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October 8, 2010

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RECEIVED

Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
Washington, D.C. 20423-0001

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

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Dear Administration Chief,

Enclosed please find for filing:

- *Motion of Northern Plains Resource Council and Mark Fix for Leave to File This Brief Rebuttal to Correct Material Errors of Fact and Law in Tongue River Railroad Company's Reply to Petition to Reopen,* with accompanying *Certificate of Service* (1 original, 10 copies).

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

Sincerely,

Patrick Parenteau

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enclosures
cc: TRRC Counsel

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC 20423

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

TONGUE RIVER RAILROAD COMPANY, INC.
CONSTRUCTION AND OPERATION – WESTERN ALIGNMENT

MOTION OF NORTHERN PLAINS RESOURCE COUNCIL AND MARK FIX FOR LEAVE TO FILE THIS BRIEF REBUTTAL TO CORRECT MATERIAL ERRORS OF FACT AND LAW IN TONGUE RIVER RAILROAD COMPANY'S REPLY TO PETITION TO REOPEN

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October 8, 2010

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[1] This decision, and consequently this Motion, 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).

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 – WESTERN ALIGNMENT

MOTION OF NORTHERN PLAINS RESOURCE COUNCIL AND MARK FIX FOR LEAVE TO FILE THIS BRIEF REBUTTAL TO CORRECT MATERIAL ERRORS OF FACT AND LAW IN TONGUE RIVER RAILROAD COMPANY'S REPLY TO PETITION TO REOPEN

The Northern Plains Resource Council and Mark Fix (collectively "Northern Plains") respectfully request that the Surface Transportation Board ("Board") allow this brief rebuttal to correct several material errors in Tongue River Railroad Company, Inc.'s ("TRRC") Reply to the Petition to Reopen filed September 14, 2010 ("TRRC Reply"). If left unchallenged these errors could mislead the Board.

I. The Record Contradicts TRRC's Assertion that the Board has already Considered the Impacts of the Otter Creek Mine

TRRC asserts that "the cumulative impacts of rail operation and assumed mining at Otter Creek have already been assessed in the relevant EISs and thus the leasing of the Otter Creek tracts does not represent a substantially changed circumstance warranting further assessment." *TRRC Reply*, ii. To the contrary, the record clearly shows that both the Interstate Commerce Commission ("ICC") and the Board have consistently said that these impacts were too speculative to warrant detailed consideration in the previous environmental impact statements ("EISs"). For example, in the first EIS, the ICC noted

[1] This decision, and consequently this Motion, 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).

that "[t]he nature of mine development in the Tongue River region is extremely speculative." Interstate Commerce Commission, *Final Environmental Impact Statement, Tongue River Railroad Company Construction and Operation of a Line of Railroad in Custer, Powder River, and Rosebud Counties, Montana* at 40 (Aug. 23, 1985) ("TRRC I EIS"). This EIS further stated that consideration of the impacts of any specific mine would be "hypothetical, since no mine plans have been filed for any area." *Id.* at 45. In contrast, TRRC states in its reply that "the cumulative impacts of rail operation and assumed mining at Otter Creek have *already been assessed*." *TRRC Reply*, ii (emphasis added).

In fact, the TRRC I EIS could not and did not contain any meaningful evaluation, let alone the "hard look" required by NEPA, of the direct, indirect, and cumulative effects of the Otter Creek mine that has only now been proposed.[2] Indeed, when the original EIS was done in 1985, there was no way of knowing where or when mining was going to take place and therefore no way of evaluating site specific impacts on land, water, wildlife, and other natural resources. The most that the EIS could do at that point was indicate that mining would occur somewhere, sometime. The TRRC I EIS mentions the effects of mining in a cursory manner. *TRRC I EIS* at 39, 40, 45, 62, 107, 112. The closest it comes to addressing the actual impacts of mining is noting the estimated acres of land that might be disturbed and mentioning that there might be hydrologic impacts. *See id.* at 107, 112 (estimating that "[m]ining will disturb from 25,889 to 31,359 acres of land" and noting that hydrologic impacts will occur "from the coal mines to be served by the railroad").

