



SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Environmental Analysis

November 28, 2014

Charlene Dwin Vaughn,
Assistant Director
Office of Federal Agency Programs
Federal Permitting, Licensing and Assistance Section
Advisory Council on Historic Preservation
401 F Street NW, Suite 308
Washington, DC 20001-2637

Re: Docket No. FD 30186, Tongue River Railroad Company, Inc.—Rail Construction and Operation—in Custer, Powder River and Rosebud Counties, Montana

Dear Ms. Vaughn:

I am writing to assure you that my office—the Office of Environmental Analysis (OEA) within the Surface Transportation Board—has carefully considered and taken actions in response to the recommendations made by the Advisory Council on Historic Preservation (ACHP) in your September 3, 2014, September 8, 2014, and October 30, 2014 letters to me. My staff and I, as well as our third party consultants, ICF International Inc., carefully considered ACHP's letters. We then reviewed the changes that we have made to the draft Programmatic Agreement (draft PA). Working with our Section 106 consulting parties, we have made (and continue to make) amendments to the draft PA, including changes in response to ACHP's letters.

OEA held a Section 106 consulting party meeting in Billings, Montana on February 13 and 14, 2014. At the meeting, several of the attendees began work on a draft PA. Since then, OEA has worked with the consulting parties on a regular basis to further develop the draft PA. In April 2014, upon the advice of ACHP, OEA provided the consulting parties with a justification statement for developing a Programmatic Agreement. In June through July 2014, OEA worked with the consulting parties to develop the recitals, or Whereas clauses, of the draft PA. From August 2014 through the present time, OEA has continued to work with the consulting parties to develop other sections of the draft PA, including the stipulations and appendices.

The draft PA stipulates measures that would be taken to complete the identification and evaluation efforts in accordance with 36 C.F.R. Part 800.4(b)(2) and to phase the application of the criteria of adverse effects in accordance with 36 C.F.R. Part 800.5(a)(3). It also outlines measures that would be taken to avoid, minimize, or mitigate the effects on historic properties (per 36 C.F.R. Part 800.6(a)) and tribal sites of significance. We have now reorganized the PA to more closely follow the four-step process as you recommended. The draft PA will be attached to the Draft Environmental Impact Statement (EIS) for further review and comment by the consulting parties and public.

As you know, OEA has created a working group as a way to address consulting party comments more effectively. We requested participation of individuals to represent a broad spectrum of opinions and have been fortunate to have key parties agree to participate. Stan

Wilmoth, the Montana Deputy State Historic Preservation Officer (SHPO), agreed to participate, as did representatives from the U.S. Army Corps of Engineers, the Department of the Interior-Bureau of Land Management, the Northern Cheyenne Tribe, the Rosebud Sioux Tribe, the National Trust on Historic Preservation (NTHP), and the Tongue River Railroad Company, Inc. (TRRC). We thank you for ACHP's willingness to participate in the working group's recent calls.

The working group has been holding conference calls on a regular basis. Following each call, OEA has created revised drafts of the PA that reflect their changes and any comments of the consulting parties. The working group's revisions to the draft PA have been circulated to the consulting parties before each monthly call to which each of the Section 106 consulting parties is invited. This way, we are able to engage the far larger group of consulting parties and request their review and comment on the various changes to the draft PA.

I have attached the most recent draft of the PA promulgated by the working group for your reference. Please note that in this draft, as with prior drafts, we have added "bubble comments" in the draft PA indicating each place where we have included new language in response to a comment or where we have decided to not make a change to the language. I believe this makes it easier for parties to track exactly where in the draft PA their comments have been addressed. I have also attached a matrix that highlights key correspondence, principally with the ACHP, in the development of the project PA. Included in the matrix are hyperlinks that will guide you to the document in question. Please let me know if you believe the matrix is helpful and/or if you recommend any changes or additions.

We are also creating a matrix that lists all the written comments received on the PA process to date and the disposition of each of the issues addressed in the comments. Our goal with this particular matrix is to ensure that it provides information of use to the Section 106 consulting parties. Once finalized, we will post the matrix on the project website (www.tonguerivereis.com) and would appreciate any suggestions you may have about the matrix at that time. We will alert the Section 106 consulting parties when we have the matrix posted and will be updating the matrix monthly as comments are received on the draft PA.

