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June 2, 2003

Mr. Kenneth Blodgett  
Section of Environmental Analysis  
Surface Transportation Board  
Case Control Unit  
Washington, DC 20423-0001

**Re: Finance Docket No. 30186, Reply of Tongue River Railroad to  
Environmental Scoping Comments**

Dear Mr. Blodgett:

Pursuant to the March 11, 2003 Notice issued in this proceeding, and the May 28, 2003 order allowing an extension for the submission of this reply, Tongue River Railroad Company ("TRRC") hereby replies to certain of the comments submitted by various parties on the appropriate scope of the supplemental environmental impact statement that is being prepared in this proceeding. TRRC offers no reply to the comments filed by the Environmental Protection Agency and by the Montana Natural Heritage Program, as it does not disagree with the observations made in those comments.

**A. Montana Environmental Information Center ("MEIC") Comments**

MEIC observes that impacts on wildlife and the cumulative impacts of coal bed methane development should be included in the scope of the analysis. TRRC does not disagree with this point, and SEA's March 26, 2003 request for further comments on the scope of its review also acknowledges this issue.

MEIC suggests that impacts from the Dakota, Minnesota and Eastern (DM&E) rail extension project be studied. In its May 1, 2003 supplemental evidence, TRRC explained that the DM&E project will serve a different area than TRRC is designed to serve. TRRC does not believe that there are any environmental impacts to study here, and MEIC does not identify what environmental issues are raised, relative to the TRRC project, by the DM&E project.

MEIC makes a series of broad observations about the length of time that the TRRC project has been pending. None of these observations pertain to the proper scope of the supplemental environmental study. TRRC's pending Western Alignment application, and this environmental supplementation undertaking are, TRRC believes, the final regulatory steps that TRRC will need to pursue at the Board prior to construction. TRRC's secondary permits will be sought at the appropriate time.

MEIC makes a series of contentions about the economics of the TRRC project, which again are not matters relevant to this scoping process. The Board will have ample opportunity to consider the merits of TRRC's initial and supplemental evidence in support of the Western Alignment proposal and has already approved construction of the remainder of the TRRC line. With respect to the Otter Creek tracts, MEIC correctly notes that these would not be served by the 17 mile Western Alignment stretch of track at issue in the TRRC III proceeding. However, since the Otter Creek coal tracts would be served by TRRC, the railroad believes it was appropriate to discuss developments relative to those tracts in its supplemental evidence, and thus did so in the supplemental evidence submitted on May 1, 2003. The Board did not disagree in its decision in TRRC III approving the submission of supplemental evidence on this and other issues. *See Tongue River Railroad Co. -- Construction and Operation -- Western Alignment*, Finance Docket No. 30186 (Sub No. 3) (served March 11, 2003) at 2, fn. 4.

In support of its contention that a new EIS should be prepared for the entire TRRC line, MEIC makes the same segmentation argument that has been made before and that other commenters have now repeated. This issue has been fully considered in the past. The Board's Section of Environmental Analysis has properly found that the preparation of a Supplemental EIS is appropriate here, rather than preparation of a new EIS for the entire TRRC line. *See Tongue River Railroad Company, Construction and Operation of the Western Alignment in Rosebud and Big Horn Counties, Montana*, Finance Docket No. 30186 (Sub No. 3) (served July 10, 1998) at 7 (noting that "the passage of time, in and of itself, is not necessarily a reason to repeat or redo environmental analysis" and that supplementation is required only in the event of significant new circumstances rendering the prior analysis no longer adequate.); 49 C.F.R. § 1105.10(5) ("An 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."). *See also Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373 (1989) (EIS need not be supplemented whenever new information comes to light); *Sierra Club v. Army Corps of Engineers*, 295 F.3d 1209, 1215 (11<sup>th</sup> Cir. 2002) (supplemental EIS required only where, according to CEQ regulations at 40 C.F.R. § 1502.9(c)(1), there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.")

The Supplemental EIS that SEA is preparing pursuant to the 1999 Scoping Notice will in fact update the prior environmental studies of the entire line, thereby fully addressing the claims of MEIC and others concerning alleged staleness and segmentation. *See Tongue River Railroad Company, Construction and Operation of the Western Alignment in Rosebud and Big Horn Counties, Montana*, Finance Docket No. 30186 (Sub No. 3) (served February 3, 1999). MEIC's failure, and that of other commenters, to identify substantial additional environmental issues -- beyond the broad series of issues that is already under review for the Supplement -- is notable, and underscores that its argument relies more on rhetoric than fact.

