. Clark*, 720 F.2d 1475, 1480 (9th Cir. 1983). See also Council on Environmental Quality, *Forty Most Asked Questions Concerning CEQ’s National Policy Act Regulation*, Question 32. Generally, an “EIS concerning an ongoing action more than five years old should be carefully examined to determine whether a supplement is needed.” *Southern Oregon Citizens Against Toxic Sprays, Inc.*, 720 F.2d at 1480. The EIS’s for TRR I and II were both prepared more than a decade ago,¹⁷ and the Board granted initial approval for the TRR in 1986, more than two decades ago. The Board has recognized its duty to supplement an EIS

¹⁶ See Exhibit J in Appendix at 3-2, 3-5, 3-6 (Norwest, Otter Creek Property Summary Report Vol. I (2006)).

¹⁷ The Final EIS for TRR I was made available to the public on August 23, 1985, and the Final EIS for TRR II was served on April 11, 1996.

“where new information that is relevant to environmental concerns is presented after a FEIS has been prepared.” *Draft Supplemental EIS for TRR, Inc. – Construction and Operation – Western Alignment*, STB Finance Docket No. 30186 (Sub-No. 3)(Service Date Oct. 15, 2004)(“TRR III DSEIS”) at 1-13.

B. A Substantial Body of New Scientific Evidence on Climate Change has Emerged since the Board Approved TRR III

At the time the Board was considering the supplemental EIS in the context of the Western Alignment proceeding there was considerable uncertainty surrounding the science of global climate change and whether “anthropogenic emissions” of greenhouse gases (GHG), such as carbon dioxide (CO₂), were causing an increase in global temperatures and associated impacts. Consequently the FSEIS is silent on the subject of climate change. Since publication of the FSEIS in 2006, however, there have been dramatic developments in the science of climate change and in our understanding of the role that humans are playing in transforming life on earth. Likewise there have been a series of dramatic legal and policy developments relating to the regulation of GHG emissions and assessment of federal actions that may affect climate change. The tremendous volume of information that has come to light in the past few years is impossible to summarize in this petition. However some of the more significant developments that warrant brief mention include:

- The Intergovernmental Panel on Climate Change (IPCC) Fourth Assessment Report (February 2007) concluding that climate change is “unequivocal” and that humans are “very likely” (i.e. to a 90% certainty) responsible for it.¹⁸ This report details a wide range of adverse effects already being felt and projects much more serious consequences unless concentrations of GHG emissions are brought under control within a few decades.

¹⁸ See Exhibit B in Appendix.

- 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 GHGs are “air pollutants” under the Clean Air Act subject to EPA’s regulatory authority. The Court directed EPA to “decide whether greenhouse gases cause or contribute to climate change” and thereby endanger public health or welfare.¹⁹
- EPA’s *Endangerment and Cause or Contribute Findings under Section 202 of the Clean Air Act* concluding that “greenhouse gases in the atmosphere endanger the public health and welfare of current and future generations.” See 74 Fed. Reg. 66,495, 66,496 (Dec. 15, 2009).²⁰ EPA further found that: “Concentrations of greenhouse gases are at unprecedented levels compared to the recent and distant past. These high atmospheric levels are the unambiguous result of human emissions, and are very likely the cause of the observed increase in average temperatures and other climatic changes.” *Id.*
- The United States Global Research Program Report, *Global Climate Change Impacts in the United States*, documenting impacts that include the increased likelihood of more frequent and 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 resources, harm to agriculture, and harm to wildlife and ecosystems, and ocean acidification.²¹
- EPA’s adoption of the nation’s first carbon emissions regulation establishing fuel economy standards for mobile sources starting with cars and light trucks.²²

¹⁹ See Exhibit C in Appendix.

²⁰ See Exhibit D in Appendix.

²¹ See Exhibit E in Appendix.

²² See Exhibit F in Appendix.

