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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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**NORTHERN PLAINS RESOURCE COUNCIL AND ROCKER SIX  
CATTLE CO.'S MOTION TO DISMISS AND REPLY TO TONGUE RIVER  
RAILROAD CO., INC'S PETITION TO HOLD PROCEEDING IN ABEYANCE**

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## INTRODUCTION

Like the Sword of Damocles hanging over the farmers and ranchers of southeast Montana, for more than three decades the Tongue River Railroad has languished before this Board. Despite twice receiving permission to build the line, not an inch of track has been laid. Yet farmers and ranchers, threatened with condemnation over an ever-shifting route, have and continue to have their lands devalued and operations interrupted. The Board's resources are perpetually wasted as multiple environmental impact statements (“EIS”) are prepared and left to lay fallow, awaiting the next mythical configuration of the line. Despite forcing another EIS and public process in 2012, the railroad requests an open-ended extension. It is time for the Board to end this travesty and terminate the application.

Northern Plains Resource Council and Rocker Six Cattle Co. (collectively “Northern Plains”) respectfully request that the Board deny and dismiss with prejudice Tongue River Railroad Company, Inc.’s (“TRRC”) pending application. Now at the eleventh hour, when TRRC and its parent companies see the writing on the wall, TRRC has filed a Petition to hold this proceeding in abeyance for “*at least* many more months” or “perhaps for another year *or more*” until Arch Coal receives a judicially-affirmed mining permit from the Montana Department of Environmental Quality (“MDEQ”).<sup>1</sup>

In reality, TRRC’s Abeyance Petition has nothing to do with timing of the mining permit and has everything to do with “market weakness”<sup>2</sup> and Arch Coal, Inc.’s (“Arch”)

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<sup>1</sup> Petition of Tongue River R.R. Co., Inc. to Hold Proceeding in Abeyance at 2 (Nov. 25,

<sup>2</sup> Abeyance Petition at 3.

inability to “*continue as a going concern over the long term*” without significantly restructuring its balance sheet.<sup>3</sup> Indeed, Arch “expect[s] to continue to use cash and report losses for the *foreseeable future*”<sup>4</sup> and admits that a bankruptcy petition “could be commenced in the *near term*.”<sup>5</sup> The Board should take careful notice that these material facts were omitted from TRRC’s Abeyance Petition.

Perhaps most importantly, TRRC’s Abeyance Petition is the latest in a 30-plus year nightmare for Northern Plains and further evidence that the project is not viable; never was, and never will be. Respectfully, the Board should reject TRRC’s misleading Abeyance Petition and remove the dark cloud that has hovered over the Board, Rocker Six Ranch, Northern Plains and its members for decades.

### **PROCEDURAL BACKGROUND**

The Interstate Commerce Commission (the Board’s predecessor) first received an application from TRRC to construct and operate an 89-mile rail line between Miles City and Ashland, Montana (“TRR I”) on June 2, 1983. TRRC intended to haul coal from the then-permitted Montco mine near Ashland, Montana.<sup>6</sup> The ICC approved the application

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<sup>3</sup> Arch Coal, Inc., Quarterly Report (Form 10-Q) at 45 (Nov. 9, 2015) (hereinafter “Arch 10-Q”) (emphasis in original), <http://goo.gl/RxNxtz>.

<sup>4</sup> Arch 10-Q at 30 (emphasis added).

<sup>5</sup> Arch 10-Q at 45 (emphasis added).

<sup>6</sup> Final Environmental Impact Statement, Tongue River R.R. Co.—Construction and Operation of a Line of Railroad in Custer, Powder River, and Rosebud Cntys., Mont. at 1 (Aug. 23, 1985).

in 1986 following a review of the transportation merits and environmental impacts.<sup>7</sup>

Despite having both a mining permit in place and authority from the ICC to construct the rail line, TRR I was never built. The promised Montco mine never materialized because the permit expired without any mining activity.<sup>8</sup>

In 1989, approximately three years later, TRRC notified the ICC of its intent to extend the permitted-but-not-built TRR I south from Ashland to Decker, Montana (TRR II), though it waited until June 1991 to file an application.<sup>9</sup> Realizing the slim likelihood of opening new mines, TRRC decided it would extend its proposal to haul coal from existing Wyoming mines already in production. TRRC proposed a shorter haul route than existing rail infrastructure to the Upper Midwest to fuel existing power plants. TRRC received letters of support from a couple of power plants expressing a vague interest in less expensive coal. The Board approved TRR II by decision served November 8, 1996. Northern Plains and rancher Mark Fix filed a Notice of Appeal to the Ninth Circuit. TRRC, however, was not satisfied with the TRR II authorization because it preferred a different alignment than the one approved by the Board. Consequently, it petitioned the Board in 1997 to reopen the TRR II decision and approve the so-called

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<sup>7</sup> *Tongue River R.R.—Rail Construction and Operation—In Custer, Powder River and Rosebud Cntys., Mont.* (Tongue River I), Finance Docket No. 30186 (ICC served Sept. 4, 1985), *modified* (ICC served May 9, 1986).

