

From: Starzak, Richard
Sent: Thursday, September 26, 2014 12:22 PM
To: 'conrad.fisher@cheyennation.com'; Conrad Fisher (esevone1@yahoo.com); 'doug_melton@blm.gov'; 'swilmoth@mt.gov'; Betsy Merritt (emerritt@savingplaces.org); Jenkins, Paul C (Chris) NWS (Paul.C.Jenkins@usace.army.mil); tclouthier@standingrock.org; brhodd1@yahoo.com; dcoburn@steptoe.com
Cc: Vicki.Rutson@stb.dot.gov; Catherine.Nadals@stb.dot.gov; Summerville, Alan; Diller, Elizabeth; Mello, Sarah
Subject: RE: Tongue River - PA working group, first call, Friday, Sept. 26 at 1PM EST; Call in information is: 1-877-423-6338, Passcode: 364456#

Hi Ben, Betsy, Chris, Conrad, David, Doug, Stan, and Terry,

FYI, I sent everyone an Outlook calendar invite with a meeting link so we all see the same computer screen with the document. Please also use call-in in the subject line.
Attached to this e-mail are the draft of the two stipulations ACHP asked to be added (previously sent to you), ACHP's letter, and a timeline for the PA development.
If you are unable to join today, we look forward to your comments on the attached draft.

Thank you so much,
Rick (in support of Vicki and Cathy)

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From: Starzak, Richard
Sent: Thursday, September 25, 2014 4:18 PM
To: 'conrad.fisher@cheyennation.com'; Conrad Fisher (esevone1@yahoo.com); 'doug_melton@blm.gov'; 'swilmoth@mt.gov'; Betsy Merritt (emerritt@savingplaces.org); Jenkins, Paul C (Chris) NWS (Paul.C.Jenkins@usace.army.mil); tclouthier@standingrock.org; brhodd1@yahoo.com; dcoburn@steptoe.com
Cc: Vicki.Rutson@stb.dot.gov; Catherine.Nadals@stb.dot.gov; Summerville, Alan; Diller, Elizabeth; Mello, Sarah
Subject: RE: Tongue River - Programmatic Agreement focused working group, first call, Friday, Sept. 26 at 1PM EST

Hi Ben, Betsy, Chris, Conrad, David, Doug, Stan, and Terry,

We look forward to your participation in Friday's PA working group call at 1 PM EST. (Call in information is: 1-877-423-6338, Passcode: 364456#)

So far, the only comments received on the PA stipulations are from ACHP, who requested two stipulations be added to the PA:

- 1) Roles and responsibilities of the consulting parties, and
- 2) Review of NEPA alternatives and coordination with the four-step Section 106 process.

We've attached a draft of those two stipulations in the attached file for your review and comment. For reference, the ACHP's comments are included in the sidebar.

Doug/Chris, we did not draft roles and responsibilities for BLM and USACE—perhaps you could provide us with a sentence or two for your agencies.

We understand everyone has busy schedules. If you are unable to make Friday's call, please provide us your comments next week, and we will update the draft accordingly.

Thank you very much,
Rick (in support of Vicki and Cathy)

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From: Starzak, Richard

Sent: Wednesday, September 24, 2014 11:02 AM

To: 'conrad.fisher@cheyennation.com'; Conrad Fisher (esevone1@yahoo.com); 'doug_melton@blm.gov'; 'swilmoth@mt.gov'; Betsy Merritt (emerritt@savingplaces.org); Jenkins, Paul C (Chris) NWS (Paul.C.Jenkins@usace.army.mil); tclouthier@standingrock.org; brhodd1@yahoo.com; dcoburn@steptoe.com

Cc: Vicki.Rutson@stb.dot.gov; Catherine.Nadals@stb.dot.gov; Summerville, Alan

Subject: Tongue River - Programmatic Agreement focused working group, first call, Friday, Sept. 26 at 1PM EST

Hi Ben, Betsy, Chris, Conrad, David, Doug, Stan, and Terry,

Vicki, Cathy, or I have reached out to all of you to invite you to be part of a focused working group on the Tongue River Railroad Programmatic Agreement. For those of you who can make the first call this Friday, it will be at 1:00 PM Eastern Time/11:00AM Mountain time, and we'll plan to keep it under an hour.

The first call will go over two new stipulations the ACHP would like us to include in the PA, regarding:

- 1) the NEPA alternatives analysis and its coordination with the four-step Section 106 process, and
- 2) the roles and responsibilities of the consulting parties.

