



Tongue River Section 106 Monthly Call - Reminder

Catherine Nadals to: cvaughn, ngabriel, wdancingfeather,
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Cc: Vicki Rutson, Danielle Gosselin, Kenneth Blodgett, Joshua Wayland,
Theodore Hunt, Evelyn Kitay

04/09/2014 01:24 PM

Dear Consulting Party,

Our next Section 106 call will be this coming **Monday, April 14th** at 1 PM EST, 12 PM CST, 11 AM MT, and 10 AM PST.

I have attached a Programmatic Agreement (PA) justification statement for your review. The purpose of this document is to explain why believe the development of a Section 106 PA is appropriate for this project. We developed this statement in response to the recommendation made by Charlene Dwin Vaughn of the Advisory Council on Historic Preservation during our last monthly call. We hope this statement provides you with the information you'll need to fully understand why we think the use of a PA is needed in this case.

We intend to discuss the following topics on Monday:

- Project Updates
- Additional field work schedule
- Programmatic Agreement

Please use the following call-in number and password for the call :

**Toll-free number: 1-877-423-6338,
Participant Passcode: 364456**

I encourage you to visit the [Tongue River Railroad project website](#) for additional information prior to the call. We recently posted a March 19, 2014 letter from Dr. Stan Wilmoth of the Montana SHPO to the website (see EI-20421; also on the Board's website). Also posted are the minutes from the meeting held in Billings, MT in February.

We are currently in the process of finalizing the meeting minutes from our last monthly call and will send those to you later this week. These will also be posted to the project website.

I hope you join us for the call on Monday!

All the best,

-Cathy

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Justification for doing a PA 4-9-2014.docx

Tongue River Railroad Undertaking:

Justification for Preparing a Programmatic Agreement

Background

On October 16, 2012, Tongue River Railroad Company, Inc. (TRRC) filed a revised application with the Surface Transportation Board (Board). TRRC intended to construct and operate an approximately 83-mile rail line between Miles City, Montana, and two ending points, one near the site of the previously planned Montco mine near Ashland, Montana, and another at the proposed Otter Creek mine in the Otter Creek area east of Ashland, Montana. On December 17, 2012, TRRC filed a supplemental application with the Board, in which TRRC changed its preferred alignment from the 83-mile Tongue River Alternative to the 42-mile Colstrip Alternative.

Because the construction and operation of this proposal has the potential to result in significant environmental impacts, the Board's Office of Environmental Analysis (OEA) has determined that the preparation of an Environmental Impact Statement (EIS) is appropriate pursuant to the National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. §§ 4321 *et seq.*). The Surface Transportation Board must also comply with the requirements of the National Historic Preservation Act (NHPA).

The regulations that implement Section 106 of NHPA at 36 CFR Part 800 require federal agencies to take into account the effects of the undertakings on historic properties listed or eligible for listing on the National Register of Historic Places (National Register) and afford the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment on such undertakings. The Section 106 regulations at 36 CFR § 800.3 through § 800.6, outline the consecutive four-step process federal agencies follow to comply with Section 106:

- 1) Initiate consultation
- 2) Identify and evaluate historic properties
- 3) Assess effects
- 4) Resolve effects

In addition to completing the four-step process consecutively, a federal agency may use a phased approach to complete these steps. The phased approach can include deferring some of the identification and evaluation (National Register assessment) of historic properties (including effects assessment and resolution, or mitigation). Agencies generally use a phased process when they are considering several alternatives and where full access to the alternatives is restricted. The Section 106 regulations at 36 CFR § 800.4(b)(2), outline the phased approach as follows:

Phased identification and evaluation. *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. The agency official may also defer final identification and evaluation of historic properties if*

it is specifically provided for in a memorandum of agreement executed pursuant to § 800.6, a programmatic agreement executed pursuant to § 800.14 (b), or the documents used by an agency official to comply with the National Environmental Policy Act pursuant to § 800.8. The process should establish the likely presence of historic properties within the area of potential effects for each alternative or inaccessible area through background research, consultation and an appropriate level of field investigation, taking into account the number of alternatives under consideration, the magnitude of the undertaking and its likely effects, and the views of the SHPO/THPO and any other consulting parties. As specific aspects or locations of an alternative are refined or access is gained, the agency official shall proceed with the identification and evaluation of historic properties in accordance with paragraphs (b)(1) and (c) of this section.

