BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 30186

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

COMMENTS OF NORTHERN PLAINS RESOURCE COUNCIL AND ROCKER SIX CATTLE COMPANY TO TONGUE RIVER RAILROAD COMPANY'S SUPPLEMENTAL APPLICATION

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INTRODUCTION

Northern Plains Resource Council and Rocker Six Cattle Company (collectively "Northern Plains") submit the following comments in opposition to the Tongue River Railroad Company's ("TRRC") application to construct a railroad for serving the Otter Creek Mine. The Board should deny the application because the Tongue River Railroad ("TRR") project is unequivocally inconsistent with the public convenience and necessity. The TRR was speculative in 1983 when first proposed to the Board's predecessor and today the project is not only speculative, it is irrational.

In August 2013, the Board granted Northern Plains' request to conduct limited discovery to, among other things, test the veracity of TRRC's thinly supported application and related filings. Having completed discovery, it is apparent that any optimism TRRC and its owners expressed in their filings is not shared privately. Northern Plains can now confirm that TRRC's owners no longer support their earlier claims that "market forces are coalescing" behind Otter Creek,[1] that transporting coal out of Otter Creek is "critical to meeting energy needs,"[2] and that "there is an *ample* reason to believe that there will be a market for the coal once it becomes available for transport."[3] Indeed, Arch Coal, Inc. ("Arch"), one of TRRC's owners and the owner of Otter Creek, [redacted] The domestic and seaborne coal markets are in such poor shape that Arch has incurred over $1 billion in losses over the last three years, plans to pay $50 million in liquidated

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[1] TRRC Supp. App. to Constr. at 21.
[2] V.S. of Stevan Bobb at 5 (Dec. 14, 2012).
[3] Letter from Coburn to Blodgett & Summerville at 1 (Feb. 6, 2013) (emphasis added).
[4] Ex. A, Tr. of Dep. of Andrew Blumenfeld at 58:1-3; 60:3-7 [hereinafter Blumenfeld Depo.].

damages for unused coal export terminal capacity in 2015, and continues to sell non-core assets to maintain liquidity to pay off mountainous debt.[5] This collapsing coal market is not cyclical; it is part of a long-term structural change.

The BNSF Railway Company ("BNSF"), TRRC's other principal owner, has come to the same conclusion—[redacted][6] Despite contrary representations to the Board, BNSF [redacted]

> [redacted].[7]

[redacted].[8]

Due to poor market conditions, Arch is also close to insolvency. It continues to incur massive losses year over year, has roughly $1 billion in debt coming due in 2018,

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[5] Arch Coal, Inc., Sec. & Exch. Comm'n (Form 10-K) (Comm'n File No. 1-13105) (Nov. 7, 2014).
[6] Ex. B, Tr. of Dep. of Stevan Bobb at 42:19-25 [hereinafter Bobb Depo.].
[7] *Id*. at 41:18–42:2.
[8] Ex. C, [redacted]); Ex. A, Blumenfeld Depo. at 108:1–111:23.

and more than $5 billion in debt maturities coming due in 2018-2021.[9] Given its current $1.2 billion in liquidity, Arch is not a company that can afford the [redacted] capital investment to open Otter Creek or the $417 million needed to construct the TRR, certainly not both.

If the Board grants a license for this speculative project, TRRC and its owners will wait with bated breath hoping the markets rebound while Northern Plains' members put their lives on hold fearing TRRC's condemnation power. The power of eminent domain for speculative projects creates significant hardships to landowners along the proposed route. As one federal court has noted, it is an "abuse of the condemnation process" to initiate a "condemnation action for a project that was always speculative, at best."[11] Such actions "squander[] not only a great deal of the Defendants' hard-earned money, but also a great deal of [the] Court's time."[12]

As with the earlier iterations of the TRR, the mere right to condemn private property creates real and significant hardship to Northern Plains' members. The threat of the TRR passing through private lands prevents ranchers and farmers improving their operations since the railroad could literally destroy the investment. The threat also creates a significant cloud on the property making it difficult, if not impossible to sell at a reasonable price. Northern Plains' members have suffered through TRRC proposal after proposal for 30 years and it is time for the Board to put an end to it. TRRC and its owners

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[9] Arch Coal, Inc., Sec. & Exch. Comm'n (Form 8-K) (Comm'n File No. 1-13105) 1 (Feb. 3, 2015) [hereinafter Arch 2015 Form 8-K].

[10] Ex. D, [redacted]); Ex. E, Tr. of Dep. of William Rowlands [hereinafter Rowlands Depo.].

[11] Ex. F, Order Denying Defendants' Application for Costs, *Dakota, Minn. & E. R.R. Corp. v. Tracy*, No. 07-CV-00144-WFD, ¶13 (D. Wyo. July 20, 2011).

[12] *Id.*

cannot provide any reasonable assurances that Otter Creek will open in the foreseeable future or that the TRR will ever be built. It is not in the public interest to license speculative projects that put ranchers and farmers in the crosshairs.

Northern Plains respectfully requests that the Board deny TRRC's application. Northern Plains has consistently demonstrated that the project fails to meet the Board's well-established test for demonstrating public convenience and necessity. There is no public demand or need for the service, the applicant is not financially fit, and the project is demonstrably not within the public interest. Because TRRC fails to meet each prong of this test, the Board should decline to issue TRRC a Certificate of Public Convenience and Necessity.

PROCEDURAL BACKGROUND

TRRC first received a permit to construct an 89-mile route between Miles City, Montana, and Ashland, Montana, in 1985 ("TRR I"). In 1989, TRRC asked the Interstate Commerce Commission ("ICC") to extend TRR I to Decker, Montana ("TRR II"). In 1998, with no notable progress made toward building a railroad, TRRC applied to the Board to construct the "Western Alignment" ("TRR III") to modify TRR II. The Board approved TRR III in 2007, which TRRC later abandoned.

Northern Plains appealed TRR II and TRR III to the Ninth Circuit. Having found violations of the National Environmental Policy Act ("NEPA"), the court remanded TRR II and III to the Board. On remand, TRRC filed a Statement of Intent with the Board claiming it was no longer interested in constructing TRR II or III, and requested the Board re-open the original route in TRR I. On June 18, 2012, the Board reopened TRR I, but required TRRC to file a revised application due to "changed circumstances" in the proposed route and TRRC's ownership. The Board noted that "[r]equiring a revised application . . . will ensure that, when the Board again considers the transportation merits of TRRC's proposal, it will have before it 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."[13]

The TRRC submitted its Revised Application for the new TRR I on October 16, 2012, proposing the "Miles City Alignment," the TRR I route with minor "refinements."[14] However, the Board rejected the application, noting TRRC's attempt to "incorporate information from the original 1983 application" as support for the current application was too dated to rely on.[15]

TRRC submitted its Supplemental Application on December 17, 2012. The Supplemental Application contained a significantly different route from the previously approved applications. Referred to as the "Colstrip Alignment," the new route proposed to connect a 42-mile rail line terminating at an existing BNSF line and two other termini — one at the proposed Otter Creek Mine, and one at the formerly proposed Montco Mine. The Board accepted the Supplemental Application and published notice in the Federal Register on January 9, 2013.

On April 2, 2013, Northern Plains filed its initial comments on the Supplemental Application ("PCN Comments"). On June 7, 2013, TRRC replied to Northern Plains'

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[13] *Tongue River R.R. Co., Inc. – Rail Constr. and Operation – In Custer, Powder River & Rosebud Cntys., Mont.*, Finance Docket 30186, at 9 (S.T.B., June 18, 2012) (Decision to re-open TRR).
[14] *Tongue River R.R. Co., Inc. – Rail Constr. and Operation – In Custer, Powder River & Rosebud Cntys., Mont.*, Finance Docket 30186 (S.T.B., Oct. 16, 2012).
[15] *Tongue River R.R. Co., Inc. – Rail Constr. and Operation – In Custer, Powder River & Rosebud Cntys., Mont.*, Finance Docket 30186, at 3 (S.T.B., Nov. 1, 2012).

comments. Thereafter, on June 15, 2013, Northern Plains petitioned the Board to issue a revised Procedural Schedule to accommodate limited discovery in this matter.

On July 7, 2013, Northern Plains filed a Sur-reply, which among other things requested limited discovery to address the complex issues in this proceeding. TRRC replied to Northern Plains' Sur-reply on August 9, 2013. On August 27, 2013, the Board accepted Northern Plains' Sur-Reply and granted its request for discovery in this proceeding. The Board noted that this proceeding involves a "number of important and complex issues" that warrant further development of evidence through discovery.[16] 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 Coal's estimates of demand for the coal.[17]

NPRC served TRRC with interrogatories on September 12 and requests for production on September 13, 2013. On October 7, 2013, the TRRC served its responses to interrogatories and requests for documents. TRRC's responses were inadequate and Northern Plains filed a motion to compel with the Board on January 13, 2014.

