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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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
PETITIONS FOR RECONSIDERATION**

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December 17, 2007

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Pursuant to 49 CFR § 1115.3, Tongue River Railroad Company, Inc. ("TRRC") hereby replies in opposition to the petitions for reconsideration filed by the following eight persons and entities: Brown Cattle Company, Senator David E. Wanzanried, Powder River Basin Resource Council, American Prairie Foundation, Alice Orr, Diamond Cross Ranch LLC, Trout Unlimited and Jerry Lunde.¹ These Petitions are addressed to the Board's October 9, 2007 Decision ("Decision") issued in this proceeding, authorizing TRRC's construction of the Western Alignment. All eight of the Petitions raise the same six arguments as to why the Board's Decision should be reconsidered, and two of the petitions raise additional arguments.²

¹ By order served December 7, 2007, the Board granted TRRC until December 17, 2007 to reply to these Petitions, the earliest (Brown Cattle and Sen. Wanzanried) of which were filed with the Board on November 19, following payment of the filing fee, and the most recent of which (Trout Unlimited and Lunde) were filed on December 10.

² These same petitioners, and others, filed petitions with the Board on October 19, 2007 seeking an administrative stay of the Board's decision. In those petitions, they raised only one of the arguments on the merits that they now raise in their petitions for reconsideration (the allegation that the Board relied on a stale record), while they raised other arguments on the merits that they do not now raise in their reconsideration petitions. The Board denied the petitions for stay by decision served November 7, 2007, finding that the petitioners had no likelihood of success on the merits.

TRRC will demonstrate in this reply that the Petitioners have failed, once again, to meet their heavy burden under the Board's rules at 49 CFR § 1115.3(b) for the relief they seek. Specifically, Petitioners would be entitled to reconsideration only if they could demonstrate that the Board's Decision should be reconsidered due to new evidence, changed circumstances or material error. They have not come forward with any new evidence or alleged changed circumstances. Neither have they succeeded in showing that the Board's Decision is based on material error.

Not only should the Petitions for Reconsideration be summarily denied, but the Board should act expeditiously so that the pending judicial review proceeding in the U.S. Court of Appeals for the Ninth Circuit can proceed and TRRC can move beyond litigation delays and toward construction of the rail line that the Board has already found not inconsistent with the public interest.

PREFACE AND SUMMARY

Petitioners incorrectly argue that the Board was required to complete a single EIS for the entire Tongue River line. While the Board would have been required to prepare one EIS if the entire line had been proposed at the outset, that was not the case here. There was no improper "segmentation" in this case because the extension at issue in *TRRC II* was not on the horizon at the time of the original EIS in *TRRC I*, and the realignment at issue in *TRRC III* was not proposed or foreseen when *TRRC II* was approved.³ Moreover, this is not a case where the agency engaged in "segmentation" to avoid preparing an EIS -- an EIS was prepared in response to each application.

³ See *Tongue River Railroad Company -- Rail Construction and Operation -- In Custer, Powder River and Rosebud Counties, MT*, Finance Docket No. 30186 (served May 9, 1986) ("*TRRC I*"), *Tongue River Railroad Co -- Rail Construction and Operation -- Ashland to Decker, MT*, F.D. No. 30186 (Sub No. 2) ("*TRRC II*")

The Petitioners also question the STB's conclusion that TRRC will be able to finance the construction of the line and that TRRC will be able to obtain the land it needs for its right-of-way. The Board reviewed the financial data and properly found that TRRC's cost estimates are reasonable and that it should be given the opportunity to raise the funds needed for completing the projects and, if needed, to use its right of eminent domain under state law.

Petitioners argue that the Board was required to perform a rate sensitivity analysis in connection with the air quality analysis undertaken for the Tongue River Railroad. However, the Petitioners offer no basis for disputing the Board's conclusion that such an analysis was not required here given the nature of the TRRC line as a "shortcut."

Petitioners assert that they and the public were deprived of adequate notice of the extent to which the TRRC line would impact BNSF. However, the fact that virtually all TRRC traffic would be interchanged with BNSF has been apparent from in the TRRC proceedings for years.

Petitioners assert that the Board's decision failed to meet the requirements of Executive Order 12898 on Environmental Justice because it "summarily" dismissed the concerns of the Northern Cheyenne Tribe. But the Northern Cheyenne Tribe has not complained of the Board's decision, and in fact the Board fully considered the impacts of the entire TRRC line on native communities, including the Northern Cheyenne Tribe.

