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LAW OFFICES
FRITZ R. KAHN, P.C.
1920 N STREET, NW (8TH FL.)
WASHINGTON, DC 20036
Tel.: (202) 263-4152 Fax: (202) 331-8330
e-mail: xccgc@verizon.net

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VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D. C. 20423

EX-113
Office of Proceedings
February 18, 2010
Public

Dear Ms. Brown:

This refers to STB Docket No. AB-397 (Sub-No. 7X), Tulare Valley Railroad Company—Abandonment Exemption—in Tulare County, CA, and to the Board's Decision, served August 19, 2009.

Among other things, the Board's Decision adopted the recommendation of the Section of Environmental Analysis ("SEA") and imposed a condition requiring that the Section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f, be completed and that the authorized abandonment of the Ultra-to-Ducor line of the Tulare Valley Railroad Company ("TVR") not be consummated until the Board has removed this condition.

The obligation of complying with Section 106 is that of the Board. The statute unambiguously states:

[T]he head of any Federal department or independent agency having authority to license any undertaking shall, prior to . . . the issuance of any license . . . take into account the effect of the undertaking on any district, site, building, structure, or object that is include in or eligible for inclusion in the National Register [of Historic Places].

See, Mid States Coalition for Progress, et seq. v. Surface Transportation Board, 345 F.3d 520, 552-53 (8th Cir. 2003); Berkshire Scenic Railway Museum v. Interstate Commerce Commission, 52 F.3d 378, 382 (1st Cir. 1995).

The Board's predecessor, the Interstate Commerce Commission, understood full well what was expected of it under Section 106. In its bellwether Decision in Implementation of Environmental Laws, 7 I.C.C.2d 807, 826 (1991), the agency, in

referring to Section 106, declared, "It requires the Commission to consult with the appropriate state historic preservation officer(s) ("SHPOs") (and other interested parties) to identify historic properties, determine if they will be adversely affected, and, if so, consider appropriate mitigation." In implementation of its Decision, the ICC adopted a regulation, at 49 C.F.R. 1105.8, requiring a railroad seeking certain relief, including the agency's abandonment authorization, to prepare a historic report that would include prescribed information relating to the properties that were 50 years old or older. "The purpose of the Historic Report," said subsection (a) of the regulation, "is to provide the Commission with sufficient information to conduct the consultation process required by the National Historic Preservation Act." Except for updating the reference to the agency, namely, the Board, the regulation remains in effect.

Section 101(b)(3)(E) of the National Historic Preservation Act, 16 U.S.C. 470a(b)(3)(E), directs the State Historic Preservation Officer ("SHPO") "to advise and assist, as appropriate, Federal and State agencies and local governments in carrying out their historic preservation responsibilities." The Advisory Council on Historic Preservation regulation, 36 C.F.R. 800.3(c)(3), addressing the role of the SHPO in the Section 106 process, states, "The agency should consult with the SHPO/THPO in a manner appropriate to the agency planning process for the undertaking and to the nature of the undertaking and its effects on historic properties."

The SHPO is expected to respond promptly to the agency's request that he or she review the agency's Section 106 findings. 36 C.F.R. 800.3 (c)(4), in part, provides, "If the SHPO/THPO fails to respond within 30 days of receipt of a request for review of a finding or determination, the agency official may either proceed to the next step in the process based on the findings or determination or consult with the Council in lieu of the SHPO/THPO." The ICC in its Decision in Implementation of Environmental Laws, supra, 7 I.C.C.2d at 827, underscored the need for a timely response by the SHPO, stating:

To expedite the historic review process, we will continue to set reasonable time limits for our consultation with SHPOs and the Advisory Council in individual cases. We also will terminate (or move to the next stage of) the process where a SHPO or the Advisory Council declines to participate in a timely manner or "sleeps on its rights."

Somewhere along the line, the Board determined that it was the SHPO who was to initiate the Section 106 process. Tulare Valley Railroad Company ("TVR"), pursuant to 49 C.F.R. 1105.7, had sought to consult with the California SHPO in the preparation of its Environmental and Historic Report, by letters dated May 7 and 22, 2009, and, pursuant to 49 C.F.R. 1105.8, served a copy of its Environmental and Historic Report on the California SHPO, by letter dated June 9, 2009, twenty days in advance of TVR's filing, on July 1, 2009, of its Notice of Exempt Abandonment. The Notice of Exempt Abandonment included the response of the California SHPO, e-mailed to TVR's representative on June 8, 2009, with a copy to SEA, in which, among other things, the California SHPO said:

In the case of the TVR abandonment in Tulare County, it does not appear that the Section 106 process has been initiated. Unfortunately, the letters from your offices do not qualify as initiating the Section 106 review process because neither your firm nor TVR are federal agencies. The Section 106 initiation request should come from the STB.

The Board obviously disagreed with the California SHPO, because the first of the conditions of its Decision, served August 19, 2009, called for the initiation of the Section 106 process through further consultation by TVR with the California SHPO.

It was for this reason that TVR, on September 8, 2009, petitioned the Board for reconsideration of its August 19, 2009, Decision, contending that calling for further consultation by TVR with the California SHPO to initiate the Section 106 process constituted material error. The Board, by its Decision, served December 1, 2009, denied TVR's Petition for Reconsideration, erroneously stating, first, that the Section 106 process was ongoing and, second, that TVR had failed to furnish the California SHPO with information which he had requested of TVR. The truth of the matter is that the California SHPO had awaited - as he continues to await - the Board's initiation of the Section 106 process and that the information he had sought - and has yet to receive - he expected to be furnished by the Board and not by TVR or its representative.

The stalemate continues. The Board has not taken the first step to initiate the Section 106 process, and it has failed to do so in contravention of the provisions of the National Historic Preservation Act, the regulations of the Advisory Council on Historic Preservation, the precedent Decision of the Interstate Commerce Commission and the wording of the Board's regulation. And the California SHPO will not initiate the Section 106 process and accept the submissions of TVR or its representative, because the obligation to begin and advance the Section 106 process is that of the Board.

No end is in sight for the deadlock between the Board and the California SHPO, leaving TVR no alternative but to ask for a six month extension, to February 20, 2011, of the date by which TVR must file its notice of consummation of the authorized abandonment of its Ducor-to-Ultra railroad line.

Sincerely yours,


Fritz R. Kahn