

**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**

**Charles Gauvin
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October 16, 2007

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Trout Unlimited (the "Petitioner") hereby moves 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 Petitioner is 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

Trout Unlimited's mission is to conserve, protect and restore North America's trout and salmon fisheries and their watersheds. The Tongue River is critical to the extensive cold water fishery resources in the vicinity of the Western Alignment. 37 of the Tongue River Basin's 44 species of fish are present along the proposed route. The Tongue River III decision therefore has severe consequences for the Petitioner and the constituency they represent.

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. 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. 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 and the Supplemental EIS prepared for Tongue River III relies heavily on the environmental and economic data prepared for Tongue River II.

The Western Alignment threatens an important cold water fishery by dramatically increasing the number of stream crossings, the total sedimentation, and the potential for toxic spills. The Board must not make the Tongue River III decision effective while Tongue II is pending judicial review, especially since the Board's own analysis concludes that complete information is not available concerning the impact of these issues, and the project in general, on fish species. The EPA's concerns regarding the impact of the project on the pallid sturgeon and the Miles City Fish Hatchery also indicate that a stay of the Tongue River III decision is the prudent course of action.

The Western Alignment, and the entire project, also threatens the water quality of the Tongue River and the Tongue River Reservoir, an issue of critical concern to the State of Montana. The Montana Department of Environmental Quality has assigned TMDLs to prevent further deterioration of water quality and to improve the hydrology of the basin, yet the Board admits that the Western Alignment, and the Tongue River Railroad project as a whole, would “increase sediment load and suspended solids” and merely brushes aside the impact of increased sedimentation by assuming that the railroad will somehow be able to comply with the state’s TMDLs at some point in the future. This conclusion is highly doubtful given that the sediment load during one week of the summer of 2006 exceeded the load for the entire year.

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. The result would be an immediate, negative and permanent impact on the mission of Trout Unlimited and the interests of the constituency they represent, and on 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 Creek 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 Petitioner, 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 mission of Trout Unlimited, and the interests of the constituency they represent, will be irreparably harmed 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 from the railroad the only certain result is the permanent environmental degradation of a sensitive ecoregion 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 Petitioner has 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,

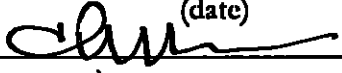


Charles Gauvin
Trout Unlimited
Arlington, Virginia

Verification

I, Charles F. Gauvin, 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 10/15/07
(date)


(Signature)

Certificate of Service

I, Charles F. Gauvin, hereby certify that on October 17, 2007, I served copies of the Petition
(date)

to Stay the Board's Decision in STB FINANCE DOCKET NO. 30186 (Sub-No. 3), on all the parties of record in this proceeding with this document by United States mail.

DATE October 17, 2007

SIGNATURE: 