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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB FINANCE DOCKET NO. 30186**

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**TONGUE RIVER RAILROAD COMPANY, INC. – RAIL CONSTRUCTION  
AND OPERATION – IN CUSTER, POWDER RIVER  
AND ROSEBUD COUNTIES, MT**

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**REPLY OF TONGUE RIVER RAILROAD COMPANY, INC. TO  
NORTHERN PLAINS RESOURCE COUNCIL AND ROCKER SIX CATTLE CO.'S  
MOTION TO DISMISS**

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Applicant Tongue River Railroad Company, Inc. (“TRRC”) hereby replies to the December 11, 2015 Motion to Dismiss submitted by Northern Plains Resource Council and Wally McRae/Clint McRae d.b.a. Rocker Six Cattle Company (collectively “NPRC”).<sup>1</sup> By that Motion, NPRC seeks the dismissal of TRRC’s pending December 17, 2012 Application (“Application”) to construct an approximately 42 mile long rail line in southeastern Montana that would be operated by BNSF Railway Company. NPRC’s Motion was filed in apparent reaction to TRRC’s November 25, 2015 Petition to Hold Proceeding in Abeyance (“Petition”) pending the issuance of a judicially-affirmed permit authorizing development of the Otter Creek coal mine, the source of the traffic that the TRRC rail line would initially serve. TRRC explained in its Petition that updated and more protracted timelines for the development of the mine and the rail line and near-term market weakness now allow the opportunity for sequential permitting of

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<sup>1</sup> NPRC’s December 11 submission also embraced its reply to TRRC’s Petition to Hold Proceeding in Abeyance. TRRC stands on that Petition and therefore is not here seeking permission to submit an otherwise unauthorized reply to NPRC’s reply. Accordingly, TRRC will focus its arguments on the claims NPRC makes in support of its Motion to Dismiss.

each project, obviating any risk that the coal mine that the TRRC line would serve might not be permitted by the State of Montana Department of Environmental Quality (“MDEQ”), where the mine permitting process has been delayed.

NPRC has twisted this straightforward and logical request into something else entirely. NPRC accuses TRRC of somehow misleading the Board and seeks the extraordinary and legally groundless remedy of dismissing with prejudice TRRC’s pending construction application. As discussed below, NPRC’s allegations and arguments are far afield. The Board should deny NPRC’s groundless Motion.

## **ARGUMENT<sup>2</sup>**

Even though it raises no dispositive legal issue, cites no precedent to support dismissal and merely rehashes arguments that it has previously raised, NPRC asks the Board to misuse the procedural vehicle of a motion to dismiss to address the merits of TRRC’s Application. NPRC does so notwithstanding the extensive merits and environmental record already developed, and still in the process of being further developed, in this proceeding and also notwithstanding the

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<sup>2</sup> NPRC includes in its Motion at 2-10 a long and biased statement of the procedural history of this proceeding. While TRRC will not burden Board with a counter-recitation of the history of the case, it bears note that there are some significant inaccuracies in NPRC’s statement. For example, contrary to NPRC’s claims, TRRC did not propose to construct the Colstrip Alignment in its pending Supplemental Application for Construction and Operation Authority dated Dec. 17, 2012 (“Application”) to “switch[] the intended destination of its coal” from the domestic market to the export market. NPRC Motion at 5-6. Rather, TRRC’s decision to propose the Colstrip Alignment rather than the Miles City alignment was “based on additional engineering and other data that show that the shorter Colstrip Alignment offers an operationally feasible, cost-effective and less environmentally impactful routing for the rail line.” Application, Stevan Bobb Verified Statement at 2. NPRC also falsely claims at page 7 of its Motion that the Board issued a decision in August 2013 in this proceeding that “recognized” certain “inconsistencies” and credibility issues with TRRC’s filings and evidence that justified discovery, whereas in fact NPRC is merely repeating its own overheated allegations. The August 2013 decision (by the Director of the Office of Proceedings) offered no view at all on those allegations and merely allowed “limited” discovery to help the Board resolve “important and complex issues.”

