

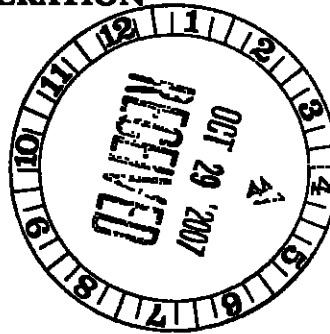
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**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

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

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

PETITION FOR RECONSIDERATION



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**Art Hayes, Jr.
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Arthur Hayes III
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October 26, 2007

**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 FOR RECONSIDERATION

PREFACE

The Petitioners submit the following petition for reconsideration of the decision of the Surface Transportation Board (the “Board” or “STB”) in STB Finance Docket No. 30186 (Sub-No. 3), Tongue River Railroad Company, Inc. – Construction and Operation – Western Alignment (the “Decision”) on the grounds that pursuant to 49 C.F.R. § 1115.3, a Petition for Reconsideration should be granted, as Board’s decision involves material error.

SUMMARY

The Petitioner presents the following arguments:

1. The Decision, and the Final SEIS on which it is based, fail to consider the entire Tongue River Railroad (TRR) as a single action, and thus are in Violation of NEPA and Council on Environmental Quality regulations. The Board and the SEA have consistently discussed Tongue River I, II, and III as a single proposal in the environmental review process and the Decision in Tongue River III (the “Decision”).
2. The Board’s analysis of TRRC’s financial fitness is inadequate and incomplete. The Board has failed to conduct a reasoned inquiry into the financial viability of the applicant and has simply taken at face value TRRC’s broad and vague assurances that it will be able to identify concrete funds in the financial markets. The Board also failed to take into consideration clearly identifiable challenges

facing the construction of the railroad, including the railroad's self-described flaw of not having procured any coal leases, which are the sole reason and justification for the railroad.

3. The SEA failed to conduct a required rate sensitivity analysis. Based on the Board's own side-by-side analysis of the DM&E and TRR projects, the only logical conclusion is that a rate sensitivity analysis must be conducted for the Tongue River Railroad, and for the combined effects of the two projects.

4. The Board violated Council on Environmental Quality regulations by not providing adequate notice of BNSF Railroad Company's role in Tongue River III. By failing to properly consider and describe BNSF's true role early in the process, the Board has violated the Council on Environmental Quality regulations at 40 C.F.R. § 1501, NEPA and Agency Planning, by improperly identifying the scope of issues to be addressed by the SEIS.

5. The Decision and the Final SEIS ignore the requirements of Executive Order 12898 and violate the Environmental Justice provisions by summarily dismissing the numerous concerns expressed by the Northern Cheyenne Tribe.

6. The Final SEIS on which the Decision is based relies on outdated environmental data and utilizes obsolete EISs to support the Decision. The Board failed to conduct a new EIS covering the entire TRRC proposal and bringing the necessary data and analysis up to date. The Decision therefore violates NEPA and the Council on Environmental Quality regulations.

The Petitioner respectfully requests the Board grant this Petition for Reconsideration of their Decision in STB Finance Docket No. 30186 (Sub-No. 3) in order to correct these material errors in the Board's decision.

**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 FOR RECONSIDERATION

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

Pursuant to 49 C.F.R. § 1115.3, this Petition for Reconsideration should be granted, as the evidence presented herein demonstrates the Board's decision involves material error.

ARGUMENT

1. The Decision, and the Final SEIS on which it is based, fail to consider the entire Tongue River Railroad (TRR) as a single action, and thus are in Violation of NEPA and Council on Environmental Quality regulations. Section 1502.4 of the CEQ states that "proposals or parts of proposal which are related to each other closely enough to be, in effect, a single course of action must be evaluated in a single NEPA document."

The Final Supplemental Environmental Impact Statement ("Final SEIS) prepared by the Board's Section of Environmental Analysis (SEA) for Tongue River III states that because Tongue River I, II and III were "applications for a separate project," that were "proposed at different times and for different reasons," it was appropriate to undertake a separate environmental review of each

proposal.”¹ This statement that the applications were for “different reasons” is simply untrue: the purpose of the Tongue River Railroad is to move coal from southeastern Montana to Miles City and thence to eastern markets, and the whole project is contingent upon the TRRC’s obtaining leases to the Otter Creek coal tracts. Without a connection to the rail lines in the vicinity of Decker, the project makes no economic sense, which is why the Miles City to Ashland section has never been built nor has any serious effort to do so ever been undertaken.