Below, I address each of the issues raised in your letters:

Issues Raised in ACHP's September 3rd Letter and OEA's Response/Action

Section 106 Consulting Parties' Consideration of Alternatives

ACHP guidance: ACHP noted that the NTHP had raised a concern regarding the proposed language in the Whereas clauses regarding how STB intends to involve consulting parties in the analysis of alternatives to the proposed undertaking. Although STB has indicated that it will consider the effects of each of the alternative routes on historic properties, such analysis should not be conducted in a vacuum.

OEA action: We revised the language in the Whereas clauses to incorporate this comment in the draft PA distributed on October 17, 2014.

Development of a Process Programmatic Agreement

ACHP guidance: ACHP recommended in late July that STB develop a process PA which would outline the procedures to be followed as STB selects the preferred alternative for the Tongue River Project. The ACHP further believes that in this particular undertaking, it is critical that STB have transparency and stakeholder engagement in all aspects of decision making. Therefore, the ACHP

urges STB to take appropriate measures to engage consulting parties as each alternative is considered so that issues related to the area of potential effect (APE), scope of work for identification and evaluation and assessment of effects are considered in a timely manner as provided for under 36 C.F.R. Part 800.6(a).

OEA action: When ACHP raised the issue of a process PA, OEA requested example “process PAs” to aid in the development of such a PA. On September 2, 2014, ACHP helpfully provided examples. OEA began incorporating the elements of these process PAs into the draft distributed on September 26, 2014 and continued to do so in subsequent drafts. As ACHP knows, the PA development process began (at the recommendation of consulting parties at the Billings meeting in February 2014) by using the 2011 Tongue River PA as a starting template with the stated understanding that the template (which was not a process PA) would be substantially revised for the current Tongue River proceeding.

Moreover, the involvement of the consulting parties in the consideration of alternatives has been provided for in several drafts of the PA, and revisions related to that involvement continue as new sections are addressed by the working group and will be shared with the full group of Section 106 consulting parties for their review and comment. This concern is addressed more fully below.

Issues Raised in ACHP’s Sept. 8th Letter and OEA’s Response/Action

Analysis of Alternatives

ACHP guidance: ACHP requests OEA add a Stipulation at the beginning of the Stipulations section clarifying that we are coordinating the review of alternatives for the TRRC proposal to build and operate a rail line as part of our NEPA review. We should also clarify how the review process outlined in the draft PA will inform the analysis of alternatives, including the selection of a preferred alternative.

OEA action: On September 26, 2014, we added Section II, Review of Alternatives, to the draft PA. Here, we clarify that we are coordinating the NEPA review and Section 106 process. We also state that we are assessing 10 alternatives (5 build alternatives with variations yielding a total of 10 alternatives) and the No Action alternative in the NEPA process. The draft PA states that the Draft EIS will set forth a comparative analysis of all alternatives (including No-Action) and that the consulting parties, as well as members of the public and other stakeholders, will have the opportunity to comment on the draft EIS and the draft PA, which will be made available to the public in the Draft EIS. Comments received from the consulting parties and others will inform the STB’s consideration of the preferred alternative. Additional revisions were made to the Whereas clauses and Section II of subsequent drafts of the PA (distributed on October 17 and November 10) that further outline the review process and how it will inform selection of a preferred alternative for the decision maker.

Roles and Responsibilities

ACHP guidance: ACHP requests that OEA add a Stipulation clarifying the roles and responsibilities of key consulting parties.

OEA action: We added Section I, Roles and Responsibilities, to the draft PA and expanded Subsection B, Other Federal Agencies, to include BLM. Further, we expanded “Subsection, E. Tribes,” to provide additional information about the Tribes’ role in assisting in the identification of and determining effects on historic properties and tribal sites of significance. We added a clause to the “Subsection F. Applicant” explaining that, in certain circumstances, TRRC shall be

responsible for providing access to the APE. We also added language regarding consultant roles and input to the Whereas clauses in Sections II and IV. The first of these changes was made to the draft PA distributed September 26, with additional revisions being made to the drafts distributed on October 17 and November 10.

