

Tongue River Railroad Environmental Impact Statement

Docket No. FD 30186

National Historic Preservation Act, Section 106 Teleconference

November 4, 2013

DRAFT Meeting Summary

Invitees: Please see meeting agenda for list of invited parties.

Attendees:

800.2(a) Surface Transportation Board, Office of Environmental Analysis, Lead Agency Official

Ken Blodgett	Office of Environmental Analysis
Cathy Nadals	Office of Environmental Analysis
Vicki Rutson	Office of Environmental Analysis

Other Federal Agencies

Shannon Johnson	U.S. Army Corps of Engineers
Matt McCullor	U.S. Army Corps of Engineers
Erica Jones	United States Department of Agriculture (USDA)
Mark Petersen	USDA Agricultural Research Station – Miles City, MT

800.2(b) Advisory Council on Historic Preservation

Charlene Vaughn	Advisory Council on Historic Preservation
-----------------	---

800.2(c) Consulting Parties

800.2(c)(2)(ii) Indian Tribes, off Tribal lands

Darlene Conrad	Northern Arapaho
----------------	------------------

800.2(c)(3) Representatives of Local Governments

Jean Riley	State of Montana, Department of Transportation (DOT)
------------	--

800.2(c)(4) Applicants for Federal assistance, permits, licenses, or other approvals

David Coburn	Steptoe and Johnson, Attorney for Applicant
Doug Dorsey	Hansen Professional Services, Consultant to Applicant
Dan Hadley	Mission Engineering, Consultant to Applicant
Jamie Hamm	TranSystems, Consultant to Applicant
Barbara Ranf	BNSF Railway
Jennifer Sheetz	BNSF Railway

800.2(c)(5) Additional Consulting Parties

Betsy Merritt	National Trust for Historic Preservation
---------------	--

800.4(a)(3) Other parties likely to have knowledge or concerns with historic properties

Beth Kaeding	Northern Plains Resource Council
--------------	----------------------------------

ICF International, Third-Party Contractor to the Surface Transportation Board

Colleen Davis	ICF International
Richard Starzak	ICF International
Alisa Reynolds	ICF International
Mark Robinson	ICF International
Sarah Mulligan	ICF International

Rick Starzak, ICF, opened the call and asked participants to introduce themselves.

Ken Blodgett, Office of Environmental Analysis (OEA) provided an update on the National Environmental Policy Act (NEPA) process. Mr. Blodgett continued by informing the meeting participants that all field work for the EIS has been completed and the analyses for resource areas requiring fieldwork are in progress. Unrelated to the NEPA process, during the two months¹ since the last call, two filings have occurred. On August 27th, the Surface Transportation Board (Board) granted Northern Plains Resource Council's (Northern Plains) request for discovery. On October 17th, Northern Plains filed a petition to extend the time to file a motion to compel to 5 days from the termination of the parties' meet and confer effort. On October 18th, the Tongue River Railroad Company (TRRC) filed in support of Northern Plains' request. On October 22th, the Board granted the Northern Plains' October 17th request.

Rick Starzak invited questions regarding the general environmental review process. No questions were asked. He then went on to summarize the Section 106 status. The data collected in the field by tribal cultural resources specialists and ICF archaeologists has been processed and a table with associated maps is being prepared to show the approximate locations of the sites identified. As was discussed in the September call, OEA will consult with the tribes regarding the appropriate distribution of this information. OEA will send the table and maps to the Montana State Historic Preservation Officer (SHPO) and proposes to send them to the primary contact at each of the 21 tribes who have been involved in the consultation.

Rick Starzak asked if any tribal representatives had joined the call. No response was received. Mr. Starzak requested comments and suggestions regarding OEA's proposal regarding the distribution of information pertaining to sites identified by tribal cultural resources specialists during the field survey. No comments were offered.

Rick Starzak continued by providing an update on consultation with the Advisory Council on Historic Preservation (ACHP). On October 28th, OEA participated in a teleconference with representatives of the ACHP and the SHPO. The teleconference focused on two basic topics. The first topic related to how the survey information would be shared with the tribes. It was determined that this will be worked out

¹ The October call was canceled because of the government shutdown.

directly with the tribes and SHPO. The second topic related to how the Section 106 process is being coordinated with the NEPA process. The ACHP has indicated that there has been some confusion about whether the Section 106 process had been initiated and how information being collected now for all of the alternatives would be used if one of the alternatives is licensed by the Board. Rick Starzak explained that the Section 106 process is being coordinated with the NEPA process. The Board initiated Section 106 consultation in December 2012. OEA sent letters to the ACHP, SHPO, tribes, and other consulting parties, initiating Section 106 consultation. The letters described the proposed undertaking and alternatives being considered under the NEPA process. Section 106 consultation has continued since that time with monthly teleconferences that started in February 2013. In April 2013, the Northern Cheyenne hosted a meeting on their reservation for the Section 106 consulting parties and other interested parties which included a bus tour. OEA added a Section 106 and historic preservation component to its project webpage so consulting parties and the public can review developments in the Section 106 consultation process. OEA invited the consulting tribes to join the field work. Thirteen of the 21 tribes that were invited participated in the field work. OEA has also consulted with the Montana SHPO periodically about the approach and level of effort.

