



**National Trust *for*
Historic Preservation**
Save the past. Enrich the future.

September 23, 2015

Mr. Ken Blodgett
Attention: Environmental filing, Docket No. 30186
Surface Transportation Board
395 E Street SW
Washington, DC 20423

Via electronic submission to:
<https://public.commentworks.com/STB/TongueRiverRailroad/>

Dear Mr. Blodgett:

The National Trust for Historic Preservation offers the following comments in response to the Draft Environmental Impact Statement (DEIS) for the proposed construction and operation of the Tongue River Railroad in eastern Montana.

Interests of the National Trust

The National Trust is a private, non-profit corporation that helps people protect, enhance, and enjoy the places that matter to them. Chartered by Congress in 1949, the National Trust protects and defends America's historic resources, furthers the historic preservation policy of the United States, and facilitates public participation in the preservation of our nation's diverse heritage. 54 U.S.C. § 312102. In addition, the National Trust has been designated by Congress as a member of the federal Advisory Council on Historic Preservation, which assists other federal agencies in complying with Section 106 of the National Historic Preservation Act. *Id.* § 304101(a)(8). We represent more than 800,000 historic preservation supporters nationwide. In addition to our NEPA comment submission here¹, the National Trust has been participating as a consulting party in the National Historic Preservation Act Section 106 process for this project and worked on the development of the draft Programmatic Agreement (PA) included as an appendix to the DEIS.

¹ The National Trust hereby adopts, endorses, and incorporates by reference the comments submitted by the Montana Preservation Alliance. Although many of these comments overlap with ours, we have attempted to avoid undue repetitiveness by relying in part on incorporation by reference.

Comments on the DEIS

Purpose and Need

We continue to question the purpose and need for this project, first proposed in 1979 when there was a very different national conversation about the future use of coal and the extraction economy, and there was not a robust Asian market for these resources. Today, there is an oversupply of global coal, prices are depressed, and there is an international dialogue about whether continued use of coal fuel is advisable in light of environmental impacts. When a project languishes for more than 35 years, it is probably a good indication that it should not go forward. We do not believe that the support of the Surface Transportation Board (STB or Board) for this project is consistent with the public convenience and necessity. While the proponent may be in a financial position to build the facility, there is simply not sufficient public demand for the resources to be conveyed on the rail line. It is not in the public interest where, in order to facilitate the development of coal mining, nearly 12,000 acres of mostly private land would be used and converted from a variety of economically viable traditional uses, such as ranching, to transportation infrastructure that would benefit only a few.

Impacts to Cultural Resources

The Use of the Phased Approach to Section 106 Presents Challenges

We believe that the STB and its contractor did an admirable job in attempting to assemble survey data, especially where access to properties was limited. However, we were concerned to read in the press that some tribal consulting parties have expressed dissatisfaction with the approach taken and the results reached. We ask that STB remain open to receiving, analyzing, and including in the FEIS any information that may come forward from additional survey work being pursued independently by other consulting parties.

We also understand that, because of the large areas of potential effect (APEs), it would be difficult, costly, and impractical to collect Class III survey data at this phase of the project. We also recognize that the phased approach was agreed to by the consulting parties. Yet, the effect of the phased approach, and adopting the assumption that every newly-identified property in the survey is “presumed eligible for listing” (DEIS at 11-34, 44), means that it is very difficult to distinguish between the alternatives and the relative effects they would have on historic properties. Furthermore, previously identified historic properties within the APEs are cited, but eligibility determinations have not been made (see *e.g.*, districts listed at DEIS 11-43). In addition, the new survey work does not identify any new potential districts (with the exception of the Eastern Montana Fairgrounds), nor does it appear to consider the presence of traditional cultural properties (TCPs), which in this landscape could include tribal or ranching TCPs. The National Park Service offers useful guidance

about TCPs in National Register Bulletin 38 - "Guidelines for Documenting and Evaluating Traditional Cultural Properties," available at, <http://www.nps.gov/nr/publications/bulletins/pdfs/nrb38.pdf> (last visited Sept. 21, 2015). It cites examples of TCPs which are likely to be found in this area:

- a location associated with the traditional beliefs of a Native American group about its origins, its cultural history, or the nature of the world;
- a rural community whose organization, buildings and structures, or patterns of land use reflect the cultural traditions valued by its longterm residents. *Id.* at 1.