Petitioners incorrectly assert that the original EIS prepared in 1986 is no longer valid due to its age. However, the Board properly reviewed the prior EISs to ensure the information presented therein remained valid, and performed additional analyses as required.

Finally, one Petitioner argues that the Board erred by failing to provide sufficient impact information and mitigation for the state-owned Miles City Fish Hatchery. In fact, however, extensive information was gathered prior to completion of the Final SEIS concerning the various

impacts of the rail line on fish, and the Board provided for extensive mitigation at the Hatchery and for continuing SEA involvement

REPLY ARGUMENT

I. The STB Did Not Violate NEPA by Failing to Prepare a Single EIS for the Entire Line

Petitioners argue that the Board was required to complete a single new EIS for the entire Tongue River line, rather than just the alignment currently before the Board. Specifically, they argue that the original 89-mile Ashland to Miles City line (*TRRC I*), the 41-mile Decker to Ashland extension (*TRRC II*), and the southernmost approximately 17-mile portion of the 41-mile extension, the so-called "Western Alignment" (*TRRC III*) are all "connected actions" under NEPA and therefore should have been considered together in a single EIS instead of being "segmented" into separate EISs. However, the routes could only have been considered in the same EIS if they had been proposed at the same time. Because the 41-mile extension was not proposed until after the original line had already been assessed and approved, the Board properly prepared a separate EIS for the extension. Similarly, the Western Alignment was developed as an alternative to the Four Mile Creek Alignment only after the latter alignment had been approved as part of the 41-mile extension, and therefore could not have been considered in the first or second EISs. See *TRRC II*, decision served December 1, 1997 at 4-5 (observing that the Western Alignment was developed by TRRC and its consultants in 1997, following a determination that there were problems with the Four Mile Creek Alternative.)

Improper segmentation occurs when an agency attempts to separate a project obviously planned as a unit into two or more pieces in order to avoid NEPA's requirements. See e.g., *Northwest Resource Information Center v. National Marine Fisheries Service*, 56 F.3d 1060, 1068 (9th Cir. 1995). Improper segmentation is not involved in the Tongue River project for the simple reason that the project was never purposefully segmented to avoid thorough environmental review. The original EIS covered the entire project as it was then envisioned. It

was only long after the first EIS was complete that it was decided that the 41-mile extension should be built. Thus, in *TRRC I* the entire project, as envisioned at that time, was reviewed in 1986. No additional "segments" or activity had been proposed when the environmental impacts of the original line were reviewed.

Petitioners are incorrect in asserting that TRRC "made a tactical decision to submit separate applications for separate phases of what is obviously a single rail line." *E.g.*, Brown Cattle Company Petition at 5. At the time of the *TRRC I* application, TRRC did not know that it would later be seeking approval for *TRRC II* or *III*. In *TRRC I*, TRRC sought permission to construct and operate an 89-mile line between Miles City and two termini in Montana to serve the Montco mine and other proposed coal mines near Ashland. Several years after *TRRC I* was approved, TRRC determined that there was adequate demand for an extension to serve the coal mines in the Decker area, so TRRC applied for permission to construct and operate the 41-mile extension (*TRRC II*) in 1991. Subsequent to the approval of *TRRC II*, TRRC determined upon review of the approved alignment that it would be more efficient to realign a portion of the routing approved in *TRRC II*, and therefore applied for approval to construct and operate the Western Alignment in *TRRC III*. Thus, contrary to Petitioners' assertions, TRRC did not make a "tactical decision" to pursue three separate applications. The number of applications filed was dictated by changing market and economic factors that occurred wholly apart from any desire on TRRC's part to segment the environmental review process. Indeed, it is counter-intuitive that TRRC would want such segmentation, which obviously has prolonged the process and greatly increased costs.