- EPA’s adoption of the “Tailoring Rule” subjecting stationary sources, such as coal-fired power plants, to regulation of GHG emissions.²³
- CEQ’s publication of *Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions* (February 2010).²⁴ This Guidance Document states: “Nearly every aspect of energy choices and use affect the development of fossil fuel and other energy resources, either adding to or reducing the cumulative total of GHG emissions.”²⁵ The Guidance further directs that “where a proposed Federal action that is analyzed in an EA or EIS would be anticipated to emit GHGs to the atmosphere in quantities that the agency finds may be meaningful, it is appropriate for the agency to quantify and disclose its estimate of the expected annual direct and indirect GHG emissions in the environmental documentation for the proposed action.”²⁶
- The publication of the National Academy of Sciences three volume report, *America’s Climate Choices*.²⁷ This report details the impacts already underway in the U.S., as well as policies and actions that are necessary to mitigate and adapt to climate change, including the use of existing agency authorities to reduce reliance on fossil fuels.

All of this is new information that must be considered in a supplemental EIS. As the Board stated in *DesertXpress Enterprises, LLC – Petition for Declaratory Order*, STB Finance Docket No. 34914 (Service Date May 7, 2010) at 7, “[t]o warrant reopening, evidence must be newly available.” None of this evidence was available at the time the supplemental EIS on the Western Alignment was being developed, and climate change is not even mentioned as an issue in any of the EIS Notices of Intent for TRR I, II, and III. The relevant date for purposes of determining

²³ See Exhibit G in Appendix.

²⁴ See Exhibit H in Appendix.

²⁵ *Id.*

²⁶ *Id.* at 2.

²⁷ See Exhibit I in Appendix.

whether evidence or other information is “newly available” is the publication of the final EIS. See *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1023 (finding that information “which came to the attention of the agency after the publication of its S-EIS...” was new and required supplementation). Furthermore, the Board, in these proceedings, has stated that an EIS must be supplemented “where new information that is relevant to environmental concerns is presented *after a FEIS has been prepared.*” *Draft Supplemental EIS for TRR, Inc. – Construction and Operation – Western Alignment*, STB Finance Docket No. 30186 (Sub-No. 3)(Service Date Oct. 15, 2004) at 1-13 (emphasis added). Thus, the dramatic scientific breakthroughs in our understanding of climate change more than qualify as new evidence that was not “reasonably available to the parties before the proceeding was concluded.” *Platnick Brothers, Inc. v. Norfolk & Western Railway Company*, 367 I.C.C. 782, 785 (1983).

Further, this new evidence “materially affects” the Board’s TRR Approval Decision. Few scientific discoveries have raised such profound implications for human societies and natural systems as the phenomenon of anthropogenic climate change. Warnings from the scientific community about the dangers of failing to take prompt, decisive action to curb greenhouse gas emissions are growing ever more insistent. As Nobel laureate and University of Montana professor Dr. Steve Running stated:

“From a state carbon emissions point of view, [leasing the Otter Creek coal tracts] is the single most important decision in the history of Montana. Indeed, the ability of the global community to avert the worst-case climate change scenarios comes down to decisions like this one at the local level in each country.”²⁸

Moreover, formal recognition by the U.S. government through the Endangerment Finding and CEQ NEPA guidance demonstrates that every agency of the Federal

²⁸ Steven W. Running, *Op-Ed: Montana at carbon emissions crossroads*, BILLINGS GAZETTE, Feb. 16, 2010, at http://billingsgazette.com/news/opinion/guest/article_99b47ee8-1aae-11df-b4c8-001cc4c002e0.html (emphasis added).

government must take climate change impacts into account in making decisions affecting the nation's overall carbon footprint.

This new climate change evidence requires supplementation of the EIS for the entire TRR project because the evidence was unavailable when the SEIS was published. Furthermore, the parties and Northern Plains could not have “foreseen or planned for” this new climate change evidence at the time of the earlier proceeding because when SEA was preparing the October 2006 SFEIS, the Board had taken the position that it was not obligated to consider climate change impacts and the climate change science at that time was still considered to be very controversial. *Canadian Nat'l Ry., Grand Trunk Corp., & Grand Trunk W. R.R. – Control – Ill. Cent. Corp., et. al.*, STB Finance Docket No. 33556 (Service Date Aug. 27, 2002) at 6 (citing *Friends of Sierra R.R., Inc. v. ICC*, 881 F.2d 663, 667 (9th Cir. 1989)). This new climate change evidence justifies reopening the TRR proceedings because it involves “facts which through no fault of [the petitioners], the original proceeding did not contain.” *Jost v. Surface Transportation Board*, 194 F. 3d 79, 84 (D.C. Cir. 1999) (quoting *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 279 (1987)).

