

APPENDIX A

Consultation

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Acronyms and Abbreviations

ACHP	Advisory Council on Historic Preservation
BLM	Bureau of Land Management
Board	Surface Transportation Board
C.F.R.	Code of Federal Regulations
DNRC	Department of Natural Resources and Conservation
EIS	Environmental Impact Statement
ESA	Endangered Species Act
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
OEA	Office of Environmental Analysis
SHPO	state historic preservation officer
THPO	tribal historic preservation officer
TRRC	Tongue River Railroad Company
USACE	U.S. Army Corp of Engineers
USDA	U.S. Department of Agriculture
USEPA	U.S. Environmental Protection Agency
USFWS	U.S. Fish and Wildlife Service

A.1 Introduction

This appendix discusses consultation on the development of this Draft Environmental Impact Statement (EIS). Examples of consultation correspondence are provided in the following three attachments. Other correspondence not included in this appendix can be found on the Surface Transportation Board's (Board) website under environmental correspondence.

- Attachment A, *Agency Consultation*
- Attachment B, *Tribal and Government-to-Government Consultation*
- Attachment C, *Section 106 Consultation*

Attachment A, *Agency Consultation*, contains a selection of the Board's Office of Environmental Analysis (OEA) written correspondence with federal, state, and local agencies. The first letter, sent to the Bureau of Land Management (BLM) on October 11, 2012, is representative of three others (four total) sent to the Montana Department of Natural Resources and Conservation (DNRC), the U.S. Army Corps of Engineers (USACE), and the U.S. Department of Agriculture (USDA) as an invitation to participate as cooperating agencies in the development of this Draft EIS. All four agencies agreed to be cooperating agencies with Montana DNRC acting as the lead agency for all other Montana State agencies, including Montana Department of Commerce, Montana Department of Environmental Quality, Montana Department of Transportation, Montana Department of Revenue, and Montana Fish, Wildlife & Parks. Response letters are included from BLM, USDA, and USACE indicating their agreement to participate as cooperating agencies. The fifth letter, sent to the U.S. Environmental Protection Agency (USEPA) on October 22, 2012, is representative of scoping letters sent to the following agencies soliciting their input regarding the scope of this Draft EIS: National Resources Conservation Service, USEPA, Montana U.S. Fish and Wildlife Service Ecological Services Field Office, State Historic Preservation Officer with the Montana Historical Society, Custer County, Miles City, Powder River County, and Rosebud County. Correspondence between OEA and the Advisory Council on Historic Preservation (ACHP) and the National Park Service are included in Attachment C, *Section 106 Consultation*.

OEA held meetings with the cooperating agencies during the scoping period, including meetings during a site visit the week of October 22, 2012 and the public scoping meetings the week of November 12, 2012. OEA met with cooperating and consulting agencies to discuss wildlife fieldwork methods in December 2012. Attachment A, *Agency Consultation*, includes a letter to USACE dated April 1, 2014. This letter provides a brief summary of the wetlands and surface water assessment method and the communications between OEA,

USACE, and ICF discussing this matter. Correspondence included teleconferences on January 16, 2013, May 9, 2013, and March 14, 2014. OEA also had several teleconferences with USEPA during the scoping period and during preparation of this Draft EIS to solicit USEPA's input on several resource area topics, including environmental justice, air quality, water quality, and wetlands. Another example of consultation included discussions with U.S. Fish and Wildlife Service (USFWS) under Section 7 of the Endangered Species Act (ESA). Lastly, OEA consulted with cooperating agencies frequently and held regularly scheduled calls to discuss recent filings and updates on the Draft EIS preparation, agency reviews, Section 106, and other pertinent topics.

Table A-1 lists all of the agencies with which OEA has exchanged written correspondence. Dates are also provided for formal correspondences.

Table A-1. Agencies Consulted and Dates of Correspondence

Agency	Dates of Correspondence
Cooperating Agencies	
Bureau of Land Management	From OEA to BLM: 10/11/2012 From BLM to OEA: 10/20/2012 From OEA to BLM: 12/11/2012 From OEA to BLM: 1/28/2015 From BLM to OEA: 1/30/2015
Montana Department of Natural Resource Conservation, acting as lead for all Montana State Agencies	From OEA to MT DNRC: 10/11/2012 From OEA to MT DNRC: 12/11/2012 From MDT to OEA: 1/9/2013 From MT FWP to MT DNRC: 1/11/2013 From MT DNRC to OEA: 1/11/2013
U.S. Army Corps of Engineers	From OEA to USACE: 10/11/2012 From USACE to OEA: 10/26/2012 From OEA to USACE: 12/11/2012 From OEA to USACE: 4/1/2014
U.S. Department of Agriculture.	From OEA to USDA: 10/11/2012 From USDA to OEA: 10/19/2012 From OEA to USDA: 12/11/2012
Federal Agencies	
U.S. Department of Agriculture, Natural Resource Conservation Services	From OEA to NRCS: 10/22/2012
U.S. Environmental Protection Agency, Region 8, Montana Office	From OEA to USEPA: 10/22/2012 From USEPA to OEA: 2/4/2013 From OEA to USFWS: 10/22/2012
U.S. Fish and Wildlife Service, Ecological Services Montana Field Office	From USFWS to OEA: 12/19/2012, From OEA to USFWS: 11/6/2014 From OEA to USFWS: 3/24/2015
Local Agencies	
Custer County, MT: County Attorney	From OEA to Local Agency: 10/22/2012
Custer County, MT: Floodplain Administrator	From OEA to Local Agency: 10/22/2012
Miles City, MT: Community Services and Planning	From OEA to Local Agency: 10/22/2012 From OEA to Local Agency: 1/28/2015 From Local Agency to OEA: 2/25/2015
Miles City, MT: Floodplain Administrator	From OEA to Local Agency: 10/22/2012
Powder River County, MT: Floodplain Administrator	From OEA to Local Agency: 10/22/2012
Rosebud County, MT: Floodplain Administrator Director of Department of Planning Rosebud County, MT Director of Department of Planning Powder River County, MT	From OEA to Local Agency: 10/22/2012
Correspondence pertaining to Section 106 consultation under the National Historic Preservation Act is included in Attachments B, Section 106 Consultation, Federal Agencies and State and Local Governments	

A.2 Tribal and Government-to-Government Consultation

OEA consulted with federally recognized tribes pursuant to the National Historic Preservation Act (NHPA), National Environmental Policy Act (NEPA), and Executive Order 13175. Executive Order 13175 requires that federal agencies conduct government-to-government consultations with federally recognized Indian tribes in the development of federal policies (including regulations, legislative comments or proposed legislation, and other policy statements or actions) that have tribal implications. Tribes may have concerns about natural resources and other potential impacts that would not be brought up during the Section 106 process and these concerns can be voiced during government-to-government consultation.

Attachment B, *Tribal and Government-to-Government Consultation*, contains a record of written government-to-government consultation between OEA and federally recognized tribes. In December 2012, OEA sent letters to the tribes listed in Table A-2 initiating government-to-government consultation. The first letter from OEA to the Crow Tribe of Indians dated December 18, 2012, is an example of the 20 letters sent to federally recognized tribes initiating formal government-to-government consultation and requesting completion of a response questionnaire (Table A-2). In the letters, OEA asked tribes if they wished to be consulted regarding impacts to cultural resources, historic properties, and sacred sites assessed under NHPA and NEPA. OEA also asked tribes if they wished to be consulted regarding other resource areas considered under NEPA.

Both the Oglala Sioux and Northern Cheyenne tribes indicated they wanted to provide input regarding the broader range of impacts analyzed under NEPA (the Northern Cheyenne had also expressed this interest through their scoping letter). The Oglala Sioux Tribe initially indicated that it wanted to consult with the Board on other resource areas considered under NEPA and participate in discussions regarding the various potential impacts of the project. Thereafter, OEA attempted to contact the tribe through phone calls and emails; however, no further response was received from the Oglala Sioux Tribe. The Northern Cheyenne Tribe entered into government-to-government consultation with OEA regarding the broader range of NEPA resource areas. OEA consulted with Northern Cheyenne natural resource specialists and other staff regarding specific resource area concerns.

Consultation consisted of a government-to-government meeting with the Northern Cheyenne Tribe in Lame Deer, Montana on April 16, 2013. This meeting allowed OEA to provide updates and answer questions on the EIS process, the alternatives under consideration, and environmental issues and concerns raised by the tribe in their January 9, 2013 scoping comment letter to OEA. Meeting participants identified the need to arrange a series of conference calls between the resource specialists with the tribe and OEA to discuss the tribe's resource-specific comments in detail. Calls took place in June of 2013 and covered wetlands, biological resources, and wildlife. OEA held a teleconference on February 27,

2015, with members of the Northern Cheyenne Tribal Council, including the president, to update them on the Draft EIS and to review the NEPA process and the Board's decision-making process. A selection of letters and emails between OEA and the Northern Cheyenne Tribe are provided in Attachment B, *Tribal and Government-to-Government Consultation*.

Table A-2 lists the federally recognized tribes that OEA invited to consult on a government-to-government basis. Dates are shown for the government-to-government initiation letters as well as further correspondence with the Northern Cheyenne Tribe.

Table A-2. Tribal and Government-to-Government Dates of Correspondence

Consulting Party	Dates of Correspondence
Tribes	
Northern Cheyenne Tribe	From OEA to Tribe: 12/17/2012 From OEA to Tribe: 12/18/2012 From Tribe to OEA: 12/31/2012 From Tribe to OEA: 1/9/2013 From OEA to Tribe: 3/15/2013 From Tribe to OEA: 6/20/2013
Crow Tribe of Indians	From OEA to Tribe: 12/18/2012
Lower Brule Sioux Tribe	From OEA to Tribe: 12/18/2012
Oglala Sioux Tribe	From OEA to Tribe: 12/18/2012 From OEA to Tribe: 7/18/2013
Standing Rock Sioux Tribe	From OEA to Tribe: 12/18/2012
Cheyenne River Sioux Tribe	From OEA to Tribe: 12/18/2012
Yankton Sioux Tribe	From OEA to Tribe: 12/18/2012
Sisseton-Wahpeton Oyate	From OEA to Tribe: 12/18/2012
Flandreau Santee Sioux Tribe	From OEA to Tribe: 12/18/2012
Rosebud Sioux Tribe	From OEA to Tribe: 12/18/2012
Santee Sioux Nation	From OEA to Tribe: 12/18/2012
Cheyenne & Arapaho Tribes	From OEA to Tribe: 12/18/2012
Northern Arapaho Tribe	From OEA to Tribe: 12/18/2012
Crow Creek Sioux Tribe	From OEA to Tribe: 12/18/2012
Shakopee Mdewakanton Sioux Community	From OEA to Tribe: 12/18/2012
Three Affiliated Tribes: Mandan, Hidatsa & Arikara Nation	From OEA to Tribe: 12/18/2012
Lower Sioux Indian Community	From OEA to Tribe: 12/18/2012
Upper Sioux Community	From OEA to Tribe: 12/18/2012
Blackfeet Nation	From OEA to Tribe: 12/18/2012
Shoshone Tribe of the Wind River Reservation	From OEA to Tribe: 12/18/2012

A.3 Section 106 Consultation under the National Historic Preservation Act

The Section 106 regulations at 36 Code of Federal Regulations (C.F.R.) Part 800 require federal agencies to consider the impact of their “undertakings” on “historic properties” listed

or eligible for listing in the National Register of Historic Places prior to licensing or providing funds for a project. In considering project impacts, federal agencies are required to consult with their applicants (Tongue River Railroad Company [TRRC], in this case), the state historic preservation officer (SHPO) and tribal historic preservation officer (THPO), tribes, and other consulting parties, including representatives of local government and certain persons or groups with a demonstrated interest in the undertaking. Agencies must also make their findings available to the public and provide the ACHP an opportunity to comment on the undertaking.

Attachment C, *Section 106 Consultation*, contains written correspondence between OEA and federal agencies and state and local governments, federally recognized tribes, and other consulting parties.

OEA sent letters to initiate Section 106 consultation to SHPO, ACHP, 20 federally recognized tribes with ancestral ties to the Tongue River Valley, and other potential consulting parties, including federal and state agencies, TRRC, and historic preservation organizations. The first two letters in Attachment C, *Section 106 Consultation*, were intended to initiate consultation with SHPO. In the next letter, OEA sought guidance and advice from ACHP. ACHP accepted OEA's invitation to provide guidance and advice and participated in the Section 106 consultation process for the proposed rail line. OEA held a consulting party meeting on the Northern Cheyenne Reservation in Lame Deer, Montana from April 16 to 18, 2013. During the meeting, OEA provided an update on the EIS process, proposed Section 106 methods, fieldwork methods, and next steps.

Included in Attachment C, *Section 106 Consultation*, is a formal invitation from OEA to the National Trust for Historic Preservation, dated December 11, 2012, initiating consultation under Section 106 of NHPA. It is representative of those sent to other consulting agencies and the 20 federally listed tribes in the project area. The letters described OEA's responsibilities to consult regarding potential impacts of the proposed project on historic properties as defined under Section 106 of NHPA and requested completion of a questionnaire. Formal responses are included in this attachment. Four additional tribes, the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, the Arapaho Tribe of the Wind River Reservation, the Fort Belknap Indian Community, and the Spirit Lake Sioux Tribe, were added as consulting tribes during the consultation process as requested or recommended by other participating tribes. The Lower Sioux Indian Community, the Upper Sioux Community, and the Blackfeet Nation chose not to participate further in the Section 106 consultation under NHPA.

To support its outreach efforts, OEA held monthly teleconferences with consulting parties beginning in February 2013. Attendees included representatives from federal agencies, local governments, federally listed tribes, SHPO, ACHP, TRRC, and additional consulting parties. During these meetings, OEA provided Section 106 consulting parties with status updates on this Draft EIS and discussed any concerns raised regarding cultural and historical resources.

OEA participated in a meeting on January 23, 2014 with ACHP and SHPO (by phone). The purpose of this meeting was to discuss the Section 106 process to date, the efforts needed to complete the Section 106 process if an alternative is licensed, and the upcoming February 13-14 meetings with consulting parties in Billings, Montana. OEA indicated that it was conducting a phased identification of historic properties pursuant to 36 C.F.R. Part 800.4(b)(2) of the Section 106 regulations. During the meeting, all parties agreed that a phased identification effort was appropriate for the proposed rail line.

OEA held additional Section 106 consulting party meetings in Billings, Montana on February 13 and 14, 2014. At the meetings, OEA provided an update on the Section 106 process to the consulting parties and solicited their comments, opinions, and concerns about the progress to date and next steps. Several of the meeting attendees recommended that work on a Programmatic Agreement begin immediately. Consequently, after the meeting was formally adjourned on February 14th, several consulting party representatives remained behind to work on redrafting the Programmatic Agreement that OEA had developed for the prior Tongue River project.

Since the February 2014 meeting, OEA worked with the consulting parties on a regular basis to develop the Programmatic Agreement. In April 2014, on the advice of ACHP, OEA provided the consulting parties with an explanation of why it would be appropriate to develop a Programmatic Agreement in this case. This justification for preparing a Programmatic Agreement is included in Attachment C, *Section 106 Consultation*. In June through July 2014, OEA worked with the consulting parties to develop the recitals, or WHEREAS clauses, of the Draft Programmatic Agreement.

On July 22, 2014, OEA participated in a meeting with ACHP. During the meeting, ACHP's comments on the draft WHEREAS clauses clarified how the Section 106 process will inform the NEPA process and that the Programmatic Agreement will guide the resolution of adverse effect on historic properties for any approved alternative. From August 2014 through January 2015, OEA continued to work with the consulting parties to develop the other sections of the Draft Programmatic Agreement, including the stipulations and appendices. The Draft Programmatic Agreement is being issued for public review and comment as part of this Draft EIS. It is contained in Appendix P, *Programmatic Agreement*. All letters and comments received on the Draft Programmatic Agreement and OEA's responses to those comments were documented in a matrix. The matrix was posted to the project website for Section 106 consulting parties to review and comment on.

All correspondences included in Attachment C, *Section 106 Consultation*, are shown in Table A-3.

Table A-3. Section 106 Consulting Parties: Dates of Correspondence

Section 106 Consulting Party	Dates of Correspondence
Federal Agencies and State and Local Governments	
	From OEA to ACHP: 12/10/2012
	From OEA to ACHP: 4/25/2014
Advisory Council on Historic Preservation	From ACHP to OEA: 9/3/2014
	From ACHP to OEA: 9/8/2014
	From ACHP to OEA: 10/30/2014
	From OEA to ACHP: 11/28/2014
Bureau of Land Management	From OEA to BLM: 12/11/2012
U.S. Army Corps of Engineers	From OEA to USACE: 12/11/2012
U.S. Department of Agriculture	From OEA to USDA: 12/11/2012
National Park Service	From OEA to NPS: 12/11/2012
	From OEA to SHPO: 10/22/2012
	From SHPO to OEA: 10/30/2012
Montana State Historic Preservation Officer	From OEA to SHPO: 3/12/2014
	From SHPO to OEA: 3/19/2014
	From OEA to SHPO: 11/17/2014
Miles City Historic Preservation Office	From OEA to HPO: 12/11/2012
Montana Department of Natural Resources and Conservation	From OEA to DNRC: 12/11/2012
Federally Recognized Tribes	
	From OEA to THPO: 12/10/2012
Tribal Historic Preservation Officer: Northern Cheyenne Tribe	From OEA to THPO: 12/11/2012
	From Tribe to OEA: 2/13/14
	From OEA to THPO: 3/10/14
Tribal Historic Preservation Officer: Crow Tribe of Indians	From OEA to THPO: 12/11/2012
	From THPO to OEA: 12/27/2012
Cultural Resource Manager: Lower Brule Sioux Tribe	From OEA to THPO: 12/11/2012
Tribal Historic Preservation Officer: Oglala Sioux Tribe	From OEA to THPO: 12/11/2012
Tribal Historic Preservation Officer: Standing Rock Sioux Tribe	From OEA to THPO: 12/11/2012
	From THPO to OEA: 1/8/2013
Tribal Historic Preservation Officer: Cheyenne River Sioux Tribe	From OEA to THPO: 12/11/2012
Tribal Historic Preservation Officer: Yankton Sioux Tribe	From OEA to THPO: 12/11/2012
Tribal Historic Preservation Officer: Sisseton-Wahpeton Oyate	From OEA to THPO: 12/11/2012
Tribal Historic Preservation Officer: Flandreau Santee Sioux	From OEA to THPO: 12/11/2012
Tribal Historic Preservation Officer: Rosebud Sioux Tribe of Indians	From OEA to THPO: 12/11/2012
Tribal Historic Preservation Officer: Santee Sioux Nation	From OEA to THPO: 12/11/2012
Tribal Historic Preservation Officer: Cheyenne & Arapaho Tribes	From OEA to THPO: 12/11/2012
Tribal Historic Preservation Officer: Northern Arapaho Tribe	From OEA to THPO: 12/11/2012
Tribal Historic Preservation Officer: Crow Creek Sioux Tribe	From OEA to THPO: 12/11/2012
Cultural Resources Director: Shakopee Mdewakanton Sioux	From OEA to THPO: 12/11/2012
Tribal Historic Preservation Officer: Three Affiliated Tribes: Mandan, Hidatsa & Arikara Nation	From OEA to THPO: 12/11/2012
Tribal Historic Preservation Officer: Lower Sioux Indian Community	From OEA to THPO: 12/11/2012
Tribal Historic Preservation Officer: Upper Sioux Community	From OEA to THPO: 12/11/2012
Tribal Historic Preservation Officer: Blackfeet Nation	From OEA to THPO: 12/11/2012
	From THPO to OEA: 12/20/2012

Section 106 Consulting Party	Dates of Correspondence
Tribal Historic Preservation Officer: Shoshone Tribe of the Wind River Reservation	From OEA to THPO: 12/11/2012
Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation	
Arapaho Tribe of the Wind River Reservation	
Fort Belknap Indian Community	
Spirit Lake Sioux Tribe	
Other Consulting Parties ^a	
Tongue River Railroad Corporation (Applicant)	
Montana Preservation Alliance	
National Trust for Historic Preservation	From OEA to NTHP: 12/11/2012 From NTHP to OEA: 12/17/2012 From NTHP to ACHP: 6/9/2014
Northern Cheyenne Otter Creek Descendants	
Rocker Six Cattle Company	
National Wildlife Federation	
Northern Plains Resource Council	
Sierra Club	
Colstrip Alternative Landowners Group	From Carrie La Seur to OEA 9/30/2014 From Carrie La Seur to OEA 11/4/2014
Fix Ranch	
Notes:	
^a Where there are no dates listed, there were no formal correspondences exchanged with the consulting party.	

Attachment A: Agency Consultation



SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Environmental Analysis

October 11, 2012

Mr. Todd Yeager
 Field Manager
 Bureau of Land Management
 Miles City Field Office
 111 Garryowen Road
 Miles City, MT 59301

Re: Docket No. FD 30186, Tongue River Railroad Company, Inc.—Rail
 Construction and Operation—in Custer, Powder River and Rosebud Counties,
 Mont.; **Cooperating Agency Invitation for New EIS**

Dear Mr. Yeager:

I am writing to invite you to participate as a cooperating agency in an Environmental Impact Statement (EIS) to be prepared by the Surface Transportation Board (Board). The EIS will evaluate a revised proposal by the Tongue River Railroad Company (TRRC) to build and operate a new rail line in Montana.

In 1986, the Board's predecessor agency, the Interstate Commerce Commission (ICC), authorized TRRC to build and operate an 89-mile rail line from Miles City to Ashland, Montana, for the purpose of transporting coal from area coal mines to a rail line north of Miles City in a proceeding known as Tongue River I.¹ As you may know, following a remand from the Ninth Circuit on two different but related TRRC cases,² the Board issued a decision requiring TRRC to

¹ Tongue River R.R.—Rail Construction and Operation—In Custer, Powder River and Rosebud Cntys., Mont. (Tongue River I), FD 30186 (ICC served Sept. 4, 1985), modified (ICC served May 9, 1986), pet. for judicial review dismissed, N. Plains Res. Council v. ICC, 817 F.2d 758 (9th Cir.), cert. denied, 484 U.S. 976 (1987).

² Tongue River R.R.—Rail Construction and Operation—Ashland to Decker, Mont., 1 S.T.B. 809 (1996), pet. for reconsid. denied (STB served Dec. 31, 1996); Tongue River R.R.—Rail Construction and Operation—Ashland to Decker, Mont., FD 30186 (Sub-No. 3) (STB served Oct. 9, 2007), pet. for reconsid. denied (STB served Mar. 13, 2008). The Ninth Circuit remanded these decisions, in part, for incomplete baseline data that formed the foundation of the

file a revised application describing changes to the proposal it had originally filed in Tongue I.³

Specifically, the Board required TRRC to “present fully TRRC’s current proposal to build the rail line between Miles City and Ashland.” The Board also required TRRC to provide “current information regarding TRRC’s ownership; the planned terminus points for the proposed line; the purpose of the proposed rail line; the demand and need for its construction; and TRRC’s financial fitness to proceed.” The Board also stated that it will prepare a **new EIS**—not a supplement to the EIS prepared in Tongue I by the ICC.⁴

TRRC has informed the Board that it intends to file its revised application shortly. Because we believe that TRRC’s revised proposal would have the potential to impact resources under your jurisdiction and because we appreciate that you have special expertise that would assist in ensuring a thorough and rigorous EIS, we are writing to you now, consistent with 40 C.F.R. § 1501.6, to ask you to join us as a cooperating agency in the preparation of a new EIS.

We expect your agency's involvement to include primarily those issue areas under your agency’s jurisdiction and special expertise. No direct writing or analysis should be required of your agency for the document's preparation. The activities we plan to undertake to facilitate interagency cooperation will likely include the following:

1. Invite you to participate in scoping meetings and other meetings;
2. Consult with you on any relevant technical studies that will be required for the project;
3. Provide you with project information, including study results;
4. Request your review of relevant sections of the Draft EIS prior to its release for comment by the public and other agencies;
5. Encourage your agency to provide input on subjects within your jurisdiction and expertise; and
6. Include information in the EIS required by your agency to discharge its National Environmental Policy Act (NEPA) responsibilities and any other requirements regarding jurisdictional approvals, permits, licenses, and/or clearances.

Please be assured that we will work closely with you to ensure that the EIS allows you to discharge your jurisdictional responsibilities. And we ask that you feel free to tell us if, at any point in the process, your needs are not being met. We expect that at the end of the environmental review, the EIS and our public involvement process will satisfy all of our NEPA requirements, including those related to project alternatives, environmental consequences, and mitigation.

OEA intends to issue the Notice of Intent (NOI) to prepare an Environmental Impact Statement and Draft Scope of Study soon after we receive TRRC’s revised application. We

EIS in Tongue River I.

³ Tongue River R.R.--Rail Constr.& Operation--In Custer, Powder River & Rosebud Cntys., Mont., FD 30186 et al. (STB served June 18, 2012).

⁴ Id. at 8.

plan to hold public scoping meetings in four communities in Montana (Miles City, Ashland, Forsythe, and Lame Deer) in the near future. We will let you know as soon as we have worked out the details of these meetings and will include the meeting details in the NOI.

If you have any questions or would like to discuss the proposal in more detail or our agencies' respective roles and responsibilities during the preparation of the EIS, please contact Ken Blodgett at 202-245-0305 (e-mail address: **blodgettk@stb.dot.gov**), or Alan Summerville of ICF International, our independent third party contractor for this project, at 703-934-3616 (e-mail address: **Alan.Summerville@icfi.com**). Please forward confirmation that you will participate as a cooperating agency to us by October 26th, 2012. We look forward to your response and to working with you and our other cooperating and consulting agencies on the new EIS for TRRC's proposal.

Very truly yours,

A handwritten signature in black ink, appearing to read "Victoria Rutson". The signature is written in a cursive style with a large initial "V".

Victoria Rutson
Director
Office of Environmental Analysis



EI-19000

KB

United States Department of Agriculture
Research, Education and Economics
Agricultural Research Service

October 19, 2012

SUBJECT: Docket No. FD 30186, Tongue River Railroad Company, Inc.-Rail Construction and Operation-in Custer, Powder River and Rosebud Counties, Mont.; Cooperating Agency Invitation for New EIS

TO: Victoria Ruston, Director, Office of Environmental Analysis
Surface Transportation Board, Washington, DC 20423

FROM: Mark Petersen, Research Leader *Mark Petersen*

Thank you for the invitation to participate as a cooperating agency in an Environmental Impact Statement to be prepared by your agency in response to a revised proposal by the Tongue River Railroad Company. In accepting your invitation, we look forward to full participation in all activities as an interagency cooperator.

Please keep us informed of the schedule for scoping meeting, questions concerning our laboratory, and opportunities to review and provide feedback concerning study results.

We are available to participate as a cooperating agency. Please contact Maribeth Wuertz at 406-874-8239 (e-mail address: maribeth.wuertz@ars.usda.gov) or myself at 406-874-8222 (e-mail address: mark.petersen@ars.usda.gov).

cc: Ed Reilly, USDA-ARS, Deputy Director, Assets Management and Property
Mark Lodine, Office General Counsel, USDA
Larry Chandler, USDA-ARS, Director, Northern Plains Area
Maribeth Wuertz, USDA-ARS, Administrative Officer



Northern Plains Area

Fort Keogh Livestock and Range Research Laboratory
243 Fort Keogh Road • Miles City, Montana 59301-4016
Telephone: 406-874-8219 • Fax 406-874-8289 • E-mail: mark.petersen@ars.usda.gov
An Equal Opportunity Employer



United States Department of the Interior



BUREAU OF LAND MANAGEMENT
Miles City Field Office
111 Garryowen Road
Miles City, Montana 59301-7000
www.blm.gov/mt

In Reply Refer To:
2800 (MTC022)

OCT 25 2012

EI-18999

LB

Surface Transportation Board
Section of Environmental Analysis
Attention: Kenneth Blodgett
Patriots Plaza
395 E Street, SW
Washington, DC 20423

Dear Mr. Blodgett:

The Bureau of Land Management (BLM), Miles City Field Office has reviewed the Surface Transportation Board (STB) request for participation as a cooperating agency in the Tongue River Railroad Environmental Impact Statement (EIS). Accept this letter as confirmation the Miles City Field Office, BLM, will participate with the STB as a cooperating agency.

Thank you and ICF International for coming to our office and introducing yourselves last Wednesday, October 24th. The Miles City Field Office fully understands the complexity and emotion this project has and will continue to generate. We look forward to working with you and meeting these challenges.

During our Wednesday meeting, you invited BLM to participate in the public scoping meetings. At this time, we are considering attendance only at the Miles City scoping meeting. The Miles City Field Office prefers to participate only in our attendance.

Dalice Landers, Realty Specialist, is your point of contact for the BLM-Miles City Field Office. Please feel free to contact Dalice at the above address or call (406) 233-2836.

Sincerely,

Todd D. Yeager
Field Manager



SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Environmental Analysis

October 22, 2012

Stephen Potts
 EPA Region 8 - Montana Office
 10 West 15th Street, Suite 3200
 Helena, MT 59626

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

Dear Mr. Potts

The Surface Transportation Board (Board) is beginning the scoping process for an Environmental Impact Statement (EIS) evaluating a revised proposal by the Tongue River Railroad Company (TRRC) to build and operate a new rail line in Montana. We are interested in hearing from you and including your comments, ideas, and concerns on the Draft Scope of Study for the EIS, which is attached to this letter.

In 1986, the Board's predecessor agency, the Interstate Commerce Commission (ICC), authorized TRRC to build and operate an 89-mile rail line from Miles City to Ashland, Montana, for the purpose of transporting coal from area coal mines to a rail line north of Miles City in a proceeding known as Tongue River I.¹ As you may know, following a remand from the Ninth Circuit on two different but related TRRC cases,² the Board issued a decision requiring TRRC to file a revised application describing changes to the proposal it had originally filed in Tongue River I.³

Specifically, the Board required TRRC to “present fully TRRC’s current proposal to build the rail line between Miles City and Ashland.” The Board also required TRRC to provide “current information regarding TRRC’s ownership; the planned terminus points for the proposed line; the purpose of the proposed rail line; the demand and need for its construction; and TRRC’s financial fitness to proceed.” The Board also stated that it will prepare a **new EIS**—not a supplement to the

¹ Tongue River R.R.—Rail Constr. and Operation—In Custer, Powder River and Rosebud Cntys., Mont. (Tongue River I), FD 30186 (ICC served Sept. 4, 1985), modified (ICC served May 9, 1986), pet. for judicial review dismissed, N. Plains Res. Council v. ICC, 817 F.2d 758 (9th Cir.), cert. denied, 484 U.S. 976 (1987).

² Tongue River R.R.—Rail Constr. and Operation—Ashland to Decker, Mont., 1 S.T.B. 809 (1996), pet. for reconsid. denied (STB served Dec. 31, 1996); Tongue River R.R.—Rail Constr. and Operation—Ashland to Decker, Mont., FD 30186 (Sub-No. 3) (STB served Oct. 9, 2007), pet. for reconsid. denied (STB served Mar. 13, 2008). The Ninth Circuit remanded these decisions, in part, for incomplete baseline data that formed the foundation of the EIS in Tongue River I.

³ Tongue River R.R.—Rail Constr.& Operation—In Custer, Powder River & Rosebud Cntys., Mont., FD 30186 et al. (STB served June 18, 2012).

EIS prepared in Tongue River I by the ICC.⁴

The Board received an application from TRRC on October 16, 2012 for the construction and operation of an approximately 80-mile rail line from Miles City, Montana, to two ending points, one near the site of the previously planned Montco mine near Ashland, Montana, and another at the proposed Otter Creek mine east of Ashland, Montana. OEA issued a Notice of Intent (NOI) to prepare an EIS for the project, a Draft Scope of Study, and a notice of scoping meetings.⁵ We would appreciate your comments on the Draft Scope of Study and potential alternatives to TRRC's proposed alignment, including at a minimum, those analyzed in the EIS in Tongue River I (see attached map) by the close of the scoping comment period on **December 6, 2012**.

The proposed rail line would extend approximately 80 miles, depending on the route selected, from Miles City, Montana, to two ending points near Ashland, Montana (see attached map). Other major elements of the proposed project would include a 200-foot-wide right-of-way; crossings of local roads, streams, trails, and utility corridors; two passing sidings one near Milepost 27 and the other near Milepost 46; and ancillary facilities. The anticipated train traffic between Miles City and Ashland on the proposed rail line would consist of 26 round trips per week, or 3.7 loaded unit coal trains daily on average, with 7.4 trains per day total (empty and loaded). The EIS will analyze and compare the potential impacts of (1) construction and operation of the proposed rail line, (2) all reasonable and feasible alternative routes, and (3) the no-action alternative (denial of the application).

Additional information on this project is available on the Board's website at http://www.stb.dot.gov/stb/environment/key_cases.html and on the project website at tonguerivereis.com. If you have any questions or would like to discuss the proposal in more detail, please contact Ken Blodgett at 202-245-0305 (e-mail address: blodgettk@stb.dot.gov), or Alan Summerville of ICF International, our independent third party contractor for this project, at 703-934-3616 (e-mail address: Alan.Summerville@icfi.com). We look forward to your participation in the Board's environmental review process.

Very truly yours,



Victoria Rutson
Director
Office of Environmental Analysis

Attachments

⁴ Id. at 8.

⁵ The Forsyth meeting location has been updated since publication of the Notice of Intent in the Federal Register. The new location is the Haugo Center at Riverview Villa, Rosebud Street, Exit 95, Forsyth, MT 59327.



SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Environmental Analysis

October 22, 2012

Mark Wilson
 Field Supervisor
 MT USFWS Ecological Services Field Office
 585 Shepard Way, Suite 1
 Helena, MT 59601

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

Dear Mr. Wilson:

The Surface Transportation Board (Board) is beginning the scoping process for an Environmental Impact Statement (EIS) evaluating a revised proposal by the Tongue River Railroad Company (TRRC) to build and operate a new rail line in Montana. We are interested in hearing from you and including your comments, ideas, and concerns on the Draft Scope of Study for the EIS, which is attached to this letter. Pursuant to Section 7(a)(2) of the Endangered Species Act, OEA is requesting a list of federally-listed species that could be found in the area of the proposed rail line.

In 1986, the Board's predecessor agency, the Interstate Commerce Commission (ICC), authorized TRRC to build and operate an 89-mile rail line from Miles City to Ashland, Montana, for the purpose of transporting coal from area coal mines to a rail line north of Miles City in a proceeding known as Tongue River I.¹ As you may know, following a remand from the Ninth Circuit on two different but related TRRC cases,² the Board issued a decision requiring TRRC to file a revised application describing changes to the proposal it had originally filed in Tongue River I.³

Specifically, the Board required TRRC to “present fully TRRC’s current proposal to build the rail line between Miles City and Ashland.” The Board also required TRRC to provide “current information regarding TRRC’s ownership; the planned terminus points for the proposed line; the

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purpose of the proposed rail line; the demand and need for its construction; and TRRC’s financial fitness to proceed.” The Board also stated that it will prepare a **new EIS**—not a supplement to the EIS prepared in Tongue River I by the ICC.⁴

The proposed rail line would extend approximately 80 miles, depending on the route selected, from Miles City, Montana, to two ending points near Ashland, Montana (see attached map). Other major elements of the proposed project would include a 200-foot-wide right-of-way; crossings of local roads, streams, trails, and utility corridors; two passing sidings one near Milepost 27 and the other near Milepost 46; and ancillary facilities. The anticipated train traffic between Miles City and Ashland on the proposed rail line would consist of 26 round trips per week, or 3.7 loaded unit coal trains daily on average, with 7.4 trains per day total (empty and loaded). The EIS will analyze and compare the potential impacts of (1) construction and operation of the proposed rail line, (2) all reasonable and feasible alternative routes, and (3) the no-action alternative (denial of the application).

The Board received an application from TRRC on October 16, 2012 for the construction and operation of an approximately 80-mile rail line from Miles City, Montana, to two ending points, one near the site of the previously planned Montco mine near Ashland, Montana, and another at the proposed Otter Creek mine east of Ashland, Montana. OEA issued a Notice of Intent (NOI) to prepare an EIS for the project, a Draft Scope of Study, and a notice of scoping meetings.⁵ We would appreciate your comments on the Draft Scope of Study and potential alternatives to TRRC’s proposed alignment, including at a minimum, those analyzed in the EIS in Tongue River I (see attached map) by the close of the scoping comment period on **December 6, 2012**.

Pursuant to Section 7(a)(2) of the Endangered Species Act (ESA) and in accordance with the Board’s environmental policies and procedures, OEA is requesting information regarding the presence of federally-listed threatened and endangered species and designated critical habitat in the project area. OEA’s review of the latest USFWS species list indicates that four federally-endangered species and two candidate species are found in the three counties where the rail line is proposed (see following Table).

Species	Federal Status	Montana County
Pallid Sturgeon	Endangered	Custer, Rosebud
Interior Least Tern	Endangered	Custer, Rosebud
Black-Footed Ferret	Endangered	Custer, Rosebud, Powder River
Whooping Crane	Endangered	Custer
Greater Sage Grouse	Candidate	Custer, Rosebud, Powder River
Sprague’s Pipit	Candidate	Custer, Rosebud, Powder River

Source: http://www.fws.gov/montanafieldoffice/Endangered_Species/Listed_Species/countylist.pdf

We request your concurrence or a revised species list within 30 days of your receipt of this letter, and are requesting any comments that you may have on the proposed action’s potential effects on federally-listed species. If we have not received a response within that time, we will assume that you concur with the list we have provided and will proceed accordingly with our

⁴ Id. at 8.