Identification Plan

ACHP guidance: ACHP emphasizes that the draft PA more clearly recognize that OEA may recommend the No Action alternative to the decision makers, the three members of the Board, and that OEA could identify the No Action alternative as the environmentally preferable alternative. Consequently, the draft PA should outline specific measures that will be taken following completion of the NEPA process and a decision by the STB either granting, or granting with the imposition of conditions, a build alternative. (If the Board decides to deny TRRC's proposal or decides to approve the No Action alternative, then further review under Section 106 would be moot.) The draft PA should set forth how the four-step Section 106 process will be coordinated during the analysis of alternatives and what role the consulting parties will have as determinations and findings are made. It would be imprudent to defer involvement of consulting parties in findings and determinations until a preferred alternative is selected.

OEA action: We added several references to the No Action alternative throughout the draft PA where the alternatives are discussed. We have clarified that the consulting parties are involved throughout the process, including in considering and commenting upon impacts of each alternative (*see e.g.*, September 26 draft PA (Section I, Roles and Responsibilities); October 17 Draft PA (Whereas clauses, Section II, Review of Alternatives, Section IV.B, Identification and Evaluations); November 10 Draft PA (Whereas clauses, Section II, Review of Alternatives, Section IV.B, Identification and Evaluation). As stated earlier, we included the four-step Section 106 process language and will include the draft PA in the Draft EIS when we issue that document this spring. OEA will specifically request comments on alternatives from all stakeholders, including the consulting parties.

In the Final EIS, we will summarize and respond to comments and will be recommending an environmentally preferred alternative based on a comparative evaluation of each alternative's impacts to the environmental disciplines (*e.g.*, air, water, biological resources, land use, safety, noise, and cultural resources). As a result, well before any decision is made with respect to TRRC's request for approval of the construction and operation of a line of railroad, the consulting parties, as well as all the stakeholders interested and involved in this matter, will have had a full opportunity to be heard. Moreover, OEA will, as part of its NEPA and Section 106 duties, respond to comments and will disclose impacts to the Board so that it is able to make a fully-informed decision.

The samples of process PAs that ACHP helpfully provided do not contain Identification Plans. Nevertheless, we are continuing to revise the Identification Plan to ensure that ACHP's concerns are fully addressed.

Development of Treatment Plans

ACHP guidance: ACHP states that more explanation about how applicant TRRC will consult with consulting parties to develop treatment plans is needed in the draft PA. Clarity is needed regarding the timing of the development of treatment plans and how consultation will occur. For example, will the treatment plans be developed before or after selection of the preferred alternative? ACHP is also concerned that a treatment plan could be developed for a portion of the

rail line. This needs to be better explained in the draft PA and have the agreement of the affected consulting parties. The treatment of the Wolf Mountains Battlefield requires a higher consideration of alternatives (under Section 110(f) and Section 800.10 of ACHP's regulations) to minimize harm to the National Historic Landmark.

OEA action: The draft PA we are currently developing with the Section 106 consulting parties sets forth the four-step Section 106 process through consideration of alternatives and sets forth the process for developing treatment plans should the STB approve a build alternative. We understand that, unless and until the STB approves a specific build alternative, the treatment plan(s) cannot be finalized. Should the STB approve a specific build alternative, the treatment plan(s) will be developed with the full participation of consulting parties identified for the specific alternative approved. Obviously, if the STB were to deny TRRC's proposed rail line construction and operation, or if were to approve the No Action alternative, there would be no need for subsequent development of treatment plan(s).

Revised Section V, Subsection B, Development of the Treatment Plan(s) provides timing, process, and participation of Montana SHPO, applicant TRRC, STB and the consulting parties identified for the specific alternative, assuming that the STB approves a build alternative. At the working group call on November 21, 2014, language was added to the mitigation measures to bolster avoidance. Moreover, clauses addressing the treatment plan were included in the Whereas clauses of the October 17 and November 10 drafts of the PA.