Tongue River I and Tongue River II, allegedly “applications for a separate project,” were approved by separate, prior Board Decisions. Tongue River I is administratively complete, and Tongue River II is pending judicial review in the 9th Circuit Court of Appeals.² Yet the Decision and the Final SEIS address not only the Western Alignment, but TRRC’s proposed refinements to the segments of the TRR authorized in Tongue River I and Tongue River II.³ If the three applications are for “applications for a separate project . . . proposed at different times and for different reasons,” the Board committed one of two material errors by either:

- (1) Revisiting and revising “applications for . . . separate project[s],” that were “proposed at different times and for different reasons,” in a new application for Tongue River III, a “separate project;” or
- (2) Failing to consider the three proposals as a single course of action, evaluated in a single NEPA document and as a single decision, as required by federal law.

The fact that the Tongue River Railroad Company (TRRC) made a tactical decision to submit separate applications for separate phases of what is obviously a single rail line does not allow the Board or the SEA to abrogate their responsibilities under NEPA and the CEQ Regulations. The Decision itself also contains multiple admissions that the Board has consistently treated the Tongue River Railroad as a single proposal to the extent that the Board cites and uses EIS components from Tongue I and II in their final analysis and determination of Tongue III. The Board also issues

¹ Final SEIS at 2-10, 2-11

² Northern Plains Resource Council, Inc. v. STB, Nos. 97-70037 et al., filed Jan. 7, 1997. The court proceeding is being held in abeyance pending the release of the Tongue River III decision.

³ See, e.g., Decision at 29.

updated mitigation measures in Tongue III that affect and change those in Tongue I and II as a basis and justification for its final decision to approve Tongue III.

a. The Board's analysis of TRRC's financial condition demonstrates that the three proposals are in fact one, and the Board treated them as such. In its applications in 1998 and in supplemental evidence in 2003, TRRC presented combined costs to construct the three lines.⁴ The Board accepted this presentation, and in arriving at the Decision, analyzed TRRC's explanation of its plan to finance construction of the three lines,⁵ rather than considering the costs of Tongue River III alone, the or combined costs of Tongue River II and III.

b. The Decision describes Tongue River II as "an extension of an 89-mile line from Miles City to Ashland, MT, authorized in Tongue River I"⁶ and provides a map of the entire TRR as Appendix A to the Decision.

c. The Decision and the SEIS involve not only the construction of the Western Alignment, but also refinements to the alignments authorized in Tongue River I and II in tandem with its discussion of Tongue River III.⁷

The Board and the SEA cannot declare the Tongue River actions to be separate for the purpose of circumventing NEPA or invoking relaxed standard of approval under 49 U.S.C. 10901, when they have consistently been discussed as a single proposal in the environmental review process and the Decision in Tongue River III.

2. The Board's analysis of TRRC's financial fitness is inadequate.

Under 49 U.S.C. 10901(c) the Board must analyze the construction and operation of a proposed new line based on their consistency with the public convenience and necessity. There is no statutory definition of public convenience and necessity, but the Board has traditionally included in its analysis

⁴ Decision at 14

⁵ Id. at 14-15

⁶ Id. at 4

⁷ See, e.g., Decision at 5

an examination of whether the applicant is financially able to undertake the project and provide rail service.⁸

In the Decision, the Board states that “[b]ased on TRRC’s 1998 estimates, the \$323 million in capital available to TRRC exceeds the estimated funds necessary . . . we are confident that TRRC will be able to obtain sufficient financial backing to complete this rail construction.”⁹ However, this conclusion appears to rely merely on TRRC’s statement that “it planned both to raise approximately \$105 million in equity capital, and to arrange for a privately placed (construction loan and first mortgage) debt of approximately \$218 million.”¹⁰ The Decision is void of any indication that TRRC has any current financial resources whatsoever or that the Board made any inquiry about TRRC’s ownership structure, history, or financial health to be sufficient to support Tongue III, let alone Tongue I and II. .

Nor does the Board’s analysis of TRRC’s finances appear to include of BNSF’s extensive role in the TRR project, discussed below.

In an interview published after the decision, Mike Gustafson, president of Wesco Resources and owner of the Tongue River Railroad, fully admits that “the entire project is contingent on getting coal leases in the Otter Creek Tracts” and that “[a] contract for coal is collateral for a railroad, and we cannot get a contract without coal.”¹¹ Gustafson stated that “[TRCC] needs a lease of a minimum of Tracts 1 and 2” of the Otter Creek Tracts, but two previous requests for lease bids were returned as premature, pending state evaluation of the coal reserves.¹² In fact, the State’s evaluation of the coal reserves had not even been completed by the time the Board issued its Decision. Since Mike Gustafson has publicly attested, the project is not viable without the coal leases, then the Board should have mandated that the Railroad demonstrate this ability to the Board in advance of a final decision of Tongue III and allowed public comment on this. This admission on

⁸ Decision at 13

⁹ Id at 16

¹⁰ Id At 15

¹¹ Jim Gransberry, *Billings Gazette*, Saturday, October 13, 2007

¹² Id

the part of the Tongue River Railroad also again demonstrates that this is one project, not three separate projects as the Board seems to use as justification for allowing the Railroad to proceed.

