



EI -18510

Preserving America's Heritage

March 29, 2011

Ms. Cathy Glidden
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

Ref: *Draft Amendment to the Programmatic Agreement for the construction and operation of a rail line by the Tongue River Railroad Company from Miles City to Decker in Custer, Rosebud, Powder River and Bighorn Counties, Montana*

Dear Ms. Glidden:

The Advisory Council on Historic Preservation (ACHP) received your letter of January 31, 2011, requesting comments on the draft amendment to the Programmatic Agreement (Amended PA) for the referenced undertaking. We have completed our review of the comments submitted by other consulting parties to the Surface Transportation Board (STB), to date, and the draft Amended PA.

Of the comments submitted by Indian tribes and consulting parties in response to STB's letter of January 31, 2011, there were a number of concerns expressed regarding the potential for substantial impacts to a diverse range of historic properties. The concerns that have been raised address the proposed railroad alignment's impact on historic and cultural landscapes, rural historic districts, archeological sites, and properties of religious and cultural significance to Indian tribes. The ACHP, therefore, recommends that STB facilitate ongoing consultation with all consulting parties to consider the full range of alternatives to avoid, minimize and mitigate adverse effects to the historic properties. This would include an evaluation of a no build alternative and an alternative(s) that would avoid adverse effects to the National Historic Landmarks (NHLs) and other historic properties.

Consultation regarding the potential effects to NHLs should be carried out in accordance to the ACHP's regulations, "Protection of Historic Properties" (36 CFR Part 800), and Section 110 of the National Historic Preservation Act (NHPA). Pursuant to the NHPA, Federal agencies, to the maximum extent possible, should undertake actions necessary to minimize harm to NHLs. The consultation for NHLs, therefore, is anticipated to be more expansive. Regrettably, we do not find the consultation conducted thus far to be adequate for an NHL.

We note that when the original PA was circulated for signature, none of the Indian tribes chose to sign as a concurring party. STB should give adequate consideration to the circumstances that discouraged the Indian tribes from concurring and establish tribal coordination protocols that are responsive to tribal issues since it appears that the same issues are being expressed in the current consultation.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

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It is evident to us that further consultation is required to finalize the Amended PA. Nevertheless, we would like to provide STB the following comments for consideration. We encourage you to work with the Tongue River Railroad Company (Applicant) in addressing these comments as well as those provided by other consulting parties. Only then can STB discuss a path forward to renegotiating this PA.

Whereas Clauses

- Revisions to the proposed Whereas clauses are required that clarify the following background information:
 - Whereas 1: A clearer definition of the undertaking and the relevant statute that authorizes STB to approve the application submitted by the Applicant.
 - Whereas 3: Provide a written description of the undertaking's area of potential effect (APE) and include appropriate maps.
 - Whereas 6 and 7: Clarify who STB has consulted regarding the effects of the undertaking on historic properties and who has been invited to sign this Amended PA as concurring parties or invited signatories.
- Add a Whereas clause that recognizes the role of the National Park Service given the presence of an NHL within the APE.
Add a Whereas clause that clarifies to what extent STB has implemented any of the stipulations of the original PA.
- Add a Whereas clause that explains historic properties identified since the execution of the original PA, such as the Wolfe Mountains Battlefield National Historic Landmark (NHL), and other historic properties;
- Add a Whereas clause that addresses the status of the selection of a preferred rail alignment.

Stipulation Section

- Add a new stipulation that outlines the roles and responsibilities of all parties under the terms of this agreement.
- Add a new stipulation clarifying the process by which STB will verify that the Applicant has satisfactorily completed the stipulations related to identification and evaluation of historic properties and assessment of effects.
- As currently drafted, STB does not advance avoidance of effects on the alignment. This, however, should be a requirement for the Applicant in project planning. While this is partially addressed in Stipulation II, it needs to be preceded by general goals and principles for project coordination.
- At the beginning of the Stipulations, STB should clarify what is to occur with regard to implementation of this PA pending receipt of all approvals and funding.

Identification Plan

- Acknowledge the existence of the NHL in the PA and the ID plan. Clarify that Indian tribes participating in the consultation, including the Northern Cheyenne and Crow tribes, need to be provided an opportunity to participate in the activities under the ID Plan.
- Expand the treatment plan “for Eligible Resources—Native American and Non-Native American” to addresses not only impacts to archeological sites but also impacts such as visual impacts, impacts on the landscape, and impacts to the NHL.

Treatment Plan and Curation

- This stipulation should be expanded to include impacts beyond those to archeological sites.

Reports

- Add a stipulation that requires annual reporting to signatories and consulting parties regarding implementation of the terms of the PA.

