

EO - 1711



RE: Replies to SHPO's Comments on Final PA

David Navecky to: Najah Duvall-Gabriel

05/13/2011 02:25 PM

"Summerville, Alan", "Charlene Vaughn", "Doug Gasek", johnson.jay,
Cc: "Judith E. Bittner", "Kusske Floyd, Kathryn", "Richard Starzak",
Vicki.Rutson

From: David Navecky/STB
To: "Najah Duvall-Gabriel" <ngabriel@achp.gov>
Cc: "Summerville, Alan" <ASummerville@icfi.com>, "Charlene Vaughn" <cvaughn@achp.gov>,
"Doug Gasek" <doug.gasek@alaska.gov>, johnson.jay@DORSEY.com, "Judith E. Bittner"
<judy.bittner@alaska.gov>, "Kusske Floyd, Kathryn" <kusske.floyd.kathryn@dorsey.com>,

Folks -

I agree with the SHPO's and ACHP's suggestion that other interested parties must be consulted throughout the MOU process. However, I have incorporated this suggestion using a different approach. I have added a new Stipulation III.A.3 that requires the Working Group to specify consultation procedures in the MOU and to consult with other interested parties throughout the MOU implementation process (see attached). I have also incorporated ACHP's suggested edit for Stipulation V.A, added a new sentence to Stipulation III.A.4 to clarify which parties must sign the MOU to execute the document, and made some minor edits to Stipulation B.1 to reflect consultations with other interested parties.

The reason I took this approach was the edit, as originally suggested by Judy, could have been interpreted to mean that the other interested parties would also be signatories to the MOU. However, this is a multi-year project, and the composition and level of active participation by of the other interested parties would likely change over time depending on the leadership of the other interested parties at the time, the portion of the proposed 35-mile rail line being evaluated, the landowners and users groups being affected, etc. This could have brought the MOU process to a grinding halt as it bogged down in a logistical and administrative details associated with keeping the signatories and legal status of the MOU up-to-date.

If this mark-up is acceptable to everyone, I will accept the tracked changes, and will redistribute the Final PA for signature. Please let me know by close-of-business, **Wednesday, May 18, 2011**, if this mark-up is acceptable.

Thanks,

Dave Navecky
202-245-0294



5_13_11_Working_Final.doc

"Najah Duvall-Gabriel"

Per a discussion with Charlene, I am advisi...

05/10/2011 01:40:22 PM

From: "Najah Duvall-Gabriel" <ngabriel@achp.gov>
To: "Judith E. Bittner" <judy.bittner@alaska.gov>, "Dave Navecky" <david.navecky@stb.dot.gov>
Cc: "Charlene Vaughn" <cvaughn@achp.gov>, "Doug Gasek" <doug.gasek@alaska.gov>,

"Summerville, Alan" <ASummerville@icfi.com>, "Richard Starzak" <rstarzak@icfi.com>,
<Vicki.Rutson@stb.dot.gov>, "Kusske Floyd, Kathryn" <kusske.floyd.kathryn@dorsey.com>,
<johnson.jay@DORSEY.com>

Date: 05/10/2011 01:40 PM
Subject: RE: Replies to SHPO's Comments on Final PA

Per a discussion with Charlene, I am advising STB that we agree with the SHPO's edits that clarify the expectation with regard to the inclusion of interested parties in the Working Group process. Also, as discussed with STB, we made some minor changes to Stipulation V by including KTC and MSB as parties with which ARRC will hold the Iditarod Dog Sledding Historic District Workshop to clarify the involvement of the Working Group parties in the workshop. (please see attached) We have no further comments about the final PA.

Thanks,

Najah Duvall-Gabriel
Historic Preservation Specialist
Advisory Council on Historic Preservation
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ngabriel@achp.gov

-----Original Message-----

From: Bittner, Judith E (DNR) [mailto:judy.bittner@alaska.gov]
Sent: Monday, May 09, 2011 3:52 PM
To: Dave Navecky; Charlene Vaughn
Cc: Najah Duvall-Gabriel; Doug Gasek; Summerville, Alan; Richard Starzak; Vicki.Rutson@stb.dot.gov; Kusske Floyd, Kathryn; johnson.jay@DORSEY.com
Subject: RE: Replies to SHPO's Comments on Final PA

WE have one small change to broaden participation in the Working Group. The Working Group has broad responsibilities and should allow for the participation of interested parties who represent those broader interests and provide different areas of expertise needed for the plans, curation, survey, evaluation and oral history. The APE includes a mix of landowners and historic property types. Section 106 in all about consultation with interested parties. If this PA is to the use a Working Group concept, then the consultation concept needs to be part of the Working Group process.

