

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 30186 (Sub-No. 3)<sup>1</sup>

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

Decided: March 12, 2008

A number of parties have asked the Board to reconsider the decision served in these proceedings on October 9, 2007 (October 2007 Decision). In that decision, the Board granted Tongue River Railroad Company, Inc. authority to construct and operate a 17.3-mile line, known as the Western Alignment, in Rosebud and Big Horn Counties, MT. The Board also modified the environmental conditions imposed on the agency's earlier authorizations for the construction and operation of 89 miles of rail line between Miles City and Ashland, MT, and the extension of that line from Ashland to Decker, MT, via the 41-mile Four Mile Creek Alternative route. For the reasons discussed below, the petitions for reconsideration will be denied.

BACKGROUND

The Prior Tongue River Cases. In 1983, the applicant, which we refer to here as TRRC,<sup>2</sup> 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. The line was intended 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

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<sup>1</sup> 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.

<sup>2</sup> The applicant was originally Tongue River Railroad Company, a partnership. The partnership has since been converted into a corporation, Tongue River Railroad Company, Inc., which now holds the authority to construct and operate the Tongue River lines.

destinations. In Tongue River I,<sup>3</sup> 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 (PRB). 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. Both of the proposed alternatives followed the Tongue River Valley. 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,<sup>4</sup> the Board approved the Four Mile Creek Alternative subject to environmental conditions. Neither the Tongue River I line nor the Tongue River II line has yet been built.

This Case. In this proceeding (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 October 2007 Decision,<sup>5</sup> TRRC sought to do so because the Western Alignment would shorten the route from Decker to Miles City by 12.1 miles, would have a considerably milder grade, and would be economically, operationally, and environmentally preferable.

Because the Tongue River III proposal would alter a portion of the line authorized in Tongue River II, SEA prepared a Supplement (SEIS) to the Environmental Impact Statement (EIS) that had been prepared in Tongue River II, pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 et seq. The SEIS addressed the environmental impacts of the proposed Western Alignment. It also included a limited reexamination of the EISs that had been prepared in Tongue River I and Tongue River II to reflect changed circumstances or to accommodate the requests of the cooperating agencies.<sup>6</sup>

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<sup>3</sup> 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).

<sup>4</sup> Tongue River RR Co.—Const. and Oper.—Ashland-Decker, MT, 1 S.T.B. 809 (1996). An appeal of that decision, docketed as Northern Plains Resource Council Inc. et al. v. STB, No. 97-70073 et al. (9th Cir. filed Jan. 7, 1997), has been held in abeyance pending the Board's decision in the instant proceeding.

<sup>5</sup> October 2007 Decision at 4-8.

<sup>6</sup> The SEIS was prepared in coordination with three cooperating agencies: the U.S. Department of the Interior, Bureau of Land Management (BLM); the U.S. Army Corps of

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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 review 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 15, 2004, that analyzed the environmental impacts of the proposed Western Alignment. The Draft SEIS compared the potential impacts of the Western Alignment to the previously authorized Four Mile Creek Alternative. The Draft SEIS addressed numerous issues, including transportation and safety, plants and wildlife, land use, cultural and paleontological resources, hydrology and water quality, socioeconomics, environmental justice communities, soils and geology, air quality, aesthetics, noise and vibration, recreation, energy, and cumulative and indirect impacts.<sup>7</sup> 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.

A Final SEIS was issued in October 2006. It responded to the comments received on the Draft SEIS, contained additional analysis on certain issues, and presented SEA's final recommendations for environmental mitigation for the Tongue River I, Tongue River II, and Tongue River III lines.

In the October 2007 Decision, the Board granted TRRC's application to construct and operate the Tongue River III line, the Western Alignment. The Board found that the Western Alignment is a superior route to the portion of the Four Mile Creek alternative 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 October 2007 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 by providing a shorter route. 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.<sup>8</sup>

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Engineers (Corps.); and the Montana Department of Natural Resources and Conservation (MTDNRC).

<sup>7</sup> See October 2007 Decision at 10.

