

M E M O R A N D U M



PUBLIC AFFAIRS
MANAGEMENT

FROM: Kay Wilson

EXT: 12

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KB

TO: Victoria Rutson, SEA,
Douglas Day, TRRC

DATE: March 24, 2003

SUBJECT: TRRC – FD 30186 Sub-No. 3 – Three Party MOU & Work Plan

COPIES: Scott Steinwert, C-file 1731

PAM REFERENCE NO.: 1731

We have reviewed the Memorandum of Understanding (MOU) among the Surface Transportation Board, Tongue River Railroad, and Public Affairs Management, which was executed in February 1998 and is attached. We believe that major changes to the MOU are not necessary for PAM to continue our work on preparing the Supplemental EIS for the project. It appears that only minor amendments would be necessary as indicated below.

Section VI Workplan A – The previous Work Plan would be superseded and replaced by the Initial Work Plan dated March 19, 2003 (also attached).

Exhibit A – would be amended to include the following additional PAM staff members: Mary Bean, Chris Caperton.

Please indicate your concurrence with these changes by signing below and returning to our office.

If you have any questions, please contact either myself or Scott Steinwert.

Accepted by: Victoria Rutson 4/10/03
Victoria Rutson, Chief, SEA Date

Accepted by: Douglas Day 4/3/03
Douglas Day, Tongue River Railroad Date

Accepted By: Kay Wilson 3/24/03
Kay A. Wilson, Public Affairs Management Date

MEMORANDUM OF UNDERSTANDING

AMONG
SURFACE TRANSPORTATION BOARD,
TONGUE RIVER RAILROAD COMPANY
AND
PUBLIC AFFAIRS MANAGEMENT

RE: ENVIRONMENTAL ANALYSIS AND DOCUMENTS RELATING TO TONGUE RIVER RAILROAD COMPANY CONSTRUCTION AND OPERATION OF THE WESTERN ALIGNMENT IN ROSEBUD AND BIG HORN COUNTIES, MONTANA, FINANCE DOCKET NO. 30186 (Sub-No. 3)

I. Introduction and Purpose

Tongue River Railroad Company (referred to herein as the "Railroad") intends to seek authority from the Surface Transportation Board ("STB" or "Board") to construct and operate the "Western Alignment," an approximately 17 mile line of railroad in Rosebud and Big Horn Counties, Montana. See Finance Docket No. 30186 (Sub-No. 3) In considering this proposal, the Board will prepare an Environmental Assessment ("EA") and/or an Environmental Impact Statement ("EIS") and related documents, reports, studies and evaluation as necessary. Pursuant to 40 CFR 1506.5(c), 49 CFR 1105.4(j) and 1105.10(d), the STB, through its Section of Environmental Analysis ("SEA"), has selected and the Railroad has agreed to engage, at the Railroad's expense, Public Affairs Management as the Independent Third Party Contractor ("Contractor") for this proposal. The Contractor shall assist SEA in conducting the environmental review process and preparing the environmental documentation¹ for this project. The purpose of this Memorandum of Understanding ("Memorandum") is to summarize the relationship among the Contractor, the Railroad, and SEA, as set forth in applicable regulations and STB policy, regarding the conditions and procedures each party must follow in preparing all environmental documentation. This Memorandum does not supersede or amend, and is made expressly subject to, the requirements of the National Environmental Policy Act ("NEPA"); and, to the

¹ The terms "environmental documentation" and "environmental document(s)" embrace draft, supplemental and final EAs, EISs, and any other reports, studies, surveys or related documents.

extent applicable, related environmental laws, and 49 CFR Part 1105 and 40 CFR Part 1500.

II. Agreement between the Railroad and Contractor

- A. Any contract between the Railroad and the Contractor, and any subcontracts, shall be consistent with the provisions of this Memorandum.
- B. The terms of this Memorandum shall override any contradictory or conflicting terms regarding the scope and performance of any work to be conducted under any contract entered into between the Railroad and the Contractor, provided, however, that the foregoing shall not limit the rights of the Railroad and Contractor to contract on terms which require that the work be performed cost-effectively.
- C. The contract between the Contractor and the Railroad shall specifically provide, and the Contractor shall represent, that (1) the Contractor and any subcontractors do not and shall not have any financial or economic interest in the Railroad or this project, except for payment for services rendered in connection with the preparation of all required environmental documentation, and except for services rendered pursuant to other agreements not prohibited by this Memorandum, and (2) there is no agreement between the Railroad or any other party and the Contractor regarding future employment that is contingent upon the Contractor's performance under this contract. The Contractor shall concurrently execute a disclosure statement as mandated by the regulations of the Council on Environmental Quality ("CEQ") (40 CFR 1506.5(c)) and submit it to both SEA and the Railroad, before beginning any work under SEA's direction. It is understood that the Contractor and any subcontractors have not done any environmental analysis related to this project for the Railroad or any other party and, therefore, can be retained as independent third party contractor(s).
- D. Restrictions on other work
 - (1) No employee of the Contractor or employee of any subcontractor, who is a part of the Contractor's core team committed to the environmental review process for this project (see Exhibit A), shall

engage in (a) other work for the Railroad, or (b) any work, relating to the project, for any other party to Finance Docket No. 30186 (Sub. No. 3) during the course of this proceeding.

