

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 30186

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

Digest:¹ Tongue River Railroad Company, Inc. has filed an application to construct and operate a rail line in southeast Montana, and the Board has accepted the filing for consideration. Several parties jointly petition the Board to reject the application. This decision denies the petitioners' requested relief and explains that parties may raise relevant issues in their comments on the transportation merits of the application or as part of the Board's ongoing environmental review. To ensure that interested persons have sufficient time to draft and file comments on the transportation merits, we are extending the procedural schedule on the transportation merits and postponing an upcoming comment deadline.

Decided: February 25, 2013

Tongue River Railroad Company, Inc. (TRRC) seeks a Board license under 49 U.S.C. § 10901 to construct and operate a rail line in southeast Montana. The purpose of the proposed line is to transport low sulfur sub-bituminous coal from a planned coal mine currently in the permitting process at Otter Creek and any future mines that might be developed in the Otter Creek and Ashland, Mont., area. TRRC had filed a revised application for its construction authority on October 16, 2012, but after a Board decision requesting additional information, modified the project in a December 17, 2012 supplemental application that supersedes the October 16 revised application. As discussed in the supplemental application, TRRC has changed its preferred alignment to the 42-mile Colstrip Alignment, which runs between Colstrip, Mont., and Ashland/Otter Creek, Mont., which would connect to the north with an existing BNSF Railway Company (BNSF) line known as the Colstrip Subdivision.

In a January 4, 2013 decision, served on January 8, 2013, and published in the Federal Register on January 9, 2013, the Board accepted TRRC's supplemental application for consideration. The Board also explained how parties could file comments by March 1 on the application. On January 7, 2013, Northern Plains Resource Council and Wally McCrae/Clint

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

McCrae, d.b.a. the Rocker Six Cattle Company, (collectively, NPRC Parties or petitioners) jointly filed a petition asking that we reject TRRC's supplemental application.² On January 25, 2013, the petitioners submitted a petition asking that the Board reconsider its decision to accept the supplemental application. TRRC filed a reply to the January 7 petition on January 28, 2013, and a reply to the January 25 petition on February 14, 2013.

We will deny the petitioners' January 7 and January 25 petitions. The petitioners raise a number of procedural concerns about TRRC's supplemental application and a number of concerns about the substance of TRRC's proposal. As discussed below, we do not find that the procedural concerns warrant rejecting the application or requiring TRRC to submit a new application. We further find that the arguments directed to the substance of TRRC's proposal go to the merits of whether the supplemental application meets the criteria of § 10901 and, therefore, are more appropriately addressed during the commenting process on the transportation merits. To the extent the arguments are environmental, they should be raised as part of the Board's environmental review. For these reasons, we will deny the petitioners' requests and proceed with the development of the record in this case. To ensure that there is sufficient opportunity for interested persons to participate, we will extend the procedural schedule by over one month so that comments on the transportation merits of the application will be due by April 2, 2013, and a reply from TRRC will be due by May 16, 2013.

BACKGROUND

In 1986, our predecessor agency, the Interstate Commerce Commission (ICC), authorized TRRC to construct an approximately 89-mile rail line between Miles City, Mont., and Ashland and Otter Creek, Mont., in a proceeding known as Tongue River I.³ In 1996, the Board authorized TRRC to build a contiguous 41-mile line from Ashland to Decker, Mont., in Tongue River II.⁴ In 2007, the Board authorized TRRC to build and operate a 17.3-mile alternative route, referred to as the Western Alignment, for a portion of the route already approved in Tongue River II, in a proceeding known as Tongue River III.⁵

² The NPRC Parties style their January 7 filing as a "Petition to Revoke the Supplemental Application." Based on a review of the filing and the fact that an application cannot technically be revoked, we will treat the NPRC Parties' filing as a petition to reject the application.

³ Tongue River R.R.—Rail Constr. and Operation—In Custer, Powder River and Rosebud Cntys., Mont. (Tongue River I), FD 30186 (ICC served Sept. 4, 1985), modified (ICC served May 9, 1986), pet. for judicial review dismissed, N. Plains Res. Council v. ICC, 817 F.2d 758 (9th Cir.), cert. denied, 484 U.S. 976 (1987).

⁴ Tongue River R.R.—Rail Constr. and Operation—Ashland to Decker, Mont., 1 S.T.B. 809 (1996), pet. for reconsid. denied (STB served Dec. 31, 1996).

⁵ Tongue River R.R.—Rail Constr. and Operation—W. Alignment, FD 30186 (Sub-No. 3) (STB served Oct. 9, 2007), pet. for reconsid. denied (STB served March 13, 2008).