Moreover, it was reasonable for the Board not to prepare a new environmental review of the entire Tongue River line in response to the *TRRC III* application, since thorough EISs had

already been prepared for the original line and the extension. See CEQ regulations, 40 C.F.R. §1501.7(a)(3) (part of the process for determining the "scope" of an EIS is to "identify and eliminate from detailed study the issues which have been covered by prior environmental review"). Where a related or connected action has been assessed in a prior EIS, the Board is not required to reproduce the entire prior analysis in a subsequent Supplemental EIS. See *COST v Dole*, 826 F.2d 60, 70-71 (D.C. Cir. 1987) (when the environmental impacts of related projects have already been reviewed in a separate document, the EA or EIS for the project under review need only incorporate the effects of the related projects into the background data base of the project at issue, rather than restating or reassessing the results of prior NEPA studies), *Northwest Environmental Defense Center v BPA*, 117 F.3d 1520, 1537 (9th Cir. 1997) (upholding agency's decision to incorporate, but not to independently assess impacts included in, another agency's EIS), *California Trout v Schaefer*, 58 F.3d 469, 474 (9th Cir. 1995) ("Requiring the [agency] to duplicate [past studies] would be nonsensical").

Instead, the Board properly incorporated the prior EISs for *TRRC I* and *TRRC II* by reference, summarized certain key information from the prior EISs, and -- importantly -- supplemented the earlier analyses as necessary. See *Conservation Law Foundation v FHA*, 24 F.3d 1465, 1474 (1st Cir. 1994) (cumulative impacts analysis upheld even though other related portions of highway project were not considered in SEIS, since prior EISs for related projects were explicitly referenced in SEIS). Notably, the cumulative impacts of construction and operation of the entire rail line have been considered in the SEIS issued in *TRRC III*. See Draft SEIS at 6-1. In addition, the Final SEIS updates the mitigation measures for the entire line, thereby ensuring that the mitigation measures imposed are consistent for the entire project, and based on the most current information. Thus, there was no improper segmentation in this case,

and the Board has properly reviewed the entire Tongue River project under NEPA. For the Board to re-do what it has already done would, in the circumstances here, serve no meaningful purpose, and would result in pointless delay and expense - which is undoubtedly what Petitioners want.⁴

II. The STB's Analysis of TRRC's Financial Fitness was Appropriate

The Petitioners take issue with the STB's conclusion that TRRC will be able to finance the construction of the line. The Board made findings based on its review of the financial data in the record that support its conclusion that, "TRRC will be able to obtain sufficient financial backing to complete this rail construction." Decision at 16. Moreover, the Board also concluded that, "the market ultimately will determine whether or not the line is built. The venture capitalists, banking institutions and the overall financial sector will provide the necessary financing if they agree that TRRC is financially viable. Given the liberal nature of our licensing statute, they should have that opportunity." Decision at 19.

⁴ The American Prairie Foundation (APF) raises a concern in its petition that the Western Alignment and the TRRC as a whole threaten "to directly impact and further fragment grassland and riparian habitats." APF Petition at 6-7. However, the SEIS fully addresses the impacts of the Western Alignment to vegetation, habitats, and wildlife. See e.g., Draft SEIS at 4-3 to 4-20. In addition, the environmental reports for *TRRC I* and *II*, which are incorporated by reference into the *TRRC III* Final SEIS, also provide a thorough discussion of the affected environment and potential impacts to vegetation, habitat and wildlife. See *TRRC II* Draft EIS at 4-82 to 4-92; *TRRC I* EIS at 12-16, 122-126, and 152. SEA also considered at length impacts to land use, biological resources and soils in the Draft SEIS in *TRRC III*, and the Board has imposed mitigation measures to reduce or avoid impacts to biological resources, including vegetation and habitat, from construction and operation of the entire TRRC line. See Draft SEIS at 4-58 to 4-107, Final SEIS at 4-3. Mitigation Measure 19 merits special note, as it imposes detailed and extensive requirements relating to the reclamation and revegetation of the TRRC right-of-way. Moreover, the Board coordinated with the USFWS on a Biological Assessment regarding potential impacts to threatened or listed species along the entire TRRC line. See Appendix D to Final SEIS in *TRRC III*. Thus, the Board has considered the impacts to vegetation, habitats and wildlife for the entire line, including grassland and riparian habitats, and has imposed appropriate mitigation measures.

Petitioners argue that there is no evidence that TRRC currently has financial resources sufficient to support its project, but of course it is not TRRC's burden to prove the current presence of such resources. Petitioners' focus on TRRC's current resources ignores the Board's finding that the private markets should have an opportunity to determine the financial viability of the TRRC project.

