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SERVICE DATE – JANUARY 8, 2013

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.

AGENCY: Surface Transportation Board.

ACTION: Notice of Supplemental Application for Construction and Operation Authority and Board Acceptance.

SUMMARY: 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 mine sites in the Otter Creek and Ashland, Mont., area. TRRC had filed a revised application for its construction authority on October 16, 2012, but modified the project in a December 17, 2012 supplemental application that supersedes the October 16 revised application. As discussed in the supplemental application, TRRC's preferred routing for the proposed line would be the Colstrip Alignment between Colstrip, Mont., and Ashland/Otter Creek, Mont., the southern portion of which was approved previously by the Interstate Commerce Commission (ICC).

The Board here gives notice that it is accepting the supplemental application. The Board has already established a service list for this proceeding in a notice served on September 20, 2012, and a procedural schedule for filings on the transportation merits in a decision served on November 1, 2012. Under that schedule, filings concerning whether the supplemental application meets the criteria of 49 U.S.C. § 10901 are due by March 1, 2013, and any reply comment from TRRC is due by April 15, 2013. As indicated below, any entity that is not currently on the service list that submits a filing by March 1 will be added to the service list.

DATES: This notice is effective on January 13, 2013. Pleadings must be filed in accordance with the procedural schedule that the Board has established in this case. All filings must be served concurrently on all parties of record and must be accompanied by a certificate of service.

ADDRESSES: Any filing submitted in this proceeding must be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions found on the Board's website at "www.stb.dot.gov" at the "E-FILING" link. Any person submitting a filing in the traditional paper format should send an original and 10 paper copies of the filing (and also an electronic version) to: Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001. In addition, one copy of each filing in this proceeding must be sent (and may be sent by e-mail

only if service by e-mail is acceptable to the recipient) to each of the following: (1) David H. Coburn, Steptoe & Johnson LLP, 1330 Connecticut Ave., N.W., Washington, DC 20036; and (2) any other person designated as a party of record on this proceeding's service list.

FOR FURTHER INFORMATION CONTACT: Marc A. Lerner, (202) 245-0390. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at: 1-800-877-8339].

SUPPLEMENTARY INFORMATION: In 1986, the 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.¹ In 1996, the Board authorized TRRC to build a contiguous 41-mile line from Ashland to Decker, Mont., in Tongue River II.² In 2007, the Board authorized TRRC to build and operate the Western Alignment, a 17.3-mile alternative route for a portion of the route already approved in Tongue River II, in a proceeding known as Tongue River III.³

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.⁴ As explained in more detail in that decision, the Board required TRRC to file a revised application that would present the its current plans to build a rail line between Miles City and Ashland. In addition, the Board announced that it would conduct a new environmental review, rather than a supplemental environmental review based on the three

¹ 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).

² 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).

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

⁴ 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).

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, although in modified form.⁵ 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 the new environmental review of the entire construction project, but also an examination of the transportation merits supporting the entire Tongue River I line.⁶ The November 1 decision also directed TRRC to supplement the revised application to provide a sufficient record for the Board's review, including additional evidence and argument in support of the transportation merits. 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 filing. 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, TRRC now proposes a different routing, known as the Colstrip Alignment, as its preferred alignment.⁷

According to TRRC, it would construct the line, and the line would be operated solely by BNSF Railway Company (BNSF), which owns a one-third interest in TRRC's parent company, Tongue River Holding Company, LLC. 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 consequently to the rest of the national rail network. Specifically, the line would connect at the north end with an existing and lightly used 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, therefore, be at the previously proposed Montco Mine location, 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.

⁵ Although the 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.

⁶ 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).

⁷ The ICC had examined a variation on the Colstrip Alignment as a potential route in Tongue River I.

Comments on the transportation aspects of TRRC's supplemental application may be filed on or before March 1, 2013. Interested persons need not be on the service list to file comments on TRRC's supplemental application, but they must serve a copy of their filing on TRRC and those on the service list. At that point, the commenting party will be added to the service list. TRRC may file a reply to the comments on or before April 15, 2013.

The Board's environmental review for this rail construction project is proceeding separately from our review of its transportation merits. Because the construction and operation of this project has the potential to result in significant environmental impacts, the Board's Office of Environmental Analysis (OEA) has determined that the preparation of an Environmental Impact Statement (EIS) is appropriate. OEA issued a notice to stakeholders and the public on October 22, 2012, announcing its intent to prepare the EIS and requesting comments on a draft scope of study. In November, OEA held scoping meetings in the project area to assist in defining the range of issues and alternatives to be considered in the EIS. Comments on the scope of the EIS must be submitted to OEA by January 11, 2013. Subsequently, OEA will issue a final scope of study for the EIS. Following the completion of scoping, OEA will prepare and issue a Draft EIS for public review and comment. The comments received will be addressed in a Final EIS. The Draft and Final EISs (including the public comments) will serve as the basis for OEA's recommendations to the Board regarding whether, from an environmental perspective, TRRC's supplemental application should be granted, granted with environmental conditions, or denied.

The Board's decision on TRRC's supplemental application then will take into consideration both the transportation merits and the environmental impacts of constructing and operating the proposed line.

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

Board decisions and notices are available on our website at www.stb.dot.gov.

Decided: January 4, 2013.

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