(2) No other employee of the Contractor or employee of any subcontractor shall engage in the environmental review process for this project, unless SEA is provided prior notice.

(3) No other employee of the Contractor or other employee of any subcontractor shall, unless SEA is provided prior notice of and approves such work, engage in (a) other work for the Railroad, or (b) any work, relating to the project, for any other party to Finance Docket No. 30186 (Sub. No. 3) during the course of the project.

E. The costs incurred by the Contractor, and by any subcontractor approved by SEA in accordance with Section III.A, in preparing the required environmental documentation to implement the requirements of NEPA and related environmental laws under the direction of SEA shall be borne by Railroad. The Railroad agrees to hold harmless and indemnify the United States of America and the STB with respect to any and all claims, demands, causes of action and the like which may arise in performing the work under the contract between the Contractor and the Railroad.

F. Any contract between the Contractor and the Railroad shall specifically limit any remedies available to the Contractor or subcontractors upon termination of the contract to affirmatively relieve the United States of America, the STB, and any officer, agent, or employee, from any liability from terminating the contract.

III. Contractor Responsibilities

A. The Contractor may engage subcontractors to perform work related to this project, subject to the provisions of Sections II.C and II.D. All work performed by the Contractor or any subcontractors shall be under the sole direction, control, supervision, and final approval of SEA. The Contractor and subcontractors, if any, will act as the agent(s) of the STB, not the Railroad, in performing its/their duties.

B. The Contractor shall provide:

- (1) Appropriate expertise in the areas of environmental concern (including, but not limited to water quality, wetlands, air quality, biological resources, land use, safety, noise, social and economic, and cultural/historic resources).
- (2) A good working knowledge of environmental laws, applicable laws and regulations (including environmental regulations) administered or promulgated by the STB, CEQ regulations and guidelines, other applicable federal regulations, state laws and regulations, and applicable local ordinances and regulations.
- (3) The capability to perform environmental impact analysis and prepare appropriate environmental documentation.
- (4) Thorough, readable, technically sound, and informative environmental documents, as well as related charts, maps, diagrams, etc.
- (5) Representatives to attend and/or facilitate meetings with Federal, state, regional and local agencies, other interested parties and the Railroad for the purpose of exchanging and obtaining information, explaining the project and related environmental concerns and impacts, and receiving comments in preparing the required environmental documentation.
- (6) Expertise in data management.

C. The Contractor shall maintain and provide SEA upon request:

- (1) Adequate record-keeping and reporting systems to assure preservation of all data gathered, including surveys, studies, etc.
- (2) Logs summarizing all telephone calls, meetings, document reviews, and other substantive communications with SEA, the Railroad, local governments, governmental agencies, citizens' groups, and any other interested parties.

- (3) Lists of all agencies, other railroads, citizens' groups, organizations, and individuals (including their respective addresses and telephone numbers) contacted in preparing the environmental documentation.
- D. The Contractor shall perform the work in a timely, responsive, satisfactory and cost-effective manner, pursuant to a work schedule developed with SEA in coordination with the Railroad and approved by SEA.
- E. The Contractor shall assist SEA in coordinating the efforts and exchange of all relevant environmental information and technical data/studies among SEA staff, the Railroad's staff and representatives, the Contractor, and any subcontractors, related to the project and necessary in preparing all required environmental documentation.
- F. The Contractor will submit directly to SEA any and all work the Contractor performs in preparing all required environmental documentation, studies, surveys, etc. The Contractor, and any subcontractors, shall not disclose the results of their work nor release any of the underlying work papers, drafts, or other materials prepared under the contract to anyone, including the Railroad, without SEA's express authorization. In no case shall the Railroad be provided the opportunity to modify or edit the Contractor's work prior to submission to SEA, without SEA's express authorization.
- G. The Contractor shall follow the directions and instructions of SEA, and incorporate them into the environmental document(s), as needed, in a timely and responsive manner. The Contractor shall submit preliminary and final drafts of any documents to SEA for final review and approval.
- H. The Contractor shall provide SEA access to and the right to review all procedures and underlying data used in the Contractor's development and preparation of any and all environmental documents. This includes, but is not limited to, field reports/surveys, technical studies and analyses, subcontractor reports, and interviews with concerned private and public parties, whether or not such information may be reflected in draft, supplemental, or final environmental documents submitted to SEA.

