



SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Environmental Analysis

January 28, 2015

Dawn Colton
 Community Services and Planning
 17 South 8th Street
 Miles City, MT 59301

Re: Docket No. FD 30186, Tongue River Railroad Company, Inc.—Rail Construction and Operation—in Custer, Powder River and Rosebud Counties, Mont.; **Request for Information Regarding 4(f) Applicability for the Spotted Eagle Recreation Area, Measures to Minimize Harm, and *de minimis* Findings**

Dear Ms. Colton:

The purpose of this letter is to request your input as the official with jurisdiction over the property identified below regarding the following three issues: (1) the applicability of Section 4(f) of the U.S. Department of Transportation Act of 1966 to the recreation property that could be affected by the proposed Tongue River Railroad; (2) whether there are any other properties under the jurisdiction of Miles City that would qualify as Section 4(f) properties and would be affected by any of the alternative rail alignments for the proposed new rail line; and (3) whether a finding of *de minimis* impacts is appropriate. To assist your review, we have attached two maps showing the alternative rail alignments.

Section 4(f) Background

As you are aware, the Surface Transportation Board's (Board) Office of Environmental Analysis (OEA) is in the process of developing a Draft Environmental Impact Statement (EIS) for the proposed Tongue River Railroad. OEA anticipates that the Draft EIS will include a determination that four of the alternatives analyzed for the proposed Tongue River Railroad could have an effect on one recreational property managed by Miles City that is eligible for protection under Section 4(f).

Although the Board is administratively affiliated with the U.S. Department of Transportation, the Board is an independent decision-making body whose governing statute is the Interstate Commerce Act (as amended by the ICC Termination Act). As such, Section 4(f) does not apply to Board actions. But if the Board were to approve an alternative that crosses Interstate 94, an underpass would need to be built, which would require approval from the Federal Highway Administration (FHWA) in coordination with the Montana Department of Transportation. This FHWA approval is subject to Section 4(f) and therefore, FHWA cannot

approve the use of land from publicly owned parks, recreation areas, wildlife and waterfowl refuges, or public and private historical sites unless there is no feasible and prudent alternative, and the project includes all possible planning to minimize harm to the Section 4(f) property.

Section 6009 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (49 U.S.C. 303), also known as SAFETEA-LU, amended Section 4(f) statutory requirements to include an exception for uses of protected land that would have a *de minimis* impact on that land. The U.S. Secretary of Transportation may make a finding of *de minimis* impact if the project “will not adversely affect the activities, features, and attributes of the park, recreation area, or wildlife or waterfowl refuge eligible for protection” under Section 4(f), and if the “Secretary has received concurrence from the officials with jurisdiction over the park, recreation area, or wildlife or waterfowl refuge.”

Eligible Section 4(f) Properties

Properties protected under Section 4(f) include “significant publicly owned public parks and recreational areas that are open to the public and significant publically owned wildlife and waterfowl refuges.” The term *significant* means that, in comparing the availability and function of the park, recreational area, or wildlife and waterfowl refuge with the park, recreation, or refuge objectives of the community or authority, the property in question plays an important role in meeting those objectives. Further, its primary purpose and function must be as a park, recreation, or refuge. Primary purpose is related to the property's primary function and how it is intended to be managed. Incidental, secondary, occasional, or dispersed activities similar to park, recreational, or refuge activities do not constitute a primary purpose in the context of Section 4(f). If the property identified below offers incidental, secondary, occasional, or dispersed park, recreational, or refuge activities, the property would not qualify for protection under Section 4(f).

OEA has identified the following Section 4(f) property that could be affected by the Tongue River Alternative, the Tongue River East Alternative, the Tongue River Road Alternative, and the Tongue River Road East Alternative for the proposed Tongue River Railroad.

- **The Spotted Eagle Recreation Area:** This 245-acre, officially designated recreational area is owned by Miles City and located southwest of Miles City between the BNSF mainline and Interstate 94. Onsite activities include fishing and swimming in Spotted Eagle Lake, archery, target shooting, picnicking, and hiking. Most of the recreational activities and features are concentrated in the 18-acre Spotted Eagle Lake and to the north and east of the lake. Interstate 94 crosses through the southeastern corner of the area, the existing BNSF railroad forms the northern border, and developed roads, parking, and other constructed features are located throughout the area. Human activity and disturbance—both audible and visual—are common characteristics of the recreational attributes of the area.

