

Before the
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings
April 17, 2012
Part of
Public Record

Finance Docket No. 30186 (Sub-No. 2)¹

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

Finance Docket No. 30186 (Sub-No. 3)²

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

NORTHERN PLAINS RESOURCE COUNCIL AND MARK FIX'S
PETITION TO REOPEN BASED ON REMAND AND REQUEST FOR A PROCEDURAL
SCHEDULE

Submitted by:

Jack R. Tuholske, Esq.
TUHOLSKE LAW OFFICE, P.C.
P.O. Box 7458
Missoula, Montana 59807
Telephone: (406) 396-6415
Fax: (406) 728-8445
jtuholske@gmail.com

Patrick Parenteau
Environmental and Natural
Resources Law Clinic
Vermont Law School
P.O. Box 96, Chelsea Street
South Royalton, VT 05068
(802) 831-1305
pparenteau@vermontlaw.edu

¹Embraces Finance Docket No. 30186, Tongue River R.R.--Rail Construction and Operation--In Custer, Powder River and Rosebud Counties, Montana and Finance Docket No. 30186 (Sub-No. 1), Tongue River Railroad Company--Issuance of Securities.

²Embraces Finance Docket No. 30186, Tongue River R.R.--Rail Construction and Operation--In Custer, Powder River and Rosebud Counties, MT, and Finance Docket No. 30186 (Sub-No. 2), Tongue River Railroad Company--Rail Construction and Operation--Ashland to Decker, Montana.

FEE RECEIVED
April 17, 2012
SURFACE
TRANSPORTATION BOARD

FILED
April 17, 2012
SURFACE
TRANSPORTATION BOARD

Dated: April 13, 2012

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 30186 (Sub-No. 2; Sub-No. 3)

NORTHERN PLAINS RESOURCE COUNCIL AND MARK FIX'S
PETITION TO REOPEN BASED ON REMAND AND REQUEST FOR A PROCEDURAL
SCHEDULE

INTRODUCTION

Petitioners Northern Plains Resource Council and Mark Fix (collectively “NPRC”) submit this Petition to Reopen Based on Remand and Request for a Procedural Schedule as a result of the Ninth Circuit Court of Appeal’s December 29, 2011 Order and Memorandum Opinion. N. Plains Res. Council v. Surface Transp. Bd., 668 F.3d 1067 (9th Cir. 2011). The Ninth Circuit decision held that the Surface Transportation Board (“Board”) failed to satisfy the requirements of the National Environmental Policy Act (“NEPA”) by failing to take a “hard look” at certain environmental impacts before approving Tongue River Railroads (“TRR”) II and III. In accordance with the Ninth Circuit’s findings regarding the inadequate environmental reviews prepared by the Board, NPRC moves the Board to set a procedural schedule to conduct a new SEIS consistent with the Ninth Circuit opinion. The pending petition to reopen, filed July 26, 2010, is based on supplemental new information and substantially changed circumstances pertaining to climate change, coal, and related matters. Petitioners consider the July 26th pending petition to be on different grounds than those presented in this petition, and therefore consider it a separate document warranting a separate response.

BACKGROUND

The Board will recall its approval of TRR I in 1986 to construct an 89-mile railroad line from Ashland to Miles City, Montana. Such approval was based on the Board’s consideration of

data gathered before the approval in 1986. The Board completed TRR II's EIS in 1996, the TRR SEIS in 2006, and approved construction for TRR III in 2007. N. Plains, 668 F.3d at 1073–74. The Ninth Circuit recently held that many aspects of the Board's data and consideration of the railroad construction for TRR II and III were arbitrary and capricious and could not be relied upon, including information that served as the foundation for the Board's FEIS for TRR I. Id. at 1089.

First, the Court held that the Board's cumulative impacts analysis, required pursuant to 40 C.F.R. § 1508.25, for TRR II and III was arbitrary and capricious because it failed to include data regarding the combined impacts of coal bed methane ("CBM") well development and coal mining projects. Id. at 1076–79. The Bureau of Land Management ("BLM") and the State of Montana found that the development of 10,000 to 26,000 new CBM wells and 250 to 975 conventional oil and gas wells is reasonably foreseeable in the next twenty years. Id. (citing BLM, Final Statewide Oil and Gas Envtl. Impact Statement (Jan. 2003), available at http://www.blm.gov/mt/st/en/fo/miles_city_field_office/og_eis.html). "The greatest concentration of CBM development is anticipated to occur in the Rosebud, Big Horn, and neighboring Powder River Counties, which is proximate to where the TRRC railroad will run." Id. at 1079. The Board reasoned that these wells would have no cumulative impact because the well construction would not occur at the same time as railroad construction. Id. However, the Ninth Circuit concluded that the Board erroneously assumed that construction of CBMs and coal mining would not occur simultaneously and therefore acted arbitrarily and capriciously when it created "a faulty analysis . . . of the possible cumulative impacts from reasonably foreseeable CBM projects that could overlap construction of the railroad line." Id. at 1079.

