

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 30186

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**TONGUE RIVER RAILROAD COMPANY, INC. – RAIL CONSTRUCTION
AND OPERATION – IN CUSTER, POWDER RIVER
AND ROSEBUD COUNTIES, MT**

**PETITION OF TONGUE RIVER RAILROAD COMPANY, INC. TO HOLD
PROCEEDING IN ABEYANCE**

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Applicant Tongue River Railroad Company, Inc. (“TRRC”) hereby petitions the Board to hold this proceeding in abeyance pending a final decision from the Montana Department of Environmental Quality (“MDEQ”) on the Otter Creek Mine permit application, and judicial affirmance of any decision granting that permit.

As the Board is aware, TRRC’s December 17, 2012 supplemental application seeks authorization to construct an approximately 42-mile common carrier rail line in southeast Montana. The rail line would connect BNSF Railway Company’s (“BNSF”) Colstrip Subdivision with two terminus points, each located near significant, currently-undeveloped coal deposits south of Ashland, Montana. The line would serve, as its initial customer, a large coal mine to be developed by Otter Creek Coal, LLC (“Otter Creek Coal”), a subsidiary of Arch Coal, Inc. (“Arch”).¹ By the same December 17 application, BNSF seeks authorization to operate the TRRC line.

¹ Arch, together with BNSF and TRR Financing, LLC, owns Tongue River Holding Company, LLC, the parent of TRRC.

On July 26, 2012, Otter Creek Coal filed an application with MDEQ for a permit that would allow it to develop the Otter Creek mine under Montana's Surface and Underground Mine Reclamation Act. This permit application remains pending.² Under the Montana Environmental Policy Act, MDEQ is required to prepare an environmental impact statement before a mine permit can be issued.³ While the environmental impact statement scoping process has been completed, a draft environmental impact statement has not yet been issued by MDEQ. TRRC understands that once the draft environmental impact statement is issued, the public will be provided an opportunity to comment. The MDEQ will then review and respond to the comments and issue a final environmental impact statement. Following the issuance of a final environmental impact statement, MDEQ will decide whether or not to grant the mine permit application.⁴ That entire process is likely to consume at least many more months, likely pushing a decision granting or denying the permit off until the latter half of 2016, at the earliest. Further, any judicial review of the Otter Creek mine permit would push the timeline for any final determination of whether and when the mine might be developed out further, perhaps for another year or more after the permit is granted.

² On October 15, 2012, the MDEQ issued a letter to Otter Creek Coal identifying certain deficiencies in the application. Otter Creek Coal responded to that deficiency letter with the requested information on November 19, 2012. On March 19, 2015, the MDEQ issued still another letter to Otter Creek Coal identifying additional deficiencies in the application in the opinion of MDEQ. Otter Creek Coal is currently working on a response to that letter. Otter Creek Coal has also applied to MDEQ for a Montana Pollutant Discharge Elimination System permit and for an Air Quality permit. These applications also remain pending as part of the overall mine permit package.

³ The Montana Department of Natural Resources and Conservation ("MDNR") is working with MDEQ on the preparation of the environmental impact statement given MDNR's role in connection with the leasing and management of state land on which the Otter Creek mine would be located.

⁴ Assuming that the MDEQ grants the mine permit application, under the terms of the lease of the coal tracts to Otter Creek Coal, the Montana Land Board would then need to approve Otter Creek Coal's reclamation plan before the mine could be developed.

Unless and until Otter Creek Coal obtains a final, judicially-affirmed permit from the State of Montana allowing it to develop a mine, and that mine is then developed, any TRRC rail line will have no coal to transport and therefore no reason to be constructed.⁵ At the time that TRRC filed its application in this proceeding on October 16, 2012, followed by the December 17, 2012 supplemental application now under review, TRRC sought to minimize the time between when it believed the mine would be ready to begin production and when the rail line would be operational on the basis that doing so would be optimal for TRRC, coal shippers, and the public. TRRC also filed its application with the Board in light of a more compressed project development timeline that was based on the proposition that concurrent rail and mine permitting were needed at the time.

However, given the delays related to the mine permitting process and near-term market weakness, TRRC and Otter Creek Coal have recently revisited the timelines for the permitting and development of their respective projects. Based on that review, they have determined that there is now sufficient time to accommodate sequential as opposed to concurrent permitting of the mine and rail projects. The availability of that additional time gives rise to the opportunity to delay the rail construction permitting until there is more clarity related to the timing of the mine permitting process. The advantage of doing so is to avoid any further expenditure, and potential waste, of resources by TRRC and the Board in the event that mine permitting is further delayed or that MDEQ decides to deny the mine permit. While Otter Creek Coal believes that it will ultimately be successful in obtaining that permit, there is some level of risk inherent in any permitting proceeding of this nature and in any judicial review proceeding that will follow

⁵ The TRRC line could potentially serve other yet to be developed mines in the Ashland area but no such mines have initiated the permitting process.

issuance of the mine permit.⁶ The more prolonged timelines now in place for the mine and rail projects allow for any uncertainty with respect to that mine permitting decision to be removed from the TRRC proceeding at the Board. In short, holding this proceeding in abeyance pending a better understanding of the timing related to receipt of a final, judicially-affirmed mine permit decision will remove any doubt as to whether there will be a permitted mine to serve once the rail proceeding is resumed, and avoid any risk that the Board (as well as TRRC) will have expended further resources on environmental review and assessment of the merits in this proceeding only to find that there is no mine for the TRRC line to serve.⁷

TRRC of course appreciates that the Board's Office of Environmental Analysis ("OEA"), and its third party contractor, have already devoted significant resources to this proceeding and produced a very detailed Draft Environmental Impact Statement that was issued on April 17, 2015 and on which public comments were submitted prior to the September 23, 2015 deadline. While TRRC understands that a Final EIS is in process, albeit probably several months from being completed, placing this proceeding on hold now will not vitiate the extensive environmental fact-gathering and impact-assessment work that has already been done and should not impair the ability of the Board's environmental staff to complete the environmental process once a final, judicially-affirmed mine permit has been issued. Nor will a hold at this time hinder the ability of the parties, once the outcome of the mine permit proceeding is known, to proceed to complete the merits work in this proceeding. In that regard, discovery remains to be

⁶ The Otter Creek Coal permitting proceeding, like this rail proceeding, faces significant opposition from some local persons and groups, as well as from some national environmental groups.