⁵ The Forsyth meeting location has been updated since publication of the Notice of Intent in the Federal Register. The new location is the Haugo Center at Riverview Villa, Rosebud Street, Exit 95, Forsyth, MT 59327.

assessment of federally-listed species as required under Section 7(a)(2) of the ESA. Once the full extent of potential impacts to federally-listed species is determined, we will make a determination of effect regarding potential impacts of the proposed action.

OEA also requests comments you may have on species or resources protected by the Bald and Golden Eagle Protection Act, Migratory Bird Treaty Act, and the Fish and Wildlife Coordination Act.

Additional information on this project is available on the Board's website at http://www.stb.dot.gov/stb/environment/key_cases.html and on the project website at tonguerivers.com. If you have any questions or would like to discuss the proposal in more detail, please contact Ken Blodgett at 202-245-0305 (e-mail address: **blodgettk@stb.dot.gov**), or Alan Summerville of ICF International, our independent third party contractor for this project, at 703-934-3616 (e-mail address: **Alan.Summerville@icfi.com**). We look forward to your participation in the Board's environmental review process.

Very truly yours,

A handwritten signature in black ink, appearing to read "Victoria Rutson". The signature is fluid and cursive, with a large initial "V" and "R".

Victoria Rutson
Director
Office of Environmental Analysis

Attachments



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
BILLINGS REGULATORY OFFICE
POST OFFICE BOX 2256
BILLINGS, MONTANA 59103-2256

ET-19001
KB

October 26, 2012

Regulatory Branch
Montana State Program
Corps No. **NWO-2011-02465-MTB**

Subject: Tongue River Railroad EIS – Response to Cooperating Agency Request

Ms. Victoria Ruston
Environmental Protection Specialist
Office of Environmental Analysis
Surface Transportation Board
Washington, DC 20423

Dear Ms. Ruston:

Reference is made to your letter dated October 11, 2012, requesting that the U.S. Army Corps of Engineers Omaha District (Corps) be a cooperating agency during the development of the Tongue River Railroad Environmental Impact Statement (EIS). The EIS will examine a proposed 80 mile rail line from Miles City, Montana, to two terminal points: one near the site of the previously planned MontCo Mine near Ashland, Montana; and the other near the proposed Otter Creek Mine east of Ashland, Montana.

Because we have jurisdiction by law under Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act, the Corps agrees to participate as a cooperating agency for the preparation of the EIS in accordance with 40 CFR 1501.6 (National Environmental Policy Act – Regulations) and 33 CFR 325, Appendix B (Corps of Engineers Environmental Quality; Procedures for Implementing the National Environmental Policy Act).

Point of contact for the Corps Omaha District Regulatory Branch will be Ms. Shannon Johnson in the Billings Regulatory Office. The Omaha District Regulatory Branch will coordinate with the Surface Transportation Board to ensure the EIS can be adopted by the Corps for Section 10 and Section 404 permitting purposes. While our primary regulatory responsibilities are associated with waters of the United States and aquatic resources, our regulations require that we also assess impacts to factors relative to public interest, including, but not limited to: fish and wildlife; historic, scenic, and recreational values; floodplain management; water supply and conservation; mineral needs; navigation; economics; mitigation; and the general needs and welfare of the people. Corps Regulatory participation as a Cooperating Agency will be commensurate with the level of project impact on Waters of the United States.

Also, the Omaha District Planning Branch is engaged in efforts and studies within the Yellowstone River basin that are not directly associated with the proposed project or with the Corps Regulatory responsibilities, but may be affected by the proposed railroad. As necessary and appropriate, they should be contacted regarding features of the proposed Tongue River Railroad could affect Corps work within their area of responsibility. The point of contact for the Omaha District Planning Branch is Mr. Bradley Thompson, phone (402) 995-2678.

If you have any questions feel free to call me at (406) 441-1376, or Ms. Shannon Johnson in our Billings Regulatory Office at (406) 657-5910. Please reference Corps File Number NWO-2011-02465-MTB on all inquiries and correspondence.

Sincerely,

A handwritten signature in blue ink, appearing to read "Todd N. Tillinger", with a long horizontal flourish extending to the right.

Todd N. Tillinger, P.E.
Montana State Program Manager

Copy Furnished:

Bradley Thompson
US Army Corps of Engineers
CENWO-PM-A
1616 Capitol Avenue Suite 9000
Omaha, Nebraska 68102



United States Department of the Interior Fish and Wildlife Service



Ecological Services
Montana Field Office
585 Shepard Way, Suite 1
Helena, Montana 59601-6287
Phone: (406) 449-5225 Fax: (406) 449-5339

December 19, 2012

Ken Blodgett
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001
ATTN: Environmental Filing, Docket No. FD 30186

Dear Mr. Blodgett:

The U.S. Fish and Wildlife Service (Service) reviewed the October 22, 2012 Surface Transportation Board Office of Environmental Analysis (OEA) letter to our Montana Ecological Services Field Office relative to a revised proposal by the Tongue River Railroad Company (TRRC) to build and operate a new rail line in Montana between Miles City and Ashland in Custer, Rosebud, and Powder River counties. A Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS), a Draft Scope of Study, and a Notice of Scoping Meetings were attached to the letter. The letter and NOI requested Service comments to assist with preparation of the EIS, as well as confirmation of the OEA list of threatened and endangered species to be considered in connection with the proposed project. Our response comments are authorized under the Endangered Species Act of 1973 (ESA), as amended (16 U.S.C. 1531 et. seq.), Migratory Bird Treaty Act (MBTA)(16 U.S.C. 703 et seq.), as amended, Executive Order 13186 *Responsibilities of Federal Agencies to Protect Migratory Birds*, Bald and Golden Eagle Protection Act (BGEPA) (16 U.S.C. 668-668d, 54 Stat. 250), as amended, and the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.).

It is our understanding that TRRC intends to construct and operate an approximately 80-mile rail line between Miles City and two ending points, one near the site of the previously planned Montco mine near Ashland, and another at the proposed Otter Creek mine in the Otter Creek area east of Ashland. Because the construction and operation of this project has the potential to result in significant environmental impacts, the Board's OEA has determined that preparation of an EIS is appropriate pursuant to the National Environmental Policy Act (NEPA), as amended (42 U.S.C. 4321 et seq.).

The project would consist of a single track constructed of continuous-welded rail. Other major

elements of the proposed project would include a 200 foot-wide right-of-way; crossings of local roads, streams, trails, and utility corridors; two passing sidings near Milepost 27 and Milepost 46; and ancillary facilities, including six set-out racks between 500 and 4,000 feet in length to provide for temporary storage of cars requiring repair and for storage of maintenance equipment. The anticipated train traffic between Miles City and Ashland on the proposed rail line would consist of 26 round trips per week, or 3.7 loaded unit coal trains daily on average, with 7.4 trains per day total (empty and loaded). The EIS will analyze and compare the potential impacts of (1) construction and operation of the proposed rail line, (2) all reasonable and feasible alternative routes, and (3) the no-action alternative (denial of the application).

Threatened and Endangered Species

In accordance with section 7(c) of the Endangered Species Act, the Service has determined that the following listed and candidate species may occur in the proposed project area:

Scientific Name	Common Name	Status	Range/Habitat
<i>Mustela nigripes</i>	Black-footed Ferret	LE	Prairie dog complexes; eastern Montana
<i>Scaphirhynchus albus</i>	Pallid Sturgeon	LE	Bottom dwelling; Missouri, Yellowstone rivers, Fort Peck Lake
<i>Sterna antillarum athalassos</i>	Interior Least Tern	LE	Yellowstone, Missouri River sandbars, beaches, Fort Peck Lake; eastern Montana
<i>Grus americana</i>	Whooping Crane	LE	Wetlands; migrant eastern Montana
<i>Centrocercus urophasianus</i>	Greater Sage-Grouse	C	Eastern, central, and southwestern Montana in sagebrush, sagebrush-grasslands, and associated agricultural lands
<i>Anthus spragueii</i>	Sprague's Pipit	C	Grassland habitats with little or no shrub cover east of the Continental Divide

*LE = Listed Endangered; C = Candidate Species

All of the above species have been documented in the general project area. Ferrets were reintroduced west of the proposed alignment on the Northern Cheyenne Indian Reservation in 2008, and numerous black-tailed prairie dog towns occur throughout the project area. A total of 88 black-footed ferrets were released on the Northern Cheyenne Reservation; 42 in 2008, 33

in 2009, and 13 in 2010. Reduction of prairie dog populations due to Sylvatic plague has been an ongoing issue in the area. Spotlight surveys were most recently conducted in 2011 for ferrets on remaining active prairie dog towns, during which only one female ferret was detected. Spotighting surveys were not conducted in 2012 due to the reduction in active prairie dog habitat and the 2012 fires across much of the local range. Mapping of prairie dog towns was conducted in the summer/fall 2012, and by November 2012 reports indicated that prairie dog numbers appeared to be expanding on the new grass emerging at many burned prairie dog town sites. Pre-construction surveys employing Service black-footed ferret survey guidelines are recommended at suitable black-tailed prairie dog towns potentially traversed by the proposed or alternative routes. We recommend that you contact Jane Roybal in our Lewistown Office (406 535-2800) with questions regarding current black-footed ferret status on the Northern Cheyenne Indian Reservation.

The pallid sturgeon occurs in the Yellowstone River below Cartersville Dam in the project area, as well as at the Miles City Fish Hatchery. Whooping crane observations have been recorded in the general project area, and this species may occur as spring and fall migrants, using suitable stopover habitat in the area. Least terns nest along the lower Yellowstone River in the project area; transitory observations have also been recorded at Castle Rock Lake near Colstrip. Critical habitat is not designated nor proposed for any species in the project area.

Greater sage-grouse confirmed and suspected breeding occurrences have been recorded throughout the project vicinity, and Sprague's pipit suspected breeding has been reported in the project area. Management of the greater sage-grouse and Sprague's pipit is the responsibility of Montana Fish, Wildlife and Parks (FWP), and we encourage your coordination with FWP to assist in identifying specific lek locations, core areas, and other seasonal habitats that may be affected by the proposed project. We also recommend pre-construction surveys for these species and suitable habitat prior to construction. In addition, the *Management Plan and Conservation Strategies for Sage-Grouse in Montana* includes information on the identification of important seasonal habitats and recommended management practices to avoid impacts. The document can be accessed at <http://fwpiis.mt.gov/content/getItem.aspx?id=31187>.

Further, if the proposed project traverses lands administered by the Bureau of Land Management (BLM), we recommend that you coordinate with BLM and comply with BLM Instruction Memorandum No. 2012-043, *Greater Sage-Grouse Interim Management Policies and Procedures*, which is available at http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2012/IM_2012-043.html. The *Sprague's Pipit (Anthus spragueii) Conservation Plan* prepared in 2010 provides useful information with respect to this species and can be accessed at <http://www.fws.gov/mountain-prairie/species/birds/spraguespipit/SpraguesJS2010r4.pdf>.

Greater sage-grouse are dependent on sagebrush habitats year-round. Habitat loss and degradation, as well as loss of population connectivity have been identified as important factors contributing to the decline of greater sage-grouse populations rangewide. Therefore, any activities that result in loss or degradation of sagebrush habitats that are important to this species or that cause avoidance of otherwise suitable habitats should be closely evaluated for their impacts to sage-grouse. We request that you document any steps that would be implemented to avoid and minimize disturbance of this habitat, and to reclaim the habitat.

Sprague's pipits are sensitive to habitat fragmentation and conversion and require large undeveloped patches of well-drained, open grassland habitat for breeding, avoiding grasslands with excessive shrubs. They can occur in lightly- to heavily-grazed areas, but avoid intrusive human features on the landscape; thus the impact of a development can be much larger than the actual footprint of the feature. The proposed project has the potential to contribute to fragmentation directly, or if the disturbance creates a pathway for invasive non-native species to spread into the nearby prairie. Again, we request that you document any steps that would be implemented to avoid, minimize, and reclaim disturbance to this habitat.

If a federal agency authorizes, funds, or carries out a proposed action, the responsible federal agency, or its delegated agent, is required to evaluate whether the action "may affect" listed species or critical habitat. If the federal agency or its designated agent determines the action "may affect, is likely to adversely affect" listed species or critical habitat, the responsible federal agency shall request formal section 7 consultation with this office. If the evaluation shows a "may affect, not likely to adversely affect" determination, concurrence from this office is required. If the evaluation shows a "no effect" determination for listed species or critical habitat, further consultation is not necessary. If a private entity receives federal funding for a construction project, or if any federal permit or license is required, the federal agency may designate the fund recipient or permittee as its agent for purposes of informal section 7 consultation. The funding, permitting, or licensing federal agency is responsible to ensure that its actions comply with the ESA, including obtaining concurrence from the Service for any action that may affect a threatened or endangered species or designated critical habitat.

We recommend that biological assessments and other such evaluations include the following:

1. A description of the project.
2. A description of the specific area that may be affected by the action.
3. The current status, habitat use, and behavior of listed/proposed T/E species and status of listed/proposed critical habitat in the project area.
4. Discussion of the methods used to determine the information in Item 3.
5. An effects analysis of the action for listed/proposed species and critical habitat, including an analysis of any interrelated or interdependent action and direct, indirect, and cumulative effects.

6. Coordination/mitigation measures that will reduce/eliminate adverse impacts to listed/proposed T/E species and critical habitat.
7. The expected status of listed/proposed T/E species and critical habitat in the future (short and long term) during and after project completion.
8. A determination of "May affect, likely to adversely affect", "May affect, not likely to adversely affect", or "No effect" for listed species and critical habitat.
9. A determination of "is likely to jeopardize" or "is not likely to jeopardize" for proposed (or candidate) species and critical habitat.
10. Citation of literature and personal contacts used in developing the assessment.

Candidate species are those placed on the candidate list for future action, meaning those species do not receive statutory protection under the ESA. Candidates are reviewed annually by the Service to determine if they continue to warrant listing or to reassess their listing priority. Ideally, sufficient threats can be removed to eliminate the need for listing. If threats are not addressed or the status of the species declines, a candidate species can move up in priority for a listing proposal. Federal agencies and non-federal applicants can voluntarily conference with the Service pursuant to section 7(a)(4) of ESA to ensure that their actions do not negatively impact candidate species. Some federal agencies provide the same level of protection to candidate species as proposed or listed species and take appropriate measures to avoid impacts. While not required, we encourage this approach. The Service is currently required to submit to the Federal Register for publication either a Proposed Rule (i.e., proposed listing) or a "not warranted" finding no later than September 30, 2015 for the greater sage-grouse and no later than September 30, 2016 for the Sprague's pipit, although such actions could occur sooner.

Migratory Birds

The MBTA prohibits the taking, killing, possession, and transportation, (among other actions) of migratory birds, their eggs, parts, and nests, except when specifically permitted. While the MBTA has no provision for allowing unintentional take, the Service realizes that some birds may be killed during project construction and operation even if all known reasonable and effective measures to protect birds are used. The Service's Law Enforcement Division carries out its mission to protect migratory birds through investigations and enforcement, as well as by fostering relationships with individuals, companies, and industries that have taken effective steps to avoid take of migratory birds and by encouraging others to implement measures to avoid take of migratory birds. It is not possible to absolve individuals, companies, or agencies from liability even if they implement bird mortality avoidance or other similar protective measures. However, the Law Enforcement Division focuses its resources on investigating and prosecuting individuals and companies that take migratory birds without identifying and implementing all reasonable, prudent and effective measures to avoid take. Companies are encouraged to work closely with Service biologists to identify available protective measures

when developing project plans and/or avian protection plans (APPs), and to implement those measures prior to and during project construction and operation.

Executive Order 13186 expressly requires that Federal agencies evaluate the effects of proposed actions on migratory birds (including eagles) pursuant to NEPA “or other established environmental review process;” restore and enhance the habitat of migratory birds, as practicable; identify where unintentional take reasonably attributable to agency actions has, or is likely to have, a measurable negative effect on migratory bird populations; and, with respect to those actions so identified, the agency shall develop and use principles, standards, and practices that will lessen the amount of unintentional take, developing any such conservation efforts in cooperation with the Service. In this EIS, OEA should include all practicable migratory bird take avoidance and minimization measures, as well as any necessary monitoring or additional mitigation, in the project plan or as Conditions of Approval in the decision document.

The 1988 amendment to the Fish and Wildlife Conservation Act mandates the Service to identify species, subspecies, and populations of all migratory nongame birds that, without additional conservation actions, are likely to become candidates for listing under the ESA. *Birds of Conservation Concern 2008 (BCC 2008)* is the most recent effort to carry out this mandate. The overall goal of this report is to accurately identify the migratory and non-migratory bird species (beyond those already designated as federally threatened or endangered) that represent our highest conservation priorities. The proposed project occurs within Bird Conservation Region (BCR) 17 – Badlands and Prairies. The following species are included on the 2008 BCC list for BCR 17 and should be considered in the EIS: horned grebe, American bittern, bald eagle, ferruginous hawk, golden eagle, peregrine falcon, prairie falcon, yellow rail, mountain plover, upland sandpiper, long-billed curlew, marbled godwit, black-billed cuckoo, burrowing owl, short-eared owl, Lewis's woodpecker, red-headed woodpecker, loggerhead shrike, pinyon jay, sage thrasher, Sprague's pipit, Brewer's sparrow, sage sparrow, grasshopper sparrow, Baird's sparrow, McCown's longspur, chestnut-collared longspur, and dickcissel.

To the maximum extent practicable, surveying and construction activities should be scheduled so as not to disrupt nesting birds or other wildlife during the breeding season (approximately April-August). We recommend that preconstruction raptor nest surveys be conducted and a 0.5-mile buffer be maintained between occupied nests and construction activities during the breeding season for most raptor species. If work is proposed to take place during the breeding season or at any other time which may result in take of migratory birds, their eggs, or active nests, the Service recommends that the project proponent take all practicable measures to avoid and minimize take, such as maintaining adequate buffers, to protect the birds until the young have fledged.

To avoid take of migratory birds, three general approaches to MBTA compliance that have proven to be useful, effective, and flexible on other projects are 1) habitat manipulation to

render project footprints unsuitable for nesting prior to the arrival of migratory birds, 2) avoidance by timing; that is, to conduct project activities during times of the year that migratory birds are not present, or 3) survey-buffer-monitor, which allows project activities to proceed during the time that migratory birds are in and/or near the project footprint provided active migratory bird nests are located and protected until the young have fledged. The Service further recommends that if field surveys for nesting birds are conducted with the intent of avoiding take during construction, any documentation of the presence of migratory birds, eggs, and active nests, along with information regarding the qualifications of the biologist(s) performing the surveys, and any avoidance measures implemented at the project site be maintained.

If the proposed project includes new or replacement power lines, the EIS should include a discussion of how such power lines would be constructed to ensure compliance with the ESA, MBTA, and BGEPA. We recommend that new power lines be buried where feasible. If not, they should be constructed according to electrocution and collision prevention guidelines developed by the Avian Power Line Interaction Committee (APLIC): *2006 Suggested Practices for Avian Protection on Power Lines* and *Mitigating Bird Collisions with Power Lines: The State of the Art in 1994*. An updated version of the 1994 APLIC document should be available in December 2012.

The project description should include a discussion of temporary or permanent roads, trails, staging areas, and other ancillary facilities that will be constructed to access and maintain the proposed rail line. Since these may have continuing impacts on migratory birds, the document should address how those continuing impacts will be addressed.

As previously mentioned, even if all measures are taken to avoid take of migratory birds during the construction phase, there is likely to be some migratory bird take associated with ongoing operation and maintenance of the rail line. To help ameliorate these impacts, the Service suggests that OMB / TRRC develop a Conservation Plan (Plan) for migratory birds to document and compensate for the impacts associated with the construction, operation, and maintenance of the rail line. We recommend that the Plan include a Habitat Equivalency Analysis (HEA) that documents the magnitude of impacts associated with the construction, operation, and maintenance of the proposed line. A HEA uses a scientific approach to determine the impacts to migratory birds over the life of the project. As part of the Plan, TRCC may purchase perpetual easements or perform additional habitat mitigation to ensure that the overall amount and quality of important habitat does not decline as a result of this project as identified in the HEA. In addition to benefitting migratory birds, the actions in the Plan would also benefit candidate species such as Sprague's pipit and greater sage-grouse, as well as bald and golden eagles.

Bald and Golden Eagles

The BGEPA prohibits anyone, without a permit issued by the Secretary of the Interior, from taking bald or golden eagles, including their parts, nests, or eggs. The BGEPA provides criminal and civil penalties for persons who take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or any manner, any bald eagle ... [or any golden eagle], alive or dead, or any part, nest, or egg thereof. The BGEPA defines take as pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb. "Disturb" means to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, 1) injury to an eagle, 2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or 3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior. In addition to immediate impacts, this definition also covers impacts that result from human-induced alterations initiated around a previously used nest site during a time when eagles are not present, if, upon the eagles return, such alterations agitate or bother an eagle to a degree that injures an eagle or substantially interferes with normal breeding, feeding, or sheltering habits and causes, or is likely to cause, a loss of productivity or nest abandonment.

Numerous nesting, wintering, and transient bald and golden eagle locations have been recorded in the project area, including along the Tongue and Yellowstone rivers. Important eagle-use areas therefore occur in the project vicinity. Specific locational data are available from the Montana Natural Heritage Program and FWP. Important eagle-use areas may include nests, foraging areas or roost sites that eagles rely on for breeding, sheltering, or feeding and the landscape features surrounding such nests, foraging areas, or roost sites that are essential for the continued viability of the sites for breeding, feeding or sheltering eagles. During the nesting season, especially early in the season, eagles can be very sensitive to disturbance near the nest site and may abandon the nest as a result of low-level disturbance, even from foot traffic.

Where construction is proposed in proximity to a bald eagle nest, concentrated foraging area, or communal roost site, we recommend that at a minimum, TRRC comply with siting recommendations, seasonal restrictions, and distance buffers specified in the *2010 Montana Bald Eagle Management Guidelines: An Addendum to Montana Bald Eagle Management Plan (1994)*. A nest buffer of at least 0.5 mile should be maintained for bald eagles. The Service's May 2007, National Bald Eagle Management Guidelines contains additional information on protecting bald eagles from disturbance due to human activity. The guidelines can be accessed on the Service's website at: <http://www.fws.gov/Migratorybirds/CurrentBirdIssues/Management/BaldEagle/NationalBaldEagleManagementGuidelines.pdf>.

The Service has not issued golden eagle management guidelines. However, appropriate buffers for nests and other important use areas based on site-specific conditions should be developed

in conjunction with this office if project activities are proposed in proximity to such areas. In Montana, the Service generally recommends avoidance of occupied nest site disturbance between January 1 and August 15. Depending on site-specific conditions, the typically recommended 0.5-mile buffer distance for bald eagle important use areas may be inadequate to ensure avoidance of golden eagle disturbance; larger buffers may be warranted. We therefore recommend avoidance of occupied golden eagle territories where practicable; maximizing distances between nests (including alternate nests) and the siting of proposed project features; avoidance of occupied nest site disturbance during the nesting season; and avoidance / minimization of impacts to important golden eagle habitat (e.g., shrub-steppe and native grasslands) within golden eagle territories.

To identify active territories, determine the presence of eagle nests or other important eagle-use areas, and facilitate avoidance and minimization of potential impacts to eagles, we recommend surveying a corridor to include the proposed route, alternative routes, and other facilities prior to any on-the-ground activities. We generally recommend adherence to the February 2010 Service *Interim Golden Eagle Technical Guidance: Inventory and Monitoring Protocols; and Other Recommendations in Support of Golden Eagle Management and Permit Issuance* (summarized below). Additional guidance regarding bald eagle surveys is provided in the 1994 *Montana Bald Eagle Management Plan* at http://www.fws.gov/montanafieldoffice/Endangered_Species/Recovery_and_Mgmt_Plans/Montana_Bald_Eagle_mgmt_plan.pdf. If an eagle nest or other important use area is observed within the survey corridor, route reconfiguration should be considered as necessary to avoid short and long-term nest disturbance or abandonment.

The Service recommends that aerial nest surveys (preferably by helicopter) be conducted within a four-mile wide evaluation corridor (centered on the proposed alignment and other proposed facilities) to identify any occupied and unoccupied eagle nest sites in proximity to the proposed project. Aerial surveys should generally be conducted between March 1 and May 15, before leaf-out, so that nests are visible, and so their status (active or inactive) can be determined. A nesting territory or inventoried habitat should be designated as unoccupied by eagles ONLY after at least two complete aerial surveys in a single breeding season. Aerial surveys should include the following:

1. Due to the ability to hover and facilitate observations of the ground, helicopters are preferred over fixed wing aircraft, although small aircraft may also be used. The Service requests that TRRC report any eagle nests found, as well as nests of any other raptors found during the survey. Whenever possible, two observers should be used to conduct the surveys.
2. Observations of any eagle nest sites should be recorded using GPS. The date, location, nest condition, activity status, and habitat should be recorded for each sighting.

3. We request that you share the qualifications of the biologist(s) conducting the survey, method of survey, and results of the survey with the Service.

Alternatively, TRRC could conduct ground surveys to identify eagle nests within the four-mile wide evaluation corridor between March 1 and May 15. However, be aware that ground surveys are often much less reliable than aerial surveys, even during leaf-off conditions, and may potentially miss some eagle nests. At least two ground observation periods lasting at least four hours or more are necessary to designate an inventoried habitat or territory as unoccupied as long as all potential nest sites and alternate nests are visible and monitored.

A permit is required for any legal take (lethal or disturbance) of bald or golden eagles or their nests (whether occupied or unoccupied). Limited issuance of permits to take bald and golden eagles can be authorized “for the protection of . . . other interests in any particular locality” where the take is compatible with the preservation of the bald eagle and the golden eagle, is associated with and not the purpose of an otherwise lawful activity, and cannot practicably be avoided. No one is required to seek a permit for any activity. However, where an activity results in take, it is a violation of BGEPA unless a permit authorizing that take has been obtained prior to the action.

To demonstrate appropriate analysis relative to the BGEPA, the Service recommends that OEA/TRRC evaluate:

- 1) whether eagle take is likely to occur from activities associated with the proposed project, including disturbance to nest sites, direct mortality associated with scavenging on rail-killed wildlife, etc;
- 2) the direct/ indirect, and cumulative impacts the project may have on the ability to meet the preservation standard of the BGEPA, which the Service has interpreted to mean “compatible with the goal of stable or increasing breeding populations”; and
- 3) appropriate monitoring and mitigation (including compensatory mitigation) and whether TRRC intends to pursue an eagle take permit.

Other Comments

We strongly recommend coordination with the Northern Cheyenne Tribe at P.O. Box 128 Lame Deer, MT 59043, 406-477-6284; Montana Fish, Wildlife & Parks at 1420 East Sixth Ave., P.O. Box 200701, Helena, MT 59620-0701, 406-444-2535 and the Montana Natural Heritage Program at 1515 East 6th Avenue, Box 201800, Helena, MT 59620-1800, 406-444-5354. These agencies may be able to provide updated, site-specific information regarding all fish and wildlife resources occurring in the proposed project area.

The EIS should evaluate, for each alternative, how project construction, operation, and maintenance would affect fish, wildlife, vegetation and important habitat features in the project area, including thorough analyses of direct, indirect, interrelated, interdependent, and cumulative actions and effects.

The Service recommends that TRRC develop and implement a comprehensive restoration plan to address temporarily disturbed areas, in particular for the impacted native grassland, sagebrush-steppe, riparian areas, and wetlands along the proposed project route. The Service recommends that TRRC survey the native habitats along the proposed project route to determine existing species composition and replant with a mix designed to replace the diversity and composition of local plant communities. Seed stock should be obtained from nurseries within 250 miles of the project area to insure the particular cultivars are well adapted to the local climate. The restoration plan should include monitoring commitments and clear criteria that define success. Restoration should not be considered complete until those criteria are met.

Sensitive resources that should be considered, via impact avoidance and minimization, in siting all project facilities include threatened, endangered, and candidate species and their habitat; bald and golden eagle and other migratory bird species nesting and habitat; wetlands; ephemeral, intermittent and permanent streams (including the Tongue and Yellowstone rivers); naturally wooded draws and riparian areas; sagebrush habitat; and native prairie. All direct and indirect impacts to the Miles City Fish Hatchery should be avoided. Additional recommendations include:

- Span wetlands and all ephemeral, intermittent, and perennial streams to provide for aquatic organism passage;
- Replace unavoidable loss of wetland habitat with functionally equivalent wetlands;
- Install and maintain appropriate erosion control measures to reduce sediment transport to adjacent wetlands and stream channels;
- Enact best management practices to avoid and minimize the spread of noxious weeds and other undesirable exotic plant species within the proposed project area;
- Confine the disturbed area along proposed ROWs as narrow as possible, especially in or near sensitive resources such as native prairie, sagebrush habitat, wooded draws and riparian areas, wetlands, or streams;
- Allow for appropriate cross-corridor wildlife passage to reduce potential for direct and indirect (scavenging) wildlife mortality;

- Provide means for prompt removal of rail-killed wildlife.

Thank you for the opportunity to review and comment on this proposed project. Please telephone Jeff Berglund at 406/449-5225, ext. 206, if you have any questions regarding this matter.

Sincerely,



R. Mark Wilson
Field Supervisor



January 9, 2013

Ken Blodgett
Surface Transportation Board
395 E Street, SW
Washington D.C. 20423-0001

Attention: Environmental filing, Docket No. FD 30186

Subject: Tongue River Railroad – Draft Scope of Study
MDT Comments

Dear Mr. Blodgett,

The Montana Department of Transportation (MDT) staff has reviewed the information presented by the Surface Transportation Board (STB) concerning the Tongue River Railroad Draft Scope of Study. MDT has the following comments concerning the study.

MDT is responsible for planning, designing, constructing and maintaining State highways and roadways, associated transportation facilities, including associated pull-offs, parking areas, and rest areas for the use and benefit of the traveling public, in a safe and efficient manner in accordance with Title 23 United States Code (U.S.C.) and Title 60 Montana Code Annotated (MCA) and has jurisdiction for Interstate 94, US 212, Secondary 332 and Secondary 447 (See attached map).

The proposed project may impact various MDT roadways. If the project requires crossing, relocation, or change in alignment of any of the MDT routes, MDT staff must review and the Montana Transportation Commission must approve the action. This approval requires MDT to be in compliance with the Montana Environmental Policy Act (MEPA) requirements. To prevent duplication of effort, please have the consultant completing the environmental documentation to be familiar with MEPA and include applicable information in the environmental document.

Some of the proposed alignments require a new crossing of Interstate 94. Any impact to Interstate 94 will also require Federal Highway Administration (FHWA) Montana Division Office approval. For FHWA approval of a crossing the environmental document must include FHWA National Environmental Policy Act (NEPA) requirements. There may be a 4(f) property located directly adjacent to Interstate 94 in the Miles City area (Fish Wildlife and Parks Fish Hatchery).

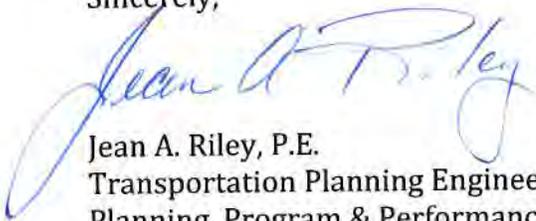
MDT requires the crossing of Interstate 94 and US 212 to be grade separated with adequate clearance to allow for high-wide truck loads. The Interstate 94 crossing must cross under the highway. If the US 212 crossing is above the roadway the following requirements must

be met: clearance of 32-feet from pavement surface to bottom of lowest beam, and a width between piers or abutments to allow for a future four-lane roadway at least 100 feet clear span width or configuration approved by MDT. Crossing on other routes (Secondary 332 or Secondary 447) should also be grade separated if practicable.

Any impacts to MDT routes due to construction equipment or material transport must be repaired to at least pre-existing conditions.

If you have any questions concerning these comments, please contact me at (406) 444-9456 or jriley@mt.gov.

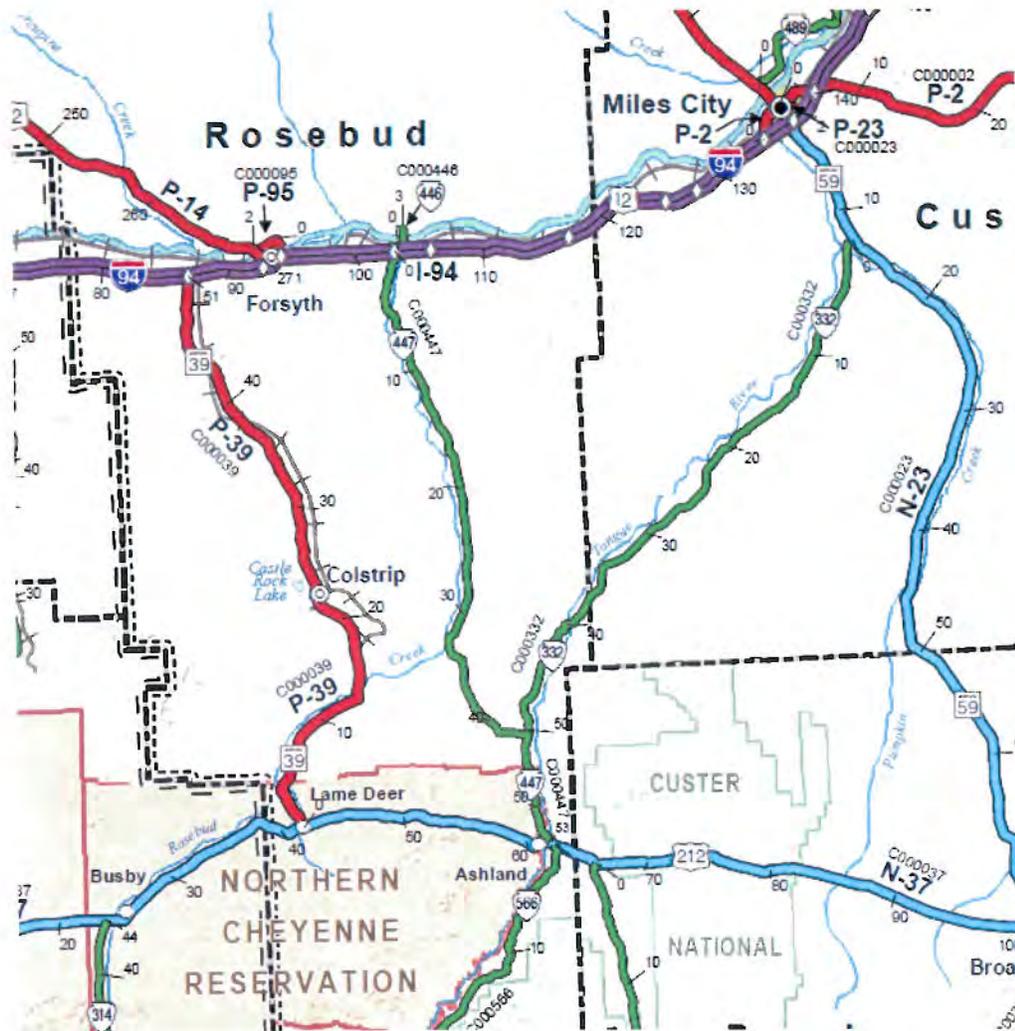
Sincerely,

A handwritten signature in blue ink that reads "Jean A. Riley". The signature is fluid and cursive, with the first name "Jean" being particularly prominent.

Jean A. Riley, P.E.
Transportation Planning Engineer
Planning, Program & Performance Analysis Bureau

Attachment: MDT Route Map

Copies: Lynn Zanto – Rail, Transit and Planning Division Administrator
Shane Mintz – Glendive District Administrator
Jim Skinner – Planning, Program & Performance Analysis Bureau
File



System Designations

- NHS Interstate
- NHS Non-interstate
- Primary
- Secondary
- Off System

Route Numbers

-  Interstate
-  U.S.
-  Montana
-  Secondary



Montana Fish, Wildlife & Parks

EI-19973

P. O. Box 200701
Helena, MT 59620-0701
406-444-3186
FAX:406-444-4952
Ref:DO015-13
January 11, 2013

Ms. Lisa Axline
Real Estate Management Bureau
Department of Natural Resources and Conservation
1625 11th Ave, PO Box 201601
Helena, MT. 59620

Dear Ms. Axline:

Montana Fish Wildlife & Parks (FWP) is responding to the Surface Transportation Board's (STB) Office of Environmental Analysis invitation to comment on the proposed Tongue River Railroad Project's Draft Scope of Study. It is FWP's understanding that you plan to organize and coordinate comments from the various state agencies for submittal to the Surface Transportation Board's Office of Environmental Analysis.

The following points and questions are FWP's comments regarding the proposal by the Tongue River Rail Road Company to build a rail line within the Tongue River drainage. The Aquatic and Terrestrial comments below are specific to the three alternatives routes that parallel the river and may apply to the Colstrip route. The final comments are specific to the Miles City Fish Hatchery and the rail line's potential impacts to this facility.

Aquatic

- Fish Populations and Migrations – Maintaining the connectivity of prairie streams and rivers needs to be considered to minimize impacts to the diverse fisheries in these systems. Fish populations in the rivers and prairie streams of Eastern Montana are dynamic, species rich, systems. The Tongue River contains 41 species most of which are native species. Native fish evolved with the warm, turbid, sporadic and short duration hydrographs experienced in prairie streams and even ephemeral streams with minimal flow of short duration can support a spawning migration of prairie fish. Spawning and other life history stages of native fish species are tied to these opportunistic habitat and climatic conditions. Many of the species produced in prairie streams are the forage base for the predatory and game species in the Tongue and Yellowstone Rivers. Large construction projects, like the Tongue River Rail Road, can

impact many prairie streams and rivers and collectively affect a considerable amount of habitat and spawning migrations.

