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SERVICE DATE – JUNE 18, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 30186

TONGUE RIVER RAILROAD COMPANY—RAIL CONSTRUCTION AND OPERATION—
IN CUSTER, POWDER RIVER AND ROSEBUD COUNTIES, MONT.

Docket No. FD 30186 (Sub-No. 2)

TONGUE RIVER RAILROAD COMPANY—CONSTRUCTION AND OPERATION—
ASHLAND TO DECKER, MONT.

Docket No. FD 30186 (Sub-No. 3)

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

Digest:¹ This decision sets up a process for responding to the court's decision in Northern Plains Resource Council v. STB, 668 F.3d 1067 (9th Cir. 2011), affirming in part, reversing in part, and remanding for further environmental review the Board's decisions in two Tongue River proceedings, FD 30186 (Sub-No. 2) and FD 30186 (Sub-No. 3), authorizing the construction of portions of the Tongue River Railroad in Montana. The Board is dismissing both of these proceedings because the railroad no longer intends to construct the rail lines that were the subject of those applications. The Board will reopen FD 30186 to require the railroad to submit a revised application that reflects its current plans for the line that the railroad still wants to build, and to conduct a new environmental review. The Board will also dismiss as moot a pending petition for reconsideration of the Board's 2011 denial of an earlier petition to reopen, deny a request that it set a procedural schedule, and address certain other procedural requests.

Decided: June 13, 2012

INTRODUCTION

Over the course of the past 30 years, the agency issued three decisions authorizing construction of portions of the proposed 130-mile Tongue River Railroad, subject to environmental conditions. No portion of the proposed line has ever been built. Petitions for

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

review of the last two decisions, known as Tongue River II² and Tongue River III,³ were filed in the Ninth Circuit, and, in 2011, the court partially reversed and remanded those decisions for additional environmental review.⁴ The Tongue River Railroad Company, Inc. (TRRC) has now informed the Board that it does not intend to build the Tongue River II and Tongue River III portions of the railroad.

TRRC does propose to build the approximately 80-mile portion initially authorized in 1986 in the proceeding known as Tongue River I,⁵ as modified in Tongue River III. Although Tongue River I was not directly at issue before the Ninth Circuit in the Tongue River II and Tongue River III appeal,⁶ the court's decision requires the Board to revisit the environmental baseline data and cumulative impacts analyses that also would apply to the Tongue River I rail line because the Board made the resulting mitigation conditions applicable to all three rail lines in its Tongue River III decision. See Tongue River III, slip op. at 34-35. TRRC has also informed the Board of a recent transfer in ownership of TRRC and changes in the purpose and need for the proposed line. Thus, the Board must now decide which Tongue River proceeding to reopen; what type of revised application should be required to reflect the changes in TRRC's proposal; and whether to supplement existing environmental documents or prepare a new environmental review.

The recent Ninth Circuit decision and TRRC's new ownership and modified plans all constitute changed circumstances that warrant reopening. For the reasons discussed below, the Board will dismiss the Tongue River II and Tongue River III proceedings and will reopen Tongue River I. The Board will also require TRRC to file a revised application that presents the railroad's current plans for the railroad it still intends to build and the information required by 49 C.F.R. pt. 1150. In addition, the Board will conduct a new environmental review that is consistent with the court's decision rather than a supplemental environmental review based on the three prior environmental reviews that began in the 1980s.

² Tongue River R.R.—Rail Construction and Operation—Ashland to Decker, Mont. (Tongue River II), 1 S.T.B. 809 (1996), pet. for reconsid. denied (STB served Dec. 31, 1996).

³ Tongue River R.R.—Rail Construction and Operation—Ashland to Decker, Mont. (Tongue River III), FD 30186 (Sub-No. 3) (STB served Oct. 9, 2007), pet. for reconsid. denied (STB served Mar. 13, 2008).

⁴ See N. Plains Res. Council v. STB, 668 F.3d 1067 (9th Cir. 2011) (Northern Plains).

