

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 30186 (Sub-No. 3)¹

TONGUE RIVER RAILROAD COMPANY, INC.—CONSTRUCTION
AND OPERATION—WESTERN ALIGNMENT

Decided: November 7, 2007

A number of petitions have been filed asking that the Board stay the effective date of a decision issued on October 9, 2007, in this proceeding approving the construction and operation of a 17.3-mile railroad in Rosebud and Big Horn Counties, MT, known as the Western Alignment, subject to environmental conditions (Tongue River III).² For the reasons discussed below, the petitioners have failed to show that a stay is warranted under the well-settled four-part test for a stay pending judicial review. Accordingly, all of the stay petitions will be denied.

¹ This decision also embraces Finance Docket No. 30186, Tongue River R.R.—Rail Construction and Operation—In Custer, Powder River and Rosebud Counties, MT, and Finance Docket No. 30186 (Sub-No. 2), Tongue River Railroad Company—Rail Construction and Operation—Ashland to Decker, Montana.

² On October 19, 2007, petitions for stay were filed by the following persons and entities: Alice Orr; American Prairie Foundation (APF); Brown Cattle Company; Caribou Land & Livestock Co.; Diamond Cross Ranch LLC; FL Ranch; Montana State Senator David Wanzenreid; Jerry Lunde; Musgrave Ranch; Powder River Basin Resource Council (PRBC); S & P Land Co.; Trout Unlimited; and V-C Cattle Company (October 19 petitioners).

On October 29, 2007 an additional stay petition was filed jointly by: Northern Plains Resource Council, Native Action, Inc., Northern Cheyenne Tribe; City of Forsyth; and United Transportation Union—General Committee of Adjustment and United Transportation Union—Montana State Legislative Board (collectively, UTU-GCA/MT) (October 29 petitioners). Subsequently, the Northern Cheyenne Tribe withdrew its name from the stay petition.

BACKGROUND

1. The Prior Tongue River Cases

In 1983, TRRC³ sought authority from the Board's predecessor, the Interstate Commerce Commission (ICC), to construct and operate 89 miles of rail line between Miles City, MT, and two termini located near Ashland, MT, to serve future coal mines in the Ashland area and to connect with a line of the former Burlington Northern Railway Company, predecessor to BNSF Railway Company (BNSF), at Miles City for shipment of coal to eastern and western destinations. In Tongue River I,⁴ the ICC authorized TRRC to construct and operate the line, using TRRC's proposed alignment, subject to environmental conditions.

In 1991, TRRC sought authority to construct and operate a 41-mile rail line between Ashland and Decker, MT, to connect with the 89-mile line authorized in Tongue River I and to serve mines around Decker and potential mines around Ashland, located in the Northern Powder River Basin. TRRC proposed two alternative routes for consideration. Its preferred route would have followed the Tongue River and passed about 1 mile west of the Tongue River Reservoir. The Four Mile Creek Alternative was developed at the request of the Board's Section of Environmental Analysis (SEA) to avoid the environmentally sensitive Tongue River Canyon. In Tongue River II,⁵ the Board approved the Four Mile Creek Alternative subject to environmental conditions. Neither the Tongue River I nor the Tongue River II line has yet been built.

2. This Case

In Tongue River III, TRRC sought authority under 49 U.S.C. 10901 to construct and operate the Western Alignment as an alternative to the southernmost portion of the Four Mile Creek Alternative routing authorized in Tongue River II. As explained in the Board's decision in Tongue River III (at 6-8), TRRC did so because it believed the Western Alignment, which would

³ The Tongue River I, Tongue River II, and Tongue River III applications were originally filed by Tongue River Railroad Company, a partnership. The partnership has since been converted into a corporation, Tongue River Railroad Company, Inc. This new entity now possesses the authority to construct and operation the Tongue River lines, and for purposes of clarity, this decision refers to the applicant in all three Tongue River proceedings as TRRC.

⁴ Tongue River R.R.—Construction and Operation—In Custer, Powder River and Rosebud Counties, MT, Finance Docket No. 30186 (ICC served Sept. 4, 1985), modified (ICC served May 9, 1986), pet. for judicial review dismissed, Northern Plains Resource Council v. ICC, 817 F.2d 758 (9th Cir.), cert. denied, 484 U.S. 976 (1987) (Tongue River I).

