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SEA

SERVICE DATE - OCTOBER 8, 1999

SURFACE TRANSPORTATION BOARD

Finance Docket No. 30186 (Sub-No. 3)

Tongue River Railroad Company, Construction and Operation of the Western
Alignment in Rosebud and Big Horn Counties, Montana

Agency: Surface Transportation Board

Action: Notice of Availability of a Draft Programmatic Agreement and Request For
Comments.

Summary: The Surface Transportation Board's Section of Environmental Analysis (SEA) has prepared a Draft Programmatic Agreement (Draft PA) to establish the process for the identification and treatment of historic and cultural resources potentially affected by the construction and operation of Tongue River Railroad Company's (TRRC's) proposed rail line from Miles City to Decker, MT. TRRC's purpose is to provide a shorter and more cost effective route to transport low sulfur, sub-bituminous coal primarily to electric utilities in the mid-western United States.

SEA has developed the Draft PA in consultation with the following likely signatories: Advisory Council on Historic Preservation (ACHP); Montana State Historic Preservation Office (MT SHPO); Department of the Interior, Bureau of Land Management (BLM); United States Army Corps of Engineers (Corps); United States Department of Agriculture, Agricultural Research Service (ARS); Montana Department of Natural Resources and Conservation (MT DNRC); and, TRRC. SEA has also consulted with the Northern Cheyenne Indian Tribe as a concurring party. At this time all the likely participants to the Draft PA generally concur with the approach and stipulations contained in the Draft PA.

The Draft PA sets forth the detailed requirements of how the impacts associated with the construction and operation of TRRC's proposed rail line from Miles City to Decker, MT would be appropriately addressed, including impacts to archeological, paleontological, architectural, historic, and cultural resources. The Draft PA would require completion of detailed on-the-ground surveys of the railroad right-of-way prior to construction; development of a Treatment Plan to mitigate adverse effects on historic and cultural resources in consultation with the

agencies to the PA and the Native American community; and, procedures for reviewing and addressing objections and/or disagreements.

TRRC's rail line from Miles City to Decker, MT is comprised of two connecting line segments, neither of which has yet been constructed. The initial 89-

mile segment, extending from Miles City, MT to a terminus point near Ashland, MT, was approved by the Interstate Commerce Commission (ICC), now the Surface Transportation Board (Board), in May 1986 in Finance Docket No. 30186 (Sub-No. 1), and also referred to as Tongue River I¹. The second segment, referred to as Tongue River II², extends approximately 40 miles in length from Ashland to Decker, MT, and was approved by the Board in November 1996 in Finance Docket No. 30186 (Sub-No. 2) via the Four Mile Creek Alternative.³

On April 27, 1998, TRRC filed an application with the Board under 49 U.S.C. 10901 and 40 CFR 1150.1-10 seeking authority to construct and operate a 17.3-mile line of railroad in Rosebud and Big Horn Counties, MT known as the “Western Alignment” and also referred to as Tongue River III. The Western Alignment is an alternative routing for the Four Mile Creek Alternative approved by the Board in Tongue River II and the remainder of the approved rail line from Ashland to Decker would remain generally unchanged. A decision by the Board on whether to grant or deny Tongue River III will be made following the completion of the environmental review process and will take into account both the environmental and transportation concerns.⁴

In Tongue River I, the Board’s predecessor, the ICC, developed a Memorandum of Agreement (MOA) to address historic and cultural issues that was signed by all the participating agencies. In Tongue River II, the Board developed a PA that addressed only the Ashland to Decker, MT portion of the line. However, the PA developed in Tongue River II was never signed by the participating agencies.

The Draft PA prepared for Tongue River III by SEA, acting on behalf of the Board, and presented for public review and comment would supercede the MOA signed in Tongue River I and the PA prepared in Tongue River II, and would apply

¹ In Tongue River I, Tongue River Railroad Company - Rail Construction And Operation - In Custer, Powder River, And Rosebud Counties, Montana, Finance Docket No. 30186 (Miles City to Ashland), the Draft Environmental Impact Statement was served July 15, 1983; the Supplement to the Draft Environmental Impact Statement was served January 19, 1984; and the Final Environmental Impact Statement was served August 23, 1985.

