

Before the
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings
May 8, 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
REPLY REGARDING TONGUE RIVER RAILROAD COMPANY, INC.'S
STATEMENT OF INTENT

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, 164 Chelsea Street
South Royalton, VT 05068
(802) 831-1305
pparenteau@vermontlaw.edu

Dated: May 8, 2012

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.

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STATEMENT OF INTENT

INTRODUCTION

Northern Plains Resource Council and Mark Fix (collectively "Northern Plains") submit this Reply Regarding Tongue River Railroad Company, Inc.'s Statement of Intent.³ This Reply addresses the April 19, 2012 Tongue River Railroad Company's ("TRRC") Statement of Intent regarding its forthcoming amended application for the 80-mile rail line between Miles City and Ashland/Otter Creek, Montana and its requests of the Surface Transportation Board ("Board") in light of the recent Ninth Circuit Court of Appeal's December 29, 2011 decision that vacated the Board's approval of the TRRC II and III rail lines. See N. Plains Res. Council v. Surface Transp. Bd., 668 F.3d 1067 (9th Cir. 2011). TRRC's Statement of Intent ("Statement") urges the Board to conduct a new SEIS for its modified application in accordance with the recent Ninth Circuit's decision. In N. Plains Res. Council, the Court held that the Board violated the National Environmental Policy Act ("NEPA") by preparing inadequate environmental reviews of TRRC II and III, including baseline environmental information that served as the foundation for the Board's FEIS for TRRC I. 668 F.3d at 1089.

Also addressed in TRRC's Statement of Intent and related to this matter are three independent petitions that Northern Plains filed with the Board. The pending Petition to Reopen, filed July 26, 2010, centers on material new information and substantially changed circumstances

³ By responding to TRRC's Statement of Intent here, Northern Plains is not waiving any arguments they may have in response to TRRC's amended application or any other arguments or claims they may have in connection with these proceedings.

pertaining to climate change, Otter Creek, coal mining, and related matters. Also pending before the Board, Northern Plains filed a Petition for Reconsideration of the denial to Reopen on July 25, 2011 explaining why the substantial new evidence and changed circumstances, that were not present in 2007 when the latest EIS was approved, warrant the reopening of the TRRC I proceeding. Most recently, Northern Plains also filed a Petition to Reopen Based on Remand on April 17, 2012, which requests that the Board set a procedural schedule to conduct a new environmental review for TRRC II and III that complies with NEPA and is in accordance with the Ninth Circuit's holding in N. Plains Res. Council.

Northern Plains agrees with TRRC's Statement that the Board needs to conduct a new environmental review in light of the recent Ninth Circuit decision and that the Board needs to render a decision in regard to Northern Plains' pending 2011 Petition for Reconsideration. But TRRC's plea to address NEPA issues under the guise of TRRC III, a railroad that TRRC now admits is postponed, confounds reality. The only proceeding that such an environmental review can take place for TRRC's amended application is under TRRC I, as it would be the only remaining docket. Northern Plains disagrees with TRRC's illogical claim that the pending Petition for Reconsideration is moot, because assertions in TRRC's Statement of Intent regarding Otter Creek actually confirm the need for the Board to reopen the proceedings. Moreover, the interests of numerous parties involved in the TRRC proceedings, such as Native Action and Union Transport, warrant input and Board consideration now that TRRC's intent to only construct an amended TRRC I line due to materially changed circumstances will undoubtedly affect those parties.

I. The Board Should Conduct a New, Comprehensive Environmental Review of TRRC I

TRRC now proposes to build only an amended TRRC I line according to TRRC's Statement of Intent. Northern Plains agrees with TRRC's Statement that the Ninth Circuit in N. Plains Res. Council vacated the Board's approval of the TRRC II and III lines. Northern Plains also agrees with TRRC that the Board should conduct a new environmental review consistent with the recent N. Plains Res. Council decision. See TRRC Statement of Intent at 3, 5.

To reiterate, such a review should, at a minimum, include: (1) the development and consideration of adequate baseline data in light of the scoping process; (2) updating all data to reflect current conditions and all reasonably foreseeable impacts; (3) proper analysis of the effects of TRRC I construction and operation on the fish at the Miles City Fish Hatchery; (4) completion of an adequate cumulative impacts assessment that includes data regarding the combined impacts of coal bed methane ("CBM") well development; and (5) consideration of the impacts of the Otter Creek mine, including greenhouse gas emissions and climate change effects. See N. Plains Res. Council, 668 F.3d at 1076–79, 1082–87; TRRC Statement of Intent at 4–5.

