

EO-1745



Port MacKenzie Rail Extension Project: 15-day Review of Draft MOU

David Navecky to: Judy Bittner

08/15/2011 02:20 PM

Cc: doug.gasek, "Kusske Floyd, Kathryn"

From: David Navecky/STB
To: "Judy Bittner" <judy.bittner@alaska.gov>
Cc: doug.gasek@alaska.gov, "Kusske Floyd, Kathryn" <kusske.floyd.kathryn@dorsey.com>

Judy -

The Programmatic Agreement (Agreement) for the Port MacKenzie Rail Extension Project was executed on June 15, 2011. The Agreement outlines the creation of a Working Group, consisting of the Alaska Railroad Corporation (ARRC), Matanuska-Susitna Borough (MSB), and the Knik Tribal Council (KTC). The Working Group will be responsible for completing certain tasks under the Agreement and reporting back to the STB and your office, the State Historic Preservation Office (SHPO).

The roles and responsibilities of the Working group are to be defined in a Memorandum of Understanding (MOU). The Working Group has prepared a draft MOU, and today I am providing you the draft MOU for a 15-day review and comment period, as specified in Stipulation III.A.4 of the Agreement.

Accordingly, please review the attached draft MOU and provide any written comments to me by Wednesday, August 31, 2011.

Please let me know if you have any questions.

Thanks,

Dave Navecky
Office of Environmental Analysis
202-245-0294



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Port MacKenzie Rail Extension Project
MEMORANDUM OF UNDERSTANDING

Implementing the Section 106 Programmatic Agreement
Regarding the Alaska Railroad Corporation Construction and
Operation of a Rail Line Extension to Port MacKenzie, Alaska

WHEREAS, the purpose of this Memorandum of Understanding (MOU) is to facilitate or carry out Stipulations II.D (Delineation of the APE), III.C and IX (Training), III.D (Future Consultation), VI (Curation), and VII (Annual Reports), and to support Stipulation IV (Evaluation and Treatment of Historic Properties) of the Port MacKenzie Rail Extension Project (Undertaking) Programmatic Agreement (Agreement), executed June 15, 2011, pursuant to Section 106 of the National Historic Preservation Act of 1966 as amended (16 USC 470; herein NHPA), and its implementing regulations (36 CFR Part 800), and to establish the respective responsibilities and commitments of the parties for such implementation; and

WHEREAS, this MOU is entered into under the authority of the NHPA, as amended, 16 USC 470 *et. seq* and the National Environmental Policy Act of 1969, as amended, 42 USC 4321 *et. Seq* (NEPA); and

WHEREAS, the Surface Transportation Board (STB) is the Lead Federal Agency responsible for compliance with Section 106 of NHPA and its implementing regulations (36 CFR 800); and

WHEREAS, the State Historic Preservation Officer (SHPO) is a Signatory to the Agreement pursuant to 36 CFR 800.6(c)(1); and

WHEREAS, the Alaska Railroad Corporation (ARRC), the Applicant for the Undertaking, is an Invited Signatory to the Agreement pursuant to 36 CFR 800.6(c)(2); and,

WHEREAS, the Knik Tribal Council (KTC), a Federally Recognized Tribe recognized as the traditional people residing in the area being crossed by the Undertaking and shall act as a point of contact for Tribal entities identified in Attachment A.2 (Tribes and Alaska Native Organization Contact List) of the Agreement, is an Invited Signatory to the Agreement pursuant to 36 CFR 800.6(c)(2); and

WHEREAS, the Matanuska-Susitna Borough (MSB), the certified local government under the NHPA (16 USC 470a(c)) in the area being crossed by the Undertaking, is an Invited Signatory to the Agreement pursuant to 36 CFR 800.6(c)(2); and

WHEREAS, MSB, ARRC, and KTC, in consultation with the STB and SHPO have formed a Working Group, per Stipulation III.A of the Agreement, for implementation of responsibilities under the Agreement and are working together to continue a positive and productive partnership for this Undertaking; and,