For a more objective statement of TRRC’s reasons for proposing the Colstrip alignment in its pending application and of the discovery process in this proceeding, the Board should refer to TRRC’s Application at 1-6 and TRRC’s Supplemental Reply to the Supplemental Comments of NPRC and of SMART-386 (“TRRC Supplemental Reply”) dated May 14, 2015 at 3-6.

Board's obligation to consider TRRC's Application and that record under the relevant statutory standards found in 49 U.S.C. § 10901. The Board should reject NPRC's invitation.

**A. The State of Today's Coal Market is Not a Dispositive Factor That Justifies Dismissal of the TRRC Application**

NPRC incorrectly claims that TRRC's recognition of "near-term market weakness" in its Petition is an admission that NPRC is correct that there is no market for Otter Creek coal. NPRC Motion at 10. However, such an acknowledgement is not a concession that there will never be a market for the Otter Creek coal that would support the construction of the TRRC rail line. Indeed, TRRC has consistently maintained that its rail line project has a time horizon longer than the current coal market, which it has acknowledged is weak. In its May 2015 Supplemental Reply, TRRC explained that "[w]hile the coal market has been volatile and struggling in recent years – making it difficult to predict what the market will be when the Otter Creek mine will begin producing coal – TRRC's recent discovery and the Supplemental Verified Statement of Mr. Schwartz confirm that a market will in all likelihood exist for Otter Creek coal in several years when the mine may begin producing coal and the TRR is constructed."<sup>3</sup> Indeed, the extensive record in this proceeding demonstrates that there is likely to be a market at that time. For example, in May 2015, Seth Schwartz, TRRC's expert, challenged the conclusion of NPRC and its expert "that there is no market demand for Otter Creek coal by citing reports of recent declines in production, short-term energy forecasts, and more gradual projected rates of long-term growth in PRB demand in more recent long-term forecasts than in older forecasts."<sup>4</sup> As Mr. Schwartz explained, "[n]one of these are evidence that there will be declining long-term demand

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<sup>3</sup> TRRC Supplemental Reply dated May 14, 2015 at 12.

<sup>4</sup> Supplemental Verified Statement of Seth Schwartz ("Supp. Schwartz VS") dated May 14, 2015 at 11. This supplemental verified statement is attached to TRRC's Supplemental Reply.

for PRB coal and, correspondingly, no market for Otter Creek (Tongue River) coal.” *Id.* at 11-12.

So too does the detailed Draft EIS prepared by the Board’s Office of Environmental Analysis (“OEA”) recognize a future market. Based on its extensive coal market analysis, the OEA concluded that “[t]he development of the Tongue River Railroad could induce coal mining. Tongue River coal production would be economically viable in most market conditions from 2018 to 2037 . . .”<sup>5</sup> With respect to the Colstrip Alignment proposed by TRRC, the OEA concluded that “annual production would range from a low of 20.0 million tons per year . . . to a high of 50 million tons per year . . .”<sup>6</sup>

Whether there is a market or not, however, is a fact issue that can be properly assessed to the extent it is relevant on the basis of the complete record that has already been developed in this proceeding – and that will be supplemented following the completion of discovery – when the Board reaches the merits of this case. NPRC’s Motion to Dismiss offers neither reason nor precedent for the Board to circumvent the ordinary process of reviewing the TRRC Application, assessing the record evidence and environmental impact data and reaching a reasoned decision on the full record.

Moreover, as TRRC has explained in previous pleadings, if there is no market for the coal, then the mine will not be developed and the railroad will not be built.<sup>7</sup> Thus, even if one

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<sup>5</sup> OEA Draft Environmental Impact Statement issued in this proceeding on April 17, 2015 (“Draft EIS”), Appendix C at C.1-1.

<sup>6</sup> Draft EIS, Appendix C, C.1-1.

