



EI-20518

Preserving America's Heritage

September 8, 2014

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

Ref: *Proposed Tongue River Railroad Project*  
*ACHP Comments on Draft Programmatic Agreement Stipulations*  
*Custer, Rosebud, Powder River and Bighorn Counties, Montana*

Dear Ms. Rutson:

On August 28, 2014, the Advisory Council on Historic Preservation (ACHP) received the Surface Transportation Board's (STB's) draft Programmatic Agreement (PA) stipulations for the referenced undertaking. We are providing the STB with our initial comments on the draft PA stipulations, recognizing that the development of this document has not yet been informed by consulting parties.

The draft PA does not adequately reflect the recommendation that we provided to STB regarding the development of a "process PA" that outlines how STB will consult during the analysis of alternatives and consideration of measures to avoid, minimize and mitigate adverse effects. While we understand that STB's decision on a "preferred" alternative and the approval of a rail line will consider several factors in addition to historic preservation, we would be remiss to agree to the development of a draft PA that did not ensure that effects to historic properties were given adequate consideration in this decision making process. In an effort to assist STB in this review, we offer the following comments regarding the Stipulations sections. We trust that they will be discussed by consulting parties during the scheduled September 8<sup>th</sup> teleconference.

#### **Analysis of Alternatives**

A stipulation should be inserted at the beginning of the Stipulations section that clarifies that STB is coordinating the review of alternatives for this undertaking as part of its NEPA review. STB also should clarify how the review process outlined in the draft PA will inform the analysis of alternatives, including the selection of a preferred alternative. Although we understand that STB intends to address this matter in the Whereas Section, it also needs to be addressed in the Stipulations section.

#### **Roles and Responsibilities**

Given the prominent role that the applicant, Tongue River Railroad Company (TRRC), will assume in project planning and implementation, we recommend that a stipulation be added to the stipulations section that clarifies the roles and responsibilities of key consulting parties. We believe that all consulting parties would find this information useful since other Federal agencies such as BLM will be involved in project reviews. Further, it will help to avoid confusion in implementing the PA once it is executed.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

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### **Identification Plan**

The draft PA starts with the assumption that an alignment will be chosen. The ACHP has previously advised the STB that it may be premature to make this assumption. Given STB's ability to recommend a "no-build" option, we need to recognize that this option could be selected as the "preferred alternative." We, therefore, suggest that the PA outline specific measures that will be taken once the analysis of alternatives is completed and STB makes a decision. Accordingly, STB should clarify in the draft PA how the four-step Section 106 review process will be coordinated during the analysis of alternatives, and what role the consulting parties will have as determinations and findings are made. To defer involvement of consulting parties in findings and determinations until the preferred alternative is selected would be imprudent. Moreover, it would likely leave STB open to challenges regarding the preferred alternative and questions about whether other alternatives may have avoided adverse effects of concern to consulting parties.

### **Development of Treatment Plans**

Further explanation is needed in this stipulation regarding how the applicant, TRRC, will consult with consulting parties to develop treatment plans. The timing of the development of these plans is unclear. Will this occur during the analysis of alternatives or after the selection of the preferred alternative? Will the Contractor have sole discretion to carry out this task or will it be done in consultation with STB? The Stipulations section should be explicit in encouraging the Contractor to give priority consideration to measures that would avoid adverse effects to historic properties. We also are concerned about the notion that a treatment plan can be prepared for a portion of the line. This concept needs to be better explained in the PA, and have agreement of affected consulting parties. Finally, the treatment of the Wolf Mountain Battlefield, a National Historic Landmark (NHL) must adhere to Section 110(f) of the NHPA and Section 800.10 of the ACHP's regulations, which requires a higher consideration of alternatives to minimize harm to the NHL.

### **Consultation on Developing Treatment Plans**

During the analysis of alternatives, consulting parties should understand the extent to which STB has considered measures to avoid adverse effects on historic properties on the particular alternative. It is our understanding that once the rail alignment is selected, the planning process will not be very flexible. Thus, once a preferred STB alignment is chosen, consulting parties will be limited in requesting modifications. It is therefore important that the consulting parties be able to share their comments on alternatives during the evaluation of an alternative and in advance of the Board's decision. The Stipulations section, therefore, needs to emphasize that the identification and evaluation process will be coordinated with the State Historic Preservation Officer (SHPO) and Tribal Historic Preservation Officers (THPOs) to ensure that adequate baseline information is prepared for below ground historic properties, cultural landscapes, and traditional cultural properties associated with each alternative.

### **Data Recovery Plan**

If avoidance of adverse effects to historic properties is not feasible, we do not believe that it is a forgone conclusion that data recovery the appropriate treatment. There should be some consultation regarding this matter, particularly when properties of religious and cultural significance to Indian tribes are involved. There are other treatment options for National Register eligible and listed archeological sites that can be considered; however, they are not outlined in the draft PA. Further, any archeology data recovery plan should have a public benefit that is explained. How would data recovery plans benefits the State, Region, and Tribes?

### **Construction**

We are concerned that we are being asked by STB to provide comments on a build alternative before STB has demonstrated that a no-build alternative is not appropriate. A stipulation needs to be added that makes it clear that good faith consultation will occur for the no build alternative. Perhaps STB should revise this

stipulation to make it clear under what circumstances construction will proceed. We also recommend that stipulations be added to be precise about how construction management, staging areas, use of Tribal monitors, etc., will be determined for the preferred alternative, and what consulting parties will be involved in this decision making.

#### **Emergency Situations**

We encourage STB to add a new section that is related to emergency situations. Emergencies occur in a number of ways that could complicate the implementation of a PA. They could change the scope of the project, or compromise the agency's ability to meet the terms of an executed PA. This provision should be developed with the consulting parties so that it addresses the concerns of the residents in the project area and provides for contingencies, as appropriate.

#### **Dispute Resolution**

As currently drafted, the stipulation for dispute resolution allows "any party to this PA" to object. Does this mean that all consulting parties can file objections? Are objections during the alternative analysis to be handled differently from objections during project implementation? This stipulation needs to be revised.

#### **Tribal Coordination**

This stipulation should recognize that there may be a need to amend tribal protocols if new tribal leadership is elected and proposes a different approach to coordinating the undertaking. To address this potential change to approved tribal protocols, we recommend that language be included in the PA that recognizes the need for amendments to the ID Plan.

#### **Public Participation**

The STB needs to include in the Stipulations section language that allows the public to file objections regarding the implementation of the terms of this PA. While the filing of reports is helpful, it is unclear what steps should be taken if the public wants to file objections to the actions, findings, or determinations that are required under the terms of the PA.

We know that the negotiation of stipulations will require extensive consultation if we are to develop a comprehensive process to address the full range of effects on historic properties. STB has advised us that it intends to continue the monthly teleconferences to finalize a draft PA. We also recommend that STB keep a comment matrix for all comments received on Whereas clauses and stipulations so that we can monitor how STB addresses comments and proposed revisions submitted during consultation.

If you have any questions regarding our comments and recommendations, please contact Najah Duvall-Gabriel at (202)517-0210 or via email at [ngabriel@achp.gov](mailto:ngabriel@achp.gov). We look forward to consulting further with STB.

Sincerely,



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