- I. The Contractor, and any approved subcontractors, shall cooperate fully with SEA in organizing, participating in, and conducting any public workshops, informational meetings, and other meetings, as SEA determines are necessary, to foster public understanding of and/or participation in the environmental review process, and to assess potential environmental impacts and develop mitigation measures related to the project.
- J. The Contractor will assist SEA in reviewing comments received during the environmental review process, will draft a summary of each comment, and will coordinate analysis of the comments with SEA.
- K. The Contractor shall assist SEA in preparing the required environmental documentation, environmental recommendations, selection of alternatives, and development of mitigation measures.
- L. The Project Director and the Project Manager shall be available to attend all meetings, briefings and consultations as SEA deems necessary. The Project Director and the Project Manager shall devote as much time to this project as is necessary to assure Contractor's performance of its responsibilities under this Agreement. This work commitment will extend for the entire time necessary to complete the environmental review process for this project.
- M. Except as specifically authorized by SEA, the Contractor and any of its subcontractors shall refer all media/press inquiries directly to SEA.

IV. Railroad Responsibilities

- A. The Railroad shall retain and pay the Contractor to assist in preparing all required environmental documentation and services.
- B. The Railroad, including its staff and representatives, shall provide to SEA and the Contractor any requested supportive expertise, resources, data, and technical capabilities necessary to undertake the environmental analysis, subject to the right of the Railroad to advise SEA of any request received from SEA or the Contractor that the Railroad believes either is not germane to matters appropriately reviewed in the environmental

review process, is contrary to applicable statutes and regulations, would impose an extraordinary burden on the Railroad, or is subject to the right of the Railroad to maintain confidentiality as to proprietary, privileged or other information which is not otherwise subject to disclosure. In the event that the Railroad so advises SEA, SEA shall determine whether the request is appropriate and shall so advise the Railroad and the Contractor of its determination. SEA, shall, to the extent possible, maintain the confidentiality of any information if so requested by the Railroad.

- C. The Railroad shall cooperate fully with SEA in organizing and participating in any public workshops, hearings, and meetings, as SEA determines is necessary (1) to foster public understanding and/or participation in the environmental review process, and (2) to assess potential environmental impacts and mitigation measures related to the project.
- D. With respect to all reports, analyses, and documents, including drafts, supplements, and final copies of the environmental documents, the Railroad shall be responsible for Contractor's administrative and clerical costs, as well as the costs of graphics, maps, layout, mailing, and printing. However, the Railroad shall have the option of directing that the printing of the draft and final EA and/or EIS be performed by a private entity, rather than SEA. The Railroad shall be solely responsible for the cost of preparing and providing to SEA the appropriate number of copies of all required environmental documentation.

V. STB/SEA Responsibilities

- A. The STB is responsible for ensuring compliance with the requirements of NEPA and other applicable environmental statutes and regulations by preparing appropriate environmental documentation.
- B. SEA shall:
 - (1) Direct, review, and approve all phases of preparing all required environmental documentation, including the work of the Contractor, using SEA's best efforts to ensure that the work is reasonably necessary to conduct the environmental review

process directly related to the Western Alignment project and the work is within the scope of NEPA requirements. For example, SEA shall ensure that the Contractor considers existing data and environmental analyses available from the Railroad, the SEA and other sources, and that the Contractor does not duplicate work already done, unless the SEA determines that the existing data is not adequate for use in preparing the environmental documentation.

- (2) Designate appropriate staff to review and approve all work as it is developed and completed.
- (3) Ensure that its representatives attend meetings, as needed, with Federal, state, regional, and local agencies, and other interested parties, as well as any public hearings or meetings, to exchange information, explain the project and related environmental concerns and impacts, obtain technical input, and receive comments in preparing all required environmental documentation.
- (4) Coordinate, with the Contractor's assistance, the exchange of information among any planning, design, or construction engineers or technical staff employed by the Railroad and the Contractor.

- C. SEA will periodically review the work of the Contractor to ensure that the STB's responsibilities under NEPA and related environmental laws and regulations are being satisfied. As each portion of any draft or final document is completed, SEA staff shall review and approve that portion and those tasks completed, and/or direct further work with regard to that portion or task.
- D. SEA will monitor the Contractor to ensure that the Contractor is making adequate progress toward meeting specific time frames established in the Work Plan described in Section VI. If SEA determines these commitments are not being met, it will notify the Railroad of its findings. It will be the responsibility of the SEA to recommend any necessary correctional action to be taken under this Memorandum.
- E. In all instances involving questions concerning the content or relevance of any material (including all data, analyses, charts, and conclusions) prepared by the

Contractor, SEA shall make the final determination on including, deleting, or revising any such material in the environmental documents.