<sup>7</sup> *See, e.g.*, Tongue River Railroad Company’s Reply Comments in Support of Its Supplemental Application for Construction and Operation Authority dated June 7, 2013 at 26 (“The owners of TRRC are large sophisticated businesses with substantial resources, and include owners with expertise in rail transportation and coal production. *They will not invest the millions of dollars in the project available to them if there were no market for the coal that the line will transport.*”) (emphasis added).

accepts NPRC's contentions about today's coal market, those contentions do not speak to the more relevant question of whether it would be appropriate to license the TRRC line for construction to serve future projected coal market needs, particularly in light of the applicable statutory standard in 49 USC § 10901, which embodies a presumption favoring rail line construction.<sup>8</sup>

**B. TRRC Has Not Misled the Board about Arch's Financial Condition**

Relying on statements made by TRRC in filings from two and a half to three years ago, NPRC argues that TRRC has misled the Board by omitting material facts about Arch's financial condition and "looming bankruptcy." NPRC Motion at 11-12. However, not only were the statements cited by NPRC completely accurate at the time they were made, but more recently TRRC has acknowledged that the coal market is cyclical and "is currently in a lower part of the cycl[e] . . ." <sup>9</sup> With respect to Arch's financial condition, TRRC stated that "Even if Arch's financial condition has not improved [by the time the mine permitting application has been approved], that does not mean the Otter Creek mine project will not be developed subsequent to being permitted."<sup>10</sup> In fact, the mine permitting process for the Otter Creek mine project continues, albeit at a slower pace than originally anticipated. While Arch's financial condition – a matter of public record – has deteriorated, both projects remain active. TRRC has merely asked that permitting of its project follow the permitting of the coal mine.

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<sup>8</sup> NPRC's opposition to the TRRC rail line is predicated on a logical inconsistency that TRRC has identified in prior submissions – it simultaneously argues that there is no market for the coal and thus no basis for approving the TRRC's Application, while arguing that the environmental impacts of operating coal trains will be severe.

<sup>9</sup> TRRC Supplemental Reply at 23.

<sup>10</sup> *Id.*

In any event, as TRRC previously explained, NPRC's claims relating to Arch's financial condition are irrelevant. "As a legal matter Arch is not the applicant so TRRC was not required to provide information regarding Arch's financial fitness. Arch is just one of TRRC's three owners, and NPRC does not challenge the financial viability of the other two large owners – BNSF or TRRC Financing, LLC . . ." <sup>11</sup>

**C. NPRC's Claim that TRRC Has Misled the Board Regarding Its "Newfound Concern Over the Mine Permit" is Specious**

NPRC next claims that the Board should dismiss TRRC's pending application with prejudice because "TRRC's newfound concern over Arch's pending mine application at the MDEQ is absolutely incredulous." <sup>12</sup> NPRC erroneously claims that TRRC could not be concerned about the mine permit application given TRRC's April 2012 request that the STB move promptly on the Application. *Id.* NPRC ignores the changed circumstances between April 2012 and today that led TRRC to file the Petition requesting that the Application be held in abeyance. As TRRC explained in the Petition, "given the delays related to the mine permitting process and near-term market weakness, TRRC and Otter Creek Coal . . . recently revisited the timelines for the permitting and development of their respective projects [and] . . . determined that there is now sufficient time to accommodate sequential as opposed to concurrent permitting of the mine and rail projects." TRRC Petition at 3.

NPRC's allegations regarding the "real" reasons that TRRC filed its abeyance petition – "Arch's looming bankruptcy and the threat of having to reveal damaging internal documents" (NPRC Motion at 16) that purportedly will lead the Board to deny TRRC's Application – are pure fantasy. As noted above, Arch's financial condition is not determinative of TRRC's

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<sup>11</sup> TRRC Supplemental Reply at 25.

<sup>12</sup> NPRC Motion at 15.

