



January 9, 2013

Ms. Catherine Glidden
Mr. Kenneth Blodgett
Surface Transportation Board
Office of Environmental Analysis
395 E ST SW
Washington, D.C. 20423

RE: Comments on the Scope of Study Regarding Cultural Resources for Docket No. FD-30186-0, the Tongue River Railroad Company—Rail Construction and Operation—In Custer, Powder River and Rosebud Counties, MT.

Dear Ms. Glidden and Mr. Blodgett:

The Montana Preservation Alliance (MPA) wishes to comment on the Surface Transportation Board's (STB) Draft Scope of Study related to a reopened Tongue River I (TR I). Having worked extensively in the Tongue River region, we have first-hand knowledge of the rich and layered cultural landscape of the valley. It is a unique place that has changed little with time; the historic qualities of the area are significant and uncommonly intact. From Native American vision quest, tipi ring and buffalo kill sites, to homestead cabins and historic dude ranches, there is a wealth of history reflected here still today, and every effort should be made to preserve the heritage of this region as new developments are proposed and considered.

STB's decision to mandate new environmental studies under the National Environmental Policy Act (NEPA) is an important step forward, but a rigorous research design and meaningful new cultural resource analysis remains critical. While we offer suggestions to help guide the study of cultural resources during the upcoming Draft Environmental Impact Statement (DEIS) process, we note that yet another rail alignment has been proposed by the applicant, the Tongue River Railroad Company (TRRC). Because the new alignment was issued on December 17, 2012, one month after the last scoping meeting was held, we urge STB to hold new scoping meetings to outline the new route to consulting parties, stakeholders, and newly-affected property owners. Further, since this undertaking is of regional, even national, interest we urge new meetings at locations throughout Montana, rather than only a few locations close to the project area.

The 2011 U.S. Ninth Circuit Court Opinion

In our opinion, STB cannot rely on existing cultural resource data for use in the new TR I DEIS, particularly in light of the Ninth Circuit Court's December 29, 2011 opinion describing the requirement for meaningful baseline environmental data. The Court noted that certain wildlife and aquatic surveys in the Tongue River III Final Environmental Impact Statement (TRIII FEIS) were inadequate "Because the TRRC III FSEIS does not provide baseline data for many of the species, and instead plans to conduct surveys and studies as part of its post-approval mitigation measures..." The Court stated that because of this approach "...the Board did not take a sufficiently 'hard look' to fulfill its NEPA obligations...prior to issuing its decision." The Court wrote that federal agencies must "provide the data on which it bases its environmental analysis" and that "such analyses must occur before the proposed action is approved, not afterward," and quoted *LaFlamme v. F.E.R.C.*, 852

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F.2d 389, 400 (9thCir. 1988) which stated that “The very purpose of NEPA’s requirement that an EIS be prepared for all actions that may significantly affect the environment is to obviate the need for speculation by insuring that available data is gathered and analyzed prior to the implementation of the proposed action.”

Significantly, the Court, while noting STB’s extensive mitigation efforts, stated that “such mitigation measures, while necessary, are not alone sufficient to meet the Board’s NEPA obligations to determine the projected extent of the environmental harm to enumerated resources *before* [the Court’s emphasis] a project is approved. Mitigation measures may help alleviate impact *after* construction, but do not help to evaluate and understand the impact before construction. In a way, reliance on mitigation measures presupposes approval. It assumes that—regardless of what effects construction may have on resources—there are mitigation measures that might counteract the effect without first understanding the extent of the problem.”

The Court concluded that any approach that relegated the collection and analysis of critical baseline data to a mitigation measure was inconsistent with NEPA, because “NEPA aims (1) to ensure that agencies carefully consider information about significant environmental impacts and (2) to guarantee relevant information is available to the public.”

The Court’s findings are highly relevant to the treatment of cultural resources in the reopened TR I, and provide a roadmap for standards of cultural resource reporting. Despite its long history and various incarnations, no intensive cultural resource survey work was conducted in preparation of any Tongue River Railroad EIS. TR III relegated cultural resource surveys to post-approval mitigation, as part of a Programmatic Agreement (PA). As the Court noted, this approach denies the public the information due to them under NEPA. This approach also denied to the Board, as the final decision-makers, the data it needed to determine if the project should be approved.

