



U.S. Department
of Transportation

**Federal Railroad
Administration**

1200 New Jersey Avenue, SE
Washington, DC 20590

JAN - 8 2009

Charlene Dwin Vaughn, AICP
Assistant Director
Office of Federal Agency Programs
Federal Permitting, Licensing, and Assistance Section
Advisory Council on Historic Preservation
1100 Pennsylvania Avenue, NW, Suite 809
Washington, DC 20004

Subject: DesertXpress Passenger Rail Project
Victorville, California to Las Vegas, NV

Dear Ms. Vaughn:

The Federal Railroad Administration (FRA) is responding to your letter of December 10, 2008 in which you requested additional information regarding the Section 106 process for the above referenced project. This letter also provides a summary of the discussion about Section 106 compliance for this project at a lead and cooperating agency meeting held on December 10, 2008 in Sacramento, California.

We first start with responses to your request for additional information.

- 1. Summarize how Section 106 compliance has been addressed by the applicant in project planning for this undertaking during the period from 2002 to 2008.*

DesertXpress, as a private applicant, has deferred formal activities related to Section 106 compliance to the lead and cooperating Federal agencies. However, in developing their project and alternatives, the applicant has tried to follow the I-15 corridor or other existing transportation corridors between Victorville and Las Vegas in an attempt to avoid sensitive environmental areas, including those that might involve historic resources. An early alignment alternative considered at the beginning of the NEPA process would have followed an existing rail right-of-way along Historic Route 66 through Victorville and Oro Grande, California. In consultation with the California SHPO, FRA learned of significant concerns about potential impacts to historic architectural resources along this route. Following SHPO consultation, the lead and cooperating agencies determined in April 2008 that the preponderance of potentially affected historic architectural resources along this route, as well as other environmental factors, were of such gravity that the proposed rail alignment through this area was removed from further consideration in the EIS.

FRA sent a letter to the California and Nevada SHPOs in November 2007 introducing the project and initiating the Section 106 process, as well as proposing the Area of Potential Effect (APE) and the scope of efforts to identify historic properties. Subsequently, FRA's Environmental Impact Statement (EIS) third-party contractor had phone conversations with the California SHPO. FRA's third-party contractor consulted SHPO staff member David Byrd in December 19, 2007 and the SHPO commented that portions of Route 66 visible from the proposed project right-of-way of Segment 1A should be included in the APE. This segment was later removed as a potential project alternative.

FRA's third-party contractor followed up with the CA SHPO several times regarding concurrence on the APE, including a February 2008 request for an official SHPO response to the APE. Mr. Byrd forwarded that request to Amanda Blosser who indicated that a letter would be forthcoming. Subsequent messages were left for David Byrd through April 2008. An e-mail was sent to Dr. Stratton and David Byrd on April 30, 2008 by FRA's third-party contractor requesting a response to FRA's November 2007 letter and APE.

FRA's EIS third-party contractor architectural historians also met with the Nevada SHPO in February 2008 to discuss previous historic surveys conducted in or near the proposed project APE, procedures for delineating the APE, and guidelines for evaluating and documenting structures over 45 years old within the APE.

Additionally, FRA contacted the SHPOs in the summer of 2008 by phone regarding FRA's proposal to prepare a Programmatic Agreement (PA) in compliance with Section 106 which would defer portions of the cultural resource studies until after the environmental document is completed in accordance with 36 CFR § 800.4(b)(2). Finally, FRA provided the SHPOs and the ACHP with a preliminary draft PA and a preliminary cultural resources section of the Draft EIS on November 13, 2008 in accordance with 36 CFR § 800.6.

2. *Clarify BLM's role in the alternatives analysis and the selection of a preferred alignment for DesertXpress. What is the current status of the application by DesertXpress for permission to use BLM land and how does the selection of a preferred alignment factor in?*

The Bureau of Land Management (BLM) is a Federal cooperating agency for the DesertXpress project environmental/historic preservation review. The BLM has been a full participant in the development of the NEPA analysis. Under BLM guidelines, the BLM may identify their agency's preferred alternative in the draft EIS. To date the BLM has not indicated a preference between the alternatives being studied. Thus, we anticipate the lead and cooperating agencies will identify agency preferences in the final EIS.

The DesertXpress has submitted an initial application to the BLM depicting the applicant's proposed route. The applicant has indicated a willingness to pursue any of

the alternatives currently being studied in the draft EIS and would amend their application to the BLM to reflect the agencies preferred alternative.

3. *Describe FRA's approach to coordinating eligibility and effects determinations with BLM on the alternative alignment under consideration.*

FRA and the cooperating Federal agencies believe that eligibility and effects determinations would be deferred through a PA until after an alternative is selected by the Federal agencies through the NEPA process. The Federal cooperating agencies have discussed and BLM has agreed that the evaluation of alternatives and selection of an agency preferred alternative through the EIS process can proceed based on summary information to be developed and included in the draft and final EIS documents including listings of cultural resources and their previously determined or assumed eligibility based on field work conducted in 2008.

