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SURFACE TRANSPORTATION BOARD¹

DECISION

Finance Docket No. 30186 (Sub-No. 2)²

TONGUE RIVER RAILROAD CO.--RAIL CONSTRUCTION
AND OPERATION--ASHLAND TO DECKER, MONTANA

Decided: October 28, 1996

In Finance Docket No. 30186 (Sub-No. 2), authority is granted to construct and operate a line of railroad between Ashland and Decker, MT, using the Four Mile Creek Alternative, subject to conditions. Finance Docket Nos. 30186 and 30186 (Sub-No. 1) are reopened, a prior condition removed, and new conditions imposed. Both authorities are conditioned, inter alia, on a 3-year deadline to complete construction and on reporting requirements during that period of time.

SUMMARY

The Tongue River Railroad Company (TRRC or the Railroad) seeks authority to build a 41-mile rail line between Ashland and Decker, MT. The line would connect with an 89-mile line between Miles City, MT, and Ashland, that the Railroad was previously authorized to construct but has not yet built. Together the 130-mile line is to provide a new, shorter route for the carriage of coal from the Wyoming Powder River Basin to eastern destinations.

The line would connect with a line of the Burlington Northern Railroad Company (BN) at both TRRC's southern and northern termini. The new line would serve a few mines in the Decker area directly. Otherwise, it is chiefly an alternative

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC or Commission) and transferred certain rail functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 10901. Therefore, this decision applies the law in effect prior to the ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

² This proceeding also embraces Tongue River R.R.--Rail Construction and Operation--In Custer, Powder River and Rosebud Counties, Montana, Finance Docket No. 30186 and Tongue River Railroad Company--Issuance of Securities, Finance Docket No. 30186 (Sub-No. 1).

route for coal that already moves over BN. On this record, the BN has made no commitment to use the proposed line, and has neither supported nor opposed TRRC's application.

The Railroad has offered two alternative routes for the proposed construction of the new segment. The first, or TRRC's "preferred" route, extends from Ashland south following the Tongue River, then passes about one mile west of the Tongue River Reservoir. It terminates at a rail line owned by the Spring Creek Coal Company, which provides access to BN. The extension along TRRC's preferred route would require five bridges and one tunnel. Four of the bridges would be 500 feet in length each, and one 400 feet long. The tunnel would be 600 feet long.

At the request of the Board's Section of Environmental Analysis (SEA), the Railroad offered an alternative routing, referred to as the Four Mile Creek Alternative. This route would extend southeast from Ashland along Four Mile Creek, climbing a 2.31% grade from the Tongue River. It would then turn southward about three miles from its divergence from the river and continue on that course to its junction with the proposed extension near the Tongue River Reservoir.

This decision also considers a petition filed by the Northern Plains Resource Council (NPRC) on November 20, 1995, to reopen and revoke the authorization in Finance Docket Nos. 30186 and 30186 (Sub-No. 1) (ICC served Sept. 4, 1985) (TRRC I). That decision was modified on administrative appeal by the Commission in a decision served May 9, 1986 (TRRC II).

In the Sub-No. 2 proceeding, we will grant the application to construct and operate the proposed extension over the Four Mile Creek Alternative Route, subject to environmental conditions recommended by SEA in Section 5A and B of Chapter 3 of the Final Environmental Impact Statement (FEIS). In addition, all of this authority is conditioned on the requirement that TRRC construct the entire line between Miles City and Decker within 3 years of the service date of this decision and comply with periodic reporting requirements during that period of time to keep the Board apprised of the progress that is being made. In the lead and Sub-No. 1 proceedings, we will grant the petition to reopen the proceeding and eliminate one condition, but will otherwise deny the request to revoke the construction authorization.

PRELIMINARY MATTER

During the course of this proceeding, numerous motions and petitions to file evidence and argument have been submitted. Numerous motions to strike have also been filed. In the interest of obtaining the most complete record possible, we will accept all filings into the record and deny all opposing motions. As the record is sufficient for us to resolve all issues raised by the parties, we will deny all outstanding requests for oral argument in this matter.

Overview

First Application. In its application in the lead docket, originally filed on June 2, 1983 (amended January 2, 1984), TRRC sought ICC approval for its construction of 89 miles of railroad between Miles City, MT, and two termini located near Ashland, MT.

The proposed line of railroad was to serve future coal mines in the Ashland area, and connect with BN's main line at Miles City for shipment of the coal to eastern and western destinations. In an initial decision, an Administrative Law Judge (ALJ) approved the application (TRRC I). NPRC appealed the initial decision. In TRRC II, the ICC denied both appeals and approved the application, subject to two conditions.

First, the ICC conditioned TRRC's start of operations upon a ruling from the Department of the Interior (DOI) that TRRC's operation of the line would not result in a violation of section 2(c) of the Mineral Lands Leasing Act (MLLA), 30 U.S.C. 202, which prohibits railroads from holding federal leases or permits for mining coal. Second, the ICC conditioned approval upon TRRC's meeting the environmental mitigating conditions contained in Appendix B to the initial decision.

Second Application. TRRC notified the ICC in January 1989 that it intended to file a second construction application. Under the National Environmental Policy Act (NEPA) and related environmental laws, the environmental effects of the proposal must be considered, and we have thoroughly done so.

The ICC's then Section of Energy and Environment (SEE), now SEA (hereinafter, all references will be to SEA) published in the Federal Register a Notice of Intent to Prepare an Environmental Impact Statement (EIS) addressing the environmental effects of the project and to hold public scoping meetings.³ In December 1989, public scoping meetings were held in Montana. At these meetings, members of the public identified areas of environmental concern regarding the proposed extension that they believed needed to be addressed in the EIS. Based on SEA's independent analysis of the comments received, site visits, and meetings and correspondence with federal and state agencies, the ICC published a "final scope" of the EIS in the Federal Register in March 1990.

On June 28, 1991, TRRC filed the application at issue, seeking approval to construct and operate approximately 41 miles of railroad running south from Ashland to the Spring Creek/Decker area. The ICC accepted the application and notice was published in the Federal Register.⁴ Numerous comments both supporting and opposing the proposed extension were filed, including requests for an oral hearing.⁵

³ Where an EIS is required, the ICC's/Board's regulations require the applicant to consult with SEA 6 months prior to filing an application. 49 CFR 1105.10. In January 1989, TRRC informed SEA that it intended to file an application for the proposed extension. In November 1989, SEA commenced the process of preparing an EIS, anticipating that TRRC would file the application within 6 months. However, TRRC did not file its application until June 1991, 2 years after it was eligible to do so.

⁴ 56 FR 37573.

⁵ We have considered all comments. However, because of the large number of comments and because many of the comments make similar arguments, we will not identify each comment separately. We have addressed all of the issues raised in the comments.

At the same time, SEA went forward with its requisite hard look at the environmental consequences of the proposal, considering the potential environmental impacts associated with TRRC's preferred route, the Four Mile Creek Alternative, and the "no-build" alternative. SEA's Draft Environmental Impact Statement (DEIS) was served on the parties on July 17, 1992. Hearings on the merits were held in Lame Deer, Forsyth, and Miles City, MT, and in Sheridan, WY. Post hearing briefs and replies were requested and filed.⁶ On March 17, 1994, SEA issued a Supplement to the DEIS (SDEIS) and requested comments on it. A FEIS was served on April 11, 1996. In the FEIS, SEA recommended the Four Mile Creek Alternative as the environmentally preferable choice because it would avoid the environmentally sensitive Tongue River Canyon. Based on SEA's independent analysis of the project, comments to the DEIS and SDEIS, and the other information before it, SEA developed appropriate mitigation conditions addressing potential environmental impacts if either construction route before the agency were approved.

Following issuance of the FEIS, TRRC filed a petition on May 3, 1996, asking the Board to take a number of actions that would, in essence, lead the Board to conclude that the Railroad's preferred alignment rather than the Four Mile Creek Alternative recommended by SEA is the environmentally preferable choice. On May 14, 1996, Director John Wardell, Montana Office, U.S. Environmental Protection Agency (EPA), filed comments concurring in SEA's conclusions, but raising questions about the purpose of, and need for, the project itself. On May 23, 1996, Dr. Stan Wilmoth of the Montana Historical Society (MHS) filed comments in which he expressed concern about adverse historic effects stemming from any construction. On May 31, 1996, Kemper McMaster, field supervisor for the Fish & Wildlife Service's (FWS) Montana Field Office, concurred unconditionally with SEA's conclusion that the Four Mile Creek Alternative was environmentally preferable to TRRC's preferred route.

As discussed below, we find that, notwithstanding the potential environmental impacts associated with this proposal, the present and future public convenience and necessity require or permit the construction and operation of the Four Mile Creek Alternative. We agree with SEA that the Four Mile Creek route is the environmentally preferable construction option and adopt SEA's environmental analysis and the conclusions reached in the FEIS. We also agree with SEA that, with the recommended mitigation, construction and operation of the Four Mile Creek Alternative should meet applicant's project goals of providing more efficient service to coal shippers in this area, without having an unduly severe impact on the environment. Accordingly, we will impose the environmental conditions recommended by SEA that are set forth in Appendix B. Additionally, we will require that TRRC complete construction of the entire line between Miles City and Decker within 3 years of the service date of this

⁶ Although an ALJ conducted the hearings, the ICC did not delegate authority to issue an initial decision. In a decision served December 20, 1993, the ICC stated that "whatever the benefits that could result from an initial decision would not be worth the cost in time and the expense in litigation." Decision at 4.

decision and comply with periodic reporting requirements during that period of time.

THE EXTENSION APPLICATION

Description. The proposed extension will consist of 41 miles of main track with two passing sidings of about 8,500 feet and three set-out tracks with a minimum total length of 1,650 feet. As indicated, the line would connect with TRRC's yet-to-be-built Ashland-to-Miles City line and create a north-south connection between the lines at the Spring Creek/Decker mines and the BN lines at Miles City. TRRC asserts that the construction and operation is designed "to capture additional existing coal traffic originating at the Spring Creek and Decker mines, plus some tonnage being hauled by BN from the Gillette, Wyoming area." The line is a short cut for coal traffic moving east. It shortens the route for that traffic by saving 130 to 160 miles, depending on where the traffic originates. The existing BN line runs northwest of the Powder River Basin to intersect BN's east-west line near Billings, MT. According to TRRC, the proposed 130-mile line (the original 89-mile line with the 41-mile extension) will provide rail service for the first time to the largest undeveloped reserves (estimated at over 10 billion tons) of low sulfur sub-bituminous coal in the United States.

In order to provide service between Miles City and Decker, TRRC states that it will exercise its Ashland option approved in TRRC I and II. As authorized there, the single track main line will begin south and west of Miles City and will extend southward paralleling the Tongue River on the west side to milepost 63.6 (about 64 miles). At that point, it will cross the Tongue River and continue nine miles on the east side of the river to Ashland. At about milepost 72.2, the main line will split, with one branch proposed to parallel the Tongue River 8.9 miles to "Terminus Point 1," where the construction of the 41-mile segment is proposed to begin. The other branch was proposed to follow Otter Creek 7.7 miles to Terminus Point 2.

TRCC has indicated that construction is to be completed in 3 years for the entire alignment, including the permitted rail line from Miles City to Terminus Point 1 and the extension from Terminus Point 1 to Spring Creek. The line will consist of a single track main line with a right-of-way averaging 200 feet. The alignment will be designed to operate unit coal trains of about 112-125 cars with a speed of 40-50 miles per hour. TRRC plans to construct new terminal facilities at Miles City, which will consist of buildings for crews, operations, and a headquarters. Three additional tracks 7800 feet long will be constructed to handle yard activities.

