

EI-18491
CB

February 8, 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:

On 02/07/2011 we received the Docket No. FD 30186 (sub- no. 3) Notice. We offer the following comments. Request for these comments is timely for a number of reasons which can be grouped under two headings: 1) new standards, information and developments since the currently extended PA was first executed and 2) ongoing Northern Cheyenne concerns and past consultation history.

The Notice reports that the Wolf Mts. Battlefield National Historic Landmark has been designated since the STB's decision to approve the Western Alignment in 2007. We note further that there are other newly recognized properties as well including the Rosebud Battlefield NHL. Further, any number of recent identification efforts in the general area continue to emphasize the high density of other cultural resources in the project area. For example: Boggs, James et.al. 2009 Northern Cheyenne Ethnogeography of the Tongue River/Powder River Plateau (Custer NF); McCormick, Mary 2006 Northern Powder River Basin SE Montana Landscape Level Overview of the High Potential Coal Bed Natural Gas Development Area; Aaberg, Stephen, 2006 Class I Overview of Paleontological and Cultural Resources in Eastern Montana (BLM). None of these inventories substitute for a hard look at cultural resources in the APE itself. They do demonstrate, as does Brownell, Joan 2005 A Study of Locational Information Pertinent to Northern Cheyenne Homesteads on the East Side of the Tongue River (Custer NF) the extreme high probability of significant Historic Properties in the APE, specifically properties significant to the Northern Cheyenne Tribe. There should be no surprise in the ongoing and traditional importance of the Tongue River watershed for the Northern Cheyenne Tribe since Tallbull and Deaver's 1991 original assessment, Potential Cultural Effects to the Northern Cheyenne from the Proposed Tongue River Railroad Extension (BLM) was written.

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Additionally, two recent judicial reviews have clarified or highlighted changing standards, particularly regarding government to government tribal consultation since 2007. Both 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) affirm and qualify the need for a "hard look" which was not met in our opinion during the original 2007 consideration by STB. The Quechan Tribe vs. USDI District Court review makes it clear, under 36 CFR 800.4 and 800.14 that while a programmatic agreement is an acceptable means of resolving adverse effects and completing agency Section 106 responsibilities when effects cannot be determined prior to an approval, the identification of historic properties cannot be deferred indefinitely (see page 2010: 8). 36 CFR 800 4(b)(2) as quoted at length in judicial review states "As specific aspects or locations of an alternative are refined or access is gained, the agency official **shall** proceed with the identification and evaluation of historic properties...." In the case of the Western Alignment the phased (and segmented) nature of consideration has in fact already identified the specific area of potential effect rendering, in our opinion, further deferral of substantive identification efforts inappropriate. Further delay, now years in passing, only emphasizes the lack of actual government to government consultation with the Northern Cheyenne (see To-Moak Tribe vs. USDI 2010: 9, 10 for description of a current standard for government to government consultation) and any substantive efforts to include Tribal concerns in the decision process.

Even the incorporation of a Class II inventory of the APE based on the input garnered from the above documents **and** appropriate Tribal consultation could move the undertaking more successfully towards consistency with 36 CFR 800 than a passive restatement of the current agreement which demonstratively no longer meets the intent of the NHPA or its regulations. We believe a new and hard look at the expired (and extended) PA is needed as well as a determination that the segmented and otherwise out of date NEPA documents meet current adequacy standards. The RODs were likely premised on the PA in question. We recommend that as a first step, if it has not occurred yet, STB initiate culturally appropriate government to government consultation and identification efforts with the Northern Cheyenne Tribe as described in the above referenced judicial reviews and in the ACHP's written guidance Consultation with Indian Tribes in the Section 106 Process: a Handbook (2008). Sensitive efforts are needed to incorporate Northern Cheyenne concerns into decisions to be made and any resulting programmatic agreement.

Thank you for requesting comment,

A handwritten signature in black ink, appearing to read "Stan Wilmoth". The signature is fluid and cursive, with a large initial "S" and a stylized "H" at the end.

Stan Wilmoth, Ph.D.

State Archaeologist/Deputy, SHPO

Copy: Charlene Vaughan/ACHP
Conrad Fisher/NC THPO
Mark Sant/BLM