C. NEPA Mandates Supplementation of the FSEIS to Consider Climate Change Impacts of Coal Combustion Resulting from Construction of the TRR

As the Eighth Circuit held in *Mid-States*, the Board has an affirmative duty under NEPA to address the significant climate change impacts of coal combustion resulting from the approval of the D M & E project to serve existing mines in the Powder River Basin of Wyoming. 343 F.3d at 549-550. The Eighth Circuit found that “it is reasonably foreseeable-indeed, it is almost certainly true-that the proposed project will increase the long-term demand for coal and any adverse effects that result from burning coal... when the *nature* of the effect is reasonably foreseeable but its *extent* is not, we think that the agency may not simply ignore the effect.” *Id.* at

549. The court also found that “SEA has completely ignored the effects of increased coal consumption, and it has made no attempt to fulfill the requirements laid out in the CEQ regulations.” *Id.* The court “believed that it would be irresponsible for the Board to approve a project of this scope without first examining the effects that may occur as a result of the reasonably foreseeable increase in coal consumption.” *Id.*

The Board has not considered the climate change impacts of the TRR project in any previous EIS. It is critical that it do so now while there is time to reconsider this matter. The Board must use the best available scientific evidence to analyze the cumulative impacts of the TRR and Otter Creek coal combustion on climate change. No matter where Otter Creek coal is burned, it will contribute to further loading of the atmosphere with CO₂. Combustion of this sub-bituminous coal will release billions of tons of carbon dioxide.²⁹ The potential CO₂ emissions here are greater than what was involved in the *Mid-States* case where the Eighth Circuit ruled that the Board must consider climate change effects. *See Mayo Foundation v. STB*, 472 F.3d 545, 554-55 (8th Cir. 2006) (upholding the Board’s determination that “projected air emissions for sulfur dioxide, nitrogen oxides, carbon dioxide, and mercury associated with the small increase of additional coal usage would be less than 1%”). Furthermore, unlike the rail line in *Mid-States*, which was designed to provide a shortcut for existing coal mines that already had rail access, here the construction of TRR is enabling the opening of an entirely new coal mine that would otherwise have no rail access.

CO₂ emissions are a classic case of cumulative impact. It is the cumulative loading of the atmosphere that is the problem. Carbon remains in the atmosphere for hundreds of years, and the

²⁹ See Energy Information Administration, Carbon Dioxide Emission Factors for Coal, available at http://www.eia.doe.gov/cneaf/coal/quarterly/co2_article/co2.html.

effects of climate change are largely irreversible,³⁰ so preventing or reducing emissions is key. As the Ninth Circuit has said “[t]he impact of GHG emissions on climate change is precisely the kind of cumulative impacts analysis NEPA requires agencies to conduct.” *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172, 1217 (9th Cir. 2008). The fact that “climate change is largely a global phenomenon that includes actions that are outside of [the agency’s] control ... does not release the agency from the duty of assessing the effects of *its* actions on global warming within the context of other actions that also affect global warming.” *Id.* at 1217. As the Supreme Court said in *Massachusetts v EPA*, “[a]gencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop.” 549 U.S. at 524. Addressing a massive problem like climate change takes time and progress must be measured in increments.³¹

III. The Board Has the Authority and Responsibility to Supplement the FSEIS and Reconsider the “No Action” Alternative as well as Potential Mitigation Measures

In *Marsh*, the Supreme Court said that the duty to supplement an EIS depended on whether “there remains major federal action to occur” in the TRR project. 490 U.S. at 374. That requirement is easily met here. The Board retains exclusive jurisdiction over “the construction, acquisition, operation, abandonment, or discontinuance of...” rail projects. See ICC Termination Act of 1995, Pub.L. No. 104-88, 109 Stat. 803 (codified as amended in scattered sections of 49 U.S.C.). Pursuant to 49 U.S.C. § 722(c), “[t]he Board may, at any time on its own initiative because of material error, new evidence, or substantially changed circumstances...(3) change an action of the Board.” Even after a railroad has been constructed, the Board retains authority over

³⁰ See Susan Solomon, Gian-Kasper Plattner, Reto Knutti, and Pierre Friedlingsteind, *Irreversible climate change due to carbon dioxide emissions*, PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES, Feb. 10, 2009, at <http://www.pnas.org/cgi/doi/10.1073/pnas.0812721106>.