Upon completion of the entire line, TRRC's sole connections will be with BN. The present route for coal traffic, which originates in the Powder River Basin and is destined for various upper midwest points, travels northwest through Sheridan to Huntley, and then eastward through Miles City. TRRC believes that it can obtain traffic originating in the Powder River Basin and, by interchanging and routing the traffic over its line, reduce the distance for this traffic about 15 percent of the total rail haul (by 130-160 miles). Traffic originating in the Powder River Basin will move from the origin, through Sheridan, then northeasterly to Decker, where BN will interchange the

traffic with TRRC. The coal will then move to Miles City where it will be interchanged again with BN.

Markets - coal sources and destinations. TRRC states that the market potential for coal from the Ashland area, where TRRC is currently authorized to construct and operate a rail line, is less favorable than it was in 1983.⁷ However, it adds that, because Congress passed the Clean Air Act Amendments in 1990, there has been an increased interest in low sulfur coal from the Powder River Basin. Applicant states that, in 1991, BN hauled over 150 million tons of coal, principally from the Wyoming Powder River Basin, and that BN has announced a targeted volume increase of 50 percent by the year 2000. According to TRRC, much of this increased delivery of coal will originate in Wyoming for central and lower midwest destinations. TRRC maintains that a benefit of the shortened mileage to the upper midwest will be to relieve current and future congestion over the heavily-traveled BN central corridor via Alliance, NE.

TRRC asserts that the present competitive market reach of Powder River coal that will use TRRC routing is well-defined, based on current coal contracts and spot purchases. The railroad states that the Clean Air Act of 1970 prompted states such as Minnesota and Michigan to develop statewide or regional regulations that limited sulfur dioxide emissions for all plants. According to TRRC, that fact, coupled with cost savings by using Powder River Basin coal, makes such coal a prime source for meeting more stringent sulfur dioxide emission standards under the amended Act.

Applicant states that the present market for the coal that TRRC would haul consists of electric utilities and industries in Minnesota, Wisconsin, and Michigan. According to TRRC, in 1991, the Decker/Spring Creek mines and the Wyoming mines produced over 16.5 million tons of coal, most of which were shipped along the Sheridan-Hardin-Miles City route. Of this total, approximately 11 million tons were shipped to the Midwest Energy Resources, Inc. (MER) terminal in Superior, WI, for lake vessel movement beyond, with the remaining tonnage being shipped on rail or rail/barge to Minnesota and Wisconsin destinations.

Financial information. The financial evidence of record can be divided into two broad categories: (1) financial information relating to the construction and financing of the line; and (2) information relating to the operations of the line in its first years of existence. As to the construction phase, TRRC provides preliminary estimates of the cost of construction and a financing plan (with related balance sheet and cash flow and income statement data). With respect to the operations phase, the railroad provides a 10-year income forecast which is challenged by NPRC. This information is discussed in more detail in Appendix A.

TRRC organizational structure. TRRC was formed on June 19, 1981, under the provisions of the Montana Uniform Limited Partnership Act. The limited partnership is comprised of Transportation Properties (TP), the general partner, and Tongue

⁷ V.S. Victor H. Wood, consultant for applicant, filed April 29, 1992.

River Holdings, Inc. (TRH), a Montana corporation and the limited partner. TP is a Montana general partnership comprised of the following general partners: ThermRail, Inc. (ThermRail), a Washington corporation, and WesRail, Ltd. (WesRail). WesRail, in turn, is a Montana limited partnership composed of Wesco Transportation, Inc. (Wesco) and Bellford & Company.

Applicant states that Wesco Resources, Inc. (Wesco Resources) of Billings, MT, is the general partner of WesRail and the parent of Wesco. Through other partnership entities or relationships, Wesco Resources has surface and coal interests in Rosebud and Powder River Counties. ThermRail is a subsidiary of Washington Energy Company (WECO), a Washington Corporation. Thermal Energy, Inc. (Thermal), another subsidiary of WECO, has surface and coal interests in Rosebud and Powder River Counties.

Applicant states that none of the partners of TRRC, TP (ThermRail, WesRail), or TRH has any interest in any federal or private coal properties. Each of the partners has invested in TRRC for transportation and investment purposes. The partnership agreement, signed June 19, 1981, and subsequently amended, provides for the separate and distinct management and conduct of the partnership solely through a management committee. Application at 6.⁸

Position of Parties. A number of parties support the proposed construction. These include: NERCO Inc., which is the owner and operator of the Spring Creek Coal Mine at Decker, and a major U.S. coal producer; the Detroit Edison Company, which is the corporate parent of NERCO; MER, another subsidiary of Detroit Edison, which operates a rail to water transfer facility in Superior, WI (in 1991, MER transloaded in excess of 11 million tons of Powder River Basin coal); Dairyland Power Cooperative, which is an operator of four electric generating stations that distribute electricity to 28 rural electrical cooperatives in Wisconsin, Illinois and Minnesota; OXY USA, Inc., which owns surface and coal leases in the Otter Creek area; the Cook Mountain Partnership, a Montana general partnership, which owns about 465 million tons of mineable coal reserves; and Montco, which is a Montana general partnership that proposes to mine coal along the 89-mile segment previously approved. Montana Governor Marc Racicot, Montana's United States Senators Max Baucus and Conrad Burns, Montana State Senators Marian Hanson, Tom Zook and Jessica Stickney (representing districts which include Miles City), the Custer County Commissioners (Miles City is in Custer County) and the City Council of Miles City support the proposed construction. Former Montana Governor Stan Stevens and former Congressman Ron Marlenee also submitted letters in support.

Several parties oppose the proposed construction. These include: NPRC, which is a coalition of ranchers, environmentalists, and other interested persons (NPRC has raised both economic and environmental arguments against the proposed construction); the Northern Cheyenne Tribe, which owns and occupies the Northern Cheyenne Reservation in Southeast Montana

⁸ Applicant states that, since the TRRC II decision, TP has acquired the interest of Arch Cartage Corporation (formerly DS Cartage, Inc.) and Otter Creek Transportation Company. Application at 7.

(the proposed extension would adjoin the eastern boundary of the reservation, including Birney Village which is adjacent to the proposed line); the Northern Cheyenne have requested the imposition of conditions to mitigate the impact on the reservation of the construction and operation of the line; the Crow Tribe, which receives revenue from BN for an easement for its Sheridan-Hardin Line through the Crow Indian Reservation in Montana (the Crow are concerned that the proposed construction would divert traffic and reduce Crow revenues from the easement); and OW Ranch, which includes 17,000 acres northeast of Decker and is adjacent to the proposed extension (600 head of cattle and 2000 sheep graze on the ranch, which is used chiefly as a hunting preserve). Rosebud County and the City of Forsyth also oppose construction of the proposed line because of anticipated adverse environmental impacts. Labor interests are represented by the United Transportation Union and the Brotherhood of Locomotive Engineers. They express concern about the potential for loss of jobs and the possibility that TRRC might employ nonunion employees.

THE ENVIRONMENTAL REVIEW PROCESS

Background. On July 17, 1992, SEA issued a DEIS evaluating the potential environmental effects of TRRC's proposed construction and operation of the rail line extension. In the DEIS, SEA thoroughly analyzed the environmental impacts of: (1) TRRC's preferred alignment, which generally parallels the Tongue River; (2) the Four Mile Creek Alternative, which would avoid the Tongue River Dam and a 10-mile section of the river just north of the Tongue River Dam; and (3) the "no build" alternative.⁹ SEA preliminarily concluded in the DEIS that the Four Mile Creek Alternative would be less environmentally harmful than TRRC's preferred alignment if the proposed construction were approved. SEA noted that TRRC's preferred routing through the approximately 10-mile canyon just north of the dam would affect the ecology of the river more than any other route because of the narrowness of the canyon and the resulting proximity of the line to the river and its bank.

SEA received and considered written comments on the DEIS from the parties and interested federal, state, local and private agencies and individuals. SEA also considered statements presented at the four public hearings conducted in August 1992. Numerous persons commented at these hearings about the DEIS and various environmental issues.

Because of concerns raised through the commenting process, SEA issued a SDEIS on March 17, 1994. There, SEA preliminarily concluded that the Four Mile Creek Alternative would have more adverse environmental consequences than TRRC's preferred route. SEA pointed out that this alternative would result in land disturbances from cut and fill procedures during construction, erosion and loss of soil, closer proximity to residences, deforestation, loss of big game and other wildlife habitat, more

⁹ In the DEIS, SEA concluded that there were no feasible construction alternatives other than TRRC's preferred route and the Four Mile Creek Alternative, primarily because of the difficult terrain. Nothing that has come to light since then casts doubt on that conclusion.

fuel consumption and increased air pollution. SEA received written comments on the SDEIS from numerous parties.

In its FEIS, SEA again analyzed the two possible construction alternatives and the "no build" option. In the FEIS, SEA was persuaded that the Four Mile Creek Alternative would be the environmentally preferable construction route because it would avoid the environmentally sensitive Tongue River Canyon. SEA determined that this alternative would allow TRRC to meet its project goals of providing more efficient service to coal shippers in the area without having an unduly severe impact on the environment. The "no-build" alternative, while environmentally benign, would not meet those objectives, SEA explained. SEA's analysis of the three alternatives, which we adopt, is summarized below.

Four Mile Creek Alternative. TRRC proposed the Four Mile Creek Alternative as the only acceptable alternative to its preferred route. The alternative would duplicate TRRC's preferred route, starting from the terminus on its previously-authorized, but not constructed, 89-mile line in Ashland, paralleling the river until the confluence of the Tongue River and Four Mile Creek. It then would leave TRRC's preferred route and extend southwest along Four Mile Creek, climbing from the Tongue River. Finally, it would turn southeastward approximately three miles from the divergence point and continue on that course to its junction with TRRC's preferred route near the Tongue River Reservoir. The Four Mile Creek Alternative would be approximately 10 miles longer than TRRC's preferred route. Like the preferred route, the Four Mile Creek Alternative would connect with BN via a rail line owned by the Spring Creek Coal Company, which provides rail service and connections for Decker-area coal shippers.

In the FEIS, SEA explained that the Four Mile Creek Alternative would avoid the Tongue River Canyon, which is located between the Tongue River Dam and the confluence of the Tongue River and Four Mile Creek. As the river meanders through the canyon, it provides diverse habitat for aquatic and terrestrial wildlife. This area of the river has been recognized as important habitat for migrating and wintering bald eagles. Additionally, since the mid-1980s, several bald eagles have nested in the cottonwood trees along this stretch of the river. Because this portion of the river does not freeze, it also provides important year-round habitat for bald eagles and waterfowl. The Four Mile Creek Alternative would avoid adverse impacts to nesting and wintering bald eagles and wintering wildfowl. Moreover, because the canyon is narrow, any ranching and farming operations are close to the river. Some of these operations would be bisected by TRRC's preferred route. The Four Mile Creek Alternative would also avoid these impacts.

SEA further pointed out that the Tongue River Reservoir State Recreation Area and the Tongue River provide popular recreational, fishing, hunting and scenic opportunities year-round. The region from the reservoir northwards along the river to its confluence with the Yellowstone River at Miles City is relatively undeveloped. Because of the canyon's narrow confines, the variety of plant and animal life and the scenery along this approximately 10-mile stretch of the river are particularly noteworthy. The river valley contrasts with the surrounding arid

and rugged hills and buttes. The alternative would avoid impairing these resources.

SEA also noted that concerns had been raised about the potential impacts to the river from the construction of the five railroad bridges and the tunnel that would be required on TRRC's preferred route within the canyon. These concerns included potential channelization, erosion and silting, flooding, and impacts from potential spills during operations. The Four Mile Creek Alternative would avoid the need to construct the bridges and tunnel.