To remedy this, STB should implement intensive, landscape-level cultural resource surveys during the DEIS process. By conducting such surveys at the outset, STB can meet the Court’s intent regarding both the depth and timing of environmental data (including cultural resources) required to meet NEPA standards. This approach benefits all concerned --the public (as well as consulting parties, stakeholders, and property owners) will have actual cultural resource data on which to comment, the Board will have the actual data on which to base a decision, and the project planners will have actual cultural resource information needed at the beginning of the process to effectively plan for preservation when significant heritage resources are discovered.

Given the dearth of existing data on the type, location, integrity, and historic significance of Tongue River region cultural resources,¹ it is difficult to envision a DEIS that effectively evaluates the “Affected Environment,” the “Environmental Consequences,” and the “Reasonably Foreseeable Impacts” to cultural resources without intensive survey work early in the process.

Future Tribal Consultation

Tribal nations with traditional ties to the Tongue River region were only recently consulted under TR III and only then as part of a PA/mitigation process. No data regarding cultural resources, especially potential Native American heritage sites, was available to tribal cultural experts during consultation because no surveys were done. Yet despite this lack of information or proper consultation, , the Board had already approved the project.

This conduct is far from the spirit of the December 5, 2012 *Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites Memorandum of Understanding* (MOU), signed by the Departments of Defense, Interior, Agriculture and Energy and the Advisory Council on Historic

¹ In the 2008 *Final Supplement to the Montana Statewide Oil and Gas Environmental Impact Statement*, the Bureau of Land Management as lead agency reported that just 4.5% of Powder River, 1.8% of Custer, and 2.6% of Rosebud counties, where the proposed railroad would be located, had been surveyed for cultural resources.

Preservation. That MOU outlines a multi-point approach to improve the protection of and tribal access to tribal sacred sites across the county. For this undertaking, new cultural resource survey work undertaken for the DEIS should be conducted in consultative partnership with affiliated Tribes, ensuring that substantial tribal involvement commences at the beginning of the DEIS process, rather than being reserved as mitigation. We encourage STB/Department of Transportation to demonstrate their commitment to this approach by joining the Sacred Sites MOU.

Recommendations and Conclusion

To meet the environmental reporting standards described by the Ninth Circuit Court and to make meaningful STB's decision to require new environmental review, STB should undertake the following for inclusion in the TR I draft EIS:

- Conduct substantial, on-going, in-person consultation with affected federally-recognized Indian nations who occupied the Tongue River region for generations. New cultural resource survey and planning for the DEIS should be conducted in consultative partnership with affiliated Tribes, to guarantee essential tribal involvement throughout the EIS process.
- Implementation of a non-linear, direct and indirect Area of Potential Effect (APE), created in consultation with Tribes, landowners, and related local, state and federal agencies that broadly considers direct and indirect impacts to cultural resources and heritage landscapes.
- Landscape-level archeological (Class III) historical and architectural surveys of the project area, conducted in partnership with consulting Tribes, stakeholders, property-owners and relevant local, state and federal agencies.
- An ethnographic study of the project area conducted in partnership with consulting Tribes, to better understand the array of traditional cultural properties, Native American heritage resources, and potential impacts to these significant, fragile resources;
- A Visual Impact Study to accurately gauge indirect impacts to tribal and other cultural resources. High-value sacred sites located on hills overlooking the culture-rich region and located far from the right-of-way may still experience significant, permanent adverse impacts by the construction and operation of the rail line. Previous EIS' have included only a minimal discussion of indirect impacts to tribal heritage resources.

The Tongue River country is a remote, rugged and pristine area of Montana with a history of human occupation that stretches back thousands of years. The cultural resources of the region are vast and fragile. Approval of the proposed undertaking has grave, irreversible consequences for this undeveloped landscape. MPA offers these recommendations as a way to better understand the region and its history before a decision is made that will irrevocably alter the region's cultural and physical landscape as it has stood for centuries.

We request that you add the Montana Preservation Alliance to the list of interested parties for all future business related to the proposed Tongue River Railroad and look forward to continued dialogue with STB regarding the preservation of this irreplaceable landscape.

Sincerely,



Chere Justo
Executive Director, Montana Preservation Alliance

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