⁵ Tongue River RR Co.—Const. and Oper.—Ashland-Decker, MT, 1 S.T.B. 809 (1996) (Tongue River II). An appeal of this decision, docketed as Northern Plains Resource Council Inc. et al. v. STB, No. 97-70073 et al. (9th Cir. filed Jan. 7, 1997) (Northern Plains), has been held in abeyance pending the Board's decision in the Tongue River III proceeding.

shorten the route from Decker to Miles City by 12 miles and would have a considerably milder grade, would be economically, operationally and environmentally preferable.⁶

Because the Tongue River III proposal was to alter a portion of the line authorized in Tongue River II, SEA prepared a Supplement to the Environmental Impact Statement prepared in Tongue River II (SEIS), pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 et seq., to address the proposed Western Alignment. The SEIS also included a limited reexamination of the EISs prepared in Tongue River I and Tongue River II, where appropriate, to reflect changed circumstances or to accommodate the requests of the cooperating agencies.⁷ In preparing the SEIS, SEA undertook extensive public outreach activities to give interested parties, agencies, organizations, tribes and the general public the opportunity to learn about the project, define issues, and actively participate in the environmental process. SEA held joint scoping meetings with the cooperating agencies to solicit public involvement, conducted site visits, prepared technical studies, and consulted with appropriate agencies and Native American representatives.

SEA issued a Draft SEIS for public review and comment on October 24, 2004, that provided an analysis of the proposed Western Alignment and compared the potential impacts of that alignment to the previously authorized Four Mile Creek Alternative. The Draft SEIS addressed numerous issues, including: transportation and safety, plants, wildlife, land use, cultural and paleontological resources, hydrology and water quality, socioeconomics, low income and minority (environmental justice) communities, soils and geology, air quality, aesthetics, noise and vibration, recreation, energy, and cumulative and indirect impacts.⁸ As explained in the Tongue River III decision, the Western Alignment was the only feasible “build” alternative considered in the SEIS because, in Tongue River II, the Board had already rejected for environmental reasons the only other “build” alternative to the Four Mile Creek Alternative: the railroad’s preferred route. The Draft SEIS also explained that, because the railroad already had authority, under Tongue River II, to construct the Four Mile Creek Alternative, the “no-build” alternative here would be the construction and operation of the previously authorized Four Mile Creek Alternative. SEA received 68 written comments on the Draft SEIS from a variety of agencies and individuals. In addition, SEA hosted public meetings attended by more than 100 people.⁹

A thorough Final SEIS was issued in October 2006, responding to the comments received on the Draft SEIS, containing additional analysis on certain issues, and presenting SEA’s final recommendations for environmental mitigation for the Tongue River I, Tongue River II, and Tongue River III lines.

⁶ Tongue River III decision at 4.

⁷ The SEIS was prepared in coordination with three cooperating agencies: the U.S. Department of the Interior, Bureau of Land Management; the U.S. Army Corps of Engineers; and the Montana Department of Natural Resources and Conservation.

⁸ See Tongue River III decision at 10.

⁹ Id. at 11.

In the Tongue River III decision, the Board granted TRRC's application to construct and operate the Western Alignment. The Board found that the Western Alignment is a superior route to the portion of Four Mile Creek that it would replace, as it is shorter and less steep and also minimizes impacts to the Tongue River Canyon, an environmentally sensitive 10-mile section of the Tongue River. As the Board explained in the Tongue River III decision, the Western Alignment route will allow TRRC to haul coal more cheaply, efficiently, and safely than using the original Four Mile Creek Alternative. It also will allow BNSF, which will be TRRC's interchange partner, to improve service to the Midwestern electric utilities located on BNSF's system. The Board's approval of Tongue River III was subject to extensive environmental mitigation (92 conditions in all) to reduce the potential adverse impacts of constructing and operating the Western Alignment and to modify and update the conditions imposed in Tongue River I and Tongue River II.¹⁰

3. The Stay Petitions

The October 19 petitioners all filed similar petitions asking the Board to stay the effective date of the Tongue River III decision pending judicial review of the Board's 1996 decision in Tongue River II in the pending Northern Plains case in the Ninth Circuit. They raise concerns that, absent a stay, TRRC could begin preparatory work such as site testing or could initiate eminent domain proceedings and construction, and they claim that the adverse results from these activities could not be reversed should the court rule for petitioners in the pending appeal to Tongue River II.