- Impacts to Stream Morphology – Rail alignment close to, or along, the physical river bank may impact the physical nature of the stream. Alterations to stream morphology such as, stream length, change in gradient, and alteration of bed materials will impact the physical nature and function of the river, especially during high or low flow events. Any chosen alternative should minimize any impacts to stream morphology.
- Habitat Loss – Related to changes in stream morphology, the potential for loss of stream reaches, pool habitats, altered meander patterns may be high dependent upon the alternative chosen. Rail alignment alternatives should minimize physical impacts to the Tongue River proper, minimizing habitat losses.
- Bank Stabilization – Lateral migration of streams and rivers is a natural geomorphic process, and is essential for the ecological health of the aquatic system. Natural channel migration can be expected to occur within the channel-migration zone. Bank stabilization projects should consider the natural channel-migration zone and impacts the proposed project will have on the natural migration of rivers. Preservation of this natural process will sustain opportunities for continued habitat formation and maintenance. Stabilization of a bank at one location has the potential for adverse impacts beyond the immediate project footprint. The following list of techniques is the template we use when addressing bank stabilization and may provide guidance in project development:
 - Vegetated Riparian Buffer – No work to the immediate bank is performed. A vegetated riparian buffer is established or preserved. Natural erosion rates are maintained.
 - Back sloping of bank and re-vegetation
 - Vegetated soil lifts with fascine (a fascine is a rough bundle of brushwood used to protect the soil lift toe from scour)
 - Vegetated soil lifts with reinforced toe (wood, rock, etc.)
 - Woody toe, rootwads, log jams
 - Vegetated rip rap – use of rip rap with soil to promote vegetation growth
 - Rip rap over bedded gravels (no geo-textile fabric)
 - Rip rap over geo-textile
- Stream Crossings - All of the potential alignments will include stream crossings. Conveyances used to facilitate these crossings need to be built in a manner that provides the least impact to stream morphology and function.

Two main factors should be considered at crossings: location and type (bridges or culverts). Crossings should be located in straight, stable reaches of streams and positioned perpendicular to the direction of stream flow. Deep, narrow, crossing sites are preferred. Crossings in braided reaches should be avoided unless the opening spans the entire floodplain. Bridges are always favored over culverts for stream crossings.

Bridges that span the active floodplain without constricting flow are preferred. If the bridge does not span the entire floodplain, it should be designed to pass 1.25 X historic high flow levels. Inclusion of flood relief culverts in the road fill may help to accommodate water flowing across the floodplain. The number of bridge piers placed in the active channel and floodplain should be kept to the minimum amount necessary. A clear-span bridge is favorable in most situations, but not always. If a larger bridge opening can be achieved by adding additional piers the net benefit may be greater. Rip-rap around bridges should be kept to the minimum amount necessary to protect the structure. Top soil and seed should be placed on rip rap that is installed outside of the bridge deck.

Culverts should be sized to span the bankfull channel width. On fish bearing streams, including ephemeral streams, the culvert should also be embedded a minimum of 20% of the culvert rise. Studies have shown that those culverts that are embedded at least 20% do not become barriers to fish migration.

- Access – Rail alignment paralleling the river will impact stream access to anglers and floaters. Public access to the Tongue River is necessary, and any impacts to such access needs to be mitigated.
- Sediment Impacts, Erosion, Cut and Fill – Building a rail alignment paralleling the Tongue River will necessitate cuts and fill within side drainages that flow into the Tongue River proper. These sites need to be engineered so that drainage conveyances are adequate to handle 1.25 x historic flows. Sediment transport from these drainages is an important component of the physical health of this river system and has direct impacts to the life history strategies of many of the fish species that live in the aquatic system. The chronology and amounts of sediment entering the river through natural causes needs to be retained and not altered. The alteration of the amount of sediment added or restricted from the system, or the addition/reduction of sediment input at the incorrect time within the system can have dramatic effect on the both the physical features of the stream and to the species that fulfill their life cycles within the system.
- Navigation hazards – The Tongue River system is a unique prairie stream that attracts canoeists, rafters and other floating recreationists. Railroad infrastructure such as bridges, stream crossings, stream bank armament, and other structures need to be developed with the potential hazard to navigation and floaters in mind.

- Spill Hazard – Development of a rail alignment paralleling the Tongue River brings with it the potential for derailment and spill hazards. Contingencies need to be developed for when this event occurs. Potential impacts to stream morphology, water quality, invertebrates and fish populations need to be planned for with the ability to minimize these impacts.
- Fish Migration Improvements on Tongue River – Historically, fish migrations from the Yellowstone River were limited to 20 river miles of the Tongue River because of T&Y Diversion Dam. The dam blocked upstream fish migrations since its construction in 1886. Substantial fish passage projects have occurred on the Tongue River in the last six years. The most significant was construction of a fish passage structure (Muggli Bypass) at T&Y Dam in 2007 and removal of SH Dam (river mile 71) in 2008. Annual monitoring has demonstrated successful fish passage at Muggli Bypass and usage of the additional 169 river miles upstream of T&Y Dam. Five new species have been documented upstream of the dam since 2007. With time additional fish species will migrate upstream of T&Y dam. Fish species already present upstream of T&Y Dam are also using the bypass and are adding to the overall fish numbers utilizing the Tongue River and smaller tributaries.

Terrestrial

- Connectivity to Habitats – The alignment of the railroad paralleling the Tongue River may create connectivity issues with diurnal ungulate migrations. Deer, antelope and elk bed in the uplands located above the proposed rail lines and use the agricultural fields along the river as foraging sites. Placement of rail lines along the river corridor may impact use of these necessary habitats and disrupt foraging strategies of said animals.
- Wildlife Mortality due to Collision - The alignment of a railway within the Tongue River corridor creates the potential for increased mortality of a variety of wildlife species due to collisions with trains. Wildlife friendly conveyances (bridges, underpasses, etc) in known migration areas may help reduce these losses.
- Access – Rail alignment within the Tongue River corridor will impact public hunting access. Track crossings and safety issues apply to this activity as well as to farm production activities. Rail alignment should not reduce or eliminate any hunting access potential to public or private lands.
- FWP Land Interests – The MT Department of FWP has purchased interest in public and private lands within the Tongue River corridor. The attached lists of properties indicate FWP land and habitat interests. Many of these are under easement in cooperation with

local landowners to help provide wildlife habitats and hunting access. The goals of these interests need to be retained and not adversely impacted by the placement of rail alignment.

- Rocker 6 - Block Management Cooperator
 - 31,000 acre property 9 miles north of Ashland, west side of River
 - T1S R44E Rosebud County
 - Property has 2.5 miles of Tongue River frontage that would be bisected by the proposed rail route. . Average annual hunter days = 683
- Don Bice Ranch – MFWP Conservation Easement and Block Management Cooperator
 - 15,934 acre property 45 miles south of Miles City, west side of River.
 - T2N 45E, T3N 45E, T 3N R45E, Custer County
 - Tongue River forms eastern boundary of the property for approximately 11.5 miles. Railroad bisects property for its entire length along the River; separating the riparian/irrigated river bottom from the native grass uplands. Route who severely impact conservation values that FWP gained an interest in through the Conservation Easement. Would severely impact hunter access and recreational opportunity provided by ranch.
 - Average annual hunter days = 439
- Ted Hirsch (Shaw) – MFWP Conservation Easement, Block Management Cooperator
 - 6,791 acre property, 35 miles south of Miles City, east and west side of River, adjoins the Bice and Les Hirsch Conservation Easement properties
 - T3N R45 & 46E , Custer County
 - Tongue River runs through the property for approximately 3 miles. Railroad bisects property for its entire length along the River; separating the riparian/irrigated river bottom from the native grass uplands. Route who severely impact conservation values that FWP gained an interest in through the Conservation Easement. Would severely impact hunter access and recreational opportunity provided by ranch. Average annual hunter days = 379
- Les Hirsch - MFWP Conservation Easement, Block Management Cooperator
 - 9,292 acre property, 30 miles south of Miles City, west side of River, adjoins the Ted Hirsch Conservation Easement property and the DNRC owned Tongue River Ranch

- T3N R45 & 46E , Custer County
- Tongue River forms eastern boundary of the property for approximately 4.5 miles. Railroad bisects property for its entire length along the River; separating the riparian/irrigated river bottom from the native grass uplands. Route who severely impact conservation values that FWP gained an interest in through the Conservation Easement. Would severely impact hunter access and recreational opportunity provided by ranch.
 - Average annual hunter days = 551
- Tongue River Ranch – recently purchased DNRC property that FWP has some cooperative hunter access and habitat monitoring, planning and implementation.
 - 20,284 acre property west side of river adjoins the Les Hirsch Conservation Easement property.
 - Tongue River forms eastern boundary of the property for approximately 6 miles. Railroad bisects property for its entire length along the River; separating the riparian/irrigated river bottom from the native grass uplands. Would severely impact hunter access and recreational opportunity provided by ranch.
 - **** All totaled (Bice, 2 Hirsch properties, DNRC Tongue River Ranch) there are 25 miles of Tongue River Frontage and associated riparian that FWP has a conservation/ hunter access interest in that would be directly impacted by the propose rail route.
- Helm - Block Management Cooperator
 - 2,300 acre property,16 miles south of Miles City east and west side of River
 - T5N R48E Custer County
 - Property has 2 miles of Tongue River frontage that would be impacted the proposed rail route. Average annual hunter days = 400
- Fix - Block Management Cooperator
 - 9.700 acre property 16 miles south of Miles City, west side of River
 - T5N R48E Custer County
 - Property has 3.5 miles of Tongue River frontage that would be bisected by the proposed rail route. Average annual hunter days = 279
- 12 mile Fishing Access Site
 - T6N 48E S 29 Custer County

- East side of Tongue River. Site is also the location of the Muggli Fish Bypass and the newly constructed fish ladder located at the start of the Tongue and Lower Yellowstone Irrigation District Canal. Rail route lies on the west side of the River less than 0.5 miles from the fish ladder location.
- Fort Keogh Range & Ag research Station - Block Management Cooperator
 - 25,000 federal acres. Property has approximately 20 miles of Tongue River frontage that would be bisected by the proposed rail route. Average annual hunter days = 1407

Miles City Hatchery

Train vibration issue:

- How it affects the eggs fry and fingerling stages of all the species that we raise?
- Yellowstone and Tongue water line issue – the effects of vibration and construction on both of these lines.
- The domestic water supply for the hatchery is a cistern that's located on top of the "camels hump", how will construction issues and vibration effect it?

Access issues:

- A rail crossing that allows access to FWP's Tongue River pump.
- Access to the tracks for maintenance.

Alignment issues:

- Current alignment will not allow for future expansion of the hatchery.
- Current alignment shows the tracks going through our forage fish pond.
- The current alignment of the tracks will not allow for any future expansion of the hatchery should the need ever arise.
- The tracks will cross the hatchery drainage ditch to Spotted Eagle lake.
- Current alignment may affect the hatchery sewage lagoon.

Other issues:

- How will the coal dust affect the hatchery?
- If the railroad has "common carrier" status how will this affect the hatchery and the potential for spills other than coal?
- Noxious weeds and weed spraying along the tracks needs to be addressed.
- Replacement fencing at the hatchery needs to be addressed.
- Survey and Inventory – As part of the EIS, baseline data will be collected on a variety of wildlife species. FWP staff are working with ICF (consultants) to help develop these

inventories and guide this effort. Are there plans to continue monitoring following the “snap-shot” baseline surveys? If population changes are detected, will there be or is there a plan to help recover, improve, or mitigate for these changes?

Montana Fish Wildlife and Parks appreciates this opportunity to provide scoping comments regarding the proposed Tongue River Railroad. FWP staff also provided verbal comments at the public scoping meetings held in southeastern Montana in November, 2012. FWP also supports comments provided by the US Fish and Wildlife Service submitted December 19, 2012. We would refer you to these comments as concerns of FWP as well.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jeff Hagen", written over a faint, larger version of the same signature.

Jeff Hagen
Director

c. Ken McDonald, Bruce Rich, Brad Schmitz, Rob Brooks

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

EI-19983



STEVE BULLOCK, GOVERNOR

1625 ELEVENTH AVENUE

STATE OF MONTANA

DIRECTOR'S OFFICE: (406) 444-2074
FAX: (406) 444-2684

PO BOX 201601
HELENA, MONTANA 59620-1601

January 11, 2013

Ken Blodgett
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

RE: Tongue River Railroad

Dear Mr. Blodgett:

The Montana Department of Natural Resources and Conservation (MDNRC) is aware of the recent application submittals to the Surface Transportation Board in regards to the proposed Tongue River Railroad.

MDNRC owns several parcels of lands that would be impacted by the proposed railroad. These lands are owned by the State of Montana in trust for several beneficiaries, including educational facilities. Additionally, other State of Montana agencies will also be impacted due to the proposed project.

Because the MDNRC is the agency for the State of Montana that bears the most impact, we will be recognized as the lead agency for the State in regards to participation in the EIS process with the Surface Transportation Board. As such, this letter is requesting recognition of the DNRC as a Cooperating Agency with the STB.

The MDNRC is assigning Lisa Axline, Right of Way Section Supervisor, as the project lead. Please coordinate all correspondence and materials to Ms. Axline.

Thank you for allowing us to participate in this process.

Sincerely,

A handwritten signature in blue ink, appearing to read "Shawn Thomas".

Shawn Thomas, Administrator
Trust Land Management Division



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

1595 Wynkoop Street
DENVER, CO 80202-1129
Phone 800-227-8917
<http://www.epa.gov/region08>

FEB 04 2013

Ref: 8EPR-N

Ken Blodgett
Office of Environmental Analysis
Surface Transportation Board
Office of Environmental Analysis 395 E Street, SW
Washington, DC 20423

Re: Scoping Comments for the Tongue River Railroad EIS

Dear Mr. Blodgett:

The U.S. Environmental Protection Agency (EPA) has reviewed the Surface Transportation Board's (STB's) Notice of Intent to prepare an Environmental Impact Statement (EIS) for the proposed Tongue River Railroad Project (TRRR). The EPA's comments are provided pursuant to our authorities under the National Environmental Policy Act (NEPA), Section 309 of the Clean Air Act, and the Clean Water Act.

The TRRR, proposed by the Tongue River Railroad Company, Inc., involves construction of a 42 mile rail line, known as the "Colstrip Alternative." The Colstrip Alternative would generally parallel Greenleaf Road (S-447) and runs from the main Burlington Northern Santa Fe (BNSF) rail line near Colstrip to two ending points, one at the proposed Otter Creek coal mine in the Otter Creek area east of Ashland, Montana, and another near the site of the previously planned Montco mine near Ashland.

In addition to looking at direct impacts in the immediate vicinity of the proposed rail line, e.g., impacts to air quality and aquatic resources, including water quality, stream morphology, groundwater and habitat, CEQ regulations (Section 1502.16) instruct agencies to consider other effects that are reasonably foreseeable. Thus, in addition to considering the impacts occurring at and near the site of the TRRR, we recommend that the EIS evaluate the potential impacts of increased traffic on the existing rail lines and more frequent coal trains on communities in Montana. We also recommend evaluating whether there may be additional impacts to communities beyond Montana along the main rail corridors. The evaluation would appropriately include the potential increases in fugitive coal dust and diesel emissions that would accompany the additional rail traffic, and the potential related human health impacts to communities along the proposed route. These types of impacts are exactly the kind of reasonably foreseeable potential impacts that NEPA was designed to address.

Other reasonably foreseeable impacts that we recommend be evaluated in the EIS include the potential impacts from construction and operation of the TRRR-serviced coal mines and combustion of the coal transported by TRRR. The stated purpose of the TRRR is transporting coal from the proposed Otter Creek coal mine and potentially the previously planned Montco coal mine to coal users. We would recommend using existing models to review the reasonably foreseeable potential for air and water quality impacts in

the United States of the coal combustion. The life cycle greenhouse gas emissions associated with the project are also appropriate to consider in this analysis. The methodologies for conducting that analysis are available and well developed; the STB could draw on the good examples of life cycle greenhouse gas emissions included in NEPA analyses by other federal agencies.

We also note that several Tribes, including the Northern Cheyenne, the Crow, and several bands of the Sioux Nation have expressed interest in the proposed project, and we believe it will be important that the STB engage in meaningful government to government consultations with these Tribes. In particular, we are aware members of the Northern Cheyenne Tribe have raised questions over potential impacts to the Tongue River and Tongue River Valley.

The enclosed detailed comments elaborate on the above points and other recommendations. We appreciate the coordination you have carried out to date. The EPA has expertise and data that may be useful to you in preparing your analysis of potential impacts, and we are prepared to provide technical assistance, including more detailed information on recommended approaches for modeling and predicting impacts and suggestions for potential mitigation measures. If you have any questions, please contact me at (303) 312-6776 or by electronic mail at hestmark.martin@epa.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Martin Hestmark".

Martin Hestmark
Assistant Regional Administrator
Office of Ecosystems Protection and Remediation

Enclosure

The EPA Detailed Scoping Comments on the Surface Transportation Board's Notice of Intent to Prepare an Environmental Impact Statement for the Tongue River Railroad

We recommend that the STB coordinate with the State of Montana during preparation of the EIS, since many of the issues that will likely be addressed in the EIS overlap with work the State is performing. For example, the State is preparing an EIS for the proposed Otter Creek, pursuant to the Montana Environmental Policy Act (MEPA).

1. Air Quality

Emissions Sources – As part of the evaluation of emissions associated with the project, we recommend providing details on projected daily peak and average train traffic. We also suggest including information about the timing and duration of the mining at Otter Creek and Montco, as well as the estimated mine acreage that will be disturbed at any one time.

Blasting – We recommend the EIS discuss practices in use at coal mines in the Powder River Basin for reducing NO_x emissions. The EPA can provide examples of these practices.

Modeling, Air Quality Workgroup and Area wide Air Emission Studies – We recommend that the EIS include far-field air quality modeling because of the proximity to the Northern Cheyenne Class I airshed as well as the TRRR and mines' potential contributions to cumulative impacts on AQRVs, such as visibility. Near-field modeling may be warranted depending on the anticipated emission levels from the coal mines and the TRRR. We can provide recommendations for modeling protocols based on the emission information the STB develops.

The Bureau of Land Management (BLM), the EPA and other agencies have been working on air quality modeling and air quality analysis for energy projects in this geographic area for several decades. We recommend that the STB consult with BLM and other agencies on the scope of the project's air quality analysis, the results of the analysis, and identification of available mitigation measures.

We recommend including an analysis of visibility degradation and PSD increment consumption from the project alone and cumulative emissions because of the proximity of the project to sensitive receptor areas and modeled air quality impacts. Cumulative impact air quality modeling prepared by the BLM for coal mines in the Powder River Basin¹ determined that air quality would be above the PSD increments on the Northern Cheyenne reservation for 24-hour PM₁₀ and SO₂. Depending on the level of development for the coal mines and operation of the TRRR, the Powder River Basin modeling predicted an increase of up to 60 days of visibility impacts in the Northern Cheyenne Class I airshed. In light of this issue, we recommend that in addition to the air quality analysis commitments identified in the STB's Notice of Intent, the EIS analyze impacts of the TRRR and associated coal mines on air quality-related values (AQRVs), including visibility, in Class I areas and sensitive Class II areas.

We anticipate that the State's future permits for the coal mines will include requirements related to design measures and emissions controls. We recommend that the STB integrate into the analysis design measures that are likely to be imposed by the State and identify these measures as permit-related conditions in the baseline emission inventory.

¹ See http://www.blm.gov/wy/st/en/programs/energy/Coal_Resources/PRB_Coal/prbdocs.html

The BLM has also initiated a major air quality study related to Resource Management Plan EISs in Montana and South Dakota. The primary focus of this effort is to assess current air quality, analyze potential air quality impacts and identify mitigation measures for BLM-authorized oil and gas development. The draft EISs, scheduled to be issued in the next several months, will contain air quality information that may be useful for the TRRR analysis.

2. Water Resources

Water Quality – We recommend that the EIS summarize existing water quality conditions and evaluate the potential water quality impacts from the TRRR and the mines. We recommend that this evaluation include information about water quality standards of the State of Montana and the Northern Cheyenne Tribe as well as any impaired waters that may exist in the project area, and those constituents that are likely to be released from the TRRR and the mines.

We recommend the STB consider the EPA's Water Quality Assessment for the Tongue River Watershed. This assessment is located at:

<http://www.epa.gov/region8/water/monitoring/Tongue%20River%20Assessment%20Report%20FINAL%20DRAFT%208-2-07.pdf>

With respect to nonpoint source pollution, the EPA recommends the STB consider our guidance document – *National Management Measures to Control Nonpoint Source Pollution from Hydromodification* (EPA 841-B-07-002, July 2007) at:

<http://www.epa.gov/owow/NPS/hydromod/>. This document describes practices that can be used to reduce impacts from activities associated with channelization, channel modification, and stream bank and shoreline erosion.

Wetland and Riparian Habitat - We recommend evaluating impacts to creeks, springs, coulees, wetlands and riparian habitat that may be affected by the project, including changes in groundwater or surface water flows caused by embankments.

Geomorphology- The EPA also recommends analyzing the impacts to the stream morphology of the Tongue River and Otter Creek. This would include a discussion of existing and proposed artificial bank stabilization structures, agricultural practices adjacent to these water bodies, and constrictions placed on the river channel and floodplain, including bridges and levees. We recommend that the EIS analyze impacts to fluvial geomorphology, bank stability and floodplains such as downcutting and/or channel widening, and bank destabilization.

Water Quantity

We recommend analyzing any impacts to water quantity such as changes in streamflow, additional uses of surface or ground water, ground water depletions, and reductions in ground water recharge.

3. Environmental Justice

We recommend incorporating a discussion of environmental justice into the impact analyses for air, water, socioeconomics, and traffic particularly considering the proximity of the Northern Cheyenne and Crow reservations. Because the direct and indirect impacts of this project could

affect different populations, we recommend that the environmental justice analysis correlate specific resource impacts to specific communities. The EPA notes that the Northern Cheyenne Tribe considers the Tongue River and Tongue River Valley to be places of cultural and spiritual significance.

4. Mitigation and Control Measures

It would be helpful to include a section in the EIS that summarizes all of the mitigation and control measures that will be implemented for the TRRR and are available for the coal mines. We recommend including the following key information:

- Whether or not implementation of the measure is required by the STB or any other governmental entity,
- What entity will be implementing the measure,
- All necessary permits, including coal mining and reclamation permits, water permits, and air permits,
- Any dust control or other mitigation measures required by BNSF for coal trains or railcars.



SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Environmental Analysis

April 01, 2014

Ms. Shannon Johnson
U.S. Army Corps of Engineers (USACE)
Billings Regulatory Office
Post Office Box 2256
Billings, Montana 59103

Re: Docket No. FD 30186, Tongue River Railroad Company, Inc.—Rail
Construction and Operation—in Custer, Powder River, Big Horn and Rosebud
Counties, Mont.; **Final Wetland/Surface Water Analysis Methods Summary**

Dear Ms. Johnson:

Thank you for participating in the March 14, 2014 teleconference where the Office of Environmental Analysis (OEA), USACE, and ICF International (ICF) reviewed the wetland and surface water determination methods and preliminary impact results for the Tongue River Rail Construction and Operation Project (project). OEA appreciates the USACE's input and your special expertise regarding impacts on these resources. The purpose of this letter is to provide for your review a brief summary of the wetlands and surface water methodology and the communications between OEA, USACE and ICF discussing this matter. If USACE does not agree with OEA's approach to analyzing potential impacts to wetlands and surface waters, please let me know.

OEA, USACE, and OEA's independent third-party consultant ICF discussed the wetland and surface water methods during teleconferences on January 16, 2013, and May 9, 2013. During the first teleconference, OEA and USACE agreed that a reconnaissance-level determination would be appropriate for the Surface Transportation Board's National Environmental Policy Act (NEPA) analysis. During the second teleconference, ICF presented the details of the proposed reconnaissance-level determination method to USACE to ensure that a sufficient level of information for the environmental impact statement (EIS) would be collected during the field effort. The method discussed consisted of three phases: *Phase I: Preliminary Mapping*, *Phase II: Reconnaissance-Level Field Determination*, and *Phase III: Final Mapping*. The details on the three phases are attached to this letter and were also provided to USACE prior to the March 14, 2014 teleconference where the analysis method was discussed. This information describes the method that was implemented and will be presented in the EIS. In summary:

- OEA, USACE, and ICF discussed the project's wetland and stream analysis methods on multiple occasions and OEA and USACE agreed that the methods would ensure that OEA collect a sufficient level of information for the NEPA analysis.
- OEA, USACE, and ICF discussed the project's wetland and surface water fieldwork that was conducted. USACE and OEA agreed that adequate wetland and surface water information has been collected for the NEPA analysis.
- OEA, USACE, and ICF reviewed the project's preliminary wetland and surface water impact results.

OEA requests that USACE respond by April 16, 2014 if you do not agree with the details provided above. If you have any questions or would like to discuss further, please contact Ken Blodgett of my staff at 202-245-0305 (blodgett@stb.dot.gov), or Alan Summerville of ICF International at 703-934-3616 (Alan.Summerville@icfi.com).

Sincerely,



Victoria Rutson
Director
Office of Environmental Analysis

Enclosures

cc:

Mr. Todd Tillinger
U.S. Army Corps of Engineers
Helena Regulatory Office
10 West 15th Street, Suite 2200
Helena, Montana 59262



SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Environmental Analysis

November 6, 2014

Mr. Brent Esmoil
U.S. Fish and Wildlife Service
Montana Ecological Services Field Office
585 Shepard Way, Suite 1
Helena, MT 59601

Re: Docket No. FD 30186, Tongue River Railroad Company, Inc.—Rail Construction and Operation—in Custer, Powder River, Big Horn, and Rosebud Counties, Montana; **Concurrence Request per Section 7(a)(2) of the Endangered Species Act**

Dear Mr. Esmoil:

Tongue River Railroad Company, Inc. (TRRC) has filed an application with the Surface Transportation Board (Board) to construct and operate a new rail line in southeastern Montana to transport low-sulfur, subbituminous coal from mine sites to be developed in Rosebud and Powder River Counties, including proposed mines in the Otter Creek area. The Board's Office of Environmental Analysis (OEA) is analyzing the environmental impacts of the proposed rail project in a forthcoming environmental impact statement (EIS).

The Board's licensing of the project is a federal action requiring compliance with the Endangered Species Act (ESA) of 1973, as amended (16 United States Code [U.S.C.] §1536). ESA Section 7(a)(2) requires federal agencies to ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat. The proposed project is a "major construction activity," as defined under ESA regulations; therefore, the enclosed biological assessment (BA) was prepared in accordance with 50 Code of Federal Regulations (C.F.R.) Part 402, Interagency Cooperation—ESA of 1973, as amended, which interprets and implements 16 USC §1536(a)–(d).

As described in the enclosed BA, the proposed project would have **no effect** on the endangered pallid sturgeon and would **not jeopardize the continued existence** of the proposed red knot. The proposed project **may affect, but is not likely to adversely affect** the endangered black-footed ferret, interior least tern, and whooping crane; per ESA Section 7(a)(2), OEA requests your concurrence with this effect determination for these three species.

Two candidate species are also addressed in the enclosed BA: greater sage-grouse and Sprague's pipit. OEA recognizes that candidate species are provided no statutory protection under the ESA and no consultation or effect determination is required. However, OEA addresses these two species in the BA and provides effect determinations should these species be listed as threatened or endangered in the future.

If you have any questions please contact Ken Blodgett at 202-245-0305 (e-mail address: **blodgett@stb.dot.gov**), or Alan Summerville of ICF International, our independent third-party contractor for this project, at 703-934-3616 (e-mail address: **Alan.Summerville@icfi.com**).

Very truly yours,

A handwritten signature in black ink, appearing to read "Victoria Rutson". The signature is written in a cursive style with a large initial "V".

Victoria Rutson
Director
Office of Environmental Analysis

Enclosure



SURFACE TRANSPORTATION BOARD
 Washington, DC 20423

Office of Environmental Analysis

January 28, 2015

Todd Yeager
 Field Manager
 U.S. Bureau of Land Management
 111 Garryowen Road
 Miles City, MT 59301

Re: Docket No. FD 30186, Tongue River Railroad Company, Inc.—Rail Construction and Operation—in Custer, Powder River and Rosebud Counties, Mont.; **Request for Information Regarding 4(f) Applicability for the Pumpkin Creek Ranch and Recreation Area, Measures to Minimize Harm, and *de minimis* Findings**

Dear Mr. Yeager:

The purpose of this letter is to request your input as the official with jurisdiction over the property identified below regarding: (1) the applicability of Section 4(f) of the U.S. Department of Transportation Act of 1966 (Section 4(f)) to the recreation property that could be affected by the proposed Tongue River Railroad; (2) whether there are any other properties under U.S. Bureau of Land Management (BLM) jurisdiction that qualify as Section 4(f) properties and would be affected by any of the alternatives for the proposed rail line; and (3) whether a finding of *de minimis* impacts is appropriate. We have attached two maps to this letter showing the alternatives for the new rail line currently under consideration.

Section 4(f) Background

As you are aware, the Surface Transportation Board's (Board) Office of Environmental Analysis (OEA) is in the process of developing a Draft Environmental Impact Statement (EIS) for the proposed Tongue River Railroad. OEA anticipates that the Draft EIS will include a determination that two of the alternatives analyzed for the proposed Tongue River Railroad could have an effect on one recreational property managed by BLM that is eligible for protection under Section 4(f).

Although the Board is administratively affiliated with the U.S. Department of Transportation, the Board is an independent decision-making body, and as such Section 4(f) is not applicable to Board actions. However, if the Board were to approve one of the alternatives that cross Interstate 94, an underpass would need to be built, which would require approval from the Federal Highway Administration (FHWA) in coordination with the Montana Department of Transportation. This FHWA approval is subject to review under Section 4(f) of the U.S.

Department of Transportation Act of 1966 (49 U.S.C. § 303(c)). Section 4(f) provides that U.S. Department of Transportation agencies, such as FHWA, cannot approve the use of land from publicly owned parks, recreation areas, wildlife and waterfowl refuges, or public and private historical sites unless there is no feasible and prudent alternative to the use of such land and the project includes all possible planning to minimize harm to the Section 4(f) property.

Section 6009 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (49 U.S.C. 303), also known as SAFETEA-LU, amended Section 4(f) statutory requirements to include an exception for uses of protected land that would have a “*de minimis*” impact on that land. The U.S. Secretary of Transportation may make a finding of *de minimis* impact if the project “will not adversely affect the activities, features, and attributes of the park, recreation area, or wildlife or waterfowl refuge eligible for protection” under Section 4(f), and if the “Secretary has received concurrence from the officials with jurisdiction over the park, recreation area, or wildlife or waterfowl refuge.”

Eligible Section 4(f) Properties

Properties protected under Section 4(f) include “significant publicly owned public parks and recreational areas that are open to the public and significant publically owned wildlife and waterfowl refuges.” The term “significant” means that in comparing the availability and function of the park, recreational area or wildlife and waterfowl refuge with the park, recreation, or refuge objectives of the community or authority, the property in question plays an important role in meeting those objectives. Further, its primary purposes and function must be as a park, recreation, or refuge. Primary purpose is related to the property's primary function and how it is intended to be managed. Incidental, secondary, occasional, or dispersed activities similar to park, recreational, or refuge activities do not constitute a primary purpose within the context of Section 4(f). If the property identified below offers incidental, secondary, occasional, or dispersed park, recreational, or refuge activities, the property would not qualify for protection under Section 4(f).

OEA has identified the following Section 4(f) property that could be affected by The Tongue River Road Alternative and the Tongue River Road East Alternative for the proposed Tongue River Railroad:

- **The Pumpkin Creek Ranch and Recreation Area:** a 20,578-acre recreational area administered by BLM and located approximately 15 miles south of Miles City. It can be accessed from Tongue River Road from the northwest and Highway 59 from the north and east. There are currently no amenities at the site, and recreational activities consist mainly of hunting, hiking, mountain biking, wildlife viewing, sledding, snowmobiling, and horseback riding.

Based on OEA’s review of the property listed above, OEA has preliminarily determined that this property meets the criteria listed above for eligibility for protection as a Section 4(f) property. OEA (on behalf of FHWA) respectfully requests that BLM confirm whether the availability and function of this property plays an important role in meeting agency objectives and verify that its primary purposes and function is as a park. Additionally, if there are other potential Section 4(f)

properties under BLM jurisdiction that would be affected by the proposed rail line that we have not identified in this letter, we would appreciate it if you let us know about these properties in your reply.

Preliminary Section 4(f) Determination

OEA has determined that either the Tongue River Road Alternative or the Tongue River Road East Alternative would traverse nearly 1.0 mile of the far northwest corner of the Pumpkin Creek Ranch and Recreation Area. During construction, there would be temporary and localized noise and visual disturbances perceptible to users of the recreational area adjacent to the construction corridor. Access across the proposed rail line via roads could be temporarily impeded during construction, resulting in temporary access restrictions to the Pumpkin Creek Ranch and Recreation Area.

Approximately 52.8 acres of the Pumpkin Creek Ranch and Recreation Area would be acquired and converted to rail line right-of-way. The area affected by the right-of-way for these alternatives would be directly adjacent to and on the east side of Tongue River Road, where it crosses the Pumpkin Creek Ranch and Recreation Area. The rail line right-of-way would cross known roads leading into the Pumpkin Creek Ranch and Recreation Area at this location. The Tongue River Road and Tongue River Road East alternatives would also sever approximately 32 acres of land from the rest of the recreation area. The severed portion of land would remain accessible to users via Tongue River Road.

If the Board should approve either the Tongue River Road Alternative or Tongue River Road East Alternative, approximately 52.8 acres of the Pumpkin Creek Ranch and Recreation Area would be incorporated into the railroad right-of-way. OEA has not identified any recreational facilities or amenities within the area of permanent incorporation or within the area that would be severed by these alternatives. The potential area of use would constitute less than 0.3 percent of the total area of the 4(f) property and would be adjacent to Tongue River Road where audible and visual disturbances from vehicular traffic are already taking place. OEA is considering a measure that would require Tongue River Railroad Corporation (TRRC) to consult with managers of recreational areas, including BLM, and other user groups as appropriate to develop a construction plan to limit impacts on recreational areas. The plan would designate temporary access points to recreational resources if main access points would be obstructed during construction. This measure would allow for continued access to the northwest corner of the Pumpkin Creek Ranch and Recreation Area from Tongue River Road during construction. OEA is also considering a measure that would require TRRC to coordinate with landowners to identify key access points to property that would be affected by operation of the proposed rail line and require TRRC to install at-grade crossings and relocate roads to maintain adequate access to properties. This measure would allow for continued access to the northwest corner of the Pumpkin Creek Ranch and Recreation Area from Tongue River Road during operation.

For these reasons, OEA has preliminarily determined that the activities, features, and attributes of the Pumpkin Creek Ranch and Recreation Area qualifying it for protection under Section 4(f) would not be adversely affected and therefore, intends to make a *de minimis* impact finding for the Pumpkin Creek Ranch and Recreation Area.

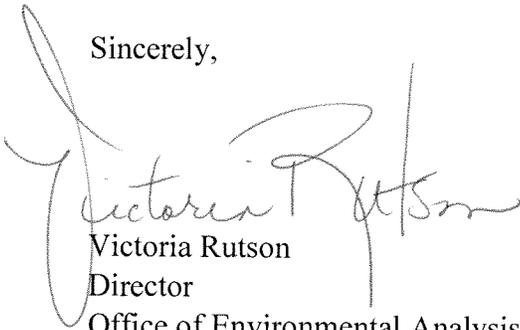
OEA is requesting your written concurrence that: (1) the Pumpkin Creek Ranch and Recreation Area is eligible for Section 4(f) protection; (2) there are no other BLM-managed Section 4(f) properties potentially affected by the proposed Tongue River Railroad; and (3) the proposed Tongue River Railroad would not adversely affect the activities, features, and attributes of the property identified above and a *de minimis* impact finding is appropriate or could be reached with the development and implementation of additional mitigation measures not yet identified.

If BLM believes that additional mitigation measures would be required to make the potential impacts on the Section 4(f) property *de minimis*, please outline such measures in your reply. Please address your reply to Mr. Kenneth Blodgett of my staff at the address below, or as an email attachment to Kenneth.Blodgett@stb.dot.gov.

Mr. Kenneth Blodgett
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001
Attention: STB Finance Docket No. 30186

If you have any questions, please do not hesitate to contact Kenneth Blodgett, OEA's Project Manager, at (202) 245-0305, or Alan Summerville of ICF International, Project Manager for OEA's third-party contracting team, at 703-934-3616. We would appreciate your reply by February 25, 2015. And thank you for your help and expertise.

Sincerely,



Victoria Rutson
Director
Office of Environmental Analysis

cc: Mr. Brian Hasselbach
Montana Division
Federal Highway Administration
585 Shepard Way, Suite 2
Helena, MT 59601



SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Environmental Analysis

January 28, 2015

Dawn Colton
 Community Services and Planning
 17 South 8th Street
 Miles City, MT 59301

Re: Docket No. FD 30186, Tongue River Railroad Company, Inc.—Rail Construction and Operation—in Custer, Powder River and Rosebud Counties, Mont.; **Request for Information Regarding 4(f) Applicability for the Spotted Eagle Recreation Area, Measures to Minimize Harm, and *de minimis* Findings**

Dear Ms. Colton:

The purpose of this letter is to request your input as the official with jurisdiction over the property identified below regarding the following three issues: (1) the applicability of Section 4(f) of the U.S. Department of Transportation Act of 1966 to the recreation property that could be affected by the proposed Tongue River Railroad; (2) whether there are any other properties under the jurisdiction of Miles City that would qualify as Section 4(f) properties and would be affected by any of the alternative rail alignments for the proposed new rail line; and (3) whether a finding of *de minimis* impacts is appropriate. To assist your review, we have attached two maps showing the alternative rail alignments.