On September 10, 2014, the Board largely granted Northern Plains' Motion to Compel and ordered TRRC to produce several categories of documents related to the PCN determination.

After TRRC completed its document production, Northern Plains deposed four individuals involved with the TRR: Andrew Blumenfeld, the Vice President of Strategy

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[16] *Tongue River R.R. Co., Inc. – Rail Constr. and Operation – In Custer, Powder River & Rosebud Cntys., Mont.*, Finance Docket 30186, at 3 (S.T.B., Aug. 27, 2013) (NRPC Sur-Reply).
[17] *Id*. at 2-3.

and Analysis at Arch; Mike Rowlands, President of Arch's subsidiary, Otter Creek Coal, LLC; Stevan Bobb, Executive Vice President and Chief Marketing Officer of BNSF and former President of TRRC; and Scott Castelberry, Director of Coal Marketing at BNSF. Messrs. Bobb, Blumenfeld, and Rowlands each provided verified statements in this proceeding.

COMMENTS

I. THE TONGUE RIVER RAILROAD COMPANY'S PROPOSED PROJECT IS INCONSISTENT WITH PUBLIC CONVENIENCE AND NECESSITY.

The Interstate Commerce Commission Termination Act ("ICCTA") prohibits the Board from authorizing the construction and operation of a railroad if it finds doing so would be "inconsistent with the public convenience and necessity."[18] A proposed railroad thus needs a Certificate of Public Convenience and Necessity to proceed. While Congress does not expressly define "public convenience and necessity," the Board evaluates railroad construction projects with the following three-prong test: (1) whether there is a public demand or need for the proposed service; (2) whether the applicant is financially fit to undertake the construction and provide the service; and (3) whether the proposed rail project is in the public interest and will not unduly harm competitors.[19] This is referred to as the "public convenience and necessity" ("PCN") test.

When arguing that a railroad proposal does not meet the PCN test, opponents do not have a "heavy burden of rebuttal."[20] Rather, opponents only need to show "credible

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[18] 49 U.S.C. § 10901(c) (2012).
[19] *N. Plains Res. Council, Inc.*, 668 F.3d at 1092; *Norfolk S. Corp. & Norfolk S. Ry. Co. — Constr. & Operation — In Indiana County, Pa.*, 2003 WL 21132522 at *4 (S.T.B 2003).
[20] *Dakota, Minn. & E.R.R. Corp., Constr. Into the Powder River Basin*, 1998 WL 398189 at *3 (S.T.B. 1998).

evidence challenging the elements that make up the public convenience and necessity determination."[21] Moreover, the Board requires that an applicant supply specific information to meet the PCN requirements rather than mere generalized, speculative statements.[22] If the Board finds that the TRRC's application fails to meet any one of these three requirements the project is inconsistent with the PCN and the Board must deny the application.

A. There is No Public Demand or Need for the TRRC's Proposed Rail Service.

Information obtained from TRRC and its owners in discovery confirms Northern Plains' earlier comments—there is no public demand and need for the TRR. Coal markets are struggling and will not create sufficient demand for Otter Creek in the foreseeable future. Moreover, it is clear that coal markets have deteriorated further since Northern Plains filed its last comments in July 2013. The Board should note that Northern Plains' comments predicted a continued downturn in the markets, a prediction that has proven accurate.

TRRC's filings have painted a different picture of the TRR project and Otter Creek mine. For example, TRRC claimed:

> [M]arket forces are coalescing behind a determination that the coal resource at Otter Creek should be developed and transported. Where 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

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[21] *Id.* at * 11 (internal quotations omitted).
[22] *See id.* at *2 (requiring greater specificity from the applicant in support of a proposed rail line project).

> construction and operation are inconsistent with the public convenience and necessity.[23]

TRRC claimed that transporting coal out of Otter Creek is "critical to meeting energy needs,"[24] and that "there is an *ample* reason to believe that there will be a market for the coal once it becomes available for transport."[25] The Board granted Northern Plains' request for discovery to test the credulity of TRRC's evidence and based on information obtained in discovery, it is clear that none of these assertions hold true.

Market forces are not coalescing around this project and TRRC's owners are <u>not</u> prepared to dedicate significant resources to the TRR and Otter Creek. [redacted]

[redacted]

> [redacted]

[23] TRRC Supp. App. to Const. at 21.
[24] V.S. of Stevan Bobb at 5 (Dec. 14, 2012).
[25] Letter from Coburn to Blodgett & Summerville at 1 (Feb. 6, 2013) (emphasis added).
[26] Ex. A, Blumenfeld Depo. at 60:22–24.
[27] *Id.* at 60:25–61:9; 32:19–47:11 ([redacted]).
Id. at 73:15–74:9.

[redacted][29]

While BNSF may be willing to spend a fraction of its budget on obtaining permits and related development expenses, it is not yet willing to make the $416 million investment necessary to construct the TRR.[30] Arch and BNSF are simply not prepared to—or in Arch's case capable of—dedicating significant resources to the TRR project and Otter Creek.

[redacted] Indeed, there is ample reason to believe that the markets will not support opening Otter Creek for the foreseeable future.

1. *There is No Domestic Demand for Otter Creek and Other Ashland-Area Coal.*

In its original comments to the Board, Northern Plains explained that domestic demand for coal is declining rapidly due to alternative fuels, especially low natural gas prices, as well as pollution control costs and greenhouse gas regulations. Consequently, many electric utilities are retiring their coal-fired power plants or converting to natural gas. Compared to other PRB coal sources, there is even less demand for Otter Creek coal

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[29] Ex. B, Bobb Depo. at 41:18–42:2.
[30] The $416 million estimate for constructing the TRR is not the only cost BNSF would incur. It would also need to upgrade the Nichols Wye at a cost of $37 million. These costs were not presented to the Board in TRRC's application. Ex. G, Stevan Bobb, *Financial Info. For Buffet Letter*, TRR-004549 (Jan. 9, 2013).
[31] V.S. of Stevan Bobb at 5 (Dec. 14, 2012).
[32] Bobb Depo. at 94:12–96:22.

and other Ashland-area coal because electric utilities generally do not prefer high-sodium content coal.

Arch acknowledges [redacted].

[redacted]

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[33] Ex. H, [redacted]
Id. at TRR-038626.
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] Ex. I, [redacted]).
[39] *Id.*

[redacted] These factors among others have led to a structural, long-lasting decline in demand for coal.[41]

The declining market is evident from declining production in the PRB, including Arch's mines. According to SNL Energy ("SNL"),[42] [redacted]

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[40] Ex. H, [redacted]).

See Ex. J, V.S. of Thomas Sanzillo at 4 ("Coal production in the PRB is shrinking due to structural, long-term changes in the domestic and international markets.").

[42] SNL is one of the leading services for energy issues. V.S. of Thomas Sanzillo at 6, n.9; *see also* Ex. A, Blumenfeld Depo. at 38:5–21.

[43] Ex. K, [redacted].

Id.

[45] *Id.*

[46] Ex. L, [redacted].

Blumenfeld Depo. at 56:22–25.

[redacted]

Not only would Otter Creek have to compete with existing idled mines in a weak market, but it would also have to compete for customers that are willing to accept high-sodium content coal, which make up a smaller percentage of the total market. The sodium content of Otter Creek coal is considered high, ranging from 5.8 to 8.8 percent, which is much higher than the 1.2 percent typical of coal from the Southern PRB in Wyoming.[50] Competition for these customers is high given [redacted]

[redacted]

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[48] *Id.* at 57:17– 58:3.
[49] *Id.* at 67:10–12.
[50] Ex. M, Norwest Corp., *Otter Creek Property Summary Report*, E-3 (July 12, 2006) [hereinafter *Norwest Report*].
[51] Ex. A, Blumenfeld Depo. at 55: 16-17
[52] Ex. N, [redacted]).
Id.

[redacted]

[redacted]

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[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] Ex. A, Blumenfeld Depo. at 64:2–3.
[60] *Id.* at 64: 7–10.
[61] *Id.* at 64:11–12.
[62] *Id.* at 64:20–25.

[redacted] Yet, these sources do not present an optimistic forecast for the coal industry.