² In Tongue River II, Tongue River Railroad Company - Rail Construction And Operation Of An Additional Rail Line From Ashland To Decker, Montana, Finance Docket No. 30186 (Sub No. 2), the Draft Environmental Impact Statement was served July 17, 1992; the Supplement to the Draft Environmental Impact Statement was served March 17, 1994; and the Final Environmental Impact Statement was served April 11, 1996.

³ Petitions for review of the November 8, 1996 decision were filed in the Ninth Circuit in Northern Plains Resource Council, Inc. Et. Al. v. STB, No. 97-70037 (filed Jan. 7, 1997) (NPRC). The court proceedings are being held in abeyance pending the conclusion of Tongue River III.

⁴SEA is presently completing a Draft Supplement to the Final Environmental Impact Statement in Tongue River III that will be made available for public comment. Based on any comments received and any further environmental analysis that may be necessary, SEA will prepare a Final Supplement to the Final Environmental Impact Statement that will also be made available to the public. The Board will then decide whether to grant Tongue River III.

to TRRC's entire rail line from Miles City to Decker, MT approved in Tongue River I and Tongue River II, and currently being considered in Tongue River III.

In compliance with Section 106 of the National Historic Preservation Act of 1966, as amended, and its implementing guidelines at 36 CFR Part 800, copies of the Draft PA are available for public review at the following locations:

Billings Library
510 N. Broadway #2
Billings, MT

Miles City Public Library
1 South 10th Street
Miles City, MT

St. Labre Indian School Library
1000 Tongue River Road
Ashland, MT

Dull Knife Memorial College Library
100 College Drive
Lame Deer, MT

Sheridan High School Library
1056 Long Drive
Sheridan, WY

Range Riders Museum
Highway 10 and 12
Miles City, MT

Big Horn County Historical Museum
Hardin, MT

Individual copies of the Draft PA can be obtained for review and comment by contacting SEA's independent third-party contractor: Scott Steinwert, (415) 989-1446, extension 17, Public Affairs Management, 101 The Embarcadero, Suite 210, San Francisco, CA 94105.

Based on comments to the Draft PA, SEA, on behalf of the Board, and in consultation with the signatory and concurring agencies to the PA, will prepare a Final PA which will be executed by the participants.

Dates: Written comments on the Draft PA are due November 30, 1999 (45 days).

Address: Send an original and 10 copies to Dana G. White, Surface Transportation Board, 1925 K Street, NW, Washington, DC 20423-0001. Please refer to Finance Docket No. 30186 (Sub-No. 3).

For Additional Information Contact: Dana G. White, (202) 565-1552 (TDD for the hearing impaired (202)565-1695)

SUPPLEMENTARY INFORMATION: Section 106 of the National Historic Preservation Act of 1966, as amended, requires that Federal agencies take into account the effect of an undertaking on a property which is included in, or eligible for inclusion in, the National Register of Historic Places (National Register). The ACHP has developed procedures at 36 CFR Part 800 for implementing compliance with the requirements of Section 106. For large or complex projects, the ACHP procedures allow preparation of a Programmatic Agreement (PA) as a way for an agency to fulfill its Section 106 responsibilities (36 CFR 800.13).

In Tongue River I, the Board's predecessor, the ICC, developed an MOA that was signed by all the participating agencies. In Tongue River II, the Board developed a PA that addressed only the Ashland to Decker, MT portion of the line. However, this PA was never signed by the participating agencies. In Tongue River III, the Board determined, in consultation with the ACHP, that preparation of a PA was appropriate to fulfill the Section 106 responsibilities relative to construction of TRRC's proposed rail line from Miles City to Decker, MT. In addition, the participating agencies agreed that the PA prepared for Tongue River III and presented here for public review and comment, should supercede the MOA signed in Tongue River I and the PA prepared in Tongue River II, and apply to TRRC's entire rail line from Miles City to Decker, MT considered in Tongue River I, Tongue River II, and Tongue River III.

