

FINANCE DOCKET NO. 30186 (SUB-NO. 2)<sup>1</sup>TONGUE RIVER RAILROAD CO.  
— RAIL CONSTRUCTION AND OPERATION —  
ASHLAND TO DECKER, MONTANA

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*Decided March 19, 1999*

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The Board removes the condition previously imposed that the rail line construction be completed within 3 years.

## BY THE BOARD:

In *Tongue River RR Co. — Const. & Oper. — Ashland-Decker, MT*, 1 S.T.B. 809 (1996) (*Tongue River II*), the Board authorized the Tongue River Railroad Company (TRRC or the Railroad) to construct and operate a 41-mile rail line between Ashland and Decker, MT.<sup>2</sup> The line would connect with an 89-mile line between Miles City, MT, and Ashland that the Railroad was previously authorized to construct and operate, but has not yet built.<sup>3</sup> As a condition to the authorization granted in *Tongue River II*, the Board required that TRRC complete construction of the entire line between Decker and Miles City within 3 years of the service date of that decision, *i.e.*, by November 8, 1999.

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<sup>1</sup> This decision embraces Finance Docket No. 30186, *Tongue River R.R. — Rail Construction and Operation — In Custer, Powder River and Rosebud Counties, Montana*.

<sup>2</sup> On June 23, 1998, the Board published notice of an application (STB Finance Docket No. 30186 (Sub-No. 3)) filed by TRRC seeking authority to construct and operate 17.3 miles of track, called the "Western Alignment," to be built between Decker, MT, and a point 17.3 miles north of Decker. The Western Alignment is proposed as an alternative routing for the portion of the 41-mile Ashland to Decker rail line that was approved in *Tongue River II* called the "Four Mile Creek Alternative." By decision served February 3, 1999, and published at 64 Fed. Reg. 5339 (1999), the Board issued, in the Sub No. 3 proceeding, a final scope of the Supplement to the Final Environmental Impact Statement developed in *Tongue River II*. The Supplement is now being prepared.

<sup>3</sup> That construction was authorized in *Tongue River R.R. — Rail Construction and Operation — In Custer, Powder River and Rosebud Counties, Montana*, Finance Docket No. 30186 (ICC served September 4, 1985). See also, *Tongue River Railroad Company — Issuance of Securities*, Finance Docket No. 30186 (Sub-No. 1).

#### BACKGROUND

By petition filed October 22, 1998, TRRC seeks removal of the 3-year condition. The Burlington Northern and Santa Fe Railway Company (BNSF) filed a pleading in support. The Northern Plains Resource Council (NPRC or Northern Plains), the Northern Cheyenne Tribe (Tribe) and Native Action, Inc. (Native Action), jointly, and the United Transportation Union-General Committee of Adjustment (UTU-GCA) and United Transportation Union-Montana State Legislative Board (UTU-MT), also jointly, filed replies in opposition.

#### PRELIMINARY MATTER

On December 22, 1998, TRRC filed a motion requesting leave to file a reply, accompanied by the reply. Northern Plains responded. Then, on February 23, 1999, TRRC filed a petition to expedite disposition of its request for removal of the 3-year condition. In support of that petition, TRRC provides evidence that opponents of the TRRC project, including the Rocker Six Cattle Company, are using the November 8, 1999, 3-year condition deadline as a reason for urging state officials to withhold or delay issuing permits for which TRRC has applied that must be obtained before physical construction of the railroad can begin. UTU-GCA and UTU-MT jointly filed a reply in opposition. Northern Plains also replied in opposition. It claims that landowners have every right to ask state agencies to factor in the 3-year deadline into their decision-making process, and argues that any delays in the process are due to TRRC's failure to act promptly in the past. The Rocker Six Cattle Company (Rocker Six), a party which did not originally oppose TRRC's petition to remove the 3-year deadline, also replied in opposition to the petition to expedite. Rocker Six argues that it is TRRC's own actions, and not those of Rocker Six, which resulted in the railroad's inability to meet the deadline. It requests that the 3-year deadline be retained.

In the interest of compiling a complete record, we will accept all the parties' filings into the record. However, we admonish the parties to stop filing pleadings that are not permitted by our rules.

We will now address the parties' arguments and, for the reasons discussed below, will grant TRRC's petition to remove the 3-year condition.

## THE PARTIES' ARGUMENTS

TRRC states that, although it is moving forward expeditiously with implementation of the construction project and has made considerable progress, it will be unable to complete construction of the entire line within the 3-year time period. TRRC acknowledges that it had indicated in earlier pleadings that construction could be completed within 3 years. But the Railroad claims that this meant completion within 3 years from the date actual physical construction begins, not 3 years from the date of the Board's decision. Indeed, in light of requirements imposed by agency decisions that TRRC obtain various permits and approvals and satisfy extensive pre-mitigation requirements, as well as TRRC's need to develop final engineering and design work and complete project financing, TRRC claims that it was never realistically possible to satisfy the condition. TRRC argues that the Board itself recognized that a 3-year deadline might prove to be unrealistic by requiring TRRC to address, in the periodic reports mandated by the Board, "whether or not [TRRC] expects to meet the 3-year time limit."

