



United States Department of the Interior

NATIONAL PARK SERVICE
INTERMOUNTAIN REGION
12795 West Alameda Parkway
P.O. Box 25287
Denver, Colorado 80225-0287



IN REPLY REFER TO:
H3417 (IMRO) NHL

EI - 18641

JUL 7 2011

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

Dear Ms. Rutson:

I want to express my appreciation to you for organizing the June 2011 Surface Transportation Board (STB) tribal summit meeting in Rapid City, South Dakota, regarding the proposed construction and operation of the Tongue River Railroad line from Miles City to Decker in Custer, Rosebud, Powder River, and Bighorn Counties, Montana. The National Park Service (NPS) Intermountain Region administers the National Historic Landmark (NHL) program in an eight-state region, including Montana. Our primary concern regarding the Tongue River Railroad project is its impact on Wolf Mountains Battlefield/Where Big Crow Walked Back and Forth, which the Secretary of the Interior designated an NHL in 2008. As you are aware, the proposed alignment of the Tongue River Railroad will run through Wolf Mountains Battlefield and have a direct adverse effect on this NHL.

We understand that STB has terminated its 2005 Programmatic Agreement (PA) for the Tongue River Railroad and that STB has proposed to develop a new PA by August 2012. As we learned during a June 27th conference call with STB, 16 tribal representatives, representing 10 tribes, attended the Rapid City meeting and unanimously stated their support for a railroad line alternative that would totally avoid the Wolf Mountains Battlefield. We also learned that the Tongue River Railroad Company believes that avoidance of the NHL will not be feasible. Nevertheless, it will be necessary for STB to consult with the Montana State Historic Preservation Office, the Indian tribes, the Advisory Council on Historic Preservation (ACHP), and NPS on resolving the adverse effects associated with the proposed Tongue River Railroad, including an analysis of alternatives that will minimize harm to the Wolf Mountains Battlefield to the maximum extent possible.

NPS Comments Regarding the PA

Per your request, the following are our comments regarding the PA, many of which were shared with you in our earlier letter of March 11, 2011.

- 1) The PA should identify and correctly acknowledge the role of the NPS in this project, as well as STB's responsibilities under Section 110(f) of the National Historic Preservation Act (NHPA). Specifically, we request that the preamble to the PA include the following statements:
 - Section 110(f) of the NHPA requires that Federal agencies exercise a higher standard of care when considering undertakings that may directly and adversely affect NHLs.

The law requires that the responsible federal agency shall, "**to the maximum extent possible** [emphasis added], undertake such planning and actions as may be necessary to minimize harm to such landmark."

- 36 CFR §800.6(a)(1) and 800.10 (c) requires that the responsible federal agency shall also request the participation of the ACHP in any consultation to resolve adverse effects on NHLs
 - 36 CFR §800.10(c) states that the responsible federal agency shall notify the Secretary of the Interior of any consultation involving an NHL and invite the Secretary to participate in the consultation where there may be an adverse effect.
- 2) The PA must address how STB proposes to meet each of the core steps of the Section 106 consultation process, as set forth in 36 CFR §800.6 through §800.10.
 - 3) Pursuant to 800.11(a), the PA must include language stating that STB will provide sufficient background documentation to each of the consulting parties, and the documentation will include each of the types of information that are stipulated in 36 CFR §800.11(e) including an analysis of alternatives that STB considered to avoid, minimize, or mitigate adverse effects on the NHL.
 - 4) The PA must include language on how STB will resolve adverse effects, but because an NHL is involved, the PA must also include language about how STB will focus its analysis of alternatives on actions that will minimize harm to the NHL and advance a preservation outcome to the maximum extent possible.
 - 5) The PA will need to include language specifying how STB shall involve the public throughout the consultation process, including how STB will seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties. The PA will also need to include language about how STB will seek the public's views about any proposed plan to avoid, minimize, or mitigate the undertaking's adverse effects, and about the process STB will use to consider the public's views on how the agency should resolve the undertaking's adverse effects

It is important to point out that STB's consultation with the NPS regarding this project, particularly regarding planning and actions with a focus on minimizing harm, to the maximum extent possible, to the Wolf Mountains Battlefield NHL has not taken place. This view is supported by the "Frequently Asked Questions" (FAQ) document that STB prepared and distributed to the tribal summit participants. The STB's FAQ incorrectly describes the role of NPS regarding federal undertakings that may adversely affect NHLs. It also suggests that STB may fail to recognize its responsibilities under Section 110(f) of NHPA. For example, FAQ No. 12 states that because Wolf Mountains Battlefield is an NHL, STB will provide NPS with "the opportunity to participate in the negotiation of an amended PA." This does not meet Section 110(f), which, as noted above, clearly outlines the actions that an agency must take when NHLs may be directly and adversely affected by an undertaking.

Also, please provide written clarification that STB is not subject to Section 4(f) of the Department of Transportation Act. We understand, however, that even if STB is not subject to Section 4(f), the agency's responsibilities under Section 110(f) of the NHPA still apply.