For example, as shown by the detailed analysis by Northern Plains' witness Thomas Sanzillo, Finance Director for the Institute of Energy Economics and Financial Analysis ("IEEFA"), the trajectory of EIA production estimates is declining, leaving demand insufficient to warrant new mine investment.[65] EIA estimates for production out of the PRB in 2030 declined by 200 mtpa from the EIA's 2011 Annual Energy Outlook ("AEO") to the 2014 AEO (projecting 699 mtpa by 2030 in 2011; and 498 mtpa in 2014). Recent release of the EIA's 2015 Short-Term Energy Outlook ("STEO") suggests that further reductions of the EIA long-term outlook may be imminent.[66] The EIA projections show "very slow growth for the PRB region, if any."[67]

TRRC's witness Mr. Seth Schwartz, President of Energy Ventures Associates ("EVA"), incorrectly interpreted EIA data as showing a huge and growing market for

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[63] *Id.*
[64] *See* Ex. O, [redacted] Similarly, TRRC stated that "the EIA forecast is perhaps the best forecast available. It is an objective forecast published on an annual basis by a knowledgeable, objective third-party." TRRC Supp. App. Reply Comments at 16.
[65] Ex. J, V.S. of Thomas Sanzillo at 17.
[66] *Id.* at 8.
[67] *Id.* at 13.

Otter Creek coal. Mr. Schwartz essentially disregarded the massive decline in coal markets in 2012 by (1) incorrectly attributing the decline to mild weather and a temporary decline in the price of natural gas; and (2) by claiming that the "short-term drop in domestic level coal demand is expected to turn around in 2013."[68] However, by August, when SNL was projecting flat or decreased coal demand for the year, it was clear that the markets were not going to turn around.[69] Mr. Schwartz had access to this information but ignored it.[70] By the end of 2013, PRB production fell from 419 mtpa in 2012 to 407 mtpa.[71] 2012 was not an anomaly.

Mr. Sanzillo also notes Mr. Schwartz's analysis of EIA data was at odds with his own firm's analysis from January 2013. Essentially, EVA noted declines in coal production and coal plant investments were solely attributable to natural gas displacement and extended periods of low natural gas prices.[72] EVA predicted coal markets would not rebound significantly until gas prices rose above $5mm/btu.[73] However, average monthly natural gas prices hit this level only once since January 2013.[74] Ultimately, "[h]ad Mr. Schwartz provided a more circumspect analysis of the long-term impacts of low natural gas prices and reflected actual 2013 coal production in both his statements, his claims would have been confounded by the facts of declining

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[68] *Id.* (citing V.S. of Seth Schwartz (June 2013)).
[69] *Id.*
[70] *Id.* at 11.
[71] *Id.* at 10.
[72] *Id.*
[73] *Id.*
[74] *Id.*

production, slowing markets, plummeting prices and the persistence of low natural gas prices."[75]

Mr. Schwartz's claims about robust growth in the Montana region are similarly problematic. Mr. Schwartz incorrectly claims that the 2013 EIA AEO demand data for Montana coal production he relies on is limited to domestic demand and excludes international demand thereby claiming there is even more demand for Montana coal than the data show.[76] However, this is not true. As Mr. Sanzillo points out, the EIA data is inclusive of domestic production without regard to where the coal may be sold.[77] Mr. Schwartz's analysis also ignores existing competition in this coal-producing region.[78] Several companies have active mines in Montana and they are unlikely to abandon those investments.[79]

A broader review of the EIA estimates show a downward trajectory of production estimates for coal production in Montana, including the 2014 EIA AEO, which lowered the outlook for Montana coal in the 2030 period. As Mr. Sanzillo states, "technically there is some projected growth, but the trajectory of production estimates is declining and is insufficient to warrant new mine investment."[80] Mr. Sanzillo notes that while [redacted] TRRC "rely heavily" upon the EIA as "the best forecast available . . . published on an annual basis by a knowledgeable, objective third-party," they ignore the fact that

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[75] *Id*.
[76] *Id*. at 15, n.44.
[77] *Id*.
[78] *Id*. at 17.
[79] *Id*. at 16.
[80] *Id*. at 17.

the EIA has been drastically reducing its outlook for PRB coal every year since Arch acquired the lease rights for Otter Creek.[81]

The EIA is not the only organization showing declining demand projections for PRB coal. The SNL Coal Supply Forecast as of December 31, 2014 shows that Southern PRB coal production is projected to remain relatively flat through 2025, and Northern PRB production is projected to decrease from 40 mtpa in 2015 to 38 mtpa in 2025.[82] Again, the decrease in production reflects demand reductions, not available resources. The EIA and SNL are two highly reputable organizations [redacted]. Both organizations show declining future demand projections for PRB coal.

Even assuming [redacted], they were still not strong enough to warrant opening the mine. [redacted]

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[81] *Id.* at 8–12; *see also* Ex.A, [redacted]; TRRC Supp. App. Reply Comments at 16.
[82] TRRC Supp. App. Reply Comments at at 29.
[83] Ex. A, [redacted].
[84] Ex. C, [redacted].

[redacted]

In conclusion, domestic demand for coal is declining rapidly due to alternative fuel availability, pollution control costs, and greenhouse gas regulations. As a result, many electric utilities are retiring their coal-fired power plants or converting to natural gas. This has led to a diminishing domestic market for PRB coal, [redacted]

2. *There is No International Market for Otter Creek Coal.*

[redacted] Arch

[86] *Id.* at 59:6–8, 18–25; 60:1–2.
[87] *Id.* at 60:3–7.
[88] *Id.* at 56:3–6, 22–25.
[89] *See* Ex. [redacted]
See Ex. Q, [redacted].
[91] Ex. P [redacted]

invested heavily in increasing port capacity. Arch contracted for greater capacity at existing ports, such as the Ridley Terminal in Prince Rupert, Canada.[92]

Arch also invested in new ports by acquiring a 38 percent interest in Millennium Bulk Terminals – Longview, L.L.C. to build a proposed coal export facility on the Columbia River near Longview, Washington.[93] With the hope for increased West Coast exports, TRRC switched the direction of the proposed TRR route with the Colstrip Alignment, which would reduce the rail distance and cost of shipping to West Coast export terminals, but increase these factors for the traditional domestic market. However, now that the international market has collapsed, the Colstrip Alignment points towards a dead market.

As Northern Plains predicted, the international markets were not a viable market for Otter Creek coal. Ports are operating far below capacity for coal exports. As Mr. Sanzillo stated, "[t]he supply of coal-port capacity for shipping coal mined in the United States exceeds demand for it."[94] Indeed, Arch anticipates incurring $50 million in liquidated damages for unused port capacity.[95] [redacted]

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[92] Arch Coal, News Release: Arch Coal Announces Agreement with Canada's Ridley Terminal for Pacific Coast Exports (Jan. 18, 2011), *available at* http://news.archcoal.com/phoenix.zhtml?c=107109&p=irol-newsArticle&ID=1517028; *see also* Tom Sanzillo, Inst. for Energy Econ. & Fin. Analysis, *No Need for New U.S. Coal Ports: Data Shows Oversupply in Capacity* (Nov. 19, 2014), *available at* http://www.ieefa.org/wp-content/uploads/2014/11/Sanzillo-port-capacity.pdf [hereinafter Sanzillo*, No Need for New U.S. Coal Ports*].

[93] Arch Coal, News Release: Arch Coal Acquires Equity Interest in West Coast Terminal (Jan. 12, 2011), *available at* http://news.archcoal.com/phoenix.zhtml?c=107109&p=irol-newsArticle&ID=1515428.

[94] Sanzillo*, No Need for New U.S. Coal Ports*.

[95] Arch Coal, News Release: Arch Coal, Inc. Reports Fourth Quarter and Full Year 2014 Results (Feb. 3, 2015), *available at* http://news.archcoal.com/phoenix.zhtml?c=107109&p=irol-newsArticle&ID=2012926; Seeking Alpha, *Arch Coal's (ACI) CEO John Eaves on Q4 2014 Results – Earnings Call Transcript, Question-and-Answer Session* (Feb. 3, 2015) http://seekingalpha.com/article/2880806-arch-coals-aci-ceo-john-eaves-on-q4-2014-results-earnings-call-transcript?page=6&p=qanda&l=last.

[redacted]

All of the evidence points to the conclusion that there is no international market for Otter Creek coal. Major investors are pulling out of Pacific Northwest coal export facility investments.[99] As stated by Mr. Sanzillo, "Any serious consideration of coal markets should suggest to public officials that the coal industry is a poor investments partner now and for the foreseeable future."[100] Since Northern Plains filed its earlier comments, no new West Coast ports have begun construction.

In January 2014, Goldman Sachs pulled out of the Gateway Pacific Terminal in Bellingham, Washington when it sold all of its shares in the project.[101] Arch's partner in the Millennium Bulk Terminals export facility, Ambre Energy, sold all of its U.S. coal investments (including its share in Millennium Bulk Terminals) to Resource Capital Funds of Denver, Colorado for $18 million in December 2014.[102] This sale was spurred by "what industry analyst firm Wood Mackenzie has described as a substantial oversupply of thermal coal in the seaborne market . . . ."[103] Ambre reported, it "has

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[redacted]

[99] Sanzillo, *No Need for New U.S. Coal Ports*.