<sup>8</sup> *Montco v. Simonich*, 947 P.2d 1047 (Mont. 1997).

<sup>9</sup> *Tongue River R.R. Co.—Rail Construction and Operation—Ashland to Decker, Mont.*, Finance Docket No. 30186 (Sub-No. 2), slip. op. at 3 (STB served Nov. 8, 1996).

Western Alignment (alternatively known as “TRR III”).<sup>10</sup> The Board denied the petition and TRRC thereafter submitted an additional application for TRR III in April 1998.<sup>11</sup> At TRRC’s request, the Board suspended the TRR III proceeding from March 2000 to December 2002.<sup>12</sup> This self-imposed delay was driven by weak markets and lack of financing for the project. In May 2003, TRRC restarted the TRR III process and submitted updated evidence in support of the transportation merits.<sup>13</sup> The Board finalized the TRR III EIS in 2006 and approved TRR III in 2007.

Northern Plains and Mark Fix appealed this new decision, which was consolidated with the 1997 appeal. The Ninth Circuit case then moved forward with merits briefing focusing on the adequacy of the EIS under the National Environmental Policy Act. On December 29, 2011, the Ninth Circuit remanded TRR II and III.<sup>14</sup> The Ninth Circuit found numerous flaws with the EIS and supplemental EIS.

On remand, TRRC abandoned its plans vis-à-vis TRR II and III in favor of the Ashland to Miles City route.<sup>15</sup> Thus after 25 years, TRR was sent back to the drawing

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<sup>10</sup> *Tongue River R.R. Co.—Construction and Operation—Western Alignment*, Finance Docket No. 30186 (Sub-No. 3), slip op. at 6 (STB served Oct. 9, 2007).

<sup>11</sup> *Id.* at 6.

<sup>12</sup> *Id.* at 7.

<sup>13</sup> *Id.*

<sup>14</sup> *Northern Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1059 (9th Cir. 2011).

<sup>15</sup> *Tongue River R.R. Co., Inc.—Rail Construction and Operation in Custer, Powder River and Rosebud Cntys., Mont.*, Finance Docket No. 30186, *Tongue River R.R. Co.—Construction and Operation—Ashland to Decker, Mont.*, Finance Docket No. 30186 (Sub-No. 2), *Tongue River R.R. Co., Inc.—Construction and Operation—Western Alignment*, Finance Docket No. 30186 (Sub-No. 3), slip op. at 2 (STB served Jun. 18, 2012).

board. Not an inch of track had been laid. Yet the landowners and public continued to bear the brunt of the uncertainty over the project, because TRRC refused to abandon its plans. The Board now demanded an entirely new application. In doing so, the Board sought “a complete and current description of TRRC’s plans and financial fitness, and any replies raising concerns about TRRC’s revised application that might be filed.”<sup>16</sup>

TRRC thereafter filed a revised application for the Miles City alignment of the Tongue River Railroad.<sup>17</sup> However, the Board rejected the revised application as “merely asking the Board to authorize certain refinements to the line approved in 1986 in Tongue River I.”<sup>18</sup> The Board therefore directed TRRC to submit a supplemental application so it could examine the transportation merits supporting the “entire Tongue River I line.”<sup>19</sup> TRRC submitted its revised application on December 17, 2012, once again switching plans, this time seeking authorization for a rail line that would run from Ashland to Colstrip, MT.<sup>20</sup> This new line impacted a new set of landowners. TRRC also switched the intended destination of its coal, recognizing the rapid demise of the domestic coal

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<sup>16</sup> *Id.* at 9.

<sup>17</sup> Tongue River R.R. Co., Inc.—Rail Construction and Operation—In Custer, Powder River, and Rosebud Counties, Mont., Revised Application for Construction and Operation Authority (Oct. 16, 2012).

<sup>18</sup> *Tongue River R.R. Co., Inc.—Rail Construction and Operation in Custer, Powder River and Rosebud Cntys., Mont.*, Finance Docket No. 30186, slip op. at 2 (STB served Nov. 1, 2012).

<sup>19</sup> *Id.* at 2–3.

<sup>20</sup> Tongue River R.R. Co., Inc., Suppl. App. for Construction and Operation Authority (Dec. 17, 2012).

industry. TRRC pointed the new route towards the West Coast, and Arch coal purchased an interest in a proposed coal export terminal in Washington State.

