

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 34936

PORT OF MOSES LAKE—CONSTRUCTION EXEMPTION—MOSES LAKE, WASH.

Digest:¹ This decision grants a petition of the Port of Moses Lake to reopen this construction exemption proceeding to consider proposed modifications to the route previously considered by the Board.

Decided: December 21, 2018

On August 28, 2008, the Port of Moses Lake (the Port) filed a petition seeking an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10901 to construct approximately 7.6 miles of rail line as part of its Northern Columbia Basin Railroad Project (NCBRP) in Moses Lake, Wash. The Port's petition involved construction of two lines, the first between the community of Wheeler, Wash., and Parker Horn, Wash. (Segment 1), and the second between existing trackage of the Columbia Basin Railroad Company, Inc. (CBRW), and the east side of the Grant County International Airport (Segment 2). Following the completion of the environmental review process, which was conducted in conjunction with the Washington State Department of Transportation, the Board, by decision served August 27, 2009, authorized construction of the route that was then proposed, subject to environmental mitigation measures.²

On November 2, 2018, the Port filed a petition to reopen the proceeding, seeking authorization from the Board under 49 U.S.C. § 10502 for proposed route modifications that were not previously considered and to enable the Federal Railroad Administration (FRA) to

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² In the same petition, the Port also sought an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10901 to acquire approximately three miles of rail line from CBRW that run approximately from Parker Horn near Stratford Road to near the Grant County International Airport (Segment 3), which would connect Segments 1 and 2. See Port of Moses Lake—Acquis. Exemption—Moses Lake, Wash., Docket No. FD 34936 (Sub-No. 1). The Board granted the acquisition exemption in its August 27, 2009 decision. The Port does not seek to reopen the acquisition proceeding, and the acquisition (covering Segment 3) will not be further considered on reopening here.

participate in a supplemental environmental review process for the modified route.³ According to the Port, the Board's authorization of the construction of the route before the Board in 2009 coincided with a significant economic downturn, which slowed implementation of the project and hampered the Port's efforts to secure funding. (Pet. 3.) The Port indicates that it received state funding in 2015 and federal funding from the U.S. Department of Transportation (USDOT) (administered by the FRA) in 2017, and is now ready to proceed with the NCBRP.⁴ However, according to the Port, in the years since the Board's authorization, the land along and near the proposed rail line has been developed, and some route modifications to the route originally proposed are necessary to avoid the relocation of several new commercial enterprises. Additionally, the Port states that new development near the end of Segment 2 warrants a minor route modification to ensure that the NCBRP can access all of the businesses that would make use of rail service.

The Port proposes the following adjustments to the proposed route, which it claims will reduce the impacts of the rail project on the environment and the local community: (1) an adjustment westward of the western end of Segment 1 to avoid buildings and reduce the acreage of wetlands affected; (2) adjustments to Segment 1 to enable the rail line to cross local roads at right angles, rather than diagonally, which the Port claims would improve visibility, increase safety, and otherwise reduce local impacts; and (3) modifications to Segment 2 to better reach existing and future development in the Grant County International Airport area, minimize impacts, and slightly reduce the amount of track required. According to the Port, the proposed route modifications would reduce the impact of the rail line on existing land uses and better fulfill the objectives of the NCBRP. No replies to the petition to reopen were filed.

A party may seek to reopen a Board proceeding by submitting a petition that (1) presents new evidence or substantially changed circumstances that would materially affect the case, or (2) demonstrates material error in a prior decision. 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.4. "To warrant reopening, the new evidence must be newly available, and the new evidence or substantially changed circumstances must materially affect the prior decision." Riffin—Pet. for Declaratory Order, FD 34997 et al., slip op. at 6 (STB served, Oct. 29, 2012).

³ To meet the Board's obligations under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370h, and related environmental laws, the Board prepares an Environmental Assessment (EA) or an Environmental Impact Statement addressing the potential environmental impacts of all proposed rail constructions. 49 C.F.R. § 1105.6(a) and (b).

⁴ According to the Port, the grant of federal funds from USDOT qualifies as a major federal action under NEPA, and therefore requires environmental analysis by the FRA. The Port states that it has been working with the FRA and the Board's Office of Environmental Analysis (OEA) to develop the framework for a Supplemental EA that would evaluate the Port's modified route and enable the participation of the FRA.

Here, the Port argues that reopening is warranted based on new evidence and changed circumstances. Specifically, according to the Port, the modified route that it is currently proposing results from the land development that has occurred along and near the proposed rail line since the Board's August 27, 2009 decision, which therefore could not have been considered during the initial environmental review and decision. Furthermore, the Port argues that the receipt of federal funding by the Port for the NCBRP constitutes new evidence because the funds were only awarded in 2017, and the need for the FRA to participate in the environmental review is a changed circumstance.⁵

The Board finds that the Port has presented new evidence and changed circumstances that warrant reopening this proceeding to consider whether to grant exemption authority to construct the modified route. The proposed revisions to the original route are designed to consider development of the land along and near the originally proposed rail line that did not occur before the Board authorized this construction in 2009 and therefore could not have been considered by the Board previously. It is appropriate to reopen this proceeding to consider the modified route. On reopening, a Supplemental EA will be prepared to meet both the Board's and the FRA's environmental review obligations.⁶ The Supplemental EA will consider what, if any, environmental impacts the proposed route modifications would have and make recommendations as to whether additional or different environmental mitigation measures are required. Following completion of the Supplemental EA, the Board will consider whether to grant an exemption authorizing the modified route, and if so, whether any changes should be made to the environmental mitigation previously imposed in the August 27, 2009 decision or any new mitigation imposed.

Comments on the transportation merits of the proposed project as modified are due February 19, 2019, and replies are due March 11, 2019.⁷

⁵ The Port also argues that the Supplemental EA currently being developed qualifies as new evidence and substantially changed circumstances because it did not exist in 2008 and 2009, and therefore also could not have been considered in the August 27, 2009 decision. However, the reopened construction authority proceeding is the major federal action that requires the Board to prepare the Supplemental EA—not the other way around.

⁶ OEA has invited the FRA to participate as a cooperating agency in the preparation of the Supplemental EA, and the FRA has accepted.

⁷ The environmental review process, which is undertaken by OEA, is separate from the agency's consideration of the transportation merits of the proposed modified project. Correspondence commenting on the environmental impacts of the proposed route modifications may be submitted to OEA, including through the Board's e-filing system under "Environmental Correspondence."

It is ordered:

1. This proceeding is reopened.
2. Comments on the transportation merits of the proposed project, as modified, are due February 19, 2019, and replies are due March 11, 2019.
3. This decision is effective on its service date.

By the Board, Board Members Begeman and Miller.