<sup>8</sup> 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  
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A number of parties filed petitions asking the Board to stay the effective date of the October 2007 Decision.<sup>9</sup> Those requests were denied in a decision served on November 7, 2007 (November 2007 Decision), and the October 2007 Decision became effective on November 8, 2007, as scheduled.<sup>10</sup>

Some of the same parties filed petitions for reconsideration of the October 2007 Decision. In particular, Brown Cattle and Montana State Senator Wanzenried filed separate petitions on November 19, 2007; PRBC filed a petition on November 23, 2007; Alice Orr and Diamond Ranch filed separate petitions on November 26, 2007; APF filed a petition on November 27, 2007; and Jerry Lunde and Trout Unlimited filed separate petitions on December 10, 2007. With a few exceptions, the petitions are nearly identical and raise the same concerns.

In a decision served on December 7, 2007, TRRC's request to extend the due date for the railroad's reply to these filings was granted. TRRC timely filed its reply on December 17, 2007.

#### PRELIMINARY MATTER

On December 3, 2007, Brown Cattle and Montana State Senator Wanzenried jointly filed a petition asking that the Board treat their petitions for reconsideration as timely filed on October 29, 2007, or that the Board extend the period for filing petitions for reconsideration and treat their petitions as timely filed on November 19, 2007. Their request arises from the fact that a pleading is not considered filed at the Board until the agency receives the required filing fee.

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prevention; water quality and hydrology; aquatic and terrestrial ecology; Native American concerns; and cultural and historic resources. See October 2007 Decision, Appendix B (listing the environmental conditions).

<sup>9</sup> On October 19, 2007, petitions for stay were filed by: Alice Orr; American Prairie Foundation (APF); Brown Cattle Company (Brown Cattle); Caribou Land & Livestock Co.; Diamond Cross Ranch LLC (Diamond Ranch); FL Ranch; Montana State Senator David Wanzenried; Jerry Lunde; Musgrave Ranch; Powder River Basin Resource Council (PRBC); S&P Land Co.; Trout Unlimited; and V-C Cattle Company.

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. Subsequently, the Northern Cheyenne Tribe withdrew its name from the stay petition.

<sup>10</sup> A petition for review of the October 2007 Decision was filed in the United States Court of Appeals for the Ninth Circuit. Northern Plains Resource Council v. STB, No. 07-74384 (9th Cir. filed Nov. 7, 2007).

Brown Cattle and the state senator submitted their filing fees on November 19 for their October petitions. Similarly, the other petitioners submitted their filings in October, but did not submit their filing fees until late November and early December. All of these petitions could be rejected as late-filed, because petitions for reconsideration were due on October 29, 20 days after the decision in question was served.<sup>11</sup>

We will, however, treat these petitions for reconsideration as timely filed. The petitioners here are not experienced with the Board's processes. Furthermore, considering the petitions for reconsideration will not unduly delay these proceedings or prejudice any party.

### DISCUSSION AND CONCLUSION

Under 49 CFR 1115.3(b), a petition for reconsideration must show that the prior action will be affected materially because of changed circumstances or new evidence or that the prior action involves material error. Petitioners have failed to show material error by the Board in the October 2007 Decision, and they have not alleged changed circumstances or submitted any new evidence that would warrant reconsideration. Accordingly, the petitions for reconsideration will be denied.

Financial Fitness Issues. Petitioners take issue with our conclusion that TRRC will be able to finance construction and operation of the Western Alignment. They argue that the Board took the applicant's claim of having sufficient funds at face value, thereby failing to conduct a reasoned inquiry into whether TRRC is financially capable of completing this project and providing the service that it proposes.

As we explained in the October 2007 Decision, the Board is directed to authorize the construction and operation of a proposed line "unless the Board finds that such activities are inconsistent with the public convenience and necessity." 49 U.S.C. 10901(c).<sup>12</sup> This permissive licensing policy reflects a statutory presumption adopted in the ICC Termination Act of 1995 (ICCTA)<sup>13</sup> that new rail lines and new rail operations should be approved.<sup>14</sup>

In determining whether the proposed activity is inconsistent with the public convenience and necessity, one factor that the Board considers is whether the applicant is financially able to undertake the project and provide rail service. As we explained in our prior decision, our purpose in doing so is not to protect the applicant or those who choose to invest in the proposed

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<sup>11</sup> See 49 CFR 1115.3(e).