Petitioners make two other points, neither of which merits reconsideration. First, they claim that one of TRRC's principals, Mr. Mike Gustafson, was quoted in the press following the issuance of the Decision as saying that the TRRC project is contingent on obtaining coal leases for the Otter Creek tracts. Petitioners claim that in light of this statement, the STB should have mandated that TRRC demonstrate its ability to obtain the coal leases in advance of issuing a final decision, and should have allowed the public to comment on that ability.

Leasing of the Otter Creek tracts is among the elements that are important for the development of the coal mines in the area to be served by TRRC. In the May 1, 2003 Supplemental Evidence submitted by TRRC in this proceeding, witness Gustafson described the transfer of the Otter Creek tracts from the federal government to the State of Montana, and further described the importance of the construction of the TRRC line to the development of the coal resources in the Otter Creek area. *See Supplemental Verified Statement of Mike T. Gustafson at 6-9.*

However, the Petitioners' suggestion that the TRRC project is entirely contingent on any specific coal leases is not correct. TRRC's Application and Supplemental Evidence describe the various sources of the coal that will be transported, which includes coal from the Ashland and Decker areas, and Wyoming coal. TRRC's evidence persuasively shows that coal in the Ashland area will be developed over the next several years to replace the dwindling reserves in the

Decker area. There is ample coal in the Northern PRB to sustain TRRC's operations, and this coal will not be sourced solely at the Otter Creek tracts.

Further, even though the Otter Creek tracts have not yet been made available for coal mine development (and TRRC is confident that this will happen), TRRC is moving forward with plans to attract the investments that it needs to build the railroad. TRRC has been actively engaged over the last several months in discussions with such investors and is well on the way toward having available the resources needed to procure the land and construct the railroad.

The Petitioners argue that TRRC will not be able to obtain through negotiation or eminent domain the land it needs for its right-of-way. Were that correct, then they would have nothing to be concerned about, the rail line would never be built. Of course, that is not correct and the fact they are bothering to oppose the TRRC project signals that they know it.

TRRC is committed to negotiate with landowners and pay them just compensation for the right to cross their land. In the event that a landowner were to refuse a written offer to acquire land needed for the right of way, TRRC has rights under Montana law to take property for its right-of-way through eminent domain. See MONT. CODE ANN. § 69-14-552(3) (providing that railroads may use the State's eminent domain statute at MONT. CODE ANN. § 70-30-101, *et seq.* to procure land needed for the construction of a rail line). See also *Burlington Northern, Inc. v. Criswell*, 1973 U.S. Dist. LEXIS 15324 (D. Mont. 1973) (railroad exercise of eminent domain is, by definition, for a public use and thus condemnation of property for a rail route was found to be proper under Montana law).

The cases cited by Petitioners do not prove otherwise. Petitioners cite *Montana Power Company v. Bokma*, 457 P.2d 769, 775 (Mont. 1969) for the proposition that TRRC will not be able to demonstrate that its rail line is "located in the manner that will be most compatible with

the greatest public good and least private injury " In *Montana Power*, the Court upheld a taking for an electronic transmission line after determining that those opposed to the taking had not shown that the taking was excessive or arbitrary given that alternative routings were considered Here, the STB's finding that the approved alignments, as opposed to rejected alternatives, are environmentally preferable and reasonable will support a taking of the land needed to construct the approved alignment, and Petitioners offer no evidence to the contrary In fact, the TRRC Application filed in this proceeding makes clear that the Western Alignment will affect fewer landowners than the Four Mile Creek Alternative and, because it is much shorter than the alternative under consideration, will affect significantly less acreage See Decision at 7, noting that the Western Alignment is 12.1 miles shorter

Petitioners also cite *State Highway Commission v Daniels*, 409 P 2d 443, 446 (Mont 1965) for the proposition that the preference of landowners to keep their land establishes a private injury that will mitigate against condemnation However, that case merely affirmed a finding requiring the state highway commission to further study alternative routes where it failed to determine which route would create more private damage Here, alternatives have been studied and reasoned findings -- not open to collateral challenge in a state eminent domain proceeding -- have been made by the STB