SEA further noted that, throughout this environmental review process, two federal agencies have consistently recommended the Four Mile Creek Alternative, or the "no build" alternative, instead of TRRC's preferred route: the U.S. Fish and Wildlife Service (FWS)¹⁰ and the U.S. Environmental Protection Agency (EPA).¹¹ SEA relied on the advice and expertise of these agencies in analyzing potential environmental impacts and in determining the environmentally preferable route.

As discussed in the SDEIS and FEIS, SEA recognized that there could be potential safety risks and other environmental impacts associated with operation of this alternative route. Moreover, it would entail land disturbance from cut and fill procedures during construction, erosion and loss of soil, deforestation, loss of big game habitat, closer proximity to residences, more fuel consumption, and increased air pollution. Because the route would traverse pronghorn habitat, the fenced right-of-way could inhibit pronghorn daily and seasonal migration.

¹⁰ In its May 4, 1994 comments on the SDEIS, FWS reiterated its initial position regarding the Four Mile Creek Alternative:

Impacts to fish and wildlife resources and to Tongue River recreation would be less; adverse impacts to Tongue River Reservoir State Recreation Area would be avoided; adverse impacts to the scenic canyon would be avoided; Tongue River crossings would be reduced to one; less channel disturbance and riparian habitat impacts; reduced pollution threats in terms of sedimentation, toxic spills, and herbicide use; reduced impacts to wintering bald eagles; and fewer adverse impacts on fish and wildlife.

¹¹ In its comments on the SDEIS dated May 9, 1994, EPA stated:

The EPA has determined that there are potential significant adverse environmental impacts associated with the TRRC's Preferred Alternative that should be avoided in order to adequately protect the environment. We believe the magnitude of these impacts would be less with the selection of the Four Mile Creek Alternative, and could be avoided altogether with the No Action Alternative. We believe that TRRC's proposed alignment would have more adverse consequences on the environment than either the Four Mile Creek Alternative or the No Action Alternative.

With respect to safety, TRRC's principal concern regarding safe operations was the effect of the steep descending 2.31% grade on operations by loaded unit trains. In the SDEIS, SEA indicated that this grade could pose an increased risk for derailments compared to TRRC's preferred route. But SEA ultimately concluded that there are design and operating options by which TRRC could mitigate potential safety problems and that, despite the difficult grade, loaded train operations could be safely performed. In reaching this conclusion, SEA consulted with the Federal Railroad Administration (FRA), which concurred that the Four Mile Creek Alternative could be operated safely. Moreover, as SEA noted in the FEIS, TRRC has acknowledged that operations could be conducted on the alternative route, albeit not in line with its preferred design and operations parameters, and with a considerable increase in construction and operating costs.

SEA acknowledged that there are some other disadvantages associated with this route. This route would require cut and fill that could significantly alter and scar the area and change the natural land configuration for the duration of rail use. Thus, there would be a potential for erosion and soil loss within the Four Mile Creek drainage equal to or greater than that for TRRC's preferred route. The necessity of laying the right-of-way on the north-facing slopes of the Four Mile Creek drainage would mean removing ponderosa pine/juniper acreage, habitat for big game, and breeding bird populations. As described in the SDEIS, SEA also noted that this route would cross more residential access roads than TRRC's preferred alignment, and would be as close as 100 feet to two residences. Moreover, the steeper grade of this route would require more locomotives during rail operations, resulting in more fuel consumption and potentially more air pollution than operations over TRRC's preferred route.

Nevertheless, SEA concluded that the Four Mile Creek Alternative was the environmentally preferable construction option and would allow TRRC to meet its project goals of providing more efficient service to coal shippers in the area without having an unduly severe impact on the environment.

TRRC Preferred Route. From the terminus on its 89-mile line from Ashland to Decker, TRRC's preferred route would follow the Tongue River, generally paralleling the eastern shore until south of the Northern Cheyenne Indian Reservation, crossing the river several times and passing to the west of the Tongue River Reservoir.

SEA noted TRRC's claim that its preferred route, despite the need to construct five bridges and a tunnel, would be preferable from an engineering standpoint. As discussed in the DEIS, SDEIS and FEIS, it would provide a relatively flat grade so that operations would require fewer locomotives and less fuel, thus lowering potential fuel emissions. Further, because TRRC's preferred route would use the flat and even terrain of the Tongue River Canyon, there would be a reduced risk for train derailments. Therefore, SEA found that TRRC's preferred route would be less costly to build and operate than the Four Mile Creek Alternative.

As SEA explained, however, the principal environmental disadvantage of TRRC's preferred route is that it would operate

through the environmentally sensitive Tongue River Canyon, and would require the construction of five bridges and a tunnel in the canyon. SEA further noted that FWS and EPA, among the primary federal agencies SEA relies on to assist it in identifying and evaluating the environmental impacts associated with proposed construction projects, have consistently advised against permitting construction of TRRC's preferred route to avoid damaging this environmentally sensitive canyon.

In its comments on the SDEIS, EPA disagreed with SEA's preliminary identification of the TRRC preferred route as the environmentally preferable alternative.¹² FWS notified SEA that four endangered species could be affected by TRRC's proposed extension (i.e., either TRRC's preferred route or the Four Mile Creek Alternative): peregrine falcon, black-footed ferret, pallid sturgeon, and bald eagle. SEA's detailed analysis under the Endangered Species Act revealed that the bald eagle could be adversely affected, although not jeopardized, if TRRC's preferred route is approved and constructed because the Tongue River Canyon provides documented habitat for that species.

Because of this potential impact, SEA prepared a Biological Assessment (BA) analyzing the impacts to this species, and sought FWS's concurrence with the BA's conclusion that there would be no undue adverse impact to the bald eagle. According to SEA, FWS responded in its Biological Opinion (BO) that TRRC's preferred route would not unduly interfere with the bald eagle recovery program in Montana. FWS also stated, however, that potential environmental impacts associated with constructing and operating the railroad through the Tongue River Canyon would be far more difficult to mitigate than the overall adverse impacts of the Four Mile Creek Alternative. FWS stated that none of the adverse environmental impacts would occur if the "no build" alternative were selected.

¹² EPA stated:

[T]he TRRC's preferred alternative, which would require construction of five bridges over the Tongue River, each of which would require excavation and/or fill within the stream's high water line, would result in significant adverse impacts to the chemical, physical, and biological integrity of the Tongue River. We also believe that the construction and operation of a railroad along the TRRC's proposed alignment in the relatively undisturbed Tongue River Canyon would result in significant adverse impacts to recreational, aesthetic, and wildlife values, including habitat for the bald eagle.

The EPA has determined that there are potential significant adverse environmental impacts associated with the TRRC's Preferred Alternative that should be avoided in order to adequately protect the environment. We believe the magnitude of these impacts would be less with the selection of the Four Mile Creek Alternative, and could be avoided altogether with the No Action Alternative.

As previously noted, TRRC's preferred route would require construction of five bridges and a tunnel. When, as here, construction involves wetlands and/or waters of the United States, the railroad must obtain a permit under section 404 of the Clean Water Act. The U.S. Army Corps of Engineers (the Corps) issues such permits only for the least environmentally damaging practicable alternative.

According to SEA, although the Corps did not formally identify a preferred alternative during this EIS process, it did review the environmental documents to ensure that the EIS included full disclosure and contained sufficient information for the Corps to make its permitting decision. In a letter dated July 29, 1994, the Corps stated that TRRC's preferred route would have greater impact to the aquatic ecosystem than the Four Mile Creek Alternative.

SEA added that the Corps requested further information about wetlands identification and delineation for TRRC's preferred route and, on review of a further study submitted by TRRC, the Corps determined that TRRC's preferred route is reasonable, given safety factors, and that wetlands would not be a significant issue here. The Corps further stated, however, that a section 404 permit application would be needed for both the proposed extension and the original 89-mile line, for which the Corps permit has now expired.

Throughout the environmental review process, SEA received numerous comments regarding the natural beauty and intrinsic value of the Tongue River Canyon and the need to protect these resources. As the comments show, many believe that the construction and operation of a rail line through this area, particularly through the canyon, would diminish and possibly destroy its aesthetic and natural appeal. Commenters have argued that noise and air pollution would be unwelcome, right-of-way fencing would inhibit wildlife movement, wildlife would be stressed and killed by trains, and overall day-to-day train operations would disturb the tranquility of the area.

SEA noted that the canyon is also popular for fishing and boating, and other recreation activities. The recreation area is adjacent to the reservoir and provides camping and picnic facilities. The reservoir is a popular recreation location, and the shores and nearby hills provide sites for vacation homes.

Thus, SEA concluded that the TRRC preferred route was not the environmentally preferable construction option.

The "No Build" Alternative. According to SEA, this alternative would be environmentally neutral because none of the environmental impacts associated with either TRRC's preferred route or the Four Mile Creek Alternative would occur. The "no build" alternative would preserve the status quo. The present movement of coal from the Decker mines would be unaffected because BN is already providing service to these mines via an alternate route; the present BN movement of coal from Decker would continue over the existing BN line now serving the Powder River Basin. This alternative, however, would not permit TRRC to participate in what it describes as a more efficient and shorter new movement serving area mines in conjunction with BN.

SEA noted that, although the extension would not be built under this alternative, the previously authorized 89-mile line from Miles City to Ashland, designed to serve new mines in Montana, could still be constructed and operated. TRRC would still be able to serve the Montco mine, a mine site with an estimated annual coal production capacity of 38 million tons, and four other potential mine sites in the Ashland/Birney/Otter Creek area.

A portion of the existing BN line extends through the Crow Indian Reservation in Montana. According to SEA, this line is currently subject to a long term lease involving the Crow Indian Tribe. It is SEA's understanding that BN may need to renegotiate this lease to continue its use of the current rail line through the Crow Indian Reservation. If the lease is not renewed, the railroad may consider alternatives such as transporting coal over its southern line through Wyoming. This would add considerable mileage to upper midwest destinations (and greater fuel use with associated pollutant emissions) that could be avoided by routing traffic over the proposed TRRC extension.

SEA's Conclusions. In its FEIS, SEA concluded, based on all the information available to it and the results of its own independent investigation, that the Four Mile Creek Alternative would be the environmentally preferable construction option. According to SEA, although TRRC's preferred route would be better from an engineering viewpoint because of the flatter grade, its advantages would be outweighed by the fact that TRRC's preferred route would traverse the environmentally sensitive Tongue River Canyon and would require the construction of several bridges and a tunnel through the canyon.

SEA also concluded that the Four Mile Creek Alternative is the only viable construction alternative to TRRC's preferred route. It would avoid the environmentally sensitive Tongue River Canyon and the area's recreation resources as well as the need for blasting near the Tongue River Dam. Moreover, because it would avoid the need to construct bridges through the Tongue River Canyon, it would reduce the potential for increased bank erosion, river channelization, and flooding.

As earlier indicated, however, SEA determined that there would be some environmental impacts associated with the Four Mile Creek Alternative. These include a grade that, though safe to operate, would require strict adherence to operating practices, increased fuel consumption and air pollution, land disturbance, habitat and wildlife loss, and proximity to residences. Because of the 2.31% grade and the need for more engines to negotiate this grade, the Four Mile Creek Alternative would be more costly to construct and operate than TRRC's preferred route.