Accordingly, here in Tongue River III, SEA, acting on behalf of the Board, developed the Draft PA in consultation with the following likely signatories: ACHP, MT SHPO, Corps, BLM, ARS, MT DNRC, and TRRC. SEA also consulted with the Northern Cheyenne Indian Tribe as a concurring party. Each of the Federal and state agencies were consulted because TRRC's rail line would cross land either owned or managed by that agency, or it would affect land regulated by that agency. While TRRC's rail line would not cross the Northern Cheyenne Indian Reservation, SEA consulted with and invited the Northern Cheyenne to be a concurring party to the Draft PA because TRRC's rail line would cross lands that may contain properties of spiritual and traditional cultural value to Native Americans, primarily the Northern Cheyenne. In addition to the Northern Cheyenne, SEA contacted the Crow, Arapaho, Oglala and Miniconjou Tribes and invited them to participate in the development of the Draft PA. However, at this time, none of the Tribes, other than the Northern Cheyenne, have responded to SEA's invitation or decided whether to participate in the development of, or concur in, the Draft PA.

Identification and Evaluation of Historic and Cultural Resources

SEA has reviewed and approved Class I Inventories conducted for a 1,500 foot area on either side of the centerline of the rail line from Miles City to Decker, MT. The Class I Inventories were conducted as part of the environmental review process for Tongue River I, Tongue River II, and Tongue River III.

A Class I Inventory identifies prehistoric sites, historic sites and structures, cultural landscapes, and properties of traditional cultural value that may be affected by construction and operation of the proposed rail line. The Class I Inventories conducted for Tongue River I, Tongue River II, and Tongue River III determined that construction and operation of a rail line by TRRC from Miles City to Decker, MT may have an effect upon historic properties included on, or eligible for inclusion on, the National Register.

The Draft PA includes stipulations that surveys and inventories would be conducted for geographic areas within which the construction and operation of the railroad may cause changes in the character or use of historic and cultural resources, to further assess the potential effects of the undertaking on these resources. These surveys and inventories would include a windshield survey from publicly accessible roads to consider visual, audible, and atmospheric effects, as well as other indirect effects on standing structures, cultural landscapes and properties of traditional cultural value that may be affected by the undertaking. These surveys are similar to a Class II Survey. A Class III Inventory of the right-of-way plus a 200 foot buffer area on either side would also be conducted by a qualified archaeologist under contract to TRRC. A Class III Inventory is an intensive survey aimed at locating and recording all historic and cultural resources that have surface or exposed profile. Representatives of the Northern Cheyenne Indian Tribe would be invited to participate in these surveys and inventories to help identify, document, and evaluate properties of spiritual and traditional cultural value to Native Americans. The windshield survey and intensive Class III inventories are hereafter referred to as the Class III Inventory Process.

The results of the Class III Inventory Process would be provided to the signatories and concurring agencies to the PA for review and comment. SEA, on behalf of the Board, would consult with the MT SHPO to resolve any conflicts and reach concurrence regarding the eligibility of properties for listing on the National Register, and the effects of constructing the rail line on these properties.

The Board, through SEA, would then consult with the signatory and concurring agencies to the PA to develop a Treatment Plan which would include measures to avoid, minimize or mitigate any adverse effects on historic and cultural resources identified in the surveys and inventories as eligible for listing on the National Register. To the extent practicable, the Treatment Plan(s) would incorporate measures identified by Native American representatives as necessary for

mitigation of adverse effects to properties that are determined to be significant for their traditional cultural values.

Under the Draft PA, a Treatment Plan would be prepared for a segment or portions of the rail line as long as the Class III Inventory Process is complete and has been approved for that segment or portion of the rail line. Whenever possible, in-place preservation of historic and cultural resources would be the preferred treatment. However, where avoidance of such resources is not feasible, a program of data recovery would be implemented. The Treatment Plan(s) would also be provided to the signatory and concurring agencies to the PA for review and comment similar to the process for the Class III Inventory.

Construction Activities

Where the right-of-way does not contain eligible historic or cultural resources, TRRC could begin construction once the signatory and concurring agencies agree on the adequacy of the Class III Inventory Report(s). Where eligible historic and cultural resources are present, TRRC could begin construction once the agreed-upon data recovery fieldwork/treatment as specified in the Treatment Plan is completed and approved by SEA, on behalf of the Board, with the concurrence of the MT SHPO. Where eligible historic and cultural resources are present on land administered by the BLM, ARS or the state of Montana, TRRC may begin construction only after the agreed upon data recovery fieldwork/treatment is completed and approved by the affected agency and with the concurrence of the MT SHPO and SEA, on behalf of the Board.