Petitions for review of Tongue River II and Tongue River III were filed in the United States Court of Appeals for the Ninth Circuit, and, in 2011, the court affirmed in part, and reversed and remanded in part those decisions for additional Board review. N. Plains Res. Council v. STB, 668 F.3d 1067 (9th Cir. 2011). The court's decision implicitly required the Board to revisit the environmental analysis for Tongue River I (as well as Tongue River II and Tongue River III), because the agency had conducted a cumulative impacts analysis for the entire line in Tongue River III, and not just the portion of the line at issue in Tongue River III, and had made the resulting mitigation conditions applicable to the entire line in its Tongue River III decision. On April 19, 2012, TRRC informed the Board that it no longer intended to build the Tongue River II and Tongue River III portions of the railroad.

In a decision served on June 18, 2012, the Board dismissed Tongue River II and Tongue River III and reopened Tongue River I.⁶ As explained in more detail in that decision, the Board required TRRC to file a revised application that would present its current plans to build a rail line between Miles City and Ashland. In addition, the Board announced that because the court's remand implicitly involved the environmental review in Tongue River I and because of changed circumstances (including a transfer of ownership⁷ and other changes to TRRC's plans since 1986), the agency would conduct a new environmental review, rather than a supplemental environmental review based on the three prior environmental reviews conducted in Tongue River I, Tongue River II, and Tongue River III.

In its revised application filed on October 16, 2012, TRRC proposed to go forward with the Tongue River I project, with minor modifications.⁸ After reviewing the submission, the Board, in a decision served on November 1, 2012, clarified that the Board's review in this proceeding would include not only a new environmental review of the entire construction and operation project, but also an examination of the transportation merits supporting the entire Tongue River I line as revised.⁹ The November 1 decision also directed TRRC to supplement the revised application to provide a sufficient record for the Board's review, including additional

⁶ See Tongue River R.R.—Rail Constr. and Operation—In Custer, Powder River and Rosebud Cntys., Mont., FD 30186, et al., slip op. at 2 (STB served June 18, 2012).

⁷ TRRC explained its new ownership in a status report it filed as part of the Tongue River II proceeding on August 29, 2011. The applicant notes that, on July 1, 2011, all of the stock of TRRC was sold to Tongue River Holding Company, LLC, a Delaware limited liability company, in which BNSF holds a 33 1/3% membership interest; Arch Coal, Inc. holds a 33 1/3% interest; and TRR Financing, LLC, a Delaware limited liability company controlled by Forrest E. Mars, Jr., holds a 33 1/3% membership interest.

⁸ Although the 1986 decision granting Tongue River I authorized the construction of an 89-mile line, TRRC described the line in its October 16 filing as being approximately 83 miles in length, based on refinements that would straighten and shorten the alignment.

⁹ The Board's review of construction applications is governed by 49 U.S.C. § 10901, its regulations at 49 C.F.R. §§ 1150.1-1150.10, and the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321- 4370f (and related environmental laws).

evidence and argument in support of the transportation merits of the project. Finally, the decision established a new procedural schedule for filings on the transportation merits appropriate for this proceeding and required that TRRC publish notices consistent with that decision.

On December 17, 2012, TRRC filed a supplemental application intended to supersede the October 16, 2012 revised application. TRRC explained that, in its October 16 application, it had proposed the construction of a line between Miles City, Mont., and Ashland/Otter Creek, Mont., following a line similar to that approved by the ICC in 1986. However, in the December 17 supplemental application, TRRC now proposes a different routing, known as the Colstrip Alignment, as its preferred alignment.¹⁰

According to the supplemental application, TRRC would construct the line, and the line would be operated solely by BNSF, which owns a one-third interest in TRRC's parent company. TRRC states that, if selected as the preferred route, the 42-mile Colstrip Alignment would provide rail transportation for low sulfur, sub-bituminous coal from proposed mines in Rosebud and Powder River Counties, Mont., to an existing BNSF line, and subsequently to market via the rest of the national rail network. Specifically, the line would connect at the north end with an existing BNSF line known as the Colstrip Subdivision, which currently connects with the Forsyth Subdivision at Nichols Wye, a point approximately 6 miles west of Forsyth and approximately 50 miles west of Miles City. At its southern end, the Colstrip Alignment would have the same two termini south of Ashland as those proposed by TRRC in its October 16 filing. Terminus Point 1 would be at the previously proposed Montco Mine location (discussed in the initial Tongue River I proceeding), and Terminus Point 2 would lie along the Otter Creek drainage. TRRC claims that the Colstrip Alignment offers the shortest, most cost effective, and least environmentally impactful routing for the proposed line.