⁵ Tongue River R.R.—Rail Construction and Operation—In Custer, Powder River and Rosebud Cntys., Mont. (Tongue River I), FD 30186 (ICC served Sept. 4, 1985), modified (ICC served May 9, 1986), pet. for judicial review dismissed, N. Plains Res. Council v. ICC, 817 F.2d 758 (9th Cir.), cert. denied, 484 U.S. 976 (1987). Although the decision granting Tongue River I authorized the construction of an 89-mile line, TRRC now describes that line as being approximately 80 miles based on refinements straightening and shortening the alignment.

⁶ Northern Plains, 668 F.3d at 1073.

This decision also dismisses as moot a pending petition for reconsideration of the Board's 2011 denial of an earlier petition to reopen, denies a request that the agency set a procedural schedule, and addresses requests for the release of a confidential agreement and a new service list.

BACKGROUND

The Prior Tongue River Decisions. In 1986, the Interstate Commerce Commission gave approval to TRRC to build and operate an 89-mile rail line between Miles City and Ashland, Montana (Tongue River I). The line was intended to serve future coal mines in the Ashland area and to connect with a line of the BNSF Railway Company (BNSF) at Miles City for shipment of the coal to eastern and western destinations. In 1996, in its Tongue River II decision, the Board authorized TRRC to build and operate a 41-mile extension of the proposed line previously authorized in Tongue River I, running south from Ashland to Decker, Montana, over the Four Mile Creek Alternative. The line extension was intended to serve existing coal mines at Decker, and to offer a shortcut of between 130 and 160 miles for BNSF's Powder River Basin coal moving from the Gillette, Wyoming, area to Midwest destinations. In 2007, in Tongue River III, the Board authorized TRRC to build and operate the Western Alignment, a 17.3-mile alternative route for the southernmost portion of the already-approved Four Mile Creek Alternative. TRRC proposed the Western Alignment to eliminate potential economic, operational, and environmental concerns that the railroad had with respect to the Four Mile Creek Alternative route.

The Board undertook environmental review of the proposals in all three proceedings pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321-4370f, with public input and consultation with federal, state, and local agencies and entities. In all three proceedings, the Board prepared Environmental Impact Statements (EISs).⁷ The environmental review in Tongue River III not only compared the potential impacts of the Western Alignment with the Four Mile Creek Alternative, but also supplemented and reevaluated the reviews previously performed in Tongue River I and Tongue River II. As a result, the Board's 2007 decision in Tongue River III approved the railroad's proposed modifications to the original Tongue River I route alignment that the railroad had proposed and imposed 92 environmental mitigation conditions that applied to the entire line between Miles City and Decker. Again, no portion of any of these lines has been built.

Northern Plains Resource Council, Mark Fix (collectively, NPRC), the City of Forsyth, Native Action, Inc. (Native Action), and the United Transportation Union—General Committee of Adjustment (UTU-GCA) filed timely petitions in the Ninth Circuit for judicial review of the Tongue River II and Tongue River III decisions, raising both environmental and transportation-

⁷ An EIS is the detailed written statement required by NEPA for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c). The Board normally prepares an EIS for rail construction proposals for which its approval is required. 49 C.F.R. § 1105.6(a).

related concerns.⁸ On July 26, 2010, while the petitions for review were pending, NPRC asked the Board to reopen Tongue River I, Tongue River II, and Tongue River III. NPRC alleged both changed circumstances and new evidence to justify asking the Board to reopen these cases and to prepare a Supplemental EIS (SEIS) for the entire rail line. NPRC pointed to recent leases of Otter Creek coal tracts in Montana as a changed circumstance that, it asserted, made the transportation and ultimate burning of this coal by power plants reasonably foreseeable and required the preparation of additional environmental review.⁹ NPRC also submitted allegedly new scientific information that it claimed demonstrated the accelerating effects of climate change caused by the burning of fossil fuels and urged the Board to conduct a new cumulative air quality impacts analysis to take into account the emissions of carbon dioxide and other greenhouse gases at the power plants that would receive coal transported by TRRC.