Once again the public was called to use its resources to attend hearings, file written comments, hire experts and so forth, all of which they did. Once again farmers and ranchers had to interrupt their lives to participate in the administrative process to protect their property. On April 2, 2013, Northern Plains filed its comments on TRRC's Supplemental Application.<sup>21</sup> TRRC replied to the comments on June 7, 2013 and included substantial amounts of new information in support of its application.<sup>22</sup> Northern Plains then filed a Sur-Reply on July 2, 2013, which included a renewed request to conduct limited discovery.<sup>23</sup> On August 9, 2013, TRRC objected to Northern Plains' Sur-Reply and filed a Reply that included objections to Northern Plains' renewed request for discovery.<sup>24</sup>

On August 27, 2013, the Board accepted Northern Plains' Sur-Reply and granted its request for discovery in this proceeding.<sup>25</sup> The Board noted that this proceeding involves a "number of important and complex issues" that warrant further development

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<sup>21</sup> Northern Plains Res. Council, Comments to Tongue River R.R. Co.'s Suppl. App. (Apr. 2, 2013).

<sup>22</sup> Tongue River R.R. Co.'s Reply Comments in Support of Its Suppl. App. for Construction and Operation Authority (Jun. 7, 2013).

<sup>23</sup> Northern Plains Res. Council, Sur-Reply to TRRC June 7, 2013 Reply to Comments (Jul. 2, 2013).

<sup>24</sup> Tongue River R.R. Co., Inc.'s Reply to Northern Plains Res. Council and Rocker Six Cattle Co.'s Surreply (Aug. 9, 2013).

<sup>25</sup> *Tongue River R.R. Co., Inc.—Rail Construction and Operation—In Custer, Powder River and Rosebud Cntys., Mont.*, Finance Docket No. 30186 (STB served Aug. 27, 2013).

of evidence through discovery.<sup>26</sup> The Decision recognized four issues raised by Northern Plains in its request for discovery: (1) inconsistencies in TRRC’s pleadings, (2) the credulity of TRRC’s evidence, (3) the level of commitment to the project from TRRC’s financial backers (Arch Coal, BNSF Railway, and TRR Financing), and (4) Arch’s estimates of demand for the coal.<sup>27</sup> The need for discovery, reflected in Northern Plains’ filings, was based on the shaky financial projections espoused by TRRC in its revised application. With both the domestic and foreign coal markets in free-fall, TRRC was still projecting a need for coal from Arch’s proposed Otter Creek mine.

On January 13, 2014, Northern Plains filed a Motion to Compel due to TRRC’s withholding highly relevant documents from discovery, including: (1) documents related to Otter Creek Mine economics; (2) factors influencing demand for Montana coal; (3) TRRC’s finances and financial relationships involved in the TRRC project; and (4) documents related to demand for Wyoming Powder River Basin coal.<sup>28</sup>

On September 9, 2014, the Board granted Northern Plains’ Motion to Compel with respect to this information and rejected TRRC’s claims.<sup>29</sup> TRRC and Northern Plains thereafter agreed to set December 31, 2014 as the deadline for producing documents. However, shortly after the parties agreed to the schedule, TRRC indicated

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<sup>26</sup> *Id.* at 3.

<sup>27</sup> *Id.*

<sup>28</sup> Northern Plains Res. Council’s Mot. to Compel (Jan. 13, 2014).

<sup>29</sup> *Tongue River R.R. Co., Inc.—Rail Construction and Operation in Custer, Powder River and Rosebud Cntys., Mont.*, Finance Docket No. 30186 (STB served Sep. 10, 2014).



for the first time that it would not produce any documents from the nearly one-year period between Northern Plains' September 2013 document requests and the Board's September 2014 Order. Therefore, before the discovery period expired, Northern Plains filed a second Motion to Compel for this set of documents.<sup>30</sup> Northern Plains then deposed two Arch Coal employees and two BNSF employees, the final deposition occurring on March 3, 2015.

On March 25, 2015, Northern Plains filed its initial post-discovery comments opposing the Colstrip alignment.<sup>31</sup> The comments, supported by internal Arch and BNSF documents, testimony obtained during depositions, and two expert reports, demonstrated: (1) weak coal markets domestically and internationally establishing a lack of demand and need for this fifth iteration of the Tongue River Railroad, (2) TRRC and Arch's lack of financial fitness, and (3) that the Colstrip alignment was not in the public interest.

On May 14, 2015, TRRC filed its reply to Northern Plains' comments, having received an extension that allowed it to support its reply with information from the Board's draft EIS for Colstrip alignment.<sup>32</sup>

On August 19, 2015, the Board granted Northern Plains' second Motion to Compel and ordered TRRC to supplement its discovery responses by October 19, 2015.<sup>33</sup>

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<sup>30</sup> Northern Plains Res. Council's Mot. to Compel Suppl. Doc. Production (Dec. 29, 2014).

<sup>31</sup> Comments of Northern Plains Res. Council and Rocker Six Cattle Co. to Tongue River R.R. Co.'s Suppl. App. (Mar. 27, 2015).

