

EI-16385

MAYER • BROWN



Mayer Brown LLP
1909 K Street, N.W.
Washington, D.C. 20006-1101

Main Tel (202) 263-3000
Main Fax (202) 263-3300
www.mayerbrown.com

Kathryn Kusske Floyd
Direct Tel (202) 263-3223
Direct Fax (202) 263-5223
kkusskefloyd@mayerbrown.com

February 11, 2009

Ms. Victoria J. Rutson
Chief, Section of Environmental Analysis
Surface Transportation Board
395 E Street, S.W.
Room 1106
Washington, D.C. 20423

Re: Finance Docket No. 34658, The Alaska Railroad Corp. -- Petition For Exemption From 49 U.S.C. §10901 To Construct and Operate a Rail Line Between North Pole, Alaska and Delta Junction (Northern Rail Extension)

Dear Ms. Rutson:

This letter provides the Alaska Railroad Corporation's comments on the Draft Environmental Impact Statement's ("DEIS") Section 6.0 Cultural Resources and Appendix H, Draft Programmatic Agreement (PA). Comments on other portions of the DEIS will be provided separately.

Section 6, Cultural Resources

1. *General Comment:* We observe that the definitions of "historic property" and "cultural resource" are inconsistently used in the DEIS, particularly comparing the use of the terms in the Glossary and Appendix H Glossary, and throughout Section 6.0. We suggest a uniform adoption of the definitions of "historic property" and "cultural resource" as was provided in the glossary to Appendix H, Programmatic Agreement (PA) with one recommended change to the definition of "cultural resource." For purposes of that definition, we suggest that the final clause regarding meeting the National Register criteria for "cultural resource" be deleted. With these definitional clarifications, we further suggest that throughout Section 6.0, "historic property" be changed to "cultural resource" unless specifically referring to a cultural resource that is listed on the National Register or that has been determined eligible for the National Register with SHPO concurrence.
2. Page 6-1. The predictive model identifies area of low, moderate and high potential for having cultural resources. This seems to be interpreted as low, moderate and high potential

Ms. Victoria J. Rutson

February 11, 2009

Page 2

for impacting cultural resources. It would helpful if the FEIS could include an explanation of the connection between the identification of areas with low, moderate, and high potential for the presence of cultural resources in the predictive model and identification of low, medium, and high potential for impacting cultural resources as identified by alternative segment in Section 6.3.4 and Table S-2.

3. Page 6-6, Section 6.2.3. The heading for this section suggests there will be a discussion of previously documented cultural resources. However, this section only discusses previous surveys. This leads to a series of questions to the reader of the DEIS such as the following: Were any cultural resources identified during the surveys? If so, how many cultural resources have been previously identified in the project area? What are those cultural resources (prehistoric, historic, archaeological, buildings)? Was there any pattern to the distribution of these resources? Are any of the previously known cultural resources listed on or eligible for the National Register? Any additional information on these points would be helpful to provide further clarification to the reader of the FEIS.
4. Page 6-6, Section 6.3.1, Paragraph 1. We believe that the first sentence is incorrect per 36 C.F.R. Section 800.16(l)(1) and suggest its deletion from or modification in the FEIS.
5. Page 6-7, Section 6.3.1, Paragraph 2 (1st full paragraph). The text indicates that a complete field survey of the overall APE was not feasible (328 feet on either side of the centerline). However, based on our limited understanding of the locations of the sites listed in Table 6-1, many cultural resource sites identified during the 2006 and 2007 surveys are well over 328 feet from the centerline, outside the APE. We believe that it would be appropriate to recognize that fact in Section 6.0.
6. Page 6-7, Section 6.3.1, Paragraph 5. The text states Type B surveys were conducted in high probability areas. The NLUR reports (2005, 2006, 2007) indicate that Type B surveys were conducted in high and moderate probability areas. The text also states testing was discretionary and based on a number of factors. We believe that it would be helpful in the FEIS to provide the reader with more detail on the factors that led to discretionary testing. It is our understanding those factors included site conditions and observations from the pedestrian walkover; in other words, cultural resource professionals selected the areas most likely to contain cultural artifacts to test.
7. Pages 6-7 to 6-8, Section 6.3.2, Paragraphs 1 and 2. The numbers for survey and sites do not appear to match the summary numbers provided in NLUR's 2007 report: 226 miles of track alignments, 241 km Type A, 122 km Type B, 195 high potential areas for testing, 63 sites, 51 prehistoric subsurface and 12 historic, 47 recommended eligible, 7 recommended not eligible, 4 require more data.
8. Page 6-8, Section 6.3.2, Paragraphs 1 and 2. Per the explanation in item 1 above, we suggest that all references to "historic properties" be changed to "cultural resources." Of the 61