Curation

- This stipulation should reference adherence to 36 CFR Part 79 and explicitly indicate where all records and items will be located. If the location is unknown at this time, the process for determining the location for curation should be explained.
- Add a stipulation that addresses contingencies should funding or timing issues arise.

Other comments

- Add a stipulation that allows other federal agencies involved in this undertaking to use the terms of this PA to meet their Section 106 compliance responsibilities.
- Detailed information is needed under a stipulation entitled "Tribal Coordination" regarding how tribal coordination will be carried out by STB;
- An appendix should be added that spells out all acronyms used throughout the Amended PA.

Although our comments assume that there will be an Amended PA executed by September 1, 2011, we caution STB that this is predicated on the agency's full consideration of the scope and depth of the issues presented at this time rather than focusing on the consultation that led to the execution of the 2005 MOA. To that end, we are available to work with STB and other consulting parties to ensure that the process established in the Amended PA is appropriately revised.

Once STB addresses all the comments submitted regarding the Amended PA, we request that STB schedule a teleconference to review the proposed revisions. If you have any questions or concerns, please contact Najah Duvall-Gabriel at (202) 606-8585, or via email at ngabriel@achp.gov.

Sincerely,

A handwritten signature in blue ink that reads "Charlene Dwin Vaughn". The signature is fluid and cursive, with the first name "Charlene" being the most prominent part.

Charlene Dwin Vaughn, AICP
Assistant Director
Office of Federal Agency Programs
Federal Permitting, Licensing, and Assistance Section



RE: Tongue River PA update

Najah Duvall-Gabriel to: Kenneth.Blodgett, Dalice_Landers, 03/30/2011 01:32 PM
doug, DCoburn, Becky Shipman, laxline,
rebecca, Stan Wilmoth, Baete, Lisa,
lowersioux, wanapeyanajica, "Duane Big Eagle", "Russell Eagle
Cc: Bear", scott, "Leonard Wabasha", rickthomas_06, blackfeetthpo,
"Perry Brady", "Darlene Conrad", "Raymond Redwing", "Wanda

From: "Najah Duvall-Gabriel" <ngabriel@achp.gov>
To: <Kenneth.Blodgett@stb.dot.gov>, <Dalice_Landers@blm.gov>,
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<scott@uppersiouxcommunity-nsn.gov>, "Leonard Wabasha"

1 attachment



mt stb tongue river railroad con 29mar11 (2).pdf

Dear All:

Please find attached the ACHP comments regarding the Tongue River PA revisions.

Thank you,
Najah Duvall-Gabriel
Historic Preservation Specialist
Advisory Council on Historic Preservation
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ngabriel@achp.gov

-----Original Message-----

From: Kenneth.Blodgett@stb.dot.gov [mailto:Kenneth.Blodgett@stb.dot.gov]

Sent: Thursday, March 24, 2011 11:35 AM
To: Najah Duvall-Gabriel; Valerie Hauser; Charlene Vaughn;
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rickthomas_06@yahoo.com; blackfeetthpo@gmail.com; Perry Brady; Darlene
Conrad; Raymond Redwing; Wanda Wells
Subject: Tongue River PA update

Greetings,

Attached you will find copies of all PA revision comments which have been received from consulting parties and other interested parties. As you recall, the Board served a notice to the public re-opening the PA to

updates and revisions, and also published the notice in the Federal Register. Comments were requested not later than March 18. We also asked consulting parties to provide specific comments/edits/ideas for updating and revising the PA by March 18. We will begin making revisions to the PA based on the input received, and in consultation with the consulting parties as appropriate. A revised copy of the PA which incorporates and addresses the concerns raised during the comment period ending March 18 will be provided to consulting parties for further review.

The Ft. Peck Assiniboine and Sioux Tribes and the Flandreau Santee Sioux Tribe have recently verbally notified us of their interest in participating as consulting parties. I am attaching an updated consulting party list with contact information for the consulting parties.

The Northern Cheyenne, Flandreau Santee Sioux, and Lower Brule Sioux tribes have requested a two week extension of time to prepare their comments. Comments have not yet been received from ACHP, but are forthcoming. I will distribute any additional comments received to consulting parties as I receive them, and they will be made available on the Board's website (ECT).

Thanks for your participation and input. Please feel free to contact me at 202-245-0305 with any questions.

(See attached file: 2011 consulting party contact info.doc)

(See attached file: BLM EI-18499.pdf)(See attached file: DOI EI-18504.pdf)(See attached file: Jenks EI-18493.pdf)(See attached file: MPA EI-18502.pdf)(See attached file: MT DNRC EI-18508.pdf)(See attached file: MT SHPO EI-18491.pdf)(See attached file: NPRC EI-18494.pdf)(See attached file: Sisseton Wahpeton Oyate EI-18503.pdf)(See attached file: TRRC EI-18501.pdf)(See attached file: USDA EI-18500.pdf)