In a decision served June 15, 2011, the Board denied reopening (Reopening Denial). The Board explained that, in deciding whether NPRC had alleged sufficient grounds to support its reopening request, it had to weigh the magnitude of the alleged bases for reopening against countervailing equitable concerns regarding administrative finality, repose, and detrimental reliance by the applicant and the public. Given the fact that NPRC had sought reopening years after the environmental review here was completed and the Board's final decision in Tongue River III was issued, the Board determined that NPRC had a "heavy burden" to meet to justify reopening. After considering the evidence presented by NPRC and TRRC's reply, the Board concluded that NPRC had not alleged the kind of new evidence or changed circumstances that would justify withdrawing the Board's authorization of the TRRC rail line to prepare an SEIS at that time, particularly where TRRC had asserted that it had detrimentally relied on the Board's decisions and would be prejudiced by reopening.¹⁰ NPRC filed a timely petition for reconsideration of the Board's decision in July 2011, which remains pending.

The Court's Decision. On December 29, 2011, in Northern Plains the court reversed in part and affirmed in part the Board's decisions in Tongue River II and Tongue River III. The court upheld the Board's decisions with respect to all but one of the transportation-related issues, but remanded the cases for further Board review on certain environmental issues. Among other things, the court found that the Board erred in finding that the Otter Creek coal mine development was too speculative to be addressed as part of the Board's environmental analysis in Tongue River III. The court also determined that the Board failed to provide adequate baseline data to document the direct impacts of the railroad on several resources, including the pallid sturgeon, sage grouse, fish and aquatic resources, other wildlife, and sensitive plants. The court found fault with the Board's reliance on mitigation conditions that called for additional surveys and analyses to be performed prior to the start of rail construction where baseline data was not sufficiently provided. In the court's view, these surveys should have been conducted

⁸ The court held in abeyance the petitions for review of Tongue River II until Tongue River III was issued.

⁹ Previously, the Board had stated that the possibility of Otter Creek coal being transported was too speculative to consider in the Tongue River III environmental review. Tongue River III at 30.

¹⁰ Reopening Denial at 5-17.

before the Board's decisions authorizing Tongue River II and Tongue River III. Moreover, the court ruled that the agency's aerial surveys performed in 1985, 1992, and 1997 were too old to provide adequate information regarding the current habitat and populations of various species and, also that the Board had not shown how aerial surveys were a sufficient method to identify fish populations in rivers, sensitive plant species, and other potentially at risk wildlife and plants.

Further Developments. On July 7, 2011, TRRC filed an Amended Corporate Disclosure Statement with the court in the then-pending Northern Plains case to inform the court and the other parties of a transfer in ownership of the railroad to a holding company, TRR Holding. TRRC also filed an amended Board-required status report (Four Month Report) with the Board on July 8, 2011. In both, TRRC explained that 1/3 ownership shares in the holding company are held respectively by BNSF, Arch Coal (the developer of the Otter Creek coal tracts), and a private investment entity subsequently identified as TRR Financing LLC, a company controlled by Mr. Forrest Mars, Jr., who is a landowner along the route approved in Tongue River II. TRRC explained that, under the terms of an agreement among the new owners, the approval of TRR Financing LLC (or its designee, successors, or assigns) would be required before any construction or certain pre-construction activities for the portion of the proposed rail line defined as the Tongue River II-III route could take place.

In a September 2, 2011 letter to the Board's Office of Environmental Analysis, TRRC clarified that the new owners "have determined that they will not, in the reasonably foreseeable future, construct the portion of the TRRC line south of the Ashland/Otter Creek area. Instead, TRRC will concentrate on moving toward construction of the line between Miles City and the Ashland/Otter Creek area, i.e., the [Tongue River I] portion of the line."¹¹

Several parties have filed pleadings proposing how the Board should proceed in light of the court's partial remand in Northern Plains. On April 13, 2012, NPRC filed a petition to reopen all three Tongue River proceedings based on the court's partial remand and requested a 775-day procedural schedule to conduct a new SEIS for all three proceedings that is consistent with the court's decision. NPRC further claimed that the Board should continue to process its pending petition for reconsideration of the June 15, 2011 denial of NPRC's 2010 petition to reopen the three Tongue River proceedings. NPRC also asked for a new and accurate service list that reflects only the parties that are still involved in the cases.

