



Nez Perce

TRIBAL EXECUTIVE COMMITTEE

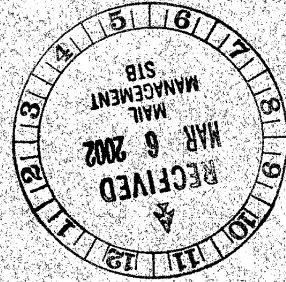
P.O. BOX 305 • LAPWAI, IDAHO 83540 • (208) 843-2253

February 13, 2002

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Office of the Secretary
Case Control Unit
STB Docket No. AB-564
1925 K Street
Washington, D.C. 20423-0001

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RE: Response to CSPR Letter and Comments to Proposed MOA

Dear Sir or Madam:

This letter serves as a follow-up to the Nez Perce Tribe's December 13, 2001 letter commenting on the letter from STB dated November 30, 2001 regarding Camas Prairie Railnet (CSPR) abandonment. This letter serves to provide clarification to the issues raised in the December 31, 2001 and February 7, 2002 letters of John Heffner, attorney for CSPR, and to provide preliminary comment on the proposed memorandum of agreement (MOA).

Initially, the Nez Perce Tribe wants to reinforce our position that we believe there are significant issues deserving attention of all parties to this process. The Tribe is committed to participating in the abandonment process in a collaborative manner. As such, we have committed the expertise of technical staff from our Cultural Resource, Fisheries, and Water Resource programs.

Comments to Heffner Letters

First, Mr. Heffner has questioned the Tribe's statement that there is not an apparent conflict on the Stream Restoration Plan. See February 2 Letter at 5-6. To clarify, the Tribe made this statement because it is unclear at this time what actions will occur to restore the Lapwai Creek and what action will be required for historic preservation. Until we have had a collaborative discussion to resolve these issues and clarify the on-the-ground needs for historic and stream protection, it is impossible to know if there is an actual conflict. The Tribe has begun

discussions with the SHPO over the elements of the draft Stream Restoration Plan to provide the needed information to identify if, in fact, there is such a conflict. Once these discussions are completed, all parties will have a better understanding of any conflicts, if any.

Further, the Tribe believes that the development of the rail-to-trail can occur in a manner that is consistent with historic preservation and stream restoration goals. On page 5 of the December 31 letter, Mr. Heffner states that the Tribe and Idaho Department of Fish and Game (IDFG) have proposed action for stream restoration that "are incompatible with the line's status as a rail trail and could prevent (or make prohibitively expensive) any future reconversion of the trail back to active railroad service." This statement is incorrect. After consulting with attorneys from the STB, the Tribe believes that the actions proposed in the draft Stream Restoration Plan will not affect the line's status as a rail-trail or any future reconversion of the trail back to an active railroad service.

The existence of a continuous right-of-way is the key component of maintaining a rail-trail. The actions proposed in the Plan will maintain a continuous right-of-way capable of redevelopment. Nothing under the federal rail-banking law precludes restoration work nor requires that a future line be redeveloped on precisely the same location within the right-of-way or at cost that is not "prohibitively expensive." Indeed, the very act of salvage of track and ties would arguably make the line "prohibitively expensive" to redevelop. The Tribe believes the proposed work will, if anything, enhance the rail-trail concept and would not contravene any important statutory objectives. As the process proceeds, we believe it would be appropriate for representatives from the Camas Prairie Rail Conservancy to be included to identify possible conflicts between stream restoration, historic preservation, and trail-development.

Second, Mr. Heffner states that the Tribe has made demands that are overreaching or unreasonable requests for expensive environmental mitigation and that the "Tribe appears to want CSPR to pay 100% of the cost required for stream restoration." See February 2 Letter at 6. To clarify, the Tribe has not made any demands. The Tribe took action, with other federal and state agencies, to develop a draft Stream Restoration Plan. The process to develop this plan was initiated after a representative of CSPR met with all parties involved in Idaho to discuss restoration needs. At the conclusion of this meeting, CSPR requested the Tribe, IDFG, National Marine Fisheries Service (NMFS), and the National Resource Conservation Service (NRCS) to create a "Track Salvage and Stream Restoration Plan." The Work Plan was designed by agencies representing tribal, state, and federal governments and submitted to CSPR for review and consultation based upon extensive technical expertise and on the ground surveys.

The Tribe does not want CSPR to pay the entire cost of restoration of Lapwai Creek. While the Tribe will acknowledge that the development of the road has contributed to impacts at Lapwai Creek, the draft Plan focuses solely on those impacts caused by the creation, location,

and maintenance of the railroad.¹ These impacts include but are not limited to: loss of riparian habitat (the width of the ROW), hydrological niche points created by bridges and culverts (not listed as individually eligible for the National Register of Historic Places), and reduction of flood plain access from rail prism construction. The expenses proposed for restoration are considerably small for the vast area the Plan proposes to restore compared to other projects in the region. The Stream Restoration Plan was also developed for obtaining the best environmental benefits with the least amount of funds. The Stream Restoration Plan does include other work required to insure the success of the Plan and funding for personnel to implement the Plan (funds could be obtained by the Tribe and other agencies).

