

FINANCE DOCKET NO. 30186 (SUB-NO. 2)

TONGUE RIVER RAILROAD CO.--RAIL CONSTRUCTION
AND OPERATION--ASHLAND TO DECKER, MONTANA

Decided November 25, 1997

The Board grants The Burlington Northern and Santa Fe Railway Company petition to intervene, but denies Tongue River Railroad Company to reopen this proceeding.

BY THE BOARD:¹

By petition filed July 15, 1997, the Tongue River Railroad Company (TRRC) seeks to reopen our decision, *Tongue River RR Co.--Const. & Oper--Ashland-Decker, MT*, 1 S.T.B. 809 (1996), (*the November 8, 1996 decision*) in this proceeding. That decision granted TRRC authority to construct and operate a line of railroad between Ashland and Decker, MT, subject to conditions. We denied TRRC's request to construct the line over the route preferred by the applicant because of the adverse environmental impacts of that routing, which could not be effectively mitigated. Rather, we approved the construction over an alternative routing proposed (but less favored) by TRRC in an effort to mitigate adverse environmental impacts of the construction and operation of the line while allowing TRRC to achieve most of the efficiencies it sought. The route we authorized is called the "Four Mile Creek Alternative." Petitions for review of *the November 8, 1996 decision* were filed in the Ninth Circuit in *Northern Plains Resource Council, Inc. et al. v. STB*, No. 97-70037 (filed January 7, 1997) (NPRC).

¹ The *ICC Termination Act of 1995*, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions to the Surface Transportation Board (Board). This decision relates to functions that are subject to Board jurisdiction under 49 U.S.C. 10901.

TRRC did not file a petition for review, but instead sought reopening.² On reopening, TRRC seeks our approval to realign the rail route authorized in the *November 8, 1996 decision*. The Burlington Northern and Santa Fe Railway Company (BNSF) filed a petition to intervene in support of TRRC's petition to reopen. Statements in support of TRRC's petition were also filed by United States Senator Conrad Burns of Montana, Montana Governor Marc Racicot, and Louis P. Matis, General Manager Combustion and Hydro Plants for Northern States Power Company. Replies opposing TRRC's petition were filed by Northern Plains Resource Council, Inc. (NPRC), Native Action, Northern Cheyenne Tribe, and United Transportation Union (UTU).³

We will grant BNSF's petition to intervene, but will deny TRRC's petition to reopen.⁴

PERTINENT BACKGROUND⁵

In 1986, the ICC granted TRRC authority to construct and operate an 89-mile rail line from a connection with BNSF at Miles City, MT, to Ashland, MT.⁶ TRRC notified the ICC in January 1989 that it planned to file a second

² The court has stayed its briefing schedule in *NPRC* because of TRRC's pending petition for reopening.

³ UTU's primary interests here concern: (1) the details of a potential TRRC/BNSF trackage rights agreement, and (2) the potential harm to BNSF employees resulting therefrom. Because these matters are not relevant to this petition to reopen and are premature, as the parties have not yet concluded any agreement, UTU's arguments will not be discussed further.

⁴ Several motions have been filed concerning procedural matters relating to the petition to reopen. In the interest of compiling a full and complete record in this matter, we will grant all of the motions, which include TRRC's request for a waiver of page limitation, the petition of TRRC for leave to file a reply to a reply, the petition of BNSF for leave to file a reply to a reply, and UTU's reply to petitions for leave to file replies.

⁵ Our decision sets out the facts of this proceeding only to the extent necessary to dispose of TRRC's petition to reopen. A complete description of the application, the history of this proceeding, and the basis for our ruling on the application are contained in the *November 8, 1996 decision*.

⁶ *Tongue River R.R. -- Rail Construction and Operation -- In Custer, Powder River and Rosebud Counties, MT*, Finance Docket No. 30186 (ICC served September 4, 1985) (the lead docket). In our *November 8, 1996 decision* we imposed a condition requiring that TRRC complete construction of the entire line between Decker and Miles City (*i.e.*, the line authorized in 1989 and the Four Mile Creek Alternative) within 3 years of the service date of that decision and comply with periodic reporting requirements during that period of time to keep the Board apprised of the progress that is being made.

construction application to build and operate a 41-mile line between Ashland and Decker, MT. This line would connect with the Miles City-Ashland line at Ashland that TRRC was previously authorized to construct but has not yet built. At Decker, the southern end, the line would serve nearby coal mines and would also connect with BNSF. TRRC stated that, by connecting with BNSF on both the southern and northern ends of the line, it could offer a shortcut for BNSF's Powder River Basin coal moving from the Gillette, WY area to Midwest destinations. This shortcut would reduce BNSF's coal train mileage by 130 to 160 miles to Midwest destinations, depending on traffic origins.