In addition, the petition for stay filed by State Senator Wanzenried claims that the environmental data used in the Board's environmental review in Tongue River III are out of date. He also claims that the SEIS fails to adequately account for cumulative air quality impacts and the cumulative impacts of coal bed methane (CBM) drilling in the area. APF argues that the Final SEIS fails to adequately consider the effects of oil and gas development in the region. PRBC raises concerns about erosion, loss of land for hay production and loss of protection of irrigation water from increased CBM production that it claims construction of the railroad would facilitate. Trout Unlimited claims that there is not enough information in the SEIS on the effects of the proposed rail line on the pallid sturgeon at the nearby Miles City Fish Hatchery and that the SEIS failed to adequately assess the impact of the railroad on water quality and the Total Maximum Daily Load (TMDL) of sediment permitted in the Tongue River. All of the October 19 petitioners argue that granting a stay would not substantially harm TRRC because none of the Tongue River lines has yet been built.

The October 29 petitioners jointly petitioned the Board to issue a stay pending the court's ruling on the Tongue River II appeal and their recently filed appeal of the Tongue River III

¹⁰ The areas covered by the Board's conditions 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 ecology; Native American concerns; and cultural and historic resources. See Tongue River III decision, Appendix B (listing the environmental conditions).

decision.¹¹ These petitioners raise concerns similar to those of the October 19 petitioners about potential irreparable harms from constructing and operating the line pending judicial review, including condemnation of land needed for TRRC's right-of-way, the threat of wildfires that could be started by passing trains, and potential harm to ranching operations. In particular, the October 29 petitioners argue that the Tongue River III decision erroneously applied a statutory presumption that the Board should approve construction applications and failed to consider the impact on rail employees and on the BNSF line running through Forsyth. They also claim that the SEIS is deficient because it relies on stale analysis in Tongue River I and Tongue River II and because, among other things, it does not adequately analyze the cumulative environmental impacts of increased coal mining that may be hastened by TRRC's operations, and the cumulative environmental effects of both rail service and the operation of CBM wells. The October 29 petitioners further argue that the Board erred in the Tongue River III decision in ruling that the "no-build" alternative would be construction and operation of the Four Mile Creek Alternative because, they allege, that is not a viable alternative.

TRRC filed replies in opposition to these stay petitions on October 25 and November 1, 2007, respectively.

PRELIMINARY MATTERS

The October 29 petitioners ask that the Board waive its 10-page limit on their stay petition. They claim that a waiver is justified because their request involves two Board decisions and a myriad of complex issues. In the interest of a complete record, their request will be granted.

DISCUSSION AND CONCLUSIONS

The traditional standards governing disposition of a petition for stay are: (1) whether there is a strong likelihood that petitioners will prevail on the merits; (2) whether petitioners would be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other parties; and (4) whether issuance of a stay would be in the public interest.¹² These same standards apply to cases alleging environmental harms.¹³ Parties seeking

¹¹ A petition for review of the Tongue River III decision was filed in the United States Court of Appeals for the Ninth Circuit on October 31, 2007.

¹² Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958); accord Oregon Natural Resources Council v. Marsh, 1986 U.S. Dist. LEXIS 27242 (D. Oregon 1986).

¹³ See Northern Cheyenne Tribe v. Norton, No.05-35408, 2007 U.S. App. LEXIS 21722, at *13, 18 (9th Cir. Sept. 11, 2007); NRDC v. United States Forest Serv., 421 F.3d 797, 817 (9th Cir. 2005).

a stay carry the burden of persuasion on all of the elements required for a stay.¹⁴ As discussed below, the petitioners have failed to make the showing required under these standards.

A. Likelihood of Success on the Merits

The petitioners have not shown that there is a strong likelihood that the decision in Tongue River II or Tongue River III will be overturned on appeal. As the Board's decision in Tongue River III shows, the Board properly found that, with the environmental conditions it imposed, the proposed construction and operation satisfies the standards of 49 U.S.C. 10901(c)¹⁵ and will further the national transportation policy by creating a shorter route and more efficient service for both TRRC and BNSF. In reaching its decision, the Board took the required "hard look" at the environmental consequences (including circumstances that had changed since Tongue River I or II were authorized);¹⁶ developed appropriate mitigation to minimize potential impacts; and reasonably concluded that the Western Alignment would be environmentally preferable to the previously approved Four Mile Creek Alternative routing.