[2] *See Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 100 (1983) ("Congress did not enact NEPA, of course, so that an agency would contemplate the environmental impact of an action as an abstract exercise. Rather, Congress intended that the 'hard look' be incorporated as part of the agency's process of deciding whether to pursue a particular federal action.")

Similarly, when the Board was considering the FSEIS on TRRC III, it concluded that "a meaningful assessment of the indirect effects of TRRC on the development of new coal tracts is not possible at this time because information on when and what kind of development might actually take place is unknown and unavailable." *FSEIS* at 2-59. Further, in its October 9, 2007 decision denying petitions to reconsider the scope and content of the FSEIS, the Board ruled that "there was no need to modify the analysis of increased coal production in the Ashland/Birney/Otter Creek area . . . *because there are currently no proposals under review for leasing of the Otter Creek tracts*." *Tongue River Railroad Company, Inc.—Construction and Operation—Western Alignment*, STB Finance Docket No. 30186 (Sub-No. 3) at 30 (emphasis added).

Thus, the record directly contradicts TRRC's statements that the Board has already considered the impacts of the Otter Creek mine tracts. Indeed, now that the precise location and size (i.e. 9000 acres) of the Otter Creek mine is known as well as the amount of new coal production being proposed (i.e. 1.3 billion tons) the mine can no longer be considered "hypothetical" and the effects are now "reasonably foreseeable" and must be considered in a supplemental EIS. *See* Montana Department of Natural Resources and Conservation, *Otter Creek Coal Proposal Fact Sheet* (June 25, 2009), http://www.dnrc.mt.gov/trust/MMB/otter_creek/2009/FAQ.pdf (last visited Oct. 5, 2010) (describing proposed mining). As the Eighth Circuit said in *Mid-States*: "an environmental effect is "reasonably foreseeable" if it is 'sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.'" *Mid States Coalition for Progress v. Surface Transp. Bd*, 345 F.3d 520, 549 (8th Cir. 2003) (citing *Sierra Club v. Marsh,* 976 F.2d 763, 767 (1st Cir.1992). Also relevant here is the

Eighth Circuit's observation that, "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.*

Contrary to TRRC's argument, Northern Plains does not have the burden of pointing to "specific facts now available that were not previously available." *TRRC Reply*, 5. Rather, NEPA requires that the Board undertake the initial analysis of the impacts of mining coal at Otter Creek now that those impacts are reasonably foreseeable. *See State of Alaska v. Andrus*, 580 F.2d 465 (D.C. Cir. 1978), *vacated in nonpertinent part sub nom. Western Oil & Gas Ass'n v. State of Alaska* 439 U.S. 922 (1978) ("NEPA does, unquestionably, impose on agencies an affirmative obligation to seek out information concerning the environmental consequences of proposed federal actions.").

Nor is it "premature" to consider these impacts as TRRC contends. *TRRC Reply*, 5. TRRC itself engages in speculation by suggesting that the leases may be "voided" at some point in the future for some unspecified reason. *Id.* However, NEPA requires that reasonably foreseeable impacts must be considered at the "earliest possible time" regardless of the fact that there may be subsequent stages of development and approvals. *Andrus v. Sierra Club*, 442 U.S. 347, 351 (1979); *Metcalf v Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000). The fact that state permits will be required for the mining activity does not relieve the Board of its independent duty under NEPA to consider the broader environmental consequences, including climate change impacts, from facilitating the development of this new source of CO2 emissions. *See Border Power Plant Working Group v. DOE*, 260 F. Supp. 2d 997, 1015 (S.D. Cal. 2003) (noting that it is imperative that agencies evaluate reasonably foreseeable climate change effects which could be caused by implementation of a proposed action).