OEA’s preliminary determination is that the Spotted Eagle Recreation Area meets the criteria for protection as a Section 4(f) property. OEA, on behalf of FHWA, respectfully requests that Miles

City confirm whether the availability and function of this property plays an important role in meeting recreational objectives and verify that its primary purpose and function is as a park. Additionally, if there are any other potential Section 4(f) properties under Miles City jurisdiction that would be affected by the proposed rail line that have not been identified in this letter, please provide information on these properties and their locations.

Preliminary Section 4(f) Determination

OEA has determined that the Tongue River Alternative, the Tongue River East Alternative, the Tongue River Road Alternative, or the Tongue River Road East Alternative would cross through the western periphery of Spotted Eagle Recreation Area. During construction, there would be temporary and localized noise and visual disturbances perceptible to users of the recreational area adjacent to the construction corridor. Construction would permanently incorporate approximately 11 acres from Spotted Eagle Recreation Area into the railroad right-of-way. OEA has not identified any developed facilities or features in the area that would be incorporated in the railroad right-of-way.

The potentially affected area would constitute less than 5 percent of the total area of the property and would be located along the western periphery, away from developed recreational features and areas likely to be used by visitors. Recreational users currently experience audible and visual disturbances from vehicular traffic along roads within and adjacent to the property and the BNSF main line that forms the northern border of the property. The roads and BNSF main line result in a perceptible level of disturbance. OEA is considering mitigation measures such as requiring Tongue River Railroad to plant a tree buffer between the Spotted Eagle Recreation Area and the railroad right-of-way to reduce visual impacts and the perception of noise on users of this property. Another mitigation measure would require the Tongue River Railroad to consult with Miles City to develop means to offset potential losses of recreational use of the property.

For these reasons, OEA (on behalf of FHWA) has made the preliminary determination that the activities, features, and attributes of the Spotted Eagle Recreation Area qualifying it for protection under Section 4(f) would not be adversely affected. Therefore, OEA intends to make a *de minimis* impact finding for the Spotted Eagle Recreation Area.

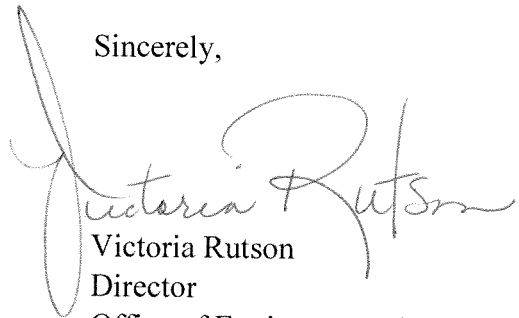
OEA (on behalf of FHWA) is requesting your written concurrence with the following statements: (1) the Spotted Eagle Recreation Area is eligible for Section 4(f) protection; (2) there are no other City-managed Section 4(f) properties potentially affected by the proposed Tongue River Railroad; and (3) the proposed Tongue River Railroad would not adversely affect the activities, features, and attributes of the property identified above and a *de minimis* impact finding is appropriate or could be reached with the development and implementation of additional mitigation measures not yet identified.

If Miles City believes that additional mitigation measures would be required to make the potential impacts on the Section 4(f) property *de minimis*, we would appreciate if you could outline such measures in your reply. Please address your reply to Mr. Kenneth Blodgett of my staff at the address below, or as an email attachment to Kenneth.Blodgett@stb.dot.gov.

Mr. Kenneth Blodgett
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001
Attention: STB Finance Docket No. 30186

If you have any questions, please do not hesitate to contact Kenneth Blodgett, OEA's Project Manager, at (202) 245-0305, or Alan Summerville of ICF International, Project Manager for OEA's third-party contracting team, at 703-934-3616. We would appreciate your reply by February 25, 2015. And thank you for your help and expertise.

Sincerely,

A handwritten signature in cursive script, appearing to read "Victoria Rutson". The signature is written in dark ink and is positioned above the printed name and title.

Victoria Rutson
Director
Office of Environmental Analysis

cc: Mr. Brian Hasselbach
Montana Division
Federal Highway Administration
585 Shepard Way, Suite 2
Helena, MT 59601