TRRC filed an application in this proceeding to build the Ashland to Decker line on June 28, 1991. During the environmental review process, it became clear that the principal environmental disadvantage of TRRC's preferred route for the Ashland to Decker line is that it would operate through the environmentally sensitive Tongue River Canyon, and require the construction of a tunnel plus four bridges over the Tongue River. In its Environmental Report filed with its application, TRRC proposed the Four Mile Creek route as the only acceptable alternative to the railroad's preferred routing.⁷ The Four Mile Creek Alternative avoids the controversial 10-mile segment of the Tongue River just north of the Tongue River Dam. This line, however, has steeper grades and is about 10 miles longer than the railroad's preferred route. TRRC never suggested that there were any other feasible construction options during the lengthy administrative proceeding. Nor did it contend that the Four Mile Creek Alternative could not be safely operated. Throughout the administrative proceeding TRRC's position had been that operations could be performed on the Four Mile Creek Alternative, albeit not in line with its preferred design and operations parameters, and with a considerable increase in construction and operation costs.

Our *November 8, 1996 decision* granted TRRC's application to build the Four Mile Creek Alternative (subject to a number of environmental conditions, reporting requirements, and a construction deadline for the entire line), but denied TRRC's application to construct the railroad's preferred route.⁸

⁷ TRRC also made some adjustments to its preferred routing during the environmental review process.

⁸ The Board's Section of Environmental Analysis (SEA) served a Draft Environmental Impact Statement (DEIS) on July 17, 1992. As relevant here, SEA analyzed TRRC's two alternate routings (the railroad's preferred route and the Four Mile Creek Alternative) plus a no-build option. SEA tentatively concluded that the Four Mile Creek Alternative was the environmentally preferable
(continued...)

In its petition to reopen, TRRC now proposes that the Board consider a new route, the "Western Alignment," that roughly parallels TRRC's preferred route, but which lies slightly to the west of that route and the Tongue River. TRRC asserts that the Western Alignment would mitigate the potential environmental consequences of TRRC's preferred route and would eliminate the potential economic and operational problems which TRRC now claims make the Four Mile Creek Alternative not a viable choice.

PRELIMINARY MATTERS

BNSF requests leave to intervene based on its engineering expertise and future interest in operations over the line. That railroad claims that its intervention will "in no sense delay or complicate this proceeding." BNSF states that TRRC's petition to reopen is based on a narrow issue: reconsideration of a portion of the route over which TRRC would construct and operate its rail line. BNSF states that it has a "significant interest in any Board decision regarding the route selection," which includes operations for northbound overhead traffic, as well as providing local service to mines developed on TRRC's line. BNSF agrees with TRRC that: (1) a route other than the Four Mile Creek Alternative must be found because of operating and engineering problems, and (2) the proposed Western Alignment is "clearly superior" and should be approved by the Board.

BNSF has demonstrated an interest in this proceeding and that its intervention will not unduly delay it or broaden the issues. Thus, we will grant BNSF's petition to intervene and consider its filings in this matter. We will also grant the other procedural motions that have been filed by TRRC, UTU, and BNSF.

⁸(...continued)

option. On March 17, 1994, SEA issued a Supplemental Draft Environmental Impact Statement (SDEIS), changing its position and tentatively concluding that TRRC's preferred alignment was preferable to the Four Mile Creek Alternative. SEA received written comments on the SDEIS from numerous parties. On April 11, 1996, SEA issued its Final Environmental Impact Statement (FEIS), which again analyzed the two construction alternatives before it and the no-build alternative. SEA was persuaded that the Four Mile Creek Alternative was the environmentally preferable construction choice and that, despite the difficult grades that would be required for that route, loaded train operations could be safely performed.

DISCUSSION AND CONCLUSIONS

The Board may, on its own initiative, or on a party's petition, reopen a proceeding because of material error, new evidence, or substantially changed circumstances. *See*, 49 CFR 1115.4. TRRC states that its petition to reopen meets all of the legal requirements for new evidence and changed circumstances. Because TRRC does not allege material error, we need not and will not address that criterion. Our consideration of the remaining two criteria for reopening leads us to conclude that TRRC's request to reopen should be denied.