Cathy and I are working on an early draft of the two new ACHP stipulations that we will circulate to you before the Friday call so we can go over them and work through revisions as a group. I will send you another e-mail with the text and the call-in information. If you can't make the first call, we'll loop back to get your comments.

Thank you so much for your expertise and involvement.
Rick

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[Insert into the PA after previously circulated WHEREAS clauses (8/15/2014) and before former first stipulation (8/28/2014)]

[Note to reviewers: the verb tense used throughout is based on the time we expect the PA to be signed, at approximately the time of the Final EIS but before STB makes a decision, not at the time of your review. Therefore, some events that have not happened yet will be described in the past tense.]

STIPULATIONS

STB has a statutory obligation as the lead federal agency to fulfill the NHPA requirements of Section 106; therefore, STB will ensure that the measures in the following parts are carried out.

I. **ROLES AND RESPONSIBILITIES**

A. **Federal Agency**

Consistent with the requirements of 36 CFR 800.2(a), the STB remains legally responsible for ensuring that the terms of this PA are carried out. The STB is responsible for notifying the ACHP if a Memorandum of Agreement (MOA) is required and determining ACHP's participation and for notifying the signatories to this PA when Section 106 is concluded. STB reserves the right to seek qualified independent expert consultation through a third-party contractor in order to fulfill its responsibilities under this PA.

B. **Other Federal Agencies**

1. USACE--note any responsibilities of the Corps, if applicable.
2. BLM--note any special responsibilities for alternatives crossing BLM land
3. Montana DOT--note any special responsibilities for alternatives that cross a highway
4. USDA-ARS--note any responsibilities for alternatives that cross ARS land

C. **ACHP**

The ACHP shall be responsible for providing technical guidance, monitoring the effectiveness of this PA, participating in dispute resolutions if needed, and notifying the STB if ACHP will participate in consultation for an MOA if needed.

D. **SHPO**

The SHPO shall be responsible for reviewing project documentation in a timely manner and participating in consultation as set forth in this PA.

E. **Tribes**

The participating Tribes shall be responsible to assist in the identification of tribal sites of significance in the APE and notifying STB and SHPO whether the properties are eligible for the National Register.

F. **Applicant**

The TRRC shall be responsible for providing plans and land survey information to accurately delineate the APE, and providing access to the right-of-way so that STB, tribes, and SHPO can complete the stipulations set forth in this PA.

G. **Other Consulting Parties**

The other participating consulting parties shall be responsible for reviewing project documentation in a timely manner and participating in consultation as set forth in this PA.

Commented [rs1]: From ACHP: 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.

II. REVIEW OF ALTERNATIVES

- A. Consistent with 36 C.F.R. § 800.3(b) and § 800.8, the STB coordinated its NEPA review with the Section 106 process. Under NEPA, the STB considered the No Action Alternative and five build alternative routes, and certain variations on the five build alternative routes: the Colstrip Alternative (the applicant's preferred alternative), the Tongue River Alternative, the Tongue River Road Alternative, the Moon Creek Alternative, and the Decker Alternative.
- B. In the EIS, the STB compared the potential impact of each of the alternatives on historic properties, cultural resources and tribal sites of significance to inform its eventual selection of the preferred alternative. The EIS was distributed to all PA consulting parties for their review and comment. Comments received by STB from the PA consulting parties informed the STB's consideration of the preferred alternative.
- C. Consistent with 36 C.F.R. § 800.3(b) and § 800.8, the STB coordinated the four-step Section 106 process set forth in 36 CFR § 800.3 through § 800.6 with the NEPA review of alternatives as follows:
1. **Step 1: Initiation of the Section 106 Process**
 - a. Establish undertaking: Pursuant to 36 C.F.R. § 800.3, STB established that its potential approval of the TRRC project is an Undertaking as defined at 36 C.F.R. § 800.16(y).
 - b. Identify the appropriate SHPO: Pursuant to Section 36 C.F.R. § 800.3(c), STB sent a letter to the Montana SHPO initiating Section 106 consultation on October 22, 2012, and since then actively sought input from the SHPO regarding the Undertaking.
 - c. Identify consulting parties: From October 2012 to December 2012, STB sent letters initiating Section 106 consultation with the PA consulting parties, and added additional consulting parties in 2013 and 2014. STB held monthly calls with the PA consulting parties since February 2013 to inform them of updates on the NEPA process, and progress on the Section 106 steps. STB held in person meetings with the PA consulting parties in Lame Deer, Montana on April 16-18, 2013, and in Billings, Montana on February 13-14, 2014, which included information about the alternatives being considered and discussions about the Section 106 process.
 - d. Plan to involve the public: STB held ten scoping meetings in multiple locations in the project vicinity from November 12-16, 2012. These meetings included maps of the alternatives and allowed for public comments on environmental topics, including cultural resources and historic properties. The project website, available to the general public at www.tonguervereis.com, was updated regularly and has a page devoted entirely to historic preservation issues.
 2. **Step 2: Identification of Historic Properties**