Ms. Victoria J. Rutson
February 11, 2009
Page 3

cultural resources documented, seven were recommended not eligible and three have not had recommendations regarding eligibility because more information is needed. In addition, in a November 21, 2008 letter, it appears that SHPO did not concur with the eligibility findings for three of the 10 sites recommended as eligible in the 2007 report.

9. Pages 6-8 to 6-10, Table 6-1. We suggest that the title of the table be changed to "Cultural Resource Site Summary Data" as it includes several cabins of recent origin that are not archaeological sites. In the last column on this table entitled "Eligibility for National Register Listing," it appears that the information in this table is from an NLUR report, and represents only NLUR's recommendations on eligibility. A more precise heading for the last column might be "Recommended Eligibility for National Register Listing." This would reflect that the STB has not yet made determinations of eligibility (and/or obtained SHPO concurrence). Further, as previously indicated in item 1, we suggest that text references in Section 6.0 to historic properties be changed to cultural resources (except for those specific properties that have received SHPO concurrence with STB's determination of eligibility). Notably, determinations of eligibility are only needed for sites within the APE, and many sites listed in Table 6-1 are over 328 feet from the centerline, well outside the APE, for which DOEs do not appear to be necessary.
10. Page 6-10, Section 6.3.3, Paragraphs 1 and 2. We observe that the discussion of possible types of impacts on cultural resources is a bit confusing and inconsistent with other sections of the DEIS. Some sentences say impacts *would* occur and others say impacts *could* occur. "Could" seems more accurate for the possible types of impacts discussed. The statements about watershed modifications and "the project would likely alter the watershed" are not consistent with Section 4.3, Groundwater and Appendix E, Water Resources. We suggest for your consideration deleting references to watershed and groundwater changes. Also, since the majority of cultural resources in the project area are lithic sites, it is unlikely these factors would have much of an impact. In Paragraph 1, we recommend deleting sentence 4 (vegetation removal and erosion) and sentence 5 (aesthetics and visual site setting) because these are potential indirect effects and this paragraph addresses direct effects. Overall, impacts other than direct impacts within 100 feet of the centerline appear to be highly speculative and are unlikely to be significant. Further, we do not agree with the language that there is a potential for impacts to aesthetics and visual site setting for buried prehistoric properties.
11. Page 6-10, Section 3.3.4, Paragraph 2 and Table 6-2. This paragraph indicates there are 16 historic sites within 328 feet of proposed project alternative segments. This appears to be inaccurate for at least some of the sites listed in the middle column of Table 6-2. For example, XBD-281 appears to be over 400 feet from the centerline of Delta 2. We recommend that the information in Table 6-2 be checked for accuracy.
12. Page 6-11, Tables 6-2 and 6-3. All sites, except for those specific properties for which SHPO has concurred with STB's determination of eligibility, we recommend be marked with

Ms. Victoria J. Rutson

February 11, 2009

Page 4

an asterisk (*) or identified as potentially eligible. As mentioned above, we do not believe that there is a basis to address potential eligibility for any property that is not within the APE. On both tables, we suggest that the column heading "Historic Properties" be changed to "Cultural Resources." We recommend that the last column be deleted as this category appears superfluous.