While ACHP expresses concern in its letter that treatment plan could be developed for a portion of the rail line, such an approach is expressly provided for under the regulations and this approach was discussed and agreed upon at the February 2014 meetings in Billings. Specifically, OEA is conducting a phased identification of historic properties pursuant to 36 C.F.R. Part 800.4(b)(2) which states, "where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process to conduct identification and evaluation efforts...." This approach is addressed in the PA justification statement and was deemed necessary because the alternatives under consideration consist of corridors or large land areas and OEA was not granted access to large portions of the APE for all alternatives.

Furthermore, the draft PA discusses the treatment of the Wolf Mountain Battlefield in multiple places. Clauses addressing treatment of the Wolf Mountain Battlefield were added to the draft PA distributed on October 17, 2014 (Whereas clauses, Section I, Roles and Responsibilities, Section III, Area of Potential Effects) and to subsequent drafts (November 10 Draft (Whereas clauses, Section I, Roles and Responsibilities, Section III, Area of Potential Effects)).

Consultation on Developing Treatment Plans

ACHP guidance: It is important that the consulting parties have an opportunity to share their comments on all alternatives under consideration in advance of the Board decision. The stipulations section must, therefore, emphasize that the identification and evaluation process will be coordinated with Montana SHPO and Tribal Historic Preservation Officers to ensure that adequate baseline information is prepared for each group of historic properties, cultural landscapes and traditional cultural properties associated with each alternative.

OEA response: As noted above, the Draft EIS will set forth each alternative analyzed and will make a comparative assessment of each alternative's effects on the environmental disciplines required under NEPA and the National Historic Preservation Act (including the No Action

alternative). For impacts to historic and tribal sites of significance, we conducted extensive surveys in 2013 and 2014 and set forth the data collected during those surveys (with the exception of specifics regarding confidential tribal data). The consulting parties, as well as members of the public and other stakeholders, will have the opportunity to comment on the EIS and the draft PA, which will be made available to the public in the Draft EIS. Comments received from the consulting parties and others will inform the Board's consideration of the preferred alternative.

Moreover, clauses addressing coordination with the Montana SHPO and the Tribal Historic Preservation Officers and the consulting parties' ability to comment on the alternatives were added to the draft PA distributed on September 26, 2014 (Section II, Review of Alternatives) and to subsequent drafts (October 17 Draft (Whereas clauses, Section I, Roles and Responsibilities, Section II, Review of Alternatives); November 10, Draft (Whereas clauses, Section I, Roles and Responsibilities, Section II, Review of Alternatives, Section III, Area of Potential Effects)).

Data Recovery Plan

ACHP guidance: Other treatment options, in addition to data recovery, should be consulted upon and considered in cases in which avoidance of adverse effects is not feasible. This is particularly important when properties of religious and cultural significance to Indian tribes are involved. Other treatment options should be outlined in the draft PA. Also, any archeological data recovery plan should have a public benefit that is explained. How would data recovery plans benefit the State, Region, and Tribes?

OEA response: Under Section VI, Subsection B, a new Part 5 has been added:

If avoidance is not possible, in-place preservation will be the preferred option. TRRC will work with the consulting parties to develop specific procedures to preserve historic properties and sites of significance in place and minimize visual and noise impacts to such resources as well as impacts to tribal, historic and rural landscapes. These procedures may include minor changes to the rail alignment or construction methods, to the extent feasible, to reduce impacts, and/or monitoring of historic properties by historian, archaeologists and tribal members for sites of significance during construction.

We will discuss this language with the working group and then share it with the all the Section 106 consulting parties to ensure that it addresses the concerns raised. The draft PA requires that the consulting parties see the treatment plan(s) in draft form and have the opportunity to comment on the plans. We understand that data recovery is a treatment, albeit not a preferred one, and, therefore, the term "data recovery" is no longer used in the provisions discussing the treatment plan(s). As you are aware, the working group is moving through the PA one section at a time starting from the beginning with the Whereas clauses. This is why clauses addressing treatment when adverse effects are not avoidable has not been addressed in the drafts already circulated to the working group.