<sup>32</sup> Tongue River R.R. Co., Inc.'s Suppl. Reply to the Suppl. Comments of NPRC and of Smart-386 (May 14, 2015).

TRRC, with Northern Plains’ consent, sought and received an extension to supplement discovery by November 16, 2015. TRRC counsel then contacted Northern Plains’ counsel on November 12, 2015 seeking consent for extending the discovery deadline again, this time until December 7, 2015. TRRC’s counsel explained that additional time was needed “because we have been diverted by other deadlines” and would raise Northern Plains’ request for rolling production with TRRC, BNSF and Arch. Northern Plains’ counsel consented to this second extension request, which TRRC indicated “should not delay the resolution of TRRC’s application.”<sup>34</sup>

On November 25, 2015, less than two weeks later, TRRC filed two petitions. The first sought to stay the discovery deadlines and the second sought to hold these proceedings in abeyance.<sup>35</sup> The Board granted TRRC’s petition to stay discovery deadlines pending its decision on TRRC’s Abeyance Petition.

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<sup>33</sup> *Tongue River R.R. Co., Inc.—Rail Construction and Operation—In Custer, Powder River and Rosebud Cntys., Mont.*, Finance Docket No. 30186 (STB served Aug. 19, 2015).

<sup>34</sup> Unopposed Mot. of Tongue River R.R. Co., Inc. for Extension of Time to Complete Suppl. Production (Nov. 12, 2015).

<sup>35</sup> Pet. of Tongue River R.R. Co., Inc. to Stay Deadlines (Nov. 25, 2015); Abeyance Petition.

This longstanding history is summed up in the table below:

Alignment	Application	Approved	Constructed?
TRR I Ashland to Miles City	1983	1986	No
TRR II Decker to Ashland	1991	1996	Abandoned Plans
TRR III Western Alignment	1998	2007	Abandoned Plans
TRR IV Ashland to Miles City	Oct. 2012	Rejected	No
TRR V Ashland to Colstrip	Dec. 2012	Pending	Seeking indefinite abeyance

## ARGUMENT

### I. THE BOARD SHOULD DENY TRRC’S APPLICATION AND DISMISS IT WITH PREJUDICE

The Board should deny TRRC’s application and dismiss it with prejudice. TRRC finally admits to what Northern Plains has argued since the Board reopened this proceeding—*there is no market for Otter Creek coal*.<sup>36</sup> If there were a market for this coal—and if Arch had the financial resources to develop it—TRRC would not hesitate to meet its discovery deadline and request a prompt decision from the Board.<sup>37</sup> However,

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<sup>36</sup> Abeyance Petition at 3. TRRC claims the market weakness is “near-term,” but presents no evidence supporting its vague claim. Indeed, the record already before the Board demonstrates the market is in a long-term, structural decline. Moreover, Arch is warning investors of its likely need to file for bankruptcy in the “near term.” Arch 10-Q at 45.

<sup>37</sup> Indeed, TRRC has accused Northern Plains of delay throughout these proceedings. *See e.g., Tongue River R.R. Co., Inc.’s Reply to Northern Plains Res. Council and Rocker Six Cattle Co.’s Surreply* (Aug. 9, 2013) at 8 (“[Northern Plains’] pending request for an extended procedural schedule so that it can pursue discovery from TRRC’s coal marketing expert is simply another delaying tactic.”); *Tongue River R.R. Co., Inc.’s Suppl. Reply to the Suppl. Comments of NPRC and of Smart-386* (May 14, 2015) at 28 (“The presentation of these arguments at this late stage of this proceeding underscores

there is no foreseeable market for Otter Creek coal. TRRC is merely trying to save face while hoping for a miracle—that perhaps some day, years or decades from now, Arch will still be a viable business, natural gas prices will spike, environmental regulations that drastically reduce domestic coal consumption will be scaled back, renewable energies will lose momentum, domestic and international coal markets will recover, and investors will be willing to make a \$1 billion investment to develop Otter Creek and the Tongue River Railroad.

Northern Plains has expended tremendous resources demonstrating the inevitable collapse of this project in the face of wildly inaccurate statements and predictions from TRRC. The Board too has expended considerable resources evaluating TRRC’s three-decade romp through countless administrative processes. At the same time landowners have endured what essentially creates a cloud on the titles of their farms and ranches because of the uncertainty of condemnation proceedings. Now TRRC offers a misleading Petition for Abeyance. The TRRC application deserves nothing short of denial and dismissal with prejudice.