II. The Record and Recent Legal Developments Contradict TRRC's Assertion that the Board has Adequately Considered the Climate Change Impacts from Combustion of Otter Creek Coal

TRRC asserts that "the Board found the TRRC project not to be a significant source of air emissions generally, and thereby *implicitly* found that the project would not be a significant source of GHGs." *TRRC Reply*, 16 (emphasis added). However, when viewed in context, no such inference can be drawn from the record. The FSEIS does note that CO_2 emissions are a potential pollutant that could be emitted as a result of the TRR. *FSEIS* at 2-47. However, it goes on to state that "[c]arbon dioxide emissions currently are not regulated." *Id.* That is no longer the case in light of EPA's Endangerment Finding and promulgation of several rules regulating GHG emissions from both mobile and stationary sources that are due to take effect starting in January 2011. *See* Petition to Reopen, 12–13.

Moreover, based on the Board's earlier determination that the Otter Creek mine was too speculative to warrant consideration, the FSEIS makes no attempt to quantify the CO_2 emissions from the Otter Creek mine or discuss the potential climate change implications. While this may have been understandable in 2006 given the uncertain state of the mine and the still-developing science of climate change, circumstances have changed dramatically since then. As the Ninth Circuit has said: "[T]he impact of greenhouse gas emissions is precisely the kind of cumulative impact analysis that NEPA requires agencies to conduct." *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008); *see also* Petition to Reopen, 15–17. The emergence of the tremendous body of scientific evidence about the impacts of climate change and the urgency of measures to mitigate GHG emissions that has

developed since the FSEIS was written underscores the need for supplementation. *See* Petition to Reopen, 11–13.

TRRC points to the statement in the FSEIS that "a detailed air quality analysis—similar to that performed for DM&E—is not necessary for TRRC." Surface Transportation Board Section of Environmental Analysis, *Final Supplemental Environmental Impact Statement*, STB Finance Docket No. 30186 (Sub-No. 3) at 2-38 (Oct. 13, 2006) ("FSEIS"). The SEA reasoned that an air quality analysis was not necessary because the TRRC is not as large as the DM&E line. However, the comparison is flawed because the DM&E line was designed to provide a shortcut for existing coal mines that already had rail access, while the TRRC would service an entirely new coal mine that otherwise would have no rail access and no other feasible means of shipping coal to market. *See Mayo Found. v. Surface Transp. Bd.*, 472 F.3d 545, 548–49 (2006) (noting the proposed D M& E line would reach existing coal mines in Wyoming's Powder River Basin); *Dakota, Minnesota, & Eastern Railroad Corp. Construction into the Powder River Basin*, 2006 WL 383507 at 12 (S.T.B. 2006) (concluding that the line will not create additional demand for coal).

III. The CO_2 Emissions from Otter Creek are not "De Minimis."

TRRC claims without support that the Board has decided that emissions from burning coal that the TRR will transport will be "de minimis." *TRRC Reply*, iii. However, even a cursory look at the emission factors used by the Energy Information Agency and EPA, shows that the combustion of 1.3 billion tons of Montana coal would generate *billions* of tons of CO_2.[3] For comparison, the Council on Environmental

[3]Montana sub-bituminous coal has an average carbon dioxide emissions factor of 213.4

Quality *Draft NEPA Guidance on Consideration of Effects of Climate Change and Greenhouse Gas Emissions* (Feb. 18, 2010), uses a benchmark of 25,000 metric tons of CO_2 as a trigger for considering GHG impacts from federally authorized projects. TRRC makes much of the fact that this is just Draft Guidance that the Board is free to ignore. *TRRC Reply*, 15. Northern Plains trusts that the Board will not adopt such a cavalier attitude toward guidance provided by a sister federal agency charged with providing direction on how NEPA's requirements apply to federal actions that may exacerbate the effects of climate change. Whether the Guidance is "binding" is not the point. The point is that the Guidance provides an objective measure for determining whether CO2 emissions from new sources such as Otter Creek mine are significant for purposes of NEPA analysis. By contrast, TRRC offers no benchmark and cites no authority for its bald statement that emissions from burning 1.3 billion tons of coal are "de minimis." The Board must have a more reasoned basis for determining whether the emissions from the combustion of Otter Creek coal are material in light of the mounting scientific evidence of the dangers posed by climate change. Given the fact that atmospheric concentrations of CO2 are already the highest they have been in over 650,000 years of geologic history[4]