4. *Share any opinions the California and Nevada SHPO's have provided to FRA on the feasibility of deferring portions of FRA's efforts to identify and evaluate historic properties, assess effects, and analyze alternatives to avoid, minimize, or mitigate adverse effects in this proposed corridor given their knowledge of the historic properties in the likely area of potential effects.*

APE maps were sent to the SHPO's in November 2007 and the FRA is still waiting concurrence. To date, the FRA has been relying on the BLM for guidance regarding cultural resource investigations and consultation with the SHPO's based on the BLM's extensive experience in this desert region. It is FRA's experience that deferral of eligibility and effects determinations, as described above, is an appropriate phased Section 106 approach for large linear transportation projects. In addition, the BLM, Surface Transportation Board (STB), and Federal Highway Administration (FHWA) concur with this approach and collectively have extensive experience with similar projects and compliance with Section 106 procedures. The FRA will be seeking further SHPO opinion on the process in the coming weeks.

5. *Explain how BLM will oversee cultural resource activities on the public lands that may be conveyed as part of an easement for the DesertXpress.*

BLM has responsibility for determining whether or not cultural resources identified on BLM public lands administered by the respective agency are eligible for listing in the NRHP and will participate fully in the Section 106 process for the DesertXpress project. The roles of the BLM as well as other federal Cooperating Agencies, the SHPOs, ACHP and tribes with respect to involvement and responsibility for cultural resources activities are described in the PA.

6. *Describe the level of tribal consultation needed in the preferred alignments given its location along I-15.*

FRA through the BLM and our third-party contractor have conducted tribal consultation for the project. BLM has taken the lead role in coordinating with the Native American community. To date, consultation has consisted of contacting each tribe through letters and phone calls to provide the tribes with information about the project and request information regarding properties that may be of interest to the Native American community. Only one tribe, the Timbisha Shoshone, requested a meeting which was held on August 19, 2008. The FRA will be conducting additional tribal outreach including sending information about the types of cultural resource sites found during surveys of the project APE prior to release of the draft EIS as well as holding meetings with tribes during the draft EIS public review period. The FRA would also allow any tribe who requested such to be a concurring party to the PA.

7. *Describe any role the Federal Highway Administration (FHWA) will play in the selection of a preferred alternative for this undertaking with response to right of way under its jurisdiction. Clarify how FHWA intends to coordinate any Section 106 review responsibilities for this undertaking with FRA and BLM.*

The FHWA is a federal Cooperating Agency for this project and as such will be required to select a preferred alternative and execute a Record of Decision. The FHWA will be a signatory to the PA and will participate in the review of all reports and documents that are required to be prepared under the PA.

The FRA, STB, FHWA, BLM, National Park Service (NPS), California Department of Transportation, and the Nevada Department of Transportation, met on December 10, 2008 in Sacramento, California for an EIS Working Group meeting on the Draft EIS NEPA document. At this meeting the agencies discussed the Section 106 process and issues raised in the conference call held on December 5, 2008 with the ACHP and the California and Nevada SHPOs.

After further deliberations the agencies came to a consensus that the process for Section 106 compliance laid out in 36 CFR 800.8 (c) of the ACHP's regulations would be unachievable given budget and time constraints, and given the more advanced stage of the NEPA process, and that it is not appropriate in this circumstance. The agencies agreed the best approach for the DesertXpress project at this time would be to follow the previously proposed process that would defer eligibility and effects determinations through a PA until after a preferred alternative is selected by the lead and cooperating agencies through the NEPA process. The federal cooperating Agencies have discussed and BLM has agreed that the evaluation of alternatives and selection of an agency preferred alternative in the NEPA document can proceed based on summary information listings of cultural resources and their previously determined or assumed eligibility based on field work conducted in 2008. BLM acknowledged that with use of a PA that defers phases of the Section 106 process, it would be appropriate to provide summarized lists of sites by alternative in the cultural resources Draft EIS section, and where eligibility of sites has not been previously established, FRA should assume eligibility of sites in the Draft EIS.

A meeting is being set up this month among FRA and cooperating agencies with the California and Nevada SHPOs, ACHP, and project applicant to confirm the Section 106 process outlined above.

We thank the Council for its participation and assistance. FRA looks forward to continuing to work with consulting parties on this project.

Sincerely,

A handwritten signature in black ink, appearing to read "David Valenstein", with a long horizontal flourish extending to the right.

David Valenstein
Environmental Program Manager
Office of Railroad Development

cc: M. Wayne Donaldson, CA SHPO
Alice Balrica, NV SHPO
Rich Rotte, BLM
Shawn Oliver, FHWA
Catherine Glidden, STB
Larry Whalon, NPS