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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

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

**REPLY OF TONGUE RIVER RAILROAD COMPANY, INC. TO
MOTION OF NORTHERN PLAINS RESOURCE COUNCIL AND MARK FIX
FOR LEAVE TO FILE A REBUTTAL IN SUPPORT OF PETITION TO REOPEN**

Betty Jo Christian
David H. Coburn
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

Attorneys for Tongue River Railroad
Company, Inc.

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* This filing also embraces *Tongue River R.R.—Rail Construction and Operation - In Custer, Powder River and Rosebud Counties, MT*, STB Finance Docket No. 30186 (Served 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) (Served Dec. 1, 1997).

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Tongue River Railroad Company, Inc. ("TRRC") hereby replies to the October 8, 2010 "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" ("Petitioners' Motion").¹ As discussed in Section I below, that Motion should be denied because it represents a violation of Board regulations and precedent disallowing the filing of a reply to a reply. However, in the event that the Motion is accepted, TRRC requests that the Board accept TRRC's response, set forth in Sections II and III below, to the arguments raised in Petitioners' Motion.

I. Petitioners' Motion Should be Denied

Petitioners filed a Petition to Reopen in these proceedings on July 26, 2010. TRRC replied on September 9, 2010. Petitioners have now replied to TRRC's reply in a filing that they characterize as a motion to file a "brief rebuttal." In fact, their motion is an eight page reply to TRRC's reply.

¹ Petitioners' Motion shows that it was served on October 8, 2010. However, it was not filed with the Board until October 12, 2010, according to the Board's website.

The Board's rule at 49 CFR 1104.13(c) expressly prohibits the filing of a "reply to a reply." On that basis, the Motion should be denied.

Although the Board does occasionally waive section 1104.13(c), it does so only when the party seeking to file the reply to a reply shows good cause. The Board has indicated that good cause exists where a reply to a reply will add new evidence to the record, point to new precedent that has emerged since the initial petition, or is necessary to clarify a factual issue.² In contrast, the Board has denied requests to waive section 1104.13(c) where a petitioner merely seeks to rebut a respondent's interpretation of the law or the record.³

Petitioners' Motion (*i.e.*, its reply) does not show good cause. Petitioners claim at page 1 of their Motion that TRRC's Reply contained material errors and could mislead the Board. In fact, Petitioners simply take issue with TRRC's view of the record and law. In these circumstances, their reply is not permissible and should not be considered.⁴

² See, e.g., *CSX Corp.—Control—Chessie System, Inc. And Seaboard Coast Line Industries, Inc. (Arbitration)*, Docket No. 28905 (Sub-No. 28), 2 STB 554, 556 (served Sept. 3, 1997) ("Under 49 CFR 1104.13(c), replies to replies are not permitted. While we may allow additional pleading for good cause shown, CSXT has not shown good cause. CSXT did not submit newly discovered evidence or precedent arising after the submission of its appeal."); *Waterloo Railway Company—Adverse Abandonment—Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge Company in Aroostook County, Maine*, Docket Nos. AB-124 (Sub-No. 2), AB-279 (Sub-No. 3), 2003 STB LEXIS 222 at *3-4 (served May 6, 2003) ("Under our regulations at 49 CFR 1104.13(c), the pleading process ends with the reply, and replies to replies are not permitted. When good cause is shown, or when additional information is necessary to develop a more complete record, we may waive the rule.").

³ See, e.g., *Waterloo Railway Company*, 2003 STB LEXIS 222 at *4 ("The Trustee argues that we should accept its pleading because CN's reply 'blatantly mischaracterizes case law pertaining to the availability of discovery in abandonment cases' and 'grossly overstates the alleged burden of complying with the Discovery Requests.' This, however, is merely an argument that CN's interpretation of case law and view of its compliance burden is incorrect.").