The Board accepted the supplemental application in a decision decided on January 4, 2013, served on January 8, 2013, and published in the Federal Register on January 9, 2013. The Board also noted that reply comments on the application would be due on March 1, 2013, and that TRRC could file a reply on or before April 15, 2013.

On January 7, the NPRC Parties filed a petition asking the Board to reject the supplemental application. The NPRC Parties assert that TRRC's current proposal (the construction along the Colstrip Alignment) has little to do with the project examined in the 1980s, and should therefore be captioned under a new Finance Docket number. The NPRC Parties state that the proposed line would, for the most part, follow a different route than what the ICC approved in Tongue River I. Moreover, they assert that the coal that TRRC proposes to haul would no longer travel to Midwestern markets, as envisioned in the original Tongue River I proceeding, but instead would be carried to the West Coast and, eventually, exported to Asian markets. The NPRC Parties believe that TRRC is attempting to obscure the intended final destination of the Tongue River freight from the Board and the public in order to avoid having to

¹⁰ The ICC had examined a similar portion of the Colstrip Alignment as a potential route in Tongue River I.

address significant down-line impacts the NPRC Parties believe would arise out of creating an export-oriented rail line.

The petitioners also claim that TRRC is underreporting the projected traffic levels on the proposed line so that the Board will not examine the effects of routing trains from the proposed rail line over the BNSF system to the West Coast. According to the NPRC Parties, BNSF is actually the de facto applicant. The NPRC Parties further contend that there are errors in the environmental report, labeled Exhibit H, which TRRC submitted with its December 17 application. As relief in its January 7 petition, the NPRC Parties request that the Board strike the application, vacate the procedural schedule, and halt all environmental analysis. The NPRC Parties ask that the Board require TRRC to file a new application under a new docket number.

In its petition filed on January 25, the NPRC Parties ask that the Board reconsider its decision accepting the application. The NPRC Parties reiterate the points they argue in their January 7 filing. The petitioners also assert that the Board precluded them from commenting on the December 17 application because the agency decided to accept the application before the 20-day period for replies had ended.¹¹

On January 28, TRRC filed a reply to the January 7 petition. TRRC opposes the relief sought by the NPRC Parties, disputes many of the petitioners' claims, and argues that the Board should continue to allow a record to develop concerning its current supplemental application. Because the Board has reopened this proceeding and made clear that it is undertaking a fresh look at both the environmental impacts and the transportation merits of the project, TRRC contends that nothing other than delay would be accomplished by initiating a new proceeding and starting over again.

DISCUSSION AND CONCLUSIONS

The arguments put forward by the NPRC Parties do not warrant the relief they seek, and thus we will deny their petitions filed on January 7 and January 25 insofar as they request that we reject the supplemental application. As discussed below, however, in order to ensure full opportunity for the public to participate in the proceeding, we are modifying the procedural schedule to provide additional time for the filing of comments on the transportation merits of the supplemental application.

The Board properly accepted the supplemental application. The NPRC Parties take issue with the completeness and sufficiency of TRRC's Exhibit H, which petitioners characterize as applicant's environmental report. Contrary to petitioners' understanding, however, Exhibit H is not an environmental report, but rather it contains portions of the 1983 Tongue River I Draft EIS that discussed alternative routes. In any event, as TRRC correctly notes, the requirement that the applicant submit an environmental report is waived in instances where, as here, a third-party

¹¹ See 49 C.F.R. § 1104.13.

consultant has been retained to work under the direction, control, and supervision of our Office of Environmental Analysis (OEA).¹²

OEA issued a Notice of Intent to Prepare an Environmental Impact Statement on October 22, 2012, along with a Draft Scope of Study for public review and comment, and scheduled and held 10 scoping meetings in the project area. OEA has initiated the environmental review process and is working with the third-party consultant independent of Exhibit H. As indicated in our June 18 and November 1 decisions, the Board is preparing a new environmental review for this proceeding, which will address the impacts of the project as currently proposed and configured.¹³ TRRC's inclusion of the portions of the 1983 Draft EIS that discussed alternative routes (including the original Colstrip Alternative) provides historic information on alternatives, but will not form the basis of the environmental review. Moreover, OEA will ensure the accuracy of the information contained in the EIS. For these reasons, questions about information contained in TRRC's Exhibit H do not warrant rejection of the application.