The Board also brushes aside concerns about the difficulty acquiring financing if TRRC fails to acquire the property for the right-of-way that it will need by pointing out that TRRC intends to negotiate with land owners to obtain the necessary property, and if such negotiations fail, that TRRC could institute condemnation proceedings under Montana state law.¹³ The Board points out in footnote 50 to the Decision that “[c]minent domain proceedings are governed by state law. In rail construction cases, the Board determines whether the proposed line is consistent with the PC&N. The applicant is responsible for acquiring the land necessary to build the line.” The Board cites generally to a South Dakota case, Dakota, Minn. & E. R. R. v. State of South Dakota, 236 F. Supp. 2d 989 (D. S.C. 2002), aff’d, 362 F.3d 512 (8th Cir. 2004) as apparent support for its position, but the case simply notes that the STB does not have a role to play in eminent domain proceedings and that the STB’s approval of that project does not carry with it any federal power to take land to complete the project.¹⁴ The proffered case is in fact a case study in the complexity of state eminent domain laws and the difficulty TRRC will likely face in acquiring the land it needs under such laws, and serves as evidence that the Board should in fact take these difficulties into consideration in considering the financial condition of the applicant and the likelihood of success of the project. Something the Board completely dismisses in the Decision and automatically assumes that the Railroad will prevail over the rights of the affected landowners as provided by Montana State Law.

The Board also dismisses the fact that overwhelming majority of all the affected landowners have stated publicly (and many of whom have gone on record with the STB), that they will never allow the Tongue River Railroad to cross their lands nor allow any access of any sort to the Railroad. Under Montana law, which the Board does not address at all, there is a strong possibility that TRRC will be unable to demonstrate that the Railroad is “located in the manner that will be most compatible with the greatest public good and the least private injury.”¹⁵ Moreover, Montana Courts have strictly construed the eminent domain statutes,¹⁶ and have recognized that the preference of

¹³ Decision at 16

¹⁴ 236 F. Supp. 2d at 997

¹⁵ Montana Power Company v. Bokma, 457 P.2d 769, 775 (Mont. 1969).

¹⁶ McCabe Petroleum Corp v N Bar Ranch, LLC, 87 P.3d 479, 484-84 (Mont. 2004).

affected landowners to keep their land establishes a private injury that will mitigate against condemnation proceedings.¹⁷

The alleged “liberal nature of [the Board’s] licensing statute . . .”¹⁸ does not alleviate the Board’s responsibility to conduct a reasoned inquiry into the financial viability of the applicant. The Board has simply taken at face value TRRC’s broad and vague assurances that it will be able to borrow money and ignores the real challenges facing the construction of the railroad, e.g., the status of the Otter Creek Tracts and the likelihood and timeline under which TRRC might eventually obtain the required leases.

3. The SEA failed to conduct a required rate sensitivity analysis.

As part of the environmental review process, Minnesotans for Efficient Energy and NPREC suggested that coal usage as a result of the TRRC project would increase enough to require an in-depth analysis of that usage and the resulting air emissions in the Midwestern markets that TRRC would serve.¹⁹ These groups also cited an 8th Circuit Court directive that the Board examine the potential indirect air emission impacts of increased coal usage that might result from lower transportation rates brought about by DM&E’s Powder River Basin construction project.²⁰ The SFIS did the required rate analysis in the DM&E SEIS, addressing how the DM&E project might affect the consumption of PRB coal through lower transportation rates, and how these changes might in turn affect air quality.

However, Tongue River III, the Board concluded that “in light of the results of the rate sensitivity analysis conducted in the DM&E case, conducting a similar detailed analysis is not necessary here. This proposal is less likely than DM&E’s to result in lower transportation rates.”²¹ The Board reaches this conclusion despite having already explained, in significant detail, how the TRRC and DM&E proposal are dissimilar and do not compete with each other:

¹⁷ State Highway Commission v. Daniels, 409 P.2d 443, 446 (Mont. 1965)

¹⁸ Decision at 19

¹⁹ Id. at 25.