**A. TRRC Misled the Board by Omitting Material Facts About Arch’s Financial Condition and Looming Bankruptcy.**

Throughout these proceedings, TRRC argued that this project would move forward because its owners—including Arch—are “sophisticated, financially stable

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NPRC’s strategy of seeking multiple bites at the apple in an obvious continuation of its effort to delay and complicate this proceeding.”).

companies”<sup>38</sup> with “substantial resources” and “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.”<sup>39</sup> The application itself claims that Arch may finance the \$416 million railroad through a 100% equity investment.<sup>40</sup> Indeed, TRRC claimed, “[w]here industry players are prepared to dedicate resources to a significant mine and the railroad needed to transport the mine’s product to market, the STB has no grounds for finding that construction and operation are inconsistent with the public convenience and necessity.”<sup>41</sup>

While TRRC has been willing to inform the Board of Arch’s alleged financial strength, it has conveniently omitted statements about Arch’s financial weaknesses. Fortunately, securities regulations require Arch to disclose material information to investors. The Board should be aware of Arch’s statements because they are highly relevant to the demand and need for the proposed rail line and TRRC’s financial fitness.<sup>42</sup> Moreover, these statements further illustrate the seriousness of TRRC’s omission.

On net losses:

[Arch] incurred a net loss for the years ended 2014, 2013 and 2012 and will report a net loss in the current year as well. Additionally, in 2014 and 2015, the Company has been unable to

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<sup>38</sup> Tongue River R.R. Co.’s Reply Comments in Support of Its Suppl. Appl. for Construction and Operation Authority 28 (Jun. 7, 2013).

<sup>39</sup> *Id.* at 26.

<sup>40</sup> Tongue River R.R. Co., Inc., Suppl. App. for Construction and Operation Authority 31 (Dec. 17, 2012).

<sup>41</sup> Suppl. App. to Construct at 21.

<sup>42</sup> As the Board is aware, TRRC is merely a shell corporation dependent on contributions from its owners.

generate sufficient cash to cover interest expense and capital expenditures.<sup>43</sup>

On cash flow and ability to access capital markets:

[Arch,] due to current market conditions, expect[s] to continue to use cash and report losses for the foreseeable future. Our EBITDA has been insufficient to cover our interest expense and capital expenditures, our debt to EBITDA leverage levels have become unsustainably high, and our debt has traded at a substantial discount to par, rendering us unable to access the capital markets for new capital.<sup>44</sup>

On its ability to comply with mine reclamation requirements:

There can be no assurance that the amount of our self-bonding obligations will not be increased or that we will continue to qualify to self-bond. To the extent we are unable to maintain our current level of self-bonding, due to legislative or regulatory changes or changes in our financial condition, ***our costs would increase and it could have a material adverse effect on our financial condition and results of operations, as well as cast substantial doubt on our ability to continue as a going concern.***<sup>45</sup>

On its ability to continue as a going concern:

***We have concluded that we need to restructure our balance sheet to continue as a going concern over the long term, but can provide no assurances of the terms thereof or how it will impact our security holders.***<sup>46</sup>

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<sup>43</sup> Arch 10-Q at 7.

<sup>44</sup> *Id.* at 30.

<sup>45</sup> *Id.* at 44 (emphasis added).

<sup>46</sup> *Id.* at 45 (emphasis in original).

On its looming bankruptcy:

[A Chapter 11] proceeding ***could be commenced in the near term***. If a plan of reorganization is implemented in a bankruptcy proceeding, it is likely that holders of claims and interests with respect to, or rights to acquire our equity securities, would likely be entitled to little or no recovery, and those claims and interests would likely be canceled for little or no consideration. If that were to occur, we anticipate that all, or substantially all, of the value of all investments in our common stock will be lost and that our equity holders would lose all or substantially all of their investment. It is also likely that our other stakeholders, including our secured and unsecured creditors, will receive substantially less than the amount of their claims.<sup>47</sup>

On risks due to the potential restructuring:

Due to our potential for restructuring, there is risk that, among other things: ***third parties lose confidence in our ability to continue to produce coal, which could impact our ability to execute on our business strategy***; . . . we could lose some or a significant portion of our liquidity, either due to stricter credit terms from suppliers, or, in the event we undertake a Chapter 11 proceeding and conclude that we need to procure but we cannot obtain any needed debtor-in-possession financing or provide adequate protection to certain secured lenders to permit us to access some or all of our cash; and our suppliers, hedge counterparties, vendors and service providers could seek to renegotiate the terms of our arrangements, terminate their relationship with us or require financial assurances from us.<sup>48</sup>

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<sup>47</sup> *Id.* (emphasis added).

<sup>48</sup> *Id.* (emphasis added).