Charlene Vaughn, ACHP, asked whether it would be helpful to clarify where of the 4-step Section 106 review process the project is. ACHP wants all stakeholders to understand that the consultation is ongoing, meetings are being held, and stakeholders have the opportunity to participate, share information, and/or seek guidance. Rick Starzak responded that Section 106 is a 4-step process. Step 1 is initiating consultation. At this stage, the existence of an undertaking has been determined and consultation with SHPO and other parties has been initiated. This has occurred for this project. Step 2 is to identify and evaluate historic properties. Historic properties are those that have been evaluated and either listed in or determined eligible for listing on the National Register of Historic Places (NRHP). Mr. Starzak continued by informing the meeting participants that OEA has conducted record searches and gathered information from knowledgeable parties regarding previously identified historic properties. Additionally, OEA has conducted field surveys on properties where landowners granted access. The field survey teams consisted of the same number of archeologists and tribal cultural resources specialists. This is called a “phased identification” because the field survey effort allowed the teams to obtain an initial understanding of where there may be historic properties. However, there are several reasons why the completion of the NRHP determination of eligibility effort is not possible at this time. Therefore, with respect to the Section 106 “steps,” the project status is at Step 1 ½. Step 3 involves evaluation of effects on historic properties, specifically whether there will be adverse effects to historic properties. Step 4 is resolving adverse effects. Step 2 cannot be completed at this time because the tribes expressed concerns that archaeological resources not be disturbed, so no shovel testing or other ground disturbance was done and because the SHPO requested that National Register eligibility determinations be deferred until after the STB licenses an alternative. When and if there is a licensed alternative, Step 2 will be completed.

Section 800.4(b)(2) (of 36 CFR 800, the implementing regulation for Section 106) regarding “phased identification and evaluation” provides that “where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a

phased process to conduct identification and evaluation efforts.” For this project, each alternative is approximately 80 miles, consists of a large land area, and only 45% of the area is accessible for field surveys. Access is restricted to approximately 55% of the project area. Section 106 provides that the phased identification “should establish the likely presence of historic properties in the area of potential effects for each alternative, and an appropriate level of field investigation.” Accordingly, tribal cultural resource specialists and archaeologists conducted field surveys together in accessible areas.

Rick Starzak further explained that consultation with the tribes and SHPO led OEA to conclude that a phased identification, delaying determination of National Register eligibility until later in the process, was appropriate. During monthly calls and the in-person meeting in April, some tribes expressed concerns that archaeological resources not be disturbed, so no shovel testing or other ground disturbance ought to be done. Accordingly, shovel testing that is normally performed as part of determining eligibility and establishing boundaries of sites was not done. In May, SHPO requested that National Register eligibility determinations be deferred until after (and if) the Board licenses an alternative. At this stage, however, enough information has been gathered to understand the likely presence of historic properties for each of the NEPA alternatives. Completion of Section 106 determinations of National Register eligibility studies will be deferred until after (and if) one of the alternatives is licensed. After which, there will be complete property access and the ability to do further field investigation.

Charlene Vaughn asked for the teleconference to stop and for participants to ask any questions about the stated approach (no questions or comments offered). Ms. Vaughn stated that she is making a note that participants in the teleconference understand that the project is in Step 1 and how alignment with NEPA is occurring.

Betsy Merritt, National Trust for Historic Preservation, noted that there is no tribal representation on the call. Ms. Merritt reiterated that, even with phased identification, enough information to establish whether there is a likelihood of historic properties must be gathered. She recommended not to defer so much identification work that “inconvenient surprises” are encountered later in the process. She expressed concern that no tribal representatives were participating in the teleconference to confirm their understanding of the process.

Vicki Rutson, OEA, also expressed concern regarding the lack of tribal representation on the call. Several emails were sent to the 21 tribal consulting party contacts. Betsy Merritt agreed that, under normal circumstances, there is significant tribal representation on this teleconference. Charlene Vaughn suggested that there may have been a scheduling conflict.

Darlene Conrad, Northern Arapaho, identified herself and stated that she had joined the teleconference late. Rick Starzak summarized the previously stated information. Where property access was granted, field survey involving observation (but no ground testing) occurred. Full evaluation of NRHP criteria has not occurred. In some cases, SHPO would need to concur with determinations of eligibility. In other cases, tribes have identified significant properties. Mr. Starzak continued by informing Ms. Conrad that if an alternative is licensed more field surveys will be conducted to complete the process.