⁴ See *id.*; *WTL Rail Corp. Petition for Declaratory Order and Interim Relief; WTL Rail Corp.—Petition for Partial Revocation of Exemption*, Docket No. 42092, Ex Parte No. 230 (Sub-No. 9), 2005 STB LEXIS 250, at *3 (served June 23, 2005) ("The reply essentially repeats

In the event that the Board nonetheless does accept Petitioners' Motion for filing, TRRC asks that the Board also accept TRRC's response set forth below. When the Board does waive 1104.13(c) and accepts a reply to a reply by petitioners, it also typically accepts any surreply offered by the respondents.⁵ As the respondent in this proceeding, TRRC should be entitled to the last word, consistent with the Board's rules.

II. The Record Supports TRRC's Assertion That The Board Has Already Considered The Impacts Of Mining In The Otter Creek Area

Petitioners argue that TRRC was mistaken when it stated in its Reply that "the cumulative impacts of rail operations and assumed mining at Otter Creek have already been assessed in the relevant EISs..." *Petitioners' Motion* at 1-2. Specifically, Petitioners rely on a statement in the *TRRC / Final Environmental Impact Statement* ("FEIS") in which the Board said that four potential mines in the Otter Creek area were "hypothetical, since no mine plans have been filed for any area" and argue that the "closest [the *TRRC / FEIS*] 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 hydrological effects." *Id.* at 2. However, in the pages immediately following language quoted by Petitioners regarding the hypothetical nature of the

arguments previously made and, because replies to replies are prohibited under 49 CFR 1104.13(c), it will not be considered.")

⁵ See *Western Fuels Association, Inc., And Basin Electric Power Cooperative v. BNSF Railway Company*, Docket No. 42088 (Sub-No. 1), 2008 STB LEXIS 790 at *8 n. 3 (served July 23, 2008) ("And while WFA's surreply is itself a reply-to-reply, we will permit the pleading as BNSF has not argued it is prejudiced by consideration of the legal or technical arguments raised therein."); *Potomac Electric Power Company v. CSX Transportation Inc.*, Docket Nos. 41989, 412952, S.T.B. 290, 291 n. 3 (served May 14, 1997) ("CSXT contends that PEPCO has not supported a departure from the rule prohibiting replies to replies, 49 CFR 1104.13(c). CSXT requests that we reject PEPCO's response or, alternatively, that we accept a tendered substantive reply. In view of the significance of this matter, we accept the responses of PEPCO and PP&L, and CSXT's reply thereto...")

mines, the *TRRC I* FEIS proceeds to provide projections of the amount of coal to be produced by mines in the Otter Creek area.⁶ as well as a cumulative impact analysis for the railroad and these mines that includes not only an estimate of the amount of land to be disturbed and but a detailed analysis of hydrological effects and potential impacts to all other relevant resources.⁷

The coal mining projections used for the cumulative impacts analysis in *TRRC I* ranged from 33 to 44 million annual tons of coal produced at four sites in the Ashland/Birney/Otter Creek areas, plus the Montco mine planned at the time for the same general area.⁸ Petitioners do not take issue with these projections, or with the revised lower annual production projections used in the *TRRC II* EISs or with any other factual assumptions used in the Board's cumulative impacts analyses.⁹ The only specific information Petitioners offer about the amount of coal that could be mined at Otter Creek is drawn from a 2009 fact sheet -- which predates the more recent Otter Creek leases -- and recites that there are 1.3 billion tons of coal available for mining in the Otter Creek tracts, a fact which does not contravene the annual coal production figures used for assessment purposes in the *TRRC I* EIS. *Petitioners' Motion* at 3. Further, Petitioners

⁶ *Final Environmental Impact Statement, Tongue River Railroad Company—Rail Construction and Operation—In Custer, Powder River and Rosebud Counties, MT*, STB Finance Docket No. 30186 (STB served Aug. 23, 1985) at 46-48.

⁷ See *TRRC I* FEIS at sections 4.1.5, 4.2.5, 4.3.5, 4.4.5, 4.5.5, 4.6.5, 4.7.5, 4.8.4, 4.9.4, 4.10.5, 4.11.4, 4.12.4, 4.13.4, 4.14.5 (describing the "overall impacts" of the railroad and the mines on land use, society and the economy, transportation, energy, air quality, noise, safety, soils and geology, hydrology and water quality, aquatic ecology, terrestrial ecology, cultural resources, aesthetic resources, and agriculture).