This comprehensive new environmental review requires reopening the TRRC I proceedings before further activity such as centerline approval, attempts to procure the land, and construction of any rail lines can proceed.

II. Northern Plains' Pending Petition for Reconsideration

TRRC now concedes that development of the Otter Creek mine constitutes a changed circumstance requiring immediate review.⁴ TRRC Statement of Intent at 4. Specifically, TRRC states that "the Line has not been built to date because the Ashland/Otter Creek coal resources

⁴ While Northern Plains will not re-argue the issues in the pending Petition to Reopen, climate change impacts inexorably flow from development and transport of the massive Otter Creek project.

which the line is primarily designed to serve have not been commercially available for development. *That situation has now changed.*” Id. (emphasis added). TRRC further stresses that in light of the recent leasing and aggregation of coal tracts, Otter Creek is now “ripe for coal mine development.” Id. Moreover, TRRC states that “the Otter Creek area is likely to begin producing coal ready for transport within the next several years.” Id.

These changed circumstances warrant reopening. Pursuant to 49 U.S.C. § 722(c), the Board possesses the statutory authority to reopen and reconsider any Board action, at any time, due to “material error, substantially changed circumstances or new evidence.” The Board’s prior environmental review, the October 2006 FSEIS, did not consider Otter Creek mining, or the climate change effects of burning millions of tons of coal. TRRC’s Statement of Intent now concedes that the *primary* reason for building an amended TRRC I rail line is to provide transport for the millions of tons of coal to be extracted from Otter Creek. As such, the Board’s prior action relating to TRRC I “will be *affected materially* because of new evidence or changed circumstances.” 49 C.F.R. § 1115.3(b)(1). Thus, in order to satisfy NEPA, the Board’s own regulations, and CEQ regulations, the Board must complete a comprehensive, new environmental review under a reopened TRRC I proceeding.

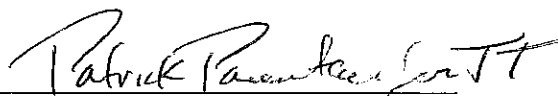
Moreover, Northern Plains’ Petition for Reconsideration is certainly *not* moot. Rather, TRRC’s Statement *confirms* Northern Plains’ reasoning for filing the 2010 Petition to Reopen and the 2011 Petition for Reconsideration. TRRC stated that the Otter Creek area is now “ripe for coal mine development,” and will likely begin extracting coal soon. TRRC Statement of Intent at 4. Viewing these statements as anything other than a confirmation of the Board’s need to grant Northern Plains’ pending Petition for Reconsideration and reopen the TRRC I proceedings is illogical.

CONCLUSION

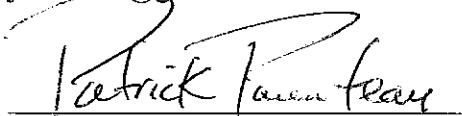
TRRC now intends solely to build an amended TRRC I line in light of the changed circumstances regarding mining at Otter Creek. The connected action between the proposed amended TRRC I rail line and Otter Creek mining "materially affects" the Board's previous decision regarding TRRC I. Contrary to TRRC's arguments in its Statement of Intent, the Board's own rules make it such that the Board needs to grant Northern Plains' pending Petition for Reconsideration and grant the reopening of TRRC I that Northern Plains' first sought in 2010. The Board then needs to conduct a comprehensive, supplemental EIS on all aspects of TRRC I's construction, including Otter Creek mining, the combustion of coal, and all cumulative impacts of the major federal action in accordance with the Ninth Circuit and NEPA.

DATED: May 8, 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, 164 Chelsea Street
South Royalton, VT 05068
(802) 831-1305
pparenteau@vermontlaw.edu

Counsel for Petitioners

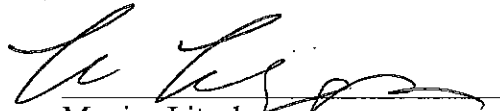
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WASHINGTON, DC 20423**

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 8, 2012, copies of *Northern Plains Resource Council and Mark Fix's Reply Regarding Tongue River Railroad Company, Inc.'s Statement of Intent* 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 8th day of May, 2012.



Monica Litzelman
Litigation Paralegal
Environmental and Natural Resources Law Clinic
Vermont Law School
PO Box 96, 164 Chelsea St.
South Royalton, VT 05068
(802) 831-1630