<sup>12</sup> See October 2007 Decision at 13.

<sup>13</sup> Pub. L. No. 104-88, 109 Stat. 803 (1995).

<sup>14</sup> See October 2007 Decision at 13.

project, but rather to protect existing shippers and communities that might be adversely affected if the applicant is unable to complete the project and provide the proposed service.<sup>15</sup>

TRRC has estimated that the combined cost to construct the three lines, using the Western Alignment, would be approximately \$341.3 million (in 2002 dollars). TRRC has explained its intent to finance construction through a combination of raising equity capital and arranging privately placed debt.

We found applicant's financing plan to be reasonable,<sup>16</sup> after taking a thorough look at the data provided by TRRC.<sup>17</sup> Our October 2007 Decision also noted that here TRRC is backed by a Class I railroad, BNSF, and that there is no reason here not to give the financial markets the opportunity to determine whether or not the line is built. Petitioners have not submitted any new evidence or evidence of changed circumstances that would cause us to reconsider our financial fitness determination, and have not established material error on this issue.

The Board also considered whether there is a public demand or need for the proposed service.<sup>18</sup> TRRC submitted revised estimates of tonnage forecasts and expected revenues. It estimated 32.1 million tons of coal in its initial year of operations (2009) and traffic growing to 36.9 million tons of coal in 2019.<sup>19</sup> TRRC projected that it would start to earn sustained profits in the 5th year of operations, that its profit margin would continue to grow, and that its loans would be paid off within 12 years.<sup>20</sup>

TRRC further provided substantial evidence that demand for the coal from Montana and Wyoming would be adequate to support this project.<sup>21</sup> Moreover, we properly concluded that BNSF's current service is less efficient than what could be provided in conjunction with TRRC.<sup>22</sup>

Petitioners claim that the Board should have given greater consideration to the circumstances that might undermine the viability of TRRC's project. For example, they argue that the acquisition of a right-of-way through the eminent domain process is a difficult task that

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<sup>15</sup> Id. at 14.

<sup>16</sup> Id. at 16.

<sup>17</sup> Id. at 14-19.

<sup>18</sup> Id. at 19.

<sup>19</sup> Id. at 17.

<sup>20</sup> Id. at 19.

<sup>21</sup> Id. at 17-20.

<sup>22</sup> Id. at 21.

might not succeed. Similarly, the petitioners note that TRRC has not yet secured coal leases and that such leases would be crucial to the success of the rail venture. Petitioners argue that the Board should not have allowed TRRC to proceed without a showing that it had secured the leases.

However, as the October 2007 Decision explains, the record here contains ample evidence showing that coal from the Ashland area will be developed over the next several years to replace the dwindling Decker area coal. TRRC remains confident that the Otter Creek tracts will be made available for coal development. Moreover, as noted in the October 2007 Decision, there is ample coal in the Northern PRB to sustain TRRC's operations, and this coal will not be sourced solely at the Otter Creek tracts.

Petitioners' arguments related to eminent domain also lack merit. As TRRC states (Reply at 6-8), the railroad is committed to negotiate with landowners and pay them just compensation for the right to cross their land, and Montana law gives TRRC rights to take property for its right-of-way through eminent domain should these negotiations fail.

In short, even though TRRC has neither secured the Otter Creek coal leases nor the right-of-way, it was not material error to find the applicant financially fit. Risk is part of any business venture. We noted the presence of risk in the Tongue River II decision and found then that it should not stand in the applicant's way.<sup>23</sup> Moreover, as we found in the October 2007 Decision, the financial market will ultimately determine whether or not the applicant secures the needed financing.<sup>24</sup> We therefore reaffirm that, under our licensing statute, the record shows that the project would not be inconsistent with this aspect of the public convenience and necessity.

Concerns about SEA's Method of Environmental Review. Petitioners argue that the Board should have prepared a single EIS for the Tongue River lines, and that the agency violated NEPA and Council on Environmental Quality (CEQ) regulations by conducting separate environmental reviews for the lines approved in Tongue River I, Tongue River II, and Tongue River III. The petitioners note that the CEQ regulations call for actions that are related to each other closely enough to be, in effect, a single action, to be analyzed in one NEPA document,<sup>25</sup> and argue that the Board has treated the Tongue River lines as a single project all along. Alternatively, the parties claim that, if the Tongue River lines are not part of a single project, the Board erred in its October 2007 Decision by modifying the grants of authority made in Tongue River I and Tongue River II.<sup>26</sup>

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<sup>23</sup> See Tongue River II, 1 S.T.B. at 829.

