



EI -18640

Preserving America's Heritage

July 6, 2011

Ms. Victoria Rutson
Chief, Section of Environmental Analysis
Surface Transportation Board
395 E Street , SW
Washington, DC 20423

Ref: Tongue River Railroad Construction and Operation (Western Alignment)
Docket No. FD 30186 (sub no. 3)
Montana

Dear Ms. Rutson:

The Advisory Council on Historic Preservation (ACHP) would like to thank you for inviting us to the tribal consultation meeting held on June 21 to 23, 2011, in Rapid City, South Dakota, to allow Indian tribes who will be affected by the referenced undertaking to have government-to-government consultation with the Surface Transportation Board (STB). The sixteen tribal representatives in attendance were able to speak candidly about their views of the proposed Tongue River Railroad (TRR) Project and shared with STB their views regarding the inadequacy of the tribal consultation prior to the execution of the Programmatic Agreement (PA) executed in 2005 among STB, the Montana State Historic Preservation Officer, the Tongue River Railroad Corporation (TRRC), and the ACHP. We would like to take this opportunity to document for the record our views on the meeting and the next steps that will be taken by STB, including the termination of the existing PA.

At the outset, we applaud STB's decision to terminate the existing 2005 PA after hearing from Indian tribes. The comments shared by Indian tribes in attendance at the meeting were unequivocal in asserting that STB had not conducted an appropriate level of tribal consultation when the 2005 PA was negotiated. As such, the tribes expressed their reluctance in reviewing the amended PA, as requested by STB. Instead, they requested that consultation for a new PA be initiated to address a number of substantive issues. Pursuant to our interpretation of the PA, any of the signatories can terminate the PA with a 30 day notification. STB should advise us how it will coordinate this effort and when it will officially terminate the 2005 PA and consult to develop a new agreement document.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

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Several of the tribes and other consulting parties have inquired whether the information from the previous consultation related to identification and evaluation and analysis of alternatives is current. With the more recent designation of the Wolf Mountains Battlefield and the Rosebud Battlefield as National Historic Landmarks; the lack of ethnographic studies to address properties of religious and cultural significance to the tribes; limited literature searches; and the lack of information regarding cultural landscapes, there are likely many previously unidentified historic properties that should be considered as part of the Section 106 review. Section 800.4 (c) of our regulations states that... *the passage of time, changing perceptions of significance, or incomplete prior evaluations may require the agency official to reevaluate properties previously determined eligible and ineligible.* As you heard during the tribal consultations, the Indian tribes believe all of these factors apply. The ACHP agrees with their assessment which is similar to those in many of the comments from other consulting parties. Therefore, in order to facilitate the consultation for a new agreement document, we recommend that you work with the Montana State Historic Preservation Officer (SHPO), and Indian tribes to define an updated area of potential effects (APE). As mentioned during the meeting, the designation of the APE should take into account the Tongue River Basin which will be substantially modified with construction of the TRR.

During the consultation, the Indian tribes requested that the analysis of alternatives be quantified to document the cost differential of the east and west alternatives. As part of that review, it would also be helpful to provide a cost analysis for other alternatives identified in the environmental documents. We are particularly interested in how the “no action” alternative has been evaluated. Would this mean that the TRR Project was rejected? Is it possible to provide transportation via trucks to another railroad location so as avoid the historic properties? Related to this analysis should be a clarification of whether there are any new trends or technological advancements in the commercial railroad industry that could result in fewer environmental impacts on a pristine and historical area that has numerous sites of religious and cultural importance to Indian tribes. In addition, has STB considered how continued access and use of the TRR basin will be provided to Indian tribes as part of the analysis of alternatives? All of this information, we believe, is essential if we are to have productive consultation with the Indian tribes, as well as other consulting parties.

