

September 30, 2014

Ms. Victoria Rutson
Office of Environmental Analysis
Surface Transportation Board
395 E Street SW
Washington, DC 20423

Re: Comments from Colstrip Alternative Landowners Group on proposed Tongue River Railroad project Programmatic Agreement

Dear Ms. Rutson:

This letter provides comments on the proposed Programmatic Agreement ("PA") on behalf of my clients who own property along the proposed Tongue River Railroad ("TRR") Colstrip Alternative: Kurt Baumgartner, Hank and Kitte Coffin, Jim and Helen Curran, Joseph Hanna Trust, Highland Rim, Rocker Six Cattle Company, Trusler Inc., Dick and Kay Wells, and Hugh and Ann Wells (collectively, "the Landowners").

"Whereas" Clauses

The Landowners' primary concern regarding the whereas clauses as written is that they are overbroad and premature. Specifically, the eighth proposed whereas clause in the July 31, 2014 draft appears to contemplate the choice of a route by the Surface Transportation Board ("STB") prior to full identification and consideration of potentially significant cultural resources along all potential routes, including full consideration of the No Action Alternative. We do not believe that the language authorizing programmatic agreements applies for this project. The subsection on Programmatic Agreements at 36 CFR 800.14(b) states:

The (Advisory) Council (on Historic Preservation) and the agency official may negotiate a programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects from *certain complex project situations* or multiple undertakings (emphasis added).

The Tongue River Railroad is not a complex project.

PAs are not an option available to the agency unconditionally. They may only be used under the circumstances described above. Only the "complex project" language appears to have potential application to the TRR project. Nowhere in the proposed PA is there any explanation of why this project should be considered "complex." We are not aware that such a finding has ever been discussed, let alone analyzed and documented sufficiently to justify the use of a PA.

We object to any unsubstantiated determination that this is a complex project such that some forms of analysis may be waived until after the agency's final decision.

The regulations do not define the term "complex." In the few cases that interpret 36 CFR 800.14, federal courts have accepted application of the term to projects with far greater complexity than the 40 or so miles of new rail line across open country at issue here. The U.S. District Court for the District of New Jersey accepted the Council's determination that a project to "combine rehabilitation and new construction on the site" of a large historic hotel constituted a complex project. *Lesser v. City of Cape May*, 110 F.Supp.2d 303, 318 (D.N.J. 2000), *affirmed* 78 Fed. Appx. 208, 2003 WL 22367169. In that case, both the Council and the New Jersey State Historic Preservation Office agreed that the project was complex, and the court relied on their expertise – not STB's. We are aware of no such findings from the Council and the Montana SHPO in this matter. In addition, at the time of approval by the city, the second phase of the project remained conceptual. We are not aware that any part of the TRR proposal remains conceptual. It is a rail line, not a seaside conference center in the design stage.

The U.S. Court of Appeals for the Eighth Circuit found that a PA should have been executed, under the same regulatory clause, or the alternative National Historic Preservation Act process completed, prior to STB licensing of a proposal to construct approximately 280 miles of new rail line and upgrade nearly 600 miles of existing rail line. *Mid-States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d 520 (8th Cir. 2003), *rehearing and rehearing en banc denied, on remand* 2004 WL 395841, *on remand* 2005 WL 1041882, *on remand* 2005 WL 3616815, *on remand* 2006 WL 383507. In other words, for constructing a rail line seven times the length of TRR, the court found a PA *optional*. Waiving any part of the agency's pre-decision impact analysis via PA is neither mandatory nor appropriate for this project.

Effects can be fully determined prior to approval.

Finally, we do not agree that the language of 36 C.F.R. § 800.14(b)(1)(ii) – "When effects on historic properties cannot be fully determined prior to approval of an undertaking" – applies to this proposed project. To the contrary, determining effects on historic properties along all alternative routes is feasible prior to the agency's decision. As the agency appears to believe otherwise, we request an explicit property description of which portions of the alternatives cannot be fully analyzed prior to the agency's final decision.

Identifying some effects after authorizing construction would disadvantage the No Action Alternative as a viable option.

Even if the regulations authorized use of a PA in this situation, it would be inadvisable as a practical matter for STB to wait until after authorizing construction – if that is the outcome – to identify some effects on historic properties. If effects turn out to be more serious

or widespread than understood at the decision point, the No Action Alternative will no longer be available. STB will have committed itself irrevocably to construction. This outcome would be a poor use of the considerable resources, government and private, devoted to making the best decision for all involved.

Stipulations

The Landowners concur on and incorporate here by reference the Council's concerns, as expressed in Charlene Vaughn's September 8, 2014 letter to Victoria Rutson. The Landowners have the following additional concerns.

Preamble

We would like a clarification here that STB's duty extends to the full scope of NHPA and its implementing regulations, not just the section mentioned here. We would also like some commitment as to the overall timeline in which STB would carry out its legal duties under the PA, if the PA takes effect. The twelve-year lifetime of the proposed PA is far too long for the Landowners to live in limbo, especially given the decades this proposal has already dragged on.

