

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



STB FINANCE DOCKET NO. 30186 (Sub-No. 3)

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

PETITION TO STAY THE BOARD'S DECISION

**ENTERED
Office of Proceedings**

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**Part of
Public Record**

**Art Hayes Jr.
Marilynn Hayes
Arthur Hayes III
Susan Hayes
Patrick Hayes
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October 19, 2007

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Art Hayes Jr., Marilyn Hayes, Arthur Hayes III, Susan Hayes, and Patrick Hayes of The Brown Cattle Company in Birney, Montana (the "Petitioners") hereby move the Surface Transportation Board (the "Board" or "STB") to stay the effective date of the Board's Decision in STB Finance Docket No 30186 (Sub-No 3), Tongue River Railroad Company, Inc – Construction and Operation – Western Alignment (the "Decision")

A stay is warranted until U S Court of Appeals for the Ninth Circuit has ruled on the merits of the petitions for review of Tongue River II filed by the Northern Plains Resource Council, Inc (NPRC), Native Action, and the United Transportation Union-General Committee on Adjustment (NPRC Inc. et al v. STB, No 97-70037, hereinafter 97-70037) The petitions were timely filed on January 7, 1997, and are being held in abeyance pending the conclusion of Tongue River III.

Now that the Board has issued a decision in Tongue River III, the Court may proceed to rule on the merits of the issues raised by 97-70037. Because Tongue River III merely approves the Western Alignment, a proposed change to the southernmost portion of the routing approved by the decision in Tongue River II, the issues in Tongue River II and Tongue River III are inseparable, and any Court order arising from NPRC Inc. et al v. STB will directly impact, or void in its entirety, the Board's decision in Tongue River III

ARGUMENT

An interested party seeking a Board-ordered stay must establish that (1) there is a strong likelihood that the Petitioner will prevail on the merits, (2) the Petitioner will suffer irreparable harm

in the absence of a stay, (3) other interested parties will not be substantially harmed, and (4) the public interest supports the granting of the stay. Hilton v. Barunskill, 481 U.S. 770, 776 (1987), Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). The Parties are prepared to meet each prong of this test, as follows:

1. There is a strong likelihood that the parties will prevail on the merits.

The petitions opposing the Board's decision in Tongue River II were timely filed with the U.S. Court of Appeals for the Ninth Circuit on January 7, 1997. The petitions were accepted by the Court and docketed as Case Number 97-70037.

On April 7, 1997, the Court denied Respondents' motions to dismiss 97-70037.

On July 15, 1997, the Tongue River Railroad Company (TRRC) filed a petition with the Board to reopen Tongue River II. The Board denied the request to reopen without prejudice in a decision served December 1, 1997.

On December 9, 1997, the Court, aware of TRRC's efforts to initiate the Tongue River III proceeding, filed an order staying the briefing schedule for 97-70037.

On March 16, 1998, the Court denied the Ninth Circuit petitioners' joint motion to set aside and vacate the Board's November 8, 1996 Tongue River II decision, ordering instead that the petition for review presented by 97-70037 would be held in abeyance pending a final decision by the Board in Finance Docket No. 30186 (Sub-No. 3), Tongue River III.

The Court has required, and received, periodic status reports from the parties to 97-70037 from April 1998 until present.

The U.S. Ninth Circuit Court of Appeals accepted the Petitions for Review 97-70037; the Petitions survived Respondents' Motions to Dismiss, and the Court has kept the matter open for nearly a decade pending the Board's decision in Tongue River III. Clearly, the Court feels that there is a strong possibility that the Petitioners in 97-70037 will prevail on the merits of their arguments.

against the Board's Decision in Tongue River II, and did not frivolously make the decision to expend such an enormous amount of the Court's, and the Parties', time and resources.

There is a strong likelihood that the petitioners in 97-70037 will prevail on the merits of their arguments, as demonstrated by the seriousness with which the Ninth Circuit Court of Appeals has treated the matter. If the petitioners in 97-70037 prevail, then the Board's decision in Tongue River III is moot.

2 The parties will suffer irreparable harm in the absence of a stay

The Tongue River III decision has serious environmental, economic, and social consequences for the Petitioners. While Tongue River III does present unique issues, many of these same issues, which impact the entire Ashland to Decker route, and indeed, the entire Tongue River Railroad, are before the Ninth Circuit Court of Appeals in 97-70037. Indeed, the Supplemental EIS prepared for Tongue River III relies heavily on the environmental and economic data prepared for the Tongue River II.

If the effective date of the Tongue River III decision is not stayed, TRCC may immediately begin site testing and other preparatory work on the Western Alignment route despite the fact that the Court has not had the opportunity to rule on the merits of the Tongue River II appeal. TRCC may also immediately initiate eminent domain proceedings against the Parties. The effects of these actions could not be reversed even if the Petitioners prevail in Case No. 97-70037 and the Western Alignment is never built.