WHEREAS, all activities and work products prepared pursuant to the MOU shall be carried out by ARRC and are subject to the oversight, review, and approval of Signatories to the Agreement as they deem appropriate; and,

NOW, THEREFORE, ARRC, MSB, and KTC hereby promise and agree by and between each other as follows:

1. PURPOSE

The purpose of this MOU is to describe and reinforce the Working Group's objectives by identifying roles and responsibilities stipulated in the Agreement; developing a summary of tasks and deliverables for completing Agreement responsibilities; developing review and consultation procedures; and establishing level of effort for identification, evaluation, and mitigation efforts under the Agreement.

2. OBJECTIVES

The objectives of the Working Group are to facilitate avoidance, minimization, and mitigation of historic properties that could be affected by the Undertaking; facilitate and continue the positive working relationship between ARRC, MSB and KTC; and promote consultation between the Working Group members, Signatories, and Concurring Parties and other interested parties to the Agreement.

3. ROLES AND RESPONSIBILITIES

In addition to all other promises and agreements in this MOU, the specific duties and responsibilities of the Working Group shall be as follows:

- (A) Consult and collaborate with Signatories and Concurring Parties throughout the five (5) year period of the Agreement
- (B) Actively participate and meet as needed to address the needs and objectives of the Agreement and this MOU
- (C) Carry out the tasks outlined in the Agreement and this MOU (see Sections 4 through 6 for Scopes of Work for these tasks), in consultation with STB, SHPO, and interested Concurring Parties, including:
 - (1) Delineate the proposed final Area of Potential Effect (APE) for the Undertaking (Section 4);
 - (2) Develop a plan for addressing additional identification and evaluation efforts as needed (Section 5);
 - (3) Collaborate on investigations conducted to identify potential historic properties in the APE (Section 5);
 - (4) Compile and submit to STB and SHPO information regarding cultural resources identified in the APE (Section 5);

- (5) Develop a *Curation Policy and Agreement* with selected facility for materials collected during identification and evaluation activities covered by the Agreement (Section 6);
- (D) Participate on the following tasks in the Agreement that are assigned to ARRC including:
 - (1) Consult on the Iditarod Dog Sledding Historic District (IDSHD) Workshop and provide input on potential design changes, modifications, and/or refinements of the Undertaking to avoid, mitigate, or minimize adverse effects on the IDSHD;
 - (2) Consult on and participate in the development of *Annual Training Curriculum* and carrying out annual training;
 - (3) Consult on treatment of cultural resource sites, artifacts, human remains, sacred objects, and/or objects of cultural patrimony discovered during construction;
 - (4) Consult on and participate in documenting the results of work conducted under the Agreement and MOU in the *Annual Reports* for this Undertaking;

See Attachment A of this MOU for a summary of Working Group and ARRC tasks identified in the Agreement.

4. DELINEATION OF THE PROPOSED FINAL APE - SCOPE OF WORK

(A) Purpose

- (1) The STB, in consultation with the SHPO, established an APE for the purposes of previous Section 106 and NEPA analysis.
- (2) The APE shall be revised to reflect ARRC's final project design for the licensed alignment.
- (3) Delineation of the APE shall guide identification and evaluation efforts and facilitate efforts to avoid, minimize, or mitigate effects on historic properties.

(B) Specific Scope of Work

- (1) The Working Group shall refine the APE, by segment, based on the definition provided in Stipulation II.C (Applicability of this Agreement and Area of Potential Effects) of the Agreement and ARRC's final project design.
- (2) The Working Group shall not show the location of sensitive archaeological sites on APE map(s).