We note that in the Section 106 Report prepared for the Montana State Historic Preservation Office, there are certain properties "called out" as "exceptional/likely eligible" or "likely not eligible," but that is as far as the eligibility analysis goes. This effort straddles a fine line between acknowledging the value and reasonableness of the phased approach and not presenting the reader with enough useful information to be able to compare the relative shortcomings or benefits of the 10 build alternatives. Simply tabulating the numerical counts of property types without regard to significance is not helpful, especially when the main factor which seems to be impacting these counts is the proposed length of each route. Therefore, we do not have a recommendation for a preferred alternative and believe that presenting information that essentially treats all alternatives as equal from a cultural resources perspective is not a useful practice, because it makes it difficult for the agency to select an alternative based on a relative understanding of the likely impacts of various alternatives.

We also believe that the way information is presented in the Section 106 Report should be incorporated into the FEIS. We understand the data used in both documents is the same, but we favor the presentation and analysis in the Section 106 Report.

Indirect Effects Need Additional Analysis

Direct effects of construction are adequately presented in the DEIS and the Section 106 Report via the tables that show impacts in the right-of-way for each alternative. We submit that indirect effects (such as noise, traffic interruption, visual effects. etc.) merit more detailed discussion in Chapter 11. For example, in Section 11.5.2.2 about the Colstrip Alternatives, there are brief references to potential visual effects (*e.g.*, "the introduction of the railroad could alter these special relationships by introducing a new and incompatible visual element.") DEIS at 11-61. But there is no discussion about potential noise effects which could be similarly disruptive to a character-defining feature of a ranch property, such as the setting. Meanwhile, language elsewhere in the DEIS says " [t]he Colstrip Alternative would result in the most adverse noise impacts from rail operation, which would exceed OEA analysis

thresholds at 89 receptors on the existing Colstrip Subdivision and at five receptors on the new rail line under the high coal production scenario.” DEIS at 7-1. Would this adverse noise impact extend to historic properties found along this alternative? Noise is referenced briefly as a general type of potential adverse effect in charts, but not discussed at all in the narrative or with regard to specifically identified historic properties.

In the chapter on downline impacts, we note that the discussion of impacts focused on only increased rail traffic, noise and vibration and, “[i]n OEA’s experience, the potential for adverse impacts to result from increased rail traffic on existing lines is usually limited to rail safety, air quality (including an increase of at least three trains per day in nonattainment areas), noise and vibration, grade-crossing delay and safety, and environmental justice.” DEIS at 17-6. We are curious why downline impacts to cultural resources have been excluded from this list of potential adverse impacts. It appears that noise, vibration and increased rail traffic could certainly cause adverse effects to downline historic properties because the integrity of the characteristics of a historic property (such as setting, feeling and association) that make it eligible for the National Register could be diminished. 36 C.F.R § 800.5(a)(1).

Cumulative Effects and Irretrievable Commitment of Resources Raise Substantial Concerns about the Project

We agree with and are concerned by the DEIS’ analysis of cumulative effects on cultural resources: “In summary, construction and operation of any build alternative would contribute to cumulative impacts on cultural resources when combined with the proposed and potentially induced coal mines, BLM land management, and energy development.” DEIS at 18-40. “Construction and operation of the proposed rail line would result in the following impacts on cultural resources: destruction, removal, or alteration of resources within the right-of-way, obstructions to accessing cultural resources, and visual impacts on resources adjacent to the right-of-way (hereafter referred to as the common cultural resources impacts). Any build alternative would contribute to cumulative impacts on cultural resources by adding to impacts from other projects.” DEIS Appendix U-169.

We also believe that the DEIS accurately assesses the effect that the construction of the railroad would have on cultural resources and we believe that the potentially extensive impacts should cause STB to pause before considering project approval: “Cultural resources (archaeological sites, tribal resources, and built resources) are nonrenewable resources, and any loss of such resources would be irreversible. . . . [T]he proposed rail line would damage or destroy from 1,391 acres to 3,372 acres with a high likelihood of archaeological sites. . . . However, for the areas surveyed within the rights-of-way, tribal members found the most tribal resources along the Decker Alternatives and the fewest along the Colstrip Alternatives and Moon Creek Alternatives. For built resources in the right-of-way where OEA conducted field surveys, the proposed rail line would damage or destroy from three to eight built resources. In areas not surveyed, the proposed rail line would damage or destroy

from zero to ten built resources.” DEIS at 21-3.