On April 19, 2012, TRRC filed a Statement of Intent offering its suggestions on how best to proceed. TRRC informed the Board that it no longer intends to construct the rail lines south of Ashland that were the subject of its applications in Tongue River II and Tongue River III and that it intends to focus its future activities on construction of the line between Miles City and Ashland/Otter Creek previously authorized in Tongue River I, with the modifications to that rail line considered in Tongue River III. TRRC stated that it planned to withdraw its application to construct Tongue River II. Because it viewed Tongue River I as administratively final, it proposed to file an amended application in Tongue River III to "refocus" that application so that it would no longer seek authority to construct the Western Alignment, but rather would only seek

¹¹ Railroad's Letter 1, Sept. 2, 2011.

whatever approval might be needed for the modifications to Tongue River I considered in Tongue River III, as well as to provide updated information on TRRC's ownership, traffic forecasts, financial projections, and other relevant information. According to TRRC, this would give the Board the information needed to prepare a thorough review of the transportation and environmental matters relevant to TRRC's current construction plans, as well as to address the matters identified by the court in Northern Plains as warranting further review, to the extent those issues remain relevant to TRRC's current plans.

On May 7, 2012, TRRC replied to NPRC's April 13, 2012 petition. It opposed reopening Tongue River I on grounds that Tongue River I is administratively final and was not directly before the court in Northern Plains. It reiterated that NPRC's pending petition for reconsideration of the 2011 Reopening Denial decision (and NPRC's underlying petition to reopen) are mooted by TRRC's decision not to seek to construct any lines south of Ashland and by TRRC's suggestion that the Board prepare an SEIS in Tongue River III to address the remanded issues and the issues raised in NPRC's 2010 petition. The railroad objected to NPRC's proposed schedule, arguing that (1) the time frames for handling applications for rail construction cases at 49 C.F.R. § 1150.10 (providing time frames for comments on applications and replies to such comments) should be applied in handling the merits side of the proceedings on remand, and (2) NPRC's proposed two-year schedule for completing the environmental review process is too long.¹² TRRC agreed with NPRC that the Board should develop a new service list for the proceeding on remand.

In similar filings dated May 7, 2012, UTU-GCA and Native Action argue that, in light of TRRC's statement that it no longer intends to construct the rail lines south of Ashland that were the subject of Tongue River II and Tongue River III, those applications should be dismissed. UTU-GCA and Native Action also contend that the Board should reject TRRC's proposal to use Tongue River III as a vehicle to consider modifications to Tongue River I and that future proceedings in these cases should take place in Tongue River I or in an entirely new Tongue River IV. In addition, these parties ask that the agreement between BNSF, Arch Coal, and TRR Financing LLC, controlled by Mr. Mars, be made publicly available, and noted that the involvement of BNSF and the relationship between BNSF and TRRC could raise potential concerns.

On May 8, 2012, NPRC submitted a reply to TRRC's Statement of Intent arguing that the only appropriate proceeding for further environmental review consistent with Northern Plains in these cases is Tongue River I because the modified Tongue River I line is the only line that TRRC still seeks to build. NPRC also claimed that its pending petition for reconsideration of the Board's 2011 Reopening Denial of the three Tongue River proceedings is not moot.

DISCUSSION AND CONCLUSIONS

1. Reopening Tongue River I and Dismissing Tongue River II and Tongue River III.

¹² In particular, TRRC contended that NPRC had failed to show why 240 days should be provided for environmental scoping comments and why it would be necessary to include time for depositions and written discovery.

