

From: "Wilmoth, Stan" <swilmoth@mt.gov>  
To: "Catherine.Nadals@stb.dot.gov" <Catherine.Nadals@stb.dot.gov>  
Date: 11/07/2014 05:02 PM  
Subject: RE: PA Working Group Friday, November 7

A couple of ideas. Stan

## 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 (09/26/2014 session)
- II. REVIEW OF ALTERNATIVES (09/26/2014 session)
- III. AREA OF POTENTIAL EFFECTS (APE) (10/10/2014 session)
- IV. IDENTIFICATION AND EVALUATION (10/10/2014 session)

### V. ASSESSMENT OF EFFECTS (10/24/2014 session, still in progress)

- A. **On surveyed areas:** In the EIS, the STB analyzed the impacts of each alternative upon the archaeological resources, tribal resources, and built resources identified through field survey in the APE on areas of accessible parcels. The EIS analyzed the types and numbers of resources that were identified in the proposed right-of-way for each build alternative and would likely be adversely affected by construction and operation activities. The EIS also analyzed potential resources that were not in the proposed right-of-way, but were identified by survey in the buffer area, and could be indirectly affected by construction and operation activities. The right-of-way plus the buffer area is identical to the APE.
- B. **On inaccessible areas:** In the EIS, STB also assessed impacts on land that was not accessible and therefore not surveyed during Phase I. STB assessed the likelihood of the presence of archaeological sites on the total acreage (both surveyed and unsurveyed) of each alternative based on the number of archaeological sites identified during the survey, combined with three slope percentage categories (high, moderate, and low). OEA then used this to extrapolate the probability of unidentified archaeological sites that could be located within the total build alternative. The probability of tribal sites of significance located within the build alternative was not assessed in the EIS. To assess impacts on built resources for areas where access was not granted, the STB's built resource survey teams reviewed tax assessor data and geographic information system (GIS) maps using Google Earth Pro satellite imagery.
- C. If the STB makes a decision to approve a build alternative, in consultation with the PA consulting parties, STB will assess the direct, indirect and cumulative effects of this Undertaking on historic properties consistent with 36 CFR 800.4(d) and identify effects on each historic property within the APE of the approved build alternative in accordance with the criteria of adverse effect established in 36 CFR 800.5(a)(1-2), and provide the PA

Commented [WS1]:

Commented [WS2]:

Formatted: Font: Bold

Commented [MS3]: Define in glossary

Commented [SR4]: The WG asked that the comment received from Lana Gravatt of the Yankton Sioux be added here, but Lana's comments were about the WHEREAS clauses.

Formatted: Font: Bold

Deleted: sensitivity

Commented [MS5]: Betsy Merritt asked for a different term than sensitivity

Deleted: sensitivity information

Commented [MS6]: Use the terms that we use: -eligible - listed tribal sites of significance.

Commented [MS7]: Conrad Fisher asked to specify that tribal resources weren't considered in the sensitivity model. Stan Wilmoth: wanted definition of sensitivity model

Commented [MS8]: Define term in glossary and clarify in whereas clause. Came from David Coburn. Betsy Merritt and Stan Wilmoth both spoke on this matter.

Commented [SR9]: Sections C-H of this stipulation follow the format of the Boardman to Hemingway PA provided by the ACHP as a template for a "process PA".

consulting parties with the results of the finding in writing, following 36 CFR 800.11(e)(4-6), as follows:

1. A description of the Undertaking's effects on historic properties;
  2. An explanation of why the criteria of adverse effect were found applicable or inapplicable, including any conditions or future actions to avoid, minimize or mitigate adverse effects; and
  3. Copies or summaries of any views provided by consulting parties and the public.
- D. The assessment of effects will serve as the basis for the development of one or more Treatment Plan(s) as described in Stipulation VI.
- E. The STB will consult with the PA consulting parties to seek ways to avoid or minimize adverse effects to historic properties. If historic properties cannot be avoided, subsurface investigation may be necessary for archaeological sites within the direct effect APE which may be adversely affected. Determination of the site boundaries in relation to the direct effect APE, and actual area of ground disturbance, may be analyzed to aid in developing alternative design and or mitigation strategies. If adverse effects cannot be avoided the STB will consult with the parties to this agreement to determine appropriate measures to resolve adverse effects to be detailed in the Treatment Plan(s).
- F. The STB, in consultation with the PA consulting parties, will broadly assess cumulative effects under Section 106 in order to identify all reasonably foreseeable potential adverse effects as a result of the Undertaking (36 CFR 800.5 (a)(1)). Potential cumulative or reasonably foreseeable effects will be based on the APEs for direct and indirect effect and be addressed in the Treatment Plan(s) according to the procedures in Stipulation VI.
- G. The STB will provide all assessments of effect to historic properties in writing to the parties to this agreement. This will be done concurrently with the distribution of the Phase II Evaluation Reports described in Stipulation IV. Reviews will proceed according to the procedures and timeframes established in Stipulation IV.
- H. Disagreement regarding assessments of effect will be handled according to the procedures established in Stipulation (TBD).