⁷ TRRC therefore requests that this proceeding be held in abeyance in its entirety, including both the environmental review process and the merits elements of the proceeding. TRRC has thus concurrently advised the Board's Office of Environmental Analysis of its request that further work on the environmental review process be suspended pending a Board determination on this Petition and pending any period of abeyance that may be granted as requested here.

completed, and supplemental post-discovery filings on the merits remain to be prepared and submitted by certain parties and TRRC.⁸ Upon completion of the discovery and subsequent supplemental filings, the Board should be in a position to complete its review of the entire record on the merits that has been developed and, following completion of the environmental review process, issue a final decision on TRRC's application.

The Board routinely holds proceedings in abeyance pending the outcome of other proceedings or transactions in situations in which the time and resources of the Board and the parties might be wasted because the outcome of those other proceedings or transactions could render the Board proceeding moot. For example in *James Riffin—Acquisition and Operation—Veneer Spur—In Baltimore County, MD*, Finance Docket No. 35246, slip op. at 1 (STB served May 29, 2009), the Board explained that the disposition of an application to acquire and operate a rail line could be dependent on the outcome of a petition for a declaratory order filed in another docket. The Board therefore agreed to hold the application in abeyance explaining that “[p]roceeding with both the application and the petition simultaneously could be wasteful and duplicative.” *Id.* Similarly in, *Kansas City Southern Ry. - Construction and Operation Exemption—Geismar Industrial Area Near Gonzales and Sorrento, LA*, Finance Docket No. 32530, slip op. at 1-2 (STB served Aug. 27, 1998), the Board held a proceeding involving a petition for a construction exemption in abeyance, explaining that if a pending merger were completed, the railroad seeking a construction exemption would be able to provide the same

⁸ By decision served August 19, 2015, the Board granted the petition of Northern Plains Resource Council and Rocker Six Cattle Company seeking supplementation of TRRC's document production in this proceeding. Following the grant of an earlier request to extend its time to produce document, on November 12, 2015 TRRC sought an additional extension until December 7, 2015 to complete production. The Board granted that request on November 20, 2015. By separate petition being filed concurrently with this submission, TRRC is asking the Board to delay its deadline for producing documents until 45 days after the Board issues an order terminating the abeyance period and that the subsequent deadlines for submission of supplemental merits filings be extended commensurately.

service for which it sought a construction exemption with existing track, and that the rail construction would therefore be unnecessary. *See also PSI Energy, Inc. v. CSX Transp., Inc. and Soo Line R.R. Co.*, Docket No. 42034, slip op. at 3 (STB served Sept. 11, 1998) (“The resources of the Board and the carriers would be wasted if we were to proceed with a complaint predicated on the shipment of 2.6-2.7 million tons per year and the court were later to uphold the carriers’ interpretation of the contract.”); *Ohio Dept. of Transp.—Petition for Declaratory Order—Status of Track at Findlay, Hancock County, OH*, slip op. at 1 (STB served Feb. 17, 2004) (holding that “[t]he declaratory order proceeding in STB Finance Docket No. 34376 is held in abeyance pending the disposition of the City’s petition to reopen STB Docket No. AB-33 (Sub-No. 132X).”); *Kansas City Southern—Control—The Kansas City Southern Ry., Gateway Eastern Ry., and The Texas Mexican Ry.*, slip op. at 3 (STB served Oct. 8, 2003) (holding that “[t]he procedural schedule adopted in Decision No.2 is suspended, pending a resolution of the uncertainties that now surround KCS’s efforts to acquire control of Tex Mex.”); *Arizona Public Service Co. & PacifiCorp v. The Burlington N. and Santa Fe Ry. Co.*, Docket No. 42091 at 1 (STB served Jan. 14, 2005) (holding proceeding in abeyance pending judicial challenge of another Board decision because if the complainant prevailed in the judicial challenge, it might seek to have its complaint currently before the Board withdrawn).

CONCLUSION

Consistent with the precedent cited above, and for the reasons stated, the Board should hold the instant proceeding in abeyance, pending a determination on the outcome of Otter Creek Coal’s mine permit application and any subsequent judicial review proceedings, to avoid a potential waste of time and resources. Should the Board grant this Petition, TRRC stands ready

to submit periodic reports to the Board on the status of the MDEQ proceeding and any judicial review of that proceeding that may be sought during the period of abeyance.

For the above reasons, the Board should grant TRRC's Petition.

Respectfully submitted,



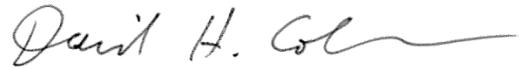
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Tongue River Railroad Company, Inc.

November 25, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of November 2015, I have caused a copy of the foregoing Petition of Tongue River Railroad Company, Inc. to be served by first-class mail, postage prepaid, on each of the parties of record in STB Finance Docket No. 30186. In addition, Northern Plains Resource Council and Wally McRae/Clint McRae d.b.a. Rocker Six Cattle Company was also concurrently served by electronic mail and Jay L. Schollmeyer, on behalf of SMART-Transportation Division, General Committee of Adjustment-G0386, was also concurrently served by hand.



David H. Coburn