Third, on page 2 of the December 31 letter, Mr. Heffner indicates that lengthy negotiations were conducted with the Tribe in order to finalize an agreement for the Tribe to conduct a cultural resource inventory. The letter indicates that the Tribe terminated negotiations after CSPR had thought an understanding had been reached on the issue. This is incorrect. Representatives from the Tribe submitted a draft contract with a budget to CSPR late in April, 2001. Over a month passed before any response was received. At that time, CSPR offered "rent" of a portion of the rail line in lieu of actual funding of the inventory. Due to the lengthy time of negotiations with CSPR, the Tribe's Cultural Resource Program was eventually unable to commit to complete the inventory in the time requested. At that time, the Tribe provided Mr. Heffner with a list of firms and other qualified individuals that would adequately perform the work required. One of these firms was eventually selected by CSPR.

Lastly, Mr. Heffner states that the Tribe somehow misconstrued federal law in concluding that the STB must comply with relevant evaluation and consultation requirements. Federal laws, such as the National Environmental Policy Act, the National Historic Preservation Act, and the Endangered Species Act, require that an agency, such as the STB, complete environmental and historic assessments before a decision can be implemented. A plethora of federal case law supports this point. *See e.g. Friends of the Atglen-Susquehanna Trail v. STB*, 252 F.3d 246 (3rd Cir. 2001) and *Idaho v. ICC*, 35 F.3d 585 (9th Cir. 1994). In other words, the federal decision authorizing abandonment cannot proceed until the STB has completed all applicable environmental and historic assessments, including consultation under §7 of the Endangered Species Act, assessment and consultation under §106 of the National Historic Preservation Act, and an Environmental Assessment or Environmental Impact Statement under the National Environmental Policy Act. Further, by stating there were to be mitigation measures to be completed by CSPR before abandonment could precede, STB acknowledged there were impacts from abandonment that needed to be addressed prior to salvage. One of the mitigation measures was for CSPR to consult, submit, and design a Work Plan to the Tribe and IDFG for their review.

¹ The CSPR has been unable to provide any information regarding the extent of the impacts of the highway or any information that questions the conclusions of the Stream Restoration Plan or points to another source as the correct source of the impacts.

The Tribe has done everything within their power to help expedite CSPR in their goal of abandonment, so much as to taking a lead role in the design of the Track Salvage and Stream Restoration Plan, and will continue to work with the parties toward completion of this effort.

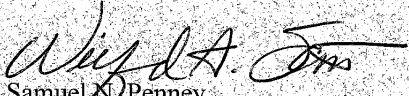
Comments / Questions to Draft MOA

- The Agreement does not address any of the environmental conditions contained in the abandonment order. How will these issues be addressed? Will there be a separate MOA to address environmental conditions that includes BLM, the Tribe, and IDFG? The Tribe firmly believes that the outstanding issues of concern must be identified and a strategy developed to address these concerns before any salvage activity occurs.
- The CSPR has proposed to keep a portion of the rail line (approximately 1 mile) operating as a spur line. How does the MOA address this issue? Will CSPR need to repetition the STB to modify the abandonment order?
- On page 1 of the MOA, it states that the STB has consulted with the Tribe regarding the line. While the STB has solicited input from the Tribe, government-to-government consultation as required by Executive Order 13175 has not occurred. This statement should be clarified to state that STB solicited the Tribe's input.
- On page 1 of the MOA, there is a reference to the religious and cultural significance of the line to the Nez Perce Tribe. This statement is incorrect. The Tribe's main historic concern is the effect of abandonment on properties of religious and cultural significance to the Tribe. The line itself does not have independent religious and cultural significance.
- The Camas Prairie Trail Conservancy needs to be a signatory to the MOA. The MOA consistently refers to this entity.
- On page 2 (and other areas), the MOA states that STB shall consult with the Tribe and others regarding the effects of salvage on historic properties. The term "consult" should be defined.
- In section V.A on page 3, "savage" should be changed to "salvage."

The Nez Perce Tribe appreciates the opportunity to comment on the MOA and to respond to Mr. Heffner's letters. Once the stream restoration and track salvage plan and MOA are nearing completion, the Tribe believes that an on-site, in-person meeting is needed to finalize issues. To that end, the Tribe would offer to host such a meeting in Lapwai at a mutually agreeable time.

If you have questions regarding these comments or questions, please contact Rick Eichstaedt in the Office of Legal Counsel (208-843-7355). Thank you.

Sincerely,


Samuel N. Penney
Chairman

cc: National Marine Fisheries Service
Idaho State Historic Preservation Office
National Park Service
Idaho Department of Fish and Game
Advisory Council on Historic Preservation
John Heffner, CSPR Attorney