In reaching its conclusions, SEA relied on the Council on Environmental Quality's (CEQ) regulations that require agencies to identify a preferable alternative or alternatives, if one or more exists.¹³ Based on this definition, SEA found that the

¹³ See 40 CFR 1502.14(e). The environmentally preferable alternative is defined by CEQ as that causing the least impact to the biological and physical environment. It would have the

(continued...)

environmentally preferable alternative here would be the "no build" alternative, because it would require no new construction and would not increase environmental impacts. The "no build" alternative, however, would fail to provide the transportation benefits for which this project was designed.

SEA ultimately concluded that the Four Mile Creek Alternative, conditioned upon compliance with the mitigation conditions specified in Sections A and B of Chapter Three of the FEIS, would be the least environmentally damaging construction option. Although the mitigation measures recommended by SEA would not eliminate all of the environmental impacts identified with the Four Mile Creek Alternative during the environmental review process, they would reduce their significance. Because of the environmental impacts associated with constructing and operating a railroad line through the canyon, mitigation would be less effective on TRRC's preferred route. Accordingly, SEA concluded that construction and operation of the Four Mile Creek Alternative should meet applicant's projected goals, but not have an unduly severe impact on the environment.

DISCUSSION AND CONCLUSIONS

Public convenience and necessity. Under 49 U.S.C. 10901, we must determine whether the present and future public convenience and necessity require or permit the construction and operation of the proposed Tongue River extension. At the time the application was filed, 49 U.S.C. 10901(a) of the Interstate Commerce Act provided that an application to construct and operate a line of railroad must be approved:

[I]f the Commission finds that the present or future public convenience and necessity requires or permits the construction or acquisition (or both) and operation of the railroad line.

The Staggers Rail Act of 1980 (Staggers Act) had changed the wording of section 10901 to ease the burden of obtaining operating authority.¹⁴ A key purpose of the Staggers Act was to create a healthy climate for new investment so that sufficient capital could be attracted to the railroad industry. Congress stated in section 3 of the Act (H.R. Rept. No. 96-1430, p. 3 (1980), Conference Report) that: "the purpose of this Act is to provide for the restoration, maintenance, and improvement of the physical facilities and financial stability of the rail system of the United States." That includes not just capital to replace outmoded plant, but also capital to improve the efficiency of the

¹³(...continued)

lowest level of ground-and vegetation-disturbing activities and would best protect, preserve, and enhance historic, cultural, and natural resources.

¹⁴ The Staggers Act amended 49 U.S.C. 10901 to facilitate entry into the rail industry. Under the prior section 10901, the Commission was required to find that the public convenience or necessity required or would be enhanced by the construction. The Staggers Act required the Commission to find that the public convenience and necessity required or permitted it.

rail network or to make the industry responsive to shipper demand for rail service as it arises.

The transportation issues that are raised in rail entry cases include: (1) whether the applicant is fit, financially and otherwise, to undertake the construction and provide rail service; (2) whether there is a public demand or need for the service; and (3) whether the competition would be harmful to existing carriers. We have considered each of those issues here.

Financial fitness. The purpose of the financial fitness test is not to protect the carrier or those who elect to invest in the proposed project, but, rather, to protect existing shippers from carrier financial decisions that could jeopardize a carrier's ability to carry out its common carrier obligation to serve the public. See, e.g., Texas & Pac. Ry. v. Gulf, Etc., Ry., 270 U.S. 266, 277-78 (1925), and Texas and New Orleans R.R. Co. v. The North Side Belt Ry. Co., 276 U.S. 475 (1928). Currently, TRRC serves no rail shippers. It is not an operating railroad. If the line were to be built and fail financially, the affected shippers at Decker would return to using BN's prior service over the more circuitous route. Thus, shippers would continue to receive rail service even if this project were to fail.

Even if financial fitness were a major issue here, we conclude that TRRC's submissions meet the applicable statutory and regulatory requirements. First, applicant has complied with the Board's regulations and submitted the required data. Moreover, as discussed in Appendix A, based on our analysis of the financial evidence before us here, we conclude that applicant's income projections show the carrier to be financially fit and able to construct the line, sustain operations, and service debt, provided that any cash flow shortfalls in the early years of operations are funded with additional partnership capital or advances on transportation charges. We note that, as with any business transaction, the financial market itself, of course, will ultimately determine if the project is economically viable--i.e., private financing approval will depend in part on current market economics, partners' willingness to contribute substantial amounts of capital, and other factors that may change by the time the project is under way.

NPRC argues that TRRC will not be able to meet its financial obligations because of a lack of potential traffic. Although NPRC has submitted studies which it believes show a lessened demand for coal in the midwest and, thus, greatly diminished income projections for TRRC revenue, we find NPRC's data and analysis unpersuasive. Our determination here does not hinge on whether the market is increasing or decreasing for coal in general, or on Montana and Wyoming compliance coal more specifically, but on whether TRRC can garner traffic for coal originating at both Decker and south of its line and destined for the upper midwest. Even if coal traffic declines, TRRC may well be able to provide sufficient efficiencies to reach its projected operating volumes.

Although TRRC may face a formidable task in obtaining the required permits and securing the traffic, this is part of the uncertainty inherent in any private-sector business venture. In any event, with over a quarter of a billion dollars at stake,

TRRC will rely on its ability to garner traffic from the Decker mines and to interchange other coal traffic with BN before entering into its financial agreements and beginning actual construction.¹⁵ In short, we conclude that TRRC has sufficient financial backing to make the project work, both from partners that are committed to substantial cash outlays and from a commercial lending source. Therefore, we find that TRRC is financially fit.

Public demand or need. We also conclude that TRRC has shown the public demand necessary to support this application. Proponents of the project include NERCO, a large coal producer; Detroit Edison; MER, a subsidiary of Detroit Edison; and Dairyland, all of whom favor the project because of anticipated reductions in transportation distances, reductions in costs to utilities and consumers, and reductions in sulfur dioxide emissions.¹⁶ Moreover, numerous Montana officials, including the Governor, both U.S. Senators, and state legislators, support the proposed line, citing such benefits as increased employment and development of coal reserves as well as a broadened tax base.

It appears that the potential users of the proposed line are seriously committed to the project and to its viability. NPRC has argued that the line is either not viable (alleging a lack of existing or future demand), or that adequate transportation services are currently available. However, the demand for this service is self-evident from the potential users' support of this application, as the buyers of TRRC's services comprise one of the cornerstones of TRRC's financing. Moreover, if there is a lack of public demand for the proposed line, it will not be built. We also note that the demand for TRRC's services will be more affected by whether it can offer a more efficient transportation service in conjunction with BN than BN can now offer on its own for coal, rather than by whether TRRC can create totally new markets.

The ICC's announced policy, which is being continued by this Board, was to eliminate entry barriers by authorizing new construction to the greatest extent possible. In the past, the Board's predecessor, the ICC, did what it could to facilitate investment initiatives and encourage expanded rail service. As pointed out by TRRC, the potential exists here for applicant to provide a more efficient service with reduced transportation costs for the coal shipper. We note, further, that TRRC is taking on the burdens of a new carrier, including the financing

¹⁵ TRRC stated in its application that it had discussed, but not concluded, final agreements with BN on matters concerning the division of rates, trackage connections, and interchange of traffic. With respect to the interchange of traffic, TRRC expects to conclude arrangements with BN in accordance with the standard interchange rules of the Association of American Railroads. If agreements on the division of rates cannot be reached, TRRC states that it will offer independent coal transportation contracts to Miles City from which coal shippers would negotiate independent transportation contracts with BN to the destination. Application at 21.

¹⁶ As noted earlier, other shippers submitted statements in support, but their evidence related to the already-approved Miles City-Ashland segment.

and the associated risks, to provide more efficient service to existing markets and, if successful, to additional markets. Certainly, rail efficiency is an important component of the overall rail system and we are charged with approving transactions which improve the efficiency of the rail system where we can appropriately do so. Cf. Union Pacific Corporation, et al.--Control and Merger--Southern Pacific Rail Corporation, et al., Finance Docket No. 32760, Decision No. 44 (STB served Aug. 6, 1996); and Burlington Northern Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 32549, Decision No. 38 (ICC served Aug. 23, 1995). This transaction certainly promotes this policy.

Competition with existing carriers. Finally, the issue of whether the proposed line would harm existing rail services is not applicable here. The only competition would be with BN, and then only for a small segment of the total haul. BN has not participated in this proceeding and has voiced no objection to the proposed line. And, even if BN were to argue that the proposed line would provide competition (i.e., routing BN-TRRC-BN instead of all BN), new construction under the circumstances would fulfill the national rail transportation policy by providing "competition and the demand for services to establish reasonable rates for transportation by rail" (Section 10101a(1)). Further, this authorization of construction would "ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers" (Section 10101a(4)) and foster sound economic conditions in transportation (Section 10101a(5)).¹⁷

Balancing environmental concerns. In deciding whether to authorize the construction and operation of a new line, we must take into account environmental concerns. As explained in the DEIS, SDEIS, and FEIS, significant environmental issues have been raised by this project. We have considered whether to deny the application because of these concerns but have decided not to do so. As SEA concluded in the FEIS, the environmentally preferable option here would be "no build," because it would require no new construction and operations and would not increase environmental impacts. However, the "no build" alternative would fail to provide the transportation benefits for which this project was designed. We agree with SEA that, with the recommended mitigation, construction and operation of the Four Mile Creek Alternative should meet TRRC's project goals of providing more efficient service to coal shippers in the area, without having an unduly severe impact on the environment.

We note that, in reaching this conclusion, SEA undertook, as previously discussed, a comprehensive environmental review, preparing a full EIS and developing detailed mitigation to address all significant environmental concerns associated with the construction and operation of the Four Mile Creek Alternative. SEA based its analysis on hearings, site visits,

¹⁷ See also such agency decisions as Gateway Western Railway Company--Construction Exemption--St. Clair County, IL, Finance Docket No. 32158, et al. (ICC served May 11, 1993) and Louisville & Jefferson Co. & CSX Const. & Oper. Jeff. KY, 4 I.C.C.2d 749, 759 (1988).

the comments of interested parties and consultations with various groups (including the Railroad and its consultant). SEA also took into account the specialized expertise of other federal and state agencies, including both FWS and EPA, which have consistently opposed TRRC's preferred alternative and endorsed either the Four Mile Creek or the "no-build" alternative. Additionally, SEA examined issues relating to the Endangered Species Act, the ecological importance of the Tongue River Valley, and the potential for cumulative impacts on the Tongue River Reservoir from rail construction and reservoir repairs. Finally, as noted earlier, SEA took into account CEQ regulations requiring agencies to identify a preferable environmental alternative or alternatives, if one or more exists.

After completing its environmental analysis, SEA concluded that, although TRRC's preferred route would be better from an engineering standpoint because of the flatter grade, its advantages would be outweighed by the fact that TRRC's preferred route traverses the environmentally sensitive Tongue River Canyon, and would require the construction of five bridges and a tunnel through the canyon. Because of the narrowness of the canyon and the resulting proximity of the line to the river and its banks, SEA concluded that TRRC's preferred routing would affect the ecology of the river more than any other route.

In this regard, SEA noted that, because the river and associated wetlands are located in an arid region, they are an oasis in southeastern Montana. It also cited an FWS report about the Tongue River Reservoir that determined that the river is already under stress, and that the stream course has been extensively altered by the reservoir and agriculture. The result, according to the report, is that the river is becoming more confined and incised, meanders and oxbows are becoming isolated, and the riparian habitat along the river is dwindling. SEA stated that the importance of this aquatic ecosystem for agriculture, ranching, and recreation is generally well recognized. SEA also stated that, recognizing the importance of preserving biodiversity, it made avoiding further disturbance to this river one of the key objectives of the environmental review process.