⁸ *Final Environmental Impact Statement, Tongue River Railroad Company—Rail Construction and Operation— In Custer, Powder River and Rosebud Counties, MT*, STB Finance Docket No. 30186 (STB served Aug. 23, 1985) at 45-48.

⁹ The annual production estimates were downgraded in *TRRC II* to about 18 million annual tons. *Draft Environmental Impact Statement, Tongue River Railroad Company - construction and Operation of an Additional Rail Line from Ashland to Decker, Montana*, Docket No. 30186 (Sub No. 2) (STB served July 17, 1992) at 1-7 through 1-9.

contention that the size of the Otter Creek mine is now known (9,000 acres) does not suggest the need for reopening or supplementation given that the STB assumed that mining in the Otter Creek area would disturb a greater number of acres, *i.e.*, 25,889 to 31,359 acres. *TRRC I FEIS* at 107.¹⁰

As noted above and in TRRC's Reply to the Petition to Reopen, the EISs assumed the Otter Creek tracts would be leased and mined, and analyzed the potential impacts of mining those tracts to the extent that was possible. Since the newly entered leases for the Otter Creek tracts do not provide any additional information that could be analyzed regarding the impacts of potential mining operations in the area or any information that contradicts the assumptions used by the prior EISs, there is no "significant new ... information relevant to environmental concerns [] bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c). The test for EIS supplementation under the CEQ regulations is thus not met.

As they did in their Petition to Reopen, Petitioners note the Board's statements in *TRRC III* that "a meaningful assessment of the indirect effects of the 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" and that "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 or constructing the coal-fired generator and power line that have been discussed." *Petitioners' Motion* at 3. Petitioners once again interpret these statements to suggest that the Board has not yet considered

¹⁰ Petitioners contention that they have no burden to show specific facts now available that were not available previously is absurd. As the party that seeks reopening for the purpose of environmental supplementation, they plainly have the burden to show a basis for such reopening under the Board's rules, a burden they have not met. See 49 CFR 1115.4.

the impacts of mining in the Otter Creek area. *Id.* However, what the quoted language actually indicates is that the Board had analyzed the impacts of mining in the Otter Creek area in *TRRC I* and *TRRC II* to the extent possible and that updating of this analysis was not necessary in *TRRC III* because there was no new information regarding the details of mine operations. Indeed, one of the quoted statements above includes a citation to portions of the *TRRC III* EISs containing statements such as the following:

The Tongue River II analysis stated that the volume of coal generated from these tracts could be as much as 18 million tons per year. SEA believes that these assumptions are unchanged . . . Based on the information available to date, SEA concludes that assumptions related to coal mine development in the Otter Creek and Ashland/Birney area (and contained in Tongue River II) are still accurate...¹¹

Just as when these statements were written, nothing has emerged since the analyses in *TRRC I* and *TRRC II* to provide more detail on the potential mining operations in the Otter Creek area or call into question the accuracy of the analyses that were undertaken. In the absence of significant new information, no environmental supplementation or reopening is required. See *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1980) (supplementation of an EIS required only if “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.”).¹²

¹¹ *Draft Supplemental Environmental Impact Statement, Tongue River Railroad Company, Inc.—Construction and Operation—Western Alignment*, STB Finance Docket No. 30186 (Sub-No. 3) (STB served Oct. 15, 2004) at 6-5. See also similar statements at *Final Supplemental Environmental Impact Statement, Tongue River Railroad Company, Inc.—Construction and Operation—Western Alignment*, STB Finance Docket No. 30186 (Sub-No. 3) (STB served Oct. 13, 2006) at 2-32 and 2-33 [hereinafter *TRRC III FSEIS*].