Section 4(f) Background

As you are aware, the Surface Transportation Board's (Board) Office of Environmental Analysis (OEA) is in the process of developing a Draft Environmental Impact Statement (EIS) for the proposed Tongue River Railroad. OEA anticipates that the Draft EIS will include a determination that four of the alternatives analyzed for the proposed Tongue River Railroad could have an effect on one recreational property managed by Miles City that is eligible for protection under Section 4(f).

Although the Board is administratively affiliated with the U.S. Department of Transportation, the Board is an independent decision-making body whose governing statute is the Interstate Commerce Act (as amended by the ICC Termination Act). As such, Section 4(f) does not apply to Board actions. But if the Board were to approve an alternative that crosses Interstate 94, an underpass would need to be built, which would require approval from the Federal Highway Administration (FHWA) in coordination with the Montana Department of Transportation. This FHWA approval is subject to Section 4(f) and therefore, FHWA cannot

approve the use of land from publicly owned parks, recreation areas, wildlife and waterfowl refuges, or public and private historical sites unless there is no feasible and prudent alternative, and the project includes all possible planning to minimize harm to the Section 4(f) property.

Section 6009 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (49 U.S.C. 303), also known as SAFETEA-LU, amended Section 4(f) statutory requirements to include an exception for uses of protected land that would have a *de minimis* impact on that land. The U.S. Secretary of Transportation may make a finding of *de minimis* impact if the project “will not adversely affect the activities, features, and attributes of the park, recreation area, or wildlife or waterfowl refuge eligible for protection” under Section 4(f), and if the “Secretary has received concurrence from the officials with jurisdiction over the park, recreation area, or wildlife or waterfowl refuge.”

Eligible Section 4(f) Properties

Properties protected under Section 4(f) include “significant publicly owned public parks and recreational areas that are open to the public and significant publically owned wildlife and waterfowl refuges.” The term *significant* means that, in comparing the availability and function of the park, recreational area, or wildlife and waterfowl refuge with the park, recreation, or refuge objectives of the community or authority, the property in question plays an important role in meeting those objectives. Further, its primary purpose and function must be as a park, recreation, or refuge. Primary purpose is related to the property's primary function and how it is intended to be managed. Incidental, secondary, occasional, or dispersed activities similar to park, recreational, or refuge activities do not constitute a primary purpose in the context of Section 4(f). If the property identified below offers incidental, secondary, occasional, or dispersed park, recreational, or refuge activities, the property would not qualify for protection under Section 4(f).

OEA has identified the following Section 4(f) property that could be affected by the Tongue River Alternative, the Tongue River East Alternative, the Tongue River Road Alternative, and the Tongue River Road East Alternative for the proposed Tongue River Railroad.

- **The Spotted Eagle Recreation Area:** This 245-acre, officially designated recreational area is owned by Miles City and located southwest of Miles City between the BNSF mainline and Interstate 94. Onsite activities include fishing and swimming in Spotted Eagle Lake, archery, target shooting, picnicking, and hiking. Most of the recreational activities and features are concentrated in the 18-acre Spotted Eagle Lake and to the north and east of the lake. Interstate 94 crosses through the southeastern corner of the area, the existing BNSF railroad forms the northern border, and developed roads, parking, and other constructed features are located throughout the area. Human activity and disturbance—both audible and visual—are common characteristics of the recreational attributes of the area.

OEA’s preliminary determination is that the Spotted Eagle Recreation Area meets the criteria for protection as a Section 4(f) property. OEA, on behalf of FHWA, respectfully requests that Miles

City confirm whether the availability and function of this property plays an important role in meeting recreational objectives and verify that its primary purpose and function is as a park. Additionally, if there are any other potential Section 4(f) properties under Miles City jurisdiction that would be affected by the proposed rail line that have not been identified in this letter, please provide information on these properties and their locations.

Preliminary Section 4(f) Determination

OEA has determined that the Tongue River Alternative, the Tongue River East Alternative, the Tongue River Road Alternative, or the Tongue River Road East Alternative would cross through the western periphery of Spotted Eagle Recreation Area. During construction, there would be temporary and localized noise and visual disturbances perceptible to users of the recreational area adjacent to the construction corridor. Construction would permanently incorporate approximately 11 acres from Spotted Eagle Recreation Area into the railroad right-of-way. OEA has not identified any developed facilities or features in the area that would be incorporated in the railroad right-of-way.

The potentially affected area would constitute less than 5 percent of the total area of the property and would be located along the western periphery, away from developed recreational features and areas likely to be used by visitors. Recreational users currently experience audible and visual disturbances from vehicular traffic along roads within and adjacent to the property and the BNSF main line that forms the northern border of the property. The roads and BNSF main line result in a perceptible level of disturbance. OEA is considering mitigation measures such as requiring Tongue River Railroad to plant a tree buffer between the Spotted Eagle Recreation Area and the railroad right-of-way to reduce visual impacts and the perception of noise on users of this property. Another mitigation measure would require the Tongue River Railroad to consult with Miles City to develop means to offset potential losses of recreational use of the property.

For these reasons, OEA (on behalf of FHWA) has made the preliminary determination that the activities, features, and attributes of the Spotted Eagle Recreation Area qualifying it for protection under Section 4(f) would not be adversely affected. Therefore, OEA intends to make a *de minimis* impact finding for the Spotted Eagle Recreation Area.

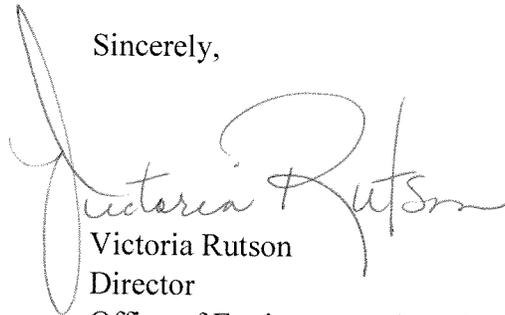
OEA (on behalf of FHWA) is requesting your written concurrence with the following statements: (1) the Spotted Eagle Recreation Area is eligible for Section 4(f) protection; (2) there are no other City-managed Section 4(f) properties potentially affected by the proposed Tongue River Railroad; and (3) the proposed Tongue River Railroad would not adversely affect the activities, features, and attributes of the property identified above and a *de minimis* impact finding is appropriate or could be reached with the development and implementation of additional mitigation measures not yet identified.

If Miles City believes that additional mitigation measures would be required to make the potential impacts on the Section 4(f) property *de minimis*, we would appreciate if you could outline such measures in your reply. Please address your reply to Mr. Kenneth Blodgett of my staff at the address below, or as an email attachment to Kenneth.Blodgett@stb.dot.gov.

Mr. Kenneth Blodgett
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001
Attention: STB Finance Docket No. 30186

If you have any questions, please do not hesitate to contact Kenneth Blodgett, OEA's Project Manager, at (202) 245-0305, or Alan Summerville of ICF International, Project Manager for OEA's third-party contracting team, at 703-934-3616. We would appreciate your reply by February 25, 2015. And thank you for your help and expertise.

Sincerely,

A handwritten signature in black ink, appearing to read "Victoria Rutson". The signature is fluid and cursive, with a large initial "V" and "R".

Victoria Rutson
Director
Office of Environmental Analysis

cc: Mr. Brian Hasselbach
Montana Division
Federal Highway Administration
585 Shepard Way, Suite 2
Helena, MT 59601

From: "Yeager, Todd" <tyeager@blm.gov>
To: <Kenneth.blodgett@stb.dot.gov>
Cc: Dalice Landers <dlanders@blm.gov>, "Findlay, Shane D" <sfindlay@blm.gov>
Date: 01/30/2015 01:51 PM
Subject:Fwd: Response to 4(f) applicability for BLM lands

Dear Mr. Blodgett,

The Miles City Field Office received your letter concerning the applicability of Section 4(f) of the US Department of Transportation Act of 1966, on BLM lands within the Pumpkin Creek area from the Tongue River Railroad alternative routes. In the letter you requested concurrence that the Pumpkin Creek area is eligible for Section 4(f) protection and identification of other BLM lands that may be eligible.

The Miles City Field Office does not believe that the Pumpkin Creek area or any BLM managed lands along the Tongue River Railroad alternative routes are eligible for Section 4(f) protection. The recreational component of all BLM administered public lands along the alternative routes are considered "dispersed" and would not qualify for protection under Section 4 (f) based on the definition provided in your letter.

In summary, the BLM administrated public lands along the alternative routes proposed by the Tongue River Railroad EIS do not qualify for protection under Section 4(f) of the US Department of Transportation Act of 1966.

Finally, the BLM does not intend to change or modify the recreational component of these areas to something more than dispersed use requiring protection.

Thank you for your consideration and attention to BLM administered public lands.

Sincerely,
Todd

Todd Yeager
Field Manager, Miles City Field Office
111 Garryowen Road
Miles City, MT 59301
406-233-2837



CITY OF MILES CITY

17 S. 8th, P.O. Box 910
Miles City, MT 59301-0910

Telephone: 406-234-3462
Fax: 406-234-2903

Feb 25, 2015

Kenneth Blodgett
Surface Transportation Board
395 East Street, SW
Washington, DC 20423-001

Attention: STB Finance Docket No. 30186

Dear Mr. Blodgett,

Thank you for the opportunity to respond to your letter dated January 28, 2015 which requested the City of Miles City to confirm the availability and function of Spotted Eagle Recreation Area and to verify that its primary purpose and function is as a "park".

Spotted Eagle Recreation Area is used year round by residents of Miles City and by tourists visiting Miles City. It provides an excellent fishing opportunity for the youth and elderly individuals year-round. Numerous school (kid's fishing days), and local fisherman and others use the park every day of the year. The local chapter of Walleye's Unlimited have invested significant time and budget in constructing and maintaining improvements they have installed, these vary from a handicapped fishing platform, to planting trees, and constructing scoria covered walking trails. The city has built improvements such as bathrooms, garbage clean up as well as year round, ongoing maintenance. Custer Rod and Gun Club members frequently use the park for their recreational activities.

The water source for Spotted Eagle Recreation Area is the MT Fish, Wildlife and Parks fish hatchery which lies west of the park and the proposed line would lie between the fish hatchery and the park. The proposed TRR line will sever the flow of water to Spotted Eagle causing the lake water to eventually become stale and evaporate leaving the city with a dry pit. The rail line must provide adequate water flow paths under the line so the health and well-being of the reservoir is secured.

The suggestion that TRR will be required to plant a tree/hedge row along the impact zone to Spotted Eagle as it could reduce visual impacts is a good idea on paper but who is responsible for the care and maintenance of the tree line? We feel it may not be a priority for the railroad and as such it may become an added budget and time expense for the city.

The primary function of Spotted Eagle Recreation Area is a community park. It is open daily from 6 am to 10 pm and is a very important attribute to the City of Miles City.

The proposed rail line would provide train traffic potentially heading to the east, which would severely restrict local flow of traffic into and out of Spotted Eagle Recreation Area. Emergency services could be restricted from accessing the recreation area due to the increase in rail traffic

Foot and bicycle traffic into and out of the recreation area will be subject to increased train traffic and safety issues.

We also recommend that TRR consult with the City of Miles City to develop means and concrete plans to offset potential impacts and loss of recreational use at Spotted Eagle,

Per your request the following applies:

1. Spotted Eagle is eligible for Section 4(f) protection.
2. The city has no other section 4 (f) properties that would be affected by the TRR proposal.
3. The proposed TRR de minimus impact finding could be reached with development and implementation of additional impact measures not yet identified.

Respectfully,

A handwritten signature in blue ink that reads "Chris A. Grenz". The signature is written in a cursive, flowing style.

Chris A. Grenz, Mayor



SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Environmental Analysis

March 24, 2014

Mr. Brent Esmoil
U.S. Fish and Wildlife Service
Montana Ecological Services Field Office
585 Shepard Way, Suite 1
Helena, MT 59601

Re: Docket No. FD 30186, Tongue River Railroad Company, Inc.—Rail Construction and Operation—in Custer, Powder River, Big Horn, and Rosebud Counties, Montana; **Concurrence Request per Section 7(a)(2) of the Endangered Species Act**

Dear Mr. Esmoil:

As you are aware, the Surface Transportation Board's Office of Environmental Analysis (OEA) is preparing an environmental impact statement for the proposed construction and operation of a new rail line in southeastern Montana by the Tongue River Railroad Company, Inc. The purpose of this letter is to transmit the attached Biological Assessment (BA), which we have revised based on consultation with your office.

As described in the enclosed BA, the proposed project would have **no effect** on the endangered pallid sturgeon and would **not jeopardize the continued existence** of the proposed red knot and northern long-eared bat. The proposed project **may affect, but is not likely to adversely affect** the endangered black-footed ferret, interior least tern, and whooping crane; per ESA Section 7(a)(2), OEA requests your concurrence with this effect determination for these three species.

Two candidate species are also addressed in the enclosed BA: greater sage-grouse and Sprague's pipit. OEA recognizes that candidate species are provided no statutory protection under the ESA and no consultation or effect determination is required. However, OEA addresses these two species in the BA and provides effect determinations should these species be listed as threatened or endangered in the future.

If you have any questions please contact Ken Blodgett at 202-245-0305 (e-mail address: **blodgettk@stb.dot.gov**), or Alan Summerville of ICF International, our independent third-party contractor for this project, at 703-934-3616 (e-mail address: **Alan.Summerville@icfi.com**).

Very truly yours,

A handwritten signature in black ink that reads "Victoria Rutson". The signature is written in a cursive style with a large, stylized initial 'V'.

Victoria Rutson
Director
Office of Environmental Analysis

Enclosure

Attachment B: Tribal and Government-to-Government Consultation



SURFACE TRANSPORTATION BOARD
Washington, DC 20423
Office of Environmental Analysis

December 17, 2012

John Robinson, President
Northern Cheyenne Tribe
P.O. Box 128
Lame Deer, MT 59043

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

Dear President Robinson:

I wanted to take this time to congratulate you on your recent election win as the new president of the Northern Cheyenne Tribe. Please accept my warmest greetings and well wishes to you.

We intend to work closely with you and the Northern Cheyenne Tribe in the coming years to ensure that you are fully informed regarding actions taken by the Surface Transportation Board (Board) that may affect your tribe. This is particularly the case with the Tongue River Railroad Construction (TRRC) Project, a proposed action that is near the Northern Cheyenne Reservation and that is subject to Board approval. As you know, we are conducting a new environmental impact statement (EIS) for the proposed project and greatly value the input of your tribe as we identify environmental issues that need to be addressed in the EIS.

I am the point of contact for tribal affairs within the Board's Office of Environmental Analysis. Please feel free to call or e-mail me anytime (202-245-0293, gliddenc@stb.dot.gov) regarding the TRRC Project or other tribal issues of concern to the Northern Cheyenne Tribe.

I look forward to working with you.

Very truly yours,

Catherine Glidden
Office of Environmental Analysis

**SURFACE TRANSPORTATION BOARD***Washington, DC 20423**Office of Environmental Analysis*

December 18, 2012

Crow Tribe of Indians
Darrin Old Coyote, Chairman
P.O. Box 159
Crow Agency, MT 59022

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

Dear Chairman Old Coyote:

The purpose of this letter is to initiate formal government-to-government consultations with the Crow Tribe of Indians regarding the above-referenced project.

As you know, the Surface Transportation Board's (Board) October 29, 2012 e-mail to you provided your tribe with information regarding our responsibility for preparing the appropriate National Environmental Policy Act (NEPA) documentation for the proposed project. This was followed by our December 11, 2012 letter that laid out our responsibilities to consult with you regarding potential effects from the proposed project to historic properties as defined under Section 106 of the National Historic Preservation Act.

The Board is now interested in knowing your views regarding your tribe's interest in our consulting with you regarding the broader range of impacts assessed under NEPA including those to tribal lands and resources such as plant gathering areas and religious sites. To assist you in your response, I have attached a comment card regarding any future involvement your tribe may want in the overall NEPA process. I respectfully request that you complete the card and return it to Catherine Glidden of my staff at your earliest convenience.

If you have any questions or would like to discuss the project in more detail please do not hesitate to contact Catherine at 202-245-0293 or Richard Starzak of ICF International, our independent third-party contractor, at 213-840-7480. Information on this project is also available on the Board's website at http://www.stb.dot.gov/stb/environment/key_cases.html, and on the project website at <http://www.tonguerivereis.com/>. We look forward to hearing from you.

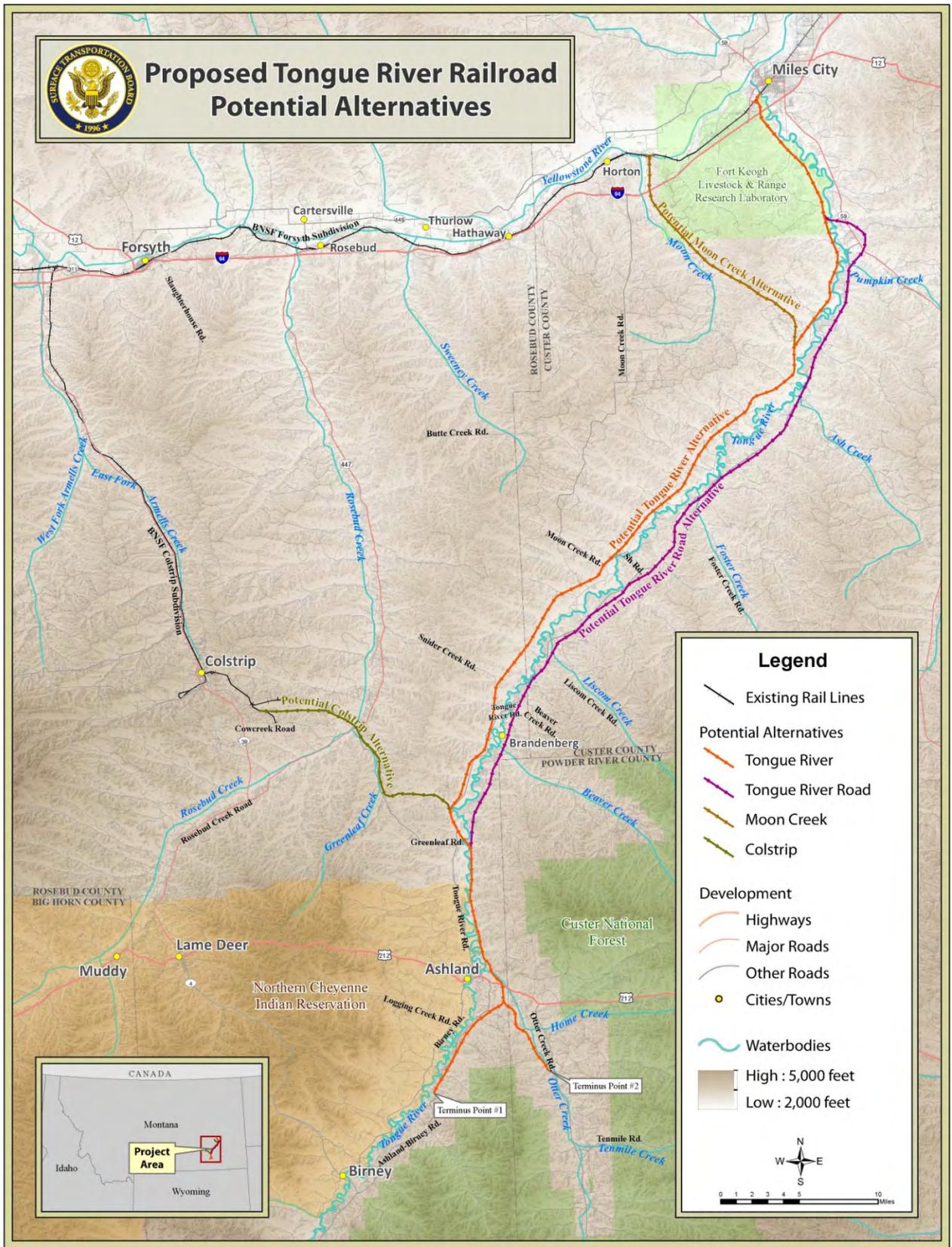
Sincerely,

Victoria Rutson
Director
Office of Environmental Analysis

Enclosures: Map of Potential Alternatives; Consultation Questionnaire
cc: Burton Pretty On Top



Proposed Tongue River Railroad Potential Alternatives



Legend

Existing Rail Lines

Potential Alternatives

Tongue River

Tongue River Road

Moon Creek

Colstrip

Development

Highways

Major Roads

Other Roads

Cities/Towns

Waterbodies

High : 5,000 feet

Low : 2,000 feet



0 1 2 3 4 5 10 Miles

CONSULTATION QUESTIONNAIRE

Crow Tribe of Indians

STB Docket No. FD 30186, Tongue River Railroad Company, Inc. (TRRC)—Rail Construction and Operation—in Custer, Powder River and Rosebud Counties, Montana.

Project Name: TRRC's proposed rail line

Please check all the appropriate response(s) that apply from the list below and use the back of this form or additional sheets if you wish to make comments:

- We have no interests associated with TRRC's proposed rail line and further consultation with our Tribe is not required.
- We want to continue to receive project information by mail and participate in the public involvement process.
- We have an interest in TRRC's proposed rail line and want to participate in government-to-government consultation.

Name of the Crow Tribe of Indians designated contact for TRRC's proposed rail line:

Please print

Phone: _____
e-mail: _____

Signed: _____ Date: _____

Please mail to: Catherine Glidden
STB Finance Docket No. 30186
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001

Or Email to: gliddenc@stb.dot.gov



SURFACE TRANSPORTATION BOARD

Washington, DC 20423

Office of Environmental Analysis

December 18, 2012

Northern Cheyenne Tribe
John Robinson, President
P.O. Box 128
Lame Deer, MT 59043

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

Dear President Robinson:

The purpose of this letter is to initiate formal government-to-government consultations with the Northern Cheyenne Tribe regarding the above-referenced project.

As you know, the Surface Transportation Board's (Board) October 29, 2012 e-mail to you provided your tribe with information regarding our responsibility for preparing the appropriate National Environmental Policy Act (NEPA) documentation for the proposed project. This was followed by our December 11, 2012 letter that laid out our responsibilities to consult with you regarding potential effects from the proposed project to historic properties as defined under Section 106 of the National Historic Preservation Act.

The Board is now interested in knowing your views regarding your tribe's interest in our consulting with you regarding the broader range of impacts assessed under NEPA including those to tribal lands and resources such as plant gathering areas and religious sites. To assist you in your response, I have attached a comment card regarding any future involvement your tribe may want in the overall NEPA process. I respectfully request that you complete the card and return it to Catherine Glidden of my staff at your earliest convenience.

If you have any questions or would like to discuss the project in more detail please do not hesitate to contact Catherine at 202-245-0293 or Richard Starzak of ICF International, our independent third-party contractor, at 213-840-7480. Information on this project is also available on the Board's website at http://www.stb.dot.gov/stb/environment/key_cases.html, and on the project website at <http://www.tonguerivereis.com/>. We look forward to hearing from you.

Sincerely,

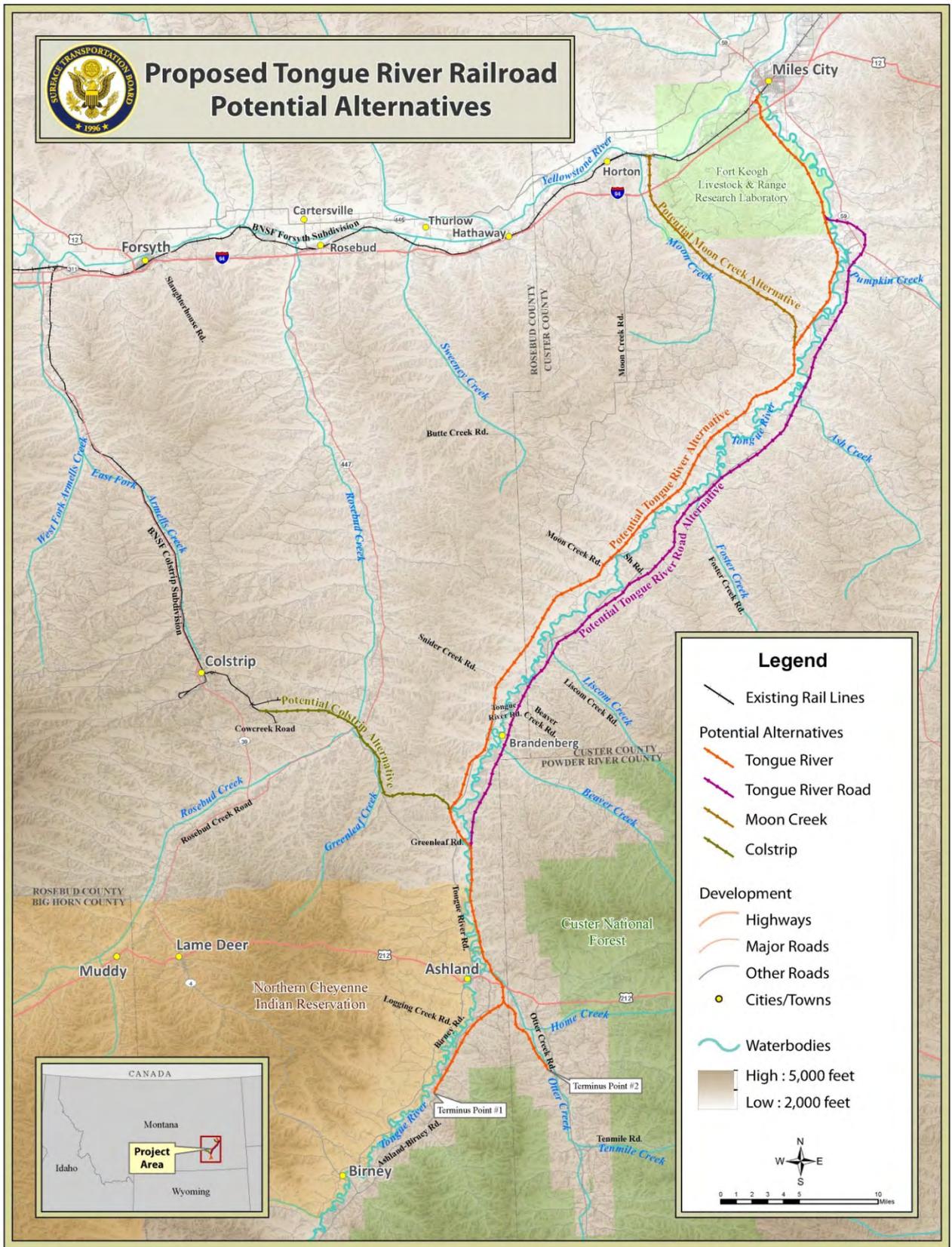
Victoria Rutson
Director
Office of Environmental Analysis

Enclosures: Map of Potential Alternatives; Consultation Questionnaire

cc: Conrad Fisher



Proposed Tongue River Railroad Potential Alternatives



CONSULTATION QUESTIONNAIRE

Northern Cheyenne Tribe

STB Docket No. FD 30186, Tongue River Railroad Company, Inc. (TRRC)—Rail Construction and Operation—in Custer, Powder River and Rosebud Counties, Montana.

Project Name: TRRC's proposed rail line

Please check all the appropriate response(s) that apply from the list below and use the back of this form or additional sheets if you wish to make comments:

- We have no interests associated with TRRC's proposed rail line and further consultation with our Tribe is not required.
- We want to continue to receive project information by mail and participate in the public involvement process.
- We have an interest in TRRC's proposed rail line and want to participate in government-to-government consultation.

Name of the Northern Cheyenne Tribe designated contact for TRRC's proposed rail line:

Please print

Phone: _____
e-mail: _____

Signed: _____ Date: _____

Please mail to: Catherine Glidden
STB Finance Docket No. 30186
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001

Or Email to: gliddenc@stb.dot.gov

Northern Cheyenne Tribe

STB Docket No. FD 30186, Tongue River Railroad Company, Inc. (TRRC)—Rail Construction and Operation—in Custer, Powder River and Rosebud Counties, Montana.

Project Name: TRRC's proposed rail line

Please check all the appropriate response(s) that apply from the list below and use the back of this form or additional sheets if you wish to make comments:

- We have no interests associated with TRRC's proposed rail line and further consultation with our Tribe is **not required**.
- We want to continue to receive project information by mail and participate in the public involvement process.
- We have an interest in TRRC's proposed rail line and want to participate in government-to-government **consultation**.

Name of Northern Cheyenne Tribe designated contact for TRRC's proposed rail line:

John J Robinson
Please print

Phone: 406 477-4846

e-mail: john.robinson@

Signed: John Robinson

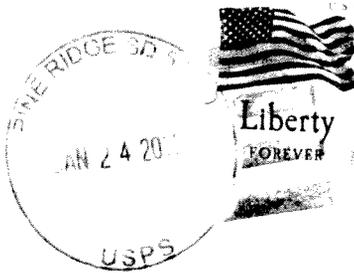
Date: 12/31/12

cheyennation.com



Cathy Glidden
 FD No. 30186
 Surface Transportation Board
 Office of Environmental Analysis
 395 E Street, SW
 Washington, D.C. 20423-0001

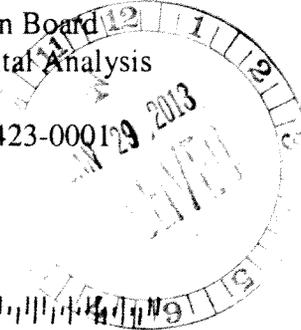




EI-20103

CG

Cathy Glidden
FD No. 30186
Surface Transportation Board
Office of Environmental Analysis
395 E Street, SW
Washington, D.C. 20423-0001



Oglala Sioux Tribe

STB Docket No. FD 30186, Tongue River Railroad Company, Inc. (TRRC)—Rail Construction and Operation—in Custer, Powder River and Rosebud Counties, Montana.

Project Name: TRRC's proposed rail line

Please check all the appropriate response(s) that apply from the list below and use the back of this form or additional sheets if you wish to make comments:

- We have no interests associated with TRRC's proposed rail line and further consultation with our Tribe is not required.
- We want to continue to receive project information by mail and participate in the public involvement process.
- We have an interest in TRRC's proposed rail line and want to participate in government-to-government consultation.

Name of Oglala Sioux Tribe designated contact for TRRC's proposed rail line:

Wilmer Mesteth
Please print

Phone: (605) 867-5969

e-mail: ostnrcra.thpo@gwtc.net

Signed: Wilmer Mesteth

Date: 1/23/12



NORTHERN CHEYENNE TRIBE
ADMINISTRATION
 P.O. Box 128
 LAME DEER, MONTANA 59043
 (406) 477-6284
 FAX (406) 477-6210



January 9, 2013

Kenneth Blodgett
 Surface Transportation Board
 395 E Street, SW
 Washington, D.C. 20423-0001,

Attention: Environmental filing, Docket No. FD 30186

Dear Mr. Blodgett,

The Northern Cheyenne Tribe ("Tribe") is a federally recognized Indian tribe that occupies the Northern Cheyenne Reservation ("Reservation"), which encompasses over 444,000 acres of land in southeastern Montana. Appendix A at 1-1, Figure 1. Pursuant to the National Environmental Policy Act ("NEPA"), the Tribe submits these scoping comments on the pending application to build a railroad line that connects the Otter Creek Coal Tracts ("Otter Creek") in southeastern Montana to existing railroad infrastructure to the north of the Reservation. The proposal would facilitate the transport of coal from Otter Creek to users in the United States and, potentially, for export to Asia and other markets.

The proposed railroad line is designed to support planned mining activities at Otter Creek. The Tribe has a significant interest in the proposed railroad line and connected and cumulative actions (collectively the "Proposed Action") due to proximity of the Proposed Action to the Reservation. In light of this interest, the Tribe requests that the Surface Transportation Board ("STB") consult with the Tribe during every step of NEPA review for the Proposed Action. To do so would be consistent with both NEPA and the sacred fiduciary obligation owed the Tribe by the federal government.

The Tribe is concerned that the Proposed Action may undermine its significant efforts to protect the environment and human health on the Reservation and minimize the impact of energy development on the Reservation environment. Accordingly, the Tribe calls on the STB to include in its NEPA assessment a thorough analysis of the direct, indirect, and cumulative impacts associated with the Proposed Action, with particular attention to any disproportionate effects that the Proposed Action may have on the Tribe, its members, and the Reservation environment.

One possibility for minimizing the potential impacts from railroad construction and operation would be to adopt a railroad alignment that is set further away from the Reservation boundary, and also further from important waterbodies such as the Tongue River, Greenleaf Creek, and Rosebud Creek. The Tribe accordingly calls on the STB to evaluate such an

LITTLE WOLF AND MORNING STAR Page 6 **Out of defeat and exile they led us back to Montana and won our Cheyenne homeland that we will keep forever.**

alternative alignment as a means for minimizing impacts to the Tribe and the Reservation environment from construction activities and operations associated with the Proposed Action.

Finally, the Tribe requests information about designating the Tribe as a “cooperating” entity for this NEPA process and about available funding to facilitate the Tribe’s role in this process and efforts to mitigate impacts to the Tribe from the Proposed Action.

I. Background

As briefly described below, the Northern Cheyenne Tribe has a long history of taking extraordinary steps to protect the environment in and around its Reservation and avoid adverse impacts of coal development and related activities. It has done so despite facing severe economic and social challenges and even though revenue from any source, even coal, is sorely needed.

Energy resources in and around the Reservation have drawn significant attention and controversy over the last fifty years. Appendix A at 2-26 through 2-31. Major interest in coal development on the Reservation first occurred in 1965, resulting in public sales of Reservation coal leases in the late 1960s. *Id.* at 2-27. However, in 1974, upon the Tribe’s petition, the Secretary of the Interior issued a decision that effectively blocked all coal development on the Reservation. *Id.* at 2-28.

Since then, the Tribe has not permitted on-Reservation coal mining. However, there has been considerable effort to develop energy resources on lands surrounding the Reservation. For example, in the 1970s, a consortium of utilities launched a plan to build two 750 MW coal-fired power plants in Colstrip, Montana, approximately 15 miles north of the Reservation boundary. Appendix A at 2-28. Concerned with the impacts that the Colstrip facility would have on air quality and human health within the Reservation, the Tribe became the first government in the United States to voluntarily raise the air quality standard within its territory to “Class I,” a standard that had previously only applied to parks and wilderness areas. *Id.* at 2-29. As a result, the Colstrip utilities were required to install the most stringent pollution control technology available at the time, fund a Tribal air quality monitoring program, and provide other economic benefits to the Tribe. *Id.* at 2-29.

Additional interest in off-Reservation coal development in the early 1980s led Interior Secretary James Watt to initiate a massive coal lease sale in the Powder River Coal Region of Montana and Wyoming. Appendix A at 2-29. The Montana tracts encircled the Reservation, and the Tribe was again concerned that the mining activities would adversely impact the Reservation environment. *Id.* The Tribe ultimately succeeded in its legal challenge to the 1982 leases—all leases for new production tracts were terminated, and the Tribe reached a settlement with the company holding the Colstrip mine extension leases that provided impact funding and other economic benefits to the Tribe. *Id.* at 2-30.

More recently, the Tribe was involved in the 1996 effort to oppose extension of the Montco mining permit, and secured a court-ordered termination of that permit. The Tribe also led successful litigation beginning in 2006 to protect water quality in the Tongue River from impacts associated with coalbed methane operations.

The Tribe has particular concern with the effects that proposed mining at Otter Creek will have on the Reservation and Tribal members. The Otter Creek tracts, estimated to contain 533 million tons of recoverable federal coal, are located approximately three miles from the eastern boundary of the Reservation. In 2002, after asserting claims challenging coal-related development at Otter Creek, the Tribe entered into a settlement agreement with the Montana State Board of Land Commissioners ("Board"). Among many other terms, the Board agreed to ensure that, upon its authorization of the leasing of Otter Creek, operating plans would be implemented to promote Tribal employment and contracting, ensure proper on-Reservation conduct by the lessee and its employees/contractors, require environmental monitoring to identify impacts on the Reservation, and ensure protection of the Tribe's cultural resources. The final versions of these operating plans, which were approved in November 2012 and are currently in force, address some of the impacts from mining at Otter Creek, but do not address impacts from the related Tongue River Railroad proposal and other connected/cumulative actions.

II. Scope of Assessment

NEPA requires the STB to consider all direct, indirect, and cumulative impacts that may result from the project proposal as well as connected and cumulative actions. *See* 40 C.F.R. § 1508.25. The Tribe is concerned that the Proposed Action could have significant disproportionate impacts to the Tribe and its members, and urges STB to thoroughly evaluate and mitigate such impacts. Disproportionate adverse impacts are likely because Otter Creek is located only three miles from the eastern boundary of the Reservation, the proposed railroad would run along the eastern boundary of the Reservation parallel to the Tongue River and other important waterbodies, and existing conditions on the Reservation may make Tribal members more susceptible to impacts from the Proposed Action. The Tribe is particularly concerned that coal dust and diesel emissions from construction activities and operations associated with the Proposed Action will adversely affect the natural environment on Reservation, the health of Tribal members, and the Tribe's religious and cultural resources. These concerns are described in more detail below.

a. Impacts to the Reservation Environment

The Proposed Action's impact on air quality and visibility on and near the Reservation is a significant concern to the Tribe. The Tribe has expended considerable resources to protect air quality on the Reservation. *See generally* Appendix A at 6-40 through 6-42. As mentioned above, the Tribe was the first government in the United States to voluntarily elevate the air quality standard on the Reservation to the most pristine "Class I" designation. *Id.* at 6-40. However, even with this stringent standard, Reservation air quality is currently impacted by numerous sources, including the Colstrip power plants. *Id.* at 6-41 through 6-42. The Tribe's considerable efforts to protect Reservation air quality and visibility would be further undermined if coal dust, diesel emissions, and other emissions from construction activities and operations associated with the Proposed Action are not adequately mitigated. Appendix B sets forth additional air quality concerns of the Tribe.