To illustrate its diligence in moving forward with the project, TRRC specifies the various actions it has taken. TRRC notes that it has already spent over \$11 million on pre-construction activities and has contracted for an additional \$4.2 million for engineering and survey work to be completed in the next few months. TRRC explains that it is in its own economic best interests to complete the project quickly, especially as it has already invested significant sums which will not generate any returns until coal actually begins to move. For this reason alone, TRRC maintains, no deadline is necessary to ensure that the project progresses with appropriate expedition. Any such deadline actually acts to slow down the project, TRRC claims, because it encourages opponents to engage in delaying tactics. To support that argument TRRC supplied with its petition to expedite a January 14, 1999, letter from counsel for the Rocker Six Cattle Company to the Montana Department of Natural Resources (DNRC) invoking the 3-year deadline as a basis for postponing the issuance of permits TRRC has sought from that agency to establish a right-of-way across state land and the Tongue River.

Another matter which has slowed down the construction, TRRC states, is the pendency of its Western Alignment application. According to TRRC, the necessity for that application was not anticipated at the time the 3-year condition was imposed. TRRC asserts that this "changed circumstance" alone justifies elimination of the condition.

Finally, TRRC argues that the condition is not needed to protect landowners from unduly prolonged uncertainty as to the possible use of their land for railroad purposes. TRRC states that all landowners have been contacted (other than those along the southern 17 miles, where TRRC is seeking approval of an alternative routing), and that contractual agreements have already been reached with many landowners while negotiations continue with others.

BNSF argues that the 3-year timetable for TRRC's construction is unrealistic unless it is construed to mean 3 years from the time actual physical construction begins. BNSF notes that it is in TRRC's best interest to complete the construction as soon as possible, and that an "artificial" deadline only encourages opponents to pursue delaying tactics.

On the other hand, Northern Plains argues that the 3-year condition was imposed as a reasonable and responsible means to ensure that those parties potentially affected by the railroad — ranchers, rail employees, Native Americans and other landowners — would not be left in perpetual limbo about the project and its effects. The Board, NPRC maintains, acted in the public interest in an attempt to bring a measure of certainty to a project that was initially approved over 10 years ago. NPRC asserts that the Board's decision relied on TRRC's own statements that the project could be completed within 3 years, and, contrary to TRRC's assertions, there was no misunderstanding on this subject. According to NPRC, it was in the public interest to bring some finality to this matter, and the Board unequivocally determined that the entire project must be completed within three years or the authority to do so would lapse.

Northern Plains argues that TRRC has not moved forward toward construction of the line with due diligence. To the contrary, Northern Plains submits, the record reveals that TRRC has failed to move forward with vital aspects of the project for years. As an example, Northern Plains says that TRRC has known since 1983 that it would need permits from the Army Corps of Engineers to begin construction, but has failed to obtain those permits and has allowed the permitting process to lapse. Similarly, Northern Plains maintains, TRRC has failed to obtain necessary easements from the U.S. Department of Agriculture or from various state agencies, and has been anything but diligent in its dealings with local ranchers and other concerned parties. NPRC says that, while local ranchers and farmers strongly oppose this construction project, they cannot be blamed for TRRC's failure to obtain permits from state and federal agencies in a timely manner. These local ranchers and farmers, NPRC claims, have been reasonable in their efforts to respond to TRRC's proposals and to suggest compromises.

Finally, Northern Plains argues that the pendency of the Western Alignment proposal is no excuse for TRRC's failure to go forward with construction on other portions of the line. NPRC says that the "discovery" of a new alignment years after the application and review process was complete is not adequate justification to remove the 3-year condition. To find otherwise, NPRC argues, would be to reward TRRC for its own incompetence and penalize the public for relying on the Board's 1996 decision.

The Tribe and Native Action argue that the record establishes TRRC's own responsibility for failing to complete this project in a timely manner. They claim that the 3-year condition was not ambiguous and was not the result of a misunderstanding of the construction time frame TRRC desired. Rather, they say, it was a straightforward response to TRRC's lethargic behavior and failure to move forward with actual construction of the railroad. To grant TRRC's petition to remove the construction time limit, they assert, would reward it for its own failures to move forward expeditiously. The Tribe and Native Action maintain that TRRC had every opportunity to move ahead and prove that its railroad was something other than a speculative venture, but failed to do so.

The Tribe and Native Action note that TRRC did not immediately object to the imposition of the 3-year deadline, and argue that it should be estopped from doing so at this late date. They claim that the other parties who have relied on the 3-year deadline should not be prejudiced and penalized by TRRC's inaction and subsequent attempt to redesign the railroad by seeking approval of the Western Alignment.