The Board must decide how to respond to the court’s partial remand in Northern Plains now that it is clear that TRRC does not intend to construct the alignments proposed in the applications filed in Tongue River II and Tongue River III, and how to respond to TRRC’s Statement of Intent to move forward with the rail line authorized in Tongue River I, as modified in Tongue River III. There is no dispute here that at least one of the Tongue River proceedings needs to be reopened in order for TRRC to move forward with its current plan to build the modified Tongue River I rail line. The court’s decision in Northern Plains makes it clear that TRRC may not build any part of the Tongue River Railroad without further environmental review. Several aspects of the court’s decision in Northern Plains found fault with the Board’s environmental mitigation—which applied to the entire line, including Tongue River I. The court also criticized the Board’s decision not to analyze the potential cumulative impacts from the Otter Creek mines (which TRRC hopes to serve with its currently proposed rail line), and rejected as stale and inadequate the baseline data and surveys in the EIS, some of which were done in the 1980s in Tongue River I. Thus, while Tongue River I was not directly before the court (see Northern Plains, 668 F.3d at 1073), the court’s decision nevertheless affects the line authorized in Tongue River I.

The Board considers reopening requests under 49 U.S.C. § 722(c), which provides that the Board may, at any time, on its own initiative or on a party’s petition, reopen an administratively final proceeding because of material error, new evidence, or substantially changed circumstances. See also 49 C.F.R. § 1115.4. In deciding whether a party has alleged sufficient grounds to support a reopening request, the Board weighs the magnitude of the alleged bases for reopening against countervailing equitable concerns regarding administrative finality and repose and detrimental reliance by the applicant and the public.

In its 2011 Reopening Denial, the Board relied heavily on the need for administrative finality and repose in finding that NPRC had not supported its request to reopen the three Tongue River proceedings at that time. For example, the Board concluded that NPRC had failed to show that the Board should reevaluate the environmental impacts that might result from prospective coal mining in the Otter Creek tracts based on recent leases of Otter Creek coal tracts when NPRC had filed its petition to reopen four years after completion of the environmental review in Tongue River III, and three years after the Board’s decision authorizing Tongue River III and imposing environmental mitigation for the entire line had become final.¹³ As the Board explained,¹⁴ once the 2007 decision in Tongue River III became effective, TRRC had the right to proceed with the many preconstruction steps incidental to any major new rail line such as obtaining the requisite easements or rights-of-way, securing financing commitments, complying with the Board’s mitigation and other federal and state regulations and processes, and developing final construction design and engineering plans. Another round of administrative review by the Board in 2011, the agency found, would not have changed the result reached in Tongue River III and would have caused “significant and prejudicial uncertainty, delay, and expense to this

¹³ Reopening Denial at 8-13.

¹⁴ Id. at 8.

project.”¹⁵ Accordingly, it was appropriate to give concerns of administrative finality and repose great weight in 2011.

Circumstances have changed significantly since then. The Northern Plains court has issued its partial remand requiring that the Board do substantial additional environmental analysis before the Tongue River II-III rail lines could be constructed and revisit the baseline data and mitigation that apply to Tongue River I, II, and III. However, TRRC has stated that it no longer wants to build the routes identified in Tongue River II-III. TRRC has also stated that, although it now wants to build the Tongue River I rail line (as modified in Tongue River III), TRRC has new ownership and the purpose and need for that proposed line has changed. Thus, it is necessary for the Board to reopen one or more of the Tongue River cases.

Having found that these changed circumstances warrant reopening, we must determine whether we should reopen Tongue River I or Tongue River III. TRRC suggests that the Board could reopen Tongue River III to do all of the additional environmental analysis required by the court that impacts the approximately 80-mile Tongue River I line, as modified in Tongue River III, even though TRRC has no intention of moving forward with the Western Alignment route that was the subject of its application in Tongue River III. On the other hand, NPRC, UTU-GCA, and Native Action contend that the additional analysis required by Northern Plains should be done in Tongue River I, given the railroad’s decision not to move forward with the Western Alignment.

The most reasonable approach here is to dismiss both Tongue River II¹⁶ and Tongue River III and to reopen Tongue River I to require a revised application under 49 U.S.C. § 10901 and 49 C.F.R. pt. 1150 that presents fully TRRC’s current proposal to build the rail line between Miles City and Ashland. The revised application should provide, at a minimum, current information regarding TRRC’s ownership; the planned terminus points for the proposed line; the purpose of the proposed rail line; the demand and need for its construction; and TRRC’s financial fitness to proceed. As noted above, TRRC itself proposed to file an amended application containing information relevant to its current plans, although it would prefer to file it in Tongue River III.