(C) Deliverables/Reporting

- (1) APE Map(s) to the STB, SHPO, and other interested Concurring Parties (draft and final)
- (2) Updated APE map(s) to the STB, SHPO, and other interested Concurring Parties should the Undertaking be altered to include an area outside of the existing APE

(D) Consultation

- (1) Working Group shall consult with Happy Trails Kennels (HTK), Willow Dog Musers Association (WDMA), Iditarod Historic Trail Alliance (IHTA), and other interested consulting parties
- (2) ARRC shall submit the proposed final APE to STB and SHPO review, comment, and approval
- (3) ARRC shall submit final APE (as approved by STB and SHPO) to all Signatories, Invited Signatories, interested Concurring Parties, and other identified consulting parties as appropriate
- (4) The process outlined in Stipulation XI (Dispute Resolution) of the Agreement shall be followed if agreement is not reached during consultation.

(E) Management

- (1) Because project design is not complete on all segments, the APE may be subject to further refinement.
- (2) The Working Group shall regularly review the Undertaking to ensure that the APE accurately reflects project construction activities.

(F) Administrative Requirements

- (1) 36 CFR 800.4(a)(1)
- (2) 36 CFR 800.16(d)

(G) Schedule

- (1) APE to be discussed and developed during the IDSHD Workshop
- (2) STB and SHPO have a 15 day review period for the proposed APE
- (3) Final APE to be delineated prior to beginning of Phase 1 construction

5. IDENTIFICATION AND EVALUATION OF POTENTIAL HISTORIC PROPERTIES IN THE APE – SCOPE OF WORK

(A) Purpose

- (1) The STB conducted initial identification and evaluation of potential historic properties for the purposes of previous Section 106 and NEPA analysis.
- (2) Following STB's licensing of an alternative and refinement of the APE to reflect final design, additional identification and evaluation of historic properties in the APE may be needed.

(B) Specific Scope of Work

- (1) The Working Group shall review data provided by STB from the previous Section 106/NEPA analysis and identify locations within the refined APE requiring further analysis.

- (2) Additional identification and evaluation efforts could include:
 - a) revising/updating probability modeling for the APE;
 - b) completing additional surveys or monitoring in moderate to high probability areas not previously surveyed in the APE;
 - c) conducting oral history interviews; conducting a workshop with users of the IDSHD to delineate the boundaries of contributing features within the APE; and
 - d) consulting with the Tribes to assess potential effects on historic properties in the APE, including effects on current harvest areas such as the ceremonial moose hunt area.
- (3) KTC and MSB cultural resources professionals and/or cultural resources professionals retained by ARRC shall complete additional identification and evaluation efforts.
- (4) The methodology to be used for the additional surveys shall include:
 - a) conducting pedestrian surveys in moderate to high probability areas within the APE that have not yet been surveyed;
 - b) excavating shovel tests at the discretion of the cultural resource professional; and
 - c) delineating the boundaries of any potentially significant cultural resources identified during pedestrian survey and/or subsurface testing.
- (5) The cultural resource professionals shall evaluate the potential eligibility of any resources identified for the National Register of Historic Places (NRHP), and whether adverse effects to historic resources would occur.
- (6) The cultural resource professionals shall prepare a report that shall include results of additional survey and/or monitoring activities, recommendations regarding eligibility for the NRHP for potential historic properties identified in the APE, and effects to NRHP eligible properties.
- (7) The Working Group shall provide the report to STB for its use in making final determinations of NRHP eligibility and effect.
- (8) ARRC shall include efforts for/results of identification and evaluation in the annual report.
- (C) Deliverables/Reporting
 - (1) Permit applications for field investigations, as needed
 - (2) Cultural resource site reports for cultural resources identified in the APE (Agreement Stipulation III.A.4; i.e., *Results of Survey: Evaluations and Recommendations* report) as needed
 - (3) Alaska Heritage Resource Survey (AHRS) forms for significant cultural resources identified in the APE as needed
 - (4) *Inadvertent or Unanticipated Discovery* reports as needed
 - (5) *Annual Report*

(D) Consultation

- (1) Consult with STB and SHPO regarding methods and level of effort for identification and evaluation
- (2) Consult with SHPO, STB, and Concurring Parties to the Agreement as appropriate regarding results of the Phase 1 survey and preliminary recommendations on NRHP eligibility (if deemed necessary)
- (3) Provide draft *Results of Survey: Evaluations and Recommendations and Inadvertent or Unanticipated Discovery* reports (as deemed necessary) to STB and SHPO for review and comment
- (4) Provide *Results of Survey: Evaluations and Recommendations and Inadvertent or Unanticipated Discovery* reports (as deemed necessary) to Signatories, interested Concurring Parties, and other identified consulting parties as appropriate (Note: Concurring Parties and other interested parties shall receive redacted reports with sensitive archaeological site information removed)
- (5) Follow the process outlined in Stipulation XI (Dispute Resolution) of the Agreement if agreement is not reached during consultation.