<sup>24</sup> See October 2007 Decision at 19.

<sup>25</sup> See 40 CFR 1502.4; 40 CFR 1508.25(a).

<sup>26</sup> In the Tongue River III proceeding, the Board reopened Tongue River I and Tongue River II to analyze any changes that might have affected the prior environmental review

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However, SEA acted properly by conducting separate environmental reviews for each of the Tongue River lines. The Tongue River lines were not proposed simultaneously. TRRC proposed Tongue River I in 1983, Tongue River II in 1991, and Tongue River III in 1998. Moreover, each individual line reflects the railroad's changing goals and motivations. When the railroad proposed the Tongue River I line, there was no indication of any intention to extend the line pursuant to the authority it later sought in Tongue River II. Because the Tongue River II line was not proposed until after the original line had already been assessed and authorized, the agency properly prepared a separate EIS for Tongue River II. As for the Tongue River III project, that line was only proposed after the railroad concluded that the routing authorized in Tongue River II would not best suit its needs. Accordingly, it was proper for an environmental review to be done separately on each application, as the 3 lines were proposed at different times, based on changing market and economic factors.<sup>27</sup>

Furthermore, there was no need to prepare a new EIS covering the entire Miles City to Decker line when TRRC submitted the Tongue River III application. By the time TRRC proposed the Tongue River III line in 1998, the Board's predecessor, the ICC, had already thoroughly examined the environmental impacts of the Tongue River II line and Tongue River I line and had issued separate EISs for those projects. The CEQ regulations do not require an agency to revisit data it has already reviewed. In fact, the CEQ rules direct agencies to reduce duplication and not reevaluate issues that have been covered by prior environmental reviews.<sup>28</sup> In short, SEA acted reasonably and in accordance with NEPA and the CEQ regulations when conducting its environmental analysis in the Tongue River cases.

Nevertheless, even though separate environmental reviews were appropriate in these proceedings, the applications to construct and operate these lines are related. Accordingly, it was appropriate to use the EIS in Tongue River III and the October 2007 Decision as a means to

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conducted in the earlier proceedings. Based on its new environmental analysis, the Board revised and supplemented the conditions previously imposed in Tongue River I and Tongue River II to further minimize the environmental impacts of those projects. See October 2007 Decision at 5, 29-33.

<sup>27</sup> See Native Ecosystems Council v. Dombeck, 304 F.3d 886, 894-95 (9th Cir. 2002) (agency accorded discretion in determining scope of action).

<sup>28</sup> See, e.g., 40 CFR 1501.7(a)(3), 1501.6(3), 1502.20, 1502.21, 1506.4, 1508.28. See also Northwest Environmental Defense Center v. BPA, 117 F.3d 1520, 1537 (9th Cir. 1997); California Trout v. Schaefer, 58 F.3d 469, 474 (9th Cir. 1995); COST v. Dole, 826 F.2d 60, 70-71 (D.C. Cir. 1987); Coker v. Skidmore, 941 F.2d 1306, 1310 (5th Cir. 1991) (all upholding agency decisions to incorporate, but not reassess, the results of prior NEPA studies in the absence of significant new circumstances or information).

update and supplement the Tongue River I and II environmental conditions and reflect circumstances that had changed sufficiently to require updated analysis.<sup>29</sup>

Stale Evidence Concerns. The petitioners further argue that the Board based its decision in Tongue River III on a stale environmental record. They point in particular to a 1997 aerial survey and question how such an “old” survey can represent an accurate evaluation of the area’s topography and ecology. They note that drought conditions have hit the region since 1997, citing to Montana newspaper articles from 2002 and 2005, as well as state historical precipitation deficit maps.<sup>30</sup>

As explained in the November 2007 Decision, the claims about stale evidence are without merit. SEA properly reviewed the EISs in Tongue River I and Tongue River II to ensure that the information presented in them remained valid and explicitly solicited public comment on whether there were any changes to the environment or new legal standards in place warranting updating of the prior EISs. SEA then 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, as appropriate.<sup>31</sup> For example, SEA conducted further wetlands analysis and prepared a Biological Assessment that updated baseline habitat and species data, further 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. Petitioners have not explained how this approach was insufficient or inadequate.