These statements indicate Arch would not be able to open Otter Creek even if it secured a judicially affirmed mining permit. This is the real reason why the Board would find “there is no mine for the TRRC line to serve.”<sup>49</sup>

**B. TRRC’s Newfound Concern Over the Mining Permit is Highly Misleading.**

TRRC’s newfound concern over Arch’s pending mining application at the MDEQ is absolutely incredulous. Ever since the Ninth Circuit Court of Appeals remanded the TRR II and III decisions, TRRC has sought the Board’s expedited approval.<sup>50</sup> For example, months *before* Arch’s subsidiary applied for a mining permit, TRRC informed the Board of the “need to move forward toward construction of the Line *as quickly as possible*” and “*urge[d]* the Board to move forward *promptly* in this proceeding.”<sup>51</sup> Indeed, in the months *after* the MDEQ issued its most recent deficiency letter, which is the cornerstone of the request for an abeyance, TRRC argued that it had “presented *ample evidence* . . . showing beyond doubt that there is a public need for the TRRC rail line.”<sup>52</sup> The evidence TRRC once considered “ample” is now full of “uncertainty” and “risk.”<sup>53</sup>

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<sup>49</sup> Abeyance Petition at 4 (arguing that the apparently minimal risk of MDEQ denying the Otter Creek permit justifies holding these proceedings in abeyance).

<sup>50</sup> Notably, after years of wasting the Board’s resources, not to mention Northern Plains’, TRRC voluntarily abandoned TRR II and III following remand.

<sup>51</sup> Tongue River R.R. Co., Inc.’s Statement of Intent Regarding the Tongue River R.R. Co. Rail Line (Apr. 19, 2012) at 7 (emphasis added).

<sup>52</sup> Tongue River R.R. Co., Inc.’s Suppl. Reply to the Suppl. Comments of NPRC and of Smart-386 at 10 (May 14, 2015) (emphasis added).

<sup>53</sup> Abeyance Petition at 4.



TRRC’s apparent concern over wasting the Board’s resources due to the “level of risk inherent in any permitting proceeding”<sup>54</sup>—a risk that has existed from day one—is a charade. It claims that an abeyance is needed to “allow for any uncertainty with respect to [the Otter Creek] mine permitting decision to be removed from the TRRC proceeding at the Board.”<sup>55</sup> If TRRC believed a judicially-affirmed mining permit were necessary for the Board’s decision on the transportation merits, it should never have wasted the Board’s time and resources with the now pending application. In reality, the mining permit has only now become an issue because Arch’s looming bankruptcy and the threat of having to reveal damaging internal documents make the Board’s denial of TRRC’s application all too real.<sup>56</sup>

TRRC’s concern over wasting the Board’s resources in the environmental review is similarly dubious. TRRC is well aware that the Ninth Circuit remanded the TRR II & III decisions after finding, among other things, that the final EIS relied on stale data.<sup>57</sup> Holding the application and the Draft EIS in abeyance indefinitely would similarly “vitiating the extensive environmental fact-gathering and impact-assessment work that has already been done . . . .”<sup>58</sup> Once again the Board’s resources would be wasted on yet another NEPA process that bears no fruit.

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> The Board need not wait to complete an EIS to deny a railroad application where, as here, the project’s transportation merits are lacking.

<sup>57</sup> *Northern Plains Res. Council*, 668 F.3d 1067, 1085–87 (9th Cir. 2011).

<sup>58</sup> Abeyance Petition at 4.

**C. Placing the Proceeding in Abeyance Indefinitely Would Substantially Prejudice Northern Plains and its Members, Including Rocker Six.**

The Board is well aware that Northern Plains has spent considerable resources opposing TRRC's application. These efforts have included written discovery, depositions, and verified statements from multiple experts, farmers, and ranchers. Northern Plains' efforts were premised on creating a complete record from which the Board could render a final decision. It would substantially prejudice Northern Plains to have to go through this process again if the Board grants TRRC's request for an indefinite abeyance.

Placing these proceedings in abeyance at the eleventh hour is also prejudicial given TRRC's substantial delay. TRRC has throughout these proceedings obtained numerous extension requests by claiming "the requested extension should not prejudice any party because it should not delay the resolution of TRRC's application."<sup>59</sup> Yet TRRC's latest extension request moved the deadline for production to December 7, 2015.<sup>60</sup> This extension conveniently gave TRRC breathing room to avoid supplementing discovery altogether and seek an abeyance.

The Board should consider the equitable doctrine of laches, which "is not merely delay, but delay that works a disadvantage to another." *Home Transp. Co., Inc. - Modification of Certificate*, 129 I.C.C. 842, 859 (ICC Nov. 22, 1977); *see also Illinois*

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<sup>59</sup> *See, e.g.*, Unopposed Mot. of Tongue River R.R. Co., Inc. For Extension Of Time to Complete Suppl. Produc. at 2 (Nov. 12, 2015).

<sup>60</sup> Counsel for TRRC failed to inform Northern Plains of its plan to put off supplemental discovery indefinitely.

*Cent. Gulf R.R. Co.-Abandonment-in Jackson & Williamson Ctys., II*, AB-43, 1988 WL 225640, at \*1 (ICC Jan. 6, 1988) (filing made more than 1 year after the certificate and decision was served barred by laches). Here, where TRRC is on record asserting there is “*ample evidence* . . . showing beyond doubt that there is a public need for the TRRC rail line,” TRRC’s request to delay a final decision indefinitely can only work to disadvantage Northern Plains.<sup>61</sup> By holding the proceeding in abeyance, TRRC is hoping to sweep away the existing record, including any unfavorable admissions from documents it has yet to produce. This is a classic example of a party using delay to obtain an unfair tactical advantage that the Board should summarily reject.