13. Page 6-11, 1st partial paragraph. Per DEIS page 6-7, the APE was expanded to 328 feet on either side of the rail centerline to account for the proposed mainline track and ancillary support facilities and the potential indirect impacts that could result from construction and operation of the rail line. Page 6-11 states that (potentially) historic properties up to 1,312 feet (400 m) from the APE would not likely be affected by the ROW, but could be affected by the final design of ancillary features and their access roads. We suggest that the "buffer area" is generally excessive and unjustified. While it may be appropriate in some very limited areas where certain ancillary facilities are sited (e.g., material sites, tower sites or access roads) some distance from the centerline, it is not the case along the entire corridor. Also, we note that neither the ROW nor final design will impact historic properties -- any potential impact would be a result of construction and operation of the rail line within the ROW.
14. Page 6-11, Tables 6-2 and 6-3. Why is FAI-1750 included on Table 6-3? It is a cabin of recent origin, and is not an historic property. Also, Tables 6-2 and 6-3 include many sites/site numbers that are not listed on Table 6-1, and no information is provided about these sites in the DEIS: XBD-027, XBD-091, XBD-128, XBD-129, XBD-188, XBD-189; FAI-071, FAI-156. We recommend adding a table of known cultural resource sites to Section 6.
15. Page 6-12, Section 6.3.4, Paragraph 4 (1st paragraph on page). We don't agree with the statement that all buried prehistoric sites are eligible for the National Register, and per SHPO, not all buried prehistoric sites have been found eligible for the National Register. We suggest that it would be more appropriate to state that they are potentially eligible, except for those specific properties for which SHPO has concurred with STB's determination of eligibility. We recommend changing the 3rd sentence to "Buried prehistoric sites are potentially eligible for listing on the NRHP . . ." Also, the statement that these sites consisted of buried cultural materials including features, artifacts, and faunal remains may be misleading to readers of the DEIS. Some sites included only artifacts (chert flakes) with no features or faunal remains.
16. Pages 6-12 to 6-15, Section 6.3.4. We suggest that definitions for low, moderate, and high sensitivity/potential could be provided for clarity. Also, for clarity, if there is no direct effect, and there have been no cultural resources identified in the APE (nor are there likely to be any), why would the indirect effect be minimal instead of "none"?

Ms. Victoria J. Rutson

February 11, 2009

Page 5

17. Page 6-13, Section 6.3.4, Connectors. The reference to the trapper's cabin (site #?) is confusing to the reader of the DEIS. Table 6-1 does not identify a trapper's cabin along Connector B.
18. Page 6-13, Section 6.3.4, 3rd full paragraph. With regard to Donnelly Alternative 1, the DEIS addresses sites between 328 and 1,640 feet of the APE, yet Donnelly 2 addresses sites within 1,312 feet of the APE. It is unclear why the basis for comparison of the alignment alternatives is not the same..
19. Page 6-13, Donnelly Alternative Segments. We submit that there is insufficient information presented in the text to form the basis for a conclusion about impacts to historic resources along the Donnelly segments. For example, the mere presence of a site within the APE (328 feet on either side of the rail centerline) does not mean there will be an adverse effect. As previously indicated, direct effects may occur within the 200-foot ROW, and indirect impacts may occur out to 328 feet. To our knowledge, there have been no determinations of effect submitted to SHPO for concurrence. Also, please note that based on the information we have seen, XBD-298 would not be affected by the Donnelly 1 alignment, and this is likely the case with some of the other sites identified as within the APE.
20. Page 6-14, Delta Alternative Segments. Please explain the basis for the conclusion that the Delta alternative segments have moderate potential to affect historic properties, since no cultural resources were found along Delta 1 and only one site was found near the APE along Delta 2. The Delta 1 site appears to be 130m from the main track centerline and 343m from microwave tower 5. Based on the information we have been provided, Delta 1 appears to be in an area of low to moderate potential for prehistoric and historic sites (not moderate as stated in the text). The text indicates the segment is situated in abandoned and active floodplain alluvium. As such, the potential for impact appears to be minimal, except in the unlikely event the site cannot be avoided in siting an access road to the tower.

Appendix H, Draft Programmatic Agreement

21. Page H-2, Preamble, 6th Whereas clause. Based on the documents we have reviewed, the STB appears to have made only a few determinations of eligibility and received SHPO concurrence with those determinations. As previously indicated, ARRC does not believe formal determinations of eligibility for all cultural resources identified are necessary at this time. Such determinations will only be needed for cultural resources within the APE associated with the selected alignment.
22. Page H-4, Section II.A. It is not clear to the reader what is meant by the term "components"? Perhaps this paragraph could be clarified, as we do not believe the PA is intended to apply to operations, once construction is complete.