Darlene Conrad stated that she has not received any information regarding the results of the field surveys conducted to date. Vicki Rutson responded that OEA is reviewing a series of maps and charts with information regarding sites identified by the tribes during the field survey. One of the goals of today's teleconference is to seek input from the tribes regarding the most appropriate format for distributing this information. Ms. Conrad stated a preference for a CD sent through U.S. Mail. Often, she said, maps are too large to print and review.

Darlene Conrad asked when an alternative will be selected. Vicki Rutson said that it is not known when or if an alternative will ever be licensed. Before the Board can make that decision, the EIS must be completed. The Draft EIS must be issued, comments received, and Final EIS issued. The tribes have indicated that the next step should be to review the sites identified in the field surveys. OEA hopes to distribute this information later in the week. After reviewing this information, OEA hopes to receive input from the tribes and consulting parties regarding next steps.

Cathy Nadals, OEA, stated that Conrad Fisher, the Northern Cheyenne Tribal Historic Preservation Officer (THPO), requested that the results of the field surveys be shared with the tribes. There are two sets of data: 1) tribal sites only, and 2) other sites (not including tribal sites). Tribal sites data would only be shared with tribes. Information regarding other sites would be shared with all the consulting parties and agencies.

Charlene Vaughn asked about the timing of sharing the field survey results. Rick Starzak responded that information regarding archeological and built environment sites should be ready by the end of the month. Vicki Rutson said that information regarding tribal sites could be available by the end of the week.

Charlene Vaughn explained that when the ACHP was developing its handbook regarding NEPA/NRHP coordination, SHPOs and tribes offered comments indicating that they have issues with just seeing one alternative. The SHPOs and THPOs who chose to comment indicated that the analysis of alternatives should be informed by the presence or absence of historic properties. Only asking the SHPO to comment on a preferred alternative excludes meaningful dialogue regarding alternatives with a critical stakeholder, the tribes. Cathy Nadals clarified that it was the tribes that requested to review the information regarding tribal sites identified during field survey before deciding upon the next step. Accordingly, the next step is to share information, as appropriate, with all the stakeholders. OEA is not moving beyond that step until all the stakeholders have had a chance to review the information. Vicki Rutson asked whether information regarding tribal site would be restricted to tribes. Ms. Nadals confirmed this and explained that information regarding other sites (archeological and built environment) will be distributed more broadly.

David Coburn asked whether broader information will be shared with the stakeholders and what the process for the review will be. Mr. Coburn asked whether parties have an opportunity to formally respond or will it be a more informal process. Cathy Nadals stated that this has not been decided.

Vicki Rutson explained that this is the first time in her 25 year tenure that archeologists and tribal representatives have collaborated to this extent on a field survey. Ms. Rutson stated that the tribes

requested to review field survey results before discussing next steps. Ms. Rutson agreed with Ms. Vaughn that discussion of survey results by alternatives needs to occur in a collaborative way. An in-person meeting is ideal for this discussion but may not be possible. The discussion may have to occur via a teleconference.

David Coburn stated that his understanding was that 45% or 55% of the area was accessible. Mr. Coburn assumes that some sort of modeling is contemplated to extrapolate information regarding places not accessed because without it, only a portion of the information needed to do an alternatives analysis is available. Rick Starzak replied that ideas regarding how to extrapolate archeological sites are under discussion. David Coburn asked whether the approach to extrapolation will be included with the results of the field survey. Rick Starzak replied that the next stage is to review the information recorded in the field

Vicki Rutson summarized that 55% of the area is inaccessible and agreed that it would be helpful to get input from the consulting parties on the approach to extrapolation. Cathy Nadals suggested that OEA share its ideas about modeling and solicit comments. Matt McCullor, U.S. Army Corps of Engineers, offered to read and comment on the approach.

Rick Starzak invited questions. Charlene Vaughn stated that she was fine with the stated approach. Ms. Vaughn suggested that a summary of the teleconference should be prepared in order to ensure all parties know that this information is being distributed and to encourage them to respond so their concerns and ideas can be taken into account.

Vicki Rutson reviewed points from the teleconference.

- Information regarding tribal sites identified in the field is ready;
- OEA asked for input on how best to share that information;
- Darlene Conrad requested information be sent on CD via U.S. Mail.

Ms. Rutson then asked if other tribal representatives had joined to call and could offer how they would like the information sent to them. Cathy Nadals stated that she would email tribal contacts regarding their preference regarding receiving information.

Rick Starzak suggested sending hard copies of the map and the chart along with the CD. Vicki Rutson noted that Conrad Fisher has mentioned in the past that his office gets deluged with mail. Cathy Nadals suggested allowing individual tribes to decide how best to transmit the information regarding sites identified. Ms. Rutson said that in the event a tribe does not specify its preference, the fallback would be hard copies and CD sent through U.S. Mail.

Vicki Rutson invited questions or concerns. Ms. Rutson requested that any parties with questions or concerns in the future contact her or Cathy Nadals. Charlene Vaughn stated that the federal agency is the decision maker and is best positioned to resolve concerns.

Next call is schedule for December 9th at 1:00pm Eastern Standard Time.