The fact that TRRC proposed to construct and operate the Western Alignment in lieu of a portion of the Four Mile Creek Alternative does not cast doubt on the Board's decision to authorize Tongue River II, as some petitioners suggest. The Board's grant of authority to construct the Four Mile Creek Alternative was permissive, and the mere fact that the railroad has chosen not to exercise a portion of that authority, but to seek authority for a shorter, less steep alternative, does not demonstrate that the Board erred in its 1996 decision to authorize the Four Mile Creek Alternative.

Petitioners suggest that the Ninth Circuit's decision to accept the petitions for review in Tongue River II, deny a motion to dismiss, and hold the Tongue River II case in abeyance for approximately 10 years pending the Tongue River III decision, somehow indicates that the court believes the petitions for review in Tongue River II have merit. But these actions cannot be read as signaling anything at all about the Ninth Circuit's view of the merits of Tongue River II. Under the Hobbs Act, courts of appeals have jurisdiction to accept any petition for review that is timely filed and is not procedurally defective. See 28 U.S.C. 2321, 2342(5), 2344.

The court's denial of the Board's motion to dismiss, by order dated April 7, 1997, and its decision to hold the petitions for review in abeyance pending a decision in Tongue River III—presumably for reasons of judicial efficiency and economy—is hardly a sign that the parties seeking judicial review of Tongue River II are likely to prevail on the merits. To the contrary,

¹⁴ See generally Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974).

¹⁵ Under 49 U.S.C. 10901, the Board must authorize the construction and operation of a new line "unless the Board finds that such activities are inconsistent with the public convenience and necessity."

¹⁶ See Public Citizen v. DOT, 541 U.S. 752, 768 (2004); Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. 87, 97 (1983); Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989); Robertson v. Methow, 490 U.S. 342, 350-51 (1989).

while the court denied the motion to dismiss, it specifically found that the parties could renew their arguments on brief. Finally, the fact that the Ninth Circuit has kept the petitions for review in Tongue River II on hold pending a decision in Tongue River III was a procedural decision.

Similarly, the October 29 petitioners have not shown that there is a strong likelihood that they will succeed in overturning Tongue River III on appeal. There is no merit to their claim that the Board applied the wrong statutory standard in the Tongue River III decision. As the Board's decision authorizing Tongue River III explains, the Board properly determined that the proposed Western Alignment application—which was filed over 2 years after the enactment of the ICC Termination Act of 1995 (ICCTA) in 1995—is governed by 49 U.S.C. 10901(c) as modified by ICCTA, and that ICCTA's permissive licensing policy reflects a statutory presumption in favor of authorizing rail line construction.¹⁷ The conclusion that the post-ICCTA version of section 10901(c) contains a presumption favoring rail construction has been expressly upheld by the Eighth Circuit.¹⁸ There is no reason to believe the Ninth Circuit would take a different view. Moreover, as the Board explained, even if the pre-ICCTA statute had been applied here, it still would have authorized Tongue River III.¹⁹

The October 29 petitioners also claim that the Board failed to consider concerns about potential job losses and downturn in traffic over the BNSF line that runs through Forsyth should rail service begin over the Western Alignment shortcut. However, the Board considered the alleged job losses, and reasonably concluded that, although some jobs might be lost, others would likely be created.²⁰ The Board further explained that BNSF's line through Forsyth will likely continue to carry traffic that will not be affected by the rerouting of coal traffic as a result of this project.²¹ And, as the Board noted (Tongue River III decision at 22), BNSF has voluntarily entered into labor agreements with its rail labor unions to provide for their employees' protection in this case. Therefore, petitioners have failed to show that their concerns regarding job losses and economic harm to the City of Forsyth and rail labor were not analyzed and properly addressed.

Nor are petitioners likely to succeed on their NEPA claims. NEPA requires agencies to take a "hard look" at the possible environmental consequences of a proposed action, to consider fully all alternatives (including a no-action one), and to inform the public concerning those effects; it does not mandate a particular result. As the environmental record in this case shows, the thorough SEIS is fully adequate to meet the Board's NEPA obligations.