³¹ In *Center for Biological Diversity* the agency’s cumulative impact analysis was found to be inadequate because the agency did not “evaluate the ‘incremental impact’ that these emissions will have on climate change or on the environment more generally in light of other past, present, and reasonably foreseeable actions....” *Center for Biological Diversity*, 538 F.3d at 1216.

it until post-abandonment conditions have been satisfied and the abandonment has been consummated. *See Friends of the Atglen-Susquehanna Trail v. STB*, 252 F.3d 246, 262 (3d Cir. 2001). Further, the Board retains authority to “change, suspend, or set aside any [prior] action on notice.” 49 U.S.C. § 722(b). Indeed the very existence of a procedure to reopen and reconsider a final action implies the authority to reverse a previous decision. 49 C.F.R. § 1115.4. Furthermore, the Board’s NEPA regulations allow the agency to “withhold a decision, stay the effective date of an exemption, or impose appropriate conditions upon any authority granted, when an environmental or historic preservation issue has not yet been resolved.” 49 C.F.R. § 1105.10.

The Board has continually exercised its ongoing authority in this proceeding. For example, the Board reviewed the environmental record and imposed new mitigation measures in this proceeding when it adopted SEA’s recommended environmental mitigation measures for TRR I, II, and III after TRRC submitted its application for the Western Alignment.³² In the October 2007 decision approving TRR III, the Board refers to its “ongoing monitoring process.”³³ Furthermore, in Mitigation Measure 15 (material changes) of the October 2006 SFEIS, the STB explicitly announced its ongoing authority and continuing role in this proceeding and the NEPA process by stating: “If there is a material change in the facts or circumstances upon which the Board relied in imposing specific environmental mitigation conditions, and upon petition by any party who demonstrates such material change, the Board

³² *See* TRR III Approval Decision at 5 (“The SEIS also addresses TRRC’s proposed refinements to the alignments authorized in Tongue River I and Tongue River II, as well as changed environmental circumstances in the project area (such as changes at the Miles City Fish Hatchery, discussed below), and includes additional analysis requested by the cooperating agencies. Although SEA has determined that there will not be significant impacts that have not already been examined with respect to those lines, it recommends additional and modified mitigation measures to further minimize the potential environmental impacts of the construction and operation of the lines authorized in Tongue River I and Tongue River II. SEA recommends that, except as specifically noted, the environmental conditions it recommends here be applied uniformly to all three lines.”).

³³ TRR III Approval Decision at 11n27.

may review the continuing applicability of its final mitigation, if warranted.”³⁴ Therefore, this is a “still pending decision-making process” which remains subject to NEPA requirements regarding supplementation based on changed circumstances and new information. *Marsh*, 490 U.S. at 374.

In its new draft NEPA climate-change guidance, CEQ strongly recommends that agencies “consider mitigation measures and reasonable alternatives to reduce action-related GHG emissions.”³⁵ President Obama’s recent Executive Order – Federal Leadership in Environmental, Energy, and Economic Performance – further underscores the need for the Board to require additional mitigation measures to increase energy efficiency and reduce GHG emissions.³⁶ Thus the President has placed the burden on the Board to take the initiative to explore mitigation measures for TRR. Petitioners note the following potential GHG mitigation options for one small part of the project, diesel locomotives:

- Use of biodiesel fuels in TRRC locomotive engines to reduce GHG emissions;³⁷
- Installation of shore connection systems that allow locomotives to “plug into” an electrical power source instead of using diesel engines while at the railyard;³⁸

³⁴ TRR III Approval Decision at 40.

³⁵ CEQ Guidance at 5.

