

Advisory Council On Historic Preservation

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OPTIONAL FORM 99 (7-90)

FAX TRANSMITTAL

of pages = 4

To <i>Vicky Rutson</i>	From <i>C. Gleichman</i>
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GENERAL SERVICES ADMINISTRATION

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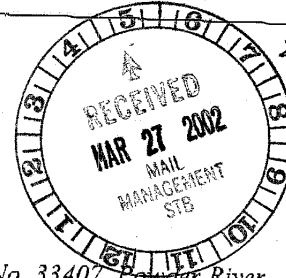
December 10, 2001

Victoria Rutson
Project Leader
Section of Environmental Analysis
Surface Transportation Board
Washington, DC 20423

ENTERED
Office of the Secretary

MAR 28 2002

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Public Record



RE: *Final Programmatic Agreement regarding STB Fiancé Docket No. 33407, Powder River Basin Expansion Project.*

Dear Ms. Rutson:

On October 9, 2001 we received the final draft Programmatic Agreement (PA) and Identification Plan for the above referenced project, with a request for our review and signature. We have reviewed the documents provided and have discussed this PA with staff of the State Historic Preservation Offices (SHPOs) of Wyoming, South Dakota, and Minnesota. In these recent discussions it came to our attention that the Minnesota SHPO has serious concerns about the adequacy of this agreement in providing for public and SHPO review of proposed changes to the existing line in Minnesota, especially with regard to effects of reconstruction on historic bridges that contribute to the National Register eligibility of DM&E's existing system. As currently drafted, the PA focuses on the development of Treatment Plans containing mitigation measures for historic properties that will be adversely affected. Although these plans will be developed in consultation with the parties to the PA, there are no provisions for obtaining the views of the public regarding effects to historic properties or in determining how to resolve adverse effects. We believe this is a serious omission given that the new regulations, at 36 CFR 800.3(e), require Federal agencies to plan for involving the public in the Section 106 process, and the potential for public interest in the effects of this substantial undertaking on historic properties.

As we understand it, STB plans to make a decision on whether to approve or deny the proposed project at the end of the month. Given this short time frame and the critical need to coordinate the completion of Section 106 with any decision reached under the National Environmental Policy Act (NEPA), we recommend you set up a conference call among the consulting parties in order to develop timely revisions to this PA, and that you circulate a revised final PA signature as quickly as possible. Until these important issues are resolved, the Council will be not be able to execute a PA with STB for this undertaking.

In addition to the above expressed concerns, we encourage you to address other comments or concerns you receive, or have received regarding this draft. We offer a number of proposed

changes in an attachment to this letter, some of which address technical errors or needed clarifications. Please note that comments 4, 6, 7, and 14 address critical issues of legal sufficiency. We do not offer, in the attached comments, suggestions for wording a stipulation regarding public involvement but rather recommend that such provision be developed after discussions with consulting parties.

If you have any questions or concerns regarding these recommendations, please contact Carol Gleichman of our Western Office at 303-969-5110 or via Email at cggleichman@achp.gov.

Sincerely,


Don L. Klima
Director
Office of Planning and Review

Enclosure

ADVISORY COUNCIL ON HISTORIC PRESERVATION
COMMENTS ON THE OCTOBER 5, 2001
FINAL PROGRAMMATIC AGREEMENT
REGARDING
THE POWDER RIVER BASIN EXPANSION PROJECT
December 10, 2001

1. Page 2, second WHEREAS, line 11: to be more specific, please reference Section 800.14(b) of the regulations rather than 800.14.
2. Page 2, third WHEREAS: This paragraph should state that "the STB **has consulted with and** invited the Cheyenne and Arapaho Tribes... to sign this agreement; and"
3. Stipulation A, Section 3.1 (page 4) includes a typographical error in referencing the regulations. The first part of line five should read: "*criteria at 36 CFR 800.5(a)(1) to the STB.*"
4. Stipulation A.5 should be deleted. The referenced section of our regulations (36 CFR 800.5(c)(3)) was recently vacated by Federal court. While the Council may appeal this decision, for the present, it is best to rely on the dispute resolution clause of the Agreement to resolve disputes or objections to STBs findings of effect.
5. Stipulation A.6 (page 5): we recommend changing the wording here to use the phrase "accepted by the STB, other Federal agencies with jurisdiction, and the appropriate SHPO(s)..."
6. Stipulation B: Prior to developing treatment plans, the Consulting parties and the public should have an opportunity to review draft plans for reconstruction of the existing line, with regard to the replacement or removal of bridges or other significant historic structures and features.
7. Although the title of Stipulation B refers to Historic Properties, Stipulation B.1 applies only to development of Treatment Plans for "each site, group of closely related sites, or category of sites..." It is our understanding that not all historic properties that may be affected are sites, so this language should be changed to be inclusive of buildings, structures, and objects that are eligible for inclusion in the National Register of Historic Places. For example, railroad bridges would be considered structures, rather than sites. This section of the PA, or just prior to it, is also an appropriate place to include provisions for public involvement in the consideration of the projects effects on historic properties.
8. Stipulation C.2 should indicate who will submit the revised Treatment Plan(s) to the SHPO(s). Also, since Council staff is generally unable to provide review comments within 30 days, due to our workload, we recommend you eliminate the Council's review of individual Treatment Plans under this stipulation, and instead involve the Council only

when there is a dispute that requires resolution under Stipulation M.

9. Stipulation E (page 8), last sentence: should be revised to read: *"The Reports...and Treatment Plans will be developed in accordance with Stipulations B and C and implemented for those sites determined to be Historic Properties."*
10. Stipulation H. (Discovery) should be reworded to clarify that STB is responsible for taking the lead in consultation with the appropriate SHPO(s), THPO(s)/cultural resource representative(s) designated by the Tribe(s)..."
11. Reference to paleontologic items or materials should be removed from Stipulation K.1, 2, and 3. STB's authority under Section 106 is limited to properties eligible for inclusion in the National Register of Historic Properties.
12. The dispute resolution clause, Stipulation M., should be revised to clarify that disputes may involve documents provided for review, in addition to actions proposed. We recommend revising the first sentence to read: *"Should any party to this Agreement object within 30 calendar-days to any action proposed or any document provided for review pursuant to this agreement, STB shall consult with the objecting party to resolve the objection..."* Also, the stipulation should be more specific regarding Council comment. The two general references to the Council's regulations in the last two sentences of this stipulation should be replaced with 36 CFR 800.7(c), regarding Council providing comments, and 36 CFR 800.7(c)(4), regarding the manner in which any Council comment will be taken into account by STB.
13. Stipulation O.1. and 2 need to be revised to clarify that neither STB, the SHPOs, DM&E, or the Council may terminate their participation in the Agreement without terminating the agreement overall. Because it is confusing with regard to what happens if another Federal agency terminated its participation, we recommend removing Stipulation O.1. altogether.
14. Stipulation O.2 must include the Council as a party with authority to terminate the PA.