If the Court overturns the Board's decision in Tongue River II, and the Board nevertheless makes their decision in Tongue River III effective, TRCC will be free to condemn land and conduct construction-related activities along the Tongue River I and Tongue River III easements, despite the fact that a middle section of the railroad might never be approved.

Petitioners' The Brown Cattle Company will have about five miles of the Tongue River Railroad crossing its lands. Petitioner has lived in the area for sixty years and relies on the ranch for his family's continued livelihood. While the Final SEIS contends that "other than the southernmost portion of the line, the remaining portion of the line approved in Tongue River II would remain

unchanged” and “since the portion of the Miles City to Decker line that is located north of the proposed Western Alignment would essentially be unchanged under Tongue River III ,” the SEA’s analysis analyzed in fact not only the impact of the Western Alignment, but TRRC’s proposed refinements to the alignments previously approved in Tongue River I and Tongue River II .The proposed refinements to Tongue River II would have a severe negative impact on the Petitioner, an impact improperly excluded from what should have been a comprehensive analysis of the Tongue River II decision now before the Ninth Circuit Court of Appeals.

The environmental well-being and natural resources of the Tongue River Valley are vital to Petitioners and their community, and failure to stay the Board’s decision would result in a permanent loss of productive land and an economic catastrophe for the Petitioners, many similarly situated ranchers, and the entire area of Montana affected by this ill-conceived project.

3. Other interested parties will not be substantially harmed

The Miles City to Ashland section of the Tongue River Railroad was first proposed in 1983 Tongue River II, the Ashland to Decker route, was proposed in 1989 The Western Alignment, the modification to the Ashland to Decker route that is the subject of the Tongue River III decision, was not proposed until July 15, 1997 After 23 years, no portion of the proposed railroad has ever been built. No possible substantial harm can result to any part from staying the effective date of the Tongue River III decision for what would most likely amount to a period of a few months until the Ninth Circuit Court of Appeals has finally had a chance to rule on the merits of 97-70037

Furthermore, the same parties who support the construction of the Tongue River Railroad have already publicly expressed their preference for mining the Otter Creeks coal tracts (whose development the Tongue River Railroad is designed to facilitate), generating power “at the mouth of the mine” and shipping it out by wire (i.e., by building a coal-fired generator and electric transmission lines at the site of the coal, rather than shipping it out by rail) The estimated completion date for this phase of the Otter Creek Energy Project is not earlier than two to four years from now. Jim Gransbery, “Otter Creek still Attracting Interest: Core Sampling near Ashland Gives Interesting Facts,” Billings Gazette, January 15, 2005.

4 The public interest supports granting the stay

The Petitioners, the Ninth Circuit petitioners in 97-70037, the Board, and the Ninth Circuit Court of Appeals have all devoted enormous time and resources to the entire Tongue River Railroad proposal. It would be contrary to the public interest to reject a stay of the decision affecting a relatively minor adjustment to the southernmost terminus of Tongue River II a stay would allow a judicial review of Tongue River II to move forward to completion, ensure that no harm comes to the Parties and similarly situated families while the Court rules on the merits of Tongue River II, and maintain the integrity of what has been, and should be, a slow and deliberate process

Absent a stay, the lives and livelihoods of the Petitioners and other similarly situated parties will be changed forever. An environmentally sensitive region of Montana will be permanently impacted. And there is no guarantee, absent a decision from the Ninth Circuit Court of Appeals on Tongue River II, that any alleged economic benefit will ever result. The only guarantee is a social and economic catastrophe for the Petitioners. A stay is clearly in the public interest.

CONCLUSION

The effective date of the Board's Decision in Tongue River III should be stayed until the U.S. Court of Appeals for the Ninth Circuit has ruled on the merits of the petitions for review of Tongue River II in NPRC Inc. et al v STB, No. 97-70037. The Parties have met the Holiday Tours pleading standard for a Board-ordered stay, and hereby respectfully request that a stay be granted, as law and the public interest demand.

Respectfully Submitted,


Art Hayes Jr. Marilynn Hayes Arthur Hayes III Susan Hayes Patrick Hayes

The Brown Cattle Company
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Birney, Montana 59012

Certificate of Service

We, Art, Marilynn, Arthur, Susan, and Patrick Hayes, hereby certify that on Oct 16, 07, we
(date)

served copies of the Petition to Stay the Board's Decision in STB FINANCE DOCKET NO 30186

(Sub-No. 3), on the Surface Transportation Board and all the parties of record in
this proceeding

by way of messenger and U.S mail.
(U S mail, Federal Express, UPS, etc)

DATE Oct 16, 2007

SIGNATURE Art Hayes

Marilynn Hayes

Arthur J Hayes Jr

Susan Hayes

Patrick Hayes

Verification

I, ART HAYES JR, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this pleading

Executed on Oct. 16, 2007
(date)

Art Hayes Jr
(Signature) PRESIDENT,
THE BROWN CATTLE CO.