[100] *Id.*

[101] David Steves, *Wall Street Giant Backs Away from Washington Coal Export Project*, OR. PUB. BROAD. (Jan. 4, 2014) http://www.opb.org/news/article/wall-street-giant-backs-away-from-washington-coal-/.

[102] *Ambre Energy to Divest Pacific Northwest Interests*, COAL AGE (Dec. 3, 2014), http://www.coalage.com/news/latest/4051-ambre-energy-to-divest-pacific-northwest-interests.html.

[103] Ex. R, Ambre Energy, Form 5057A Filing with the Australian Sec.& Invest. Comm'n ¶ 29(a) (Nov. 12, 2014).

struggled, in the face of a sharply deteriorating thermal coal market, to raise the capital required to fund the operations of AENA, that is, the development of its US port projects, the optimization of its US coal mining assets, and the implementation generally of its US coal export strategy."[104]

[redacted][5] Similarly, Goldman Sachs echoes these findings, stating "the start of [carbon dioxide] emissions trading in China is a particularly symbolic move coming from an emerging market that is particularly reliant on coal. Meanwhile, far from boosting the seaborne market, the Chinese domestic market is currently acting as a drag on demand growth and thermal coal prices."[106]

Thus, it is clear that China is not going to be exporting as much coal as they used to, generally speaking, and any coal that they do import will likely not be U.S. — or Otter Creek— coal. Even if China continues to import coal, other countries are much more competitive than the U.S. market, especially since China recently places a tariff on all coal imports coming from markets other than Indonesian and Vietnamese coal sources; accordingly, Indonesian and Vietnamese markets have an immense advantage over U.S. coal resources.[107]

Even if China were to import significant amounts of U.S. coal, Otter Creek coal would not be necessary because other U.S. mines are already operating far below

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[104] *Id*. at ¶ 34(a).
[105] Ex [redacted]
Goldman Sachs, *The Window for Thermal Coal Investment is Closing,* 4 (July 24, 2013) http://goo.gl/Z9RlE1.
[107] *See* Sanzillo, *No Need for New U.S. Coal Ports.*

production capacity. [redacted]

Beyond China, Asian markets generally cannot support a demand for Otter Creek coal. For example, India imported less than 1 million tons US coal in 2013, and India has set goals to significantly reduce its coal import levels. Sanzillo Verified Statement at 37. But even if India increases coal imports, India's principle coal suppliers, Indonesia and South Africa, already have an advantage as being currently engaged in the Indian market. Sanzillo Verified Statement at 37. Similarly, Australian coal is already being developed for this Indian market by both Australian and Indian interests. Sanzillo Verified Statement at 37.

The prospect of an Asian market for coal has fooled investors before. For example, the $200 million Los Angeles Export Terminal from the late 1990's never exceeded 4 million tons per year and went out of operation only six-years after it was first commissioned.[109] With the rapid decline in Asian imports, as noted above, investors are pulling out of the export market. Like in the 1990's example of the LA export terminal, the markets do not justify the investment for new port construction.

As Arch Coal is well aware, coal markets have plummeted domestically and the overseas market cannot compensate.[110] The coal industry's predictions of a growing

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[108] Ex. A, [redacted]

[109] *See* Patrick McGreevy, *L.A. Weighs Costly Exit From Coal Terminal*, L.A. TIMES (Jun. 14, 2003) http://articles.latimes.com/2003/jun/14/local/me-coal14.

[110] Global Credit Research, *Moody's: Weak Demand Leads to Negative Outlook for North American Coal Industry* (Mar. 12, 2015) https://www.moodys.com/research/Moodys-Weak-Demand-Leads-to-Negative-

overseas market failed to materialize and instead the picture today is of an oversuplied global market whose forcasts for US coal producers is likely to only get worse.[111] Mr. Sanzillo notes that "[i]nternational thermal coal prices have collapsed . . . and are likely to stay low for the foreseeable future."[112] For example, an Australian coal product used as a global benchmark for thermal coal, Newcastle Coal, fell dramatically from its peak in 2011 of $141.94 per ton to its present price (as of March 19, 2015) of $59.50 per ton. Given the low price of thermal coal on the international market, any supposed cost of production advantage at Otter Creek has been eviscerated.[113] Whatever need China has for imported coal can be adequately filled without Otter Creek coal. "Most financial analyst projections have evolved to a clear consensus: as China reduces its import needs, sufficient capacity from the Pacific Rim producers (Australia, South Africa, Indonesia, and Russia) exists to meet the needs of the remaining import countries, including India."[114]

3. *Arch is financially unable to open the Otter Creek mine for the foreseeable future.*

The weak coal markets are reflected in Arch's stock price and poor financial performance. Over the last several years, Arch's stock has plummeted from a high of roughly $60 per share to at or below $1. Its management has taken drastic measures to control costs. Recently, Arch elected to freeze its employee pension plan benefits.[115]

Outlook-for-North-American--PR_320617 ("The outlook for the North American coal industry has been changed to negative from stable, Moody's Investors Service says in a new report.").
[111] Ex. J, V.S. of Thomas Sanzillo at 5–6.
[112] *Id.* at 21.
[113] *Id*. at 23–25.
[114] *Id.* at 22.
[115] Arch 2015 Form 8-K.

Freezing employee pension plan benefits allows Arch to show significant increases in operating income on their annual reports to shareholders. It is typical for financially unhealthy companies to freeze employee pension plan benefits in order to reduce expenses, likely due to pressure from near term notes that are due and pressure from creditors.[116] Arch, as reported in their most recent 8-K, has a total of $5.1 billion in long-term debt; of which, $1.9 billion is due in 2018.[117] Arch has not demonstrated it could both service its debts and still have the necessary funds to construct and service the proposed TRR project or open the Otter Creek mine.

Arch Coal's financial fitness has been the subject of recent news as the company "became at least the third U.S. coal producer to cut or suspend its dividend."[118] On its website, Arch states:

> In the past, the company has paid quarterly dividends, with the payable dates occurring on or around March 15, June 15, September 15 and December 15. However, there can be no assurance that the company will continue to pay quarterly dividends in the future. Quarterly dividend payments are made at the discretion of the board of directors, and are dependent on Arch Coal's future earnings, capital requirements and financial condition.[119]

According to this statement, Arch's dividend to investors is contingent upon its "future earnings" and "financial condition."[120] Arch's cancelled dividend payments to

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[116] Pension Rights Center, *Pension Freezes*, http://www.pensionrights.org/publications/fact-sheet/pension-freezes (last visited Mar.23, 2015).
[117] Arch 2015 Form 8-K.
[118] Tim Loh, *Arch Is Latest Coal Miner to Cut Dividend as Prices Slump*, BLOOMBERG BUS. (Feb. 3, 2015, 8:01 AM) http://www.bloomberg.com/news/articles/2015-02-03/arch-coal-suspends-dividend-amid-market-downturn.
[119] *Investor FAQ*, Arch Coal, http://investor.archcoal.com/phoenix.zhtml?c=107109&p=irol-faq (last visited Feb. 25, 2015).
[120] *Id*.

investors shows the company is less certain of future earnings and has a less than positive outlook on its financial condition. The company further states "[t]he moves underscore how far embattled U.S. coal miners are going to cut costs amid the worst downturn for the commodity in decades."[121] Although suspending its dividend is an indication of Arch's own financial fitness, it is also indicative of the floundering coal market generally, which contributes to Arch's overall financial woes. Zacks Investment Research, a leading investment research firm, recently put the coal industry at "220 out of 258" industries in their expanded industry classification — "[t]his puts the industry in the lower third of all industries, corresponding to a negative outlook."[122]

In Arch's most recent financial report on fourth quarter and full year 2014 earnings results, it reported a net loss of $240.1 million for the fourth quarter alone.[123] In 2014, Arch reported a net loss of $558.4 million for the year and divested assets in Appalachia "as part of the company's ongoing asset portfolio re-alignment effort."[124] These results are consistent with Arch's downward financial spiral due to a significantly negative short- and long-term coal market outlook.[125] Arch's underperforming assets incurred significant amounts of impairment costs and goodwill payments, which necessitated its divestiture.

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[121] *Id*.
[122] *Zacks Industry Outlook Highlights: Peabody Energy, Arch Coal & Hallador Energy Press Releases*, NASDAQ.COM, (Mar. 13, 2015) http://www nasdaq.com/article/zacks-industry-outlook-highlights-peabody-energy-arch-coal-and-hallador-energy-press-releases-cm454565#ixzz3UhZ2QMD6.
[123] Arch 2015 Form 8-K.
[124] *Id*. at 2.
[125] Andrew Meola, *Arch Coal (ACI) Stock Closes Lower Today After Argus Downgrade,* STREET.COM (Feb. 23, 2015 at 4:09 PM) http://www.thestreet.com/story/13055182/1/arch-coal-aci-stock-closes-lower-today-after-argus-downgrade.html.