Changed circumstances. TRRC states that it never advanced the Western Alignment prior to the filing of the petition to reopen because TRRC's mitigation plan, biological assessment, and alteration to the preferred alignment that was initially proposed during the environmental review process appeared to meet agency concerns, as evidenced by the SDEIS. TRRC also states that there was no reason to propose other alignments because, in the SDEIS, SEA had deemed TRRC's preferred route to be the environmentally preferable construction choice.

TRRC states that it has consistently maintained that the Four Mile Creek Alternative has significant operational and economic problems. TRRC adds that, only after the Board's *November 1996 decision*, did it commission Mission Engineering, a railroad design firm, and BNSF's engineering and design departments to review the Four Mile Creek Alternative.⁹ According to TRRC, this 1997 review verified that the Four Mile Creek Alternative was not feasible from a design and operational standpoint. As a result, TRRC and its consultants developed the Western Alignment.

TRRC's recent analysis of the Four Mile Creek Alternative and its proposed new Western Alignment come much too late in this proceeding. The Four Mile Creek Alternative had its genesis years before the SDEIS was served in March 1994, and the Board's decision was served in November 1996. Indeed, TRRC

⁹ Specifically, BNSF asserts that, at the time of the Board's decision in November 1996, it had not conducted the operating and engineering analyses that support the petition for reopening. BNSF adds that " * * * in the spring of 1997, BNSF had its first opportunity to examine and formulate in detail the preferred engineering layout for the TRRC line and to model the design characteristics of the two routes to determine their respective operational efficiency and feasibility." As with the other so-called "new" evidence sought to be considered here, BNSF fails to adequately explain why it could not, and should not, have performed these analyses much earlier (*i.e.*, at the very latest after SEA, in the FEIS, determined that the Four Mile Creek Alternative was the environmentally preferable construction option and that the route could be safely operated).

itself had proposed the Four Mile Creek Alternative in the Environmental Report accompanying its 1991 application as the only viable alternative to its preferred route. The ICC (and then the Board) processed TRRC's application based on the carrier's assurances that Four Mile Creek was a feasible alternative. Indeed, TRRC assured SEA that it had searched for feasible construction alternatives and that that route was the only viable alternative to the railroad's preferred route. In a letter dated June 7, 1994¹⁰ (subsequent to the SDEIS), TRRC stated that:

The TRRC undertook an exhaustive review of possible routings for the railroad before submitting its application for the preferred alignment. TRRC's engineering consultants reviewed a number of rail line alternatives in the upland areas south of Ashland. These were noted briefly in the SDEIS (pages 8-19). None of these alternatives proved feasible because of the dissected nature of the rugged terrain and high terrain bordering the Tongue River Valley. The DEIS and the SDEIS correctly considered the only possible alignments for this railroad - the preferred alignment and the Four Mile Creek Alternative.

Moreover, by the time the DEIS was served in July 1992, SEA had been closely examining the application for about 3 years and had concluded that the Four Mile Creek Alternative was the only viable construction option to the railroad's preferred route. By then, other governmental agencies and interests had been brought into the process to review and comment on the environmental aspects of this proposed construction project. These entities included 12 federal government agencies, 9 Montana state agencies, 3 Wyoming state agencies, 4 Montana county agencies, and Native American interests.¹¹ These entities, along with SEA, expended considerable time and effort reviewing and analyzing the two alternative construction options and reaching conclusions regarding their comparative merits. Throughout the environmental review process, correspondence from these agencies to SEA discussing the environmental concerns associated with both TRRC's preferred route and the Four Mile Creek Alternative was made available to TRRC.

TRRC's petition to reopen asks us to believe that serious consideration of the Four Mile Creek Alternative did not need to begin until the application had been decided. TRRC claims that, because SEA in the SDEIS modified its initial conclusion in the DEIS that TRRC's preferred alignment was the more

¹⁰ Letter to Elaine Kaiser, Chief.

¹¹ See DEIS, E-1, 2.

environmentally preferable routing, TRRC was entitled to believe that no issues remained that could result in the approval of the Four Mile Creek Alternative.

TRRC's argument is meritless. As TRRC was aware,¹² the SDEIS did not end the process, but merely constituted a step toward the FEIS and the final decision. In short, TRRC knew that the environmental process would not be completed until the FEIS was served, and that the Board could either accept or reject SEA's final environmental recommendations or deny TRRC's application altogether.