SEA acknowledged that the Four Mile Creek Alternative would have its own environmental impacts. These include a grade that would require strict adherence to rigorous operating practices, increased fuel consumption and air pollution, land disturbance, and habitat and wildlife loss. The alternative routing would also run in close proximity to a number of residences. Because of the grade and the consequent need for more engines, the Four Mile Creek Alternative would be more costly to construct and operate than TRRC's preferred route. It would, however, avoid the environmentally sensitive Tongue River Canyon. It would also avoid the area's recreation resources and the need for blasting near the Tongue River Dam. Because there would be no need to construct bridges through the Tongue River Canyon with this alternative, SEA concluded that the potential for increased bank erosion, river channelization, and flooding would be reduced.

The Board's Mitigation Conditions. As noted, SEA developed detailed mitigation conditions in the FEIS to offset potential adverse impacts of the construction and operation of the Four Mile Creek Alternative. TRRC suggested and/or agreed to many of

these mitigation measures. Areas covered by these comprehensive conditions (which are set forth in Appendix B) include land use (agricultural, ranching, recreational), social, economic and transportation concerns, air and noise impacts, safety and fire prevention, water quality and hydrology, aquatic and terrestrial ecology¹⁸, Native American concerns, and cultural and historic resources.

We adopt SEA's recommended mitigation and believe that with that mitigation (and the addition of reporting requirements and a construction deadline for the entire line, as discussed below), the construction and operation of the Four Mile Creek Alternative should be approved.

We are confident that the interests of affected Native Americans are protected to the extent possible within our jurisdiction. Our mitigation addresses Native American concerns by including measures to offer job opportunities, and to protect Native American values and cultural resources. For example, TRRC will be required to appoint a liaison between TRRC management and the Northern Cheyenne Tribe to assist in ensuring that tribal members receive an equal opportunity to secure temporary construction and full-time operational jobs with TRRC.¹⁹ Also, Native Americans will be asked to assist in the identification of traditionally-important plants, sacred sites, and cultural resources.

A key feature of the mitigation plan for the Ashland-Decker extension is the formation of an Multi-Agency/Railroad Task Force²⁰ comprised of this agency and various other federal and state agencies. The purpose of the agency Task Force will be to advise, assist and coordinate with TRRC in implementing the detailed mitigation measures we have imposed to address terrestrial and aquatic impacts for the Ashland-Decker extension. In addition to these supervisory functions, the Task Force will be available to deal with the unanticipated environmental issues that can arise as this particular project is implemented and construction begins, specifically including issues related to the concerns of landowners and Native Americans. The Task Force's membership will be comprised of specified agencies, but it is broadly representative. In addition, the Task Force will consult, as needed, with affected interests, including ranchers, other landowners, Native Americans, and other federal, state or private organizations that could provide additional expertise.²¹ TRRC will retain an independent third-party contractor, selected by SEA, to aid the Board in fulfilling its responsibility as the

¹⁸ We note that the Biological Assessment recommended in condition No. A.9.3.1.1. of the DEIS has already been completed.

¹⁹ We note that TRRC agreed to this mitigation, which is beyond the scope of the mitigation that we would normally impose.

²⁰ The Task Force does not apply to the 89-mile line from Miles City to Ashland.

²¹ We encourage the Task Force to use innovative means to address the issues before it, consistent with the conditions we have imposed. Any significant changes would need to be approved by the Board.

lead agency for the Task Force. The contractor will work under the direct supervision and control of SEA.

Finally, as part of the mitigation plan, we are in the process of finalizing a Programmatic Agreement (PA) with the Montana State Historic Preservation Officer (SHPO), the Advisory Council on Historic Preservation (ACHP), and TRRC to reduce or eliminate adverse impacts to cultural and historic resources. This PA is being negotiated in accordance with the requirements of the National Historic Preservation Act (NHPA). To date, the SHPO, TRRC, ACHP and the Board have agreed in principle to the PA's terms. Representatives of the Northern Cheyenne Tribe will be asked to concur in the agreement, and other affected tribes will be asked to participate where appropriate. Mitigation measures addressing potential adverse impacts to Native Americans, specifically the Northern Cheyenne, are set forth in both the PA and in other mitigation measures recommended by SEA.

In a letter dated May 23, 1996, Dr. Wilmoth of MHS raised new historic preservation issues. He states that he believes that "both a historic Traditional Ranching Cultural Landscape or District and a Native American Traditional Cultural Landscape or District would be Adversely Effected by either action alternative," and that "Effects very likely can not be mitigated." He further states that the concerns of traditionalist Native Americans and the "Historic Ranching community" have not been addressed, requests that the "No Action" alternative be more completely analyzed, and concludes that there appears to be no public benefit derived from either construction alternative.

We disagree. As the record here shows, SEA has given extensive consideration to both historic preservation and cultural resource issues in this case. SEA has consulted with the SHPO, ACHP, the Northern Cheyenne Indians, and the Railroad throughout the course of this proceeding and the preparation of the comprehensive PA. We believe that, to the extent possible within the Board's jurisdiction, the PA is designed to fulfill the goals and mandates of section 106 of the NHPA and to ensure the protection of both historic and cultural resources. Dr. Wilmoth will be able to participate during the final negotiation and implementation of the PA. This will provide ample opportunity to address Dr. Wilmoth's concerns.

We disagree with Dr. Wilmoth's suggestion that SEA's recommended mitigation is inadequate. SEA evaluated the possible presence of a Native American Traditional Cultural Landscape and included mitigation to address impacts to such a resource in the PA. During preparation of the PA, SEA identified a number of historic and cultural resources that could be mitigated, while leaving room for the discovery and preservation of additional resources that may be present but not yet identified. In sum, we conclude that the PA, if implemented, would protect, to the extent possible within our jurisdiction, potentially adversely affected historical and cultural resources.

As indicated above, TRRC has filed a post-FEIS petition in which it essentially asks us to reject SEA's recommendation and select the preferred route. In support, applicant argues that federal and state agencies having primary responsibility for the project have concurred in the mitigation measures proposed for

its preferred alignment, citing to a Corps letter stating that the Corps has no concerns about wetlands on the route.²² TRRC further argues that, with SEA's recommended mitigation for that route, no significant environmental impacts would remain.

Although the Corps initially expressed some reservations about TRRC's preferred route, its final letter to SEA, dated December 16, 1994,²³ after that agency reviewed the wetlands delineation report, stated that applicant's preferred alternative was reasonable, given safety factors, and that wetlands were not a significant issue. However, the FEIS did not rest its recommendation primarily upon the Corps' assessment of the relative impacts of the various routes upon wetlands, nor has that been a significant factor in our decision here.

Thus, we do not find TRRC's arguments persuasive. The record before us indicates that construction and operation impacts associated with building the rail line through the canyon would be far more difficult to mitigate than those associated with the Four Mile Creek Alternative.²⁴ Moreover, even with the detailed mitigation measures SEA developed for the railroad's preferred route, and with the completion of additional studies (the BA and wetlands delineation report), most of the agencies with which SEA has consulted continue to believe that the Four Mile Creek Alternative is environmentally preferable to TRRC's preferred route.

Indeed, we note that EPA and FWS recently reiterated that this remains their view. In September 1995, fully aware of the extensive environmental analysis that had been done in this case, EPA stated that:

The U.S. Environmental Protection Agency, Region VIII, Montana Office, continues to believe that [the] Four Mile Creek Alternative is the environmentally preferred alternative for the Tongue River Railroad, since it avoids disturbing the environmentally sensitive section of the Tongue River below the Tongue River Dam, and eliminates the need to construct five

²² According to TRRC, 3.8 acres of riparian wetlands would be affected, and the difference of affected wetlands between the preferred and alternate routes is .1 acre for either alignment.

²³ Letter from Robert S. Nebel, Chief, Environmental Analysis Branch of the Corps, Omaha, NE.

²⁴ SEA should not be faulted for having changed its position on which route was preferable during the environmental review process. It is SEA's responsibility to explore possible alternatives and to let the public comment on them. The DEIS and the SDEIS were preliminary documents that allowed SEA and the public to evaluate all aspects of TRRC's proposed construction and operation, consider any new evidence, and change or readopt any preliminary conclusions made during the environmental review process before reaching a final conclusion. As the DEIS, SDEIS, and FEIS show, the environmental review process here was thorough. There was ample public participation, and the reasons for SEA's final recommendation that the Four Mile Creek Alternative is the preferable construction option are fully explained.

bridges across the Tongue River and a tunnel. We believe that the construction and operation of a railroad along the proposed Tongue River Canyon alignment in the relatively undisturbed Tongue River Canyon would result in significant adverse impacts to recreational, aesthetic, and wildlife values, including habitat of the threatened bald eagle. We believe the magnitude of these impacts would be less with the selection of the Four Mile Creek Alternative, and could be avoided altogether with the No Action Alternative. We believe that TRRC's proposed alignment would have more adverse consequences on the environment than either the Four Mile Creek Alternative or the No Action Alternative.²⁵

FWS stated initially that: "We know of no potential impacts to fish and wildlife that are anything close to being of comparable extent in connection with the Four Mile Creek route. From a fish and wildlife perspective, the Four Mile Creek route appears clearly preferable."²⁶

Later, well after the completion of the SDEIS, FWS stated that: "It is the Service's position that construction impacts associated with building the railroad through the canyon will be far more difficult to mitigate than adverse impacts associated with the Four Mile Creek Alternative. Obviously, none of the adverse environmental impacts would occur if a "No Build" alternative was selected."²⁷

FWS reaffirmed this position in November 1995 when it stated that its BO referred only to the potential effects on the bald eagle, and not the overall environmental acceptability of the proposed project. FWS's opinion regarding the overall acceptability of the proposed action was addressed in its May 4, 1994 and August 29, 1991 letters.²⁸ In other words, FWS continues

²⁵ Letter from John F. Wardell, Director, Montana Office, EPA, dated September 6, 1995.

²⁶ Letter from Dale Harms, State Supervisor, Montana State Office, FWS, dated August 29, 1991.

²⁷ Letter from Kemper M. McMaster, Field Supervisor, Montana Field Office, FWS, dated May 4, 1994. FWS reiterated that its initial opinion expressed in 1991 had not changed, and that the construction impacts associated with building the railroad through the canyon will be far more difficult to mitigate than adverse impacts associated with the Four Mile Creek Alternative. FWS's prior comments on the Four Mile Creek Alternative were: (1) impacts to fish and wildlife resources and to Tongue River Recreation would be less; (2) adverse impacts to Tongue River State Recreation Area would be avoided; (3) adverse impacts to the scenic canyon would be avoided; (4) Tongue River crossings would be reduced to one; (5) less channel disturbance and riparian habitat impacts; (6) reduced pollution threats from sedimentation, toxic spills, herbicide use; (7) reduced impacts to wintering bald eagles; and (8) Four Mile Creek Alternative preferable from fish and wildlife perspective.

²⁸ Final BO from Dale Harms, Field Supervisor, Montana Field
(continued...)

to believe, even after the completion of its November 1995 BO, that the construction impacts associated with building the railroad through the canyon would be far more difficult to mitigate than adverse impacts associated with the Four Mile Creek Alternative.

The TRRC Preferred Route Is Not Environmentally Acceptable. Notwithstanding the record that has been developed, TRRC claims that the impacts through the canyon can be mitigated, and that we should approve both that route and the Four Mile Creek Alternative as environmentally acceptable.²⁹ TRRC believes that the mitigation measures recommended by SEA for TRRC's preferred canyon route are adequate to minimize the impacts of the canyon alignment and that we should therefore approve TRRC's preferred routing.