The Tribe is also concerned with the potential impacts that the Proposed Action will have on ground and surface water quality within the Reservation. Preserving water quality on the

Reservation is especially important to the Tribe, as the Reservation is located in an arid portion of the western United States where access to water is limited. *See generally* Appendix A at 6-2 through 6-40. Water quality on portions of the Tongue River, which forms the eastern boundary of the Reservation, and its tributaries, is already impaired, largely as a result of agricultural runoff, discharges from municipal point sources, and discharges from coalbed methane operations. *Id.* at 6-13 through 6-18. The Tribe is concerned that coal dust, diesel emissions, and runoff from construction activities and operations associated with the Proposed Action will cause further impairment of Reservation waters and may limit the Tribe's use of water for human consumption, agriculture, and other uses. *Id.* at 6-33 through 6-40. Appendix C provides more details of the Tribe's water quality concerns.

The Proposed Action may also impact the Tribe's wildlife resources, which are culturally and economically important to the Tribe. *See generally* Appendix A at 6-45 through 6-54. Construction and operation activities associated with the Proposed Action could disturb a wide variety of wildlife and their longstanding migration patterns on and near the Reservation, including big game animals, small mammals, migratory birds, raptors, waterfowl, amphibians, reptiles, and fish. Many of these species are already impaired, and some are listed as "threatened" or "endangered" under the Endangered Species Act. *Id.* at 6-51.

b. Human Health Impacts

The Tribe is also concerned that the Proposed Action may result in disproportionate adverse health effects to Tribal members. Of particular concern is exposure to coal dust and diesel exhaust emissions as well as toxic chemicals found in such emissions (such as lead, selenium, and mercury). Exposure to coal dust and diesel exhaust are associated with a wide range of health effects such as stunted lung development, increased probability of heart attacks, cancer, asthma, kidney disease, and infant mortality.

The Tribe calls on the STB to fully evaluate, minimize when possible, and mitigate potential health effects that the Tribe's members may suffer as a result of the Proposed Action. In conducting this assessment, the STB should consider existing health conditions on the Reservation and the cumulative effect of exposure to pollutants resulting from the Proposed Action and other pre-existing or reasonably foreseeable activities on and near the Reservation.

c. Impacts to Cultural Resources

The Tribe also calls on the STB to evaluate the effects of the Proposed Action on sites of religious and cultural significance to the Tribe. *See generally* Appendix A at 7-1 through 7-30. Sites of religious significance often feature graves, cemeteries, and other burials; large cairns and pilgrimage/trail marker cairns; vision quest and fasting structures; eagle trapping pits; medicine wheels, arrows, alignments, and prayer lines; very large and very small rings; and rock art motifs. *Id.* at 7-6 through 7-7. Sites of cultural importance include springs, rivers, swamps, and groundwater; ceremonial sites; and places where special plants, animals, and minerals are found. *Id.* at 7-9 through 7-16. These types of sites occur throughout the Tongue River Valley and may be impacted by construction activities and operations associated with the Proposed Action. *Id.* at 7-26 through 7-29. Further information detailing this is in Appendix D.

d. Other Potential Impacts to the Tribe

In addition to the potential impacts discussed above, the Proposed Action could have numerous other adverse effects on the Tribe that should be evaluated, minimized, and mitigated. These include the following:

- Impacts to the Reservation transportation systems caused by increased traffic and congestion associated with the Proposed Action;
- Impacts to the Tribe's land uses in areas adjacent to the Proposed Action, including impacts to Tribal trust acres located on the east side of the Tongue River that may be in the direct path of the proposed railroad;
- Navigability impacts to the Tongue River and other waterbodies;
- Impacts to water availability in the Tongue River Basin (including impacts to the Tribe's Federal Indian Reserved Water Rights in the Tongue River Basin);
- Fire-related impacts to Tribal lands and resources on and near the Reservation;
- Noise and vibration impacts caused by construction and operation of the Proposed Action;
- Socio-economic impacts to the Tribe that result from an influx of workers for the construction and operation of the Proposed Action;
- Aesthetic impacts to the Tongue River Valley, Otter Creek Valley, and the Reservation;
- Impacts to Tribal members' recreational, ceremonial and cultural activities in the Tongue River Valley, Otter Creek Valley, and on the Reservation in areas impacted by the Proposed Action;
- Environmental justice implications of the Proposed Action, including the inequity of allowing the Tribe to suffer disproportionate impacts while receiving only limited benefits from the Proposed Action.

III. Conclusion

The Tribe calls on the STB to: (1) conduct a thorough review of all direct, indirect, and cumulative the impacts that may result from the Proposed Action, with special focus on and disproportionate impacts to the Tribe and its members described above; (2) evaluate alternatives that minimize and mitigate any impacts to the Tribe, including an alternative railroad alignment that would locate railroad operations as far as possible from the eastern Reservation boundary, the Tongue River, and other important waterbodies; (3) provide information about designating the Tribe as a cooperating entity for NEPA review of the Proposed Action and about funding to facilitate Tribal participation in such review; and (4) and consult with the Tribe during every step of the NEPA process.

Sincerely,



John J. Robinson
President
Northern Cheyenne Tribe

1/9/13
Date

- Appendix A – Northern Cheyenne Narrative Report
- Appendix B – Air Quality
- Appendix C – Water Quality
- Appendix D – Cultural Resources



Surface Transportation Board
Washington, D.C. 20423-0001

EO-2051
yr

Office of Environmental Analysis

March 15, 2013

John J. Robinson, President
Northern Cheyenne Tribe
P.O. Box 128
Lame Deer, MT 59043

Dear President Robinson:

Thank you for your letter dated January 9, 2013, setting forth the scoping comments of the Northern Cheyenne Tribe and requesting information on designating the Tribe as a cooperating agency for the Environmental Impact Statement for the Tongue River Railroad's proposal to build and operate a rail line from two termini points near Ashland, Montana, to an existing BNSF rail line. We are currently working on developing the Final Scope of Study, and the Tribe's comments identify several important environmental issues, as well as an alignment set further away from the Reservation boundary and further from the Tongue River and other waterways in the area. I am writing to you today to respond to your request for information on designating the Tribe as a cooperating agency.

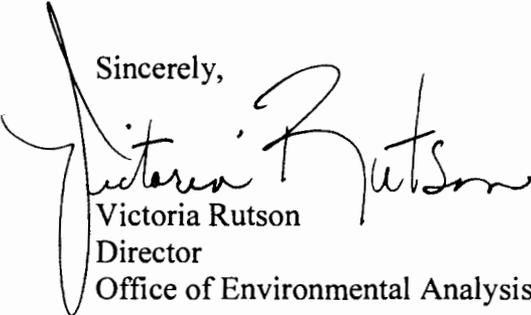
The Surface Transportation Board, like all federal agencies, adheres to the regulations of the President's Council on Environmental Quality (CEQ), which direct agencies on what they must do to comply with the procedures and to achieve the goals of the National Environmental Policy Act. For the Tongue River Railroad proposal, the Board's Office of Environmental Analysis (OEA) is the "lead" agency, meaning that OEA is responsible for preparing the Environmental Impact Statement that will assess the potential environmental impacts associated with construction and operation of the proposed rail line. OEA has asked three other agencies to be cooperating agencies under our lead. They are the Bureau of Land Management, the U.S. Army Corps of Engineers, and the Montana Department of Natural Resources, which is acting for the State Agencies of Montana. We asked these agencies to be cooperating agencies because they would each need to issue a license or permit for the proposed rail line, meaning that they have jurisdiction by law over some aspect of Tongue River Railroad's proposal. See 40 C.F.R. 1501.6. Each of these agencies has accepted our invitation. As small Federal agency with a limited budget (140 people with a yearly budget of less than \$30 million), we cannot fund these agencies or any other agencies to facilitate their roles as cooperating agencies.

Part 1508 of the CEQ regulations provides that when the environmental effects of a proposal or a reasonable alternative to a proposal are on a reservation, an Indian Tribe may, by agreement with the lead agency, become a cooperating agency. 40 C.F.R. 1508.5. The alternative routes for Tongue River Railroad's proposed rail line set out in the Draft Scope of Study, as well as those raised during the scoping meetings and comment period that closed on

January 11, 2013, do not enter the Northern Cheyenne Reservation. Because none of the alternatives under consideration at this point in the environmental review would cross the Northern Cheyenne Reservation, OEA does not anticipate requesting the Tribe to be a cooperating agency. We have and will continue to consult, coordinate, and involve the Tribe in every phase of the Environmental Impact Statement process, as you have requested in your letter. And we appreciate the Northern Cheyenne's willingness to host two of our ten public scoping meetings on the Reservation. Your generosity provided us the opportunity to hear directly from members of the Tribe on the potential environmental impacts from Tongue River Railroad's proposal.

I would be honored to speak with you about this, either in person or by telephone. I have asked our Tribal liaison—Ms. Catherine Nadals—to contact Mr. Conrad Fisher of the Northern Cheyenne Tribe to arrange a convenient time for us to speak. Until then, I am, respectfully, available by phone or email (202-245-0295, rutsonv@stb.dot.gov) to answer any questions or provide additional information.

Sincerely,



Victoria Rutson
Director
Office of Environmental Analysis



-WOHEHIV-
The Morning Star

**NORTHERN CHEYENNE TRIBE
ADMINISTRATION**

P.O. Box 128
LAME DEER, MONTANA 59043
(406) 477-6284
FAX (406) 477-6210



-WOHEHIV-
The Morning Star

6/20/2013

Ken Blodgett
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001,

Attention: Environmental filing, Docket No. FD 30186

Sent via U.S. mail

Re: Northern Cheyenne Tribe's Response to Tongue River Railroad Supplement to Alternatives Screening Analysis.

Dear Mr. Blodgett,

The Northern Cheyenne Tribe ("Tribe") provides this response to the "Supplement to Alternatives Screening Analysis" ("Supplemental Analysis") submitted by the Tongue River Railroad applicants ("Applicants") on April 30, 2013. As detailed below, the Tribe objects to the Supplemental Analysis and renews its call for the Surface Transportation Board ("STB") to include in Tongue River Railroad Environmental Impact Statement ("EIS") a full assessment of reasonable alternatives to reduce the impacts of the project on the Tribe and the Northern Cheyenne Reservation ("Reservation").

As discussed in scoping comments submitted by the Tribe and others, the proposed Tongue River Railroad may have direct and indirect impacts on Tribal interests, including adverse effects to human health of Tribal members and the Reservation environment. To address these impacts, the Tribe's scoping comments requested that the STB consider alternative alignments that would locate the project "as far as possible from the eastern Reservation boundary, the Tongue River, and other important waterbodies." In response, the STB directed the Applicants to consider the "Ashland East" and "Terminus 1" Variations (collectively "Northern Variations"), which would locate portions of the project up to four miles further from the Reservation boundary and the Tongue River than Applicants' preferred alignment, thus potentially reducing the human health, environmental, cultural, and aesthetic impacts to the Tribe from the project. The STB also directed the Applicants to evaluate two alternative routes going south from Ashland to Decker rather than north to Colstrip (the "Decker Alternatives").

Applicants oppose the Northern Variations, claiming that "[t]here do not appear to be any apparent offsetting benefits" to these alignments. Supplemental Analysis at 23. However, Applicants contradict this statement by conceding that the Ashland East Variation could

LITTLE WOLF AND MORNING STAR – Out of defeat and exile they led us back to Montana and won our Cheyenne homeland that we will keep forever.

potentially result in reduced noise and air quality impacts to the Tribe and the Reservation. See Supplemental Analysis at 22 (“noise impacts on the reservation could be lower [but] the number of receptors in the area traversed by the Ashland East Variation would need to be determined in order to meaningfully compare noise impacts”); *id.* (“further study would be required to assess air quality impacts to the reservation of the proposed Variation in contrast to the originally proposed routes.”). The Terminus 1 Variation would also be located further from the Reservation boundary and the Tongue River, and would similarly reduce noise and air quality impacts on the Reservation. While Applicants are correct that the precise magnitude of such benefits is uncertain, such uncertainty is not a valid basis to exclude consideration of the Northern Variations in the EIS. See *Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1195 (9th Cir. 1988) (“The purpose of an EIS is to obviate the need for such speculation by insuring that available data are gathered and analyzed prior to the implementation of the proposed action.”).

Applicants also oppose the Decker Alternatives, claiming that “the two Decker alternatives would be disadvantageous for Otter Creek coal moving to its primary markets and therefore would not serve the purpose and need” of the project. Supplemental Analysis at 10. This argument is premised on Applicants’ narrow characterization of the purpose and need as “to **efficiently** transport low-sulfur, sub-bituminous coal from mine sites” in the region. Supplemental Analysis at 8 (emphasis added). The Tribe questions the validity of this construction of the purpose and need, which is narrower than the construction provided by the STB in its March 2013 scoping decision (goal of project “is to transport low sulfur, sub-bituminous coal from mine sites developed in Rosebud and Powder River Counties, Montana, including proposed mines in the Otter Creek area.”). See *Klamath-Siskiyou Wildlands Ctr. v. U.S. Forest Serv.*, 373 F. Supp. 2d 1069, 1087 (E.D. Cal. 2004) (NEPA does not permit an agency to “narrowly define its purpose and need so as to winnow down the alternatives until only the desired one survives.”). Moreover, even if “efficient” transportation of coal were the purpose and need of this project, analysis of project efficiency must evaluate costs beyond construction and operation costs incurred by Applicants, including the public and societal costs that may be avoided by various alternatives (e.g., reduced exposure to harmful pollutants, noise and vibration-related injuries, and traffic-congestion related impacts).

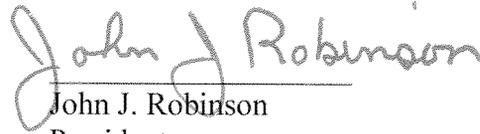
Applicants fail to demonstrate that the Northern Variations or Decker Alternatives would be infeasible or otherwise unreasonable to implement, and acknowledge that at least the Northern Variations may result in reduced adverse impacts to the Tribe. Accordingly, exclusion of the Northern Variations or Decker Alternatives from the EIS would be inconsistent with the “rule of reason” that guides NEPA decisionmaking. See *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1207 (9th Cir. 2004) (“The rule of reason ‘guides both the choice of alternatives as well as the extent to which the [EIS] must discuss each alternative.’”) (quoting *City of Carmel-by-the-Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997)) (brackets in original).

* * *

The Tribe continues to be concerned that the Tongue River Railroad project will result in unacceptable environmental, economic, and cultural injuries to the Tribe and its members. To address these concerns, the Tribe calls on the STB to prepare an EIS for this proposal that

includes a full evaluation of all reasonable alternatives that could reduce impacts to the Tribe, including detailed assessment of the Northern Variations and Decker Alternatives.

Sincerely,

A handwritten signature in black ink that reads "John J. Robinson". The signature is written in a cursive style with a horizontal line underneath the name.

John J. Robinson

President

Northern Cheyenne Tribe

cc: Shannon Johnson, U.S. Army Corps of Engineers
Shane Findlay, U.S. Bureau of Land Management
Kristi Ponozo, Montana Department of Environmental Quality

**Meeting with Surface Transportation Board****Catherine Nadals** to: Bryan

Cc: wanapeyanajica, ostnrrathpo, "Starzak, Richard"

07/18/2013 12:10 PM

Dear President Brewer:

The Surface Transportation Board would like to set up a short call with you to discuss the Tongue River Railroad Construction Project. Victoria Rutson, Director of the Office of Environmental Analysis, would be representing the Board on the call to you.

The purpose of the call is to ensure that we are appropriately considering any issues that may be of concern to your tribe. Wilmer Mesteth has informed us that the Oglala Sioux is interested in being included in government to government consultations for all the issues considered under the NEPA umbrella. We have been in contact with Mr. Mesteth and with Joyce Whiting regarding various potential impacts of the project to the human and natural environment. However, Miss Rutson would like to speak with you personally to ensure that all of your concerns are being addressed.

Please kindly inform me of a time next week when you would be available for the call. Miss Rutson's direct number is 202-245-0295.

Thank you.

Catherine Nadals
Environmental Protection Specialist
Office of Environmental Analysis
Surface Transportation Board
Washington, DC 20423
(202) 245-0293

Attachment C: Section 106 Consultation



SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Environmental Analysis

October 22, 2012

Dr. Mark Baumler
 State Historic Preservation Officer
 Montana Historical Society
 225 North Roberts, P.O. Box 201201
 Helena, MT 59620-1201

Attn: Stan Wilmoth

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

Dear Dr. Baumler:

The Surface Transportation Board (Board) is beginning the scoping process for an Environmental Impact Statement (EIS) evaluating a revised proposal by the Tongue River Railroad Company (TRRC) to build and operate a new rail line in Montana. We are interested in hearing from you and including your comments, ideas, and concerns on the Draft Scope of Study for the EIS, which is attached to this letter. Pursuant to the National Environmental Policy Act (NEPA), Section 106 of the National Historic Preservation Act (NHPA), the Montana Antiquities Act, and Montana Human Skeletal Remains and Burial Site Protection Act, OEA would like to initiate consultation with your office to determine if the proposed rail line has the potential to affect architectural, archeological, tribal or other historic properties.

In 1986, the Board's predecessor agency, the Interstate Commerce Commission (ICC), authorized TRRC to build and operate an 89-mile rail line from Miles City to Ashland, Montana, for the purpose of transporting coal from area coal mines to a rail line north of Miles City in a proceeding known as Tongue River I.¹ As you may know, following a remand from the Ninth Circuit on two different but related TRRC cases,² the Board issued a decision requiring TRRC to file a revised application describing changes to the proposal it had originally filed in Tongue River I.³

¹ Tongue River R.R.—Rail Constr. and Operation—In Custer, Powder River and Rosebud Cntys., Mont. (Tongue River I), FD 30186 (ICC served Sept. 4, 1985), modified (ICC served May 9, 1986), pet. for judicial review dismissed, N. Plains Res. Council v. ICC, 817 F.2d 758 (9th Cir.), cert. denied, 484 U.S. 976 (1987).

² Tongue River R.R.—Rail Constr. and Operation—Ashland to Decker, Mont., 1 S.T.B. 809 (1996), pet. for reconsid. denied (STB served Dec. 31, 1996); Tongue River R.R.—Rail Constr. and Operation—Ashland to Decker, Mont., FD 30186 (Sub-No. 3) (STB served Oct. 9, 2007), pet. for reconsid. denied (STB served Mar. 13, 2008). The Ninth Circuit remanded these decisions, in part, for incomplete baseline data that formed the foundation of the EIS in Tongue River I.

³ Tongue River R.R.—Rail Constr. & Operation—In Custer, Powder River & Rosebud Cntys., Mont., FD 30186 et al. (STB served June 18, 2012).

Specifically, the Board required TRRC to “present fully TRRC’s current proposal to build the rail line between Miles City and Ashland.” The Board also required TRRC to provide “current information regarding TRRC’s ownership; the planned terminus points for the proposed line; the purpose of the proposed rail line; the demand and need for its construction; and TRRC’s financial fitness to proceed.” The Board also stated that it will prepare a **new EIS**—not a supplement to the EIS prepared in Tongue River I by the ICC.⁴

The Board received an application from TRRC on October 16, 2012 for the construction and operation of an approximately 80-mile rail line from Miles City, Montana, to two ending points, one near the site of the previously planned Montco mine near Ashland, Montana, and another at the proposed Otter Creek mine east of Ashland, Montana. OEA issued a Notice of Intent (NOI) to prepare an EIS for the project, a Draft Scope of Study, and a notice of scoping meetings.⁵ We would appreciate your comments on the Draft Scope of Study and potential alternatives to TRRC’s proposed alignment, including at a minimum, those analyzed in the EIS in Tongue River I (see attached map) by the close of the scoping comment period on **December 6, 2012**.

The proposed rail line would extend approximately 80 miles, depending on the route selected, from Miles City, Montana, to two ending points near Ashland, Montana (see attached map). Other major elements of the proposed project would include a 200-foot-wide right-of-way; crossings of local roads, streams, trails, and utility corridors; two passing sidings one near Milepost 27 and the other near Milepost 46; and ancillary facilities. The anticipated train traffic between Miles City and Ashland on the proposed rail line would consist of 26 round trips per week, or 3.7 loaded unit coal trains daily on average, with 7.4 trains per day total (empty and loaded). The EIS will analyze and compare the potential impacts of (1) construction and operation of the proposed rail line, (2) all reasonable and feasible alternative routes, and (3) the no-action alternative (denial of the application).

As part of the NEPA and Section 106 processes, OEA is requesting your initial comments regarding the potential for the rail line to affect historical, architectural, archeological, tribal or other historic properties that may be in the project area.

Initiation of Section 106 Consultation

OEA much appreciates your involvement in the Section 106 consultations for the earlier proposed alignments of Tongue River I, II, and III, and would now like to initiate consultation with you for the new undertaking as currently proposed by TRRC to the Board. OEA also appreciates the attendance of Stan Wilmoth of your staff at our meeting held on January 25-26, 2012, with tribes and other consulting parties to discuss the alignment under consideration at that time. OEA will be re-visiting the definition and documentation of the Area of Potential Effects (APE) and the methodology for the identification of historic properties and traditional cultural properties that was developed in the now expired Programmatic Agreement and will send information on those topics under separate cover for your review and comment. Also, under separate cover, we will provide for your review and comment, a list of Section 106 consulting

⁴ Id. at 8.

⁵ The Forsyth meeting location has been updated since publication of the Notice of Intent in the Federal Register. The new location is the Haugo Center at Riverview Villa, Rosebud Street, Exit 95, Forsyth, MT 59327.

parties currently under consideration by OEA. We welcome any suggestions you may have regarding consulting parties that you think should be added to our list.

Additional information on this project is available on the Board's website at http://www.stb.dot.gov/stb/environment/key_cases.html, and on the project website at tonguerivereis.com. If you have any questions or would like to discuss the proposal in more detail, please contact Ken Blodgett at 202-245-0305 (blodgett@stb.dot.gov) who is the environmental manager for this project. You can also contact Alan Summerville with ICF International (our third party contractor), at 703-934-3616 (Alan.Summerville@icfi.com). As before, Catherine Glidden of my staff will be working on the historic preservation and tribal portions of the project. She can be contacted at 202-245-0293 (gliddenc@stb.dot.gov).

We look forward to consulting with you and your office on this project.

Very truly yours,

A handwritten signature in black ink, appearing to read "Victoria Rutson". The signature is fluid and cursive, with a large initial "V" and "R".

Victoria Rutson
Director
Office of Environmental Analysis

Attachments

Big Sky. Big Land. Big History.
Montana
Historical Society

*Historic Preservation
Museum
Outreach & Interpretation
Publications
Research Center*

October 30, 2012

VICTORIA RUTSON
OFFICE OF ENVIRONMENTAL REVIEW
SURFACE TRANSPORTATION BOARD
395 E ST, SW
WASHINGTON DC 20423

RE: Docket No FD 30186 Tongue River Railroad

Dear Director Rutson:

Thank you for initiating consultation with our office for the renewed consideration of Historic Properties which may be affected should the proposed Tongue River Railroad be approved and constructed. We look forward to further discussion regarding the APE, methodology for identification efforts and development of a Programmatic Agreement. We agree that the Northern Cheyenne, Crow and the various Lakota tribes of North and South Dakota should be invited to consult. We suggest that the Three Affiliated Tribes, Wind River Shoshone and Fort Peck Tribes should also be invited. As your tribal consultation proceeds please inform us of issues and concerns elicited (with the permission of tribes of course) so we can include those considerations in our determinations or findings. As tribal issues are a matter of record we will need that information to move forward just as STB will. The issue of potential eligible landscape scale Historic Properties – ethnographic, traditional cultural, or recreational and ranching/farming/homesteading should be included in the mix of identification efforts as early as possible.

Sincerely,



Stan Wilmoth, Ph.D.
State Archaeologist/Deputy, SHPO

225 North Roberts Street
P.O. Box 201201
Helena, MT 59620-1201
(406) 444-2694
(406) 444-2696 FAX
montanahistoricalsociety.org



SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Environmental Analysis

December 10, 2012

Ms. Charlene Dwin-Vaughn
Director
Advisory Council on Historic Preservation
1100 Pennsylvania Avenue NW, Suite 803
Washington, DC 20004

Attn: Ms. Najah Duvall-Gabriel

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

Dear Ms. Dwin-Vaughn:

Your involvement, advice, and guidance for the previously proposed undertakings known as Tongue River Railroad I, II, and III is much appreciated. On October 16, 2012, the Surface Transportation Board (Board) received a revised application from the Tongue River Railroad Company (TRRC) to construct and operate a new rail line from Miles City, Montana to two ending points, one near the site of the previously planned Montco mine near Ashland, Montana and another at the proposed Otter Creek mine east of Ashland. The purpose of this letter is to inform the Council of the extent of the undertaking as currently proposed and to seek your guidance and advice as we begin the compliance process with Section 106 of the National Historic Preservation Act (NHPA) and the Council's regulations at 36 CFR Part 800.

As you are aware, the Board is the Federal agency responsible for granting authority for the construction and operation of the proposed rail line by TRRC, and the Board's potential licensing is a Section 106 undertaking. As part of the process for considering whether to grant authority, the Board has already initiated the Section 106 process with the Montana State Historic Preservation Officer (SHPO) and is in the process of identifying other consulting parties, including the Northern Cheyenne and other tribes who now or previously inhabited this area. For your reference, Attachment A to this letter includes a map of the potential alternatives currently being considered and Attachment B includes the list of Section 106 Consulting Parties we have reached out to regarding this undertaking.

The Office of Environmental Analysis (OEA) is the office within the Board responsible for preparing the appropriate documentation for compliance with the National Environmental Policy Act (NEPA) as well as Section 106 of the NHPA. Concurrently, OEA is preparing an Environmental Impact Statement (EIS) to evaluate the potential environmental impacts of the TRRC's proposed rail line, including consideration of potential impacts to cultural resources. ICF International is serving as the independent third-party consultant to assist OEA with the EIS and Section 106.

Description of the undertaking: The proposed rail line would extend approximately 83 miles, depending on the route selected, from Miles City, Montana, to two ending points near

Ashland, Montana. Other major elements of the proposed project would include a 200-foot-wide right-of-way; crossings of local roads, streams, trails, and utility corridors; two passing sidings one near proposed Milepost 27 and the other near proposed Milepost 46; and ancillary facilities. At a minimum, OEA is considering those alternatives analyzed in the Tongue River I EIS – the Tongue River Road Alternative, the Moon Creek Alternative, and the Colstrip Alternative. As part of its alternatives development process, OEA is determining the feasibility of these and other potential rail routes. None of the potential alternatives currently under consideration would enter the Northern Cheyenne Indian Reservation; however, one of the potential alternatives would be located along the opposite side and to the east of the Tongue River, which forms the eastern boundary of the reservation.

As mentioned earlier, OEA very much appreciates your involvement in the Section 106 consultations for the earlier proposed alignments of Tongue River I, II, and III, and would now like to initiate consultation with you for the new undertaking. OEA also appreciates the attendance via teleconference of you and your staff at our meeting held on January 25-26, 2012, with the Northern Cheyenne Indian Tribe, other tribes and other consulting parties to discuss the alignment under consideration at that time. OEA will be re-visiting the definition and documentation of the Area of Potential Effects (APE) and the methodology for the identification of historic properties and traditional cultural properties that was developed in the now expired Programmatic Agreement and will send information on those topics under separate cover for your review and comment. We welcome any advice or guidance you may have for us at this time, in accordance with 36 CFR § 800.2(b)(2).

Additional information on this undertaking is available on the Board's website at http://www.stb.dot.gov/stb/environment/key_cases.html, and on the project website at <http://www.tonguerivereis.com>. As before, Catherine Glidden of my staff will be the Section 106 contact for the undertaking. She can be contacted at 202-245-0293 (gliddenc@stb.dot.gov). You can also contact Richard Starzak with ICF International (our third party contractor) at 213-627-5376 ext. 222 (richard.starzak@icfi.com).

We look forward to continuing consultation with you and your office on this undertaking.

Very truly yours,



Victoria Rutson
Director
Office of Environmental Analysis

Attachments: Map; Background

Attachment B: Section 106 Consulting Party List

800.2(a) Other Federal Agencies

Douglas Melton, Archaeologist, BLM
Shannon L. Johnson, Billings Regulatory Office, USACE
Erica Jones, Realty Specialist, Agricultural Research Service, USDA
Christine Whitacre, Program Manager, Heritage Partnerships Program, NPS

800.2(c)(1) Montana SHPO

Mark Baumler, Ph. D., State Historic Preservation Officer
Stan Wilmoth, Ph. D., State Archaeologist

800.2(c)(2) Indian Tribes

Conrad Fisher, Tribal Historic Preservation Officer (THPO), Northern Cheyenne Tribe
Burton Pretty On Top, THPO, Director, Cultural Department, The Crow Tribe of Indians
Clair S. Green, Cultural Resource Manager, Lower Brule Sioux Tribe
Wilmer Mesteth, THPO, Oglala Sioux Tribe
Waste'Win Young, THPO, Standing Rock Sioux Tribe
Steve Vance, THPO, Cheyenne River Sioux Tribe
Lana M. Gravatt, THPO, Yankton Sioux Tribe
Dianne Desrosiers, THPO, Sisseton-Wahpeton Oyate
James B. "JB" Weston, THPO, Flandreau Santee Sioux
Russell Eagle Bear, THPO, Rosebud Sioux Tribe of Indians
Rick Thomas, THPO, Santee Sioux Nation (Santee Sioux Tribe of Nebraska)
Lynette Gray, THPO, Planning & Development, Cheyenne & Arapaho Tribes
Darlene Conrad, THPO, Northern Arapaho Tribe
Wanda Wells, THPO, Crow Creek Sioux Tribe
Leonard Wabasha, Cultural Committee, Shakopee Mdewakanton Sioux
Elgin Crows Breast, THPO, Three Affiliated Tribes: Mandan, Hidatsa & Arikara Nation
Anthony Morse, THPO, Lower Sioux Indian Community
Marlow LaBatte, THPO, Upper Sioux Community
John Murray, THPO, The Blackfeet Nation
Wilfred Ferris, THPO, Shoshone Tribe of the Wind River Reservation

800.2(c)(3) Representatives of local governments

Lisa Axline, Right-of-Way Specialist, Montana Department of Natural Resources & Conservation
Connie Muggli, Historic Preservation Officer, Miles City Historic Preservation Office

800.2(c)(4) Applicants for Federal assistance, permits, licenses and other approvals

David Coburn, Steptoe & Johnson, representing Tongue River Railroad Company, Inc.
Barbara Ranf, Director, Government Affairs, BNSF

800.2(c)(5) Additional consulting parties

National Trust for Historic Preservation
Betsy Merritt, Deputy General Counsel,
Amy Cole, Regional Attorney/Sr. Program Officer



SURFACE TRANSPORTATION BOARD
Washington, DC 20423

EO-1995

Office of Environmental Analysis

December 10, 2012

Conrad Fisher
Tribal Historic Preservation Officer
Northern Cheyenne Tribe
P.O. Box 128
Lame Deer, MT 59043

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

Dear Mr. Fisher:

The Office of Environmental Analysis (OEA) appreciates your ongoing involvement in the Section 106 consultations for the proposed Tongue River railroad. Thank you for hosting, a meeting on November 16, 2012 with Cathy Glidden of my staff to discuss a revised project proposed by Tongue River Railroad Company, Inc. (TRRC) to the Surface Transportation Board (Board) on October 16, 2012. As currently proposed, TRRC's rail line would be constructed and operated between Miles City to two ending points; one near the site of the previously planned Montco mine and another at the proposed Otter Creek mine, a distance of approximately 83 miles (see attached map). None of the potential alternatives currently under consideration would enter the Northern Cheyenne Indian Reservation; however, one of the potential alternatives would be located along the eastern side of the Tongue River (see the attached map.) More information is available on the Board's website at http://www.stb.dot.gov/stb/environment/key_cases.html, and on the project website at <http://www.tonguerivereis.com>.

The purpose of this letter is to formally and respectfully invite the Northern Cheyenne Tribe to continue to be a Consulting Party on TRRC's rail line under Section 106 of the National Historic Preservation Act (NHPA). As requested in the February 10, 2012, letter from former President Spang, the Board also intends to initiate government-to-government consultation with the Northern Cheyenne Tribe, but that consultation will be formally initiated in a separate letter to the new president, John Robinson.

OEA looks forward to consulting with you and other tribal representatives. We have already initiated the Section 106 process with the Montana State Historic Preservation Officer (SHPO) and are in the process of identifying other consulting parties, including the tribes mentioned in the February 10 letter.

As before, Cathy will be OEA's point of contact at 202-245-0293 (gliddenc@stb.dot.gov). You can also contact Rick Starzak with ICF International (our third party contractor) at 213-627-5376 ext. 222 (richard.starzak@icfi.com). Please feel free to contact Cathy or Rick anytime.

We look forward to consulting with you and all tribal representatives on this revised undertaking.

Very truly yours,

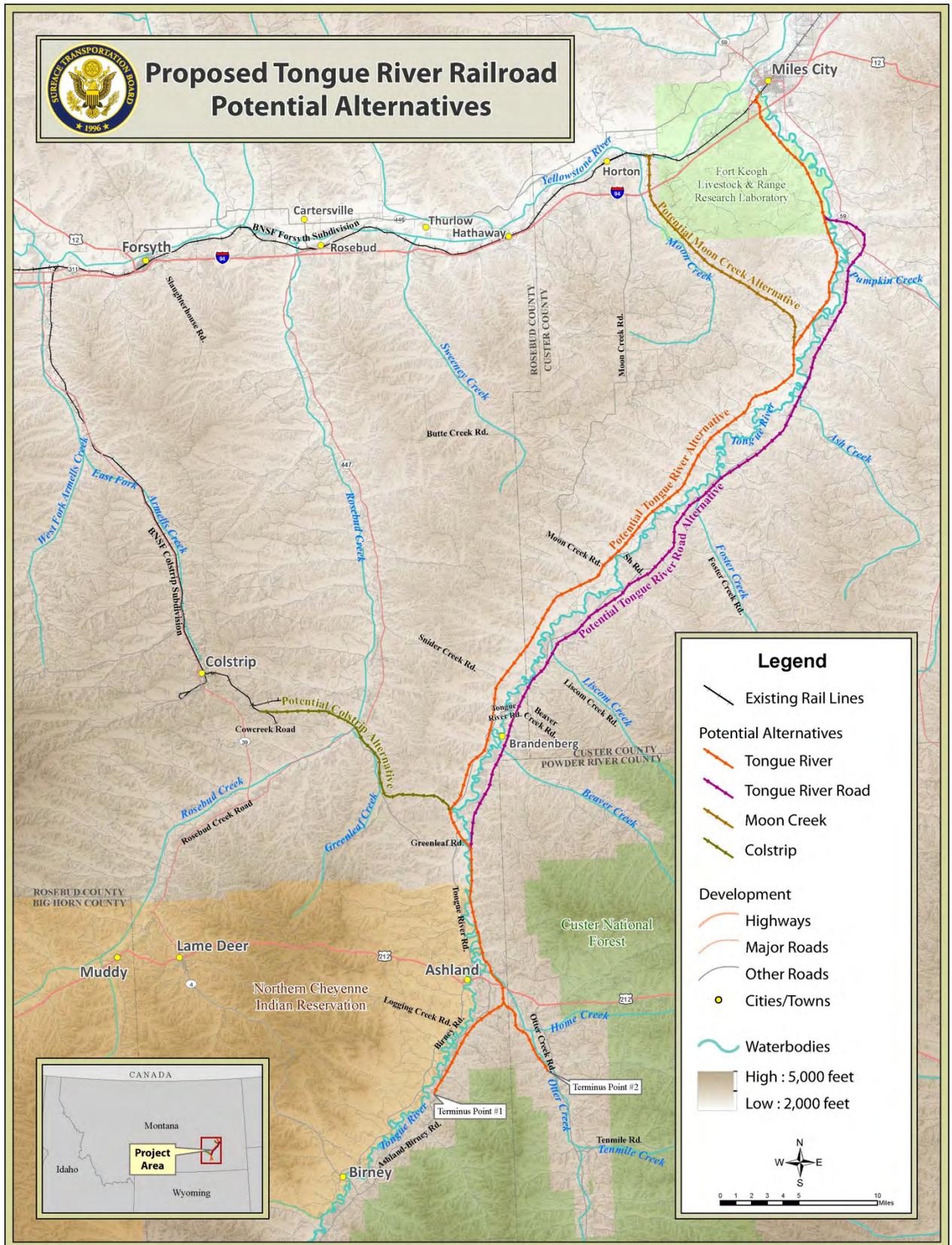
Victoria Rutson

Director

Office of Environmental Analysis

Attachments: Map of Potential Alternatives

Attachment: Map of Potential Alternatives





SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Environmental Analysis

December 11, 2012

Amy Cole
Regional Attorney/Sr. Program Officer
National Trust for Historic Preservation
535 16th St., Suite 750
Denver, CO 80202

Re: Docket No. FD 30186, Tongue River Railroad Company, Inc.—Rail Construction and Operation—in Custer, Powder River and Rosebud Counties, Montana: Initiation of Section 106 Consultation for Revised Undertaking.