(E) Management

- (1) The Working Group shall meet regularly to discuss identification and evaluation efforts.
- (2) Summaries of progress shall be submitted regularly to STB and SHPO.

(F) Administrative Requirements

- (1) 36 CFR 800.4
- (2) 36 CFR 61, Appendix A

(G) Schedule

- (1) Identification and evaluation efforts for the Phase I area shall be completed prior to the beginning of Phase 1 construction if deemed necessary

6. DEVELOPMENT OF A CURATION POLICY AND AGREEMENT – SCOPE OF WORK

(A) Purpose

- (1) To develop a *Curation Policy and Agreement* with the Working Group's selected curatorial facility that meets requirements found in 36 CFR 79 and ensure that all artifacts, faunal remains, samples, records and field notes, and related materials collected during activities covered by the Agreement and MOU are deposited in the selected curatorial facility.

(B) Specific Scope of Work

- (1) The Working Group shall identify a curatorial facility that meets requirements in 36 CFR 79

- (2) The Working Group shall identify landowners in the area(s) to be surveyed
 - (3) The Working Group shall develop a *Curation Policy and Agreement* in consultation with STB, SHPO, the selected repository, and identified landowners
- (C) Deliverables/Reporting
 - (1) *Curation Policy and Agreement*
 - (2) *Annual Report*
- (D) Consultation
 - (1) Consult with STB, SHPO, Tribes, identified landowners, and the identified curatorial facility regarding curation
 - (2) Consult with SHPO and STB regarding the draft *Curation Policy and Agreement*
 - (3) Provide the *Curation Policy and Agreement* to Signatories and Concurring Parties as appropriate
 - (4) Append the *Curation Policy and Agreement* to the Agreement
 - (5) Follow the process outlined in Stipulation XI (Dispute Resolution) of the Agreement if agreement is not reached during consultation.
- (E) Management
 - (1) ARRC shall ensure that all artifacts, faunal remains, samples, records and field notes, and related materials collected during activities covered by this Agreement are deposited in a curatorial facility that meets requirements found in 36 CFR 79
 - (2) ARRC shall ensure that collections shall be packaged in archival quality materials and in a manner appropriate to the material type consistent with 36 CFR 79
- (F) Administrative Requirements
 - (1) 36 CFR 79 (*Curation of Federally Owned and Administered Archaeological Collections*)
- (G) Schedule
 - (1) The *Curation Policy and Agreement* shall be completed prior to the beginning of Phase 1 construction
 - (2) STB and SHPO shall have a 30 day review and comment period for the draft document

7. GENERAL CONSULTATION PROCEDURES

- (A) Consulting parties may include Signatories, Invited Signatories, and Concurring Parties to the Agreement as well as other individuals and organizations with a demonstrated interest in the Undertaking and/or who have expressed interest during consultation on MOU tasks.