²⁰ Mid States Coalition for Progress v. STB, 345 F.3d 520 (8th Cir. 2003)

²¹ Decision at 26

a. The TRRC expects to carry both Montana and Wyoming coal, while DM&E would only carry Wyoming coal, and that therefore, DM&E would not directly compete with TRRC for customers that use Montana coal;²²

b. For customers of Wyoming coal, DM&E assumed that generally it would not succeed in obtaining commitments to serve plants that are solely served by either BNSF or Union Pacific Railroad Company (UP), while TRCC plans to participate in movements destined to customers that are solely served by BNSF. Therefore, because TRRC and DM&E would primarily serve different customers, "the effect of DM&E's construction project on TRRC is expected to be minimal."²³

c. The DM& E line will be over 100 miles to the south-southeast of the TRRC line at its closest point.²⁴

d. TRRC will carry NPRB coal from Montana as well as SRB coal from Wyoming, whereas DM&E would only access SPRB coal from Wyoming.²⁵

In summary, the Board concludes that "[t]he DM&E and TRRC lines generally would serve different customers and transport primarily different types of coal." Based on the Board's own side-by-side analysis of the two projects, the only logical conclusion is that a rate sensitivity analysis must be conducted for the Tongue River Railroad, and for the combined effects of the two projects.

4. The Board violated Council on Environmental Quality regulations by not providing adequate notice of BNSF Railroad Company's role in Tongue River III.

The Application and the Draft and Final SEISs do contain discussion of and comments by BNSF. But the Decision is replete with definitive references to BNSF's role in the Tongue River Railroad that paint a far different picture than the one that the public was given a chance to review and

²² Id. at 18

²³ Id.

²⁴ Id. at 20

²⁵ Id.

comment on, a role that the public was precluded from considering by the Board's refusal to grant UTU-GCA/MT's request for an oral hearing on just that subject:

a. In the Decision "Overview," the Board states as one of its primary findings that "[The Western Alignment] also will allow BNSF, which will be TRRC's interchange partner, to improve service to the Midwestern electric utilities located on BNSF's system."²⁶ This reference to BNSF as TRRC's "interchange partner" appears nowhere in the Draft SEIS

b. "However, a BNSF-TRCC-BNSF-vessel route would have a mileage savings over existing BNSF routes to some plants in eastern Michigan. Therefore, BNSF/TRCC could lower their joint rate to these plants in response to competitive pressure from DM&E. This would reduce the chance of BNSF and TRRC losing market share."²⁷

c. "The availability of this shorter route will help BNSF handle Wyoming PRB traffic using BNSF's northern route through Forsyth more quickly and efficiently. To the extent that the cost savings are passed through, the shorter route to some of BNSF's core markets could also result in lower rates for the utilities and ultimately the electricity consuming public."²⁸

d. "BNSF's current service is less efficient than what could be provided in conjunction with TRRC. Additionally, BNSF may not be able to continue to meet the demand for NPRB coal, because the mines on BNSF's line around Decker are being depleted."²⁹

e. "DM&E, as a new, separate competitor in the PRB, could be expected to under-price BNSF and UP in order to obtain market share. In contrast, TRRC would transport coal in conjunction with BNSF, so it would not have the same need to offer lower rates to capture traffic."

²⁶ Id. at 4.

²⁷ Id. at 19

²⁸ Id. at 20

²⁹ Id. at 21

The Decision clearly points out that BNSF is the prime beneficiary of the Decision, and that indeed, the interests of TRRC are indistinguishable from those of BNSF. BNSF should have been a party to the Application for the Tongue River I-III proposal, and failing that, the public should have had an adequate opportunity to comment on the now seemingly precise nature of BNSF's role as the Board has defined in Tongue III

In conclusion, by failing to properly consider BNSF's role early in the process, the Board has violated the Council on Environmental Quality regulations at 40 C.F.R. § 1501, NEPA and Agency Planning, by improperly identifying the scope of issues to be addressed by the SEIS. In particular, the Board's error has defeated one of the key functions of scoping, to identify the public involvement/public hearing procedures

5. The Decision ignores the requirements of Executive Order 12898.

Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,"³⁰ provides that "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations." The Executive Order makes clear that its provisions apply fully to programs involving Native Americans. In the memorandum to heads of departments and agencies that accompanied Executive Order 12898, the President specifically recognized the importance of procedures under NEPA for identifying and addressing environmental justice concerns. The memorandum states that "each Federal agency shall analyze the environmental effects, including human health, economic and social effects, of Federal actions, including effects on minority communities and low-income communities, when such analysis is required by [NEPA]." Final SEIS Master Response 14, "Effect of the Project on the Battle Butte Battlefield," makes the conclusion that:

