

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:<sup>1</sup> This decision concerns a rail construction and operation project in southeast Montana proposed by Tongue River Railroad Company, Inc. (TRRC). The decision clarifies what the Board will review in the case and directs TRRC to supplement the application it filed. The decision also establishes an expanded procedural schedule from the one set forth in our rules and requires TRRC to publish notice of that procedural schedule and the scope of this proceeding, as discussed here.

Decided: October 31, 2012

On October 16, 2012, Tongue River Railroad Company, Inc. (TRRC) filed a revised application pursuant to 49 U.S.C. § 10901 in Docket No. FD 30186. TRRC intends to construct and operate an approximately 83-mile line between Miles City, Mont., and two ending points, one near the site of the previously planned Montco mine near Ashland, Mont., and another at the proposed Otter Creek mine in the Otter Creek area east of Ashland. We now clarify what the Board will review in the case, direct TRRC to file supplemental information related to the transportation merits of the revised line TRRC now proposes to build, establish a new procedural schedule appropriate for this proceeding, and require that TRRC publish new notices consistent with this decision.

BACKGROUND

In 1986, the agency authorized TRRC to construct an approximately 89-mile rail line between Miles City, Mont. and Ashland and Otter Creek, Mont., a proceeding known as Tongue River I.<sup>2</sup> In 1996, the Board authorized TRRC to build a contiguous 41-mile line from Ashland

---

<sup>1</sup> 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).

<sup>2</sup> 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).

to Decker, Mont., in Tongue River II.<sup>3</sup> 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.<sup>4</sup>

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 environmental review. N. Plains Res. Council v. STB, 668 F.3d 1067 (9th Cir. 2011). The court's decision requires the Board to revisit the environmental analysis for Tongue River I (as well as Tongue River II and Tongue River III) because the Board had conducted a cumulative impacts analysis for the entire line in Tongue River III and 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. As explained in more detail in that decision, the Board required TRRC to file a revised application that would present the railroad's 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 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 proposes to go forward with the Tongue River I project, although in modified form.<sup>5</sup>

## DISCUSSION AND CONCLUSIONS

TRRC's October 16, 2012 revised application can be read as merely asking the Board to authorize certain refinements to the line approved in 1986 in Tongue River I. Accordingly, we believe it necessary to clarify at the outset that we intend to consider in this proceeding TRRC's current plans for the entire 83-mile line that TRRC presently intends to build. We make clear here that we reopened the Tongue River I proceeding to review in full what is now the entire Tongue River I line construction project. The Board's review will include not only the new environmental review of the entire construction project that will be prepared, but also an examination of the transportation merits supporting the entire Tongue River I line.<sup>6</sup>

---

<sup>3</sup> 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).

<sup>4</sup> Tongue River R.R.—Rail Constr. and Operation—Ashland to Decker, Mont., FD 30186 (Sub-No. 3) (STB served Oct. 9, 2007), pet. for reconsid. denied (STB served March 13, 2008).

<sup>5</sup> Although the decision granting Tongue River I authorized the construction of an 89-mile line, TRRC now describes the line as being approximately 83 miles in length based on refinements that would straighten and shorten the alignment.

<sup>6</sup> The Board's review of construction applications is governed by 49 U.S.C. § 10901 and its regulations at 49 C.F.R. §§ 1150.1-1150.10 and by the requirements of the National

(continued . . . )

In light of this clarification, TRRC is directed to supplement its application to provide a sufficient record for the Board's review. TRRC appears to seek to incorporate information from the original 1983 application to construct the Tongue River I line in its current application. However, in order to make this material readily accessible to the public, TRRC must include in its supplement any and all information from its 1983 application that is still relevant and that it wants considered in the record. TRRC also must include in the supplement a description of its complete ownership structure. Finally, TRRC must submit any additional evidence and argument in its supplemental filing in support of the transportation merits for the line that it now intends to build.

Under our regulations, comments on TRRC's application would be due 35 days after its October 16, 2012 filing date, and TRRC's reply would be due 5 days after the comments are due. See 49 C.F.R. §§ 1150.10(g) and (h). Given the need for TRRC to file supplemental information and the nature of this proceeding, we are adopting a revised procedural schedule<sup>7</sup> that provides additional time for the parties' submissions to ensure a complete record.<sup>8</sup> This schedule is set forth in the Appendix to this decision.

TRRC might have already published notices stating that comments on the application are due on or before November 20, 2012, as ordinarily required by our rules. Therefore, we clarify that interested parties may file comments at any time until the expiration of the deadlines in the procedural schedule we establish here. To alert the parties to what we intend to consider in this proceeding and the new schedule, we will require TRRC to publish new notices consistent with this decision within 15 days of the service date of this decision in the same places as any prior notices might have been published and to certify to the Board that it has done so.

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

---

( . . . continued)

Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370d (NEPA), and related environmental laws. Section 10901 requires the Board to grant a construction application unless the Board finds that the proposal is inconsistent with the public convenience and necessity (PC&N).

<sup>7</sup> The environmental review process for this rail construction project will proceed separately. On October 22, 2012, the Board's Office of Environmental Analysis issued a notice of intent to prepare an Environmental Impact Statement (EIS), a notice of scoping meetings to be held in Montana the week of November 12, 2012, and a request for comments on a draft scope of study for the EIS.

<sup>8</sup> Where appropriate, the Board has previously extended the procedural schedule in rail construction cases. See United States Dep't of Energy—Rail Constr. and Operation—Caliente Rail Line in Lincoln, Nye, and Esmeralda Cnty., Nev., FD 35106 (STB served Apr. 11, 2008).

It is ordered:

1. TRRC shall file a supplement to its application, as discussed above by December 17, 2012.
2. TRRC shall publish notices of the scope of the proceeding and the new procedural schedule within 15 days of the service date of this decision, as discussed above.
3. The Board adopts the procedural schedule set forth in the Appendix to this decision.

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

**APPENDIX**

November 1, 2012	Service Date of this Decision.
November 16, 2012	Due date for certification by TRRC that it has published newspaper notices pursuant to this decision.
December 17, 2012	Due date for TRRC's supplement.
January 9, 2013	Publication of <u>Federal Register</u> notice accepting or rejecting the application.
March 1, 2013	Due date for comments in support of or opposition to the application.
April 15, 2013	Due date for TRRC's reply.