**D. Holding this Proceeding in Abeyance Indefinitely Would Cause Substantial and Undue Hardship to Northern Plains’ Members, Including Rocker Six.**

Northern Plains submitted verified statements in earlier filings that demonstrate the substantial and undue hardship caused by TRRC’s proposal. As noted there, “TRRC’s plans to construct a railroad in the Montana PRB have held private landowners captive for over three decades.”<sup>62</sup> That the railroad is not yet constructed is of no moment to landowners like Clint McRae, a fourth-generation rancher, and Mark Fix, a rancher and farmer. Both have suffered real and significant economic harm, as have others. Mr. McRae sums up the problem:

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<sup>61</sup> Tongue River R.R. Co., Inc.’s Suppl. Reply to the Suppl. Comments of NPRC and of Smart-386 at 10 (emphasis added).

<sup>62</sup> Comments of Northern Plains Res. Council and Rocker Six Cattle Co. to Tongue River R.R. Co.’s Suppl. App. at 31(Mar. 27, 2015).

Ranching is not an easy business and we need to be efficient to compete in the global market. We have put our business and lives on hold because any improvements we make to the ranch could be severely impacted by TRRC's eminent domain rights. We would not be compensated for these losses. The restrictions TRR proposals have placed on our ranch has caused uncertainty in our future.<sup>63</sup>

Property owners also suffer real economic harm when trying to sell property impacted by one of the many Tongue River Railroad alignments. Roger Jacobs, a licensed real estate professional who represents prospective buyers and sellers of ranchland in the intermountain west, stated that buyers often find it "too risky" to invest in properties that are potentially burdened by a railroad.<sup>64</sup> It is entirely unfair to subject these and other landowners to years of further harm.

The impact to private property owners has been exacerbated by TRRC's ever-shifting and never fully defined railroad line. The current DEIS analyzes routes north to Miles City and west to Colstrip. As a result, dozens of ranches and farms are potentially subject to condemnation proceedings. TRRC has never defined its alignment with precision. As a result, ranchers and farmers are impacted in day-to-day decisions like where to develop new water resources, and new pastures. Far from the corporate boardrooms that continually hatch schemes to build this project, the prospect of TRRC affects real people and their property on a daily basis. TRRC's callous disregard for

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<sup>63</sup> *Id.* at 33.

<sup>64</sup> *Id.* at 34.

property rights and willingness to hold eminent domain proceedings over the heads of farmers and ranchers for 30-plus years is decidedly not in the public interest.

**E. TRRC's Authorities are Unavailing.**

TRRC's authorities are unavailing and easily distinguished. In *James Riffin—Acquisition and Operation—Veneer Spur—In Baltimore County, Md.*, Finance Docket No. 35264 (STB served May 29, 2009), an applicant sought two decisions from the Board. First, the applicant sought to acquire and operate 400 feet of track under 49 U.S.C. § 10902. Second, and on the same day, the applicant sought a declaratory order to determine: (1) whether it became a common carrier by way of an earlier transaction; and (2) whether operating the 400-foot spur would constitute an additional line of railroad. *Id.* at 1. The Board held the declaratory order in abeyance because it would “directly address” two important requirements for the 10902 petition. *Id.* Consequently, proceeding with both “simultaneously could be wasteful and duplicative.” *Id.*

The TRRC proceedings are distinguishable for several reasons. First, unlike *James Riffin*, TRRC has only one proceeding before the Board. The risk of addressing the same issues in two dockets simultaneously does not exist here. Second, *James Riffin* did not address a railroad project that had been alive in one form or another for more than three decades, and which would have reached a decision on the merits but for the applicant's unwillingness to continue. Likewise, the applicant in *James Riffin* had not already used up tremendous Board resources. TRRC's request for an abeyance is more properly viewed as an attempt to delay a near-final proceeding because the applicant is concerned that the Board will deny its application.

*Kansas City Southern Ry.—Construction and Operation Exemption—Geismar Industrial Area Near Gonzalez and Sorrento, LA*, Finance Docket No. 32530 (STB served Aug. 27, 1998) likewise involved two Board proceedings. There, a railway company (Kansas City Southern or “KCS”) applied to the Board to construct and operate nine miles of track to serve an industrial area. *Id.* at 1. The Board decided to hold the KCS application in abeyance because, pending a Board-approved merger between two other railway companies, KCS would be able to serve the industrial area using existing track and thereby avoid disruptive environmental consequences. *Id.* at 2. Like *James Riffin*, and unlike the TRRC application, *Kansas City Southern* involved multiple, related proceedings before the Board.