The alignment approved in Tongue River II would pass through the center of the Battle Butte Battlefield. The refinements proposed as part of Tongue River III for this portion of the

³⁰ 59 Fed. Reg. 7629 (1994)

Tongue River II alignment would place the rail line approximately 1,000 feet farther to the south. This proposed realignment would move the rail line farther away from the military encampment and military positions located near the river, and would place the rail line in areas of the site that were associated with Indian positions.³¹

Master Response 14 also notes that “. . . the proposed Western Alignment would adversely affect the Cheyenne grave site.”³²

The Decision and the Final SEIS that supports it summarily dismiss the many concerns expressed by the Northern Cheyenne Tribe and their conclusion that the STB’s contacts “in no way constitute[d] formal consultation” with the tribe,³³ further hard evidence of the STB’s failure to adhere to the requirements of Executive Order 12898.

6. The Final SEIS on which the Decision is based relies on outdated environmental data.

The bulk of the railroad is covered by the EIS for Tongue River I, which was completed in 1983 and relies on research going back to the 1970’s. Most of the current Final SEIS for Tongue River III relies on the data in the TRR II EIS was published in 1992, with most of the data coming from the 1980’s. There have been numerous changes throughout the entire Tongue River Valley over the past 30 years, and the Surface Transportation Board errs in assuming that the data are still valid.

For example, in Master Response 1 of the Final SEIS, the SEA states that “the 1997 fixed-wing aerial surveys are adequate to provide information about the existing physical conditions (topography, habitat, hydrology, etc.) of the proposed Western Alignment and accurately update information previously collected for Tongue River I and Tongue River II because the physical environment of the area at issue here is substantially the same. The report does not explain how data collected in 1997 update a report issued in 2006, nor does it provide any scientific data to support the conclusion that the physical environment, nearly a decade after the studies in question, is “substantially the same.” Instead of taking a “hard look” at the environmental

³¹ Final SEIS, p 2-19

³² Id

³³ Id. at 3-111 to 3-313

consequences of Tongue River III, the Final SEIS merely offers unsubstantiated conclusions that old data is still relevant.

The assumption that a river valley ecosystem has not changed substantially in ten years, especially given the drought conditions which existed during much of that time, is simply scientifically unsupportable. Much of Montana, including the area directly impacted by the project, has suffered below normal precipitation for much of the past decade,³⁴ and the effects of these conditions have been widely reported, including below-normal water levels in rivers and reservoirs, reduced snowpack, and increased loss of topsoil.³⁵ The Tongue River Railroad must be considered in a single EIS which takes into account the current conditions and future projections of temperature and precipitation, not outdated and irrelevant data.

The Board states that “where appropriate, the Draft SEIS updated the environmental analysis of Tongue River I and Tongue River II to reflect changed circumstances and to assist the cooperating agencies³⁶ and “. . . we have thoroughly reviewed the SEIS, as well as the EISs prepared in Tongue River I and Tongue River II to the extent they remain relevant.”³⁷ The Board and the SEA should not cherry-pick findings from obsolete EISs to support the Decision; they should conduct a new EIS which covers the entire TRRC proposal and bring the necessary data and analysis up to date

CONCLUSION

The Petitioners respectfully request the Board grant this Petition for Reconsideration of their Decision in STB Finance Docket No. 30186 (Sub-No. 3) in order to correct the several material errors in the Board’s decision.

³⁴ See, e.g., Montana Natural Resource Information System, 8-year and 5-year Historical Deficit Maps of Montana Precipitation Departure.

³⁵ See, e.g., Michael Jamison, *Drought grips Montana*, The Missoulian, Mar 13, 2005, *Montana’s drought has hint of Dust Bowl days*, USA Today, Feb 27, 2002.

³⁶ Decision at 10

³⁷ Id. at 25

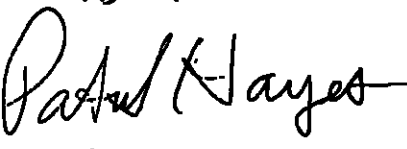
Respectfully Submitted,


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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 10.26.07
(date)

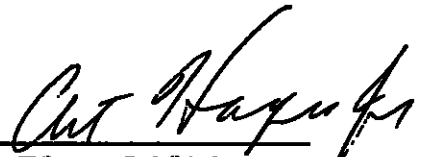

(Signature) PRESIDENT
THE BROWN CATTLE CO.

Certificate of Service

I, ART HAYES JR, hereby certify that on 10 26 07, I served copies of the Petition for Reconsideration of 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 10 26 07

SIGNATURE


PRESIDENT
THE BROWN CATTLE CO.