We do not agree. We have carefully examined the record, including TRRC's data, arguments, and willingness to employ mitigation measures; the expert analyses and opinions of other governmental agencies; and SEA's analyses and conclusions regarding the environmental impacts of the various routings. TRRC's preferred route along the Tongue River, while preferable for the relatively flat grade from both engineering and operating standpoints, plainly is not preferable in other respects. Regardless of the mitigation measures that we could impose on a grant of TRRC's preferred route, this route would still require construction and operation through the narrow 10-mile canyon north of the Tongue River Dam. This area is so narrow that the rail line cannot remain on one side of the river, but must cross several times, necessitating the use of five bridges and a tunnel. Therefore, we agree with SEA that severe environmental degradation is likely to occur, and that this degradation could not be effectively mitigated. As SEA points out, inevitable ecological impacts to the river would occur because of the narrowness of the canyon and the resulting proximity of the line to the river and its banks.

TRRC mischaracterizes SEA's decision to develop mitigation measures for TRRC's preferred route as well as the Four Mile Creek Alternative. SEA was obligated to assess and make recommendations on all the feasible alternatives before the Board. Because we can reject SEA's recommendations, SEA was required to develop mitigation measures for the two feasible construction alternatives at issue here and to address the "no-build" alternative. The fact that SEA developed mitigation for TRRC's preferred route does not mean that SEA finds it to be environmentally acceptable.

²⁸(...continued)
Office, FWS, dated November 22, 1995.

²⁹ Petition of applicant filed May 3, 1996. In that petition, TRRC also requests that we take notice of TRRC's data which it believes were not considered by SEA in its conclusions; make no recommendation as to selection of an alignment in a decision on the merits; and allow TRRC to corroborate coal projections submitted in May 1994 in rebuttal to NPRC's February 1994 petition to reopen.

We are also mindful that, while NEPA requires us to take a hard look at the environmental consequences of our decision, it does not mandate a particular result. Robertson v. Methow, 490 U.S. 332, 350 (1989). Once the adverse environmental effects of a proposed action have been adequately identified and evaluated, we may conclude that other values outweigh the environmental costs.

Here, however, there are good reasons for selecting the Four Mile Creek Alternative. The record shows that economic and transportation efficiencies can be achieved through either construction alternative, as both routings can serve the Decker mines and the bridge traffic from the Wyoming Powder River Basin. However, TRRC's preferred routing will have serious, unavoidable environmental impacts which outweigh any increased costs that constructing and operating the Four Mile Creek Alternative will entail. On the other hand, the Four Mile Creek Alternative will allow TRRC to achieve most of the efficiencies it seeks without the profound environmental impacts to the Tongue River Reservoir and the area of the canyon north of the reservoir. We reject the "no-build" alternative because we believe that the economic and transportation efficiencies of allowing TRRC's construction and operation of the Four Mile Creek Alternative outweigh the potential effects to the environment, as mitigated by the conditions recommended by SEA and the additional reporting and construction deadline conditions we will impose. For these reasons, we will authorize construction and operation of the Four Mile Creek Alternative with these mitigation conditions.

The petition to reopen/revoke. In its petition, NPRC makes three arguments that TRRC's authority to build the first segment should be revoked. TRRC opposes both reopening and revoking the authorization. We will grant NPRC's petition to reopen TRRC I and TRRC II, remove one earlier-imposed condition, require that construction be completed within 3 years, and require that reports of progress be filed, but otherwise deny the request for revocation.

NPRC's first argument for revocation is that TRRC's certificate was conditioned in TRRC I (the initial decision) on the commencement of construction within 1 year from date of the initial decision, and applicant did not meet that condition. As previously discussed, the TRRC II decision imposed two conditions: the mitigating conditions in Appendix B of the initial decision and the 2(c) condition precedent to operations. Moreover, ordering paragraph Number 2 thereof stated that the "initial decision, as modified here and subject to the environmental mitigation plan and section 2(c) conditions, is affirmed." The issue thus is whether the two mitigating conditions in TRRC II replaced those in TRRC I (including the 1-year condition) or simply modified them. TRRC maintains that the 1 year commencement requirement was nullified in TRRC II. Additionally, TRRC submitted a chronology of events that it states are part of the construction process.³⁰ It believes that

³⁰ TRRC stated that the construction for the Miles City-Ashland segment is divided into three phases. Phase I involves ordering design and engineering studies, and obtaining the necessary permits and certificates for construction and

(continued...)

is has undertaken enough of the process (by proceeding with the permitting and engineering in phase I) to comply with the 1-year requirement.

We agree with TRRC that, even though no physical construction began on the authorized route, the actions taken by TRRC are an integral part of the construction process. Thus we conclude that, regardless of whether TRRC II removed the 1-year construction requirement, TRRC has fulfilled it.

The second argument for revocation is that TRRC has not obtained the necessary 2(c) authorization opinion by DOI as the Commission required in TRRC II.³¹ As stated earlier, section 2(c) of the MLLA prohibits railroads from holding federal leases or permits for mining. The issue here is whether, under the then-existing TRRC organization, TRRC could legally provide rail service while its partners maintained coal leases. TRRC states that the coal lease in question has been canceled and that the necessity for a ruling under section 2(c) is no longer required.

Upon further consideration, we have now decided to remove the section 2(c) condition from the lead docket. We believe that it is inappropriate to single out any one particular governmental requirement for which TRRC must submit evidence of compliance. Whether or not we impose a specific condition, TRRC will have to comply with all applicable federal statutes and regulations, including 2(c) authorization, if necessary, prior to commencing operations over this line. Consequently, the 2(c) condition is not required. Accordingly, we will issue a modified certificate of public convenience and necessity to reflect this change and the additional requirements for progress reports and construction time limits discussed below.

NPRC's final argument is that, because of substantially-changed circumstances, the economic justification for the originally authorized segment is no longer valid. In support, NPRC points to the apparent termination of state and federal mining permits for the Montco mine. Again, we find no basis for revocation. Regardless of the status of the Montco mine permits, the public convenience and necessity finding for the extension is applicable to the originally-authorized segment as well. Indeed, we believe that the success of this project will depend upon applicant's being able to construct and operate the full line between Miles City and Decker.

³⁰(...continued)

operation, negotiating mitigating conditions, and arranging preliminary financing. Phase II involves all functions relating to construction, such as purchasing right-of-way, obtaining materials and equipment, and securing bids from contractors. Phase III involves obtaining long-term financing, completing construction, purchasing equipment, and commencing operations. TRRC II at 3-4.

³¹ The only court challenge to the grant of the 89-mile line in TRRC I and TRRC II involved the issue of whether the ICC's decision violated section 2(c) of MLLA, 30 U.S.C. 202. See Northern Plains Resource Council v. ICC, 817 F.2d 758 (9th Cir. 1987) (unpublished opinion dismissing the appeal for lack of standing), cert. denied sub nom. Northern Plains Resource Council v. United States, 484 U.S. 976 (1987).

Time limits and reporting. We will impose a time limit for TRRC to construct this entire line (i.e. both the line between Ashland and Decker and the 89-mile line between Miles City and Ashland that the Railroad was previously authorized to construct, but has not yet built). Without definitive action on TRRC's part, landowners would be unnecessarily affected by the uncertainty concerning possible condemnation of part of this land for railroad use. TRRC has stated in the record that it could build the line within 3 years. We will therefore impose a time limit of 3 years from the effective date of this decision for TRRC to complete construction of the entire line. If construction is not completed by that time, this authority will lapse.

In order to assure that TRRC makes reasonable progress toward compliance with that deadline, we will require the applicant to file reports every 4 months, following the service of this decision, on the entire line from Decker to Miles City. The reports should describe the progress that TRRC is making in implementing the authority we have granted it, including progress in financing and land acquisition, any difficulties it is encountering, and a statement as to whether or not it expects to meet the 3 year time limit. An original and 10 copies should be filed with the Board and copies should be served on the parties to this proceeding. In the event that reasonable progress is not made toward compliance with the 3 year limit, we are putting TRRC on notice that, if warranted, we may withdraw the authorization to construct the entire line before the 3-year construction period has ended.

FINDINGS

In Finance Docket No. 30186 (Sub-No. 2), we find that the present and future public convenience and necessity require or permit the construction and operation of a line of railroad described above along the Four Mile Creek Alternative route, subject to: (1) the environmental mitigation conditions in Appendix B to this decision; (2) the requirement that TRRC complete construction of the entire line between Decker and Miles City within 3 years of the service date of this decision; and (3) the requirement that TRRC report on its progress every 4 months.

We further find that, while there are potentially significant environmental impacts associated with both construction alternatives, it is the Four Mile Creek Alternative, as conditioned by the environmental mitigation conditions set forth in Appendix B, that should meet applicant's project goals, but not have an unduly severe impact on the environment.

In Finance Docket Nos. 30186 and 30186 (Sub-No. 1), we find that the authority should be continued, subject to: (1) the removal of the 2(c) condition; (2) the requirement that TRRC complete construction of the entire line between Decker and Miles City within 3 years of the service date of this decision, and (3) the requirement that TRRC report on its progress every 4 months.

It is certified in Finance Docket No. 30186 (Sub-No. 2):

The present and future public convenience and necessity require or permit construction of the Four Mile Creek Alternative route and operation by Tongue River Railroad Company of a rail

line from Ashland, MT, to a point near Decker/Spring Creek, MT, subject to: (1) the environmental mitigation conditions in Appendix B to this decision; (2) the requirement that TRRC complete construction of the entire line between Decker and Miles City within 3 years from the effective date of this decision; and (3) the requirement that TRRC report on its progress every 4 months.

It is certified in Finance Docket No. 30186:

The present and future public convenience and necessity require or permit the construction and operation of a line of railroad described in an ICC decision served May 9, 1986 (including either of the alignments at Miles City and Ashland), subject to: (1) the mitigating conditions in Appendix B of the initial decision; (2) the requirement that TRRC complete the entire line between Decker and Miles City within 3 years from the effective date of this decision; and (3) the requirement that TRRC report on its progress every 4 months.

It is ordered:

In Finance Docket No. 30186 (Sub-No. 2):

1. All motions to enter statements, pleadings, and evidence into the record are granted.
2. All motions to strike evidence and pleadings and requests for oral argument are denied.
3. The mitigation measures set out in Appendix B are imposed as conditions to this decision.
4. The application to construct the rail line along the preferred route is denied and the application to construct the Four Mile Creek Alternative is granted with conditions set out herein.
5. TRRC shall retain an independent third party contractor, selected by SEA, to aid the Board in fulfilling its responsibility as the lead agency for the Multi-Agency/Railroad Task Force that is part of the mitigation plan for the Ashland-Decker extension.

In Finance Docket Nos. 30186 and 30186 (Sub-No. 1):

1. The proceeding is reopened.
2. The section 2(c) condition imposed in TRRC II is removed.
3. NPRC's petition to revoke is denied.
4. The previously authorized construction authority is extended for a limited period of 3 years from the effective date of this decision.
5. TRRC must file progress reports every 4 months.

This decision is effective 30 days from its date of service.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams
Secretary

APPENDIX A
FINANCIAL ANALYSIS

Construction Phase - Preliminary Estimates of Cost. Capital costs for the construction of the line, including the 41-mile extension (preferred alignment) are projected to be approximately \$233 million. For the Four Mile Creek Alternative (which has an additional length of 9.75 miles), costs are projected to be approximately \$241.5 million. Applicant provides a detailed summary of construction costs in each of the 3 years it would require to construct the line, assuming approval of TRRC's preferred alignment. TRRC also furnishes a detailed comparison of cost for the two extension variants, the preferred alignment and the Four Mile Creek Alternative.