Identification Plan

Many of the Landowners have long family relationships with the land to be crossed and personal knowledge of historically and culturally significant sites that may be affected by the rail line. Most have had little or no opportunity to share this information. The oral history surveys prescribed in National Register Bulletin 24 have not taken place. There is no barrier to collecting this information immediately. Participants with relevant knowledge should receive reasonable financial reimbursement for their time.

The 15-day timeline for response by PA consulting parties on each Phase I ID Report, and again for submitting final comments, is far too short. The Landowners are working people participating in this process in their spare time. At some points during the agricultural calendar, they are effectively unavailable for weeks. To ensure the Landowners' ability to participate meaningfully, the minimum turn-around for their response should be 45 days.

The five days allowed for STB to provide missing information or determine that additional information is not needed may be inadequate where a significant data gap is identified. We also request an automatic extension period of at least 15 days on any deadline named in the PA, if requested in writing by one of the interested parties, and reasonable financial reimbursement for the Landowners' time required to review reports, or if deemed necessary by the Landowners, reasonable financial reimbursement for a qualified expert approved by the Landowners to assist them with this review.

Finalization of Treatment Plan(s)

The 15-day timeline for PA consulting party responses on informational deficiencies is inadequate. To ensure the Landowners' ability to participate meaningfully, the minimum turn-around for their response should be 45 days. The Landowners will require expert assistance to review the sufficiency and quality of the Treatment Plans for their property. We request reasonable financial reimbursement for a qualified expert approved by the Landowners to assist them with this review.

The Landowners are not willing to be bound by any clause that interprets their failure to comment as concurrence.

Data Recovery Plan

We are concerned that subsection (c), regarding the Contractor's duty to conduct data recovery in accordance with the Data Recovery Plan, includes no timeline and could potentially be delayed indefinitely. We request a clear timeline.

Review of Data Recovery Reports

The 15-day timeline for PA consulting party responses on informational deficiencies is inadequate. To ensure the Landowners' ability to participate meaningfully, the minimum turn-around for their response should be 45 days.

Construction

The Landowners are concerned that the PA contemplates consideration of "the full range of treatment options (including avoidance)" after a route decision has been made. The only way that STB can realistically consider the full range of options is to analyze all the data described in the Stipulations prior to the route decision. In addition, a phased review of data while construction is underway may foreclose options that would have been available prior to construction. As a practical matter, delays and route changes will be far more costly to TRRC during construction, putting additional pressure on the Contractor and STB to set aside serious concerns. For other interested parties, being forced to raise objections during construction creates the risk of being required by a court to post a bond while attempting to have the PA enforced, which the Landowners cannot afford to do. Only a full review of all data *prior to the route decision* will leave all options open and protect all parties' rights.

The Landowners will require expert assistance to review the sufficiency and quality of the Contractor's data recovery fieldwork/treatment on their land. We request reasonable financial reimbursement for a qualified expert approved by the Landowners to assist them with this review.

Changes to the Rail Line Alignment/Other Areas Subject to Direct Impacts

The language of this stipulation represents the first notice the Landowners have had that there are plans for staging areas or work camps. Such facilities represent many potential impacts that have not yet been considered at all in the planning process, such as damage to roads and

other infrastructure, and law enforcement needs. We are very concerned that STB would propose to consider these impacts, along with those created by construction access routes and completely unknown "changes to the alignment," *after* selecting an alternative. These impacts are completely knowable in advance if the agency makes the effort to acquire the information. Again we object to any plan to postpone collection of this vital data until after an alternative is chosen.

As above, the Landowners will require expert assistance to review the sufficiency and quality of supplemental reports. We request reasonable financial reimbursement for a qualified expert approved by the Landowners to assist them with this review. The Landowners request at least 45 days to provide comments.

Discovery

The Discovery Plan creates the same need for expert assistance. We request reasonable financial reimbursement for a qualified expert approved by the Landowners to assist them with this review.

Curation

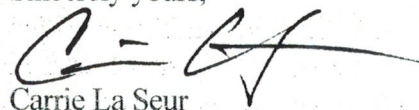
The Landowners express their preference for preservation in place of all archeological, cultural, and paleontological materials discovered on their property, and their wish to be consulted on the handling of such materials before any removal from the Landowners' individual properties. The Landowners wish to receive a detailed report on and receipt for any such materials prior to their removal. Finally, the Landowners request that STB require a bond from TRRC prior to the beginning of construction sufficient to cover the expense of handling and returning any such materials to private property owners.

Dispute Resolution

Given the possibility that the Landowners will not ultimately sign the PA, but have participated in its development and will continue to have a significant interest in its enforcement, they request language that would grant them access to review of disputes by the Council as described under subsections (a) – (f), instead of the lesser level of review offered to members of the public at subsection (g). The Landowners also request the right to initiate Council review of an objection in the event that STB declines to do so.

We appreciate your consideration of these issues.

Sincerely yours,



Carrie La Seur