To combat poor market conditions and the current financial position of Arch, John T. Drexler, Arch's Senior Vice President and Chief Financial Officer, stated "Arch's top financial priorities are preserving liquidity, controlling costs and holding the line on capital spending."[126] Though its recent balance sheet shows $1.54 billion in total current assets on hand, Arch Coal has consistently been losing money every quarter for the past three years. [127]

Furthermore, over the past three years — and significantly, over the past year — Arch's debt to Earnings Before Interest, Taxes, Depreciation and Amortization ("EBITDA") ratio has exponentially increased. Debt to EBITDA ratio is one of the more common methods of evaluating the financial health and liquidity position of a particular entity. In this case, the consistently high debt to EBITDA ratio for Arch is indicative of its inability to pay off its debts. Therefore, it is clear that Arch is taking on more debt than their business is earning.

Given the amount of debt coming due, the negative outlook for coal markets, and Arch's substantial yearly losses, and its strategic goals, Arch is simply not in a position financially to make the [redacted] investment in opening a new mine. It is

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[126] Arch 2015 Form 8-K.
[127] *Id.* at 9. *I.e.,* Arch reported a net loss of $240.1 million on Feb. 3, 2015. Arch 2015 Form 8-K; $97 million on Oct. 28, 2014. Arch Coal, Inc., Securities & Exchange Comm'n, (Form 8-K) (Comm'n File No. 1-13105) 1 (Oct. 28, 2014); $97 million on July 29, 2014. Arch Coal, Inc., Securities & Exchange Comm'n, (Form 8-K) (Comm'n File No. 1-13105) 1 (July 29, 2014); $124.1 million on Apr. 22, 2014. Arch Coal, Inc., Securities & Exchange Comm'n, (Form 8-K) (Comm'n File No. 1-13105) 1 (Apr. 22, 2014); $371.2 million on Feb. 4, 2014. Arch Coal, Inc., Securities & Exchange Comm'n, (Form 8-K) (Comm'n File No. 1-13105) 1 (Feb 4, 2014); $128.4 million on Oct. 29, 2013. Arch Coal, Inc., Securities & Exchange Comm'n, (Form 8-K) (Comm'n File No. 1-13105) 1 (Oct. 29, 2013); $72.2 million on July 30, 2013. Arch Coal, Inc., Securities & Exchange Comm'n, (Form 8-K) (Comm'n File No. 1-13105) 1 (July 30, 2013); $70 million on Apr. 23, 2013. Arch Coal, Inc., Securities & Exchange Comm'n, (Form 8-K) (Comm'n File No. 1-13105) 1 (Apr. 23, 2013); and $295 million on Feb. 3, 2013. Arch Coal, Inc., Securities & Exchange Comm'n, (Form 8-K) (Comm'n File No. 1-13105) 1 (Feb. 3, 2013).

considered one of the "most financially challenged companies in the industry" and "will not be able to raise the capital necessary to finance Otter Creek or the Tongue River Railroad."[128]

B. The Tongue River Railroad Company is Not Financially Fit to Undertake the Construction of, and to Provide Services of, the Proposed Project.

Arch's financial fitness also places TRRC's financial fitness in doubt. As noted above, [redacted]

Currently, BNSF and Arch each own a 38.29 percent share in TRHC, with the remainder 23.42 percent owned by TRR Financing, LLC.[130] Since the submission of Northern Plains' most recent comments, Arch has continued to illustrate that it is not financially fit to move forward with the $416 million construction the proposed TRR rail line while at the same time financing the [redacted] needed to open Otter Creek.

Obviously, if Arch does not open Otter Creek, TRRC will not construct a railroad to serve it. Even assuming it opens and it reaches the production levels claimed in TRRC's application, its financial fitness remains questionable. First, TRRC's project income is simply a calculation of what TRRC would have to earn assuming the railroad costs $416 million to construct and the cost of capital is 11.57%. The projected income further *assumes* that an operator will pay this amount. When Northern Plains highlighted this issue in its initial PCN comments, TRRC provided a projected net income statement that estimates the amount of net income BNSF would receive in the first two years of

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[128] Ex. J, V.S. of Thomas Sanzillo at 4-5.
[129] Ex. B, [redacted].
[130] Letter from Coburn to Brown RE: Updated List of Directors & Officers for TRRC Inc. & BNSF Railway Co. & Updated Ownership Percentages for TRRC, Inc. (Mar. 6, 2015).

operation following construction.[131] However, as noted above, BNSF has not yet committed to being the operator of the line and these projections may be entirely irrelevant.

Northern Plains' expert witness Michael Nelson, an expert in railroad finances and veteran of Board proceedings, reviewed the income projections and points to serious flaws in the revenue projections. He notes that the "Net Income from the 'TRRC Segment' does not come close to justifying the investment required in the 'TRRC Segment', and that it would be irrational for BNSF to make up the difference since BNSF will benefit from the same flows (from other mines) even if the project is not constructed."[132] He concludes, "[o]verall, the earnings the project could generate are nowhere near the level that would make the project attractive to a rational investor."[133] TRRC is not financially fit given these realities.

C. The Tongue River Railroad Company's Proposed Project is Not in the Public Interest.

Even if the Board decides that the TRRC's proposed project meets the demand and financial fitness prongs of the PCN test, the Board must reject the application if the project is not in the public interest.[134] The Board's public interest finding "is a broad one," involving "consideration of a wide range of factors."[135] One factor the Board must consider is the impact the new rail line might have in furthering the goals of the national

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[131] TRRC notes that the BNSF income projection does not supersede the earlier TRRC projection that assumes payment from the operator. TRRC Reply at 4 (Aug. 9, 2013).
[132] *Id*.
[133] Ex. T, V.S. of Michael Nelson at 10.
[134] *Northern Plains Res. Council v. Surface Trans. Bd.*, 668 F.3d 1067, 1092–93 (9th Cir. 2011).
[135] *Louisville & Jefferson Ctny. Riverport Auth. & CSX Trans., Inc.*, *Construction and Operation Exemption in Jefferson Cnty., KY*, 4 I.C.C. 2d 749, 754, 1988 WL 226227 (S.T.B. 1988).

rail transportation policy.[136] Additional factors the Board must consider include the environmental impacts of the proposed rail line.[137] The Board must also consider whether the project will have detrimental impacts to the public health and safety in its public interest determination.[138]

The Board must consider the impacts the proposed project will have on members of the public at large — including affected private landowners, locally and regionally affected communities, and the international welfare — during its public interest analysis. If the Board accepts the TRRC's demand assertions as true, it must evaluate the significant impacts the project will have on the public interest based on the project's maximum projected operation levels (transporting 20 million tons of PRB coal per year via the TRR).

1. *The TRR is Not in the Public Interest Because it is a Speculative Project that has Deprived Neighboring Landowners of the Full Use and Economic Value of their Private Property.*

TRRC's plans to construct a railroad in the Montana PRB have held private landowners captive for over three decades. The constant prospect of the railroad impacts the daily decisions landowners must make about their property. TRRC's speculative

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[136] *Louisville & Jefferson Ctny. Riverport Auth. & CSX Trans., Inc.*, 4 I.C.C. 2d at 754–55 (holding that "the rail transportation policy of 49 U.S.C. §10101a reflects [the Board's] public interest considerations" and a new rail line proposal must promote the rail transportation policy of §10101a to be in the public interest).

[137] *Alaska RR Corp., Construction and Operation Exemption, Rail Line Between North Pole and Delta Junction, AK*, Fed. Carr. Cas. P 37331 (I.C.C.), 2010 WL 24954 at *8 (S.T.B. 2010) ("In a rail construction case, we weigh environmental concerns against transportation concerns in evaluating the public interest. Environmental impacts can lead the Board to find that a proposal is not consistent with the public convenience and necessity.").

[138] *Indiana & Ohio Ry. Co., Construction and Operation, Butler, Warren, and Hamilton Cntys., OH*, 9 I.C.C. 2d 783, 788, 1993 WL 287692 (S.T.B. 1993) (holding that the Board's overarching mandate to abide by the rail transportation policy of 49 U.S.C. § 10101a(8) "'to operate transportation facilities and equipment without detriment to the public health and safety'" is "a statement of the public interest which [the Board] will use as a guideline in determining whether the public convenience and necessity require or permit construction of a new rail line.").

railroad projects have deprived landowners, including Northern Plains' members, of their fundamental right to make the best use of their property.