- F. To coordinate the preparation of all required environmental documentation, and to verify project-related data, SEA may hold joint meetings with the Railroad and the Contractor. As necessary, SEA may exclude the Railroad from participation. SEA may also consult directly with appropriate Federal, state, and local officials, and other interested parties.
- G. SEA, with the assistance of the Contractor, will be responsible for organizing and conducting any public workshops or meetings that may be necessary in preparing environmental documents during the environmental review process.
- H. SEA, with the assistance of the Contractor, will receive all comments submitted during the environmental review process and comment period. At the close of any public review and comment period, SEA, in consultation with the Contractor, shall identify the issues and comments that will require a response in the Board's final environmental document. SEA will direct these comments to the Railroad and to the Contractor, as appropriate, for preparing responses to be included in the final environmental document. SEA may modify these responses as appropriate.
- I. SEA, with the assistance of the Contractor, shall prepare the final environmental document and recommendations for the STB.
- J. SEA shall retain responsibility for deciding the environmentally preferable alternative, and any mitigation measures to be included in the final environmental document.

VI. Work Plan

- A. The Contractor, in consultation with SEA and the Railroad, shall submit a draft Work Plan to SEA for preparing the required environmental documentation within forty-five (45) days after all parties have signed this Memorandum. The Work Plan shall contain at least the following elements:

- (1) A description of all work to be performed (including preparing and sending consultation letters; participating in scoping/public/agency meetings; outlining and drafting environmental documents; reviewing, analyzing, and summarizing public comments; conducting analyses, etc.
 - (2) The projected schedule for completing the various tasks described.
 - (3) Identification of Contractor's staff members who will be responsible for preparing, analyzing, and reviewing the work.
 - (4) An outline of the environmental analysis.
- B. Following receipt of the draft Work Plan, SEA, in consultation with the Contractor and the Railroad, shall finalize the Work Plan in a timely manner.
- C. Subsequent to consultation with the Contractor and the Railroad, SEA may amend the Work Plan from time to time as the project necessitates.

VII. Nonperformance and Termination

- A. The Railroad or Contractor shall notify SEA of any concerns either party might have with respect to the other party's performance under the contract between the Railroad and the Contractor or this Memorandum. All parties will attempt to resolve, in good faith, any disputes or disagreements.
- B. If SEA determines that either the Contractor or Railroad is not adequately performing its responsibilities and duties in accordance with this Memorandum, SEA will discuss its concerns with Contractor and Railroad. If SEA's concerns cannot be satisfactorily resolved, SEA will notify the Railroad that SEA is removing the Contractor for cause, or direct Railroad to comply with the Memorandum. Upon removal of the Contractor, SEA shall endeavor to replace the Contractor with another qualified third party Contractor as soon as practicable.
- C. Both Railroad and the Contractor shall immediately notify SEA of any attempt by either party to modify or

terminate the contract between the Railroad and Contractor. Termination of the Contract shall be subject to SEA's prior approval, after consultation with the Railroad and the Contractor. Upon approving termination of the contract, SEA shall endeavor to replace the Contractor with another qualified third party contractor as soon as practicable. Notwithstanding the foregoing, Railroad may terminate the contract without SEA's approval in the event that it withdraws its notice of intent or application.

VIII. Modification

This Memorandum of Understanding may be modified only by written amendment executed by SEA, the Railroad and the Contractor.

TONGUE RIVER RAILROAD COMPANY

By: Douglas A. Gray
Title: Project Manager
Date: 2/24/98

PUBLIC AFFAIRS MANAGEMENT

By: Kooy A. Wilson
Title: President
Date: 2/23/98

SURFACE TRANSPORTATION BOARD,
SECTION OF ENVIRONMENTAL
ANALYSIS

By: Clare J. Farris
Title: Chief, Section of Environmental Analysis
Date: 2/20/98

Exhibit A

CORE TEAM STAFF COMMITTED TO
TONGUE RIVER RAILROAD COMPANY "WESTERN ALIGNMENT" PROJECT

The following consultant personnel are committed to the Tongue River Railroad Company "Western Alignment" Project as the Core Team. These staff members will be assigned to the project and shall not engage in (a) other work for the Railroad, or (b) any work, relating to the project, for any other party to Finance Docket No. 30186 (Sub-No. 3) during the course of this proceeding. This list will be amended as may be required due to additions or changes in personnel through the course of the project.

Company Name

Staff Member

Public Affairs Management

Kay Wilson, Project Director
Scott Steinwert, Project Manager