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pounds of carbon dioxide per million BTUs. See Energy Info. Admin., DOE, Carbon Dioxide Emission Factors for Coal, DOE/EIA-0121, Table FE4 (Aug. 1994), at http://www.eia.doe.gov/cneaf/coal/quarterly/co2_article/co2.html (last visited Oct. 5, 2010). Otter Creek coal heating values average about 8,600 BTU/lb on an as-received basis. Norwest Corporation, *Montana Otter Creek State Coal Valuation* at 2-8 (2009). Converting tons of coal to estimated BTUs and BTUs to CO_2 emissions yields a result of about 2.4 billion tons of CO_2 or 1.84 tons CO_2 per ton of coal. Although a rough estimate, this indicates eventual emissions will far exceed Council on Environmental Quality benchmarks.

[4] IPCC Fourth Assessment, Working Group I Report, "The Physical Basis (2007) available at: http://www.ipcc.ch/ipccreports/ar4-wg1.htm

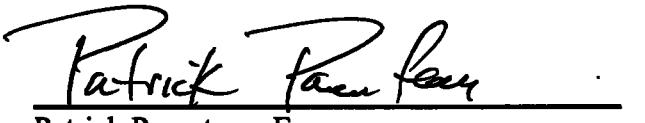
the emission of billions of tons of CO_2 must be considered a material fact demanding closer scrutiny under NEPA.[5]

CONCLUSION

For the foregoing reasons Northern Plains respectfully requests that the Board reject TRRC's attempt to remake the record and grant the Petition to Reopen.

DATED: October 8, 2010
South Royalton, VT

Respectfully submitted,*



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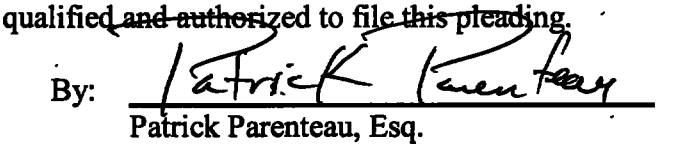
Counsel for Petitioners

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 October 8, 2010

By: 

Patrick Parenteau, Esq.
Counsel for Petitioners

* The contributions of Alan Panebaker, Vermont Law School student and clinician in the Environmental and Natural Resources Law Clinic, are gratefully acknowledged.

[5] In the final "Tailoring Rule," the Environmental Protection Agency has developed benchmarks for when greenhouse gas emissions must be regulated under the Clean Air Act. For example, permit requirements will apply to all projects that increase net GHG emissions by at least 75,000 tons per year of carbon dioxide equivalent. Environmental Protection Agency, *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule* at 12 *available at* http://www.epa.gov/NSR/documents/20100413final.pdf. Although TRRC dismisses these rules as not applicable to railroads, the point is they provide another benchmark for measuring the significance of CO_2 emissions from coal combustion.

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC 20423

TONGUE RIVER RAILROAD COMPANY, INC. RAIL CONSTRUCTION AND OPERATION WESTERN ALIGNMENT	)	**STB FINANCE DOCKET NO. 30186**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 8, 2010 copies of *Motion of Northern Plains Resource Council and Mark Fix for Leave to File This Brief Rebuttal to Correct Material Errors of Fact and Law in Tongue River Railroad Company's Reply to Petition to Reopen*, 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 opposing counsel and all parties of record in this proceeding.

SIGNED and DATED at South Royalton, Vermont this 8th day of October, 2010.

ENVIRONMENTAL AND NATURAL
RESOURCES LAW CLINIC

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