Petitioners rely on *McCabe Petroleum Corp v N Bar Ranch, LLC*, 87 P 3d 479, 484 (Mont 2004), to argue that Montana courts have strictly construed the eminent domain statute In that case, the court held that an oil well owner lacks eminent domain authority under state law TRRC's right as a railroad to invoke eminent domain is not in question, however, as Montana statutory law is clear on this point, and railroads have exercised eminent domain rights in the past See MONT CODE ANN § 69-14-552(3) (railroads may use the State's eminent domain

statute at MON1. CODE ANN § 70-30-101, *et seq.*), *Wine v Northern Pac Ry Co*, 136 P 387, 389 (Mont 1913)(railway company, through condemnation, can take property necessary for construction and operation), *Great Falls & Teton County Ry Co*, 136 P 390 (Mont 1913)(affirming condemnation order in favor of railroad), *Northern Pac Ry Co v McAdow*, 121 P 473, 475 (Mont 1912)(Montana Code is "exceedingly liberal in bestowing upon railroad corporations the power to appropriate the property of the citizen to carry forward the public service")

Moreover, while eminent domain is a right granted by state law to federally-authorized common carrier railroads, such as TRRC, any effort by a state to regulate railroads so as to preclude the use of eminent domain for taking property needed for construction of a rail line by such a railroad would be preempted under federal law. See 49 U.S.C. § 10502 (STB's jurisdiction over construction of rail lines is exclusive), *Dakota, Minnesota & Eastern Railroad Corp v South Dakota*, 236 F Supp 2d 989, *aff'd on other grounds*, 362 F 3d 512 (8th Cir 2004) (affirming District Court holding that certain provisions of South Dakota eminent domain law are preempted under 49 USC § 10502 because they are regulatory in nature and would effectively preclude an STB-approved rail line from being constructed); *The Burlington Northern and Santa Fe Railway Company v City of Houston*, 171 S.W.3d 240, 249 (Tx Ct App 2005). ("when state eminent domain law, as applied in the circumstances, amounts to regulation by blocking a federally-approved rail line, it is expressly preempted") Thus, TRRC has full confidence that, to the extent needed, it will be able to exercise its rights to acquire property for its rail right-of-way under Montana's eminent domain statute

III. The Board Properly Concluded that a Rate Sensitivity Analysis Was Not Required

Petitioners argue that the Board was required, in connection with its assessment of TRRC's air quality impacts in the regions to which TRRC-transported coal would be burned, to

perform a rate sensitivity analysis for the Tongue River Railroad. The only support they offer for this argument is that a rate sensitivity analysis was performed for the DM&E Powder River Basin project. As the Board properly explained in its decision, however, the operation of the TRRC line is much less likely to result in lower transportation rates than DM&E because TRRC does not represent a new competitor intent on capturing traffic from incumbents, but rather will serve as an interline partner with incumbent BNSF and its coal would reach plants already served by BNSF. See Decision at 26, Final SEIS at 2-39.

SEA fully reviewed the DM&E decision, the rate sensitivity analysis performed in that case, and the implications for TRRC. Final SEIS at 2-34 to 2-59. The results of the SEA's analysis in DM&E demonstrated that little additional coal would be consumed as a result of that project. Final SEIS at 2-35. SEA then concluded that the TRRC would be even less likely to result in lower transportation rates, or higher coal consumption, because TRRC would carry less coal than DM&E and would have fewer incentives to offer lower transportation rates than DM&E given that it would not be injecting competition from a third railroad into an area currently served by two competing railroads. *Id.* Thus, the Board fully explained why neither a rate sensitivity analysis, nor additional modeling, was required to assess the impacts on air quality of the TRRC line. Petitioners have offered no new evidence on this point, and have not demonstrated material error.

IV. The Board Provided Adequate Notice of the Project's Impact on BNSF

The Petitioners claim that the Board failed to identify BNSF as a key beneficiary of the TRRC line in the Draft and Final SEISs, and therefore failed to provide adequate notice of the scope of the issues to be addressed in the SEIS. The argument ignores the evidence in these proceedings.

The fact that the TRRC line would connect at both ends to BNSF, and therefore that BNSF would be significantly affected by approval of the TRRC application, was surely no secret in this proceeding -- it is a fact that would be apparent to any interested person from nothing more than a review of the map of the TRRC line. Indeed, it is intuitive from the fact that TRRC connects only with BNSF that all TRRC traffic will be interchanged with BNSF. The Board's reference to TRRC's impact on BNSF and its reference to BNSF as TRRC's "interchange partner" should therefore come as no surprise to Petitioners -- although apparently it does.