Attached is a marked up copy with SHPO comments.

Judith Bittner
Alaska State Historic Preservation Officer

-----Original Message-----

From: David.Navecky@stb.dot.gov [mailto:David.Navecky@stb.dot.gov]
Sent: Monday, May 09, 2011 10:55 AM
To: cvaughn@achp.gov; Bittner, Judith E (DNR)
Cc: ngabriel@achp.gov; Gasek, Douglas F (DNR); Summerville, Alan; Starzak, Richard; Vicki.Rutson@stb.dot.gov; Kusske Floyd, Kathryn; johnson.jay@DORSEY.com
Subject: Replies to SHPO's Comments on Final PA

Folks -

I'm forwarding a reply by the Mat-Su Borough (MSB) and the Alaska Railroad to SHPO's May 2, 2011 comments on the Signature Version of the Final PA (see email text below and attached Word document).

I believe the MSB's and railroad's reply represents a reasonable response to the SHPO's comments and I propose that we move forward with these changes as the revised Final PA.

Despite the STB, MSB and railroad having already signed the April 15, 2011 Final PA, I will need to recirculate the document again for signature. My intent is to accept the attached version of the Final PA and then resend the document to the Signatories and Invited signatories for signature.

Please let me know by close-of-business Wednesday, May 11, 2011 if you concur that the attached Final PA can be circulated for signature, or if you have specific, substantive objections to the document.

Thanks,

Dave Navecky
202-245-0294

----- Forwarded by David Navecky/STB on 05/09/2011 10:01 AM -----

From: <johnson.jay@DORSEY.com>
To: <David.Navecky@stb.dot.gov>
Cc: <ASummerville@icfi.com>, <RStarzak@icfi.com>, <kusske.floyd.kathryn@DORSEY.com>
Date: 05/06/2011 04:05 PM
Subject: RE: Port MacKenzie Final PA - More SHPO Comments

Dave,

ARRC has reviewed the most recent changes to the Programmatic Agreement proposed by SHPO, and is writing this email to express its concerns.

In general, ARRC is concerned that adding new members to the Working Group created in Stipulation III of the PA conflicts with the primary purpose of forming a smaller group to address various issues that may arise in connection with specific stipulations. At the same time, ARRC recognizes SHPO's concern over adding the Iditarod Historic Dog Sledding District to the Working Group's responsibilities. But instead of expanding the Working Group, as SHPO suggests, ARRC believes that the best solution is to simply remove Stipulation V relating to the Iditarod Historic Dog Sledding District from the list of issues that will be addressed in the Working Group's Memorandum of Understanding. That change fully addresses SHPO's stated concern without altering the composition of the Working Group. (HTK and WDMA will still be able to participate in the Workshop conducted by ARRC pursuant to Stipulation V.) With the Iditarod Historic Dog Sledding Group removed from the Working Group's purview, there should be no need for additional changes to Stipulation III.D.

With regard to the other change proposed by SHPO, ARRC does not agree with the deletion of the word "contributing" on page 9 of the PA. ARRC considers "contributing element" to be a commonly used term of art with an accepted meaning. In ARRC's view, using the term "element" by itself is confusing.

A redline showing ARRC's proposed change to Stipulation III.D is

attached.

We are happy to discuss these issues in more detail over the phone at your convenience.

Regards,

Jay

-----Original Message-----

From: David.Navecky@stb.dot.gov [mailto:David.Navecky@stb.dot.gov]

Sent: Wednesday, May 04, 2011 10:16 AM

To: Kusske Floyd, Kathryn; Johnson, Jay

Cc: Summerville, Alan; Starzak, Richard

Subject: Port MacKenzie Final PA - More SHPO Comments

Kathryn and Jay -

The SHPO has submitted more comments on the Final PA, dated April 15, 2011, that had been sent out for signature. I have attached the two pages that contain edits. Let me know if the edits are acceptable to ARRC and MSB.

