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SERVICE DATE - MARCH 18, 2004

SURFACE TRANSPORTATION BOARD

DECISION

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

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

Decided: March 15, 2004

On August 22, 2003, the Board's Section of Environmental Analysis (SEA) issued an Amended Final Scope of the Supplemental Environmental Impact Statement (Amended Final Scope) in this proceeding (Tongue River III). On September 2, 2003, the United Transportation Union-General Committee of Adjustment and the United Transportation Union-Montana State Legislative Board (UTU-GCA/MT) filed a joint appeal asking the Board to revise the Amended Final Scope in certain respects. Tongue River Railroad Company, Inc. (TRRC)¹ filed a reply on September 22, 2003. UTU-GCA/MT's appeal will be denied for the reasons discussed below.

BACKGROUND

An extensive description of the background of this proceeding is set forth in two decisions served earlier,² and it need not be repeated in detail here. It is sufficient to note that TRRC was previously authorized to construct 89 miles of rail line between Miles City and Ashland, MT,³ and to construct a contiguous 41-mile line from Ashland to Decker, MT.⁴ The Tongue River III proceeding

¹ In a decision served September 2, 2003, the Board allowed Tongue River Railroad Company, Inc. to be substituted for Tongue River Railroad Company as the applicant. UTU-GCA/MT has sought reconsideration of that decision. For purposes of this decision, however, there is no reason to differentiate between the two Tongue River entities, and they will be referred to here collectively as TRRC.

² See the decisions served on March 11 and May 19, 2003, in this proceeding.

³ See 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) (Tongue River I).

⁴ See Tongue River Railroad Company–Rail Construction and Operation–Ashland to Decker,

(continued...)

now before the Board involves a request by TRRC for authority to construct and operate a 17.3-mile rail line over an alternate route (the Western Alignment) to the route the Board previously approved in Tongue River II (the Four Mile Creek Alternative) for the southernmost portion of the Ashland to Decker line.

TRRC filed the Tongue River III application on April 27, 1998. On July 10, 1998, SEA served a Notice of Intent to prepare a Supplemental Environmental Impact Statement (SEIS) to evaluate and consider the potential environmental impacts that might result from the construction and operation of the Western Alignment, and requested comments on the scope of the SEIS. SEA served its Final Scope of the SEIS on February 3, 1999. On March 2, 2000, before SEA completed its Draft SEIS, TRRC requested that SEA suspend its environmental work. SEA complied with the request.

On December 19, 2002, TRRC advised SEA that it was in a position to move forward and asked SEA to resume its environmental review of the application. On March 26, 2003, SEA served an Amended Notice of Intent to prepare a SEIS and requested comments on the adequacy of the earlier published Final Scope of the SEIS. Eight comments were received. After reviewing them, SEA served an Amended Final Scope on August 22, 2003, which revises in certain respects the earlier Final Scope.

DISCUSSION AND CONCLUSIONS

UTU-GCA/MT argues that SEA has gone beyond simply addressing environmental matters in its Amended Final Scope and has addressed the merits of the case. Specifically, UTU-GCA/MT first claims that SEA errs by stating that there is a presumption that a rail construction proposal will be approved. UTU-GCA/MT continues to argue that this proceeding is governed by the version of 49 U.S.C. 10901(c) in effect prior to enactment of the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (ICCTA), rather than by section 10901(c) as modified by that Act. That argument was rejected, however, in the Board's decision in this proceeding served on May 19, 2003, and there is no need to revisit this issue here. In any event, the Amended Final Scope in no way prejudices the ultimate disposition of this proceeding. It is simply a document prepared by SEA that explains the parameters of the environmental study that SEA will conduct of the proposed project. In referring to the statutory presumption, SEA merely reiterated the Board's own interpretation of the applicable statutory provision.

⁴(...continued)

Montana, Finance Docket No. 30186 (Sub-No. 2) (STB served Nov. 8, 1996) (Tongue River II), pending judicial review sub nom. Northern Plains Resource Council, Inc. v. STB, Nos. 97-70037 et al. (9th Cir. filed Jan. 7, 1997).

