



SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Environmental Analysis

December 9, 2011

Re: Finance Docket No. 30186 (Sub-No. 1), Tongue River Railroad Company—
Construction and Operation—of a Line of Railroad in Custer, Rosebud, and
Powder River Counties, Montana

Dear Section 106 Consulting Party:

I am writing to provide you with some information on the next step in the Surface Transportation Board's consultation process under Section 106 of the National Historic Preservation Act (NHPA). As you know, we held a conference call on November 17, 2011 to solicit your views on moving forward with consultation on Tongue River I, the construction and operation of an 89-mile rail line in Montana from Miles City to the Otter Creek and Montco coal mines south of Ashland. The Board's predecessor agency, the Interstate Commerce Commission, approved Tongue River I in 1986.

What we heard during the conference call was that some consulting parties, including tribes, would like to move forward with the Section 106 process for Tongue River I. We also heard several parties raise concerns related to the environmental review conducted under the National Environmental Policy Act (NEPA). Many comments were made asking the Board to prepare a new Environmental Impact Statement (EIS) under NEPA for Tongue River I.

The question of whether the existing EIS is stale and should be done over again is pending before the 9th Circuit Court of Appeals. The court held oral argument in the case on July 11, 2011, but has not yet issued a decision. There is no set time by which the court must issue a decision. Moreover, NEPA and NHPA are separate statutes with separate processes. The process under one of these statutes should not dictate the process under the other. See 36 C.F.R. 800.2(a)(4), 36 C.F.R. 800.3, and 36 C.F.R. 800.8(a)(1). I feel strongly that we should move forward with the Section 106 consultation process now and not wait until the court issues its decision, which could take months, or even years. I have met with staff from the Advisory Council on Historic Preservation and they are aware of my interest in moving forward with Section 106 consultation for Tongue River I.

During the upcoming consultation meeting, and in any subsequent meetings and phone calls, we will be adhering closely to the four-step consultation process mandated by the ACHP regulations governing the Section 106 process set forth at 36 C.F.R. 800 Subpart B: (1) Initiating the Section 106 process, (2) Identifying historic properties, (3) Assessing adverse effects, and (4) Resolving adverse effects. As part of the first step in the Section 106 process, we have established the undertaking and identified appropriate SHPO/THPOs, tribes, and other consulting parties interested in the undertaking. At the January meeting, we will build on our earlier efforts to complete Step 1 by seeking your assistance in identifying other consulting parties that should be included. We will also be providing an overview of Tongue River I so that you are fully informed about the extent and nature of the undertaking.

The agenda for our upcoming meeting on January 25-26, 2012, in Rapid City, SD, will focus on the second step of the consultation process—that is, determining the scope of efforts, identifying historic properties, and evaluating historic significance. We will not be discussing NEPA issues. If your only interest is to discuss NEPA concerns (staleness of the EIS, need for a new EIS, etc.), I ask that you notify us in writing that you wish to have your participation in the Section 106 process put on hold until the 9th Circuit Court issues its decision in the pending court case. I have enclosed a form to this letter for your convenience to assist you in notifying us if you would like to suspend your consultation. Please understand that we will be moving the Section 106 consultation process forward through the requisite four steps, with or without you.

We will shortly be sending out information on the details of the Section 106 consultation meeting on January 25-26, 2012, in Rapid City, including a detailed agenda that will allow us to consider your views on step 2 of the Section 106 process. In the meantime, if you wish to suspend your participation in the consultation process until the court issues its decision, please complete the attached form and mail or email it to Ms. Catherine Glidden at the address below.

Sincerely,

A handwritten signature in black ink, appearing to read "Victoria Rutson". The signature is fluid and cursive, with the first name "Victoria" and last name "Rutson" clearly distinguishable.

Victoria Rutson