I've made a similar inquiry with the ACHP.

Thanks,

Dave

(See attached file: SHPO Edits on Final PA.pdf) (See attached file: Final PA 04-15-2011 (2).doc)
[attachment "Final PA 04-15-2011 (2).rtf" deleted by David Navecky/STB]

2. ARRC shall incorporate STB and SHPO comments as appropriate, and submit the final APE to all Signatories, Invited Signatories, and interested Concurring Parties for their reference and records.
3. If the licensing or permitting processes result in any changes to the final APE, ARRC shall submit those changes to STB and SHPO within 30 days of ARRC's receipt of such license or permit. The STB and SHPO shall have a 15-day review and comment period. ARRC shall incorporate STB and SHPO comments as appropriate, and submit the changes to all Signatories, Invited Signatories, and interested Concurring Parties for their reference and records.
4. The location of sensitive archaeological sites shall not be shown on a map of the final APE because of its broad distribution to non-Tribal entities.

III. Tribal Coordination

The STB initiated consultation with the Tribes listed in Attachment A.2 of this Agreement regarding the Section 106 process, in conjunction with the *Government-to-Government Consultation and Coordination Plan* prepared for this Undertaking on June 18, 2009, and preparation of the EIS. Specific consultation will continue as the terms of this Agreement are carried out, as follows:

A. Development of a Working Group

1. A Working Group, consisting of representatives of ARRC, MSB and KTC, ~~and other interested consulting parties~~ in consultation with STB, shall develop a detailed draft Memorandum of Understanding (MOU) not later than 45 days after an alternative has been licensed by STB.
2. The draft MOU will be developed to facilitate or carry out Stipulations II.D (Delineation of the APE), III.C and IX (Training), III.C (Future Consultation), VI (Curation), and VII (Annual Reports), and to support Stipulations IV (Evaluation and Treatment of Historic Properties) ~~and V (Treatment of Identified Historic Dog Sledding District).~~
- 2.3. The MOU shall outline procedures for identifying and consulting other interested parties beyond those already identified as concurring parties or contacted during the development of this PA. The Working Group shall consult with and engage other interested parties while carrying out Stipulations II.D (Delineation of the APE), III.C and IX (Training), III.C (Future Consultation), VI (Curation), and VII (Annual Reports), and to support Stipulation IV (Evaluation and Treatment of Historic Properties). The Annual Reports shall identify the other interested parties consulted during ~~in~~ that reporting period and summarize the outcome of those consultations.
- 3.4. Prior to execution, ARRC shall submit the draft MOU to STB and SHPO, who shall have a 15-day review and comment period. The ARRC shall

incorporate comments, as appropriate, and submit the executed MOU to STB and SHPO for their reference and records. Following STB and SHPO review and comment, the MOU shall become effective upon execution by the ARRC, MSB and KTC.

- 4.5. Nothing in this Agreement shall prohibit the Working Group from beginning to work on non-mitigation activities prior to receiving comments on the draft MOU from the STB and SHPO.

B. Objectives and Tasks of Working Group

1. The objectives of the Working Group are to facilitate and continue the positive working relationship between ARRC, MSB and KTC; to facilitate communication ~~between-among~~ Working Group members and consultation ~~between-among~~ Working Group members, Signatories, and Concurring Parties ~~and other interested parties~~; and to facilitate avoidance, minimization, and mitigation of historic properties that could be affected by the Undertaking.
2. The MOU tasks shall include the following:
 - a. review of final construction plans to identify the proposed final APE for the alternative licensed by the STB;
 - b. identify roles and responsibilities of the Working Group;
 - c. develop review and consultation procedures;
 - d. establish level of effort for identification, evaluation, and mitigation efforts such as conducting additional surveys in moderate to high probability areas not previously surveyed; oral history interviews; and at least one workshop with the Tribes to assess potential effects on historic properties, including effects on current harvest areas such as the ceremonial moose hunt area.
3. ARRC shall document the results of work conducted under the MOU in the Annual Reports (see Stipulation VII.A), as appropriate.
4. Within 30 days of investigating any of the 74 previously identified sites or any newly surveyed sites (See Attachment C) located in the final APE, the Working Group will submit any information it develops about any of these sites to the SHPO and STB for their review, comment, and consideration under Stipulation IV.