Dear Ms. Cole:

The Office of Environmental Analysis (OEA) appreciates your time and effort during the Section 106 consultations for the earlier proposed alignments of Tongue River I, II, and III. As you probably know, on October 16, 2012, the Surface Transportation Board received a revised application from the Tongue River Railroad Company (TRRC) seeking the Board's authority to construct and operate a new rail line. The decision facing the Board whether or not to permit the construction and operation of the new rail line is an undertaking subject to compliance with Section 106 of the National Historic Preservation Act (NHPA) and its implementing regulations at 36 CFR Part 800.

This letter has three purposes:

- First, to learn whether your organization remains interested in participating as a Consulting Party. We have enclosed a post card (Attachment B) that we hope makes it easier for you to select the level of involvement that you are interested in. If we do not hear back from you, we will assume that you want to continue as a Consulting Party.
- Second, to initiate formal consultation under Section 106 of the National Historic Preservation Act.
- And third, to provide another forum (in addition to the scoping meetings) for you to submit comments on potential effects to historic properties that may be located in the area and should be afforded close attention in the Environmental Impact Statement.

For your reference, Attachment A to this letter includes a map of the potential alternatives currently being considered. Additional information on this project is available on the Board's website at http://www.stb.dot.gov/stb/environment/key_cases.html, and on the project website at <http://www.tonguerivereis.com/>. Attachment B is the post card discussed above.

As before, Catherine Glidden of my staff will be leading the Section 106 consultation for the project. She may be contacted at 202-245-0293 (gliddenc@stb.dot.gov). You may also contact

Amy Cole, National Trust for Historic Preservation

December 11, 2012

Page 2

Richard Starzak with ICF International (OEA's third party contractor) at 213-627-5376 ext. 222 (richard.starzak@icfi.com). Thank you for your time and efforts in helping us do the best job we can.

Sincerely,

A handwritten signature in black ink, appearing to read "Victoria Rutson". The signature is fluid and cursive, with the first name "Victoria" written in a larger, more prominent script than the last name "Rutson".

Victoria Rutson
Director
Office of Environmental Analysis

cc: Richard Starzak, ICF International
Enclosures: Map of Potential Alternatives; NHPA Section 106 Consultation Options Form

ATTACHMENT B: NHPA SECTION 106 CONSULTATION OPTIONS FORM

National Trust for Historic Preservation

STB Docket No. FD 30186, Tongue River Railroad Company, Inc. (TRRC)—Rail Construction and Operation—
in Custer, Powder River and Rosebud Counties, Montana.

Project Name: TRRC’s proposed rail line

Please check all the appropriate response(s) that apply from the list below and use the back of this form or additional sheets if you wish to make comments:

_____ We have no interests associated with TRRC’s proposed rail line and further consultation with our organization is not required.

_____ We want to continue to receive project information by mail and participate in the public involvement process.

_____ We have an interest in TRRC’s proposed rail line and want to participate as a “Consulting Party” in the Section 106 of the NHPA process.

Name of National Trust for Historic Preservation designated contact for Section 106 Consultation for STB’s decision on whether to allow TRRC to construct and operate a new rail line in Montana:

Please print

Phone: _____

e-mail: _____

Signed: _____

Date: _____

Please mail to: Cathy Glidden
FD No. 30186
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001

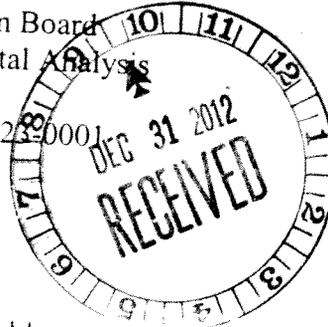
Comments on potential effects to historic properties that may be located in the area:

Empty rectangular box for comments.

\$0.450
US POSTAGE
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Cathy Glidden
FD No. 30186
Surface Transportation Board
Office of Environmental Analysis
395 E Street, SW
Washington, D.C. 20423-0001



U.S. Army Corps of Engineers

STB Docket No. FD 30186, Tongue River Railroad Company, Inc. (TRRC)—
Rail Construction and Operation—in Custer, Powder River and Rosebud
Counties, Montana. Project: **TRRC's Proposed Rail Line**

Please check all the appropriate response(s) that apply from the list below:

We have no interests associated with TRRC's proposed rail line and further consultation with our organization is not required.

We want to continue to receive project information by mail and participate in the public involvement process.

We have an interest in TRRC's proposed rail line and want to participate as a "Consulting Party" in the Section 106 of the NHPA process.

Contact name for Section 106 Consultation for STB's decision on whether to allow TRRC to construct and operate a new rail line in Montana::

Shannon Johnson
Please print

Phone: 406-657-5910
e-mail: Shannon.johnson@usace.army.mil

Signed: Shannon Johnson

Date: 12-14-12

National Trust for Historic Preservation

STB Docket No. FD 30186, Tongue River Railroad Company, Inc. (TRRC)—
Rail Construction and Operation—in Custer, Powder River and Rosebud
Counties, Montana. Project: **TRRC's Proposed Rail Line**

Please check all the appropriate response(s) that apply from the list below:

We have no interests associated with TRRC's proposed rail line and further consultation with our organization is not required.

We want to continue to receive project information by mail and participate in the public involvement process.

We have an interest in TRRC's proposed rail line and want to participate as a "Consulting Party" in the Section 106 of the NHPA process.

Contact name for Section 106 Consultation for STB's decision on whether to allow TRRC to construct and operate a new rail line in Montana::

Elizabeth Merritt Phone: 202-588-6026
Please print e-mail: emerritt@
savingplaces.org
Signed: Elizabeth S. Merritt Date: 12/17/12

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Cathy Glidden
FD No. 30186
Surface Transportation Board
Office of Environmental Analysis
395 E Street, SW
Washington, D.C. 20423-0001

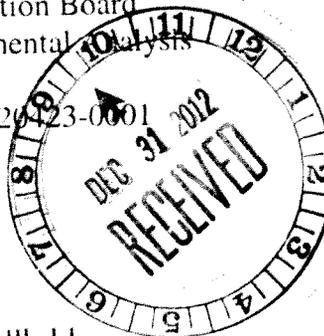


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Cathy Glidden
FD No. 30186
Surface Transportation Board
Office of Environmental Analysis
395 E Street, SW
Washington, D.C. 20423-0001



Montana Department of Natural Resources & Conservation

STB Docket No. FD 30186, Tongue River Railroad Company, Inc. (TRRC)—
Rail Construction and Operation—in Custer, Powder River and Rosebud
Counties, Montana. Project: **TRRC's Proposed Rail Line**

Please check all the appropriate response(s) that apply from the list below:

- We have no interests associated with TRRC's proposed rail line and further consultation with our organization is not required.
- We want to continue to receive project information by mail and participate in the public involvement process.
- We have an interest in TRRC's proposed rail line and want to participate as a "Consulting Party" in the Section 106 of the NHPA process.

Contact name for Section 106 Consultation for STB's decision on whether to allow TRRC to construct and operate a new rail line in Montana::

Patrick Rennie
Please print

Phone: 406-444-2882
e-mail: prennie@mt.gov

Signed: Sasa Axline

Date: 12-17-2012

The Crow Tribe of Indians

STB Docket No. FD 30186, Tongue River Railroad Company, Inc. (TRRC)—
Rail Construction and Operation—in Custer, Powder River and Rosebud
Counties, Montana. Project: **TRRC's Proposed Rail Line**

Please check all the appropriate response(s) that apply from the list below:

We have no interests associated with TRRC's proposed rail line and
further consultation with our organization is not required.

We want to continue to receive project information by mail and
participate in the public involvement process.

We have an interest in TRRC's proposed rail line and want to
participate as a "Consulting Party" in the Section 106 of the NHPA process.

Contact name for Section 106 Consultation for STB's decision on whether to
allow TRRC to construct and operate a new rail line in Montana:

Herbert S. Two Leggings
Please print

Phone: ^{(406) 639-3878 office} (406) 639-3157 cell
e-mail: herbert@crowtribe.net

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Cathy Glidden
FD No. 30186
Surface Transportation Board
Office of Environmental Analysis
395 E Street, SW
Washington, D.C. 20423-0001



The Blackfeet Nation

STB Docket No. FD 30186, Tongue River Railroad Company, Inc. (TRRC)—
Rail Construction and Operation—in Custer, Powder River and Rosebud
Counties, Montana. Project: **TRRC's Proposed Rail Line**

Please check all the appropriate response(s) that apply from the list below:

- We have no interests associated with TRRC's proposed rail line and further consultation with our organization is not required.
- We want to continue to receive project information by mail and participate in the public involvement process.
- We have an interest in TRRC's proposed rail line and want to participate as a "Consulting Party" in the Section 106 of the NHPA process.

Contact name for Section 106 Consultation for STB's decision on whether to allow TRRC to construct and operate a new rail line in Montana::

John R. Murray, THPO
 Please print Blackfeet
 Signed [Signature]

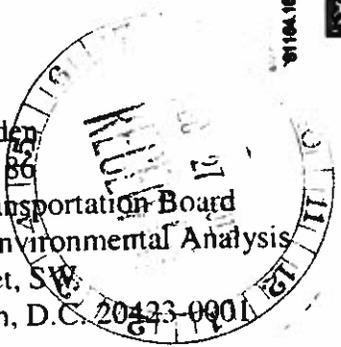
406 338 7522
 Phone: _____
 e-mail: [Handwritten]
 Date: 12/20/12

Handwritten: jkthpo@901.com

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Cathy Glidden
 FD No. 30186
 Surface Transportation Board
 Office of Environmental Analysis
 395 E Street, SW
 Washington, D.C. 20423-0901



ATTACHMENT B: NHPA SECTION 106 CONSULTATION OPTIONS FORM

representing Tongue River Railroad Company, Inc.

STB Docket No. FD 30186, Tongue River Railroad Company, Inc. (TRRC)—Rail Construction and Operation—
in Custer, Powder River and Rosebud Counties, Montana.

Project Name: TRRC's proposed rail line

*Please check all the appropriate response(s) that apply from the list below and use the back of this form or
additional sheets if you wish to make comments:*

- We have no interests associated with TRRC's proposed rail line and further consultation with our organization is not required.
- We want to continue to receive project information by mail and participate in the public involvement process.
- We have an interest in TRRC's proposed rail line and want to participate as a "Consulting Party" in the Section 106 of the NHPA process.

Name of representing Tongue River Railroad Company, Inc. designated contact for Section 106 Consultation for STB's decision on whether to allow TRRC to construct and operate a new rail line in Montana:

David H. Coburn
Please print Attorney for Tongue River RR
Signed: 

Phone: 202 429 8063
e-mail: dcoburn@stptar.com
Date: 12/21/12

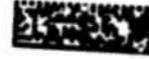
Please mail to: Cathy Glidden
FD No. 30186
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001

Comments on potential effects to historic properties that may be located in the area:



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Cathy Glidden
FD No. 30186
Surface Transportation Board
Office of Environmental Analysis
395 E Street, SW
Washington, D.C. 20423-0001



National Park Service

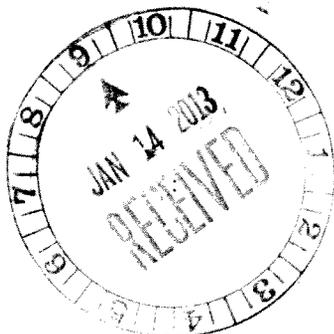
STB Docket No. FD 30186, Tongue River Railroad Company, Inc. (TRRC)—
Rail Construction and Operation—in Custer, Powder River and Rosebud
Counties, Montana. Project: **TRRC's Proposed Rail Line**

Please check all the appropriate response(s) that apply from the list below:

- We have no interests associated with TRRC's proposed rail line and further consultation with our organization is not required.
- We want to continue to receive project information by mail and participate in the public involvement process.
- We have an interest in TRRC's proposed rail line and want to participate as a "Consulting Party" in the Section 106 of the NHPA process.

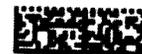
Contact name for Section 106 Consultation for STB's decision on whether to allow TRRC to construct and operate a new rail line in Montana::

Christine Whitacre Phone: *303-969-2882*
 Please print e-mail: *christine.whitacre@nps.gov*
 Signed: *Christine Whitacre* Date: *12/21/2012*



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Cathy Glidden
FD No. 30186
Surface Transportation Board
Office of Environmental Analysis
395 E Street, SW
Washington, D.C. 20423-0001



Miles City Historic Preservation Office

STB Docket No. FD 30186, Tongue River Railroad Company, Inc. (TRRC)—
Rail Construction and Operation—in Custer, Powder River and Rosebud
Counties, Montana. Project: **TRRC's Proposed Rail Line**

Please check all the appropriate response(s) that apply from the list below:

We have no interests associated with TRRC's proposed rail line and further consultation with our organization is not required.

We want to continue to receive project information by mail and participate in the public involvement process.

We have an interest in TRRC's proposed rail line and want to participate as a "Consulting Party" in the Section 106 of the NHPA process.

Contact name for Section 106 Consultation for STB's decision on whether to allow TRRC to construct and operate a new rail line in Montana::

Constance L Muggli
Please print

Phone: 706-232-8914
e-mail: forclaritygroup@gmail.com

Signed: Constance L Muggli

Date: 1/14/2013

Standing Rock Sioux Tribe

STB Docket No. FD 30186, Tongue River Railroad Company, Inc. (TRRC)—
Rail Construction and Operation—in Custer, Powder River and Rosebud
Counties, Montana. Project: **TRRC's Proposed Rail Line**

Please check all the appropriate response(s) that apply from the list below:

We have no interests associated with TRRC's proposed rail line and
further consultation with our organization is not required.

We want to continue to receive project information by mail and
participate in the public involvement process.

We have an interest in TRRC's proposed rail line and want to
participate as a "Consulting Party" in the Section 106 of the NHPA process.

Contact name for Section 106 Consultation for STB's decision on whether to
allow TRRC to construct and operate a new rail line in Montana::

Waste'win Young

Phone: 701-854-2120

Please print Mary Wilson

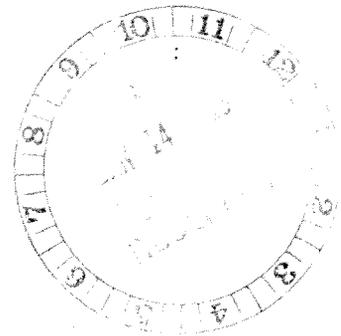
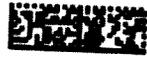
e-mail: wyoung@standingrock.org
mwilson@standingrock.org

Signed: Mary Wilson

Date: 1-8-13

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Cathy Glidden
FD No. 30186
Surface Transportation Board
Office of Environmental Analysis
395 E Street, SW
Washington, D.C. 20423-0001



TO THE SURFACE TRANSPORTATION BOARD**c/o CHAIRMAN DANIEL R. ELLIOTT, III****395 E Street SW, Washington, DC 20423****Re: Tongue River Railroad, Docket # FD 30186****(FOLLOWED BY ORAL COMMENTS on Feb 13th, 2014)****BY PRESIDENT LLEVANDO “COWBOY” FISHER****NORTHERN CHEYENNE TRIBE, MONTANA**

Dear Chairman Elliot: On behalf of the Northern Cheyenne Tribe, I thank you for conducting a Section 106 meeting in Billings, Montana during February 13-14, 2014 to consider the potential Otter Creek coal mine, the proposed Tongue River Railroad and the impacts that could have on the environment and culturally significant areas for the Northern Cheyenne.

We know that Section 106 provides a mechanism for avoidance and mitigation of impacts to the environment. And, we understand that the National Historic Preservation Act sets out rules requiring federal agencies to evaluate impacts to historic and cultural heritage where a project might have an impact. Section 106 requirements are a federal level compliance issue for industry – compliance is not optional and penalties can be significant.

We appreciate the opportunity to participate in this process because development of the Otter Creek Coal Mine to be served by the Tongue River Railroad could also bring many employment and financial benefits to the Northern Cheyenne people. We join with you in seeking a reasonable balance.

Federal agencies must make a reasonable and good faith effort to identify cultural resources and concerns. We have worked hard to identify Cheyenne cultural and historic sites in the impacted area including identification work, background research, consultation, oral history interviews, sample field investigations and field surveys. The Northern Cheyenne Cultural Commission, an advisory board, has been entrusted with this duty by the Northern Cheyenne Tribe. They have made a number of recommendations and listed several important concerns. In my view, we can work together in good faith to find and implement solutions that will protect our valuable cultural and environmental resources while allowing for jobs and income to our very poor people.

I clarify that the final decisions on this matter rest with the Tribal Council, the duly elected representatives of the Northern Cheyenne People. At this point, the Northern Cheyenne Tribal Council has not adopted a position on the proposed Tongue River Railroad. The Tribe, is however, on record to support the development of the Otter Creek Coal Mine, supported by a binding agreement with the Montana Land Board, a tribal referendum in overwhelming support of Otter Creek and numerous advocates of such development, hoping for employment.

Under my Administration, tribal members will soon have the opportunity to decide upon reservation coal development. Our people must decide this matter. While some are strongly opposed, many others think we should go this route. Spokespersons for both sides

have talked to me about this matter. Both sides urge a referendum vote: "Let the people decide" they say. As the duly elected Tribal President, I believe this is the prudent course. We may not all agree, but will let the majority decide.

At one time, I was opposed to on-reservation coal development, but have reconsidered, considering the bleak financial future facing our Nation. We, as Northern Cheyenne must now explore all options for self-sufficiency. My own grandson, for example now makes a very good living, a railroad contractor. The Tribe cannot offer him the same opportunity So, I think about my grandchildren.

Thus, I have asked the Tribal Council to schedule a referendum, reservation wide vote about developing our own coal. This will occur in the near future. As a leader, it is not my place to sole-handedly decide this matter or declare a policy about the Tongue River Railroad. We wait to hear from our people.

If the Northern Cheyenne vote yes by a majority for coal development on our reservation we will go strongly in that direction. That would require a railroad to move our coal and other commodities. If they vote no, we will look for other options. Though at this time, I don't know what that would be.

Thank you for the opportunity to make this statement. I do, however, only speak as President of the Northern Cheyenne Tribe. Not for all of the Northern Cheyenne. We await their verdict.



Surface Transportation Board
Washington, D.C. 20423-0001

Office of the Chairman

March 10, 2014

The Honorable Llevando Fisher, President
Northern Cheyenne Tribe
P.O. Box 128
Lame Deer, Montana 59043

Dear President Fisher:

I received your letter dated February 13, 2014, which was read into the record during the recent meeting in Billings, Montana, held by the Surface Transportation Board's Office of Environmental Analysis to discuss issues of importance to the Tribes and Cultural Resource Consulting Parties regarding the Tongue River Railroad proposal currently pending before the Board. The proceeding is docketed as Docket No. FD 30186, *Tongue River Railroad Company, Inc. — Rail Construction and Operation — In Custer, Powder River and Rosebud Counties, Mont.* In your letter, you explain that, under your Administration, Northern Cheyenne tribal members will have the opportunity to vote in a referendum to decide whether to support or oppose the issue of coal development on the Northern Cheyenne reservation.

Thank you for sharing your views and for informing the Board about the referendum vote. Your letter, along with this response, will be made a part of the public docket. Because the case is pending before the Board, we are unable to comment further on the matter at this time.

Victoria Rutson and Catherine Nadals, both with the Board's Office of Environmental Analysis, will continue working with you and representatives from the Northern Cheyenne. Please do not hesitate to contact Victoria Rutson, Director, Office of Environmental Analysis, at 202-245-0295 or Victoria.Rutson@stb.dot.gov should you need further help on this matter.

Sincerely,

Daniel R. Elliott III
Chairman



SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Environmental Analysis

March 12, 2014

Dr. Mark Baumler
 State Historic Preservation Officer
 Montana Historical Society
 225 North Roberts, P.O. Box 201201
 Helena, MT 59620-1201

Attn: Stan Wilmoth

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

Dear Dr. Baumler:

As you know, the Surface Transportation Board (Board) initiated consultation with your office regarding the proposed Tongue River Railroad Company, Inc. (TRRC) Rail Construction and Operation on October 22, 2012, pursuant to the National Environmental Policy Act (NEPA) and Section 106 regulations (36 CFR Part 800) of the National Historic Preservation (NHPA). The purpose of this letter is to summarize our historic preservation outreach, consultation, and fieldwork efforts to date, and to thank you for the input and guidance you have provided to the Board's Office of Environmental Analysis (OEA) thus far. We begin with our current list of Section 106 consulting parties.

Consulting Parties

Since October 2012, OEA has sent letters initiating consultation with the ACHP, affiliated federally recognized tribes, federal and state agencies, TRRC, and several historic preservation organizations, ranchers, and environmental groups, as follows:

36 CFR § 800.2 Participants in the Section 106 process:

§ 800.2(a) Agency Official

Surface Transportation Board, Office of Environmental Analysis

§ 800.2(a)(2)Lead Federal Agency

Surface Transportation Board

Other Federal Agencies include:

U.S. Army Corps of Engineers (USACE)

Bureau of Land Management (BLM)

U.S. Department of Agriculture (USDA)

National Park Service (NPS)

§ 800.2(b) Council

Advisory Council on Historic Preservation (ACHP)

§ 800.2(c) Consulting Parties

§ 800.2(c)(1) State Historic Preservation Officer

Montana State Historic Preservation Officer (SHPO)

§ 800.2(c)(2) Federally Recognized Tribes¹

Cheyenne & Arapaho Tribes	Rosebud Sioux Tribe of Indians
Cheyenne River Sioux Tribe	Santee Sioux Nation (Santee Sioux Tribe of Nebraska)
Crow Creek Sioux Tribe	Shakopee Mdewakanton Sioux
Crow Tribe of Indians	Shoshone Tribe of the Wind River Reservation
Flandreau Santee Sioux	Sisseton Wahpeton- Oyate
Ft. Belknap Indian Community	Spirit Lake Tribe
Ft. Peck Assiniboine and Sioux Tribes	Standing Rock Sioux Tribe
Lower Brule Sioux Tribe	Three Affiliated Tribes: Mandan, Hidatsa & Arikara Nation
Lower Sioux Indian Community ²	Turtle Mountain Band of Chippewa
Northern Arapaho Tribe	Upper Sioux Community ³
Northern Cheyenne Tribe	Yankton Sioux Tribe
Oglala Sioux Tribe	

§ 800.2(c)(3) Representatives of Local Governments

Montana Department of Natural Resources and Conservation
Montana Department of Transportation
Miles City Historic Preservation Office

§ 800.2 (c)(4) Applicants for Federal Assistance, Permits, Licenses, or Other Approvals

Tongue River Railroad Company

§ 800.2(c)(5) Additional Consulting Parties

Fix Ranch
Montana Preservation Alliance
National Wildlife Federation
National Trust for Historic Preservation
Northern Cheyenne Otter Creek Descendants
Northern Plains Resource Council
Rocker Six Cattle Company
Sierra Club

¹ The Blackfeet Nation declined to be a consulting party.

² The Lower Sioux Indian Community requested to continue to receive information about the undertaking, but declined consulting party status.

³ The Upper Sioux Community has been contacted, but has not expressed a preference to date.

We believe we had a productive meeting on January 23, 2014, with Stan Wilmoth of your office and Charlene Vaughn and Najah Duvall-Gabriel of the ACHP. The meeting provided us with an opportunity to discuss an appropriate strategy for completing our historic reviews for the TRRC project moving forward. The meeting included a discussion regarding our consultation efforts to date, as discussed below.

Consultation Efforts

OEA has been holding its monthly calls with consulting parties since February 2013. OEA has also created a historic preservation page on the Tongue River Project website accessible to consulting parties and members of the public (http://www.tonguerivereis.com/sect_106.html). The website includes pertinent Section 106 correspondence, documents, and project maps. OEA held a consulting party meeting on the Northern Cheyenne Reservation in Lame Deer, Montana, from April 16th to 18th, 2013. The meeting included a one-day bus tour of portions of the study area. During the meeting, representatives from the Rosebud Sioux Tribe offered suggestions for OEA to consider in developing its archaeological methods for the project. These suggestions, which follow, were echoed by other tribal representatives at the meeting.

- Tribal members and archaeologists offer differing expertise, which should be considered in the identification of sites of religious and cultural significance to tribes.
- Tribal sites should be respected.
- Tribal members should have parity with archaeologists.

These suggestions were incorporated into the development of our field survey methods and the composition of our field crews, as described below.

OEA recently held a Section 106 consulting party meeting in Billings, Montana, February 13 to 14, 2014, and it was attended by Stan Wilmoth of your office. OEA provided an update on Section 106 to the consulting parties and solicited their comments, questions, and concerns about the progress to date and next steps. Several of the meeting attendees had recommended that we begin work on a PA right away. Consequently, after the meeting was formally adjourned on February 14th, the following consulting party representatives remained behind to work on redrafting the PA that we had developed for the old Tongue River project:

- Conrad Fisher, Northern Cheyenne Tribe, Tribal Historic Preservation Officer (THPO)
- Terry Clouthier, Standing Rock Sioux Tribe, tribal archaeologist
- Ben Rhodd, Rosebud Sioux Tribe, contract archaeologist
- Tamara St. John, Sisseton-Wahpeton Oyate, THPO office archivist
- Steve Vance, Cheyenne River Sioux Tribe, THPO
- Curley (Darrell) Youpee, Ft. Peck Assiniboine and Sioux Tribes, THPO
- Chris Jenkins, USACE, Regulatory Branch, Cultural Resources Program Manager
- David Coburn, Steptoe & Johnson, representing the TRRC.

OEA intends to further refine the old PA with the current project description. Once we have completed the administrative edits, we will send around the redrafted PA for your review and

comment. We also intend to add some language to the redrafted PA to incorporate recommendations made by the meeting participants on February 14th and 15th. However, OEA will not make any additional changes to the PA until you and the consulting parties have a chance to review the revised draft to ensure that you and the consulting parties are in agreement with these inclusions/changes to the PA.

Area of Potential Effects

Pursuant to 36 CFR § 800.4(a)(1), OEA established a preliminary Area of Potential Effect(s) (APE) to identify cultural and tribal resources in the study area. The preliminary APE for tribal and archaeological sites was defined as the right-of-way for each build alternative plus a 200-foot-wide buffer on either side of the right-of-way.

The preliminary APE for built resources (historic buildings, structures, objects and districts) was limited to the right-of-way with a maximum 1,500-foot buffer as defined above. This buffer was selected to allow for analysis of the full range of potential impacts on built resources, which could include demolition, construction and operation impacts, and impacts caused by changes to the visual and auditory setting of the resource. Areas within the 1,500-foot buffer but obscured by a butte or mountain were not included.

Previously Recorded Sites and Resources

Pursuant to 36 CFR § 800.4(a)(2), OEA reviewed existing information on historic properties within the APE. As you know, cultural resources in Montana are recorded on site forms that are retained in the State of Montana Cultural Resource Information System (CRIS) database, maintained by the Montana Historical Society (MHS). OEA obtained site records from the MHS for an area extending one mile from each side of the centerline for each build alternative, which is larger than the APE. This large records search area, because it yields many site forms describing previously found cultural resources, also provides a better context to describe the cultural environment of the study area. Reports of past surveys and analyses were also obtained from the MHS, indicating that *less than 10 percent* of the APE had been previously surveyed for archaeological sites. The records searches yielded 780 site forms: 170 from Custer County, 166 from Powder River County, 312 from Rosebud County, and 132 from Bighorn County. Of these 780 previously recorded cultural resources, 71 fell within the APE, including 44 archaeological sites (Table 1) and 27 built resources (Table 2).

Table 1. Previously Recorded Archaeological Sites—All Build Alternatives

Lithic Scatter	Lithic Scatter with Other Components	Stone Circle	Cairn	Historic Water – Associated Features	Historic Trail or Fence	Other ^a	TOTAL Archaeology Sites	Tribal Sites
16	23	2	1	0	0	2	44	0

Notes:

^a *Other* includes two railroad grades

Table 2. Previously Recorded Built Resources—All Build Alternatives

Barn	Bridge	Dam/ Levee	District ^a	Homestead	Railroad	Ranch	Road/ Trail	Utility	Windmill	Other ^b
0	2	0	2	3	2	11	2	0	0	5

Notes:

^aThe two *districts* included the Lee Community Historic District and the Main Street Historic District in Miles City,

^b *Other* includes schools, irrigation systems, and a grave marker.

In addition to the 27 built resources formally recorded in the State of Montana CRIS database, three other built resources were identified through literature review.

- Birney Ranching Rural Historic District: *Cultural Landscape of the Upper Tongue River Valley in Rosebud County, Montana* (Montana Preservation Alliance 2007).
- The Tongue River Valley Rural Historic District: *Cultural Landscape-Scale Overview of the High Potential Coal Bed Natural Gas Development Area* (Renewable Technologies, Inc. 2006).
- The Hogback Pasture: *A Study of the Hogback Pasture on the Fort Keogh USDA Agricultural Station* (Ethnoscience in press).

OEA also reviewed the inventory of properties listed in the National Register of Historic Places (National Register) through the National Park Service’s Focus digital library. Based on this search, OEA found that the Main Street Historic District in Miles City is the sole property in the APE that is currently listed in the National Register. The Wolf Mountains Battlefield, Bones Brothers Ranch, and Fort Keogh Historic District are not located in the APE.

Phased Identification

OEA is conducting a phased identification of historic properties allowable under 36 CFR § 800.4(b)(2) “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 was deemed necessary because some landowners did not grant OEA access to portions of the APE for each build alternative. In a telephone call with Stan Wilmoth of your office on May 23, 2013, it was deemed that a phased identification effort was appropriate for this project given these circumstances. This approach to a phased identification and evaluation was reaffirmed twice by the ACHP, Mr. Wilmoth, and OEA: in a telephone call on October 28, 2013; and in a meeting on January 23, 2014.

If the Board approves a build alternative for construction and operation, OEA would complete any additional identification, apply the National Register criteria to each resource identified in the preliminary APE, and submit the determinations of eligibility to you for review and assessment. In accordance with 36 CFR § 800.14(b), OEA will develop a PA with the SHPO, federal agencies, ACHP, federally recognized tribes, and other consulting parties that would stipulate the measures and process for completing the identification and evaluation efforts and lay out steps to avoid, minimize, or mitigate any adverse effects.

In summer 2013, OEA conducted pedestrian surveys within the APE for each build alternative under consideration. OEA could not gain access in some areas due to landowner restrictions, as some parcels were surrounded by inaccessible parcels, or because weather and fire conditions prohibited safe access. Even so, tribal members and OEA archaeologists conducted pedestrian transect surveys of 4,464 acres in the preliminary APE. OEA historians and architectural historians also conducted vehicular or pedestrian surveys of 34,944 acres in the preliminary APE. However, due to concerns expressed by some participants at the consulting party meeting on February 13 to 14, 2014, OEA plans to undertake additional field surveys in spring 2014, with tribal members and OEA archaeologists, in areas where landowners provide access.

Tribal and Archaeological Sites

In summer 2013, OEA archaeologists organized four survey teams, designated A through D, to conduct field surveys on accessible property in the APE. Each team included four tribal members and four OEA archaeologists. The OEA chief archaeologist for each rotation met the Secretary of the Interior Standards (36 CFR § 61) for archaeology; all other OEA crew members had a Bachelor’s degree or higher in anthropology or a closely related field. In accordance with 36 CFR § 800.4(a)(4), all tribes who expressed interest and availability were able to participate in the field survey. Thirteen tribes participated in the field surveys (Table 3).

Table 3. Tribes Participating in Field Surveys

Team A <i>July 15–24, 2013</i>	Team B <i>July 29–August 7, 2013</i>	Team C <i>August 12–21, 2013</i>	Team D <i>August 26–Sept. 4, 2013</i>
Northern Arapaho	Mandan, Hidatsa, and Arikara	Crow	Cheyenne and Arapaho
Northern Cheyenne	Northern Cheyenne	Northern Cheyenne	Crow Creek Sioux
Fort Peck Assiniboine and Sioux	Oglala Sioux	Standing Rock Sioux	Northern Cheyenne
Yankton Sioux	Rosebud Sioux	Yankton Sioux	Sisseton Wahpeton Oyate Turtle Mountain Chippewa

During each rotation, all eight survey team members conducted the survey as one team. Individuals were spaced approximately 49 feet apart and walked at the same pace observing the ground for any indications of cultural and tribal resources such as rock alignments, flaked stone (lithics), bone, historical debris, or other deposits or feature types. As potential resources were encountered, the entire crew stopped and recorded the resource using a global positioning system (GPS) device and iPad® to record the location and attributes, as appropriate. The crew did not perform any earthmoving or excavation, and all team members took care not to disturb any cultural resources they observed. Archaeological site types were recorded using standard types based on the CRIS form. Team members kept field notes and took photos of archaeological resources.

In accordance with 36 CFR § 800.4(a)(4), if a tribal member observed tribal sites (sites containing attributes beyond or in addition to archaeological data), the team recorded a single GPS point for that resource, along with a brief description that protected confidentiality. In all cases, all four tribal participants agreed that the resource should be recorded before OEA archaeologists collected any information.

The field survey in the summer of 2013 resulted in the identification of 198 new sites in the preliminary APE, including 162 archaeological and 36 tribal resources (Table 4).

Table 4. Newly Recorded Tribal Sites and Archaeological Sites

Lithic Scatter	Lithic Scatter with Other Components	Stone Circle/Tipi Rings	Cairn	Historic Water-Associated Features	Historic Trail or Fence	Other	Total Archaeology Sites	Tribal Sites
107	9	3	6	6	7	24	162	36

These archaeological sites are summarized in Table A-1 and their approximate locations shown on Figure 1 in the attachment to this letter. The information on the archaeological sites will be reported to you in greater detail under separate cover. The confidential information gathered on tribal sites was sent to the primary contacts at the tribes via certified mail on November 19, 2013, in person on February 13, 2014, and is available to you upon request. OEA considers the newly identified tribal and archaeological sites potentially eligible for listing in the National Register.

Built Resources

Two teams of two federally qualified (36 CFR § 61) architectural historians conducted field survey work for built resources from July 15 to 24, 2013, and from July 29 to August 7, 2013. Their methods involved reviewing geographic information system (GIS) maps using Google Earth Pro satellite imagery (Google Earth 2013); reviewing previously recorded site forms; interviewing land owners or managers; conducting a windshield survey along public roads; and conducting a pedestrian or all-terrain vehicle field survey along private roads, trails, or cow paths, where available. In accordance with 36 CFR § 800.4(a)(3), the architectural historians made contact with the following various local repositories and organizations to determine if they have knowledge of the significance of built resources in the preliminary APE and to seek information from them. The groups are:

- | | |
|---|---|
| American Prairie Foundation | Montana Live |
| Billings Preservation Alliance | Montana Preservation Alliance |
| Bureau of Land Management Research Center | Montana State Historic Preservation Office |
| Custer County Art and Heritage Center and Waterworks Art Museum | Montana State Historic Preservation Office |
| Frontier Heritage Alliance | Montana State University Billings - Library |
| Frontier Montana Museum | Montana State University Bozeman - Library |
| Hardin, Big Horn County, Certified Local Government | Museums Association of Montana |
| Miles City, Certified Local Government | Range Riders Museum |
| Miles City Public Library | Sheridan (Wyoming) Fulmer Public Library |
| Montana Heritage Commission | USDA Agricultural Research Center |
| Montana Historical Society Research Center | Western Heritage Center |

The architectural historians recorded buildings, structures, objects, and districts that appeared to be 50 years of age or older—the general threshold for consideration under the National Register. The field survey resulted in the recording of 35 new built resources in the preliminary APE for all build alternatives (Table 5).

Table 5. Newly Recorded Built Resources

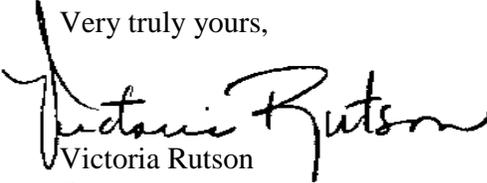
Barn	Bridge	Dam/ Levee	District	Homestead	Railroad	Ranch	Road/Trail	Utility	Windmill	Other^a
3	3	2	1	4	2	3	4	3	4	6

Notes:
^a *Other* includes a pump house, fish hatchery, culvert, cattle pen, park facilities, and a residence

These built resources are summarized in Table A-2 and their approximate locations shown on Figure 2 in the attachment to this letter. The information on the built resources will be reported to you in greater detail under separate cover. OEA considers these built resources potentially eligible for listing in the National Register.

At this time, OEA would appreciate your comments on the following areas: (1) please let us know if there are other consulting parties that should be included in our outreach; (2) we would also value your opinion regarding the preliminary APE(s); (3) our ongoing identification efforts; (4) results of our records searches and field surveys; and (5) the level of tribal involvement in the project thus far. In addition to the field work planned for this spring, more intensive identification and National Register evaluation of historic properties would be completed if and when the Board approves construction and operation of a railroad line along one or more of the selected alternatives according to the procedures and stipulations set forth in a PA for this undertaking.

As before, Catherine Nadals of my staff will be working on the Section 106 compliance aspects of the project. Please feel free to contact me or Ms. Nadals at 202-245-0293 (Catherine.Nadals@stb.dot.gov). You may also contact Rick Starzak with ICF International (our third-party contractor) at 213-312-1751 (Richard.Starzak@icfi.com). We look forward to your comments and appreciate your assistance.