³⁶ E.O. 13514 – Federal Leadership in Environmental, Energy, and Economic Performance, 74 Fed. Reg. 52117-52127 (Oct. 5, 2009). This Executive Order expands upon the energy reduction and environmental performance requirements of E.O. 13423 - Strengthening Federal Environmental, Energy, and Transportation Management, 72 Fed. Reg. 3919 (Jan. 24, 2007).

³⁷ See NS, EMD to Test Biodiesel as Locomotive Fuel, *PROGRESSIVE RAILROADING*, Apr. 14, 2010, at <http://www.progressiverailroading.com/news/article.asp?id=23021>.

³⁸ See EPA Smartway Transport Partnership – Idling Reduction Technologies, at <http://www.epa.gov/smartway/transport/what-smartway/verified-technologies.htm#apu> (“Idle reduction technology allows engine operators to refrain from long-duration idling of the main propulsion engine by using an alternative technology. An idle reduction technology is generally defined as the installation of a technology or device that: is installed on a vehicle (e.g., bus, truck, locomotive, automobile, marine vessel, equipment, etc.) or at a location, and reduces unnecessary main engine idling of the vehicle or equipment, and/or is designed to provide services (e.g., heat, air conditioning, and/or electricity) to the vehicle or equipment that would otherwise require the operation of the main drive engine while the vehicle or equipment is temporarily parked or remains stationary.”).

- Installation of auxiliary power units and generator set systems (APU/GS) to supply heating, cooling, and electrical power to locomotives rather than idling diesel engines;³⁹
- Installation of fuel operated heaters on locomotives which have an automatic start/stop capability;⁴⁰
- Installation of automatic engine shut-down/start-up systems that not only turn off the main engine while idling but can also re-start the engine when necessary;⁴¹
- Working with TRRC to develop an idle-shutdown policy for its locomotives.⁴²

Undoubtedly there are other mitigation options that could be developed through the NEPA process. But for that to occur the Board must first decide to reopen the proceeding and initiate that process.

Conclusion

For the foregoing reasons, Northern Plains respectfully requests that the Board reopen these proceedings, direct SEA to prepare a supplemental EIS, afford the public an opportunity to comment, and reconsider its determination that construction of TRR from Miles City to Decker is not inconsistent with public convenience and necessity. As no construction has commenced and the project remains in a state of economic limbo, no prejudice will result from the Board's exercise of its authority to reopen and take a harder look at the substantial negative effects on the public interest of building this new rail line to facilitate further coal development at a time when there is an urgent need to reduce reliance on fossil fuels to avert potentially catastrophic consequences for humanity.

³⁹ *See id.*

⁴⁰ *See id.*

⁴¹ *See id.*

⁴² "In 2008, The U.S. Environmental Protection Agency (EPA) adopted new more stringent emissions standards and mandated the application of idle-emission controls on newly manufactured and remanufactured locomotives." EPA website, Control of Emissions from Idling Locomotives (March 2008), at <http://www.epa.gov/otaq/regs/nonroad/locomotiv/420f08014.htm>.

Dated: South Royalton, Vermont
July 26, 2010

Respectfully submitted,

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I, Patrick Parenteau, declare under penalty of perjury that the
foregoing is true and correct. Further, I certify that I am qualified and authorized to file this
pleading.

Executed on July 26, 2010

By: Patrick Parenteau

Patrick Parenteau, Esq.
Counsel for Petitioners

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC 20423**

STB Finance Docket No. 30186

**TONGUE RIVER RAILROAD COMPANY, INC.
RAIL CONSTRUCTION AND OPERATION**

**PETITION OF NORTHERN PLAINS RESOURCE COUNCIL AND MARK FIX
TO REOPEN THE RECORD AND REQUEST THAT THE BOARD PREPARE A
SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT AND
RECONSIDER ITS FINAL DECISION APPROVING THE TONGUE RIVER
RAILROAD IN LIGHT OF SUBSTANTIAL CHANGES IN CIRCUMSTANCES
AND NEW EVIDENCE THAT MATERIALLY AFFECT THE BOARD'S PRIOR
DETERMINATION OF PUBLIC CONVENIENCE AND NECESSITY**

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