The concerns raised about the aerial survey do not show that the Board’s environmental review was based on stale information. In addition to the 1997 airplane survey cited by petitioners (similar to the surveys conducted in 1985 and 1992 for the other sections of the entire Miles City to Decker line), SEA based its analysis on focused helicopter surveys conducted in 2004. The helicopter surveys provided detailed biological information about black-tailed prairie

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<sup>29</sup> See 40 CFR 1502.9(c)(1)(ii) (agencies should prepare a supplemental EIS when “there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts”).

<sup>30</sup> The petitioners do not include any of these documents with their petitions for reconsideration.

<sup>31</sup> See Draft SEIS at 3-6 to 3-9; Final SEIS at 1-20 to 1-21; Tongue River III decision at 29-30.

dog colonies in the Spring and bald eagle sites in the Winter. These surveys, which covered the entire line from Miles City to Decker, were conducted by qualified biologists with experience conducting aerial surveys, and, with the associated aerial photographs of the Western Alignment, the Four Mile Creek Alternative, and the alignment authorized in Tongue River I, gave the Board detailed information on topography and ecology.<sup>32</sup>

Additionally, SEA conducted a number of site visits to the project areas and relied upon existing mapping and surveys obtained from various sources. SEA conducted site visits in 1997, 1999, and 2003. The site visits and surveys were conducted at different times of the year to ensure a complete understanding of the environment.<sup>33</sup> Thus, contrary to petitioners' claims, the SEIS provided a thorough and up-to-date picture of the area's ecology and habitat. Finally, several of the mitigation measures we have imposed will require additional surveys before the line is actually constructed.<sup>34</sup>

Rate Sensitivity Analysis. The petitioners argue that the Board erred by not conducting a rate sensitivity analysis of the potential indirect air emission impacts of increased coal usage that might result from this project similar to the analysis the Board performed in a rail construction case involving the Dakota, Minnesota & Eastern Railroad Corporation's PRB rail construction project.<sup>35</sup> As the petitioners note, in the October 2007 Decision, the Board concluded after careful consideration that a rate sensitivity analysis was not necessary for the TRRC project.<sup>36</sup> The petitioners do not support their claim that a rate sensitivity analysis should be performed here merely by citing the Board's determination that DM&E and TRRC generally would serve different customers and transport different types of coal.

The Board had good reason to conclude that the TRRC proposal is less likely than DM&E's project to result in lower transportation rates and lead to increased coal consumption (and increased air emissions). As the Board explained, part of the Ashland area coal that the Tongue River lines would carry would simply be a replacement for coal from depleted mines in the Decker area, and TRRC's opening access to new Montana coal mines would likely have little effect on the historically stable consumption of this type of coal.<sup>37</sup> With respect to coal

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<sup>32</sup> See Final SEIS at 2-2.

<sup>33</sup> See id.

<sup>34</sup> See October 2007 Decision, mitigation measures 25 and 26.

<sup>35</sup> See Dakota, Minnesota & Eastern Railroad Corporation Construction into the Powder River Basin, STB Finance Docket No. 33407 (STB served Feb. 15, 2006) (final approval), aff'd sub nom. Mayo Foundation et al. v. STB, 472 F.3d 545 (8th Cir. 2006) (collectively, DM&E).

<sup>36</sup> See October 2007 Decision at 26-27; Final SEIS, Chapter 2, Master Response 23 at 2-34 to 2-59.

<sup>37</sup> See id. at 26.

originated in Wyoming, the amount handled by TRRC would be only a small percentage of the total volume of coal originating in Wyoming. There is no reason to expect TRRC, acting as a bridge carrier to BNSF without direct access to the mines or utilities, to significantly influence the pricing and consumption of Wyoming coal. Rather, TRRC would have fewer incentives to offer lower transportation rates than DM&E because TRRC would transport coal in conjunction with BNSF, and thus would not have the same need to offer lower rates to capture traffic as DM&E, a new separate competitor in the PRB.