In *PSI Energy, Inc. v. CSX Transp., Inc. and Soo Line R.R. Co.*, Docket No. 42034 (STB served Sept. 11, 1998), the Board suspended a rate case while waiting for a federal court to resolve a dispute between the parties over the scope of a contract. The Board noted its common sense practice of suspending a rate case while the courts resolve disputed contracts, “the interpretation of which is necessary to resolve essential issues in a railroad rate complaint . . . .” *Id.* at 3. Here, the timing of the Otter Creek mining permit is not essential to TRRC’s application because Arch could not open the mine due to market weakness and its financial even if MDEQ were to issue the permit today. Moreover, TRRC has never claimed that the timing of the Otter Creek permit is essential to its pending application.

In *Kansas City Southern—Control—The Kansas City Southern Ry., Gateway Eastern Ry., and The Texas Mexican Ry.*, Finance Docket No. 34342 (STB served Oct. 8, 2003), the Board held a railroad control proceeding in abeyance when the original efforts

of Kansas City Southern to acquire another railroad fell through, but additional efforts were continuing. The docket had been open less than a year at the time of the decision and further did not require preparation of an environmental impact statement. *See Kansas City Southern—Control—The Kansas City Southern Ry., Gateway Eastern Ry., and The Texas Mexican Ry.*, Finance Docket No. 34342, slip op. at 1, 19 (STB served Jun. 9, 2003); *see also* Decision. No. 12, slip op. at 24 (STB served Nov. 29, 2004). Here, in contrast, the TRRC project requires an EIS and does not involve a merger and control transaction between two companies or a short-lived proceeding.

In *Arizona Public Service Co. & Pacificorp v. The Burlington N. and Santa Fe Ry. Co.*, Docket No. 42091 (STB served Jan. 14, 2005), the Board granted an unopposed request to hold a rate case in abeyance pending judicial review of a dispute between the same parties in another docket. The complainant filed the request for an abeyance on the same day it filed its complaint, noting that there was overlap between the proceedings and that it might withdraw the later rate case if it succeeded at court. *Id.* at 1. Thus, unlike here, resources were not wasted and all parties agreed holding the proceeding in abeyance was reasonable. *Id.*

TRRC also cites to *Ohio Dept. of Transp.—Petition for Declaratory Order—Status of Track at Findlay, Hancock County, OH*, slip op. at 1 (STB served Feb. 17, 2004), but the quoted language does not appear in that decision. Instead, it appears that TRRC intended to cite *City of Creede, Co—Petition for Declaratory Order*, Docket No. 34376, *Union Pac. R.R. Co.—Abandonment Exemption-in Rio Grande & Mineral Ctys., CO*, Docket No. AB-33 (Sub-No. 132X), slip op. at 3 (STB served Nov. 3, 2003).

However, again, this decision involved two matters before the Board; one a petition for a

declaratory order; the other, a petition to reopen. *Id.* at 1–2. The Board held the declaratory order proceeding in abeyance while it decided the petition to reopen. *Id.* at 3.

If the Board relies on any of its precedent, it should rely on *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). There, the ICC denied an application to construct and operate a rail line. *Id.* at \*2. The ICC, voted to deny the application and issued a press release on the vote before drafting its final decision. *Id.* The applicant then moved to dismiss its application with prejudice before the ICC issued a written decision. *Id.*<sup>65</sup> Groups opposing the project (“protestants”) argued that the case had been “pending for a long time”<sup>66</sup> and instead sought a formal decision “to ensure the matter does not or is not re-initiated by the applicant or some successor carrier in a later point in time.” *Id.* at \*2. The ICC decided to issue a written decision because it was the first time it had denied an application based on evidence from an EIS and believed the “explanation [would] provide useful guidance to the public in future cases involving construction of rail lines.” *Id.* The ICC also noted a written decision would help protect the protestant’s interests while also recognizing dismissal with prejudice would have res judicata effect. *Id.* at \*2 n.9. Similarly, the Board should deny and dismiss TRRC’s application with prejudice.

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<sup>65</sup> The reported decision does not indicate why the applicant sought to dismiss the application with prejudice instead of without prejudice, only noting the applicant “merely [argued] that it was not aware of any opposition to dismissal.” *Indiana & Ohio Railway Company*, 1993 WL 287692 at \*2.

<sup>66</sup> The application was pending for less than three years.



## CONCLUSION

The Tongue River Railroad project has been languishing for more than thirty years. It is time for the Board to deny the application, particularly in light of TRRC's admission that there is no demand and need for the railroad and its misleading request for an abeyance. Northern Plains and its members should be free of this burden once and for all.

Dated this 11<sup>th</sup> day of December, 2015



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**CERTIFICATE OF SERVICE**

I certify that the foregoing has been served by U.S. mail on all parties of record on this 11<sup>th</sup> day of December 2015.



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