#### **B. Bones Brothers Ranch Comments**

Most of these comments address issues that pertain to whether there will be a sufficient traffic base to sustain the TRRC line. Such issues are not properly considered in connection with

the Supplemental EIS. (Bones Brothers claims that Otter Creek Coal is unlikely to be a source for the TRRC, but the article attached to its comments indicates that there is widespread agreement among Montana leaders that mining at Otter Creek is needed as soon as possible.)

The only environmental scoping issue mentioned in the Bones Brothers comments is the need to review, in the cumulative impacts section of the Supplemental EIS, the impacts of coal bed methane development in the area. Again, TRRC does not disagree that this should be considered.

#### **C. Mark Fix Comments**

Mr. Fix, a local rancher, also questions the economic viability of the project. Such questions are not properly raised in the environmental review phase of this proceeding.

Mr. Fix argues that the impacts of the TRRC on water quality/availability in the area should be evaluated, particularly in view of the projected impacts of coal bed methane development. The scope of the Supplemental EIS, as defined by SEA in its 1999 Scoping Notice, already covers a hydrological analysis of the Tongue River and the impacts of the Tongue River III project on the River, as well as an analysis of water quality impacts of Tongue River I and II. Further, TRRC agrees that the impact of the coal bed methane project should be considered in the cumulative impacts analysis.

Mr. Fix argues in favor of completing a wildlife impacts analysis. The 1999 Scoping Notice already contemplates an updated biological assessment for Tongue River I and II, and a biological assessment for Tongue River III, in each case to be done in coordination with the U.S. Fish and Wildlife Service ("USFWS"). The March 26 request for comments acknowledges changes in the list of threatened and endangered species.

Mr. Fix argues that the entire EIS should be redone. This argument has been addressed above.

#### **D. Beth Kaeding Comments**

Ms. Kaeding, a biologist employed by the federal government, argues that a series of developments that she contends have occurred in the area require that an entire new EIS be undertaken for the TRRC project, rather than a Supplemental EIS. In addition to coal bed methane development, she points to several new power plants and expanded coal mining in Wyoming, the potential for new power plants in Montana, and the lapse of time since the prior environmental documents were prepared.

TRRC has already responded to the coal bed methane point. Ms. Kaeding does not explain why new or projected power plants in Wyoming and the speculative potential of new plants in Montana would have any environmental impacts warranting study here, and TRRC does not believe that they would. As to the length of time since the prior documents were prepared, we note again that the scope of the Supplement, as defined in 1999, will include an assessment of any matter as to which environmental circumstances or requirements have changed in a manner warranting updating since the time that the original documents were prepared.

Ms. Kaeding expresses concern that a thorough inventory of plant, fish or wildlife resources has not been done in a manner consistent with "today's standards." However, the 1999 Scoping Notice provides that a biological assessment will be done, consistent with current standards and in conjunction with USFWS, for the entire TRRC line.

Ms. Kaeding raises concerns about what she alleges to be the amount of earth that will need to be moved to build the railroad and she expresses skepticism that the U.S. Army Corps of Engineers ("Corps") will issue a 404 permit to TRRC because sufficient mitigation may not be possible. These matters will be studied as per the 1999 Scoping Notice and will likely be addressed by the Corps during the permitting process. It bears note that the 1999 Scoping Notice contemplates that the updated and supplemental environmental review will include those analyses needed to satisfy the current requirements of the cooperating agencies, including the Corps.

Ms. Kaeding also raises issues about the impact of the railroad on noxious weeds. The 1999 Scoping Notice expressly includes a review of appropriate mitigation to ensure adequate protection from the introduction and spread of such noxious weeds as part of the TRRC III study. Further, TRRC is already under an obligation as a consequence of mitigation conditions imposed in TRRC I and TRRC II to address the noxious weed issue.

Ms. Kaeding questions the impact of the amount of water that will be used during construction on stream levels/water table and on the sauger, sickle-fin chub and paddlefish. To the extent that SEA agrees that these are appropriate subjects for analysis that may not already be embraced within the assessment of biological and hydrological impacts, TRRC does not object to the consideration of these issues.