Use of the phased approach, described above, requires an agency to develop a Programmatic Agreement (PA). A PA is an agreement document that sets forth roles, responsibilities, procedures and stipulations that would be followed when all of the steps in the Section 106 process cannot be completed prior to an agency's approval of a proposed undertaking. A PA can include a description of future types of activities that would need to be completed following an agency's approval, such as: identification of all area(s) of potential effects; additional identification of historic, tribal and botanical resources; the completion of studies such as ethnographies and ethno-botanical analyses; and definitive National Register assessments of historic properties likely to be adversely affected by the undertaking. An agency would also need to evaluate the types of effects that all eligible historic properties would undergo (indirect versus direct physical impacts); the PA would then describe any agreed upon measures to mitigate such effects. Federal agencies are required to consult with the State Historic Preservation Officer (SHPO) and involve its Section 106 consulting parties including federally recognized tribes in the development of a PA [36 CFR § 800.4(b)(2)]. Once a PA is agreed upon, it is executed by its signatories, which generally include the lead federal agency, SHPO, ACHP (when participating), and those parties that have a specific role in the completion of the activities outlined in the PA. Federally recognized tribes and other consulting parties are encouraged to sign the finalized PA as concurring parties.

OEA has kept in close contact with the Montana SHPO and ACHP since the onset of this project and has involved federally recognized tribes in all aspect of the proposed undertaking, including the identification of historic and tribal properties in areas where access has been granted. Both the Montana SHPO and ACHP have indicated their endorsement of developing a PA for this project, agreed to consult, and are actively participating in consultation. OEA has initiated Section 106 consultations with the ACHP, Montana SHPO, other federal and state agencies, and federally recognized tribes and has identified other consulting parties, including local landowners and preservation groups. OEA would invite all of these consulting parties to participate in the development of a PA. Once executed, the project PA would set forth roles, responsibilities, procedures, milestones, schedules, stipulations, and post-agreement review protocols that have been agreed upon by the consulting parties to ensure compliance with Section 106.

Why is a Programmatic Agreement needed here?

For the same reasons set forth in the Council's regulations at 36 CFR § 800.4(b)(2), the Board will not be able to complete the 4-step Section 106 process for the Tongue River Railroad proposal before deciding whether to approve the undertaking. The Tongue River Railroad proposal is a complex project, consisting of five alternative routes and two variations that encompass approximately 240 miles and 11,975 acres of possible railroad rights-of-way. Landowners have only granted OEA access to slightly less than half of the project area, making completion of identification and evaluation efforts challenging. Where access has been granted, OEA has completed some identification of historic properties through archaeological/tribal and historic property surveys (some of the surveys were completed in 2013 and additional archaeological/tribal surveys are planned for May and June of 2014). However, appropriate additional identification and evaluation efforts would be required for any alternative the Board licenses as only preliminary surveys are being conducted and no definitive National Register assessments of any identified historic properties will be made before the Board decides whether to approve the undertaking. In addition, precise alignments will not be known (not fully engineered) until the Board issues its final decision on the proposed undertaking, requiring post-agreement Section 106 reviews.

When, or if, the Board decides to authorize the construction and operation of one of the alternatives under consideration, exact areas could be identified as the project's area(s) of potential effect(s), including those National Register eligible historic and tribal resources that would be subject to direct physical impacts from the proposed rail line and those that would undergo indirect effects from the noise and visual impacts imposed by a new railroad. Any mitigation measures outlined in the PA will be tied to the type of impact as well as type of resource (i.e. mitigation for a site that might be destroyed by the proposed railroad might differ from impacts to sites indirectly affected from noise or the visual intrusion of a new railroad). The mitigation measures in the PA would also be based on consultation with the Section 106 consulting parties.

A PA outlines the process for establishing additional identification efforts that would be conducted and set forth stipulations on and clarify how to mitigate any adverse effects to National Register eligible historic and tribal properties. This could include ethnographies, ethno-botanical studies, or other mitigation measures (perhaps unique to the Tongue River Valley area) that the consulting parties agree upon. All of the measures appropriate for inclusion in the PA could be incorporated in a mitigation plan or a treatment plan developed by the STB in consultation with the Section 106 consulting parties. Should the STB approve an alternative alignment, negotiations with landowners would begin for access to all the property along the licensed alternative, the precise location of the route would be engineered completely and staked, and the measures already outlined in the PA for complying with Section 106—including convening Section 106 parties for additional consultation as set forth in the PA—would be initiated.