NPS Comments Regarding Analysis of Alternatives for Routing of Tongue River Railroad

David Coburn, attorney for the Tongue River Railroad Company, sent to NPS a copy of the "Analysis of Alternatives Studied for Routing of the Tongue River Railroad in the Vicinity of the Wolf Mountains Battlefield," prepared by Dan Hadley of Mission Engineering. This report was the basis of the presentation that was given at the tribal summit meeting. Following are NPS comments and questions regarding that report:

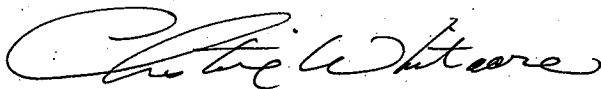
- Page 2: The report notes that "According to the Final EIS, the alignment which the STB subsequently approved . . . would not 'pass through the BLM's established Area of Critical Environmental Concern . . .'" This Area of Critical Environmental Concern (ACEC) was designated because of its association with Battle Butte, also known as Wolf Mountains Battlefield. The BLM land where the ACEC exists is but a very small portion of the battlefield. Although consideration was given to the ACEC, please explain why no similar level of consideration was given to the entire National Register and NHL site.
- Please provide a map of the Battle Butte ACEC relative to the National Register and NHL boundaries for Wolf Mountains Battlefield. (Also note the comment below that the NHL boundary is incorrectly shown in the report.)
- Pages 2-3: There is a discussion regarding the Tongue River Railroad Company suggestion that the rail line be located south of the proposed alignment, but still within the NHL boundary. This alternative route was described as "½ mile south of the core area of the battlefield." This statement is incorrect because the proposed line – as well as a line to the south – would both go through the NHL, all of which is the core area of the battlefield.
- Page 3: The "Relevant Rail Line Design Criteria" identifies the environmental criteria that were used in choosing the alignment for the railroad, including the avoidance of floodplains and wetlands. The design criteria currently do not include any cultural criteria, including any consideration of the national significance of Wolf Mountains Battlefield.
- Page 4: Under the heading "Routing the TRRC Line around the NHL Boundary is Not Feasible," there is a statement that the proposed line "limits environmental impacts to the maximum extent possible." It appears that the definition of "environmental impacts" that is being used here does not include cultural resource impacts, including impacts to NHLs. Under the National Environmental Policy Act (NEPA), federal agencies must also consider effects on historic properties in assessing the impact on the environment.
- Page 5: There is a statement that the bypass routes do not allow the Tongue River Railroad to meet its relevant design criteria. The relevant design criteria, as identified in the report, do not include protection of the Wolf Mountains Battlefield.

- Page 6: The statement that the bypass routes would cause "significantly more disruption to the landscape and thus to the environment" indicates that the analysis did not take into consideration the impacts to the Wolf Mountains Battlefield, and that the definition of "landscape" and "environment" does not include cultural resource considerations. The landscape, setting and environment of the Wolf Mountains Battlefield NHL are among its primary character-defining features.
- Exhibit A: The line labeled "NHL Boundary" is incorrect; the line illustrates the National Register of Historic Places boundary. Page 4 also includes an incorrect statement referencing the NHL boundary.

As a next step, we propose that STB and NPS meet in the near future to discuss how we may fully evaluate and consider alternatives that will best protect the Wolf Mountains Battlefield/Where Big Crow Walked Back and Forth NHL for present and future generations of Americans.

Given the higher standard of compliance that Section 110(f) of the National Historic Preservation Act affords to National Historic Landmarks, we believe that STB and its applicant will need to work very closely with NPS, the Montana State Historic Preservation Office, the ACHP, and the Indian tribes who attach great cultural significance to the battlefield in order to find a solution that will minimize harm to this nationally significant property. We look forward to hearing from you.

Sincerely,



Christine Whitacre
Program Manager
Heritage Partnerships Program

cc:

Ms. Charlene Vaughn, Advisory Council on Historic Preservation, 1100 Pennsylvania Avenue NW, Suite 803, Washington, DC 20004

Mr. Mark Baumler, Montana State Office of Historic Preservation, Montana Historical Society, 225 North Roberts Street, P.O. Box 201202, Helena, MT 59620-120

Ms. Dalice Landers, Bureau of Land Management, Miles City Field Office, 111 Garryowen Road, Miles City, MT 59301

Ms. Kay Lohof, Quarter Circle U Ranch, HC 71, Box 1, Birney, MT 59012-9501

Barbara Pahl, Director, National Trust for Historic Preservation, Mountain/Plains Office, 535 16th Street, Suite 750, Denver, CO 80202.



NPS Letter to STB, July 7, 2011

Christine_Whitacre to: Vicki.Rutson

07/07/2011 04:45 PM

mbaumler, DCoburn, conrad.fisher, kenneth.blodgett, steve.brady,
Cc: joe.foxjr, swilmoth, gravattlana, Lysa_Wegman-French,
Jeffrey_Durbin, amy_cole, Catherine.Glidden, cvaughn

From: Christine_Whitacre@nps.gov
To: Vicki.Rutson@stb.dot.gov
Cc: mbaumler@mt.gov, DCoburn@steptoe.com, conrad.fisher@cheyennenation.com,
kenneth.blodgett@stb.dot.gov, steve.brady@cheyennenation.com,
joe.foxjr@cheyennenation.com, swilmoth@mt.gov, gravattlana@yahoo.gov,

1 attachment



NPS STB Letter July 7 2011.pdf

Vicki,

Please see NPS comments regarding the PA for the Tongue River Railroad project. We also will mail to you a paper copy of this letter.

Christine

(See attached file: NPS STB Letter July 7 2011.pdf)

The National Park Service cares for special places
saved by the American people so that all
may experience our heritage.

EXPERIENCE YOUR AMERICA!

Christine Whitacre
Program Manager, Heritage Partnerships Program
National Park Service, Intermountain Region
P.O. Box 25287
Denver, Colorado 80225-0287
christine_whitacre@nps.gov
PHONE: 303-969-2882
FAX: 303-987-6675

FED EX Mailing Address:
National Park Service, Intermountain Region
12795 W. Alameda Parkway
Denver, Colorado 80228