The Section 4(f) Analysis Is Inadequate

Of the ten build alternatives identified, six would require construction of an underpass crossing of I-94 west of Miles City, Montana, which would require authorization by the Federal Highway Administration (FHWA). DEIS at Appendix Q-5. Before issuing any such authorization, the FHWA must ensure that the project complies with Section 4(f) of the Department of Transportation Act, 23 U.S.C. § 138(a); 49 U.S.C. § 303(c). Section 4(f) prohibits the use of land from historic properties and other protected sites, unless (1) there is no feasible and prudent avoidance alternative to the use of the site, and (2) the project includes “all possible planning to minimize harm” to the protected site. *Id.* The use of a resource protected by Section 4(f) is exempt from these requirements if the use is deemed to be “de minimis.” In the case of historic properties, that requires written concurrence from the State Historic Preservation Officer that the project will have “no adverse effect” on the historic property. 23 U.S.C. § 138(b); 49 U.S.C. § 303(d); 23 C.F.R. § 774.17. The six build alternatives that are subject to the requirements of Section 4(f) are the two Tongue River Alternatives, the two Tongue River Road Alternatives, and the two Moon Creek Alternatives. DEIS at Appendix Q-5.

With the exception of the Spotted Eagle Recreation Area, the STB proposes to defer all further Section 4(f) compliance until after the Record of Decision. This decision is based on the explicit assumption that all historic properties potentially affected by the project will either be determined not eligible for the National Register, or will be avoided, or the level of impact on the historic properties will be reduced to the point of “no adverse effect,” through the Programmatic Agreement adopted under Section 106. *See* DEIS at Appendix Q-9. However, that assumption is flatly contradicted by the potential impacts disclosed in other chapters of the DEIS, and simply cannot be substantiated. As a result, we believe that the STB’s proposed approach to the deferral of Section 4(f) compliance is not consistent with the requirements of the law. We do not agree that all potential Section 4(f) matters will be definitively addressed by the PA, because the procedural requirements for Section 106 compliance to “take into account” potential adverse effects on historic properties are not the same as the more stringent substantive requirements of Section 4(f).

Furthermore, Chapters 11 and 12 present information that appears to be inconsistent with Appendix Q and with other parts of the DEIS and Section 106 Report. First, the STB has declined to analyze the National Register eligibility of properties at this phase, but proposed to treat all as “presumed eligible.” Yet, there is extensive discussion about the number of known and presumed eligible resources (not including any sites yet to be identified in unsurveyed areas), including specific numbers that will be damaged or destroyed *within the right-of-way*. For example, “[t]he number of presumed-eligible cultural resources identified through research findings and field surveys—including archaeological, tribal, and built resources—located in the right-of-

way would range from 57 to 78 depending on which of the ten build alternatives are being considered.” DEIS at Appendix Q-11.

The DEIS asserts that, “[i]f any eligible cultural resources were identified through this process, OEA anticipates that the implementation of the Programmatic Agreement would result in either the avoidance of Section 4(f)-eligible cultural resources or the mitigation of impacts on those resources to a level sufficient for a de minimis impact determination.” DEIS at Appendix Q-11. These assurances are simply not credible under the circumstances, where (1) National Register eligibility for nearly all sites is undetermined, and (2) it appears to be a foregone conclusion that sites of all types will be damaged or destroyed during construction, no matter which build alternative is selected.

In essence, we believe that the STB’s deferral of compliance with Section 4(f) until an unknown point in the future is unlawful. There is no guarantee that the PA would in fact “result in either the avoidance of Section 4(f)-eligible cultural resources or the mitigation of impacts on those resources to a level sufficient for a de minimis impact determination.” DEIS at Appendix Q-11. Rather, compliance with Section 4(f) is required *before* the approval of a project, and that is not contemplated in the approach set forth here. See *North Idaho Community Action Network v. U.S. Dep’t of Transp.*, 545 F.3d 1147, 1158 (9th Cir. 2008); *Corridor H Alternatives, Inc. v. Slater*, 166 F.3d 368, 372-74 (D.C. Cir. 1999).

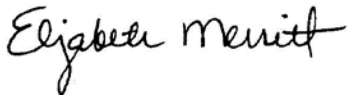
Conclusion

We have followed this project for many of its 35 years, and we believe that the STB should not approve it based on longstanding community concerns and impacts to cultural resources. Thank you for considering our comments. Should you have any questions, please do not hesitate to contact us.

Sincerely,



Amy Cole
Senior Field Officer & Attorney



Elizabeth S. Merritt
Deputy General Counsel

cc: Najah Duvall-Gabriel, Charlene Dwin Vaughn, and Reid Nelson
Advisory Council on Historic Preservation
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