¹⁷ See Tongue River III decision at 13-14.

¹⁸ See Mid States Coalition for Progress v. STB, 345 F.3d 520, 552 (8th Cir. 2003).

¹⁹ See Tongue River III decision at 14.

²⁰ Id. at 22.

²¹ See id. at n.75. Additional discussion of the socioeconomic impacts of the project can be found in the Draft SEIS at 4-160 to 4-170.

Petitioners assert that the SEIS failed to adequately account for the cumulative effects of CBM development combined with the construction and operation of the Tongue River lines. But the SEIS thoroughly analyzed the CBM issue as well as the cumulative impacts of new mines opening in the Otter Creek tracts based on its grant of construction and operation authority.²² The Board also properly found that coal mine development in the area was too speculative to allow for any further analysis beyond that already undertaken in Tongue River I and Tongue River II.²³ And, contrary to the claims of some of the petitioners, the potential cumulative air quality impacts were fully considered.²⁴

Petitioners' charge that the SEIS failed to revisit "stale" environmental analysis for Tongue River I and Tongue River II in Tongue River III is also without merit. In fact, SEA explicitly solicited public comment on whether there were any changes to the environment or new legal standards in place warranting updating of the EISs prepared in Tongue River I and Tongue River II. SEA updated and augmented the environmental analyses conducted in Tongue River I and Tongue River II on certain issues and undertook additional analysis for the Tongue River III SEIS.²⁵ For example, SEA conducted further wetlands analysis and prepared a Biological Assessment that updated baseline habitat and species data, identified threatened and endangered species and their habitats, and provided current information on the presence of bald eagles. SEA performed additional analysis of the water quality of Otter Creek and the upper and lower Tongue River, because these portions of the Tongue River had recently been designated by the State of Montana as impaired water bodies. New analyses of soils and geology, air quality, noise and vibration, socioeconomics, impact on the Miles City fish hatchery, and the feasibility of realigning the Tongue River I line to bypass a battlefield site were also performed. The Final SEIS contains 11 new or modified mitigation measures that result from this analysis.

Lastly, the claim that the Board erred in using the already-approved Four Mile Creek Alternative as the "no-build" alternative for purposes of its environmental analysis in Tongue River III is unpersuasive. Because the Board had already authorized the Four Mile Creek Alternative in Tongue River II, TRRC could proceed with the construction and operation of that line regardless of the outcome in Tongue River III. Therefore, the Four Mile Creek option—and not no new construction—was the "no-build" alternative to the Western Alignment in this case.

²² See Final SEIS at 2-29 to 2-33.

²³ See id. at 2-27 to 2-33.

²⁴ See Tongue River III decision at 25-27.

²⁵ See Draft SEIS at 3-6 to 3-9; Final SEIS at 1-20 to 1-21; Tongue River III decision at 29-30.

B. Irreparable Harm

An administrative order is not ordinarily stayed without an appropriate showing of irreparable harm.²⁶ Here, petitioners have not demonstrated unredressable actual and imminent harm that would warrant a stay of the effectiveness of the Tongue River III decision.²⁷

Petitioners allege that, if TRRC is allowed to initiate eminent domain proceedings, begin site testing and other preparatory work, or actually start construction on the Western Alignment, TRRC may have needlessly and irreparably disrupted the area should the court overturn the Board's Tongue River II and/or Tongue River III decisions. But petitioners have failed to show how site testing could cause any irreparable harm, as it is not the kind of action that would prevent any party from the continued productive use of its property or cause permanent and irreparable adverse impact on the environment. And, before TRRC could exercise eminent domain to acquire the right-of-way, it will need first to attempt to reach a voluntary agreement with each affected landowner. Only if those efforts fail, which presumably will take some time to pursue, could TRRC exercise eminent domain under Montana state law. As part of that process, TRRC would be required to provide just compensation to every landowner for loss of property. Therefore, by definition, any loss of that property would not be irreparable, but would be compensated through the payment of an agreed-upon amount or the amount fixed by Montana's eminent domain statute.²⁸

In short, petitioners' arguments are unpersuasive that TRRC is likely to immediately begin the sort of construction activities that could result in irreparable injury. Petitioners also fail to recognize that the extensive environmental mitigation the Board has imposed here includes numerous conditions that must be met before TRRC could proceed very far and assure that the construction of this line will be undertaken in a manner that is environmentally acceptable. It will take considerable time before the pre-construction surveys of habitat, wetlands and cultural resources required by the environmental mitigation the Board has imposed can be completed.²⁹ Moreover, TRRC will need secondary permits or other approvals from the Corps of Engineers and Bureau of Land Management and various state agencies.³⁰

²⁶ Permian Basin Area Rate Cases, 390 U.S. 747, 777 (1968).