BNSF's role in relation to the TRRC project was also made apparent in the application filed by TRRC in this proceeding, just as it was in the prior applications. *See, e.g.*, TRRC Application for Construction and Operation Authority, filed April 1998 at 13 ("The Western Alignment will connect with BNSF at Spring Creek/Decker and, at the northernmost point of its previously approved segment, TRRC will connect with BNSF at Miles City.") TRRC also made clear in its *TRRC III* Application that BNSF traffic could use the shortcut offered by the TRRC line to save 130-160 train miles in each direction. *See* TRRC Application, Exhibit D (Operating Plan) at 2. TRRC's May 1, 2003 Supplemental Evidence submitted in this proceeding further elaborated on the fact that BNSF and TRRC had entered a loan agreement, that the two railroads would be discussing a commercial operating agreement and that TRRC and BNSF were discussing engineering and marketing issues of common interest. *See* TRRC Supplemental Evidence, Supplemental Verified Statement of Mike T. Gustafson at 9. Indeed, it was BNSF's engineering experts who were among those who identified the Western Alignment as a superior routing for the TRRC line. *See* TRRC II, December 1, 1997 Decision at 4-5.

BNSF's interest in this matter is more economic than environmental in nature and therefore was discussed in some detail in the Application and other evidentiary filings made on

the "merits" side of this proceeding, in which Petitioners chose not to be actively engaged. Nonetheless, BNSF's role was also made clear in environmental review documents. For example, the Amended Final Scope for the Supplemental EIS in this proceeding, served by the Board on August 22, 2003, expressly noted that TRRC's updated evidence on the merits side of the proceeding, "provided insight into its relationship with The Burlington Northern Santa Fe Railway Company, with which the proposed line connects." Scoping Notice at 3. Likewise, the Draft and Final SEISs issued in this proceeding noted BNSF's role and took into account the BNSF-originating traffic from Wyoming that will use the TRRC line. E.g., Draft SEIS at 2-4, 2-7 (noting that TRRC would transport coal now transported entirely by BNSF over the circuitous Shendan-Miles City route and discussing possibility that BNSF could operate the TRRC line), Final SEIS at 2-41 (discussing TRRC handling of Wyoming coal originated on BNSF lines). The public thus had a full and fair opportunity to comment on the impact of the TRRC line on BNSF, and did so.

V. The Final SEIS Adequately Addresses Issues Related to the Northern Cheyenne Tribe

Petitioners also assert that the Board's decision failed to meet the requirements of Executive Order 12898⁵ on Environmental Justice because it "summarily" dismissed the concerns of the Northern Cheyenne Tribe. Petitioners' argument is curious since the Northern

⁵ Executive Order 12898 provides the following directive to federal agencies:

To the greatest extent practicable and permitted by law, each federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States.

Cheyenne Tribe has not complained of the Board's decision in *TRRC III*, either at the Board or in Court

Contrary to Petitioners' assertions, the Board's analysis presented in the SEIS includes a thorough evaluation of potential direct, indirect, and cumulative effects to Native Americans, including the Northern Cheyenne Tribe See Final SEIS at 2-18 to 2-22 and Draft SEIS at 4-119 to 4-127 As provided in the SEIS, the Board consulted with the tribes to assess their concerns, including interviewing Northern Cheyenne elders, and providing the Northern Cheyenne with maps and other materials to facilitate the identification of areas of cultural significance Draft SEIS at 4-34

Based on extensive consultation with tribal representatives, the Board developed a Programmatic Agreement ("PA") under Section 106 of the National Historic Preservation Act (NHPA) that covers construction and operation of the entire rail line from Miles City to Decker See App C to Final EIS The Northern Cheyenne Tribe concurred in the Agreement. The PA requires completion of detailed on-the-ground surveys of the railroad ROW prior to construction, development of a Treatment Plan in consultation with the parties to the PA; and procedures for reviewing and addressing objections and/or disagreements The PA also provides that the tribes will be invited to participate in the inventories to help identify and evaluate "properties to which they attach traditional religious and cultural significance." *Id* at p 3 The Board's decision properly found that the PA assures that the interests of Native Americans will be adequately protected