## VI. TREATMENT PLANS

### A. Consultation on Developing Treatment Plans

1. STB will consult with the MT SHPO, consulting tribes and other PA consulting parties to develop measures that would avoid, minimize or mitigate adverse effects to tribal sites of significance or identified National Register-eligible or -listed historic properties and memorialize such measures in a Treatment Plan(s). The STB will meet with the MT SHPO, TRRC, the managing federal agency (for sites on federal land), and consulting tribes to further review the framework for how individual treatment plans will be developed, and to consider ways to avoid or minimize adverse effects to tribal sites of significance, individual historic properties, groups of closely related historic properties, or category of historic properties including traditional cultural properties and historic or tribal landscapes. STB will notify the PA consulting parties and participating tribes of the proposed treatment

**Commented [WS10]:** How about a statement here describing what document and when it will be released (either by date or in milestone order or something) that will ID the preferred PA, the finding of effect and if applicable the Board decision to license what Alt.

**Commented [WS11]:** In answer to conrads concern what a bot in role Stip II "" Tribes will be consulted during initial ID efforts and participate in sample field ID efforts and will formally be requested to comment on a proposed PA, Draft EIS and alt.s, elig. And effect at (what time or step....Spring 2105 for draft EIS, When for Draft PA? Etc.

**Commented [SR12]:** This Stipulation based on the 2011 PA.

options within 45 days of the date of issuance of complimentary Final Phase II Evaluation reports.

**B. Development of the Treatment Plan(s)**

1. The STB will ensure that the Contractor prepares a Treatment Plan(s) that will address the adverse effects of the proposed Undertaking on historic properties, including direct and indirect impacts (visual, noise, aesthetic, etc.). A separate Treatment Plan will be developed for the Wolf Mountains Battlefield NHL if the Decker Alternative is approved; and one or more Treatment Plans may be prepared for other sections of the APE affected by the Undertaking. A Treatment Plan may be prepared for a portion of the line provided that the Phase I ID Report for that portion has been completed and approved in accordance with Stipulation IV. Each Treatment Plan will be amended, if necessary, after the finalization of any supplemental Phase II Evaluation Report(s).
2. Each Treatment Plan will do the following:
  - a. identify tribal sites of significance and National Register-eligible historic properties in the APE or portion thereof;
  - b. identify the nature of the effects to which each property will be subjected; and
  - c. identify the treatment strategies proposed to avoid, minimize or mitigate the effects of the Undertaking on the historic properties.
3. Each Treatment Plan will incorporate, to the extent feasible, measures identified by tribal representatives to resolve adverse effects to properties significant for their traditional cultural values and, if possible, the protection and continuing access to gathering sites of traditionally-important plants. If appropriate, TRRC may attempt to negotiate tribal access to public or private lands that are not currently accessible to tribes for plant gathering purposes. The Treatment Plan(s) will conform to the principles of the Council's Treatment of Archaeological Properties: A Handbook, Parts I and II, the "Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation" (48 Fed. Reg. pp. 44716-44742), and appropriate MT SHPO guidelines. Each finalized Treatment Plan will be implemented by TRRC prior to the onset of construction activities.
4. Each Treatment Plan will examine the feasibility of avoiding National Register-listed or -eligible historic properties, or tribal sites of significance. These measures may include modifications to the rail alignment, to the extent feasible, to avoid adverse impacts.
5. 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,

**Commented [SR13]:** From ACHP letter, 9/8/2014:

***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."

to reduce impacts, and/or monitoring of historic properties by historians, archaeologists and tribal members for sites of significance during construction.

C. Finalization of Treatment Plan(s)

1. STB will submit the draft Treatment Plan(s) to the PA consulting parties for review. Within 30 days of receipt of the Treatment Plan(s), a PA consulting party must notify STB in writing of any informational deficiencies in the Treatment Plan(s). STB will then have 10 days to provide the additional information or to determine that such information is not required. The PA consulting parties will have 45 days from the receipt of the complete information, or the determination that additional information is not required, to comment on the Treatment Plan(s). If no additional information is requested, the PA consulting parties will have 60 days from receipt of the initial Treatment Plan(s) to submit comments. A copy of any comments sent to STB will be sent simultaneously to the MT SHPO. If any PA consulting party fails to submit its comments within 45 days of the receipt of the complete information, or 60 days of receipt of the initial Treatment Plan(s) if it is complete, STB may assume that party's concurrence with the Treatment Plan(s). STB will make any required revisions to the Treatment Plan(s), as appropriately, within 45 days of the close of the comment period, taking into consideration the comments received during this review period.
2. The final decision on the acceptability of the Treatment Plan(s) will be made by STB, in consultation with the MT SHPO. A copy of the final Treatment Plan(s) will be provided by STB to the PA consulting parties.

**Commented [SR14]:** From ACHP 9/8/2014 letter: *"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."

**Commented [SR15]:** Per 9/30/2104 comment letter from Baumstark Braaten Law Partners-Colstrip Alternative Landowners Group: "The 15-day timeline for PA consulting party responses on informational deficiencies is inadequate. To ensure the Landowners' ability to participate meaningfully, the minimum turn-around for their response should be 45 days. The Landowners will require expert assistance to review the sufficiency and quality of the Treatment Plans for their property. We request reasonable financial reimbursement for a qualified expert approved by the Landowners to assist them with this review.

The Landowners are not willing to be bound by any clause that interprets their failure to comment as concurrence."

**Deleted:** 15 days