The Board also properly concluded that significant cumulative air quality impacts or further effects on coal rates and hence coal consumption are not likely to result from building both the TRRC and DM&E lines that would not result from building the new DM&E line alone.<sup>38</sup> In short, our October 2007 Decision fully explained why neither a rate sensitivity analysis nor additional modeling was required to assess the impacts of the TRRC lines. Petitioners have offered no new evidence on this point, and have not demonstrated material error.

Role of BNSF. Additionally, the petitioners claim that the Board failed to identify BNSF's role as a key beneficiary of the TRRC project in the early stages of the SEIS process and therefore failed to provide adequate notice of the scope of the issues to be addressed by the SEIS.

These notice claims lack merit. TRRC's application in Tongue River III provided the Board and the public with notice that TRRC would interchange traffic with BNSF, and that BNSF might operate the proposed line. TRRC provided additional details in its supplemental evidence when it noted that BNSF had provided financial assistance to the applicant and that negotiations about which entity will operate the line were continuing. BNSF's role was also appropriately addressed in the Board's environmental review documents. See, e.g., amended Final Scope for Supplemental EIS (at 3); Draft SEIS (at 2-4, 2-7); Final SEIS (at 2-41). The public thus had a full and fair opportunity to comment on the impact of the TRRC project on BNSF.

Native American Issues. Furthermore, the petitioners argue that the Board summarily dismissed the concerns of the Northern Cheyenne Tribe and failed to engage in consultations with the group. The petitioners argue that this violates Executive Order 12898 on Environmental Justice,<sup>39</sup> which requires agencies to consider and, if appropriate, mitigate the effects of their decisions on low income and minority groups.

These claims are without merit. As discussed in the October 2007 Decision,<sup>40</sup> SEA developed a Programmatic Agreement (PA) under section 106 of the National Historic

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<sup>38</sup> See id. at 26-27.

<sup>39</sup> See 59 FR 7629 (Feb. 16, 1984).

<sup>40</sup> See October 2007 Decision at 23.

Preservation Act in consultation with a number of entities, including the Advisory Council on Historic Preservation, the Montana State Historic Preservation Officer, MTDNRC, BLM, the Corps, the Northern Cheyenne Tribe, and the Crow Tribe.<sup>41</sup> The PA sets out detailed requirements of how impacts to Native Americans associated with the construction and operation of either the Western Alignment or the Four Mile Creek Alternative will be addressed. The PA details a process for the identification and treatment of cultural resources, including archeological, architectural, historic, and cultural properties. The PA requires completion of detailed on-the-ground surveys of the railroad right-of-way prior to construction and development of a Treatment Plan in consultation with the parties to the PA; in addition, it sets out procedures for reviewing and addressing objections and/or disagreements. This new PA, compliance with which is required by mitigation measure 52, replaced the previous PA developed in connection with the Tongue River II decision. This new PA, which reflects public input and consultation with tribal representatives, assures that impacts to cultural and paleontological resources will be minimized to the extent possible.

SEA solicited Native American input in the preparation of the PA. For example, SEA wrote letters and directed phone calls to members of the Northern Cheyenne Tribe, Arapaho Business Council, Crow Tribal Council, Shoshone Business Council, Oglala Sioux Tribal Council, and Standing Rock Sioux Tribal Council. The Northern Cheyenne Tribe participated in the Tongue River I proceeding as a cooperating agency. In the Tongue River II proceeding, a formal meeting was held with the Northern Cheyenne Tribe, and a number of other tribes were contacted. The Northern Cheyenne Tribe and the Crow Tribe are concurring parties to the PA. Also, as part of the PA process, SEA will seek the cooperation of the Northern Cheyenne Tribe and the Crow Tribe in the identification of sites of cultural significance to them along the Western Alignment, to ensure proper identification and treatment of cultural and paleontological resources that may be affected by this project.<sup>42</sup> Finally, the SEIS extensively addressed the Battle Butte Battlefield, and the PA requires a treatment plan to be developed in consultation with the tribes to mitigate impacts to this site. And the proposed refinement in Tongue River III to the Tongue River II alignment would place the rail line farther away from an identified Northern Cheyenne Tribe grave site.

