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vhauser@achp.gov,
Bcc:
Subject: Comment Regarding the Tongue River Railroad III Programmatic Agreement
From: Jim Jenks <jimjenks.mpa@gmail.com> - Wednesday 03/02/2011 02:14 PM

1 attachment



Jenks_Comment_Regarding TRIII PA_March2011.docx

Dear Mr. Blodgett, please find attached my comment regarding revision of the Tongue River Railroad III Programmatic Agreement. Thank you for the chance to comment.

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Jim Jenks
Historian
Montana Preservation Alliance

March 1, 2011

KENNETH BLODGETT
SURFACE TRANSPORTATION BOARD
OFFICE OF ENVIRONMENTAL ANALYSIS
395 E ST SW
WASHINGTON DC 20423

RE: Tongue River RR Construction and Operation Western Alignment Programmatic Agreement
Docket No. FD 30186 (sub-no. 3)

Dear Mr. Blodgett:

Thank you for the opportunity to comment on the extension of the Tongue River Railroad Company's (TRRC) Tongue River III (TR III) Programmatic Agreement (PA). As an historian with a background in the implementation of the National Historic Preservation Act (NHPA), and with knowledge of the history of the Tongue River Valley, I have concerns regarding the approach adopted by the Surface Transportation Board (STB, or OEA, the STB's Office of Environmental Analysis) to comply with Section 106 of the NHPA.

Meaningful Tribal Consultation Has Not Occurred

The Northern Cheyenne Tribe is a federally-recognized, sovereign nation within the borders of the United States. Section 106 of the NHPA makes it clear that government-to-government consultation with federally-recognized tribes should occur as early as possible in the NHPA compliance process. The undertaking labeled TR III dates back to 1997, a now 14-year period during which ongoing consultation with the Northern Cheyenne should have been initiated by STB, as the lead agency, in concert with the creation of the TR III PA.

At various places in both the 2004 Draft Supplemental Environmental Impact Statement (DSEIS) and 2006 Final Supplemental Environmental Impact Statement (FSEIS), STB labeled its efforts at consultation with the Northern Cheyenne as "extensive," stating "SEA is confident that the PA, which reflects public input and extensive consultation with tribal representatives, assures that the interests of Native Americans will be adequately protected" (FSEIS 2-21 to 22).

However, a review of the chronology of TR III undermines STB's assertion. Study of the DSEIS and FSEIS reveals that just a single face-to-face meeting occurred between STB and Northern Cheyenne representatives since TR III was initiated in 1997¹. That consultation occurred in 1999, between STB staff and members of the Northern Cheyenne Cultural Committee (2004 DSEIS, 3-5), two (2) years after TR III was initiated.

This means that approximately six (6) years elapsed between the single meeting with Northern Cheyenne tribal officials and the issuance of the TR III PA. How STB could construe this level of

¹ The documents contain a reference to a 1990 meeting between STB and Northern Cheyenne representatives, but this meeting was conducted as part of TR II, and is thus not related to the creation of the TR III PA, issued fifteen years later. This 1990 meeting should not be considered part of the consultation process for the TR III PA.

consultation with the Northern Cheyenne as meaningful and extensive, and in fact, lawful under the NHPA is puzzling.² And while STB stated frequently in environmental documents that letters were sent and phone calls made to tribal officials, this in no way represents consultation under the NHPA

Further, in December 2004, STB received correspondence from then Northern Cheyenne Tribal President Eugene LittleCoyote. In his letter, President LittleCoyote stated that “The Northern Cheyenne Tribe is very disappointed by the efforts by the STB to date to schedule and hold consultation meetings on the proposed project” (FSEIS 3-111). When that letter was written, five (5) years had elapsed since the last meeting between STB and the Northern Cheyenne Tribe, yet STB still issued the TR III PA approximately seven (7) months later. That STB persisted in labeling its consultative efforts with the Northern Cheyenne as “extensive,” while at the same time the President of the Northern Cheyenne Tribe protested the lack of meaningful consultation, is troubling.