Petitioners specifically raise the Battle Butte Battlefield (also known as the Wolf Mountain Battlefield) This site was extensively addressed in the SEIS In response to comments, an analysis was undertaken of a potential re-routing of the alignment to avoid the

battlefield site entirely Based on this analysis, it was determined that bypass routings would be infeasible .See Appendix I to Final SEIS Although the Battlefield cannot be avoided entirely, the PA requires a treatment plan be developed in consultation with the tribes to mitigate the impacts of the rail line to this site Thus, the concerns raised regarding the Battlefield were far from "summarily" dismissed

Petitioners also quote Master Response 14 as finding that " the proposed Western Alignment would adversely affect the Cheyenne grave site." Petition at 13 However, the entire discussion regarding the grave site is as follows:

The proposed refinements to the Tongue River II alignment would also place the rail line farther from an identified Cheyenne grave, and this additional distance or buffer achieved by the proposed realignment make it somewhat more favorable However the location of both the Four Mile Creek alignment and the proposed Western Alignment would adversely affect the Cheyenne grave site Final SEIS at 2-19

Thus, *TRRC III* will actually reduce the impacts to the grave site because the alignment will be further away than the alignment previously approved in *TRRC II* Moreover, as discussed above, the PA includes methods to address the effect of the rail line on the grave site, including preparation of a Class I literature survey and a Class III pedestrian survey Based on the results of the surveys, a treatment plan will be developed in consultation with the SHPO and tribes to avoid or mitigate the impacts of the rail line to this site

In sum, the Board properly considered the impacts of the entire TRRC line on native communities, including the Northern Cheyenne Tribe, and has developed a programmatic agreement to ensure impacts on tribes continue to be evaluated and mitigated throughout construction and operation of the project

VI. The Final EIS Properly Incorporates and Updates Prior NEPA Documents

Petitioners argue that the 1986 EIS for the original line is "stale" due to changed circumstances, and therefore the environmental impacts of the original line should be reevaluated concurrently with the EIS for the proposed Western Alignment. The Board has already considered and rejected this argument in its November 7, 2007 Decision denying the Petitions for Stay in this proceeding. There, it noted that, "SEA updated and augmented the environmental analyses conducted in Tongue River I and Tongue River II on certain issues and undertook additional analyses for the Tongue River III SEIS." November 7 Decision at 8.

Time in and of itself does not require an agency to update an EIS. *Coker v. Skulmore*, 941 F.2d 1306, 1310 (5th Cir. 1991) (5 year old EIS is not necessarily out-of-date -- CEQ regulations only require a supplemental EIS if there are "significant new circumstances."); *Becker v. Federal Railroad Admin.*, 999 F. Supp. 240, 249 (D.C. Conn. 1996) ("[EIS] done eighteen years ago does not necessarily make it either stale or no longer useful.") Rather the question is whether the original proposed action has substantially changed or there are significant new circumstances or information relevant to the project and its environmental impact.

The Council on Environmental Quality's regulations implementing NEPA require that an EIS be supplemented when.

- (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns, or
- (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts

40 C F R § 1502.9(c) (emphasis added) ⁶ Thus, an EIS does not need to be updated or supplemented unless there is a significant change in circumstances or significant new information relevant to the environmental impacts of the project.

Petitioners argue that the physical characteristics of the area have changed due to drought conditions that have occurred since the original EIS was prepared. However, they fail to explain how these environmental changes impact or undercut any of the findings of the original EIS.

In this case, the Board properly reviewed the prior EISs to ensure the information presented therein remained valid. First, the Board issued a public notice asking for comment on whether the *TRRC I* and *II* EISs should be revised or updated. See *TRRC III*, Decision served February 3, 1999 (detailing scope of additional analysis for Supplemental EIS for portions of line approved in *TRRC I* and *II*), *TRRC III*, March 26, 2003 (providing further opportunity for public comments on the scope of the Supplemental EIS, including comments on "significant changes in land use, topography, wetlands or water resources, endangered species or cultural resources" that might warrant changes to the scope of the analysis); *TRRC III*, Decision served August 22, 2003 (addressing scope of supplemental analysis to be provided for *TRRC I* and *II*). Petitioners thus had ample opportunity to offer any comments on how the *TRRC I* or *TRRC II* analyses should be supplemented.