The projected cost of the original 89-mile segment was estimated to be between \$228 and \$229 million in 1984. TRRC's most recent estimate (1991) places the cost of the extended line at \$233 million. Applicant contends that the small difference between these two estimates is the result of the use of different inflation rates in each of the two cost projections. For the original 89-mile line, the railroad used an 11% inflation factor; for the longer line, it used a 4% inflation factor.

TRRC also proposes to lease or purchase trackage from BN from the end of the Spring Creek trackage to enter the East and West Decker Mines, and advises that it will construct its own track if it cannot negotiate a lease or purchase arrangement with BN. No provision for the additional cost of this track is provided in TRRC's construction cost projections, but TRRC may be able to negotiate a lease or purchase arrangement with BN. In that case, there would be no additional cost of construction other than those estimated. In any event, applicant includes a contingency allowance of \$19 million, which would likely more than cover any additional cost of constructing track into the Decker mines.

NPRC does not contest applicant's cost estimates for the proposed line. NPRC does note, however, that construction of the Four Mile Creek Alternative would increase the cost of the line, as well as the railroad's associated debt burden and interest expense.

Construction Phase - Financing Plan and Related Information. TRRC proposes to finance construction of the line (plus interest on the construction loan during the construction period) by: (1) raising partners' capital equal to approximately 35% of the total capital needed; and (2) borrowing the remaining 65% of required capital through the private placement of long-term debt from commercial banks and institutional lenders. This private placement of debt would be at competitive market interest rates with scheduled maturities to coincide with forecasted cash flow

generation. Lenders would have recourse to the railroad's assets and revenue in the event of default. For purposes of the instant application, it is assumed that debt capital will be raised under a 15-year credit facility provided by a syndicate of commercial lenders.

TRRC's financing plan was developed by the investment banking firm of Lehman Brothers and is based on a financial feasibility study developed by Corporate Strategies, Inc. (CSI). The railroad's financial advisors are confident that prospective investors will find TRRC to be an attractive investment opportunity. The railroad furnishes a projected balance sheet which "gives effect" to its financing plan, reflecting its start-up capital structure and debt service requirements for each of the first 10 years of operation. For purposes of its financial forecasts, TRRC assumes that it will commence operations with approximately \$254 million in capital.

NPRC does not challenge TRRC's financing plan. It does, however, question the railroad's financial viability, particularly with respect to its ability to generate sufficient revenue to service the debt it will incur under the financing plan.

Applicant's financing plan for the extended rail line amends and supplements the previous plan which was approved by the ICC in Finance Docket No. 30186 (Sub-No. 1), a related securities application. Originally, several series of promissory notes with varying maturities were to be issued, but it is unclear whether the new plan, described by TRRC's financial advisors, replicates or supersedes that previous plan.

TRRC's projected balance sheet shows that, at the starting point of operations (Year 0), the total capital raised roughly equals the cost of the constructed line and a nominal investment in equipment and operating property. Road property and buildings are recorded at a cost of about \$227 million, which is \$6 million less than estimated construction costs of \$233 million. No provision has been made for interest during construction which, it appears, would be rolled in as principal in a term loan of at least 15 years upon completion of the construction project. Assuming that 65 percent of the construction costs in each of the 3 years of the construction period were funded with debt at the implied interest rate of 12.2 percent for the first year of operations, the railroad would be required to roll over more than \$38 million in interest during construction. Additional interest expense in the first year of operations would be almost \$4.7 million. With this added interest, the \$4.6 million dollar loss projected in the first year of operations would increase in size to over \$9 million. It would also appear that partners' capital, reported to be \$83 million, is overstated by the \$38.2 million representing interest during construction.

As mentioned, TRRC would incur additional construction costs to construct the Four Mile Creek Alternative and the line to link with the East and West Decker Mines. No provision is made for these additional construction costs in TRRC's balance sheet projections. As discussed below, TRRC would be faced with an additional capital outlay of about \$15 million for the purchase of helper units needed to negotiate the steeper grades on the Four Mile Creek Alternative. The railroad's projected balance sheet does not account for this additional purchase of equipment and the financing that this purchase would necessitate.

Applicant's balance sheet shows \$4 million in subordinated debt to the partnership which offsets most of TRRC's first year operating loss and is carried as an additional capital contribution through year 10 of operations. Although not specifically discussed in its financing plan, it appears that the partners are willing to make additional contributions when cash generation from operations is insufficient to cover the railroad's debt service requirements.

Because TRRC's projected balance sheet and income statement do not reflect the full level of capital outlays and associated financing costs that it may experience, TRRC's capital needs will probably be greater than represented. But if BN and its shippers agree to divert traffic to TRRC, it is highly likely that TRRC will be able to raise needed capital to construct the rail line.

Operation Phase - Income Projections and Financial Viability. TRRC expects to move 19 million tons of coal in its initial stages of operation, with an additional 5 to 10 million tons projected to move over the new line with the opening of the Montco and other Tongue River Valley coal mines. By the year 2000, TRRC expects to haul 27 million tons, with volume increasing to 31 million tons by the year 2005.

To demonstrate its financial ability to sustain operations, TRRC provides in its application a projected income statement for each of the first 10 years of operations. TRRC projects that revenues will increase from \$34.2 million during the first year of operations to approximately \$74.9 million in year 10. Operating expenses are expected to total \$18.3 million in the first year and steadily increase to \$33.2 million by year 10, with maintenance-of-way being a major operating expense item. Except for the first year of operations, the railroad is expected to be profitable, with projected income exceeding fixed charges (interest expense) for each of the years 2 through 10.

TRRC's income projections do not reflect the additional operating costs of running trains on the Four Mile Creek Alternative. If this alternative route is constructed, according to applicant, operating costs would rise because of additional operating time, fuel costs, and locomotive power. Applicant estimates that direct operating costs would increase by about \$3.2 million annually for the Four Mile Creek Alternative.

NPRC restates TRRC's financial projections developed from CSI's model to argue that TRRC's business forecasts are based on unrealistic assumptions and that the carrier would be unprofitable and unable to service its debt burden. Protestant had developed three forecast scenarios which are summarized below.

The first restates TRRC's projections to reflect movement at the proposed rate levels for coal destined only to the generating facilities of Detroit Edison, the one customer that protestant believes might benefit from the new line. These projections assume that TRRC would be unable to divert any other traffic from existing routes at the proposed rate levels. It also assumes that proposed new coal mines along the route would not be developed because of overcapacity. At the lower tonnage levels forecast in this scenario, TRRC would fail to generate sufficient income in each of the first 6 years of operations to meet interest payments on its long-term debt.

In the second scenario, NPRC projects operating results at TRRC's proposed tonnage levels, but with rate levels which NPRC argues are more in keeping with the prevailing market rates. NPRC argues that these are reflected in what NPRC claims is BN's average revenue per ton of \$1.31 in 1991. At these lower rate levels, TRRC would lack sufficient income in the first 5 years of operations to pay interest on long-term debt.

The third scenario shows the amount of tons that would have to be moved, using NPRC's computation of the average BN per-ton rate of \$1.31, to generate operating revenues necessary to just cover all expenses and fixed charges, i.e., the break-even level. These required tonnage figures, NPRC points out, would have to be significantly greater than those projected by the railroad.

Our analysis of the railroad's income projections is divided into two parts. In part one, NPRC's arguments about projected tonnage and rate levels is discussed and analyzed. In part two, applicant's projections are analyzed in light of representations made elsewhere in the evidence about expenditures and financing.

Critical to TRRC's financial viability is its ability to generate sufficient revenue to cover its operating expenses and service the debt it will incur to finance construction of its rail line. Projected revenue is a function of two variables, traffic volume (in tons hauled) and the rate per ton charged. In its financial projections, TRRC has projected revenue based on traffic volume and pricing assumptions which NPRC challenges as being unrealizable. Much of protestant's argument that TRRC's rail line is a duplicate route and is not economically justified centers on the long-term market prospects for Western coal. As such, the argument does not directly address applicant's revenue projections. In evaluating the reasonableness of TRRC's projections, our analysis below is necessarily confined only to those arguments directed to, and which quantifiably challenge, the railroad's forecast assumptions.

In its 6-year projections, NPRC limits tonnage to only overhead traffic for Detroit Edison at proposed rate levels on the claim that this is the only customer that would benefit from the new route. We believe that this limited perspective arbitrarily ignores potential business from other sources. As TRRC correctly notes, NPRC's 6-year forecast excludes traffic from other shippers, particularly traffic generated on the proposed route from new mine openings, in the later years of the forecast. Although TRRC's projected tonnage levels are necessarily speculative, we believe that NPRC's tonnage figures are unduly pessimistic. We are mindful, however, that failure to reach these projected tonnage levels will adversely affect the railroad's ability to generate sufficient revenue to sustain operations and service debt.

NPRC argues that, at what NPRC considers to be BN's average revenue per-ton in 1991, TRRC would incur large losses during its first 5 years of operations. As a result, the railroad would not have sufficient revenue to cover interest payments (fixed charges) to lenders. NPRC also projects the tonnages TRRC would have to haul to break even using its misstatement of BN's average per-ton rate, noting that these tonnage levels far exceed those projected by the railroad. As to the reasonableness of protestant's projection scenarios, we agree with TRRC that pegging its rates to BN's average revenue on a per-ton basis is

not relevant in deciding rates at which TRRC might attract traffic now moving via BN. In our view, significant cost savings to BN would be an incentive to do business with TRRC. Thus, the focus should be on BN's costs of moving coal over its longer route and the cost savings, if any, realizable by shifting its traffic onto TRRC.

TRRC claims that, at a starting rate per ton of \$1.80 in the first year of operations, BN would realize savings of \$2.10 per ton of coal hauled by using the shorter route. TRRC bases these savings on an average BN rate of \$3.90, which means that the \$2.10 difference is not "savings" from using the shorter route, but the additional per-ton profit that BN would theoretically realize. However, BN would not, in fact, earn a profit of \$2.10 per ton because it would still be incurring costs of operating its trains over the TRRC route. In fact, in order for BN to have an incentive to operate over the TRRC track, its total cost per ton, including payments to TRRC, would have to be less than it is currently spending to move traffic over its own longer routing.

Applicant did not furnish any BN cost evidence in its statements. In the absence of such evidence, we have used BN system average cost data from the Uniform Rail Costing System (URCS). These data indicate that BN's cost in 1991 to move traffic over its own 298 mile route was \$2.53 per ton. Assuming that it has to pay TRRC \$1.80 per ton to move traffic over TRRC's shorter 128-mile route, BN's other costs (the cost of operating over the shorter route, including fuel, locomotive costs, and switching charges, but excluding crew wages since TRRC provides the crews) would have to be less than \$0.73 per ton (\$2.53 minus \$1.80) to provide it with the incentive to use the TRRC route. We have computed the per-ton cost of BN train operations to be \$0.74 per-ton using the shorter route. When added to the \$1.80 per-ton charge by TRRC, the resulting per-ton cost to BN of \$2.54 is marginally higher than the \$2.53 cost using the longer line. However, we expect that there would be other operating savings to BN not reflected in this analysis of costs associated with reduced cycle time, i.e., better utilization of equipment. Also, service may improve because of the shorter route and possible higher speeds associated with new track. It is also possible that diversion of traffic to TRRC would relieve congestion, if any, on BN's existing route. Finally, the potential for new mine openings along the TRRC route might be attractive to BN if the coal moving from those mines did not compete with coal moving by BN from other mining sites.

Neither parties' arguments are sufficiently persuasive to permit us to definitively and unequivocally conclude whether or not BN will, in fact, agree to operate over the new line at the line's projected revenue levels. The question is somewhat academic, however. In the final analysis BN will provide the answer.