Pursuant to 36 C.F.R. § 800.4(b)(2), the STB is deferring final identification and evaluation of historic properties. For the analysis of impacts under NEPA, STB utilized crews of archaeologists, tribal members, historians and architectural historians to conduct field surveys in the APE of the build alternatives where access was granted to STB by landowners. The results of the identification effort were reported to the PA consulting parties, and were documented in the EIS for additional review and comment by the PA consulting parties, agencies, and the public.

Commented [rs2]: From ACHP: 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.

Commented [rs3]: From ACHP: 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. [SEE STIPULATIONS III AND ABOVE] 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.

3. Step 3: Assessment of Adverse Effect

Pursuant to 36 C.F.R. § 800.5(a)(3), the STB phased the application of the criteria of adverse effect. The EIS documented the adverse effects of the build alternatives for cultural resources identified by the field crews, and predicted the potential adverse effects in areas that were not surveyed.

4. Step 4: Resolution of Adverse Effect

A Draft of this PA, which includes ways to avoid, minimize, and mitigate potential adverse effects on historic properties discussed among the PA consulting parties, was included in the Draft EIS for further review and comment. In accordance with 36 C.F.R. § 800.6(a), should the STB approve a build alternative, the STB shall continue consultation with the PA consulting parties to avoid, minimize and mitigate the potential adverse effects of the Undertaking to historic properties and tribal sites of significance.

- D. In the event the STB approves a build alternative, the STB would ensure that the stipulations that follow shall be implemented.

[Continue to Stipulations distributed on August 28, 2014]



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 8th 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. We look forward to consulting further with STB.

Sincerely,



Charlene Dwin Vaughn, AICP
Assistant Director
Office of Federal Agency Programs
Federal Permitting, Licensing and Assistance Section

Tongue River Railroad Environmental Impact Statement

Docket No. FD 30186

Timeline for Programmatic Agreement

September 23, 2014

Activity	Date	Notes
PA Working Group Conference Call #1	Friday, September 26, 2014	Calls will last one hour. Comments will be exchanged among Work Group members between calls to facilitate the process. For the first call the group will review and resolve comments on: Alternative Consultation Stipulation Step 1 - Roles and Responsibilities
PA Working Group Conference Call #2	Friday, October 10, 2014	Group will review and resolve comments on: Step 2 - Identification and Evaluation
Monthly Section 106 Conference Call	Monday, October 20, 2014	This monthly conference call will address the current versions of: Alternative consultation stipulation Step 1 - Roles and Responsibilities Step 2 - Identification and Evaluation
PA Working Group Conference Call #3	Friday, October 24, 2014	Group will review and resolve comments on: Step 3 - Assess Effects

Activity	Date	Notes
PA Working Group Conference Call #4	Friday, November 7, 2014	Group will review and resolve comments on: Step 4 - Resolve effects Avoidance measures Minimization measures Treatment plan
Monthly Section 106 Conference Call	Monday, November 10, 2014	Report out on versions resulting from PA Working Group Conference Calls #3 and #4, and discuss any comments from other consulting parties
PA Working Group Conference Call #5	Friday, November 21, 2014	Group will review and resolve comments on: Mitigation measures Data recovery
PA Working Group Conference Call #6	Friday, December 5, 2014	Group will review and resolve comments on: Administrative measures Signature parties Check draft WHEREAS clauses
Monthly Section 106 Conference Call	Monday, December 8, 2014	For the last monthly conference call report out on versions resulting from PA Working Group Conference Calls #5 and #6, and discuss any comments from other consulting parties. Distribute entire PA for review with comments due prior to the meeting or conference call in January.
Wrap-up meeting or conference call	January 2015	The meeting or conference call would consist of a line-by-line review of any final comments.
Addition of Draft PA to the Draft EIS	January 2015	
Finalize PA and collect required signatures for PA		After Draft EIS is issued, OEA will finalize the PA and obtain required signatures.