Second, the SEA conducted additional analyses of the *TRRC I* and *II* portions of the line, including a Biological Assessment and further identification of threatened and endangered species and their habitats, as well as additional water quality and air quality analyses. It also

⁶ Similarly, the Board's NEPA regulations provide

[a]n Environmental Impact Statement may be supplemented 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) (emphasis added)

further addressed the impacts of the line on the Miles City Fish Hatchery and the Battle Butte site. In addition, SEA considered the proposed refinements to alignments previously approved in *TRRC I* and *TRRC II* and found no new significant impacts beyond those already assessed. SEA also reviewed the cumulative impacts of the entire line and found no significant new impacts requiring an SEIS for the entire line. Finally, the Board reviewed and updated the mitigation measures for the entire line.

Thus, the Board has taken the requisite "hard look", including ensuring that the environmental reports for *TRRC I* and *II* remain valid. See *Price Road v. FHA*, 113 F.3d 1505, 1511 (9th Cir. 1997) (upholding agency decision not to supplement project EA based on design change where agency reevaluated design and found no significant or uncertain effects).

VII. The Board Properly Addressed the Miles City Fish Hatchery

Petitioners Trout Unlimited and Diamond Cross Ranch argue that the Board erred by failing to provide for specific mitigation for the Miles City Fish Hatchery, leaving undecided the appropriate mitigation for the Hatchery. In fact, the Board provided for extensive mitigation at the Hatchery and for continuing SEA involvement.

Mitigation Measures 84 through 87, and 92, each address the impacts of the TRRC line on the Miles City Fish Hatchery. These measures provide for protection of the Hatchery's water supply lines (Measure 84), for weed control in the area of the Hatchery (Measure 85), for continuing consultation between TRRC and the Montana Department of Fish, Wildlife and Parks (DFWP) over matters impacting the Hatchery (Measure 86), for TRRC adherence to reasonable conditions imposed by DFWP in connection with the easement that TRRC requires to cross the Hatchery property (Measure 87) and for implementation by TRRC of a work plan agreed to with the DFWP (Measure 92).

Petitioners' complaint that the effects of the TRRC line on the Hatchery are unknown is false. Extensive information was gathered prior to completion of the Final SEIS concerning the various impacts of the rail line on fish. See *TRRC III* Draft SEIS, Appendix F (setting forth information on coal dust, weed control, and pipeline protection, and including a study of geotechnical and vibration analyses undertaken by experts). No evidence was presented to demonstrate an adverse impact from vibration. In fact, the vibration study appended to the Draft SEIS states that "the predicted ground vibration levels at the Miles city Fish Hatchery from construction and operation of the TRR are extremely low and potential damage to the ponds and raceway from train vibration is not indicated by the models conducted for the TRR and analysis conducted for other rail projects, including the DM&E." May 7, 2004 Womack & Associates, Inc. Study, at 6 (set forth at Appendix F of Draft SEIS).

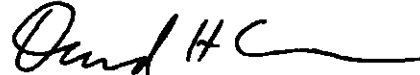
Further, TRRC's consultants have now completed the study required by the work plan referenced in Measure 92 and has submitted the results to DFWP and SEA. The study reaffirms that there will be no noise or vibration impacts of the TRRC line greater than the existing ambient noise and vibration levels at the Hatchery. Thus, under the work plan's terms, no further studies of noise and vibration impacts, or further mitigation measures, are required to be conducted.

At this time, TRRC is awaiting action by DFWP on its easement application. TRRC will adhere to reasonable conditions to that easement. Obviously, TRRC's line will not be able to cross the Hatchery until that easement is granted and the reasonable conditions on the easement met. Petitioner's claim that the Board has allowed TRRC to go forward before mitigation measures are in place to protect the Hatchery is simply wrong.

CONCLUSION

For all of the reasons stated above, Petitioners have failed to demonstrate any material error in the Board's Decision. The Petitions for Reconsideration should be expeditiously denied.

Respectfully submitted,



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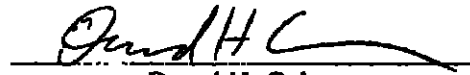
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Attorneys for Tongue River Railroad
Company, Inc.

December 17, 2007

CERTIFICATE OF SERVICE

I hereby certify that I have this 17th day of December 2007 served a copy of the foregoing
Reply to Petitions for Reconsideration on all parties of record by first class mail, postage
prepaid


David H. Coburn