Construction

ACHP guidance: A stipulation needs to be added that makes it clear that good faith consultation will occur for the No Action alternative. Stipulations should 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.

OEA response: Under Section II, "Review of Alternatives," OEA added the No Action alternative at the beginning of the list of alternatives under consideration. Under NEPA, OEA is conducting a

comparative analysis of 10 alternatives (5 build alternatives with variations yielding a total of 10 alternatives) and the No Action alternative. As noted above, the consulting parties, as well as members of the public and other stakeholders, will have the opportunity to comment on the draft EIS and the draft PA, which will be made available to the public in the Draft EIS. Comments received from the consulting parties and others will inform the STB's consideration of the preferred alternative.

Details such as construction management, staging areas, and the use of Tribal monitors will be set forth in the treatment plan(s) once the STB has made a decision. If the STB should deny TRRC's proposed rail line construction and operation or approve the No Action alternative, then there will be no need for the development of the treatment plan(s). If the STB should approve a specific build alternative, construction would be able to proceed, but only after development and agreement on the treatment plan(s).

Emergency Situations

ACHP guidance: ACHP encourages OEA to add a new section related to emergency situations. 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.

OEA action: OEA has added this topic to the next working group call to be held on Dec. 5 and the Section 106 consulting party call on Dec. 8. In preparation for those two conference calls, we have developed draft language concerning inadvertent discovery of tribal sites of significance, cultural resources and human remains. Again, this topic has not been previously discussed because each comment and issue must be addressed in turn and not all can be addressed at once.

Dispute Resolution

ACHP guidance: This stipulation as it is currently drafted 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.

OEA response: Again, revisions relating to this comment have not yet been made to the PA because it is a topic that was identified as being on the agenda for the two upcoming meetings. Therefore, while the issue has not yet been explicitly addressed, OEA fully plans to address this issue raised by ACHP.

Tribal Coordination

ACHP guidance: 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.

OEA response: Revisions relating to this comment have not yet been made to the PA because it is a topic that was identified as being on the agenda for the two upcoming meetings. Therefore, while the issue has not yet been explicitly addressed, OEA fully plans to address this issue raised by ACHP.

Public Participation

ACHP guidance: Language should be included in the stipulations section allowing the public to file objections regarding the implementation of the terms of the PA. While filing 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.

OEA response: Provisions addressing public participation were added to the draft PA (and are addressed above) and further revisions relating to this comment have not yet been made to the PA because it is a topic that was identified as being on the agenda for the two upcoming meetings.

Confidentiality

ACHP guidance and OEA response: In your October 30, 2014 letter, you added one new topic for our consideration: our duty to keep the location of sites of religious importance to tribes confidential. We received a letter in October 2014 from Carrie LaSeur, attorney for the Colstrip Alternative Landowners. Ms. LaSeur described in general terms the location of a site discovered during the fall surveys. With Ms. LaSeur's approval, we redacted sensitive information from that letter and posted it to the Board's website under Environmental Correspondence, consistent with our practice. During a subsequent conference call with the Section 106 consulting parties, one of our consultants at ICF mentioned the name of the ranch where the site is located. The information relating to the relevant landowner is in Ms. LaSeur's letter and was not redacted. No confidential information was revealed during the conference call. We take our duty to keep sensitive information confidential with the utmost seriousness.

I hope the information set forth in this letter assures you that OEA values ACHP's guidance and is taking appropriate action in working with our Section 106 consulting parties in developing the draft PA. If you still have questions or concerns, please do not hesitate to contact me at 202-245-0295 or Catherine Nadals of my staff at 202-245-0293 (nadalsc@stb.dot.gov). I am grateful for your guidance on our Section 106 compliance. I look forward to our continued consultations with ACHP and our Section 106 consulting parties as we continue with the Section 106 process for the TRRC Proposal.

Sincerely,



Victoria Rutson
Director
Office of Environmental Analysis

cc: Najah Duvall-Gabriel

Encls.

Draft PA with "bubble comments"
Draft ACHP PA communications matrix