- (B) ARRC shall act as a point of contact for the Working Group.
- (C) KTC shall act as a point of contact for Tribal entities identified in Attachment A.2 (Tribes and Alaska Native Organization Contact List) of the Agreement. It shall be assumed, based on the Agreement, that KTC speaks in the interest of the Tribes for Section 106 activities and shall disseminate information regarding Tribal resources to other Tribes as appropriate unless the Tribe has informed STB otherwise.
- (D) Consultation may occur via email, letter, telephone, or meetings as deemed appropriate by the Working Group in consultation with STB and SHPO.
- (E) Consultation efforts, including identification of additional consulting parties and meetings or correspondence, that have occurred in coordination with tasks outlined in the Agreement and this MOU shall be documented and summarized for inclusion in the *Annual Report*.
- (F) Schedules/deadlines for review and comment on deliverables submitted to consulting parties shall be clearly stated in transmittals.
- (G) Discussion/agendas for consultation meetings may combine MOU tasks as appropriate.
- (H) Consultation on the MOU
 - (1) Working Group shall develop MOU in consultation with STB and SHPO
 - (2) ARRC shall submit MOU to STB and SHPO for 15 day review and comment
 - (3) ARRC shall incorporate STB and SHPO comments on the draft MOU as appropriate
 - (4) ARRC shall provide executed MOU to STB and SHPO for their reference and records
- (I) Procedures for identifying and consulting other interested parties beyond those identified in the Agreement or contacted during development of the Agreement (Stipulation III.A.3)
 - (1) Working Group, in consultation with Signatories and Concurring Parties to the Agreement, shall identify other parties that should be invited to participate, including interested members of the public
 - a. Consult with Signatories and Concurring Parties to determine if additional parties, not already a Concurring Party or contacted as part of Agreement development, have expressed an interest in being a consulting party for the Undertaking
 - b. Contact potential additional consulting parties identified in Section 7.I.1.a to confirm their interest in being a consulting party
 - c. Add information to the Project website regarding consultation opportunities (e.g., meetings, document review, etc.) and how to be added to the consulting party list
 - d. Provide sign-up sheets for people interested in becoming a consulting party at consultation workshops

- (2) Consulting parties, identified in consultation with Signatories and Concurring Parties to the Agreement (Section 7.I.1), shall be invited in writing by STB, or ARRC if designated by STB to do so, to participate in consultation
- (3) Other groups or individuals, not identified in consultation with Signatories and Concurring Parties to the Agreement but with a demonstrated interest in the Undertaking, may submit written requests to be a consulting party to STB

8. MONITORING, AMENDMENTS, TERMINATION, AND CONSISTENCY WITH THE AGREEMENT

- (A) **Monitoring.** All tasks carried out under the MOU are subject to the oversight, review, and approval by the Signatories to the Agreement (STB, SHPO, and the Advisory Council on Historic Preservation [ACHP]) as the Signatories deem appropriate.
- (B) **Amendments.** Any party to this MOU may request that it be amended. Amendments shall be submitted in writing to MOU parties for consideration and inclusion in the MOU. The revised MOU shall be submitted to STB and SHPO for review and comment.
- (C) **Termination.** Any party to this MOU may terminate it by providing 30 days written notice to the other parties. Parties to the MOU shall consult during this 30-day period to seek agreements on amendments or other actions that would avoid termination. ARRC shall notify STB and SHPO of consultation to avoid termination and invite them to participate. In the event that STB and SHPO approve termination of the MOU, STB shall comply with Stipulation XIII (Termination) of the Agreement.
- (D) **Consistency with the Agreement.** Wherever this MOU contradicts or is inconsistent with the Agreement, the provisions of the Agreement shall govern exclusively and such contradiction or inconsistency shall have no force or effect.

DRAFT, July 21, 2011

SIGNATORIES

ALASKA RAILROAD CORPORATION

By: _____ Date: _____
Christopher Aadnesen, President and Chief Executive Officer