Thus, the Board properly took into account the impacts on native communities, including the Northern Cheyenne Tribe, regarding the construction and operation of the Western Alignment.

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<sup>41</sup> The fully executed PA is set out at Appendix C of the Final SEIS. See also Draft SEIS at 4-118 to 4-127; Final SEIS at 2-21 to 2-22. The work SEA performed to identify potential impacts on cultural resources in the vicinity of the Western Alignment is reported in section 4.3.5.2 and 4.3.5.3 of the Draft SEIS and is summarized in the Final SEIS at 3-28 to 3-30 and 3-114 to 3-115.

<sup>42</sup> See Draft SEIS, Appendix C; Final SEIS at 2-21 to 2-22, 3-29, 3-11 to 3-115, 3-121, 3-213 to 3-214, 3-486 to 3-487, Appendix C.

Miles City Fish Hatchery. Diamond Ranch and Trout Unlimited argue that the Board erred by allowing TRRC to proceed before it is entirely clear what effect the line's operation will have on the fish hatchery located near the Tongue River I line.<sup>43</sup> We find no material error in the handling of this issue in the SEIS and the October 2007 Decision.

Extensive information on the various potential impacts of the line on fish was gathered prior to completion of the Final SEIS.<sup>44</sup> Moreover, pursuant to mitigation measure 92, imposed in the October 2007 Decision, TRRC must implement a prescribed work plan and conduct additional vibration studies contained in the plan. TRRC indicates in its reply that it has conducted the necessary work; that the new study reaffirms that there will be no noise or vibration impacts of the TRRC project greater than the ambient noise and vibration levels at the hatchery; and that TRRC has provided its findings in a report to the MTDFWP for that agency's review.

MTDFWP will continue negotiating with TRRC about the vibration issue. At the end of these negotiations, MTDFWP has the right, pursuant to mitigation measure 86, to ask the Board to impose additional mitigation measures. Any new concerns about the vibration issue can be addressed at that time. Moreover, under mitigation measure 87, MTDFWP can impose reasonable conditions on its easement that TRRC is obligated to accept, further helping to ensure proper mitigation of potential vibration prior to construction and operation of the line. TRRC will not be able to cross the hatchery until that easement is granted and the reasonable conditions on the easement met. Thus, petitioners' claim that the Board has allowed TRRC to go forward prematurely is not correct.

Grassland Concerns. Finally, APF raises concerns that the Tongue River lines will detrimentally affect grasslands and their ecosystems and argues that the Board must minimize these effects under NEPA. However, SEA has thoroughly studied the effects of the rail line's construction and operation on land use, biological resources, soils, and water quality. Based on these studies, SEA crafted mitigation measures to minimize the impact of the railroad's project on the local grasslands. The Board adopted these measures in its October 2007 Decision.<sup>45</sup>

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<sup>43</sup> In Tongue River I, TRRC proposed two alternatives for crossing the hatchery's property. Now, TRRC proposes to move a staging yard and necessary facilities to a location south of Interstate 94, and to construct a wye track on hatchery property to connect with the existing BNSF rail line.

<sup>44</sup> See Draft SEIS, Appendix F (providing information on coal dust, weed control, pipeline protection, and vibration). Moreover, vibration studies included in that document predicted that ground vibration levels at the hatchery from this project would be low.

<sup>45</sup> See, e.g., October 2007 Decision, mitigation measures 9, 10, 11, 14, 18, 19, 20, 21, 22, 29, 43 and 47.

Included in our mitigation is mitigation measure 14, which requires the creation of a Multi-agency/Railroad Task Force to approve the implementation and monitoring of the biological mitigation measures for the entire rail line, except the Miles City Fish Hatchery. As the Board's environmental documentation shows, we have thoroughly examined the effects of the project on the grasslands and adopted appropriate measures to mitigate their impacts. Accordingly, APF's concerns have been analyzed and addressed in accordance with NEPA.

For the reasons discussed above, there is no material error in the October 2007 Decision.

It is ordered:

1. The petitions for reconsideration will be treated as if they were timely filed.
2. The petitions for reconsideration are denied.
3. This decision is effective on its date of service.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan  
Acting Secretary