STB’s level of consultation to date cannot, for the purposes of compliance with Section 106 of the NHPA, be considered meaningful as the law is currently understood. STB should review the following cases for current standards of tribal consultation, including, Quechan Tribe of the Fort Yuma Indian Reservation vs. USDI (12/15/10) US District Court of Southern Calif. (case 10cv2241-LAB (CAB) and Te-Moak Tribe of Western Shoshone of Nev. vs. USDI (06/18/2010) US Court of Appeals, Ninth Circuit (608 F.3d 592) for court rulings which define current standards of tribal consultation. I would also direct STB to Northern Cheyenne Tribe and Native Action v. Gale Norton, Kathleen Clarke, and Martin Ott (Defendants), et al (filed May 8, 2003) United States District Court for the District of Montana, Billings Division (case CV-03-78-BLG-RWA, consolidated with CV-03-069-BLGRWA). Here, a federal magistrate ruled in favor of the Northern Cheyenne Tribe in its lawsuit against the Bureau of Land Management (BLM) for failure to engage in formal consultation required under Section 106 of the NHPA.

While a December 2010 meeting occurred between STB staff and the Northern Cheyenne Tribe, that meeting was hastily scheduled by STB when agency officials realized after the fact that the TR III PA had expired. It appears that STB only met with Northern Cheyenne officials after a tribal resolution was passed insisting on consultation, and after the federal Advisory Council on Historic Preservation (ACHP) supported the Northern Cheyenne over the legal requirement for government-to-government consultation before the TR III PA could be extended.

Whatever the circumstances, the December 2010 meeting should be viewed as a beginning. STB should revise the existing PA through meaningful, government-to-government consultation with the Northern Cheyenne Tribe, as well as other tribes with traditional ties to the project area. STB, as the lead agency, is required by law to initiate and conduct meaningful consultation, and to date has neglected this responsibility. In your response to these comments, please provide the dates and locations of upcoming, face-to-face STB consultation with Northern Cheyenne tribal officials.

² This 1999 meeting was the single reference to face-to-face consultation related to the TR III PA located in a review of the DSEIS and FSEIS. If this information is incomplete please provide in a response a complete list of the dates and locations of other face-to-face meetings between STB and Northern Cheyenne officials.

Adverse Impacts to Wolf Mountains Battlefield National Historic Landmark

The Wolf Mountains Battlefield is now a National Historic Landmark (NHL). Under the NHPA, Federal agencies must “exercise a higher standard of care when considering undertakings that may directly and adversely affect NHLs. The law requires that agencies, ‘to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark.’” (Sec 106 Regulations User’s Guide, ACHP) As an NHL, this historic battlefield now requires a higher level of consideration of adverse impacts to its historic integrity than those properties listed on the National Register of Historic Places. The FSEIS notes that TRRC undertook a feasibility study which evaluated rerouting the rail line around the battlefield. However, the proponent dismissed this alternative as, in part, too costly, and STB did not pursue the reroute. The battlefield’s NHL status now mandates that STB require thorough analysis of alternatives by the proponent, including new feasibility studies to move the alignment. Further, the feasibility study conducted by TRRC should be shared with the National Park Service (NPS), the Northern Cheyenne Tribe, impacted local landowners, the Montana State Historic Preservation Office (MTSHPO) and the ACHP so that they may understand the methodology used by the proponent. (2006 FEIS, 2-19 to 21). This sharing of data does not yet appear to have occurred.

Unless the rail line is rerouted, its construction will probably result in the destruction of the NHL. The NHL’s generally unchanged setting is critical, and the industrialization of the landscape resulting from construction of the railroad will irrevocably change this. An immediate course of action to study the impact this undertaking will have on the NHL is an NPS Landmarks Program “Section 213” report, described in the NHPA as the way to evaluate impacts to NHLs. The ACHP should request such a report from NPS.

Conclusion

While the best alternative is to end this destructive undertaking, this is unlikely to occur. The only way forward is a unified approach to recrafting the PA through meaningful, government-to-government dialogue with the Northern Cheyenne Tribe and other tribes affiliated with the Tongue River Valley and its history. The STB should 1) Conduct meaningful, ongoing, face-to-face consultation with the Northern Cheyenne Tribe and revise the TR III PA accordingly; 2) Renew the feasibility of rerouting the rail line around the Wolf Mountains Battlefield NHL and supply the existing feasibility study to appropriate citizens and tribal, state, and federal officials; and, 3) assist the NPS in a Section 213 report issued by the NPS Landmarks Office.

Sincerely,

James W. Jenks
Historian
187 W. Shady Ln
Worley, ID 83876

Cc: Mr. Conrad Fisher, Northern Cheyenne Tribal Historic Preservation Officer (via email)
Mr. Steve Brady, Chair, Northern Cheyenne Cultural Committee (via email)
Valerie Hauser, Advisory Council on Historic Preservation (via email)