Application since two other large financially viable businesses own TRRC. With respect to NPRC's other allegation, if the Board holds this proceeding in abeyance as requested, TRRC will still have the obligation to supplement its production once the proceeding is reinstated so the alleged "damaging internal documents" (the existence of which is unknown to TRRC) would still be a part of the record in the proceeding before the Board makes any decision on the Application. TRRC did not somehow obviate its obligation to supplement its discovery production by filing its petition to hold this proceeding in abeyance, it merely asked the Board to postpone the production until after the abeyance is lifted.

**D. Placing the Proceeding in Abeyance Pending Final Approval of the Mine Application Would Not Substantially Prejudice or Unduly Harm NPRC's Members**

NPRC claims that the Board should dismiss this proceeding because its members would be unduly prejudiced if it would have "to go through this process again if the Board grants TRRC's request for an indefinite abeyance." NPRC Motion at 17. NPRC further erroneously claims that granting the abeyance would allow TRRC "to avoid supplementing discovery altogether." *Id.* Contrary to NPRC's claims, its members would not have to "go through this process again" if the Board granted TRRC's request. Right now, NPRC has the right to file supplemental comments following TRRC's supplemental document production. If TRRC's Petition is granted, TRRC would still have to supplement its production once the abeyance is lifted and then NPRC would have the same opportunity to file supplemental comments following TRRC's supplemental production. The prejudice to NPRC's members is no different than any other situation where permitting is prolonged – but here it makes sense to handle sequentially for the reasons set forth in TRRC's Petition.

NPRC's laches argument is similarly based on the flawed assumption that if the proceeding is held in abeyance, TRRC will "sweep away the existing record, including any unfavorable admissions from documents it has yet to produce." NPRC Motion at 18. However, the existing record will remain intact and TRRC will still have to produce its supplemental production once the abeyance is removed. Thus, nothing will be "swept away" from the record if the TRRC Petition is granted.

Finally, NPRC's claim that NPRC's local landowner members would suffer undue hardship unless the STB dismisses this proceeding is simply a rehash of claims that NPRC has made previously and they should be rejected for the reasons that TRRC provided previously.<sup>13</sup>

**E. There is No Legal Basis for Dismissal with Prejudice**

Finally, NPRC claims that the Board should deny and dismiss TRRC's Application with prejudice. However, even if dismissal were warranted – which it is not – there is no legal ground on which the Board could bar TRRC from invoking the Board's processes to pursue a rail construction application.

The only authority NPRC cites for dismissal with prejudice (at page 23 of its Motion) is a 1993 Interstate Commerce Commission decision, *The Indiana & Ohio Railway Company—Construction and Operation—Butler, Warren, and Hamilton Counties, OH*, Finance Docket No. 32320, 1993 WL 287692 (ICC Jul. 23, 1993). NPRC's own description of this case demonstrates that it is completely distinguishable from this proceeding. In the 1993 case, the ICC voted to deny a construction application in a voting conference on the grounds that the proposed rail line would pose a threat to public safety. It was only after the ICC orally explained that it would deny the application that *the applicants themselves moved to dismiss the case with prejudice before the ICC issued a written decision*. The ICC decided to issue a written decision

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<sup>13</sup> TRRC Supplemental Reply at 30-33.

in which it considered the merits of the application and the relevant environmental review, and denied it on the basis of the then-applicable statutory standard. The ICC's decision to deny that application in light of the full record offers no support for the extraordinary motion for dismissal of TRRC's Application, much less dismissal with prejudice as NPRC requests.

### CONCLUSION

For the reasons stated, NPRC's Motion to Dismiss should be denied.

Respectfully submitted,



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December 31, 2015

**CERTIFICATE OF SERVICE**

I hereby certify that on this 31<sup>st</sup> day of December 2015, I have caused a copy of the foregoing Reply of Tongue River Railroad Company, Inc. to be served by first-class mail, postage prepaid, on each of the parties of record in STB Finance Docket No. 30186.



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David H. Coburn