Private property rights are at the core of our constitutional democracy and civil society. Holding private property hostage to a wholly speculative railroad offends our fundamental notions of due process and fair play. While private corporations are entitled to risk their capital for speculative private ventures, Congress long ago recognized that railroads had to be regulated in the public interest, and that included the approval of new rail lines because with that approval comes a right a condemnation, a right normally reserved to the sovereign. This Board has an obligation to transfer that sovereign right sparingly, and only upon a demonstrated public need.

Northern Plains' members Clint McRae and Mark Fix have for years suffered from the various TRR proposals. Mr. McRae, a fourth-generation rancher, has been forced to delay making improvements to his ranch due to the everlasting uncertainty of the TRR.[139] For example, Mr. McRae has wanted to improve the efficiency of his ranch by constructing cross-fencing and livestock watering pipelines.[140] Although these improvements are critical to the ranch's productivity and viability, Mr. McRae cannot afford to make the improvements twice.[141] The railroad would not reimburse Mr. McRae for the costs to move the fencing and water pipelines.

Mr. Fix faced similar problems. As the owner and operator of a ranch along the banks of the Tongue River, Mr. Fix is threatened by the TRRC's inconsistent route proposals hampering his ability to make the most efficient and effective use of his

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[139] Ex. U, V.S. of Clint McRae at 1–2.
[140] *Id*. at 2–4.
[141] *Id*. at 4.

ranchlands.[142] For example, Mr. Fix was forced to delay constructing a circle-pivot irrigation system for nearly a decade due to the ICC's approval of TRR I and TRRC's inconsistent route proposals.[143] Additionally, Mr. Fix has had to consider how to manage his cattle if the TRR bisects his lands, cutting off his pastures from the ranch's primary water source.[144]

As stated by Mr. McRae,

> "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."[145]

Mr. Fix reports that delaying improvements on account of the TRR cost him approximately $405,000 in lost sales.[146]

Although the Board assumes that private landowners like Mr. McRae and Mr. Fix would be compensated for any right-of-way TRRC receives through eminent domain, the Board must consider that ranchers and farmers like Mr. McRae and Mr. Fix have never been compensated for their losses described above. As noted by Mr. Nelson, the willingness of landowners such as Mr. McRae and Mr. Fix "to spend substantial sums to defend their property rights reflects, in part, the economic harms to their farms, ranches, etc. posed by the uncertainty surrounding the project."[147] As evidenced above, "[a]

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[142] Ex. V, V.S. of Mark Fix at 1–2.
[143] *Id*. at 2–3.
[144] *Id*. at 2.
[145] *Id*. at 2.
[146] *Id.* at 3.
[147] Ex. T, V.S. of Michael Nelson at 4.

railroad holding condemnation authority for a project that might not be built unavoidably interferes with land use planning and restricts investments that farmers, ranchers and others normally would undertake to ensure the most productive and efficient use of their land."[148]

Even though it was never built, TRR I had a significant impact on property values along its proposed right-of-way. As described by Roger Jacobs, a licensed real estate professional representing prospective buyers and sellers of ranchlands in the intermountain west (including Montana's PRB), buyers often feel it is simply "too risky" to purchase ranchland when the possibility of a railroad running through the property hangs overhead.[149] The risk lies within the railroad's potential to "cross irrigation lines, making maintenance difficult or even impossible," and its ability to destroy "wells, circle pivots, water tanks, and fencing dividing the pastures that have been built on the property."[150] Mr. Jacobs has experienced first-hand the difficulties of selling ranchland affected by the TRR. When Mr. Jacobs attempted to sell the Ball Ranch, located just southwest of Miles City along eight miles of the Tongue River and in the path of the TRR I route, he found that it was "impossible to sell" the ranch with the prospect of the TRR's condemnation of its potential right of way clouding the title.[151] The Ball Ranch is a prime example of the interference TRRC's ventures have had on local landowners despite the fact it was never built. The Ball Ranch was an excellent property — it ran a cow-calf operation and feedlot for 600 cows; it had an irrigation system with over 33 miles of

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[148] *Id*.
[149] Ex. W, V.S. of Roger Jacobs at 3.
[150] *Id*.
[151] *Id*. at 2–3.

pipeline to ensure cattle were constantly close to water; it had the additional irrigation capacity to produce crops such as alfalfa, hay, and corn; and it also provided ideal wildlife habitat for outdoor enthusiasts.[152] However, once the required disclosure was made to prospective buyers that that the TRRC had a right to build a railroad through the land, buyers became either completely disinterested or became unwilling to pay the full value of the ranch.[153] Mr. Ball was finally able to sell the Ball Ranch after TRRC abandoned that route.[154] If the Board authorizes TRRC's proposal, landowners along the planned route will face the same fate as the owners of the Ball Ranch. It will be difficult, if not impossible, to sell their property at a fair value even though the railroad may never be built. Since TRR I was first approved in 1985, there has yet to be a railroad constructed. Three decades of uncertainty is enough — it is time for the Board to end the process once and for all in all fairness to the public interest of affected private landowners.

2. *Granting a Certificate of Public Convenience and Necessity to a Wholly Speculative Railroad Project is Not in the Public Interest.*

An earlier decision by the Board in the DM&E proceeding demonstrates the dangers of sanctioning eminent domain authority for speculative railroad projects. The Board granted the DM&E's application to extend its railroad system into the PRB even though the record indicated the project had limited financial viability.[155] With a Certificate of Public Convenience in hand, DM&E initiated condemnation proceedings

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152 *Id*. at 2.
153 *Id*. at 2–3.
154 *Id*. at 3.
155 *Dakota, Minnesota, & Eastern Railroad Corporation Construction into the Powder River Basin*, 3 S.T.B. 847, 1998 WL 869567 at *3 (1998).

against landowners. After several years of litigation, and on the eve of a decision, DM&E abruptly dismissed the case. In a subsequent order, the court remarked on the impropriety of the proceeding in light of the speculative nature of the project and warned that courts will not uphold abusive uses of the condemnation process.[156] "Plaintiffs initiated this condemnation action for a project that was always speculative, at best. By their conduct, Plaintiffs have squandered not only a great deal of the Defendant's hard-earned money, but also a great deal of this Court's time."[157] Indeed, the court noted DM&E could not provide any "reasonable assurances that the railroad would be built in the foreseeable future."[158] Similarly here, TRRC has not provided any "reasonable assurances" the TRR will be built in the foreseeable future.

3. *The TRR is Not in the Public Interest Because it May Violate Competition, Discrimination, and Sound Rail Transportation Policy Goals of the National Rail Transportation Policy.*

The Board must consider the influence the proposed TRR might have on its ability to carry out the national rail transportation policy goals assuring against unlawful discrimination, guaranteeing effective competition, and fostering a sound rail transportation system during its public interest analysis.[159] As ably described by Mr. Nelson, the Board should consider (1) the potentially discriminatory impact of the TRR for its favoring of the transport of coal from the Otter Creek Mine solely, and (2) the impacts of BNSF's chronic service problems already experienced along its Northern

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[156] Ex. F, Order Denying Defendants' Application for Costs, *Dakota, Minn. & E. R.R. Corp. v. Tracy*, No. 07-CV-00144-WFD, ¶13 (D. Wyo. July 20, 2011).
[157] *Id*.
[158] *Id*. at ¶ 11.
[159] *Louisville & Jefferson Ctny. Riverport Auth. & CSX Trans., Inc.*, 4 I.C.C. 2d at 754–55 ("the rail transportation policy of 49 U.S.C. §10101a reflects [the Board's] public interest considerations").

Corridor route as issues potentially contravening the national rail transportation policy during its public interest analysis.[160]

As noted, the Board must ensure approval of the TRR will meet the national rail transportation policy goals of 49 U.S.C. § 10101. Section 10101(5) states that it is the policy of the United States "to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes." Section 10101(12) states the national policy is "to prohibit predatory . . . practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination." And, Section 10101(4) mandates the national rail transportation policy is "to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public."

First, the TRRC's application arguably runs afoul of sections 10101(5) and (12).[161] The application fails to explain why it is in the public interest to expend significant funds to construct a spur rail line meant to serve only one potential customer (the Otter Creek Mine).[162] Arch and BNSF have both acknowledged that other potential mines and development activities in the Ashland area that may benefit from the proposed TRR have since been terminated.[163] Indeed, there is no foreseeable need for the TRR absent the potential Otter Creek Mine development.[164] BNSF's significant partnership interest with Arch to fully fund the proposed TRR can thus be interpreted as arguably

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[160] Ex. T, V.S. of Michael Nelson at 8–9.
[161] *Id.* at 8.
[162] *Id.*
[163] *Id.*
[164] *Id.*

discriminatory action against other existing mines and rail carriers throughout the PRB.[165] For example, while BNSF has historically funded new trackage of branch lines connecting to main lines in the PRB, these rails have generally been for the benefit of multiple mines.[166] Instances in which BNSF has funded rail access for a single mine are limited to short segments in which a mine site is connected directly to a branch or main rail route.[167] The fact that BNSF is willing to expend significant amounts of its limited resources to service a 42-mile route benefitting only one potential customer — a single customer that supports a single commodity, at that (the coal industry) — is disconcerting.[168] As such, the TRRC's application arguably violates the national rail transportation policy's goals of §§ 10101(5) and (12).