5. All activities conducted and work products prepared pursuant to the MOU shall be carried out by the ARRC and are subject to the oversight, review, and approval by the Signatories to this Agreement, as the Signatories deem appropriate. Specific procedures shall be addressed as necessary in the MOU.

C. Training

1. The KTC, as part of the Working Group, shall participate in conducting training to be given to ARRC's construction and other project-related personnel.

D. Future Consultation

1. The KTC, NVE, CIRI, Knikatu, Inc. and other Tribes in Attachment A.2 and any other concurring parties shall receive for their review and comment, the Annual Report(s) described in Stipulation VII.A for historic properties that would be affected by the alternative licensed by the STB.
2. KTC has volunteered to serve as a point of contact for all Tribes under Attachment A.2. If any Tribes in Attachment A.2 object to KTC being the point of contact, they shall notify STB in writing, and all future consultation will be carried out directly with that Tribe.
3. STB consultation with the Tribes will remain open throughout the duration of the Project and as the terms of this Agreement are carried out. If further research or analysis results in the identification of other Tribes with interests or cultural ties to the Project, they will also be added to the list of consulting Tribes. Consultation methods will vary depending on the requests from the Tribes. Consultation types may vary from letters, phone calls, on-site meetings and various levels of documentation for review, to jointly developing site specific treatment plans and/or agreement documents. Consultation may also vary according to the type of resource involved, the periods when the various tribes are known to have occupied the project vicinity, and which alternative is ultimately licensed by the STB.

E. Government-to-Government Actions

The STB plans the following Government to Government actions to facilitate carrying out the terms of this Agreement:

1. The STB shall send all Tribes this Agreement and their ideas and preferences will be solicited concerning all parts of this Agreement that are Tribal-related. The Tribes will be able to send comments via mail, Email, or phone.

2. As appropriate, the STB shall solicit Tribal review of all identification efforts, assessments of effect, and treatment plans via mail, Email, or phone in accordance with Stipulation IV of this Agreement and the list of contacts identified in Attachment A.2 of this Agreement.
3. The STB shall notify the Tribes of the Annual Reports being prepared in accordance with Stipulation VII of this Agreement.

IV. Evaluation and Treatment of Potential Historic Properties

Evaluation efforts for potential historic properties affected by the alternative licensed by the STB will be required as follows:

- A. The STB will review the efforts of the Working Group in Stipulation III.B.4. The STB shall make determinations of NRHP eligibility and effects, including boundary delineations of potential historic properties within the final APE of the alternative licensed by the STB and submit them to SHPO, who shall have a 30-day period to review and concur. The STB shall incorporate SHPO's comments as appropriate, and submit its findings to Signatories, Invited Signatories, and interested Concurring Parties, who shall have a 15-day review and comment period. The STB shall incorporate comments, as appropriate.
- B. If a potential historic property is identified in the final APE and the STB and SHPO agree it is eligible for the NRHP, the STB will consult with Signatories, Invited Signatories, and Concurring Parties to seek ways to avoid, minimize or mitigate adverse effects. If adverse effects to a historic property cannot be avoided, measures will be identified to minimize or mitigate effects to that historic property. The mitigation measures may include: data recovery, development of local historic preservation plans and ordinances, developing educational materials/curriculum and web sites, conducting interviews with tribal elders or other knowledgeable individuals, purchasing properties containing historic properties, or developing historic property management plans as a supplement to, or even in lieu of, standard mitigation.
- C. If a potential historic property is identified in the APE and the STB and SHPO do not agree it is eligible for the NRHP, or if the ACHP so requests, the STB shall follow the procedures set forth in 36 C.F.R. § 800.4.(c)(2).

V. Treatment of Iditarod Dog Sledding Historic District

A. Workshop

1. Within 60 days after the STB licenses an alternative, ARRC, in consultation with the STB and SHPO, will hold a workshop with HTK, WDMA, KTC, MSB and other parties interested in the Iditarod Dog Sledding Historic District, to delineate the boundaries of contributing features within the APE of the alternative licensed by the STB; discuss which are still used for their historic function; and determine how that