Ms. Kaeding suggests that review is needed with respect to a series of issues that are in fact already embraced in the 1999 Scoping Notice (fires from rail operations, noise, impacts on livestock). She also proposes that SEA consider the impacts of a partially completed TRRC line, or one that is abandoned after completion. Clearly, however, these latter issues are not matters that reasonably could be assessed due to their speculative nature. Were the TRRC line ever abandoned in whole or part, the impacts of that abandonment would be considered at the time pursuant to the STB's abandonment rules.

#### **E. Northern Plains Resource Council ("NPRC") Comments**

Many of the issues raised by NPRC have been addressed above. NPRC argues that the TRRC is a single rail line, and therefore should be the subject of a new EIS for the entire railroad. It also claims that SEA decided to limit the scope of the Supplemental EIS to the Western Alignment, and that this decision was contrary to law. What NPRC overlooks is that, pursuant to the 1999 Scoping Notice, the Supplemental EIS will address a variety of issues relative to the entire project. The prior environmental studies will be updated and supplemented where appropriate and cumulative impacts relative to the entire line will be addressed, as well as issues relative to the pending Western Alignment application. As already discussed above, starting all over again with a completely new EIS is not necessary under governing NEPA

standards and would add nothing to the NEPA review of the project, other than the delay that NPRC obviously wants. *See* 49 CFR § 1105.10(a)(5).

Further, NPRC has not identified any issue that would warrant preparation of a new EIS in lieu of the planned supplement. NPRC notes that there will be coal bed methane development in the area. TRRC has already addressed this issue, and agrees that this development should be assessed in the cumulative impacts section of the Supplemental EIS.

NPRC notes that the State of Montana is developing Total Maximum Daily Loads ("TMDL's") for pollutants for the Tongue River and its tributaries, and claims that the Northern Cheyenne Indian Tribe has established water quality standards for waters on the reservation and petitioned EPA to implement these. TRRC concurs that these developments could be relevant to the environmental analysis and sees no reason why, to the extent these matters are deemed relevant by SEA or the cooperating agencies, they should not be given appropriate consideration in the Supplemental EIS.

NPRC notes various changes to the list of threatened and endangered species and species of concern. As noted above, the Supplemental EIS scope, as defined in the 1999 Scoping Notice, will address these matters through an updated biological assessment.

NPRC notes that the Montana Supreme Court has ruled that the state's constitution protects every citizen's fundamental right to a clean and healthful environment. Whatever the relevance of this ruling, which certainly does not override the STB's rail licensing authority, the Supplemental EIS will address all pertinent environmental issues, including matters such as air and water quality to the extent that these matters require updating or supplementation as to TRRC I and TRRC II, and to the extent that they pertain to the Western Alignment.

NPRC argues that a new EIS should consider changes TRRC has made to its right of way. The 1999 Scoping Notice indicates that any refinements made to the alignment will be reviewed in the Supplemental EIS to determine if such refinements will have any environmental impacts.

NPRC takes issue with what it claims is the STB's statement that the U.S. Supreme Court's ruling on the jurisdictional limits of the Clean Water Act is "irrelevant" to these proceedings. NPRC is apparently referring to the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, et al.*, 531 U.S. 159 (2001). TRRC is unaware of SEA claiming that this decision is irrelevant to this proceeding. To the contrary, the March 26, 2003 notice requesting further comments on the scope of the Supplemental EIS notes that SEA is aware of this decision. TRRC has no reason to doubt that SEA and the Corps, a cooperating agency, will act consistently with that decision in addressing issues pertinent to the Corps' jurisdiction.

NPRC argues that the EIS should consider an alternative under which the TRRC project is approved pursuant to a condition on completion of construction within a certain amount of time. The Board has previously removed a three-year condition that had been placed on the construction of the entire line in TRRC II. *See Tongue River Railroad Co. -- Rail Construction and Operation -- Ashland to Decker, MT*, Finance Docket No. 30186 (Sub No. 2) (served March

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23, 1999). Thus, there is no basis for the type of alternative NPRC is proposing. Further, NPRC fails to explain how any time limit would have any affect on the environmental review.

Finally, NPRC raises a series of non-environmental issues, including issues relating to coal demand, mine closures, implications of the DM&E project, and changes to state eminent domain laws. NPRC has failed to show that any of these are matters properly addressed as part of the environmental assessment in this proceeding.

Respectfully,



Betty Jo Christian

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Company

cc: Parties that submitted comments  
in response to scoping notice