We remind you that Section 110(f) of the National Historic Preservation Act requires federal agency “to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to National Historic Landmarks, which may be directly and adversely affected by an undertaking.” Additionally, the ACHP has the option of requesting from the National Park Service a Section 213 Report in accordance with the National Historic Preservation Act and the ACHP’s regulations, “Protection of Historic Properties” (36 CFR Part 800). Since the Indian tribes, the National Park Service, and the Montana Preservation Alliance have also recommended the preparation of a report to assess the impacts of an undertaking on the national significance, the ACHP is actively considering how this information could inform the consultation process. More importantly, this information could provide to the STB an objective assessment about the potential for the National Historic Landmarks to lose their designations if a new railroad is constructed in the Tongue River Basin. It is our intent to determine whether a 213 report is necessary by the end of July as it typically will take approximately 60 days from the time of request to produce one.

We were pleased to have had the Bureau of Land Management (BLM) and the Corps of Engineers (Corps) join the tribal consultation meeting. It was revealed during the meeting that both agencies intend to comply with Section 106 independent of STB for the TRR. Since three distinct agreements for the same undertaking is not typically how we handle large scale undertakings, we would like STB to clarify for us how the coordination of the TRR Project could be approached to avoid duplication of efforts and the execution of separate agreements with participating agencies. Likewise, it would be helpful for us to understand the project schedule and the milestones you have established to move forward with the Section 106 review process. Finally, inasmuch as there is the expectation that additional time will be required to fully engage in Section 106 consultation, STB should ensure that the applicant has been advised of Section 110(k) of the NHPA so that any inadvertent adverse effects can be avoided in the management of the TRR Project.

We appreciate STB's willingness to initiate the Section 106 consultation so that all consulting parties have an opportunity to receive current data and to consult about the avoidance, minimization, and mitigation measures. While we acknowledged that you have invested considerable resources to get to this point, further efforts are needed to conduct good faith consultation. As you learn the outcome of pending lawsuits and review the applicant's contractual commitments to transport coal, this information should be shared with consulting parties. To that end, we would appreciate STB providing relevant information to the Section 106 review in separate packages since most consulting parties have expressed difficulty in culling through the Final Environmental Statement (EIS) and the Supplemental EIS. We have had difficulty in accessing several documents posted on your web site due to the size of the documents. Similar concerns have been expressed by other consulting parties, too. Therefore, we would suggest that you provide discrete packages of the background documentation required pursuant to Section 800.11(e) of our regulations as we proceed with consultation.

Should you have any questions or desire to discuss our comments further, please contact Charlene Dwin Vaughn, AICP by e-mail at cvaughn@achp.gov or via telephone at 202-606-8533.

Sincerely,

A handwritten signature in black ink, appearing to read 'Reid Nelson', with a long horizontal flourish extending to the right.

Reid Nelson
Director
Office of Federal Agency Programs



Tongue River Railroad Construction and Operation (Western Alignment), Montana
OFAP

to:

Victoria Rutson

07/06/2011 04:02 PM

Cc:

"Mark F. Baumler", doug, DCoburn, laxline, "Conrad Fisher", "Clair Green", wyoung, steve.vance, "Lana Gravatt", "Dianne Desrosiers", curley_up, "Franky Jackson", rickthomas_06, "Darlene Conrad", "Wanda Wells", jb.weston, "Elgin Crows Breast", wanapeyanajica, brandonsazue, "Kenneth Blodgett", tom.lennon, "Christine Whitacre", steve.brady, joe.foxjr, "Stan Wilmoth", "Russell Eagle Bear", Leonard.Wabasha, Dalice_Landers, pcoffey, rebecca, marni.wheaton, chambellan

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1 Attachment



mt.stb.tongue river railroad.con.6jul11.pdf

From: Office of Federal Agency Programs

Advisory Council on Historic Preservation

Attached is our letter on the subject undertaking (in Adobe Acrobat PDF format)

If you have any questions concerning our letter, please contact:

Charlene Dwin Vaughn (202) 606-8533
cvaughn@achp.gov
Case # 3971

Note: Please do not reply to this email.

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