Second, the TRRC's application arguably ignores the Board's duty to foster "a sound rail transportation system" under Section 10101(4).[169] Since 2013, BNSF has acknowledged its own deficiencies in service along its Northern Corridor route (BNSF's route including the area of the PRB and proposed TRR).[170] Although BNSF has attributed these service problems to mere weather and unanticipated traffic issues, complications along BNSF's Northern Corridor continue to evolve and clearly have not yet been adequately resolved.[171] It is apparent that BNSF has either (1) chosen not to devote the resources necessary to mend the service issues being experienced along the Northern Corridor, or (2) has not ensured the resources it has expended have been efficiently used.

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[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *See id.* at 8–9.
[170] *Id.*
[171] *Id.* at 9.

Id. Adding the proposed TRR to BNSF's Northern Corridor has the potential to only further exacerbate BNSF's already existing chronic service problems by diverting resources to service a single potential customer.[172] Additionally, given the difficult topography of the proposed TRR route, the TRR project will demand even higher amounts of resources that, based upon the state of BNSF's service level along the Northern Corridor thus far, BNSF apparently does not have.[173] The Board must consider BNSF's ability to render adequate service if it approves the proposed TRR as part of its mandate to ensure "a sound rail transportation system" under the national rail transportation policy.[174]

Accordingly, the Board should consider that the TRRC's application likely fails to meet the mandated national rail transportation policy goals of Sections 10101 (4), (5), and (12), and therefore, fails the public interest prong of the PCN test.

4. *TRRC's Project is Not in the Public Interest Because it Cannot be Built and Operated Without Detriment to the Environment, Public Health, and Public Safety.*

In addition to the TRRC proposal's devastating impacts upon neighboring landowners and the proposal's potential defiance of the national rail transportation policy goals regarding discrimination, competition, and soundness of the national rail system, the project is not in the interest of the broader public due to its detrimental impacts upon the environment, public health, and public safety. First, although the TRRC's project is undergoing the procedural environmental analyses of the National Environmental Policy Act ("NEPA") in a separate proceeding, the Board can deny an application under the

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[172] *Id.*
[173] *Id.*
[174] *Id*.

PCN test before completion of NEPA's environmental review if the existing evidence sufficiently demonstrates that the project is not in the public interest.[175]

Second, the national rail transportation policy of 49 U.S.C. § 10101 explicitly provides that the United States government must "operate transportation facilities and equipment *without detriment to the public health and safety*."[176] Accordingly, the Board has held that this policy mandate must be achieved if the Board is to find that a proposed railroad application meets the public interest prong of the PCN test.[177]

a. <u>If Built, the TRR will Cause Significant Harm to the Environment on Local, Regional, and International Levels.</u>

The TRRC's application fails the public interest prong of the PCN test based on the environmental ramifications of a variety of constituent elements: (1) the construction and operation of the TRR, (2) the associated construction and operation of the Otter Creek Mine, and (3) the subsequent burning of coal mined from Otter Creek and transported via the TRR. Although the environmental review process is on-going and will reveal the full extent of environmental harm caused by the TRRC's project once completed, it is clear at this point that the harmful, cumulative environmental effects of the TRR will affect local, regional, and international ecosystems. These factors may be considered during the Board's public interest PCN analysis.[178]

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[175] *See Northern Plains Res. Council*, 668 F.3d at 1094–95 ("When conducting a public convenience and necessity test, the Board may 'draw its conclusion from the infinite variety of circumstances which may occur in specific instances.'. . . Thus, consideration of the public interest is permissible under this test." (internal citation omitted)).
[176] 49 U.S.C. §10101(8) (2012) (emphasis added).
[177] *Indiana & Ohio Ry. Co.,* 9 I.C.C. 2d at 788; *Louisville & Jefferson Ctny. Riverport Auth. & CSX Trans., Inc.*, 4 I.C.C. 2d at 754–55.
[178] *Alaska RR Corp.,* 2010 WL 24954 at *8.

First, if the TRR is constructed as proposed, the project will have the potentially devastating effect of transforming the Tongue River Valley's ("TRV") iconic agricultural landscape into an industrial belt serving to benefit multinational corporations and overseas fossil fuel markets over the interests of local ranchers and communities who rely on the TRV's essential environmental resources. The environmental impacts of 20 million tons of coal per year being transported through the currently stable, family-owned ranchlands of the TRV would be disastrous to local soil conditions, air quality, and water resources. The immediately impacted local ranchlands are currently rich in clean air and water resources, support abundant native fish and wildlife habitat, and provide prime opportunities for successful agricultural operations and recreation. This environment will be devastated by the coal dust from TRR trains being deposited along the rail tracks throughout the vital riparian landscape of the TRV, impacting the health of local livestock, fish, and wildlife.[179]

Additionally, as noted in the ICC's 1985 mitigation plan for the approval of TRR I, there are a variety of environmental consequences inherent in all railroad construction and operation projects.[180] Significant environmental impacts that will affect the local landscape if the TRR was again approved during the current proceeding are: (1) the decreased productivity of ranches; (2) the loss of ranchland due to railroad right of ways;

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[179] *See BNSF Railway Statement on STB Coal Dust Decision: Coal Dust Frequently Asked Questions,* BURLINGTON N. SANTA FE RY., http://www.bnsf.com/customers/what-can-i-ship/coal/coal-dust html#2 (last visited Feb. 24, 2015) (acknowledging fugitive coal dust as an environmental concern); *see also* Edward M. Calvin & Jerome E. Williams, *A Rail Emission Study: Fugitive Coal Dust Assessment and Mitigation*, in *Proceedings for the Seventh Annual Environment Virginia '19 Symposium*, 44–53, 44 (1996) *available at* http://www.powerpastcoal.org/wp-content/uploads/2011/08/A-RAIL-EMISSION-STUDY-FUGITIVE-COAL-DUST-ASSESSMENT-AND-MITIGATION.pdf (finding that approximately 0.6 tons of coal per rail car escapes during rail transport).

[180] *See* Interstate Commerce Comm'n, *Appendix B, A Master Mitigation Policy and Plan for the Proposed Tongue River Railroad Project, Finance Docket No. 30186* (Sept. 4, 1985).

(3) the indirect land losses resulting from the severance of parcels; (4) wildlife disturbance and the proliferation of noxious weeds; and (5) increased demand for community services.[181] Environmental impacts from decreased air quality associated with increased diesel engine train traffic, fugitive coal dust emissions, and the risk of accidents and spills will affect not only the localized region nearest to the proposed TRR, but will be felt in communities down-line throughout Montana, Idaho, Washington, and Oregon as well.[182]

Accordingly, if approved, the TRR's environmental devastation will stretch far beyond the source of the increased coal production in the Powder River Basin (PRB). After making its way through the ranchlands of southwestern Montana, the TRR's coal trains will move westward impacting communities and landscapes throughout the Intermountain West and Pacific Northwest. Down-line communities will feel the brunt of increased rail traffic pressure, increased air and water pollution from coal dust escaping from rail cars, and the environmental harms associated with the burning of coal either domestically or in Asian countries.

In fact, perhaps most significantly, the TRR will only add insult to injury to the spiraling environmental harms associated with global climate change. The Board must consider the cumulative environmental impacts of the proposed project and, therefore, must consider the project's contribution to increased global greenhouse gas emissions.[183]

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[181] *Id.*
[182] *Id.*
[183] *Mid States Coalition for Progress v. Surface Trans. Bd.,* 345 F.3d 520, 549 (8th Cir. 2003) (holding that "it would be irresponsible for the Board to approve" the proposed rail construction project "without fist examining the effects that may occur as a result of the reasonably foreseeable increase in coal consumption.").