Ms. Victoria J. Rutson
February 11, 2009
Page 6

23. Page H-4, Sections II.B and C. What is a "consensus agreement"? It does not appear that STB's letters of 8/22/07 and 1/16/08 to SHPO provided STB's determinations of eligibility, nor does it appear that the 9/24/07 or the 7/16/08 letters from SHPO concur with any STB determinations of eligibility. We recommend that Paragraph II.B be reworded, as it appears to reflect NLUR's preliminary determinations of eligibility or recommendations regarding eligibility, and not STB determinations that have received SHPO concurrence.
24. Page H-5, Section IV.A. In addition to identifying areas that may require additional investigation, it would be useful to identify areas that do not require further investigation. These areas may include existing access roads/trails, provided disturbance remains within the previously disturbed area. As recommended by NLUR (see Potter 2007, pages 113 and 246), this section should also exclude from further investigation areas where the alignment shifts less than 100 meters from the APE surveyed in 2006 and 2007.
25. Page H-5, Section IV.A.1. We agree that the APE should be the 200-foot ROW, plus ancillary facilities that may extend outside the ROW. However, this does not appear to be consistent with the DEIS, which indicates the APE is 328 feet on either side of the centerline.
26. Page H-5, Section IV.A.3. We are unable to evaluate this stipulation without more information on the specific sites that require additional information to establish boundaries or determine the effects of the Undertaking.
27. Page H-6, Section V.A. Refer to "historic properties" rather than "cultural resources". Also, add "to the extent practicable" to the sentence. ARRC must also consider impacts to other resources and engineering constraints in the determining the final alignment.
28. Page H-6, Section V.B. We recommend that this section apply only to properties determined by the STB to be eligible for the National Register, that would be adversely affected, and that have received SHPO concurrence with both the eligibility determination and the finding of effect.
29. Page H-6, Section V.C. We are pleased to see that this section includes alternatives to the standard mitigation approach for archaeological sites (data recovery). In addition to the alternatives mentioned, other mitigation approaches might also be recognized, including avoiding, minimizing, rectifying, preserving in place, and compensation. Finally, this section should recognize that destruction without data recovery may be the appropriate treatment at some archaeological sites, which is specifically acknowledged in the ACHP's Recommended Approach for Consultation on Recovery of Significant Information from Archeological Sites (<http://www.achp.gov/archguide.html>).
30. Pages H-11 to H-12. A statement could be added to the stipulations regarding disputes about eligibility determinations. For example, "Disputes concerning eligibility will be resolved by the Keeper of the National Register (Keeper) pursuant to 36 CFR Part 63 and 36 CFR Part

Ms. Victoria J. Rutson

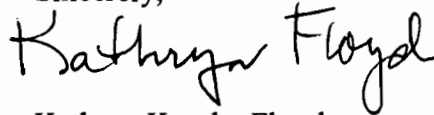
February 11, 2009

Page 7

800.4(c)(2)." Also, we believe the PA could also address disputes regarding additional identification and evaluation efforts, and findings of effect.

In addition to the comments above, we are attaching hereto proposed errata to the DEIS for your consideration. Thank you for providing us with the opportunity to review and comment on the DEIS. Please let us know if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Kathryn Floyd". The signature is written in a cursive, flowing style.