²⁷ Petitioners are completely out of time to be seeking a stay of the earlier decisions in Tongue River I and Tongue River II. Therefore, the Board will give no further consideration to those requests.

²⁸ See MCA § 70-30-302; McKenzie v. City of Chicago, 118 F.3d 552, 556 (7th Cir. 1997 (taking of property is not irreparable injury when compensated by money damages).

²⁹ See, e.g., Mitigation Measures 23 (pre-construction stream surveys); 26 (pre-construction habitat data reconnaissance, which must be conducted only during specific times of year); 34 (pre-construction aquatic resource sampling).

³⁰ See, e.g., Mitigation Measures 22, 55, and 86.

The Board's mitigation measures are designed to reduce or eliminate any adverse environmental impacts related to this project. The mitigation addresses such issues as cattle passes (to assure that cattle will be able to cross the line), track safety, land use, agriculture, livestock, water quality, sediment in the Tongue River and its impact on fishing, air quality and dust, wildfires, traffic, noise and vibration, and weed control.³¹ Further, the Board's mitigation addresses concerns raised about the pallid sturgeon in the Miles City Fish Hatchery.³² Petitioners fail to explain why the environmental mitigation the Board has imposed here—which applies to Tongue River I and Tongue River II, as well as Tongue River III—is inadequate to address their environmental concerns.

Some of the petitioners claim that failure to issue a stay would result in the loss of the use of tens of thousands of acres of prime ranchland, the loss of clean water from the Tongue River and the Tongue River Reservoir, the loss of livestock and the loss of hay ground. However, in their petitions they offer no additional concerns that the Board has not already addressed. The impacts of the line, once built, to land use, agriculture, livestock, and water resources were considered and assessed in the EISs issued in the TRRC proceedings, and mitigated as needed. Finally, it is important to note that the Western Alignment authorized in Tongue River III is a superior and environmentally preferable route to the Four Mile Creek Alternative previously approved in Tongue River II.

For all these reasons, petitioners have failed to show that they will suffer irreparable harm that would warrant a stay.

C. Harm to Other Parties

Petitioners have not supported their claim that TRRC would not be harmed by a stay. TRRC states that it intends to move forward with secondary permitting, pre-construction surveys, and complying with the Board's environmental conditions. To the extent that a stay would impair TRRC's ability to proceed with the pre-construction work necessary to permit eventual construction, a stay could unnecessarily delay the project and increase its costs.

³¹ See, e.g., Mitigation Measures 3 (cattle passes); Mitigation Measures 9-12 (wildfire suppression and fire prevention), Mitigation Measure 21 (noxious weeds), Mitigation Measures 34-35, 43-51 (water quality, sedimentation and fishing), Mitigation Measures 53-68 (transportation and safety), Mitigation Measures 69-73 (air quality and dust suppression), and Mitigation Measures 74-80 (noise and vibration).

³² See Mitigation Measures 84-87.

D. Public Interest

The Board has found that significant transportation and other public benefits would be realized from this project and that the Western Alignment, as conditioned, will generally have less of an impact on the environment than the previously approved Four Mile Creek Alternative.³³ Moreover, nothing in the SEIS caused the Board to question the prior grants of authority by the agency to construct and operate Tongue River I and Tongue River II. Accordingly, the public interest here favors the denial of a stay.

In sum, petitioners have failed to meet their burden of showing that the stay criteria have been met.

Given the extensive environmental review that has taken place here, and the environmental mitigation the Board has imposed to reduce or eliminate the potential adverse impacts, this decision to deny the stay requests will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The request for waiver is granted.
2. The petitions for stay are denied and the Tongue River III decision in this proceeding will become effective as scheduled.
3. This decision is effective on its service date.

By the Board, Charles D. Nottingham, Chairman.

Vernon A. Williams
Secretary

³³ Tongue River III decision at 33.