Moreover, it makes sense to conduct the additional environmental review in Tongue River I, not Tongue River III. First, because TRRC no longer intends to build the Western Alignment proposed in its application in Tongue River III, it is unnecessary to undertake any additional environmental review of that proposal. Second, the railroad hopes to build the Tongue River I line as modified in Tongue River III; thus conducting the additional environmental review in Tongue River I is appropriate.

Because of the recent transfer of ownership of the railroad to BNSF, Arch Coal, and TRR Financing LLC, and the other changes to TRRC’s plans that have taken place since 1986, the

¹⁵ Id.

¹⁶ The parties all agree that Tongue River II should be dismissed.

Board on remand will not be addressing the same proposal that was before the agency in Tongue River I. Although the railroad has advised the Board of these changes, it has provided few details and interested parties and the general public have had no chance to address any concerns about the transfer of ownership and changes in TRRC's plans that they might have. Requiring a revised application containing the information discussed above will ensure that, when the Board again considers the transportation merits of TRRC's proposal, it will have before it a complete and current description of TRRC's plans and financial fitness, and any replies raising concerns about TRRC's revised application that might be filed. Therefore, the Board will dismiss Tongue River II and Tongue River III and reopen Tongue River I to require a revised application that reflects TRRC's current plans.

2. A New EIS Rather Than a SEIS in Tongue River I.

Agencies are required to prepare a supplement to a Draft EIS or Final EIS where the agency makes "substantial changes in the proposed action that are relevant to environmental concerns" or there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1). Agencies may also prepare supplements (as opposed to new EISs) when they determine that the purposes of NEPA will be furthered by doing so. Id. The decision to undertake a supplemental EIS is subject to a "rule of reason." Marsh v. Or. Natural Res. Council, 490 U.S. 360, 374 (1989).

TRRC has suggested that an SEIS might be sufficient to respond to the court's concerns in Northern Plains and to comply with the requirements of NEPA. The Board disagrees, for several reasons. First, in Northern Plains, the court held that the baseline data used to assess the potential impacts of TRRC's proposals in the prior EISs were too stale and that some of the Board's surveys were inadequate, which means that they could not be used in the environmental review on remand. The fact that the agency's prior EISs are old, going back in Tongue River I to environmental analysis prepared in the 1980s and in Tongue River II to the 1990s, might not be enough standing alone to make them invalid. Given the court's partial remand, however, it would not be appropriate to continue building on an environmental foundation that has been found to be unsound. Second, most of the Board's more recent environmental analysis pertains to the area around the Four Mile Creek Alternative and the Western Alignment, neither of which the railroad still proposes to build.

Third, scoping is required for new EISs but is not for supplements. 40 C.F.R. §§ 1501.7, 1502.9. Scoping is meant to be an early and open process to determine the scope of issues to be addressed in an EIS and the significant issues related to a proposed action. 40 C.F.R. § 1501.7. As part of scoping, the Board issues for public review and comment a notice of intent to prepare an EIS and a draft scope, invites the participation of potentially affected agencies, Indian tribes, and other interested persons, and typically holds a scoping meeting in the project area. A final scope is issued following the receipt of comments on the draft. 49 C.F.R. § 1105.10(a). It is appropriate to do scoping again here given the passage of time since the Board issued its Tongue River I decision, the fact that no part of the Tongue River Railroad has been built, the changes to

the railroad's original proposal discussed above, and the fact that different individuals, tribes, and agencies might be interested in this project now than those who participated in the 1980s.¹⁷

Finally, a new EIS will encourage and facilitate public participation throughout the environmental review on remand because interested parties will have all the relevant information in one place and will not need to review multiple EISs prepared over the course of 30 years that include extensive analysis on lines the railroad no longer intends to build.¹⁸ This approach will further one of the key purposes of NEPA, which is to ensure that relevant information regarding a proposed federal action is available to the public. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

This case presents a unique set of facts that we have not seen in other rail construction licensing proceedings. Given the passage of time, the failure to begin any construction of the Tongue River Railroad, the types of issues that were remanded (such as baseline data), the other changes that have taken place (such as the Otter Creek leases), TRRC's decision not to move forward with the Western Alignment or the Four Mile Creek Alternative, and its decision to build a different project than what was originally proposed in Tongue River I, a new EIS is appropriate.