We have restated TRRC's income projections³² to take into account additional capital outlays and costs not accounted for in applicant's balance sheet and income statement projections. In each of the first 3 years of operations, the railroad would not generate sufficient operating income to cover interest expense. For the 3-year period, the total shortfall would exceed \$20

³² See Exhibit I, attached.

million. Similarly, cash flow (new income plus depreciation expense) in each of the first 3 years of operations would not be sufficient to retire long-term debt maturing during that time frame. Beginning in year four, however, our restatement of TRRC's income projections show sufficient cash flow generation to service debt. The only financial problem, therefore, appears to be any cash flow deficiency in the early years of operations. In the earlier application, the use of the prepaid freight technique and additional contributions from the railroad's partners were established as viable means for overcoming any cash flow problems that the railroad might encounter. Given the infusion of additional capital from these sources, we believe that TRRC would be financially fit and able to sustain operations and manage its debt burden.

NOTE: INSERT 34XHIBIT HERE

APPENDIX B

ENVIRONMENTAL MITIGATION CONDITIONS

The recommended mitigation measures set forth below are based on SEA's independent analysis of the project, comments to the DEIS, SDEIS, and FEIS, the environmental record, the Biological Opinion and a proposed Programmatic Agreement (PA), and conditions either proposed or agreed upon by the railroad. We have incorporated by reference specified portions of the proposed Mitigation Plan that was set forth in Appendix A of the DEIS. The recommended mitigation measures set forth below reflect the changes discussed in the FEIS, and other clarifying changes.³³

LAND USE

- (1) TRRC shall negotiate compensation for direct and indirect loss of agricultural land on an individual basis with each landowner. TRRC shall assist landowners in identifying and developing alternate agricultural uses for severed land, where appropriate. TRRC shall apply a combination of alternative land use assistance and compensation as necessary and agreed upon during right-of-way negotiations.
- (2) Where capital improvements are displaced, TRRC shall relocate or replace these improvements or provide appropriate compensation.
- (3) TRRC shall construct right-of-way fencing along the entire line according to specifications suitable to the landowners and consistent with industry standards. TRRC shall negotiate special fencing needs with individual landowners.

³³ Of course, TRRC must comply with all applicable federal, state and local regulations to the extent they deal with subjects other than those covered by the conditions we have imposed here.

(4) TRRC shall install cattle passes (oval, corrugated metal structures, approximately 11 ft. high and 12 ft. wide at the base) along the right-of-way to ensure passage of cattle under the rail line. TRRC shall work with landowners to identify appropriate locations for cattle passes and private grade crossings for equipment.

(5) During final engineering, TRRC shall work with individual landowners to avoid unnecessary conflict between construction activities and ranching operations.

(6) TRRC shall confine all construction activities to right-of-way and to the construction camps along the rail line, at locations to be negotiated between individual landowners and TRRC.

(7) TRRC shall require its contractors to assure that its construction camps are orderly. Upon completion of construction, TRRC shall return the camps to their previously existing use.

(8) TRRC shall appoint a representative, with direct access to management, to work with primary contractors, subcontractors, and landowners to resolve problems that develop during construction.

SOCIAL AND ECONOMIC

(1) TRRC shall make available to local governments and to the Northern Cheyenne Tribe all public data and studies that it is aware of concerning the facilities and services that may be required as a result of mine development.

(2) TRRC shall appoint a liaison between TRRC management and the Northern Cheyenne Tribe to ensure that tribal members receive an equal opportunity to secure temporary construction and full-time operational jobs with the railroad.

TRANSPORTATION

(1) During construction, TRRC shall encourage contractors to provide laborers with daily transportation to the work site from a central location.

(2) To the extent possible, TRRC shall confine all construction related traffic to a temporary access road within the right-of-way. Where traffic cannot be confined to this access road, TRRC shall ensure that contractors make necessary arrangements with landowners or affected agencies to gain access from private or public roadways. The access road shall be used only during construction of the railroad grade, after which construction shall be confined to the right-of-way.

(3) Where traffic along a public roadway may be disrupted during construction, TRRC shall comply with all requirements of the Montana Department of Highways (MDH) or other appropriate agencies. In the absence of such requirements, TRRC shall endeavor to maintain at least one lane of traffic open at all times. Specific plans shall be developed by TRRC, in coordination with state and local agencies, to assure the quick passage of emergency vehicles. TRRC shall submit all construction plans affecting public roadways to MDH for review and approval.

(4) TRRC shall comply with MDH's *Manual of Uniform Traffic Control Devices* for work zone safety.

(5) TRRC shall equip all grade crossings with warning signs and devices, as deemed appropriate under MDH's Railroad Crossing Protection Policy.

AIR QUALITY

(1) TRRC shall subject all heavy equipment and vehicles used in the construction, operation, and maintenance of the railroad to regular inspection and maintenance to ensure that operation complies with manufacturer's specifications and that equipment is running as cleanly and efficiently as possible.

(2) When vegetation is removed from the right-of-way, TRRC shall clear areas only as necessary to mitigate impacts of wind erosion and fugitive dust.

(3) Where devegetation has taken place, TRRC shall begin revegetation as early as possible. Where immediate revegetation is not possible, TRRC shall implement alternative stabilization measures such as matting and mulching.

(4) TRRC shall suppress dust at all work areas by using water trucks, and shall make water available to local landowners, governmental agencies, or associations for these activities. TRRC shall conduct dust suppression activities regularly and frequently during the dry periods.

(5) TRRC shall conduct any open burning in strict accordance with local or other applicable regulations, and shall obtain all necessary permits and observe all necessary safety precautions.

NOISE

(1) To the extent practicable, TRRC shall schedule major noise producing construction activities during the weekday and daylight hours.

SAFETY

(1) Because of the descending 2.3 percent grade, TRRC shall strictly adhere to safe railroad operating practices, such as the use of seven locomotives at no more than 10 miles per hour for the descent, if appropriate.

(2) TRRC shall adhere to federal and state construction safety regulations to minimize the potential for accidents. TRRC shall require its contractors to conduct safety meetings for their workers and to ensure that each person understands safety measures and procedures.

(3) TRRC shall develop an internal Emergency Response Plan consistent with Montana State plans authorized under Title 10, *Montana Code Annotated*.³⁴

³⁴ This includes a roster of agencies and specific persons to be contacted for specific emergencies, procedures to be
(continued...)

(4) TRRC shall establish cooperative relationships with all federal, state, and local agencies with responsibility for disaster/emergency response. TRRC shall provide operational plans and copies of the emergency response plan identified above to such agencies and incorporate their comments as appropriate.³⁵

(5) TRRC shall develop a Wildfire Suppression and Control Plan for fires occurring on the right-of-way as a result of rail construction/operations or undetermined causes. TRRC shall include the measures relating to fire suppression set forth in the mitigation plan in the DEIS.

(6) TRRC will negotiate the placement of fire suppression equipment with local ranchers.

(7) TRRC will maintain a serviceable access road and/or access points along the right-of-way, at locations determined in consultation with the local fire officials.

(8) TRRC will develop and install a mobile communications system between the local volunteer fire fighting units, train crews, and ranchers with property adjacent to the right-of-way.

(9) TRRC shall develop, in cooperation with appropriate federal, state and local agencies, a plan to prevent spills of oil or other petroleum products, both during construction and operation and maintenance. TRRC's plan shall include measures pertaining to oil spills set forth in the mitigation plan in the DEIS.

(10) TRRC shall develop guidelines based on the tasks to be accomplished by individual contractors, including: (a) steps during refueling to guard against overflows, (b) storage of fuel only in metal storage tanks surrounded by impervious dikes capable of containing greater than the capacity of the tank, (c) removal of waste oil to appropriate sites, and (d) maintaining equipment in good running order and conducting routine maintenance activities.

(11) If an herbicide spill occurs, TRRC shall respond using the same general approach discussed above. TRRC shall immediately contain the spill, notify the appropriate agencies, and implement appropriate clean-up procedures.

(...continued)

followed by particular rail employees, emergency routes for vehicles, and location of emergency equipment.

³⁵ These agencies include: Disaster and Emergency Services Division of the Department of Military Affairs, Helena; rural fire departments along the route; local ambulance and emergency medical services and air evacuation services in Billings and Sheridan; the Montana Department of Health and Environmental Sciences (especially the Water Quality Board); Montana Department of Fish, Wildlife and Parks (MT FWP); Montana Department of Natural Resources and Conservation (MT DNRC); the Northern Cheyenne tribe; the Bureau of Land Management (BLM) or U.S. Forest Service; and other local agencies or groups which are identified as key to disaster response.

HYDROLOGY AND WATER QUALITY

- (1) To assure that overall water quantity and quality are not unnecessarily altered or diminished by this project, TRRC shall submit detailed permit applications to the applicable agencies, including the Corps, local Conservation Districts, the Water Quality Bureau of the Montana Department of Health and Environmental Services, and any other applicable agencies.
- (2) TRRC shall secure applicable permits from MT DNRC for bridge crossings over the stream bed of the Tongue River.
- (3) TRRC shall consult with EPA to implement EPA's river bank stabilization methods.
- (4) TRRC shall ensure that all culverts and other drainage structures installed at ephemeral and perennial stream crossings will be designed to pass the projected 25-year flood.
- (5) Where possible, the route shall be designed to avoid the flood plain. Where the railroad grade does infringe upon the flood plain, TRRC shall install drainage structures to assure that the grade does not restrict or reroute the 25-year flood.
- (6) Construction of all stream crossings, including bridges and culverts and activities requiring stream bank encroachments (riprap, for example), shall occur during periods of low or no flow in the streams affected.

AQUATIC AND TERRESTRIAL ECOLOGY³⁶

- (1) TRRC shall participate as a member of the Multi-agency/Railroad Task Force (Task Force), which will advise, assist and coordinate with TRRC in accomplishing the mitigation measures set forth in the Mitigation Plan in the DEIS addressing aquatic and terrestrial ecology.³⁷

WILDLIFE

- (1) TRRC (in cooperation with MT FWP) will expand its ground and air survey program to include seasonal surveys showing where pronghorn are concentrated and their distribution and movement. From this information, TRRC shall assess and minimize impacts from the proposed right-of-way.
- (2) TRRC will place fencing to accommodate seasonal migration, in compliance with the BLM Fencing Handbook, to protect ranching operations, while allowing for pronghorn movement.

³⁶ See Section A.9 of the DEIS Mitigation Plan. This mitigation shall be implemented to the extent applicable to the Four Mile Creek Alternative.

³⁷ For reclamation on cut and fill slopes TRRC shall construct serrations perpendicular to the slope.

CULTURAL RESOURCES

(1) TRRC will comply with the provisions of the proposed PA, see Appendix G of the FEIS, or a final PA, if one is executed.

(2) TRRC, in the preparation of the cultural resource inventory described in the PA, shall invite Northern Cheyenne tribal representatives to identify and compile a list of traditionally-important plants occurring in the area of potential effect and of gathering sites and access points for these plants. TRRC shall use this information in considering the need to protect and assure continuing access to these plants.

TONGUE RIVER DAM RECONSTRUCTION

(1) During construction of the rail line, TRRC shall provide 24-hour a day access to the MT DNRC for the construction and maintenance of the Tongue River dam either via the construction of temporary roads and/or flagging devices or by other reasonable alternatives.

(2) Before construction, TRRC shall coordinate development of the geotechnical drilling program near the dam with MT DNRC. Once the results of the drilling are completed, TRRC along with input from MT DNRC, will determine the best engineering method for removal of the cut material. If blasting is necessary, the charges will be designed to insure that there will be no adverse affect to the integrity of the dam.