Very truly yours,

Victoria Rutson
Director
Office of Environmental Analysis

Attachment

cc: Charlene Dwin Vaughn, ACHP
Najah Duvall-Gabriel, ACHP

ATTACHMENT

**Newly and Previously Identified Archaeological
Resources Identified within the Study Area
Surface Transportation Board
Field Survey for Tongue River Railroad EIS - 2013
Docket No. FD 30186**

Table A1. Archaeological Resources^a within Study Area

Archaeological Resources	Build Alternative						Grand Total
	Ashland East	Colstrip	Decker	Moon Creek	Tongue River	Tongue River Road	
Lithic Scatter	3	2	35	22	60	7	129
Lithic Scatter with other components			1	1	7		9
Cairn			3	1	2		6
Stone Circle			1	1	3		5
Historic Trail or Fence		1	1		4	1	7
Historic Water Resource				3	2		5
Other ^b		1	6		15	4	26
Grand Total	3	4	47	28	93	12	187

Notes:

^a Includes newly identified resources and record search results but does not include tribally-identified resources.

^b Includes historic refuse features, building remains, survey markers, a buffalo jump, and historic petroglyphs.

Lithic Scatters

These sites, from both pre-contact and historic periods, consist of culturally-modified stone tool materials including refuse and fully formed tools such as projectile points. Lithic scatters are by far the most common site type in the study area.

Lithic Scatters with Other Components

Lithic scatters, as defined above, are often found associated with other types of cultural features. These include quarry sites, bedrock milling features, and historic period petroglyphs.

Stone Circles

This site type includes circular or semi-circular stone alignments typically made of cobbles.

Cairns

Cairns are piles of rocks of varying sizes. Cairns may have functioned for ceremonial purposes and may mark the location of burials.

Figure 1 presents the information contained in Table A1 on a map of the project area.

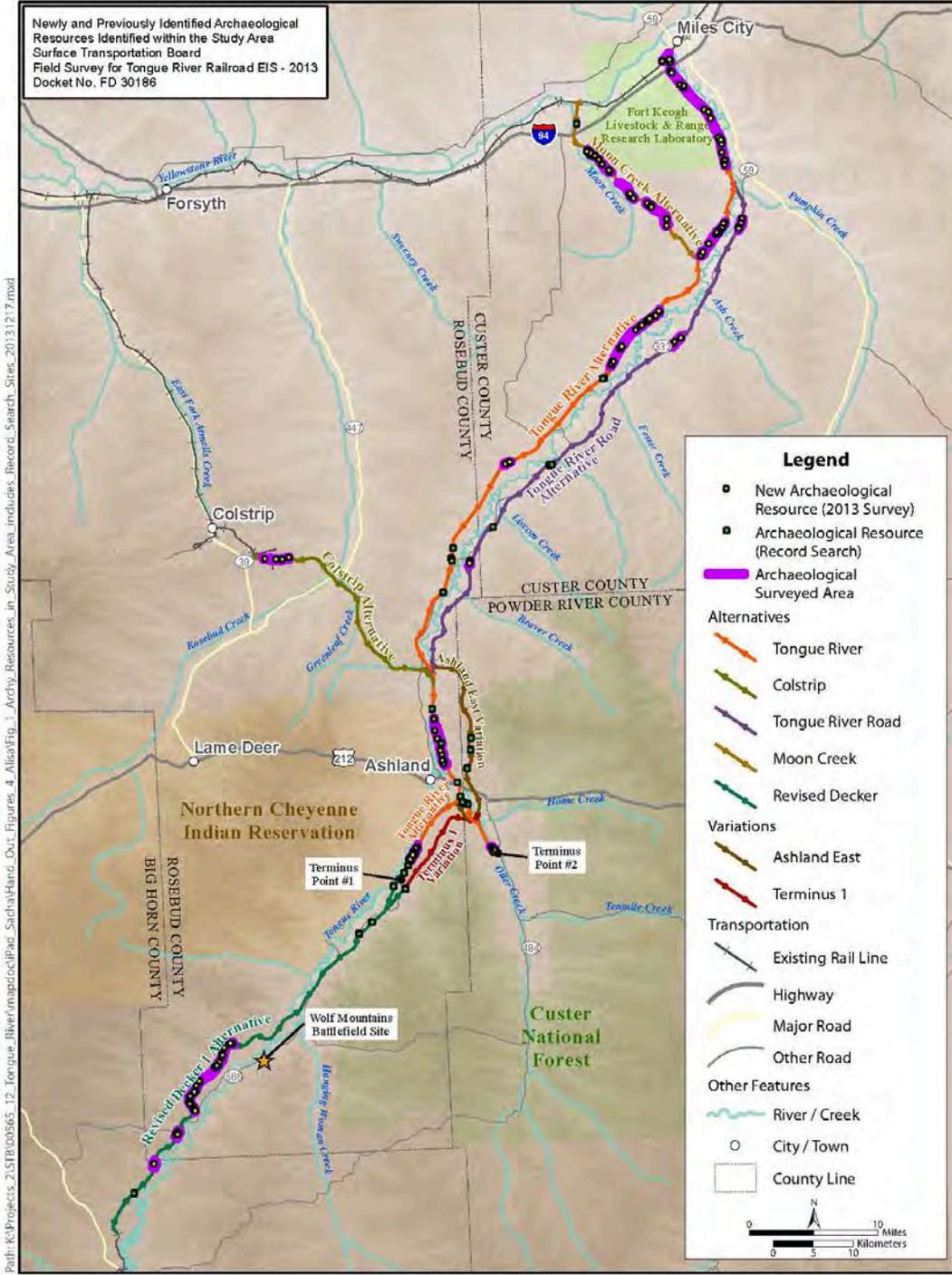


Figure 1. Newly and Previously Identified Archaeological Resources in 2013 Tongue River Railroad EIS Study Area

**Newly and Previously Identified Built Resources
Identified within the Study Area
Surface Transportation Board
Field Survey for Tongue River Railroad EIS - 2013
Docket No. FD 30186**

Table A-2. Built Resources^a within Study Area

Built Environment Resources	Build Alternative						Grand Total ^b
	Ashland East	Colstrip	Decker	Moon Creek	Tongue River	Tongue River Road	
Barn				1	2		3
Bridge				1	3	1	5
Dam/Levee				1	1		2
Historic District		1	2		3		6 ^b
Homestead	1		1		4	1	7
Other ^c		1	1	1	7	3	12 ^b
Railroad		2	1	1	1		4 ^b
Ranch		2			7	5	14
Road/Trail			1	3	2	1	7
Utility					3		3
Windmill			1	2	1		4
Grand Total	1	6	7	10	34	11	69^b

Notes:

^a Includes newly identified built resources and literature/record search results.

^b There are a total of 65 discrete built resources. Some of these built resources are located in the study area for more than one alternative so they are counted more than once. Therefore, the grand total numbers may exceed the actual number of discrete built resources.

^c *Other* includes schools, irrigation systems, a grave marker, hogback pasture, fish hatchery, culvert, residence, pump house, park facilities, and cattle pen.

Figure 2 presents the information contained in Table A-2 on a map of the project area.

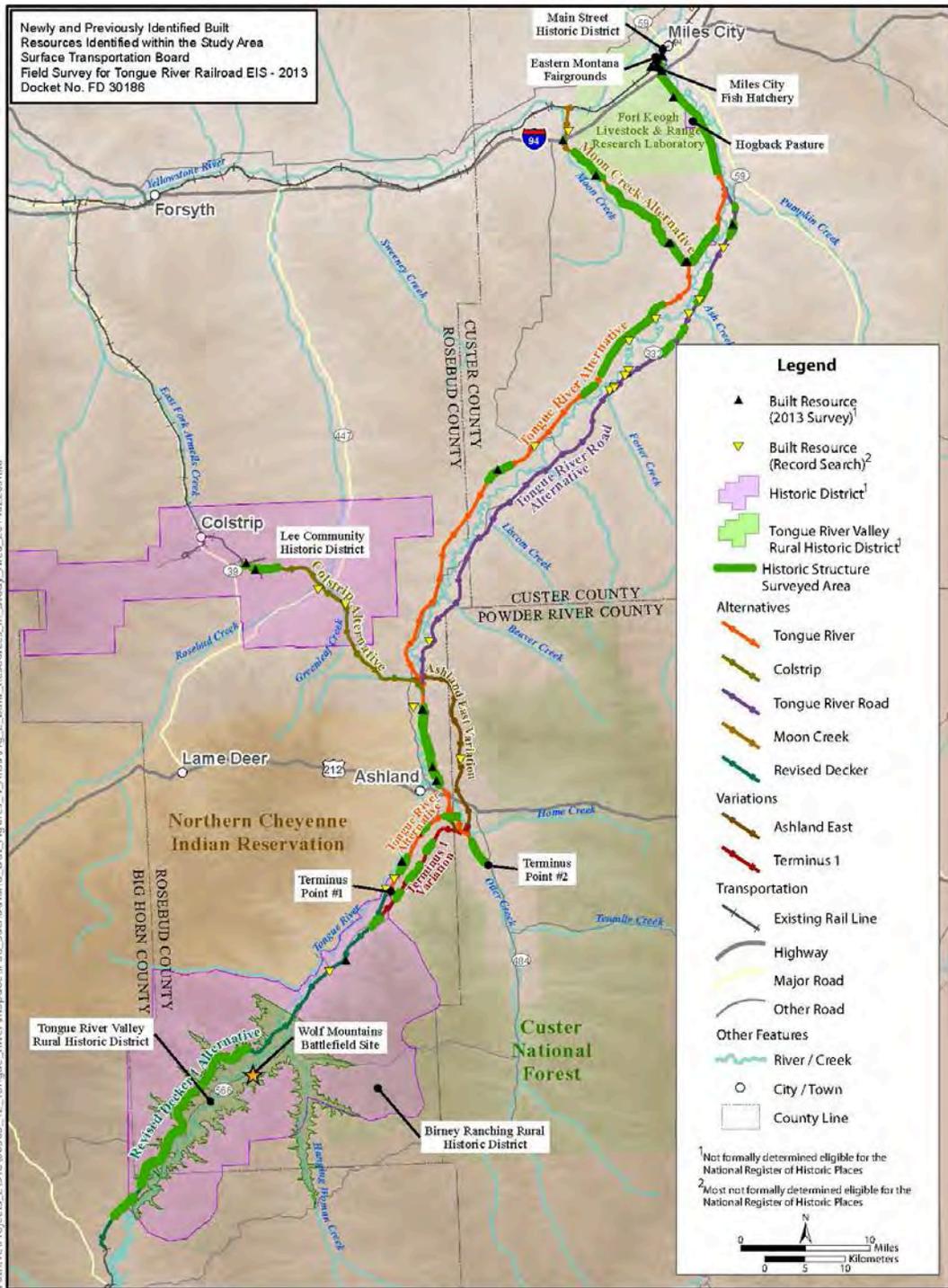


Figure 2. Newly and Previously Identified Built Resources in 2013 Tongue River Railroad EIS Study Area

March 19, 2014

VICTORIA RUTSON
OFFICE OF ENVIRONMENTAL ANALYSIS
SURFACE TRANSPORTATION BOARD
WASHINGTON D.D. 20423

Re: Docket No. 30186 Tongue River Railroad Company Project Updates (03/012/14)

Dear Vicky:

Thank you for the project updates. As part of the update package you request our comments on five areas:

- 1) We do not know of other appropriate consulting parties at this time,
- 2) We believe the preliminary APE is appropriate – with the common sense proviso that some properties and or effects may need wider consideration. That may in particular apply to properties of cultural or religious significance to tribes, and of course to Districts if they extend beyond the preliminary APE. We are not privy to knowledge of specific tribal properties to which this caution may apply,
- 3) We support the ongoing identification effort and continue to applaud the effort to get a good look at each alternative. I have requested ICF to let us know the percentage coverage to date of each alternative and have been told they are working in that information. As stated at the Billings meeting in so far as the identification of cultural resources is to inform the selection of the route then as much up front inventory as possible is desirable. And some assessment of eligibility whether it is preliminary or otherwise will be useful. Obviously the regulations do not require 100% identification, particularly where there is a PA, but it will, in our opinion, be useful in making and justifying a route choice (if cultural resources are seriously in the mix of considerations),
- 4) We don't really have the details to assess the field work to date, but have much confidence,
- 5) We believe there has been a sea change in the level of effort to involve Tribes, and applaud that effort and the results to date. As with inventory, more is always better.

Thank you,



Stan Wilmoth, Ph.D.
State Archaeologist/Deputy, SHPO

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(406) 444-2694
(406) 444-2696 FAX
montanahistoricalsociety.org



SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Environmental Analysis

April 25, 2014

Charlene Dwin Vaughn, AICP
Assistant Director
Office of Federal Agency Programs
Advisory Council on Historic Preservation
1100 Pennsylvania Avenue NW, Suite 803
Washington, DC 20004

RE: Docket No. FD 30186, Tongue River Railroad Company, Inc.—Rail Construction and Operation—in Custer, Powder River and Rosebud Counties, Montana: Notification of Decision to Prepare a Programmatic Agreement

Dear Ms. Vaughn:

The purpose of this letter is to notify you that the Surface Transportation Board's (STB or Board) will prepare a Programmatic Agreement (PA) for the proposed Tongue River Railroad Company's (TRRC) proposed rail line construction and operation. As we wrote in our December 10, 2013 Section 106 initiation letter to you, the Board is the federal agency responsible for granting authority for the construction and operation of the proposed rail line by TRRC. The undertaking here would be the Board's approval of the construction and operation of a specific rail alignment. The Board's Office of Environmental Analysis (OEA) is preparing the appropriate documentation for compliance with Section 106 of the National Historic Preservation Act and the National Environmental Policy Act (NEPA).

As you know, the Section 106 regulations of NHPA at 36 CFR § 800.14(b)(1)(ii), state that a PA may be developed "when effects on historic properties cannot be fully determined prior to approval of an undertaking." Such is the case here. The proposed project consists of five alternatives and two variations that encompass approximately 240 unique linear miles and 11,975 unique acres of possible railroad rights-of-way. Landowners have granted the Board limited access (at the time of this letter, slightly less than 50%) to the land area under consideration. Moreover, while the proposed rights-of-way are generally known, the exact alignments have been neither engineered nor defined with enough certainty to establish which historic properties would be affected by each alternative under consideration. For these reasons, and those set forth in the Justification document (enclosed), we have concluded that preparation of a PA done in consultation with the Section 106 consulting parties is the appropriate next step. Below, I have summarized our outreach efforts and pledge to you that we will continue working closely with our consultation partners in developing the PA.

As described in detail on pages 1 through 3 of the attached letter to SHPO, OEA has been conducting extensive outreach to obtain the views of consulting parties and the public. OEA has been holding monthly calls with consulting parties since February 2013. OEA also created a historic preservation page on the Tongue River Project website accessible to consulting parties and members of the public (http://www.tongueriveris.com/sect_106.html). The website includes

pertinent Section 106 correspondence, documents, and project maps. In addition to the above, OEA held two well-attended consulting party meetings. The first meeting was held on the Northern Cheyenne Reservation in Lame Deer, Montana, April 16 to 18, 2013; the second was in Billings, Montana, February 13 to 14, 2014. All meeting transcripts and monthly call summaries are posted on the project website. Some of our consulting parties have suggested that we begin work on a PA for the TRRC Project and we are following their suggestions.

We look forward to our continued positive consultations with your office regarding the TRRC project. Our Section 106 process, and particularly our outreach with consulting parties, has benefited greatly by your expert guidance and involvement. If you have any questions or comments, please feel free to contact either myself or Cathy Nadals of my staff at 202-245-0293 (Catherine.Nadals@stb.dot.gov). Please also feel free to contact Rick Starzak with ICF International (our third party contractor) at 213-312-1751 (richard.starzak@icfi.com).

Sincerely,

Victoria Rutson
Director
Office of Environmental Analysis

Attachments: Justification for Preparing a PA
 Summary of Section 106 Process Thus Far
 Letter to SHPO dated March 12, 2014
 Map of Alternatives

cc: Najah Duval-Gabriel, Council

Attachment 1 of 4:

Justification for Preparing a PA

Tongue River Railroad Undertaking:

Justification for Preparing a Programmatic Agreement

Background

On October 16, 2012, Tongue River Railroad Company, Inc. (TRRC) filed a revised application with the Surface Transportation Board (Board). TRRC intended to construct and operate an approximately 83-mile rail line between Miles City, Montana, and two ending points, one near the site of the previously planned Montco mine near Ashland, Montana, and another at the proposed Otter Creek mine in the Otter Creek area east of Ashland, Montana. On December 17, 2012, TRRC filed a supplemental application with the Board, in which TRRC changed its preferred alignment from the 83-mile Tongue River Alternative to the 42-mile Colstrip Alternative.

Because the construction and operation of this proposal has the potential to result in significant environmental impacts, the Board's Office of Environmental Analysis (OEA) has determined that the preparation of an Environmental Impact Statement (EIS) is appropriate pursuant to the National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. §§ 4321 *et seq.*). The Surface Transportation Board must also comply with the requirements of the National Historic Preservation Act (NHPA).

The regulations that implement Section 106 of NHPA at 36 CFR Part 800 require federal agencies to take into account the effects of the undertakings on historic properties listed or eligible for listing on the National Register of Historic Places (National Register) and afford the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment on such undertakings. The Section 106 regulations at 36 CFR § 800.3 through § 800.6, outline the consecutive four-step process federal agencies follow to comply with Section 106:

- 1) Initiate consultation
- 2) Identify and evaluate historic properties
- 3) Assess effects
- 4) Resolve effects

In addition to completing the four-step process consecutively, a federal agency may use a phased approach to complete these steps. The phased approach can include deferring some of the identification and evaluation (National Register assessment) of historic properties (including effects assessment and resolution, or mitigation). Agencies generally use a phased process when they are considering several alternatives and where full access to the alternatives is restricted. The Section 106 regulations at 36 CFR § 800.4(b)(2), outline the phased approach as follows:

Phased identification and evaluation. *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. The agency official may also defer final identification and evaluation of historic properties if*

it is specifically provided for in a memorandum of agreement executed pursuant to § 800.6, a programmatic agreement executed pursuant to § 800.14 (b), or the documents used by an agency official to comply with the National Environmental Policy Act pursuant to § 800.8. The process should establish the likely presence of historic properties within the area of potential effects for each alternative or inaccessible area through background research, consultation and an appropriate level of field investigation, taking into account the number of alternatives under consideration, the magnitude of the undertaking and its likely effects, and the views of the SHPO/THPO and any other consulting parties. As specific aspects or locations of an alternative are refined or access is gained, the agency official shall proceed with the identification and evaluation of historic properties in accordance with paragraphs (b)(1) and (c) of this section.

Use of the phased approach, described above, requires an agency to develop a Programmatic Agreement (PA). A PA is an agreement document that sets forth roles, responsibilities, procedures and stipulations that would be followed when all of the steps in the Section 106 process cannot be completed prior to an agency's approval of a proposed undertaking. A PA can include a description of future types of activities that would need to be completed following an agency's approval, such as: identification of all area(s) of potential effects; additional identification of historic, tribal and botanical resources; the completion of studies such as ethnographies and ethno-botanical analyses; and definitive National Register assessments of historic properties likely to be adversely affected by the undertaking. An agency would also need to evaluate the types of effects that all eligible historic properties would undergo (indirect versus direct physical impacts); the PA would then describe any agreed upon measures to mitigate such effects. Federal agencies are required to consult with the State Historic Preservation Officer (SHPO) and involve its Section 106 consulting parties including federally recognized tribes in the development of a PA [36 CFR § 800.4(b)(2)]. Once a PA is agreed upon, it is executed by its signatories, which generally include the lead federal agency, SHPO, ACHP (when participating), and those parties that have a specific role in the completion of the activities outlined in the PA. Federally recognized tribes and other consulting parties are encouraged to sign the finalized PA as concurring parties.

OEA has kept in close contact with the Montana SHPO and ACHP since the onset of this project and has involved federally recognized tribes in all aspect of the proposed undertaking, including the identification of historic and tribal properties in areas where access has been granted. Both the Montana SHPO and ACHP have indicated their endorsement of developing a PA for this project and they are actively participating in consultation. OEA has initiated Section 106 consultations with the ACHP, Montana SHPO, other federal and state agencies, and federally recognized tribes and has identified other consulting parties, including local landowners and preservation groups. OEA would invite all of these consulting parties to participate in the development of a PA. Once executed, the project PA would set forth roles, responsibilities, procedures, milestones, schedules, stipulations, and post-agreement review protocols that have been agreed upon by the consulting parties to ensure compliance with Section 106.

Why is a Programmatic Agreement needed here?

For the same reasons set forth in the Council's regulations at 36 CFR § 800.4(b)(2), the Board will not be able to complete the 4-step Section 106 process for the Tongue River Railroad proposal before deciding whether to approve the undertaking. The Tongue River Railroad proposal is a complex project, consisting of five alternative routes and two variations that encompass approximately 240 miles and 11,975 acres of possible railroad rights-of-way. Landowners have only granted OEA access to slightly less than half of the project area, making completion of identification and evaluation efforts challenging. Where access has been granted, OEA has completed some identification of historic properties through archaeological/tribal and historic property surveys (some of the surveys were completed in 2013 and additional archaeological/tribal surveys are planned for May and June of 2014). However, appropriate additional identification and evaluation efforts would be required for any alternative the Board licenses as only preliminary surveys are being conducted and no definitive National Register assessments of any identified historic properties will be made before the Board decides whether to approve the undertaking. In addition, precise alignments will not be known (not fully engineered) until the Board issues its final decision on the proposed undertaking, requiring post-agreement Section 106 reviews.

When, or if, the Board decides to authorize the construction and operation of one of the alternatives under consideration, exact areas could be identified as the project's area(s) of potential effect(s), including those National Register eligible historic and tribal resources that would be subject to direct physical impacts from the proposed rail line and those that would undergo indirect effects from the noise and visual impacts imposed by a new railroad. Any mitigation measures outlined in the PA will be tied to the type of impact as well as type of resource (i.e. mitigation for a site that might be destroyed by the proposed railroad might differ from impacts to sites indirectly affected from noise or the visual intrusion of a new railroad). The mitigation measures in the PA would also be based on consultation with the Section 106 consulting parties.

A PA would outline the additional identification efforts that would be conducted and set forth stipulations on and clarify how to mitigate any adverse effects to National Register eligible historic and tribal properties. This could include ethnographies, ethno-botanical studies, or other mitigation measures (perhaps unique to the Tongue River Valley area) that the consulting parties agree upon. All of the measures described in the PA could be incorporated in a mitigation plan or a treatment plan developed by the STB in consultation with the Section 106 consulting parties. Should an alternative be approved, negotiations with landowners would begin for access to all the property along the licensed alternative, the precise location of the route would be staked, and the measures outlined in the PA for complying with Section 106, including convening Section 106 parties for post-agreement reviews, would be initiated.

Attachment 2 of 4:

Summary of Section 106 Process Thus Far

Summary of Section 106 Process Thus Far

April 2014

1. DESCRIPTION OF UNDERTAKING

On October 16, 2012, the Board received a revised application from TRRC to construct and operate a new rail line from Miles City, Montana to two ending points, one near the site of the previously planned Montco mine near Ashland, Montana; and another at the proposed Otter Creek mine east of Ashland. The purpose of the proposed rail line would be to transport low sulfur, subbituminous coal from proposed mine sites in the Tongue River Valley and Powder River Basin. On December 17, 2012, TRRC filed a supplemental application with the Board in which TRRC changed its preferred alternative from the 83-mile Tongue River Alternative to the 42-mile Colstrip Alternative. TRRC's new preferred alignment would generally parallel Greenleaf Road (S-447) rather than follow Roe and Cooper Creek.

The Board is considering five alternative routes and two variations to be carried forward in its environmental impact statement (EIS): the Tongue River Alternative, the Tongue River Road Alternative, the Moon Creek Alternative, the Decker Alternative, the Colstrip Alternative, the Ashland East Variation, and the Terminus 1 Variation (see attached Map 1 of alternatives). The proposed alternatives are located in Custer, Rosebud, Powder River, and Bighorn Counties, Montana.

Areas of Potential Effect. Pursuant to § 800.4(a)(1), OEA established preliminary Areas of Potential Effect (APEs) to identify cultural, tribal and built resources in the study area. The preliminary APE for tribal and archaeological sites was defined as the right-of-way for each alternative plus a 200-foot-wide buffer on either side of the right-of-way. The preliminary APE for built resources (historic buildings, structures, objects and districts) was limited to the right-of-way with a maximum 1,500-foot buffer on either side of the right-of-way. This wider buffer allows for analysis of the full range of potential impacts on built resources, which could include operation impacts caused by changes to the visual and auditory setting of the resource. Areas within the 1,500-foot buffer but obscured by a butte or mountain were not included.

2. STEPS TAKEN TO IDENTIFY HISTORIC PROPERTIES

OEA provided details of the steps it has taken to identify historic properties in a letter to the Montana State Historic Preservation Officer (SHPO) dated March 12, 2014 to which you were copied (also attached here). The information provided in that letter is summarized as follows. (Please refer to the SHPO letter for a more detailed synopsis of this section.)

Previously Recorded Sites and Resources. Pursuant to 36 CFR § 800.4(a)(2), OEA reviewed existing information from the Montana Cultural Resources Information System (CRIS) on historic properties from a larger study area than the preliminary APEs. Reports of past surveys indicated that *less than 10 percent* of the APEs had been previously surveyed for archaeological sites.

The records searches identified 780 previously recorded cultural resources, 71 of which fell within the preliminary APEs including 44 archaeological sites and 27 built resources. No previously recorded tribal sites were identified within the project area.

The following three resource areas were identified through a literature review of the project area:

- Birney Ranching Rural Historic District
- Tongue River Valley Rural Historic District
- Hogback Pasture

OEA also reviewed the inventory of properties listed in the National Register of Historic Places (National Register) through the National Park Service's Focus digital library. Based on this search, OEA discovered that a small portion of the Main Street Historic District in Miles City is the sole property in the APE for the built environment that is currently listed in the National Register. Other listed properties in the project vicinity, but not the APE, are the Wolf Mountains Battlefield, Bones Brothers Ranch, and Fort Keogh Historic District.

Phased Identification. OEA is conducting a phased identification of historic properties allowable under 36 CFR § 800.4(b)(2), "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..." OEA determined that the phased approach was appropriate here because several landowners did not grant OEA access to their land over which portions of the APE for the alternatives under consideration were located. Given the complexity of the project and the number of alternatives under consideration, on May 23, 2013, Dr. Stan Wilmoth of the Montana SHPO approved of the phased approach. Later, Dr. Wilmoth and Advisory Council reaffirmed OEA's decision to conduct a phased approach: in a telephone call on October 28, 2013 and in a meeting on January 23, 2014.

If the Board should decide to approve one of the build alternatives for construction and operation, OEA would execute a PA to memorialize any agreed upon steps to mitigate any adverse effects to historic properties. This would include additional identification of historic and tribal resources, a full application of the National Register criteria and other mitigation measures agreed to by the consulting parties including an ethnographic and ethno botanical analyses.

Tribal and Archaeological Sites. In the summer of 2013, OEA conducted pedestrian surveys within the APE for each alternative under consideration. Tribal members and archaeologists from ICF International, OEA's independent third-party consultant, conducted pedestrian transect surveys of 4,464 acres in the preliminary APE. OEA could not gain access in some areas due to landowner restrictions, because some parcels were surrounded by inaccessible parcels, or because severe weather and fire hazard conditions prohibited safe access. Because of concerns expressed by Section 106 consulting parties at the consulting party meeting held in Billings, MT, on February 13 to 14, 2014, OEA decided to conduct additional field surveys in May and June 2014, with tribal members and ICF archaeologists, in some areas previously inaccessible because of lack of landowner permission or fire hazard concerns.

In conducting the cultural resources survey work during the summer of 2013, ICF archaeologists organized four survey teams, designated A through D, to conduct field surveys on accessible property in the APE. Each team included four tribal members and four OEA archaeologists. The ICF chief archaeologist for each rotation met the Secretary of the Interior Standards (36 C.F.R. § 61) for archaeology; all other ICF crewmembers had Bachelor's degrees or higher in anthropology or a closely related field. Consistent with 36 C.F.R. § 800.4(a)(4), all tribes who expressed interest and availability were able to participate in the field survey. Thirteen tribes participated in the field surveys (Table 1).

Table 1. Tribes that Participated in 2013 Field Surveys

Team A <i>July 15–24, 2013</i>	Team B <i>July 29–August 7, 2013</i>	Team C <i>August 12–21, 2013</i>	Team D <i>August 26–Sept. 4, 2013</i>
Northern Arapaho	Mandan, Hidatsa, and Arikara	Crow	Cheyenne and Arapaho
Northern Cheyenne	Northern Cheyenne	Northern Cheyenne	Crow Creek Sioux
Fort Peck Assiniboine and Sioux	Oglala Sioux	Standing Rock Sioux	Northern Cheyenne
Yankton Sioux	Rosebud Sioux	Yankton Sioux	Sisseton Wahpeton Oyate Turtle Mountain Chippewa

During each rotation, all eight survey team members conducted the survey as one team. Individuals were spaced approximately 49 feet apart and walked at the same pace observing the ground for any indications of cultural and tribal resources such as rock alignments, flaked stone (lithics), bone, historical debris, or other deposits or feature types. As potential resources were encountered, the entire crew stopped and recorded the resource using a global positioning system (GPS) device and iPad® to record the location and attributes, as appropriate. The crew did not perform any earthmoving or excavation, and all team members took care not to disturb any cultural resources they observed. Archaeological site types were recorded using standard types based on the CRIS form. Team members kept field notes.

As tribal members observed tribal sites (sites containing attributes beyond or in addition to archaeological data), the team recorded a single GPS point for that resource along with a brief description consistent with protecting confidentiality. In all cases, all four tribal participants collectively agreed that a particular resource should be recorded before ICF archaeologists collected any information.

Built Resources. OEA historians and architectural historians conducted vehicular or pedestrian surveys of 34,944 acres in the preliminary APE. Two teams of two federally qualified (36 C.F.R. § 61) architectural historians conducted field survey work for built resources from July 15 to 24, 2013, and from July 29 to August 7, 2013. Their methods involved reviewing geographic information system (GIS) maps using Google Earth Pro satellite imagery (Google Earth 2013); reviewing previously recorded site forms; interviewing landowners or managers; primarily conducting a survey using public roads and private roads where permission was granted; and a pedestrian survey where appropriate. In accordance with 36 C.F.R. § 800.4(a)(3), the architectural historians made contact with 23 local repositories and organizations regarding the location and significance of any built resources that might be located in the preliminary APE. The groups contacted are listed on page 7 of the attached SHPO letter.

3. DESCRIPTION OF POTENTIALLY AFFECTED HISTORIC PROPERTIES

Tribal and Archaeological Sites. The field survey conducted in 2013 resulted in the identification of 198 new sites in the preliminary APE, including 162 archaeological and 36 tribal resources (Table 2).

Table 2. Newly Recorded Tribal Sites and Archaeological Sites

Lithic Scatter	Lithic Scatter with Other Components	Stone Circle/Tipi Rings	Cairn	Historic Water-Associated Features	Historic Trail or Fence	Other	Total Archaeology Sites	Tribal Sites
107	9	3	6	6	7	24	162	36

These archaeological sites are summarized in Table A-1 and their approximate locations shown on Figure 1 in the attached letter to SHPO. The information on the archaeological sites will be reported to SHPO in greater detail under separate cover. The confidential information gathered on tribal sites was sent to the primary contacts at the tribes via certified mail on November 19, 2013, delivered in person to tribal representatives attending the consulting party meeting in Billings, MT on February 13, 2014, and is available to you upon request. OEA has determined all newly identified tribal and newly identified archaeological sites potentially eligible for listing in the National Register.

Built Resources. The architectural historians recorded buildings, structures, objects, and districts that appeared to be 50 years of age or older—the general threshold for consideration under the National Register. The field survey resulted in the recording of 35 new built resources in the preliminary APEs for all five alternatives (Table 3).

Table 3. Newly Recorded Built Resources

Barn	Bridge	Dam/Levee	District	Homestead	Railroad	Ranch	Road/Trail	Utility	Windmill	Other ^a
3	3	2	1	4	2	3	4	3	4	6

Notes:

^a *Other* includes a pump house, fish hatchery, culvert, cattle pen, park facilities, and a residence

These built resources are summarized in Table A-2 and their approximate locations shown on Figure 2 in the attached letter to SHPO. The information on the built resources will be reported to SHPO in greater detail in the near future. OEA has determined all identified built resources potentially eligible for listing in the National Register.

4. DESCRIPTION OF LIKELY EFFECTS ON HISTORIC PROPERTIES

In accordance with § 800.5(a)(3), because the Tongue River Railroad “alternatives under consideration consist of corridors,” “large land areas,” and “where access to properties is restricted,” the Board is using a phased process to apply the criteria of adverse effect consistent with its phased identification and evaluation efforts. The likely effect on historic properties will be analyzed and reported in the Draft EIS and submitted under separate cover to the SHPO. OEA, in concert with the Section 106 consulting parties, will develop the PA. Working with the Council, the SHPO, federally recognized tribes, other federal agencies, and other consulting parties, OEA will develop a PA that will stipulate the measures and process for completing the identification and evaluation efforts should the Board approve an alternative for construction and operation and when access to restricted properties is gained. The PA will lay out steps to avoid, minimize, or mitigate any adverse effects to historic properties and tribal sites.

5. APPLICABILITY OF CRITERIA OF ADVERSE EFFECT

The criteria of adverse effect would only be applicable if the Board approves an alternative for construction and operation. In that event, the Board would need to further refine the engineering of any approved alternative(s); gain access to the APE(s), including any previously restricted properties; and determine if any historic properties and tribal sites would be adversely affected by the proposed action. Once the PA is developed, executed and implemented, it will lay out steps to avoid, minimize, or mitigate any adverse effects to historic properties and tribal sites. Although specific resources have not been fully evaluated for the National Register at this time, they can be categorized into general resource types, and the likely effect of the undertaking can be summarized based on the characteristics and sensitivity of the resource type. Tables 4 and 5 provide the seven examples of *criteria of adverse effect* described at 36 C.F.R. § 800.5(a)(1), the activity that may be likely to cause an adverse effect, and the general resource types that may be adversely affected. Table 4 is related to construction activity and Table 5 is related to operations activity.