Neither the coal mining project nor the CBM well development was contemplated when TRR I was issued. The Court found that these projects must be included in the cumulative impact analysis of TRR II and III. Id. Therefore, the cumulative impacts are sufficient enough to require a reevaluation of the analysis for TRR I as well. The Court also stated that a large concentration of CBM development is likely to occur in Rosebud County, where Ashland, Montana is located, directly along the line of TRR I. Id. at 1079. Since the Court found that the CBM wells and coal mining require additional environmental analysis, and this development will impact all the TRR routes, the Board must reconsider its cumulative impact analysis for TRR I, II, and III.

Secondly, the Court held that the Board violated NEPA by failing to consider the impacts of the Otter Creek mine. Id. at 1082. As the opinion notes, the Board knew of the federal government's Otter Creek land transfer to the State of Montana for purposes of coal development since 2002. Id. Further, the draft EIS "included a map with the sites of future coal mines." Id. Despite the fact that the Board considered the Otter Creek mine as a financial justification for TRR II and III, the Board attempted to explain that the Otter Creek mine was not foreseeable. Id. From this, the Court found that the Board's decision not to consider the Otter Creek mine was arbitrary and capricious. Id. Therefore, the Board must reevaluate the impacts of the mine in a SEIS for TRR I, II, and III. The court also ordered that all the lines must undergo a water quality analysis to consider the reasonably foreseeable impacts from the Otter Creek coal mine. Id. at 1082. Moreover, completion of a water quality analysis is necessary because the Court held that the Board erroneously decided that construction of the railroad line would not overlap with construction of CBM wells. Id. Because railroad construction increases sediment loading into the Tongue River, simultaneous construction will further increase the sediment loading—thus, these impacts must be evaluated for all the lines in a SEIS.

Third, the Court discussed at length the inadequacy of, and lack of, the Board's baseline data to assess the railroad's impacts. Id. at 1083–85. Specifically, the Ninth Circuit was dissatisfied with the Board's failure to determine if noise and vibration from railroad construction, and railroad operation upon completion of construction, would be harmful to fish at the Miles City Fish Hatchery. Id. at 1083–84. TRR I is the only line that runs through Miles City. See id. (explaining that TRR I extends from Miles City to Ashland, TRR II from Ashland to Decker, and TRR III is an alternative route to parts of the TRR II line). The Court also found error in the Board's reliance on mitigation measures concerning sage grouse, fish and aquatic resources, plant research, and other wildlife *after* the Board had already approved the railroad application for TRR II and III. Id. at 1084–85. The Board must gather baseline data across the whole line and analyze the effects of TRR I construction and operation on the fish at the Miles City Fish Hatchery. Therefore, the Court's holding necessitates a SEIS for TRR I, II, and III.

The Ninth Circuit also found that the Board arbitrarily and capriciously relied on aerial surveys and data from TRR I in its completion of the EIS for TRR III. Id. at 1085–87. The Court also found that other surveys from TRR II and III were too stale. Id. Reliance on this outdated material fails to constitute the required "hard look" necessary to satisfy the requirements of NEPA. Id. The Board failed to provide the Court with any scientific evidence to support its assertion that the physical environment of the area remained the same 27 years after the Board collected the data. Id. at 1086. Because the data arbitrarily represented the current physical state of the area, the Board must reevaluate and gather up-to-date data of the area around TRR I and properly consider it in a new SEIS for the whole line.

Finally, the Court held that the Board was arbitrary and capricious in its evaluation of the application for TRR III because it did not consider new evidence of operational and safety

concerns or look at the “financial viability” of an alternative route. Id. at 1099. The Board would not let the railroad raise these concerns after it approved TRR II, but instead told the railroad to propose an alternative, what became TRR III. Id. at 1098. When the railroad proposed the alternative as the Board requested, the Board still refused to consider the safety concerns, maintaining that the TRR II route was “currently authorized.” Id. at 1099. Thus, the Ninth Circuit found that the Board acted arbitrarily and capriciously because it “was well aware of the [operational and safety] concerns . . . about the viability” of the line but still did not review this evidence. Id. Therefore, TRR III’s application and approval must be redone. In light of all this evidence, the Ninth Circuit found that the Board’s decision must be reversed and remanded for proper review and a “hard look” at the environmental and operational safety concerns before it decides whether to approve the three lines. Thus, the decisions in TRR I, II, and III must be reopened to comply with the Ninth Circuit’s order.

COMMENTS

Since TRR I’s approval in 1986, the Tongue River Railroad Company has not made any progress towards commencing construction, as evidenced by their lack of progress in finalizing siting for the route of the railroad, securing easements, or initiating condemnation proceedings. In light of this and the Ninth Circuit’s findings detailed above, the need arises for the Board to establish a procedural schedule to complete a SEIS for TRR I, II and III.

NPRC proposes the Board set a procedural schedule. Any supplemental EIS must follow the standard procedures for the original EIS “to the extent practical.” 49 C.F.R. § 1105.10(a)(5). The Board should stake a final resting place for the rail line; a shifting location alters the environmental effects and adds to the unnecessary uncertainty of landowners in the affected counties.