KNIK TRIBAL COUNCIL

By: _____ Date: _____
Debra Call, President

MATANUSKA SUSITNA BOROUGH

By: _____ Date: _____
John Moosey, MSB Manager

ATTACHMENT A: SUMMARY OF TASKS AND DELIVERABLES

Task	Responsible Party	Contributors	Deliverables	Review/ Comment Period	Consulting Parties	Task Deadline	Associated Tasks
Develop Memorandum of Understanding (MOU) - Agreement Stipulation III A - Revisions by ARRC in consultation with Working Group - Draft and Final version to STB and SHPO	Working Group	Working Group in consultation with STB & SHPO	MOU	15 days	STB & SHPO	No later than 45 days after STB licensing of Alternative	APE, Training, Curation, Identification & Evaluation of Potential Historic Properties, Annual Report
Develop Identified Dog Sledding Historic District (IDSHD) Workshop - Agreement Stipulation V A - Draft to ARRC, STB, SHPO, Working Group - Revisions by ARRC	ARRC	ARRC in consultation with STB, SHPO, & Working Group	Agenda and Materials	15 days	STB, SHPO, Working Group	Within 60 days after STB licensing of Alternative	Workshop Summary & Implementation Plan, *Delineation of APE
Develop IDSHD Workshop Summary & Implementation Plan - Agreement Stipulation V B - Revisions by ARRC - Draft and Final version to all Signatories, Invited Signatories, & interested consulting parties	ARRC	ARRC in consultation with STB, SHPO, & Working Group	Summary and Implementation Plan	30 days	Signatories, Invited Signatories, & interested consulting parties	Within 60 days after IDSHD Workshop	IDSHD Workshop
Delineate Area of Potential Effect (APE) - Agreement Stipulation II D 1-2, II D 3 - Draft of Proposed Final APE to SHPO & STB - Revisions by ARRC - Revisions of Proposed Final APE to SHPO & STB (if needed) - Final version and revisions to all Signatories, Invited Signatories, & Interested Concurring Parties	Working Group	Working Group, HTK, WDMA, and other consulting parties interested in the IDSHD	Proposed Final APE	15 days	Signatories, Invited Signatories, & Interested Concurring Parties	No later than 60 days after STB licensing of Alternative	IDSHD Workshop
			Revised Final APE (if needed)	15 days (if needed)		Within 30 days of ARRC's receipt of license/permit altering APE (if needed)	
Develop Curation Policy and Agreement - Agreement Stipulation VI - Draft to STB and SHPO - Revisions by Working Group - Final to Signatories, Invited Signatories, & Concurring Parties	Working Group	Working Group in consultation with STB & SHPO	Curation Policy & Agreement	30 days	Draft to STB and SHPO	Prior to ground-disturbing activity	MOU, APE, Identification & Evaluation
Develop Annual Training Curriculum - Agreement Stipulation III C, IX - Draft to STB, SHPO, MSB, and Tribes - Revisions by ARRC - Final version goes in Training Binder kept by supervisory personnel	ARRC	ARRC in consultation with STB, SHPO, & Working Group	Annual Training Curriculum	30 days (no review period stipulated in Agreement)	STB, SHPO, MSB, and Tribes in Attachment A 2 of Agreement	Annually	
Identification & Evaluation of Potential Historic Properties in APE - Agreement Stipulation III B 4 - Draft to STB & SHPO - Revisions by Working Group	Working Group	Working Group	Documentation and Evaluation of Potential Historic Properties in the APE	30 days (no review period stipulated in Agreement)	STB & SHPO	Within 30 days of investigating any sites in final APE	APE
Evaluation and Treatment of Potential Historic Properties (STB) - Agreement Stipulation IV - Draft to SHPO - Revisions by STB - Final to all Signatories, Invited Signatories, & Interested Concurring Parties	STB	Working Group	Evaluation and Treatment of Potential Historic Properties in the APE	30 days	SHPO		APE, Identification & Evaluation
				15 days		Signatories, Invited Signatories, & Interested Concurring Parties	
Prepare and Review Unanticipated Discovery Reports Draft to STB & SHPO as needed	ARRC	ARRC	Inadvertent or Unanticipated Discovery Reports	5 days	STB, SHPO, Tribes, and land managing agency (as appropriate)	Within 72 hours of discovery	APE, Identification & Evaluation
Prepare Annual Report	ARRC	ARRC, Working Group, STB, SHPO	Annual Report	30 days (no review period stipulated in Agreement)	Signatories, Invited Signatories, & Interested Concurring Parties	Annually	MOU, Identification & Evaluation, Annual Training