¹² Petitioners do not take issue with the fact that there are legal challenges pending to the leasing of the Otter Creek tracts or, assuming that the leases survive challenge, that the state will need to issue a permit before a coal mine can be developed. These contingencies offer further reason why reopening and supplementation would be inappropriate. None of the cases cited by Petitioners at page 4 of their Motion suggest otherwise.

III. The Climate Change Information Cited By Petitioners Does Not Necessitate Reopening Of The Record Or Supplementation Of The EIS

Petitioners claim that the Board did not find that the TRRC project would be an insignificant source of air emissions, including emissions of CO₂, and that the environmental impact statements must therefore be supplemented with an analysis of the impacts of greenhouse gas emissions. While Petitioners acknowledge that the Board discussed CO₂ as a pollutant in its analysis of the air emissions impacts, they argue that the Board's discussion is not sufficient because at the time CO₂ emissions were not regulated and because the quantity and potential climate change impacts of those CO₂ emissions were not addressed. *Petitioners' Motion* at 5. As discussed in TRRC's Reply, the Board concluded that the TRRC project would not be a significant source of any air emissions, including CO₂.¹³ This conclusion was based on the Board's finding that the TRRC project would result in only minimal changes in national and regional coal consumption and related emissions.¹⁴ The Board also explicitly discussed CO₂ emissions.¹⁵

¹³ *Reply to Petition to Reopen* at 16; see *TRRC III FSEIS* at 2-34 through 2-59.

¹⁴ See, e.g., *TRRC III FSEIS* at 2-42 (“[T]he volume of coal carried by TRRC would likely translate to only minor increases in coal consumption and resulting air emissions, at least on a national and regional basis.”)

¹⁵ *Id.* at 2-37-2-39 (“The analysis further shows that the small changes in PRB coal usage from DM&E would translate to minimal changes in national and regional air emissions from the electric power sector. According to EIA's report, on both national and regional levels, projected air emissions for sulfur dioxide, nitrogen oxides, *carbon dioxide*, and mercury would be less than 1%... [C]oal usage is expected to increase less than projected for DM&E, resulting in even fewer air quality impacts than the minimal effects found in DM&E.”) (emphasis added); *id.* at 2-43, 2-47 (finding that although national and regional emissions levels would be relatively unaffected, local emissions levels could increase and summarizing the nature of the potential impacts of various pollutants, including carbon dioxide, because the extent of the local impacts could not be estimated)

Petitioners also suggest that the Board's analysis of air quality impacts was flawed. In particular, Petitioners take issue with the Board's comparison of the TRRC to the DM&E line. *Petitioners' Motion* at 6. Petitioners claim that the Board "reasoned that an air quality analysis was not necessary because the TRRC is not as large as the DM&E line" and that such a "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..." *Id.* This is a mischaracterization of the Board's analysis. The Board did not just focus on the size of the TRRC line compared to the DM&E line. Rather, the Board found that the TRRC project is less likely to increase coal consumption and the resulting air emissions than the DM&E line because of the smaller amount of coal TRRC would carry, the rates likely to be charged by TRRC, and the type of coal that TRRC would carry.¹⁶ Contrary to Petitioners' suggestion, in this analysis, the Board accounted for the fact that the new TRRC rail line might lead to the opening of new mines.¹⁷

Petitioners argue that the CO₂ emissions associated with Otter Creek will be significant and that CEQ's February 2010 "Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions" ("Draft Guidance") suggests that the Board should analyze the effects of these emissions. In particular, Petitioners claim that billions of tons of CO₂ will be released as a result of burning coal from the Otter Creek mines and that the

¹⁶ See *TRRC III FSEIS* at 2-36, 2-38-2-41.

¹⁷ *Id.* at 2-40 ("Even with access to new coal reserves, there are several factors that would limit any increase in coal consumption as a result of the TRRC project."); *id.* at 2-38-2-39 ("While TRRC would be able to access certain new coal reserves in Montana, some of these reserves would simply replace mines that have been depleted, and the market for this particular type of coal has remained remarkably stable in recent years, suggesting that these new reserves would have little impact on consumption of that type of coal."); *id.* at 2-35 ("[O]ne possible indirect effect of the construction and operation of TRRC... is that there might be more mines opening near the new rail line...").