Because this matter has been controversial since its inception, the Board must hold public hearings in Ashland, Billings, and Miles City, Montana, after it issues the draft SEIS. Because Ashland is the terminus city for TRR I, the beginning for TRR II, and ground zero for the Otter Creek mine, the local citizens have a large stake in the railroad's activities. Miles City is the current terminus for TRR I and the location of the Miles City Fish Hatchery. Billings is the major population center in the area. The hearings in these cities are essential for the Board to appropriately gauge and address local concerns and properly evaluate suggestions for improvement. The draft EIS must be available to the public fifteen (15) days before a public hearing on environmental issues, so these hearings should take place no earlier than fifteen (15) days *after* the Board issues the draft SEIS. 49 C.F.R. § 1105.10(a)(4).

In addition, NPRC proposes that the Board replace the outdated service list with a new and accurate service list. Since the commencement of the Tongue River Railroad matter over 25 years ago, the Board's requirement pursuant to 49 C.F.R. § 1104.12 to serve all the parties of record has become overly burdensome and outdated, as many of these parties, numbering in the dozens, are no longer involved in the case. A new service list would be more efficient and favored by parties that do not wish to receive continued filings. Accordingly, NPRC asks the Board to compile an updated service list.

PROPOSED SCHEDULE

NPRC urges the Board to adopt the following procedural schedule in completing the SEIS for TRR I, II, and III. All time periods run from the date that the Board issues its order to undertake the SEIS.

Day 60	Board begins SEIS process and publishes notice.
--------	---

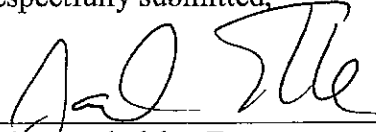
Day 90	Board notifies original parties of interest to reapply and accepts re-filings of persons of interest until day 120.
Day 120	Date persons wishing to participate as a party of record ("POR") must file a notice of intent to participate.
Day 150	Issue updated and accurate service list.
Day 240	Scoping comments deadline.
Day 365	All depositions, if appropriate, must be completed by this day.
Day 365	All written discovery, if appropriate, must be completed by this day.
Day 730	Board issues draft SEIS and responds to public comments.
Day 760	Hold public hearings in Ashland, Montana.
Day 762	Hold public hearings in Billings, Montana.
Day 764	Hold public hearings in Miles City, Montana.
Day 775	Public comment period ends.

CONCLUSION

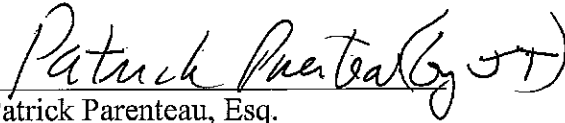
The Ninth Circuit's opinion necessitates a new SEIS to correct the deficiencies of the Board's 27 year old environmental review of TRR I and the subsequent inadequate environmental reviews of TRR II and TRR III. The Board must follow the Ninth Circuit's mandate and reexamine its cumulative impact analysis, reevaluate the project in conjunction with the Otter Creek Mines, and gather new environmental impact data. Accordingly, NPRC requests that the Board reopen based on remand and set a procedural schedule for the completion of a SEIS, accounting for public hearings and discovery. Additionally, NPRC urges the Board to complete an updated and accurate service list to ensure efficient filing.

DATED: April 13, 2012
South Royalton, VT

Respectfully submitted,



Jack R. Tuholske, Esq.
TUHOLSKE LAW OFFICE, P.C.
P.O. Box 7458
Missoula, Montana 59807
Telephone: (406) 396-6415
Fax: (406) 728-8445
jtuholske@gmail.com



Patrick Parenteau, Esq.
Environmental and Natural Resources Law Clinic
Vermont Law School
P.O. Box 96, Chelsea Street
South Royalton, VT 05068
(802) 831-1305
pparenteau@vermontlaw.edu

Counsel for Petitioners

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC 20423**

STB Finance Docket No. 30186

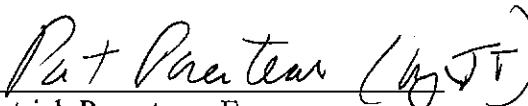
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 13, 2012, copies of *Northern Plains Resource Council and Mark Fix's Petition to Reopen Based on Remand and Request for a Procedural Schedule* on behalf of Petitioners Northern Plains Resources Council and Mark Fix were served via United States Postal Service first-class mail, with adequate prepaid postage on opposing counsel and all parties of record in this proceeding.

SIGNED and DATED at South Royalton, Vermont this 13th day of April, 2012.



Jack R. Tuholske, Esq.
TUHOLSKE LAW OFFICE, P.C.
P.O. Box 7458
Missoula, Montana 59807
Telephone: (406) 396-6415
Fax: (406) 728-8445
jtuholske@gmail.com



Patrick Parenteau, Esq.
Environmental and Natural Resources Law Clinic
Vermont Law School
P.O. Box 96, Chelsea Street
South Royalton, VT 05068
(802) 831-1305
pparenteau@vermontlaw.edu

Counsel for Petitioners