TRRC has failed to show any "changed circumstances" that would require consideration of the Western Alignment at this point, such as a recent change in the topography or terrain of the area or the removal of some past obstacle that prevented it from introducing the Western Alignment earlier. Also, as noted, SEA repeatedly discussed the issue of alternative routes with TRRC and provided TRRC with the opportunity to develop additional alternative routes throughout the environmental review process. SEA staff met with TRRC's engineers and representatives and requested documentation of other possible alternative routes. TRRC submitted written evidence of other routes that it had considered and rejected as not viable, *i.e.*, Prairie Dog Creek, Canyon Creek, and Hanging Woman Creek, none of which resemble the Western Alignment. Indeed, TRRC continued to maintain throughout this lengthy process that its proposed route and the Four Mile Creek Alternative were the only possible alignments for this construction project.

In short, contrary to TRRC's position, the issuance of a Board decision on a matter is not a "changed circumstance" warranting reopening but, rather, merely the final step in the administrative process. For all of these reasons, we conclude that petitioner has not shown changed circumstances warranting a reopening of this proceeding at this late date.

New evidence. TRRC's petition to reopen contains recent analyses by BNSF and Mission Engineering allegedly showing that the Four Mile Creek Alternative has unacceptable economic, safety, and operational problems. This "new evidence" concludes that the Four Mile Creek Alternative is not economically feasible due to its long, steep grades, longer running times, increased maintenance expense, and greater fuel consumption requirements.

¹² TRRC knew the process from the outset, having completed a similar process in the lead docket proceeding. Moreover, the SDEIS specifically requested comments from all interested parties and made it clear that an FEIS would be issued containing SEA's final recommendations, based on SEA's review and further investigation of the comments received.

This evidence alleges that the steep grades on the Four Mile Creek Alternative present substantial operating problems for coal trains and that, because the Four Mile Creek Alternative is 11.6 miles longer than the proposed Western Alignment, construction of that route would mean higher construction and maintenance costs as well as greater land disturbances. Finally, according to TRRC, this evidence also demonstrates that the Western Alignment is superior to Four Mile Creek from both operational and environmental standpoints.

The evidence that TRRC now seeks to introduce regarding the Four Mile Creek Alternative is not new. Either the concerns it addresses have already been extensively considered and disposed of by SEA and the Board or the evidence, relating to a construction project first proposed 5 years before SEA issued its FEIS, could have and should have been developed and presented earlier. This also leads us to reject as "new" the evidence contained in the Mission Engineering and BNSF studies regarding the proposed Western Alignment. This evidence, although newly introduced, is not new because it also could have been presented earlier, but was not. As discussed previously, throughout the environmental review process, SEA continuously encouraged TRRC to look for and present new alternative routes. The topography and terrain have remained unchanged. There is no reason why TRRC could not have earlier identified and presented the Western Alignment. The applicant did not do so and cannot now rectify that error by asking us to consider what is in effect an entirely new application on reopening.

In summary, TRRC has not shown either changed circumstances or newly discovered evidence warranting reopening of the *November 8, 1996 decision*. TRRC is attempting to use this petition to reopen as a vehicle to propose an entirely new route. That is an abuse of this agency's process and would be prejudicial to the interests of the numerous parties and agencies who participated in this lengthy proceeding on the basis that the entirety of TRRC's proposal was placed before them.

For these reasons, we will deny TRRC's petition to reopen our *November 8, 1996 decision* authorizing construction of the Four Mile Creek Alternative within 3 years. This is without prejudice to TRRC's filing a new application for authority to construct the Western Alignment that the railroad now seeks. The filing of such an application would not automatically relieve TRRC of its obligation to build the 89-mile line from Miles City to Ashland within 3 years of the service date of our *November 8, 1996 decision*.

Furthermore, because of the pending court litigation involving *the November 8, 1996 decision*, TRRC should promptly advise us of its intentions.

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

It is ordered:

1. The following motions are granted: TRRC's request for a waiver of page limitation; petition of TRRC for leave to reply to NPRC and UTU replies; petition of BNSF for leave to reply to NPRC and UTU replies; and UTU reply to petitions for leave to file replies to replies.
2. BNSF's petition for leave to intervene is granted.
3. TRRC's petition to reopen is denied
4. This decision is effective on December 1, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.