The agency's acceptance of the application fewer than 20 days after it was filed does not demonstrate error. Under 49 C.F.R. § 1104.13(a), parties may file a reply or a motion addressed to any pleading within 20 days after that pleading was filed, unless the Board specifies a different time frame. In this case, the Board's November 1 decision specified that the agency would rule on whether to accept or reject TRRC's supplemental application and would publish notice of its decision in the Federal Register on January 9. Therefore, the Board did not err in accepting the application when it did. In any event, we are considering the NPRC Parties' January 7 petition in this decision and find their arguments either to be without merit, or, as explained below, more appropriately addressed at a later date when we consider whether the application should be granted. Additionally, the Board has specifically extended the comment period for filing comments on the application well beyond the usual 35-day period for construction applications (see 49 C.F.R. § 1150.11(g)),¹⁴ and is now extending that comment period again until April 2, 2013. Petitioners will have ample opportunity to present their arguments concerning the merits of the application within that time period.

Next, the fact that the preferred alternative routing now proposed by TRRC is different from the project put forward in the initial Tongue River I proceeding does not require the creation of an entire new proceeding with a new docket number. As noted above, the Board has already made clear in its November 1 decision that the Board's forthcoming review will include not only a new environmental review of the entire project, but also an examination of the

¹² See 49 C.F.R. § 1105.10(d).

¹³ See Tongue River R.R.—Rail Constr. and Operation—In Custer, Powder River and Rosebud Cntys., Mont., FD 30186, et al., slip op. at 9-10 (STB served June 18, 2012); see also . Tongue River R.R.—Rail Constr. and Operation—In Custer, Powder River and Rosebud Cntys., Mont., FD 30186, slip op. at 2 (STB served November 1, 2012).

¹⁴ The schedule issued in the November 1 decision extended the due date for comments on the transportation aspects of the application from January 21, 2013, to March 1, 2013.

transportation merits supporting the entire Tongue River I line as now proposed by TRRC. Creating a new docket number or new proceeding would not change the scope of our analysis of TRRC's proposed project or the ability of the public to participate fully and meaningfully in that process.¹⁵

Other arguments that the NPRC Parties raise go to the substance of TRRC's proposal. Questions such as whether the coal to be transported is destined for Asian markets or elsewhere, whether the Colstrip Alignment is operationally feasible, and other substantive debate about the proposal are properly part of the commenting and review process on the transportation merits or the environmental review. As the parties are aware, we have already provided a schedule for the submission of comments on the transportation merits. We will consider all such comments submitted as part of that process in deciding whether to grant, grant as modified, or deny TRRC's application.

Environmental concerns should be raised with OEA as part of the environmental review process. Starting in October 2012, comments about the scope of environmental analysis and other environmental concerns were raised with OEA as part of the scoping review process. OEA has received more than 2,500 scoping comments, which were due on January 11, 2013, to help it determine the scope of its analysis, and the NPRC Parties have raised many of the arguments they raise here with OEA. OEA is in the process of considering these comments and preparing the Final Scope of Study. Following that, OEA will continue to evaluate the potential environmental impacts of TRRC's proposal in a Draft EIS, which will be made available for a minimum of 45 days for public review and comment. Environmental comments will be considered by and responded to by OEA in a Final EIS. The Final EIS will set forth OEA's final conclusions on potential impacts that might result from TRRC's proposal and OEA's final recommendations. The complete environmental record—the Draft and Final EISs and the comments submitted during the environmental review process—will ensure that the agency takes the requisite “hard look” at the environmental impacts of the project, as required by the National Environmental Policy Act.

For these reasons, we find the TRRC's supplemental application should not be rejected, and we will allow the development of the record to continue. To ensure that there is sufficient time for interested persons to draft and file comments on the supplemental application, however, we will modify the procedural schedule so that comments on the transportation merits of TRRC's application will be due by April 2, 2013, and a reply from TRRC will be due by May 16, 2013. Under these circumstances, no parties should be prejudiced by this extension.

¹⁵ The NPRC Parties argue that the case's title is misleading because it refers to the construction of a line from “Ashland to Miles City.” However, the docket title does not reference these cities. The title references Custer, Powder River, and Rosebud Counties and reflects the general area in which the Colstrip Alignment and the other alternative routes that will likely be considered are primarily located. This title will not mislead any of the parties or the public.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The NPRC Parties' petitions are denied.
2. Comments on TRRC's application are due by April 2, 2013, and a reply from TRRC is due by May 16, 2013.
3. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.