CEQ's Draft Guidance "uses a benchmark of 25,000 metric tons of CO₂ as a trigger for considering GHG impacts..." *Petitioners' Motion* at 6-7. However, as discussed above, the Board found that coal consumption and resulting emissions would not significantly increase as a result of the TRRC project. There is thus no obligation on the Board to undertake a further analysis of the impact of this project on air emissions, including greenhouse gases.¹⁸

Moreover, the CEQ Draft Guidance on which Petitioners rely is still in draft form and not in effect.¹⁹ Not only might the CEQ Guidance change before being finalized, but it is at present designed to be prospective in nature; it will provide guidance for future NEPA reviews and not a basis for reopening previously completed EISs. Petitioners in fact have failed to cite any statute, rule or precedent requiring that an EIS assess greenhouse gas impacts in a rail construction case. As one court has recently noted, NEPA "does not expressly refer to climate change or greenhouse gas emissions." *North Carolina Alliance for Transportation Reform, Inc. v. U.S. Department of Transportation*, 2010 U.S. Dist. LEXIS 49742, at *69 (M.D.N.C. May 19, 2010) (holding that agency did not err by failing to include greenhouse gas impact analysis in case involving highway construction).

Petitioners also misrepresent the benchmark used by the Draft Guidance. It is not 25,000 metric tons of CO₂ as they claim, but 25,000 metric tons of CO₂ *per year* stemming from the *direct effects* of the Federal agency action.²⁰ Thus under the Draft Guidance, the 25,000 metric

¹⁸ See *Mayo Foundation v. Surface Transportation Board*, 472 F.3d 545 (8th Cir. 2006) (rejecting argument that Supplemental EIS' consideration of emissions from end-use of coal was insufficient where project would result in only a small increase in coal consumption).

¹⁹ *Draft Guidance* at 12 ("After consideration of public comment, CEQ intends to expeditiously issue this guidance in final form. In the meantime, CEQ does not intend this guidance to become effective until its issuance in final form.")

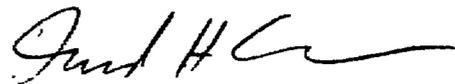
²⁰ *Draft Guidance* at 1 ("Specifically, if a proposed action would be reasonably anticipated to *cause direct emissions* of 25,000 metric tons or more of CO₂-equivalent GHG

ton benchmark would only apply if the TRRC project itself, not including indirect effects, would directly result in emissions of more than 25,000 metric tons of CO₂ per year. Petitioners have not suggested that this is the case.

CONCLUSION

For the above-stated reasons, the Board should deny the Petition to Reopen and the Petitioners' Motion.

Respectfully submitted,



Betty Jo Christian
David H. Coburn
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

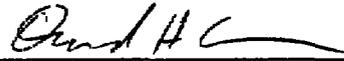
Attorneys for Tongue River Railroad
Company, Inc

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emissions *on an annual basis*, agencies should consider this an indicator that a quantitative and qualitative assessment may be meaningful to decision makers and the public.”) (emphasis added); *id.* at 2-3 (“Where the proposed activity is subject to GHG emissions accounting requirements, such as Clean Air Act reporting requirements that apply to stationary sources that directly emit 25,000 metric tons or more of CO₂-equivalent GHG *on an annual basis*, the agency should include this information in the NEPA documentation for consideration by decision makers and the public. *CEQ does not propose this reference point for use as a measure of indirect effects...*”) (emphasis added).

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of November 2010, I have caused a copy of the foregoing Reply of Tongue River Railroad Company, Inc. to Motion for Leave File Rebuttal to be served by first-class mail, postage prepaid, on counsel for all parties of record in STB Finance Docket Nos. 30186, 30186 (Sub-No. 2), and 30186 (Sub No.3).



David H. Coburn