UTU-GCA and UTU-MT argue that TRRC should have come forward sooner if it had problems with the 3-year condition and that TRRC's attempt to modify the condition to a period commencing with the actual start of construction should not be permitted. They claim that TRRC has acted in bad faith and should be required to begin the process anew, and that BNSF should be a co-applicant. This, UTU-GCA and UTU-MT maintain, would permit the Board to examine all relevant issues, including the impact of traffic diversion from BNSF to the new line.<sup>4</sup>

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<sup>4</sup> The primary concern of UTU-GCA and UTU-MT here is the potential harm to BNSF employees resulting from the possible operation of the line by BNSF. Because BNSF and TRRC have not yet concluded any operating agreement, this is not relevant to the petition at issue here and will not be discussed further in this decision. We note, however, that TRRC states in its petition that BNSF has already reached an agreement with the United Transportation Union and the Brotherhood of Locomotive Engineers with respect to possible BNSF operations on the line.

#### DISCUSSION AND CONCLUSIONS

The 3-year condition was imposed to ensure that TRRC would make adequate progress in moving forward with the construction process. We were concerned that a failure to act diligently would cause serious difficulties for various landowners who could be forced to deal indefinitely with the uncertain status of their property and the resultant inability to make plans for its use or disposition. In order to ensure that the process would move along as expeditiously as possible and to alleviate some of the uncertainties these landowners faced, we imposed the 3-year condition.

Although there are many more steps which TRRC must pursue, we are now satisfied that the 3-year condition has served its purpose and that TRRC is moving forward as rapidly as possible. TRRC has already made capital expenditures of over \$11 million, and has contracted for an additional \$4.2 million for engineering and survey work. Among other things it has also already accomplished, TRRC states that it has entered into agreements with Granite Construction Company and Kewit Construction Company, as well as with two large engineering firms, URS Greiner and Carter Burgess. Further, TRRC has contracted with Dubray Land Services to assist in dealing with adjacent landowners, and it has contacted each landowner on the Board-approved route (excluding the southernmost 17 miles), reaching access agreements for approximately 60% of the land along the right-of-way. TRRC also maintains that efforts are underway to secure the approvals needed from state and federal agencies to acquire easements over their properties, and that it is working closely with Chase Securities to finalize financing plans for the project. Airborne topographical mapping and digital terrain modeling have been completed by John E. Chance & Associates, while the geotechnical engineer of record, Woodward-Clyde, has initiated a full geotechnical investigation. TRRC has selected Queen City, Inc., as the subcontractor for track work, and American Systems Technology as the subcontractor for the signals and communication system.

Further, the DNRC has granted TRRC's application for access to state school trust lands to conduct surveys, which is the initial step in obtaining easements. TRRC and DNRC have entered into an environmental review funding agreement whereby DNRC will monitor a third party contractor's development of environmental documents and TRRC will reimburse DNRC for its costs. In addition, TRRC claims in its latest 4-month report to the Board that it has secured requisite state approvals for temporary water use, highway and road

crossings, stream crossings, an easement across the state fish hatchery, and for storm water discharge.

Thus, TRRC has made considerable progress toward completion of this project since we imposed the 3-year condition. The Railroad has made large capital expenditures and is devoting significant human resources to the project. TRRC is working with state and federal agencies in seeking the necessary regulatory approvals, and appears to be trying to deal with landowners in an effort to resolve the difficult problems associated with acquiring the requisite rights-of-way.

We never intended that this condition provide an incentive for opponents to attempt to delay the project unnecessarily in the hope that we would eventually retract our permission to construct the line. Rather, we meant only to ensure that TRRC not view its construction authority as a grant in perpetuity that could be pursued at its convenience.

Similarly, although the protestants argue otherwise, it was never our intent to terminate the construction authority, regardless of the circumstances, if the line was not completed by November 8, 1999. From the outset, we contemplated that it might be necessary to reassess the situation and left open the possibility of extending or removing the condition, if warranted, by specifically requiring TRRC to advise us in its periodic reports if it would be unable to meet this deadline. TRRC did, in fact, so advise us in its first such report. In short, while we did not intend to grant an open-ended authorization for construction, we likewise did not intend to prevent TRRC from timely completing the project if it showed satisfactory diligence in pursuing that end, but more than 3 years to complete this project proved to be necessary. The evidence now before us shows plainly that TRRC is taking the proper steps to proceed with implementing the construction project and it is thus in the public interest to remove the condition at this time.

Were we to do what the opponents ask — rigidly adhere to the condition — the result would be, in essence, revocation of the construction authorization. This would be tantamount to overturning the decisions which found that the public convenience and necessity would be best served by the construction. In addition, all of the time and resources devoted to the project to date would be wasted. Such a result is not warranted.

It is within our discretion to modify or rescind conditions we impose. In light of the above, we will do so at this time. It is in TRRC's economic self-interest to continue to proceed as expeditiously as possible, and we are confident that it will do so. However, we will continue to monitor the situation and require

TRRC to continue submitting progress reports to us every four months so that we can assure that satisfactory progress continues to be made.

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

*It is ordered:*

1. Finance Docket No. 30186 is reopened.
2. TRRC's petition is granted and the previously imposed requirement in both Finance Docket No. 30186 and Finance Docket No. 30186 (Sub-No. 2) that construction be completed within a period of 3 years from November 8, 1996, is removed.
3. TRRC must continue to file progress reports every 4 months.
4. This decision is effective on March 30, 1999.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.