UTU-GCA/MT also argues that SEA's Amended Final Scope prejudices Board action on the entire line by stating that the Board will not reopen and reconsider the authority granted in Tongue River I and Tongue River II. Of course, SEA's statement does not bind the Board. In any event, SEA was merely responding to requests received in response to the Amended Notice of Intent to re-examine in this SEIS the environmental impacts of the entire 130-mile line from Miles City to Decker. In this context, SEA properly noted that the construction authority granted in Tongue River I and Tongue River II has long been administratively final, and that therefore the SEIS in Tongue River III need only update and augment the analysis in Tongue River I and Tongue River II in those areas: (1) where environmental circumstances or requirements have changed; (2) where there have been refinements to the alignment previously considered in the Tongue River I and Tongue River II EISs that might result in significant environmental impacts not addressed in those previous EISs; and (3) where further environmental analysis is appropriate to assist the cooperating agencies. In short, SEA has not prejudged Board action; it has merely described the current status of the Tongue River proceedings while declining a request for a *de novo*, wide-ranging environmental review of what has already been considered in Tongue River I and Tongue River II.

UTU-GCA/MT finds fault with SEA's mentioning in the Amended Final Scope that there is a pending petition for review of the Tongue River II decision. UTU-GCA/MT argues that its petition for review also encompasses review of the earlier Tongue River I docket because, in Tongue River II, the Board reopened Tongue River I in certain respects. UTU-GCA/MT can raise its claims about Tongue River I in the pending court case. But regardless of the merits of its argument about Tongue River I, SEA's simple statement that judicial review of Tongue River II is pending is entirely correct.

UTU-GCA/MT also questions whether SEA's plans for disseminating the Draft SEIS will provide adequate public notice and a meaningful opportunity to participate in the environmental review process. SEA has stated that the Draft SEIS will be served on all persons listed on the Tongue River III service list. But UTU-GCA/MT claims that the Board served its July 7, 2003 decision on persons involved in both Tongue River II and Tongue River III. UTU-GCA/MT's concern appears to be that SEA will limit participation in the environmental process by serving its Draft SEIS only on those participating in Tongue River III. UTU-GCA/MT suggests that the Board can remedy any public confusion over the difference between the various Tongue River proceedings, and ensure participation by all interested persons, by adding all those listed in the Tongue River I and Tongue River II service lists to the Tongue River III service list.

UTU-GCA/MT's proposed course of action is not warranted. First, both the July 7, 2003 decision and the Amended Final Scope were served only on persons found on the Tongue River III service list (even though some persons on that list are also on the service list in Tongue River I and Tongue River II). In addition, as SEA indicated in the Amended Final Scope, notice of the availability of the Draft SEIS will be published in the Federal Register. Moreover, the Draft SEIS will be made

available on the Board's website. This will provide widespread notice and ensure that the actual Draft SEIS is readily available. There will also be ample opportunity for public participation in the environmental review process. Any interested person, entity, organization, or community can file comments on the Draft SEIS; there is no requirement that a commenter on a draft environmental document be a party of record. Accordingly, there is no need to serve all parties on the service lists of the earlier Tongue River proceedings.

UTU-GCA/MT maintains that, in light of what it characterizes as erroneous procedures used by SEA and the prejudgment of Board action displayed by SEA, the Board should remove the environmental review of this proceeding from SEA and grant oversight authority to a Board member. As discussed above, however, UTU-GCA/MT has not demonstrated that SEA has acted improperly and its arguments are not convincing reasons to take the requested action.

Finally, UTU-GCA/MT complains that the public should have been granted access to a meeting attended by representatives of TRRC, SEA, and a member of the Board's Office of the General Counsel about what TRRC would have to do to restart the environmental review process. But that process is necessarily an informal one that depends on cooperative consultations with railroad applicants, as well as other agencies, to permit applicants to find out in advance what environmental studies or other information will be required in connection with the environmental review process. See, e.g., 40 CFR 1506.5(c); 49 CFR 1105.4(j). UTU-GCA/MT has shown no reason why the meeting was improper. UTU-GCA/MT and all others will have a full opportunity to review and comment on the Draft SEIS when it is issued. This opportunity for public participation on the draft document provides the necessary checks and balances by assuring that all possible environmental information, issues, and points of view will come before the agency in the case. See City of Auburn v. United States, 154 F.3d 1025, 1033 (9th Cir. 1998).

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

It is ordered:

1. The appeal filed by UTU-GCA/MT is denied.

2. This decision is effective on its service date.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary