

Tongue River Railroad Environmental Impact Statement

Docket No. FD 30186

National Historic Preservation Act, Section 106 Teleconference

July 14, 2014

DRAFT Teleconference Summary

Invitees: Please see meeting agenda for list of invited parties.

Attendees:

800.2(a) Surface Transportation Board, Office of Environmental Analysis, Lead Agency Official

Vicki Rutson	Office of Environmental Analysis
Ken Blodgett	Office of Environmental Analysis

Other Federal Agencies

Shannon Johnson	U.S. Army Corps of Engineers
Matt McCullor	U.S. Army Corps of Engineers

800.2(b) Advisory Council on Historic Preservation

Najah Duvall-Gabriel	Advisory Council on Historic Preservation
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800.2(c) Consulting Parties

800.2(c) (1) Montana State Historic Preservation Office

Stan Wilmoth	Montana State Historic Preservation Office
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800.2(c) (2) (ii) Indian Tribes, off Tribal Lands

Steve Vance	Cheyenne River Sioux
Conrad Fisher	Northern Cheyenne Tribe
Steve Brady	Northern Cheyenne Tribe
Jerry Rowland	Northern Cheyenne Tribe
Roger Killsnight	Northern Cheyenne Tribe

800.2(c) (3) Representatives of Local Governments

Lisa Axline	Montana Department of Natural Resources and Conservation
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800.2(c) (4) Applicants for Federal assistance, permits, licenses, or other approvals

David Coburn	Steptoe and Johnson, Attorney for Applicant
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Cynthia Taub	Step toe and Johnson, Attorney for Applicant
Barbara Ranf	BNSF
Jennifer Sheetz	BNSF
Dan Hadley	Mission Engineering, Consultant to Applicant

800.2(c) (5) Additional Consulting Parties

Betsy Merritt	National Trust for Historic Preservation
Mike Scott	Sierra Club
Carrie La Seur	Representative for Colstrip Landowners

800.2(d) The Public

Clint McRae	Landowner
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800.4(a) (3) Other Parties Likely to Have Knowledge or Concerns with Historic Properties

Beth Kaeding	Northern Plains Resource Council
Alexis Bonogofsky	National Wildlife Federation
Shane Newman	Northern Plains Resource Council

ICF International, Third-Party Contractor to the Surface Transportation Board

Alan Summerville	ICF International
Rick Starzak	ICF International
Mark Robinson	ICF International
Sarah Mello	ICF International

Agenda:

1. Introductions
2. Status of Environmental Impact Statement
3. Status of field surveys
4. Discussion of whereas clauses in Programmatic Agreement

Rick Starzak of ICF International thanked all participants for joining and explained that this teleconference would focus on developing a final working draft of the whereas clauses of the Programmatic Agreement (PA). After introductions, Ken Blodgett of the Surface Transportation Board (Board or STB) Office of Environmental Analysis (OEA) gave an update on the Draft Environmental Impact Statement (EIS). The resource area chapters of the Draft EIS are in various stages of production. Consultation with cooperating agencies is ongoing and once the Biological Assessment is updated with new information it will be submitted to the U.S. Fish and Wildlife Service. On May 29, 2014, OEA received the Applicant’s response to the fifth information request and on June 26, 2014 OEA requested additional information from the Applicant to assist in analyses in the EIS. This sixth information request inquired about access roads and requested additional information on construction costs of different alternatives. This can be viewed on the website for the Tongue River Railroad EIS and STB’s

Environmental Correspondence website. There have been no new formal filings or Board decisions on this docket since the last Section 106 monthly teleconference.

Mr. Starzak gave a brief overview of the ongoing fieldwork. The current surveys are part of the third session this year and will be ending on July 18, 2014. Currently, representatives from Cheyenne River Sioux Tribe, Standing Rock Sioux Tribe, and Northern Cheyenne Tribe are participating in the field surveys.

Clint McRae, a landowner on the Colstrip Alternative, asked when the site reports will be finished and distributed to the landowners. Mark Robinson of ICF International said that the Cultural Resources team hopes to finish the site forms in the next eight weeks, at which point they will be sent to OEA for a short review before being released to the landowners. Carrie La Seur, representing the Colstrip Landowners, noted that part of the land entry agreement was that Cultural Resources survey data from a property would be disclosed to that landowner promptly. Mr. Robinson said that the team will prioritize the site forms for those properties. Vicki Rutson, OEA, said that the site forms will be reviewed on a rolling basis in order to share them with landowners as soon as possible. Mr. McRae asked about the difference between a site report and a site form. Mr. Robinson explained that a site form is for each specific cultural resources site and there may be many forms for one property; the report is a compilation of all those site forms and a brief summary. Mr. Robinson estimated that the reports would be completed later this summer.

Najah Duvall-Gabriel, from the Advisory Council on Historic Preservation (ACHP), asked what information the site forms would contain and if recommendations for site eligibility would be included. Mr. Robinson and Mr. Starzak explained that no eligibility recommendations would be provided at that time. Without ground disturbing tests, only a preliminary recommendation would be possible, such as grouping sites into “likely eligible” or “unlikely to be eligible”. If the Board were to approve an alternative, the PA would allow for a phased identification and evaluation process for sites along the licensed alternative. Mr. Starzak noted that the ACHP’s guidelines, cited in the whereas clauses, indicate that a phased approach is allowable in this instance.

David Coburn, attorney for the Applicant, asked if site forms and site reports would be recorded in the docket and available to the public. Mr. Robinson and Ms. Rutson explained that while all data will be shared with the State Historic Preservation Office, there are restrictions in place to protect site locations. The site forms and reports will not be appearing on the public docket or on the Environmental Correspondence tracking site but the number of sites found will be included in a summary table, keeping the specific locations confidential. Mr. Coburn wanted to know if this information would ever be disclosed to the Applicant so that if an alternative was approved, the construction team would know where the sites were and avoid them as necessary. The confidentiality of tribal sites is extremely important and Conrad Fisher of the Northern Cheyenne Tribe suggested, and many others agreed, that this topic would require further discussion. Mr. Coburn explained that he did not mean that the location of tribal sites should be public, but was wondering how the Applicant could avoid sites without knowing their locations. Mr. Starzak said that the PA would address this process. A

procedure would be set-up regarding how to avoid, minimize, and mitigate the potential adverse effects.

Ms. Rutson summarized this discussion by saying that OEA will get the archeological site forms to the landowners as soon as possible, provide the compiled site information to the Tribal Historic Preservation Officers (THPOs), then discuss what, if any, tribal data could be shared with landowners to improve mitigation efforts.

Ms. Duvall-Gabriel wanted to know, after the required eight weeks needed to complete the site forms, how consultation would move forward in terms of analyzing alternatives based on the survey results and if the 106 consulting parties would provide feedback on the analysis before STB makes a decision. Mr. Starzak explained that the results would be presented to the consulting parties in a tabular form, similar to the tables and maps provided at the meeting in Billings, MT. Ms. Rutson added that the 106 consulting parties can provide feedback during the comment period for the Draft EIS and the PA would take into consideration the consultation thus far.

Mr. Starzak then led the group through the revisions made to the whereas clauses based on the Section 106 teleconference on June 9, 2014 as well as edits and comments from Stan Wilmoth, Betsy Merritt, and Najah Duvall-Gabriel. There were a few occasions where the edits conflicted with each other or with the Board's procedures. After Mr. Starzak's summary of the main changes, Ms. Merritt expressed her concern about deferring all identification and evaluation until after an alternative has been chosen, when ideally that information could inform the decision. Ms. La Seur agreed and added that the language of the first whereas clause on the second page was inaccurate. It says that if "significance cannot be fully determined" prior to the Board's approval than a PA is appropriate. Since all alternatives have been clearly mapped, Ms. La Seur did not think this whereas clause was applicable. Ms. Rutson clarified that without 100% access to properties, it was impossible to fully determine significance. Mr. McRae said that significance could be fully evaluated for the Colstrip Alternative. Ms. Rutson explained that even though OEA has access to the Colstrip Alternative, it is only one alternative out of many and the PA applies to all alternatives. Mr. Starzak suggested clarifying the whereas clause by saying "cannot be fully determined for all alternatives" which participants agreed was helpful.

Mr. Starzak noted the clause regarding Section 4(f) and explained that Section 4(f) is only applicable at certain locations where grade separations at highways exist, but not for the overall project. Ms. Duvall-Gabriel asked if an alternative was approved for which Montana Department of Transportation (MDOT) would need to be involved, would there be another PA for the chosen alternative since it triggered Section 4(f). Alan Summerville, ICF International, explained that his team has been working with MDOT for Section 4(f) and if an alternative is approved that triggers 4(f), MDOT can look to the EIS with no need for additional documentation.

Ms. Duvall-Gabriel asked about the language that indicates the PA would encompass all alternatives. If the PA would go into effect for only the approved alternative, then it was her understanding that the Board would then revise the whereas clauses and take out the references to five alternatives. She also said that the ongoing consultation process should be included in the PA. Mr. Starzak explained that the

PA would be signed and finalized before the Board made their decision. It is designed so that if an alternative is approved it can immediately go into effect for whichever alternative may have been chosen. It had been Ms. Duvall-Gabriel's understanding that this was to be a processed PA which would include the procedure for consultation as well as the phased identification. It was agreed that a separate dialog was needed for this discussion.

Mr. McRae suggested that it would be very helpful for the consulting parties if the Board could provide a timeline showing what steps have happened, what still needs to happen in the process, and an estimated timeline for those steps. This schedule does not need to dictate final due dates, simply provide consulting parties with an overall view of the process. Ms. Rutson and Mr. Starzak said OEA would be happy to put together bullet points to lay out the steps with an estimated timeline. This will show the parallel timelines of Section 106 consultation and the National Environmental Policy Act (NEPA) process.

Ms. La Seur asked if consulting parties could receive a copy of the cultural resources methodology. Ms. Rutson said that typically that information would not be available until the Draft EIS was published. OEA will discuss this topic with ICF to see if an early release of the methodology is possible. If not, that information will become available to the public in the Draft EIS which has an estimated publication date of April 2015.

Mr. McRae asked if any alternatives had been eliminated from study. Mr. Summerville said that OEA eliminated alternatives during the final scope of study but not subsequent to it. All of the alternatives on the maps provided to consulting parties are still viable and analyses are ongoing. Mr. McRae also wanted to know about the location and methods for addressing potential adverse impacts from access roads. Mr. Summerville explained that all known access roads run parallel to alternatives and are inside the right-of-way. However, in the sixth information request, OEA requested that the Applicant provide information on access roads that may be perpendicular to alternatives, falling outside the right-of-way. When the Applicant's response is received this topic can be discussed further. Mr. McRae also mentioned his concern about road relocations, where that gravel will come from and be stored, as well as staging areas and cut and fill beyond the right-of-way. He was also worried that landowners don't have the same federal guidelines that BLM has for activities on their land. Ms. Rutson assured him that a statement in the PA will ensure that all work conforms to federal guidelines.

Conrad Fisher of the Northern Cheyenne Tribe proposed having this Section 106 meeting every two weeks instead of every month or perhaps another round table discussion. Ms. Rutson agreed to look at the schedule to see if more meetings are possible. Mr. Brady also inquired about the delineation of authorities for the Otter Creek Mine and the Tongue River Railroad. He would also like an ethnographic study on all alternatives as well as a plant inventory. Mr. Brady mentioned that OEA had not cited President Obama's memorandum from November 5, 2009. Ms. Rutson explained that, since the board is not an executive agency it is not required to comply with executive orders. Therefore the Board cannot state that it has to comply with an Executive Order that does not apply to them. Nevertheless, can voluntarily comply with the Executive Order. As for the Otter Creek Mine, OEA is treating it as a cumulative action and has been analyzing it accordingly, but has not been able to get access to any

Cultural Resources work done by Arch Coal at the mine. Mr. Fisher suggested discussing the authority delineations with Mr. Wilmoth.

To recap the highlights of this Section 106 teleconference, Ms. Rutson listed the following action items:

1. OEA is committed to review the site forms quickly and on a rolling basis in order to get them to landowners as soon as possible. Properties for which landowners requested prompt reports will be prioritized.
2. OEA will set up a meeting with Tribes to discuss sharing tribal information. A potential date for this meeting is during the week of July 28, 2014.
3. OEA will talk to ICF about sharing the Cultural Resources methodology before the publication of the Draft EIS. This discussion should occur before Friday 18, 2014.
4. OEA and ICF will create a timeline for major milestones in the Section 106 process and the NEPA process.
5. OEA will follow up with ACHP to discuss what type of PA this is going to be and why consultations are not included.
6. Mr. Starzak will begin drafting the stipulations for the PA.

After this brief overview, Ms. Rutson thanked all the participants for their time and helpful contributions and ended the teleconference.