Changes in the ROW/Other Ancillary Areas

The Draft PA includes provisions that if changes are made to the alignment after a Class III Inventory Process is completed that place the alignment or ancillary areas outside of the areas previously surveyed, then SEA, on behalf of the Board, would require TRRC to inventory those areas and would require that TRRC retain the services of a qualified archaeologist to prepare a supplemental Class III Inventory Report prior to construction in the previously un-surveyed areas.

Discovery Plan

The Draft PA includes provisions that if a previously undiscovered archaeological, historical, or cultural property is encountered during construction, or previously known properties would be affected in an unanticipated manner, all work would cease within 200 feet of the resource in all directions until SEA, on behalf of the Board, could evaluate and, if necessary, authorize steps to mitigate impacts to the new discovery. Evaluation and mitigation would be carried out in consultation with

the signatory and concurring agencies to the PA as expeditiously as possible.

The Draft PA also includes provisions that if historic or cultural resources are encountered on lands administered by the BLM, ARS or the state of Montana, SEA, on behalf of the Board, would consult with the affected agency to develop appropriate mitigation measures. TRRC would provide the construction contractor with written notification of the proper protocol, discussed above, for discovery of previously unencountered sites.

Human Remains

To address the potential for encountering human remains, cultural items and items of cultural patrimony associated with human remains during construction, the Draft PA includes provisions that in these circumstances on Federal lands, SEA, on behalf of the Board, or the appropriate Federal land management agency would consult with Native Americans, or other appropriate groups to determine treatment and disposition measures consistent with applicable Federal laws such as the Native American Graves Protection and Repatriation Act (NAGPRA) and Section 106 of the National Historic Preservation Act and state laws such as Montana laws M.C.A. 22-3-801 through 811. If human remains were encountered on state-administered lands, SEA, on behalf of the Board, would consult with the MT SHPO and MT DNRC as to appropriate mitigation measures in accordance with Montana laws M.C.A.22-3-801 through 811. If human remains were encountered on private lands, the Board would ensure that they are treated according to the provisions of the Montana Human Skeletal Remains and Burial Site Protection Act.

The Draft PA further requires that in the case of inadvertent discovery of Native American human remains during construction activities, SEA, on behalf of the Board, would attempt to identify the appropriate Native American tribe(s) or other ethnic group(s) related to the burial, and consult with them over the treatment of remains in accordance with procedures identified in the Treatment Plan. All work would cease within 200 feet in all directions of the human remains until the requirements of Federal and state laws were satisfied.

Curation

The Draft PA includes provisions that all records and other items resulting from identification and data recovery efforts would be curated in accordance with 36 CFR Part 79, and the provisions of the NAGPRA. All archaeological materials recovered from BLM-administered lands would be curated in accordance with BLM requirements at BLM's Billings (MT) Curation Center. All archeological materials recovered from ARS-administered lands would be curated in accordance with 36 CFR Part 79.

The Board would encourage private land owners to curate collections from

their lands in an appropriate facility. Materials from private lands to be returned to the private land owners would be maintained in accordance with 36 CFR Part 79 until any specified analysis is complete.

The Board would ensure through consultation with the MT DNRC that all cultural and paleontological materials discovered on Montana lands would be curated in accordance with Montana laws M.C.A. 22-3-432.

Dispute Resolution

The Draft PA includes provisions for resolving disputes among the signatories to the PA. These include: 1) consulting with the objecting party to resolve the objection; 2) forwarding all documentation relevant to the dispute to the ACHP, unless the dispute involves site eligibility; and 3) sending any unresolved issue regarding site eligibility to the Keeper of the National Register.

Final PA

Based on comments to the Draft PA, SEA, on behalf of the Board, and in consultation with the signatory and concurring agencies to the PA, will prepare a Final PA which will be executed by the participants.

By the Board, Elaine K. Kaiser, Chief, Section of Environmental Analysis.

Vernon A. Williams
Secretary