3. Denial of NPRC's 2011 Reconsideration Petition and 2012 Reopening Petition.

The Board will dismiss as moot NPRC's pending petition for reconsideration of the June 2011 Reopening Denial. As previously noted, NPRC asked the Board in 2010 to reopen all three Tongue River proceedings to prepare an SEIS for the entire rail line. NPRC's reconsideration petition asks the Board to reconsider its 2011 Reopening Denial decision. Because Tongue River II and Tongue River III are being dismissed, there is no need for the Board to consider further NPRC's requests for additional environmental review in those proceedings. Moreover, the new (not merely supplemental) environmental review that will take place relating to the currently proposed Tongue River I rail line will address, as appropriate, the issues on which NPRC's petitions to reopen and to reconsider were based. NPRC also will be free to raise the concerns addressed in its petitions during the scoping process on the new EIS and in comments to the Draft EIS. See 49 C.F.R. § 1105.10(a). The Board is also dismissing NPRC's 2012 petition to reopen. This decision fully addresses the issues raised in that petition.

¹⁷ TRRC has suggested that, although not required, the Board could initiate scoping with an SEIS as well. However, the scope of an SEIS is, by definition, narrower, and could limit the range of concerns and comments that would be communicated to the Board and that the Board would consider in its subsequent environmental review.

¹⁸ The tribes engaged in ongoing tribal consultation regarding this project have complained about the difficulty of having to consult numerous EISs to understand TRRC's proposal.

4. Timetable for Reopened Proceeding.

As noted above, NPRC proposed a schedule for handling the reopened proceeding, which mixes together a schedule for the merits and environmental phases of the proceeding. The Board will not adopt NPRC's proposed schedule. For the merits side of the proceeding, the regulations at 49 C.F.R. § 1150.10 (providing time frames for the filing of comments on applications for authority to construct and operate rail lines and replies to such comments) will apply to the revised application that TRRC will file under 49 U.S.C. § 10901. The Board does not normally set a schedule for the environmental review process in rail construction cases and will not do so in this decision. Prior to scoping, the Board cannot predict accurately how long the agency's environmental review will take. The Board intends to expedite this case to the extent possible.

5. Requests for Confidential Agreement and New Service List.

It is premature to consider the request of UTU-GCA and Native Action asking the Board to order TRRC to make publicly available the confidential agreement between BNSF, Arch Coal, and TRR Financing LLC. In its revised application, TRRC will need to submit detailed information about the applicant, as required by 49 C.F.R. § 1150.3, that may satisfy UTU-GCA and Native Action's concerns. If not, UTU-GCA and Native Action may renew their request at that time.

However, the Board agrees with the parties that a new service list should be prepared for the proceedings on reopening of the Tongue River I proceeding. See 49 C.F.R. § 1104.12. The Board will thus require that any persons or entities who are interested in participating in the reopened Tongue River I proceeding file a notice of intent within 30 days from date of service of this decision, indicating whether they wish to remain listed either as a party of record or as a non-party on the service list.

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

It is ordered:

1. Docket Nos. FD 30186 (Sub-No. 2) and FD 30186 (Sub-No. 3) are dismissed.
2. Docket No. FD 30186 is reopened for the purpose of requiring the railroad to file a revised application for the currently proposed rail line and preparing a new environmental review.
3. Any persons or entities who are interested in participating in the reopened Tongue River I proceeding shall file a notice of intent by July 18, 2012 indicating whether they wish to remain listed either as a party of record or as a non-party on the service list. A party of record will be served all filings in this proceeding; a non-party of record will only receive copies of Board decisions.
4. NPRC's July 2011 petition for reconsideration is denied as moot.

5. NPRC's April 2012 petition to reopen the three Tongue River proceedings is denied.
6. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.
Chairman Elliott did not participate.