Coal combustion is responsible for over 30 percent of the United States' total carbon dioxide emissions, which are a significant contributor to global climate change.[184] Indeed, coal plants constitute the "single largest source of sulfur dioxide, mercury, and air toxic emissions and the second largest source of nitrogen oxide pollution."[185] These toxins contribute to the build-up of greenhouse gases in the atmosphere creating a host of threats to the environment and human health generally.[186]

The Board cannot ignore the impacts of global climate change upon the public environment. The United States government must proceed with caution as they consider the energy choices they make into the future to avoid reaching the "tipping point" at which our environment can no longer handle the offsetting balance caused by global climate change.[187] Accordingly, the Board should not approve a project, such as the TRR, that will result in a clear exacerbation of the harmful impacts of climate change. Contrary to the public interest, the TRRC's project would damage our local, regional, and international environment.

b. If Built, the TRR will Threaten the Public Health and Safety of Communities Throughout Montana, the Pacific Northwest, and Beyond.

The TRRC's proposed project fails the public interest prong of the PCN test because it violates the national rail policy's mandate that rail transportation facilities and

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[184] Alan H. Lockwood, et. al., *Physicians for Social Responsibility, Coal's Assault on Human Health* 8 (Nov. 2009) *available at* http://www.psr.org/assets/pdfs/psr-coal-fullreport.pdf [hereinafter Lockwood, *Health Report*].
[185] *Id*. at 8 (citations omitted).
[186] *Id*. at 35-36.
[187] *Id*. at 39, 41.

equipment must not cause "detriment to the public health and safety."[188] Where "substantial adverse public safety concerns outweigh the transportation benefits of the proposed line," the Board must deny an application for a Certificate of Public Convenience and Necessity under Section 10901.[189] Affected communities throughout the West have expressed their opposition to the very real public health and safety concerns their communities face if the TRR is approved.[190]

First, coal dust resulting from TRR's operation will negatively impact the health of children and adults throughout the West. Coal is harmful to human health at all stages of its lifecycle.[191] During transport, coal trains are responsible for releasing coal dust particles and diesel fumes "into the air, degrading air quality and exposing nearby communities to dust inhalation."[192] Unfortunately, children often face the most severe health risks from coal dust pollution.[193]

Second, the increased rail traffic in communities throughout the West resulting from the TRR's operation will threaten public safety. The TRR has the potential to severely impact the public safety of communities along rail lines transporting coal originating in the TRV to its final destination. Public safety concerns include delayed

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[188] 49 U.S.C. §10101(8) (2012).
[189] *Indiana & Ohio Ry. Co.*, 9 I.C.C. 2d at 783.
[190] *See e.g.* Ex. X, (including letters and resolutions from the Cities of Livingston, Montana; Sandpoint, Idaho; Spokane, Stevenson, and Seattle, Washington; and Hood River, Oregon all opposing the Board's approval of the TRR due to the harms associated with the project upon the environment, health, and safety of their local communities).
[191] Lockwood, *Health Report* at v.
[192] *Id*. at 8 (stating that "[t]ogether, railroad engines and trucks release over 600,000 tons of nitrogen and 50,000 tons of particulate matter into the air every year in the process of hauling coal, largely through diesel exhaust. Diesel engines currently produce approximately 1.8 million tons of NOx [(Nitrogen Oxide)] and 63,000 tons of small particles (less than 2.5 microns in diameter) each year. These emissions adversely effect many organ systems." (citations omitted)).
[193] *Id*. at x–xi (noting that children/infants are the "most vulnerable population[]" in five of eleven enumerated diseases caused by coal pollution).

emergency response times, increased risk of accidents and spills, and the health impacts noted previously from increased diesel engine use and coal dust emissions from rail cars. A traffic study conducted in Seattle, Washington to analyze the impacts of increased coal train traffic that would result from the construction and operation of a proposed new coal export terminal on the U.S. West Coast states that increased coal train traffic could have "potentially severe consequences for the City's transportation plan and improvements, with increases in risk of accidents, impacts to the City's levels of service, ability to provide effective emergency response times, and possible interference with local freight delivery systems important to the City's economic recovery."[194]

Health officials have also noted the safety threats associated with increased coal train traffic through communities across the West. Dr. Melissa Weakland, MD, of the Washington Academy of Family Physicians stated "We know from the data that the coal trains would negatively impact the health of our communities because of increased air pollution from diesel particulates and coal dust, delays in emergency response time because of long waits at railroad crossings, and increases in noise pollution in our communities."[195] Additionally, the Multnomah County Health Department in Oregon noted that "coal dust from rail transport along (not including coal dust from a terminal) has potential to result in growth and development problems, heart and lung problems, cancers, and safety related injury and deaths."[196]

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[194] Gibson Traffic Consultants, Inc., *Cherry Point Coal Export Facility Rail Operations-City of Seattle–Preliminary Report, GTC #11-036*, 4 (Feb. 13, 2012) *available at* http://www.powerpastcoal.org/wp-content/uploads/2012/10/GTC-Seattle-Traffic-Report-SO-small.pdf [hereinafter Gibson Traffic Report].
[195] Power Past Coal, *Health Concerns About Coal Export in the Northwest* 1 (Dec. 2013) *available at* http://www.powerpastcoal.org/wp-content/uploads/2013/12/health-impacts-03.pdf.
[196] *Id*. at 2.

Each passing coal train has the potential to cause six to seven minute delays at rail crossings.[197] Based on an average of 18 additional coal trains per day, communities along rail lines throughout the West will feel the safety impacts of one additional coal train passing through a given crossing every 1.3 hours, 24-hours per day.[198] The added delays at rail crossings resulting from TRR shipments being added to already congested rail lines presents a serious public safety issue in communities bisected by affected rail lines. As described by one former emergency medical physician:

> There are several medical conditions that are extremely time sensitive. In certain stroke patients 5 minutes may make the difference between being able to be treated with thrombolytics or not. Thrombolytics in certain stroke patients can reverse devastating neurologic defects. In heart attack victims a delay of minutes can result in heart muscle death. And in major trauma time delays can result in increased blood loss and organ failure. . . . [If] potential delays in reaching a hospital caused by the increased coal traffic" is not considered, "[l]iterally, some people's lives may hang in the balance.[199]

If approved, the TRR will threaten communities along its route, contrary to the statutory mandate that the Board "operate transportation facilities and equipment *without detriment to the public health and safety*."[200]

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[197] Gibson Traffic Report at 1 (basing the delay on a 1.5 mile long coal train travelling 35 miles per hour; delays are approximately three to four minutes for trains travelling at 50 miles per hour).
[198] *Id*.
[199] Power Past Coal, *Health Concerns About Coal Export in the Northwest* 2 (Dec. 2013) *available at* http://www.powerpastcoal.org/wp-content/uploads/2013/12/health-impacts-03.pdf (quoting Eric Luther Schutz, MD).
[200] 49 U.S.C. §10101(8) (2012) (emphasis added).

5. *Because the TRR will Harm Local Landowners, will Defy National Rail Transportation Policy Goals, and will Impair the Environment, Health, and Safety of the General Public, the Board must Reject the TRRC's Application for the Proposed Project's Failure to be in the Public Interest.*

In sum, even if the Board accepts the TRRC's assertions that there is adequate public demand and need and that the TRRC is financially fit to construct and operate the TRR, the Board cannot find that the TRRC's project is in the public interest. The TRRC's application, therefore, fails to pass the third prong of the PCN test. The TRRC's project has been negatively impacting local private landowners' beneficial use and economic value of their ranchlands. The TRRC's application fails to indicate how the proposed rail line complies with the national rail transportation policy goals of 49 U.S.C. § 10101 regarding the prevention of unlawful discrimination, the guarantee of adequate competition, and the maintenance of a sound national rail system. If approved, the TRR will have serious, detrimental impacts upon the environment, the public health, and the public safety in communities throughout the region and the world. As such, the Board must reject the TRRC's application for the project's failure to be in the public interest.

CONCLUSION

The Board cannot approve the TRRC's supplemental application to construct the TRR if it finds that doing so would be "inconsistent with the public convenience and necessity."[201] In order to receive a Certificate of Public Convenience and Necessity, as required by Section 10901(c), the TRRC must demonstrate (1) that there is public demand and need for the TRR; (2) that the TRRC is financially fit to undertake construction and operation of the TRR; and (3) that construction of the TRR would be in

[201] 49 U.S.C. § 10901(c) (2012).

the public interest.[202] As evidenced, the TRRC does not meet any one of these requirements.

Northern Plains Resource Council, Inc. and Wally McRae/Clint McRae dba Rocker Six Cattle Company hereby request that the Board deny TRRC's application for a Certificate of Public Convenience and Necessity because there is no public demand and need for the proposed rail line, TRRC is not financially fit, and the rail line is not in the public interest.

Dated this 26th day of March, 2015

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[202] *Norfolk Southern Corporation and Norfolk Southern Railway Company*, 2003 WL 21132522 at *4.

CERTIFICATE OF SERVICE

I certify that the foregoing has been served by U.S. mail on all parties of this record on this 26th day of March, 2015.

Kenneth J. Rumelt
Attorney for Northern Plains and Rocker Six Cattle Company