Kathryn Kusske Floyd

Attachment

cc: Dave Navecky
Alan Summerville
Brian Lindamood

PROPOSED ERRATA	
Reference	Comment
#35 DEIS Glossary, Definition of NHPA	Add a clause at the end, as follows: "... and give the Advisory Council on Historic Preservation a reasonable opportunity to comment with regard to the undertaking".
#36 Page 6-1, Section 6.2	Define prehistoric and historic.
#37 Page 6-6, Section 6.2.3	4th line. "has" should be "have".
#38 Page 6-7, Section 6.3.1, Paragraph 2 (1 st full paragraph)	Consider revising the first paragraph as follows for clarification. "In general, the purpose of a cultural resource survey is to identify NRHP eligible cultural resources, or historic properties, that could potentially be affected by construction and operation of the proposed project. For the purposes of the NRE cultural resources surveys, the Area of Potential Effect (APE) for direct effects was considered to be 100 feet on either side of the track centerline. ... To accommodate the proposed mainline track, any proposed ancillary support facilities, and an area of indirect effects, the APE was expanded to 328 feet (100 meters) on either side of the rail centerline. The survey was conducted as a systematic sampling survey..."
Page 6-7, Section 6.3.1., Paragraph 4	The first sentence should be clarified to indicate that the predictive model is for prehistoric sites.
Page 6-8, Section 6.3.2., Paragraph 2	Under which criterion are the Salchaket Village sites likely eligible?
Page 6-8, Section 6.3.2., Paragraph 2	For clarification, consider changing the 3 rd sentence as follows and deleting the 4 th sentence. "A total of 51 cultural resource sites were recommended eligible under NRHP Significance Criterion D because of their potential to yield information regarding prehistoric technology, subsistence, and/or settlement patterns important to the cultural history of Interior Alaska."
Pages 6-8 to 6-10, Table 6-1	In note (a) for Site (column 1), are these Alaska Heritage Resources Survey (AHRs) numbers? If so, that could be stated.
Page 6-8 to 6-10, Table 6-1	Change eligibility on XBD 336, XBD 340, and XBD 342 to "Not Eligible"
Page 6-10, Section 3.3.4, Paragraph 1	This paragraph states "The limits of disturbance for the mainline track extend 100 feet on either side of the track centerline. These areas

	subject to direct impacts. The overall project APE is considered 328 feet (100 meters) from the centerline. These areas, outside the limits of direct disturbance, are subject to indirect impacts from the build alternatives.” The last sentence would be more clear if revised as follows: “The areas outside the 200 foot ROW to 328 feet from the centerline may be subject to indirect impacts.”
Page 6-12, Section 6.3.4, Paragraph 5	This paragraph states there are two historic Salchaket Village sites, but previous discussion states there are three (see page 6-8, XBD 295 is missing). Also, consider using consistent terminology for throughout document—either “National Register” or “NRPH”.
Page 6-13, Section 6.3.4., Salcha Alternative Segments, Paragraph 2	Further explanation of the numerous archaeological resources encountered would be useful. Are they all within the 328 foot APE?
Page 6-13, Section 6.3.4, Donnelly Alternative Segments, Paragraph 1	Please explain the relevance of the Donnelly-Washburn Trail. Is it a cultural resource that could be eligible for the NRHP, and if so, what effect would the alternative have on the trail?
Page 6-13, Section 6.3.4., Donnelly Alternative Segments, Paragraph 2	If the prehistoric sites will not be listed, consider referring the reader to the appropriate table.
Page H-2, Preamble, 2 nd Whereas clause.	We recommend clarifying this clause to indicate whether the Invited Signatories and Concurring Parties do or do not have the right to amend or terminate the PA.
Page H-2 Preamble, 5 th Whereas clause	The numbers in the PA do not match the numbers in the DEIS section regarding acres and number of sites identified.
Page H-4, Section II.B.	The numbers of sites do not match numbers in DEIS. Further, we recommend deleting the percentages and including a reference to SHPO’s letter dated 11/21/08 and consider including the correspondence between STB and SHPO be included in an appendix?
Page H-4, Section II.C.	What are “determinations of APE”? Should this be “determinations of eligibility” or “delineation of APE”?
Page H-6, Section V.B.	Change “scared” to “sacred” in last sentence.
Page H-6, Section V.B.2.	The section should be clarified to acknowledge that the significance of the Salchaket Village sites have yet to be determined (per NLUR and SHPO).
Page H-7, Sections VI and VII.D, and page 10, Section X.B.	Human remains policy is Appendix A.1.
Page H-21, Appendix	NAGPRA only applies to Native American human remains and

A.1.	cultural items found on Federal lands. Perhaps a reference to State regulations might be included.
PageH-23, Appendix A.1	We recommend specifically identifying the appropriate qualification standards—Secretary of Interior’s Professional Qualification Standards (48 FR 44734 44737).