Table 4. Possible Adverse Effects Related to Construction Activity

Possible Adverse Effect	Construction Activity	Archaeological and Tribal Resources	Built Resources
<i>Physical destruction of or damage to all or part of the property</i>	Clearing railroad right-of-way for staging and construction grading, cuts, excavating earth and rock on previously undisturbed land	All types that are in the path of construction or staging	All types that are in the path of construction or staging
<i>Alteration of a property...that is not consistent with the Secretary's Standards for the Treatment of Historic Properties (36 C.F.R. § 68) and applicable guidelines</i>	Railbed construction and staging, access roads	All types that can be altered by compression or spreading of fill	Districts, linear features that need to be rerouted (e.g., roads and trails)
	Rerouting of irrigation or drainage	All types in the path of rerouting	Water conveyance features
<i>Removal of the property from its historic location</i>	Clearing the railroad right-of-way for construction, existing road relocation	All moveable objects that are in the path of construction or staging	All moveable buildings, structures, and objects that are in the path of construction or staging
<i>Change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance</i>	Existing road relocation	Properties whose setting contributes to its significance	Properties whose setting contributes to its significance
<i>Introduction of visual, atmospheric, or audible elements that diminish the integrity of the property's significant historic features</i>	Pile driving or heavy construction equipment that generates temporary noise or vibration, fugitive dust	All types sensitive to temporary visual, noise, vibration, or atmospheric elements	All types sensitive to temporary visual, noise, vibration, or atmospheric elements
<i>Neglect of a property which causes its deterioration</i>	NA	NA	NA
<i>Transfer, lease or sale out of federal ownership or control.</i>	Board licensing, property acquisition, lease, or easement	All types on federal lands, i.e., BLM and USDA	All types on federal lands
Notes:			
NA = not applicable; BLM = Bureau of Land Management; USDA = U.S. Department of Agriculture			

Table 5. Possible Adverse Effects Related to Operations Activity

Possible Adverse Effect	Operational Activity	Archaeological and Tribal Resources	Built Resources
<i>Physical destruction of or damage to all or part of the property</i>	Changes in water flow from culverts, and other drainage structures may lead to erosion or flooding	Types that could be damaged by erosion or flooding	Types that could be damaged by erosion (irrigation ditches) or flooding (buildings)
<i>Change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance</i>	Permanent change of setting from railroad grade, bridges and structures	Properties where setting contributes to its significance (e.g., tribal sites, petroglyphs, and rock art sites)	Properties where setting contributes to its significance (e.g., districts, ranches, and homesteads)
<i>Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features</i>	Visibility of railroad structures (e.g., tracks, sidings, trestles, bridges, embankments, communications towers, and power lines); Atmospheric elements- engine emissions; long-term railroad noise	All types sensitive to visual, noise, vibration, or atmospheric elements	All types sensitive to visual, noise, vibration, or atmospheric elements
<i>Neglect of a property which causes its deterioration</i>	Change in land use that results in abandonment	NA	Some ranches, buildings or structures if their continued use becomes no longer practical
	Access limitation that results in abandonment	NA	Some ranches, buildings or structures if their continued use becomes no longer practical
<i>Transfer, lease or sale out of federal ownership or control</i>	NA	NA	NA
Notes: NA = not applicable			

6. VIEWS OF CONSULTING PARTIES AND THE PUBLIC

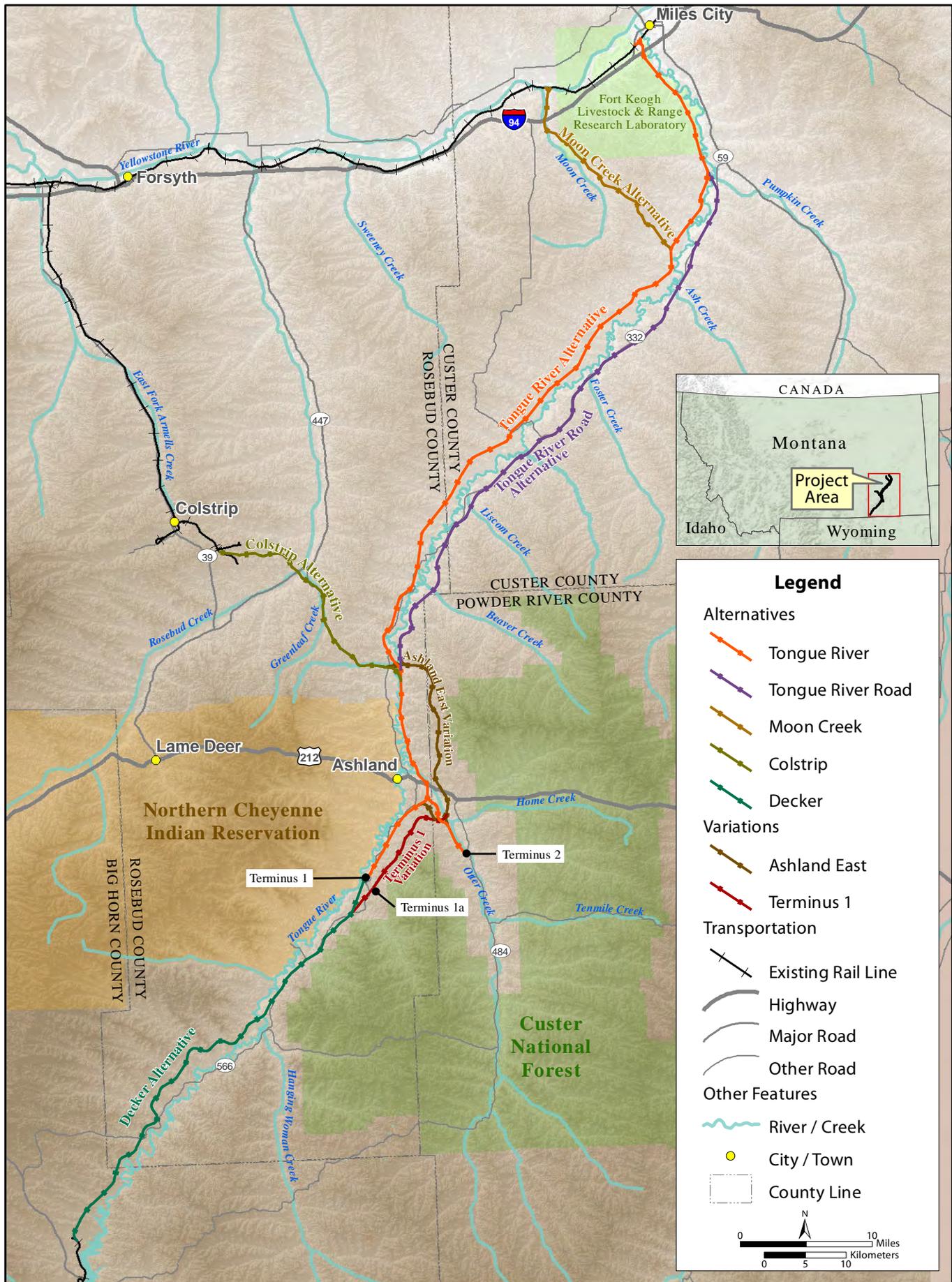
As described in detail on pages 1 through 3 of the attached letter to SHPO, OEA has been conducting extensive outreach to obtain the views of consulting parties and the public. OEA has been holding monthly calls with consulting parties since February 2013. OEA also created a historic preservation page on the Tongue River Project website accessible to consulting parties and members of the public (http://www.tonguerivereis.com/sect_106.html). The website includes pertinent Section 106 correspondence, documents, and project maps. In addition to the above, OEA held two well-attended consulting party meetings. The first meeting was held on the Northern Cheyenne Reservation in Lame Deer, Montana, April 16 to 18, 2013; the second was in Billings, Montana, February 13 to 14, 2014. All meeting transcripts and monthly call summaries are posted on the project website.

Attachment 3 of 4:

Letter to SHPO dated March 12, 2014

Attachment 4 of 5:

Map of Alternatives



Map 1. Project Vicinity

From: Charlene Vaughn [<mailto:cvaughn@achp.gov>]

Sent: Monday, June 09, 2014 3:22 PM

To: Elizabeth Merritt

Cc: Najah Duvall-Gabriel; Starzak, Richard; catherine.nadals@stb.dot.gov; vicki.rutson@stb.dot.gov; Reid Nelson; Amy Cole

Subject: Re: Tongue River Railroad PA - draft whereas clauses

All,

I'd like to review these comments and others with Najah when I return to the office next week, and before the ACHP submits our final comments to STB on the Whereas clauses section. I'm currently on vacation.

Charlene

Sent from my iPhone

From: "Betsy Merritt" <emerritt@savingplaces.org>:

Sent: June 9, 2014, at 11:56 AM,

Najah,

Here's a good way to fix that first Whereas Clause at the top of p.2:

"WHEREAS, the effects on historic properties and tribal sites of significance cannot be fully determined prior to the approval of the TRRC project by the STB, **and therefore a programmatic agreement (PA) is appropriate pursuant to 36 CFR 800.14(b)(1)(ii);**"

This will make it explicitly clear what the connection is to Section 106, because it parrots this part of the regulations verbatim.

I know that this regulation is also cited in the second Whereas Clause on p.2, so you may want to combine them, or you could eliminate the cite from the second Whereas Clause.

I'm not sure who all should be copied on this message, so please share with any others who are also directly involved in the process of editing the Whereas Clauses.

Thanks,

Betsy Merritt

Elizabeth Sherrill Merritt | DEPUTY GENERAL COUNSEL

P 202.588.6026 | **M** 202.297.4133

NATIONAL TRUST FOR HISTORIC PRESERVATION

The Watergate Office Building
2600 Virginia Avenue NW Suite 1100
Washington, DC 20037

www.PreservationNation.org

WE'VE MOVED!

Note my new e-mail address:
emerritt@savingplaces.org



**National Trust for
Historic Preservation**
Save the past. Enrich the future.



Preserving America's Heritage

September 3, 2014

Ms. Victoria Rutson
Surface Transportation Board
Office of Environmental Analysis
395 E Street, SW
Washington, DC 20423

Ref: Proposed Tongue River Railroad Project, Analysis of Alternatives to Resolve Adverse Effects Custer, Rosebud, Powder River and Bighorn Counties, Montana

Dear Ms. Rutson:

On August 11, 2014, the Advisory Council on Historic Preservation (ACHP) participated in the Surface Transportation Board's (STB's) consulting party meeting via teleconference for the referenced undertaking. During the teleconference, the National Trust for Historic Preservation (NTHP) 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. Accordingly, the inquiry made by the NTHP is relevant to the STB Section 106 consultation, and should be addressed in future consulting party meeting teleconferences.

During the teleconference on July 25, 2014, the ACHP recommended that STB develop a process Programmatic Agreement (PA) which would outline the procedures to be followed prior as STB selects the preferred alternative for the Tongue River Project. We understood that we were proposing an approach that differs from that recommended by the Tongue River Railroad. However, the ACHP believes that in this particular undertaking, it is critical that STB have transparency and stakeholder engagement in all aspects of decision making. Therefore, we urge STB to take appropriate measures to engage consulting parties as each alternative is considered so that issues related to the APE, scope of work for identification and evaluation and assessment of effects are considered in a timely manner. Section 800.6(a) of our regulations, "Protection of Historic Properties" (36 CFR Part 800) states:

The agency official shall consult with the SHPO/THPO and other consulting parties, including Indian tribes and Native Hawaiian organizations, to develop and evaluate alternatives or modifications that could avoid, minimize, or mitigate adverse effects to historic properties.

Since STB has not yet selected a preferred alternative for the Tongue River Project, the evaluation of alternatives must be incorporated in any PA that will be used by the agency to fulfill the requirements of Section 106. We have recommended to STB during previous teleconferences that it develop a PA that outlines the procedure to be followed for each step of the Section 106 process that will not have been completed prior to executing the PA. The analysis of alternatives would be done under the Resolution of Adverse Effects in Step IV. We are providing STB with an example of a processed PA that the ACHP

ADVISORY COUNCIL ON HISTORIC PRESERVATION

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was involved in developing (see enclosed). We recommend that STB share this sample PA with other consulting parties so that we can discuss this issue further.

Since the last teleconference held on August 11, 2014, ended without a discussion regarding the analysis of alternatives, we request that STB include this topic on the next meeting agenda. Other consulting parties may want to share their views regarding the analysis of alternatives as well. Moreover, we believe that STB's position on this issue be resolved before consulting parties negotiate the avoidance, minimization, and mitigation stipulations.

If you have any questions, please contact Najah Duvall-Gabriel at (202) 517-0120, or via email at ngabriel@achp.gov.

Sincerely,

A handwritten signature in cursive script that reads "Charlene Dwin Vaughn". The signature is written in black ink and is positioned above the typed name and title.

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



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.

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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

September 30, 2014

Ms. Victoria Rutson
Office of Environmental Analysis
Surface Transportation Board
395 E Street SW
Washington, DC 20423

Re: Comments from Colstrip Alternative Landowners Group on proposed Tongue River Railroad project Programmatic Agreement

Dear Ms. Rutson:

This letter provides comments on the proposed Programmatic Agreement (“PA”) on behalf of my clients who own property along the proposed Tongue River Railroad (“TRR”) Colstrip Alternative: Kurt Baumgartner, Hank and Kitte Coffin, Jim and Helen Curran, Joseph Hanna Trust, Highland Rim, Rocker Six Cattle Company, Trusler Inc., Dick and Kay Wells, and Hugh and Ann Wells (collectively, “the Landowners”).

“Whereas” Clauses

The Landowners’ primary concern regarding the whereas clauses as written is that they are overbroad and premature. Specifically, the eighth proposed whereas clause in the July 31, 2014 draft appears to contemplate the choice of a route by the Surface Transportation Board (“STB”) prior to full identification and consideration of potentially significant cultural resources along all potential routes, including full consideration of the No Action Alternative. We do not believe that the language authorizing programmatic agreements applies for this project. The subsection on Programmatic Agreements at 36 CFR 800.14(b) states:

The (Advisory) Council (on Historic Preservation) and the agency official may negotiate a programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects from *certain complex project situations* or multiple undertakings (emphasis added).

The Tongue River Railroad is not a complex project.

PAs are not an option available to the agency unconditionally. They may only be used under the circumstances described above. Only the “complex project” language appears to have potential application to the TRR project. Nowhere in the proposed PA is there any explanation of why this project should be considered “complex.” We are not aware that such a finding has ever been discussed, let alone analyzed and documented sufficiently to justify the use of a PA.

We object to any unsubstantiated determination that this is a complex project such that some forms of analysis may be waived until after the agency's final decision.

The regulations do not define the term "complex." In the few cases that interpret 36 CFR 800.14, federal courts have accepted application of the term to projects with far greater complexity than the 40 or so miles of new rail line across open country at issue here. The U.S. District Court for the District of New Jersey accepted the Council's determination that a project to "combine rehabilitation and new construction on the site" of a large historic hotel constituted a complex project. *Lesser v. City of Cape May*, 110 F.Supp.2d 303, 318 (D.N.J. 2000), *affirmed* 78 Fed. Appx. 208, 2003 WL 22367169. In that case, both the Council and the New Jersey State Historic Preservation Office agreed that the project was complex, and the court relied on their expertise – not STB's. We are aware of no such findings from the Council and the Montana SHPO in this matter. In addition, at the time of approval by the city, the second phase of the project remained conceptual. We are not aware that any part of the TRR proposal remains conceptual. It is a rail line, not a seaside conference center in the design stage.

The U.S. Court of Appeals for the Eighth Circuit found that a PA should have been executed, under the same regulatory clause, or the alternative National Historic Preservation Act process completed, prior to STB licensing of a proposal to construct approximately 280 miles of new rail line and upgrade nearly 600 miles of existing rail line. *Mid-States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d 520 (8th Cir. 2003), *rehearing and rehearing en banc denied, on remand* 2004 WL 395841, *on remand* 2005 WL 1041882, *on remand* 2005 WL 3616815, *on remand* 2006 WL 383507. In other words, for constructing a rail line seven times the length of TRR, the court found a PA *optional*. Waiving any part of the agency's pre-decision impact analysis via PA is neither mandatory nor appropriate for this project.

Effects can be fully determined prior to approval.

Finally, we do not agree that the language of 36 C.F.R. § 800.14(b)(1)(ii) – "When effects on historic properties cannot be fully determined prior to approval of an undertaking" – applies to this proposed project. To the contrary, determining effects on historic properties along all alternative routes is feasible prior to the agency's decision. As the agency appears to believe otherwise, we request an explicit property description of which portions of the alternatives cannot be fully analyzed prior to the agency's final decision.

Identifying some effects after authorizing construction would disadvantage the No Action Alternative as a viable option.

Even if the regulations authorized use of a PA in this situation, it would be inadvisable as a practical matter for STB to wait until after authorizing construction – if that is the outcome – to identify some effects on historic properties. If effects turn out to be more serious

or widespread than understood at the decision point, the No Action Alternative will no longer be available. STB will have committed itself irrevocably to construction. This outcome would be a poor use of the considerable resources, government and private, devoted to making the best decision for all involved.

Stipulations

The Landowners concur on and incorporate here by reference the Council's concerns, as expressed in Charlene Vaughn's September 8, 2014 letter to Victoria Rutson. The Landowners have the following additional concerns.

Preamble

We would like a clarification here that STB's duty extends to the full scope of NHPA and its implementing regulations, not just the section mentioned here. We would also like some commitment as to the overall timeline in which STB would carry out its legal duties under the PA, if the PA takes effect. The twelve-year lifetime of the proposed PA is far too long for the Landowners to live in limbo, especially given the decades this proposal has already dragged on.

Identification Plan

Many of the Landowners have long family relationships with the land to be crossed and personal knowledge of historically and culturally significant sites that may be affected by the rail line. Most have had little or no opportunity to share this information. The oral history surveys prescribed in National Register Bulletin 24 have not taken place. There is no barrier to collecting this information immediately. Participants with relevant knowledge should receive reasonable financial reimbursement for their time.

The 15-day timeline for response by PA consulting parties on each Phase I ID Report, and again for submitting final comments, is far too short. The Landowners are working people participating in this process in their spare time. At some points during the agricultural calendar, they are effectively unavailable for weeks. To ensure the Landowners' ability to participate meaningfully, the minimum turn-around for their response should be 45 days.

The five days allowed for STB to provide missing information or determine that additional information is not needed may be inadequate where a significant data gap is identified. We also request an automatic extension period of at least 15 days on any deadline named in the PA, if requested in writing by one of the interested parties, and reasonable financial reimbursement for the Landowners' time required to review reports, or if deemed necessary by the Landowners, reasonable financial reimbursement for a qualified expert approved by the Landowners to assist them with this review.

Finalization of Treatment Plan(s)

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.

Data Recovery Plan

We are concerned that subsection (c), regarding the Contractor's duty to conduct data recovery in accordance with the Data Recovery Plan, includes no timeline and could potentially be delayed indefinitely. We request a clear timeline.

Review of Data Recovery Reports

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.

Construction

The Landowners are concerned that the PA contemplates consideration of "the full range of treatment options (including avoidance)" after a route decision has been made. The only way that STB can realistically consider the full range of options is to analyze all the data described in the Stipulations prior to the route decision. In addition, a phased review of data while construction is underway may foreclose options that would have been available prior to construction. As a practical matter, delays and route changes will be far more costly to TRRC during construction, putting additional pressure on the Contractor and STB to set aside serious concerns. For other interested parties, being forced to raise objections during construction creates the risk of being required by a court to post a bond while attempting to have the PA enforced, which the Landowners cannot afford to do. Only a full review of all data *prior to the route decision* will leave all options open and protect all parties' rights.

The Landowners will require expert assistance to review the sufficiency and quality of the Contractor's data recovery fieldwork/treatment on their land. We request reasonable financial reimbursement for a qualified expert approved by the Landowners to assist them with this review.

Changes to the Rail Line Alignment/Other Areas Subject to Direct Impacts

The language of this stipulation represents the first notice the Landowners have had that there are plans for staging areas or work camps. Such facilities represent many potential impacts that have not yet been considered at all in the planning process, such as damage to roads and

other infrastructure, and law enforcement needs. We are very concerned that STB would propose to consider these impacts, along with those created by construction access routes and completely unknown “changes to the alignment,” *after* selecting an alternative. These impacts are completely knowable in advance if the agency makes the effort to acquire the information. Again we object to any plan to postpone collection of this vital data until after an alternative is chosen.

As above, the Landowners will require expert assistance to review the sufficiency and quality of supplemental reports. We request reasonable financial reimbursement for a qualified expert approved by the Landowners to assist them with this review. The Landowners request at least 45 days to provide comments.

Discovery

The Discovery Plan creates the same need for expert assistance. We request reasonable financial reimbursement for a qualified expert approved by the Landowners to assist them with this review.

Curation

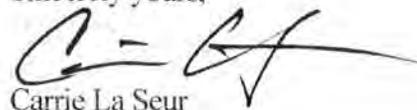
The Landowners express their preference for preservation in place of all archeological, cultural, and paleontological materials discovered on their property, and their wish to be consulted on the handling of such materials before any removal from the Landowners' individual properties. The Landowners wish to receive a detailed report on and receipt for any such materials prior to their removal. Finally, the Landowners request that STB require a bond from TRRC prior to the beginning of construction sufficient to cover the expense of handling and returning any such materials to private property owners.

Dispute Resolution

Given the possibility that the Landowners will not ultimately sign the PA, but have participated in its development and will continue to have a significant interest in its enforcement, they request language that would grant them access to review of disputes by the Council as described under subsections (a) – (f), instead of the lesser level of review offered to members of the public at subsection (g). The Landowners also request the right to initiate Council review of an objection in the event that STB declines to do so.

We appreciate your consideration of these issues.

Sincerely yours,



Carrie La Seur



Preserving America's Heritage

October 30, 2014

Ms. Victoria Rutson
Surface Transportation Board
Office of Environmental Analysis
395 E Street, SW
Washington, DC 20423

Ref: *Section 106 Consultation, Proposed Tongue River Railroad Project Cluster, Rosebud, Powder River and Bighorn Counties, Montana*

Dear Ms. Rutson:

On October 20, 2014, the Advisory Council on Historic Preservation (ACHP) participated in a consulting party teleconference for the Tongue River Project. The ACHP would like to follow up with the Surface Transportation Board (STB) regarding some of the discussion points raised during this call as they are important to the Section 106 consultation.

Confidentiality of Information Regarding Sites of Religious and Cultural Significance to Indian Tribes

During the teleconference, STB's consultant shared information considered confidential to Indian tribes. We remind STB that it is the responsibility of the federal agency to protect confidential information and not make it accessible to inappropriate parties. This responsibility applies to the federal agency's consultants as well. Please ensure that STB's protocols on confidential information are known by all and adhered to as a matter of principal.

Draft Programmatic Agreement Stipulations

The current draft programmatic agreement (PA) circulated by STB does not appear to include all of the ACHP's recommended revisions outlined in our letter of September 8, 2014 to STB. (See enclosed) Nor does the draft PA include comments submitted by other consulting parties. Since no explanations are provided in the draft PA, we question whether it was ready for circulation. Nevertheless, we request that STB revise the current draft PA to include all comments and recirculate it to all consulting parties with an explanation of comments submitted on the stipulation and STB's proposed action.

STB is encouraged to continue to conduct this Section 106 review in a meaningful and collaborative manner. Comments from all consulting parties should be shared so that the drafting of the PA is transparent. This will ensure that identification and evaluation, assessment of effects and analysis of alternative alignments adhere to the requirements of the Section 106 regulations. Consulting party comments and STB's responses also will establish the administrative record for this undertaking. Failure to fully engage all consulting parties and manage information they submit could delay the Section 106 process and potentially require STB to revisit major issues that were not clearly documented.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

401 F Street NW, Suite 308 • Washington, DC 20001-2637

Phone: 202-517-0200 • Fax: 202-517-6381 • achp@achp.gov • www.achp.gov

Consistent with our advice to STB, we are sharing this letter with all of the consulting parties. If you have any questions or concerns, please contact Najah Duvall-Gabriel at (202) 517-0210 or via email at ngabriel@achp.gov.

Sincerely,

A handwritten signature in cursive script that reads "Charlene Dwin Vaughn".

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

Enclosure

**New ACHP Guidance on Agreement Documents now available at:
<http://www.achp.gov/agreementdocguidance.html>**



Ms. Victoria Rutson
Office of Environmental Analysis
Surface Transportation Board
395 E Street SW
Washington, DC 20423

2501 Montana Avenue, Suite 4
Billings, Montana 59101
Phone: 406-969-1014
Fax: 877-926-6998
www.baumstarkbraaten.com

November 4, 2014

Re: Additional comments from Colstrip Alternative Landowners Group on proposed TRR project Programmatic Agreement v. 10-17-14

Dear Ms. Rutson:

This letter provides additional comments on the proposed Programmatic Agreement ("PA") on behalf of my clients who own property along the proposed Tongue River Railroad ("TRR") Colstrip Alternative: Kurt Baumgartner, Hank and Kitte Coffin, Jim and Helen Curran, Joseph Hanna Trust, Highland Rim, Rocker Six Cattle Company, Trusler Inc., Dick and Kay Wells, and Hugh and Ann Wells (collectively, "the Landowners").

On October 20, 2014, the agency distributed revisions to the Whereas clauses and Stipulations to Section 106 call participants so soon before the call as to make review impossible. Agency representatives then insisted on the call that a discussion of the Landowners' 9-30-14 letter, commenting on the previous version of the PA Whereas clauses and Stipulations, was inappropriate because the newly revised versions of these documents now addressed the Landowners' concerns. The Landowners' attempts to address their concerns were met with agency requests to put them "in writing" – which the Landowners had already done in a detailed September 30, 2014 letter, organized according to sections of the draft PA Stipulations. Agency staff further requested that the Landowners put their comments in the text of the revised Whereas clause and Stipulation documents.

As the Landowners discovered upon reviewing the new PA revisions after the call, the agency had incorporated almost none of the Landowners' comments and suggestions into the revisions. In at least one case, annotated in comments to the attached Stipulations document, the agency appears to have *decreased* a review timeline for interested parties that the Landowners had criticized as already too short. The Stipulation revisions, dated 10-17-14 but distributed on 10-20-14, did not include many sections on which the Landowners had commented. It is difficult to understand how agency staff could have believed that the revisions "addressed" the Landowners' comments.

The Landowners are left with the strong impression that the agency gave little or no attention to their 9-30-14 comments, which they and their legal counsel took seriously and spent significant time drafting in good faith. In light of what was in the 10-17-14

revisions, agency staff's statements on the 10-20-14 call appear to have been a successful attempt to dodge discussion of the Landowners' concerns about the PA by lying about the content of the PA revisions. If the agency intends to carry out so-called "consultations" with interested parties in this sort of bad faith, the Landowners see little advantage in continuing to participate.

Commented versions of the agency's 10-17-14 PA revisions are attached, with comments embedded in the text of the documents, as requested. The Landowners would greatly appreciate written responses to each of their comments, delivered at least one full working day before the next Section 106 call.

In a related matter, the Landowners remind the agency that the terms of the access agreements for cultural surveys included *timely* access to data gathered. They are each entitled to immediate access to site reports relating to their land. The Landowners also request that cultural resource analysis of their properties be performed according to the standards and practices required for federally owned land.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Carrie La Seur', with a stylized flourish at the end.

Carrie La Seur

Attorney for Colstrip Alternative
Landowners' Group



*

SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Environmental Analysis

November 17, 2014

Dr. Mark Baumler
State Historic Preservation Officer
Montana Historical Society
225 North Roberts, P.O. Box 201201
Helena, MT 59620-1201

Attn: Dr. Stan Wilmoth

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

Dear Dr. Baumler:

The purpose of this letter is to update you on recent developments in our ongoing historic reviews for the Tongue River Railroad Construction Project. We begin with a summary of the fieldwork conducted this summer, followed by a status report on the draft Programmatic Agreement being developed for this project.

Summary of Field Work

A. Survey Areas

The Surface Transportation Board's Office of Environmental Analysis (OEA) made a reasonable and good-faith effort to gain access and survey property within the right-of-way for portions of each build alternative. OEA was unable to gain access to some areas either because landowners would not allow entry or because some accessible areas were surrounded by inaccessible parcels. The resultant survey data will allow OEA to evaluate the potential impacts to historic properties within each of the alternatives and to weigh the potential impacts among the alternatives. Landowners in the project area granted access to approximately 51% of the archaeological and tribal resources Area of Potential Effects (APE) and OEA conducted pedestrian transect surveys on 72% of the accessible APE (Table 1). OEA was granted access to approximately 50% of the built resources APE and OEA conducted pedestrian and vehicular surveys or confirmed the absence of built resources on 96% of the accessible APE. Both APEs included buffer zones to capture indirect effects. The APE for the archaeological and tribal resources was expanded with a buffer zone of 200 feet on either side of the right-of-way or direct impact area, for a total of 400 feet. Similarly, the APE for the built resources was expanded by 1,500 feet outside of the right-of-way, for a total of 3,000 feet.

Table 1. Acres Surveyed

APE	Total Acres	Accessible Acres	Percent Access Granted	Total Acreage Surveyed	Percent Accessible Surveyed
Archaeological and tribal resources	23,431	11,995	51	8,650	72
Built Resources	96,116	48,274	50	46,578	96

In response to Dr. Stan Wilmoth’s letter to OEA dated March 19, 2014, Table A1 (attached) shows the total acres surveyed and the percentage coverage for each build alternative.

B. Tribal and Archaeological Sites

Eight-member survey teams (teams A-G) with an equal number of archaeologist and tribal members, conducted pedestrian surveys to identify tribal and archaeological sites (members from 15 tribes were represented, see Table 2). The teams worked in seven 10-day increments over the summers of 2013 and 2014 (Table 3). They surveyed portions of all of the build alternatives and covered a total of 8,650 acres. Archeologists were members of ICF International, OEA’s third party consultant for the Tongue River Railroad Proposal Environmental Impact Statement.

The chief archaeologist for each team met the Secretary of the Interior Professional Qualifications Standards (36 C.F.R. Part 61) for archaeology; all other crew members had a Bachelor’s degree (BA or BS) or higher, in anthropology or a closely related field. Tribal members were not required to meet the Secretary of Interior Standards; OEA relied on their expertise to identify tribal sites.

Table 2. Tribes Participating in Field Surveys

Team A	Team B	Team C	Team D
Northern Arapaho	Mandan, Hidatsa, and Arikara	Crow	Cheyenne and Arapaho
Northern Cheyenne	Northern Cheyenne	Northern Cheyenne	Crow Creek Sioux
Fort Peck Assiniboine and Sioux	Oglala Sioux	Standing Rock Sioux	Northern Cheyenne
Yankton Sioux	Rosebud Sioux	Yankton Sioux	Sisseton Wahpeton Oyate Turtle Mountain Chippewa
Team E	Team F	Team G	
Cheyenne and Arapaho	Crow Creek Sioux	Cheyenne River Sioux	
Crow	Fort Belknap	Northern Cheyenne (member #1)	
Northern Arapaho	Mandan, Hidatsa, and Arikara	Northern Cheyenne (member #2)	
Northern Cheyenne	Northern Cheyenne	Standing Rock Sioux	
Turtle Mountain Chippewa	Rosebud Sioux		

Table 3. Survey Dates

APE	Team A	Team B	Team C	Team D
Archaeological and tribal resources	July 15, 2013– July 24, 2013	July 29, 2013– August 7, 2013	August 12, 2013– August 21, 2013	August 26, 2013– September 4, 2013
Built Resources	July 15, 2013– July 24, 2013	July 29, 2013– August 7, 2013	N/A	N/A
APE	Team E	Team F	Team G	
Archaeological and tribal resources	May 12, 2014– May 23, 2014	June 2, 2014– June 13, 2014	July 7, 2014– July 18, 2014	
Built Resources	N/A	June 2, 2014– June 9, 2014	N/A	

During the surveys, individuals were spaced approximately 50 feet apart and walked at the same pace observing the ground for any indications of archaeological resources and/or tribal resources such as rock alignments, flaked stone (lithics), bone, historical debris, or other deposits. As resources were encountered, the entire crew stopped and recorded the resource, using a global positioning system

(GPS) device and iPad® to record the location and attributes, as appropriate. In response to requests made by tribal members during consultation for this undertaking, the crews did not perform any earthmoving or excavation, and all team members took care not to disturb any cultural resources observed. Archaeological site types were recorded using standard terminology, as described in the attachment to this letter. Team members kept field notes and took photos of all archaeological resources.

In accordance with 36 CFR § 800.4(a)(4), if a tribal member observed sites of tribal significance (sites containing attributes beyond or in addition to archaeological data), the team recorded a single GPS point for that resource, along with a brief description that protected confidentiality. Archaeologists only collected any information if all four tribal participants agreed that the resource should be recorded.

The field survey resulted in the identification of 386 newly recorded archaeological and tribal resources in the APE, including 350 archaeological and 36 tribal resources (Table 4).

Table 4. Numbers of Newly Recorded Tribal and Archaeological Resources

Lithic Scatter	Lithic Scatter with other components	Stone Circle/Tipi Rings	Cairn	Historic Water Associated	Historic Trail or Fence	Other	Isolate	Total Archaeology Sites	Tribal Resources
83	27	12	39	6	6	51	126	350	36

C. Built Resources

Three teams of two federally qualified (36 CFR § 61) architectural historians or historians conducted field survey work for built resources from July 15 to July 24, 2013, from July 29 to August 7, 2013, and from June 2 to June 9, 2014. Their methods involved reviewing geographic information system (GIS) maps using Google Earth Pro satellite imagery (Google Earth 2013); reviewing previously recorded site forms; interviewing land owners or managers who offered to provide information; conducting a windshield survey along public roads; and conducting a pedestrian or all-terrain vehicle field survey along private roads, trails, or cow paths, where available. Our letter to you dated March 12, 2014, included a list of local repositories and organizations the architectural historians contacted to seek information of built resources in the APE in accordance with 36 CFR § 800.4(a)(3). The architectural historians recorded buildings, structures, objects, and districts that appeared to be 50 years of age or older—the general threshold for consideration under the National Register. The field survey resulted in recording 51 newly identified built resources in the preliminary APE for all build alternatives (Table 5).

Table 5. Newly Recorded Built Resources

Barn	Bridge	Dam/Levee	District ^a	Homestead	Irrigation Ditch	Railroad	Ranch	Road/Trail	Utility	Windmill	Other ^b	Total Built Resources
3	3	4	1	4	3	3	4	5	3	6	10	51

Notes:

^a District includes the newly identified Eastern Montana Fairgrounds Historic District

^b Other includes a pump house, fish hatchery, school, culvert, cattle pen, park facilities, pasture, storage shed, corrals, and a residence.

D. Further Information

The attachment to this letter summarizes previously recorded and newly identified archaeological resources, tribal resources, and built resources in the APE by alternative in Tables A-2 and A-3, and shows their approximate locations on Figure 1. The information on the archaeological resources and built resources has been reported to you in greater detail on site forms under separate cover, and information on resources identified by tribal members will be coordinated with the tribes. Dr. Wilmoth stated in his letter dated March 19, 2014, “some assessment of eligibility whether it is preliminary or otherwise will be useful.” Therefore, the attachment to this letter provides a general description of the resource types identified, and presents our reasoning for their potential eligibility for the National Register.

Programmatic Agreement Development

OEA held a Section 106 consulting party meeting in Billings, Montana, February 13 and 14, 2014, and several of the meeting attendees recommended that work on a Programmatic Agreement begin immediately. Since that meeting, OEA has worked with the consulting parties on a regular basis to develop the draft Programmatic Agreement. In April 2014, upon the advice of ACHP, OEA provided the consulting parties with the justification 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 Programmatic Agreement. From August 2014 through the present time, OEA continues to work with the consulting parties to develop the other sections of the draft Programmatic Agreement, including the stipulations and appendices.

The draft Programmatic Agreement stipulates measures that would be taken to complete the identification and evaluation efforts in accordance with C.F.R. Part 800.4(b)(2) and to phase the application of the criteria of adverse effect 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 and tribal sites of significance in accordance with 36 C.F.R. Part 800.6(a). The draft Programmatic Agreement will be attached to the Draft EIS for further review and comment by the consulting parties and the public.

In a letter dated September 8, 2014, the Advisory Council on Historic Preservation asked that two stipulations be added to the draft Programmatic Agreement:

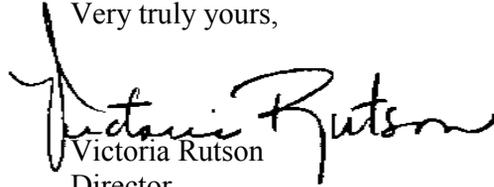
- 1) Roles and responsibilities of key consulting parties, and
- 2) Analysis of alternatives considered under NEPA and how that analysis is informed by the historic properties review process in the draft Programmatic Agreement, including the selection of a preferred alternative.

OEA has established a working group to regularly revise the draft Programmatic Agreement. Deputy SHPO Dr. Wilmoth has participated in the working group, and joined our first teleconference held on September 26, 2014. Other members of the working group represent the U.S. Army Corps of Engineers, the Department of the Interior-Bureau of Land Management, the Northern Cheyenne, the Rosebud Sioux, the Standing Rock Sioux, the National Trust on Historic Preservation, and TRRC (the applicant). The working group meets twice a month, and the group’s revisions have been circulated to the rest of the consulting parties before each monthly call for discussion, review and comment.

At this time, OEA would appreciate any comments you may have, including but not limited to 1) the level of effort to identify archaeological, tribal, and built resources conducted during the analysis of alternatives being considered in the EIS and 2) the involvement of the consulting parties in the development of the draft Programmatic Agreement. We look forward to continuing work with Dr. Wilmoth on the draft Programmatic Agreement.

Thank you for the consistent input and guidance your office has provided to OEA regarding the proposed Tongue River Railroad Construction Project. As before, Catherine Nadals of my staff will be working on the Section 106 compliance aspects of the project. Please feel free to contact me or Ms. Nadals at 202-245-0293 (Catherine.Nadals@stb.dot.gov). You may also contact Rick Starzak with ICF International (our third-party contractor) at 213-312-1751 (Richard.Starzak@icfi.com). We look forward to your comments and appreciate your assistance.

Very truly yours,

A handwritten signature in black ink that reads "Victoria Rutson". The signature is fluid and cursive, with a large initial "V" and "R".

Victoria Rutson
Director
Office of Environmental Analysis

Attachment

cc: Charlene Dwin Vaughn, ACHP
Najah Duvall-Gabriel, ACHP

ATTACHMENT

Identified Archaeological Resources, Tribal Resources, and Built Resources Identified within the APE by Alternative Surface Transportation Board Field Survey for Tongue River Railroad EIS – 2013-2014 Docket No. FD 30186

As requested in your letter dated March 19, 2014, Table A1 provides the percentage coverage of OEA’s identification effort for each alternative. The results include the:

- Total number of acres of the Area of Potential Effects (APE) for archaeological resources and tribal resources,
- Accessible number of acres of the APE,
- Number of acres surveyed, and
- Percent surveyed of the APE that was accessible.

Table A1. Coverage of Identification Effort for Archaeological and Tribal Resources

Alternative	Total Acres in the APE ^a	Total Acreage Accessible	Percent Access Granted	Total Acreage Surveyed	Percent of APE Surveyed	Percent Accessible Surveyed
Tongue River	7,921	4,226	53	2,674	34	63
Tongue River East	8,097	4,353	54	3,080	38	71
Colstrip	4,133	2,913	71	2,124	51	73
Colstrip East	4,369	3,156	72	2,590	59	82
Tongue River Road	8,368	3,641	44	2,493	30	68
Tongue River Road East	8,491	3,714	44	2,834	33	76
Moon Creek	8,086	4,299	53	2,456	30	57
Moon Creek East	8,262	4,426	54	2,862	35	65
Decker	5,420	2,555	47	1,699	31	66
Decker East	5,229	2,560	49	1,683	32	66
Unique Segment Total ^b	23,431	11,995	51	8,650	37	72

Notes:

^a APE includes a 200-foot buffer zone on either side of the right-of-way edge.

^b Some alternatives share common segments; the total is for unique segments.

Table A2 tallies and categorizes the archaeological resources and tribal resources that were identified by OEA’s survey effort in 2013 and 2014 within the accessible areas of the APE of each alternative.

Table A2. Number of Archaeological and Tribal Resources identified within Alternative APEs

	Lithic Scatter	Lithic Scatter with other components	Stone Circle/Tipi Rings	Cairn	Historic Water Associated	Historic Trail or Fence	Other	Isolate	TOTAL Archaeological Resources	TOTAL Tribal Resources	TOTAL
Tongue River Alternative											
Within or intersected by the right-of-way	19	9	2	5	2	2	3	16	58	5	63
Within 200-foot buffer zone	9	0	0	1	0	0	8	17	35	5	40
TOTAL	28	9	2	6	2	2	11	33	93	10	103
Tongue River East Alternative											
Within or intersected by the right-of-way	20	8	2	7	2	0	5	17	61	6	67
Within 200-foot buffer zone	10	0	3	2	0	0	11	24	50	8	58
TOTAL	30	8	5	9	2	0	16	41	111	14	125
Colstrip Alternative											
Within or intersected by the right-of-way	8	1	4	6	2	2	13	10	46	3	49
Within 200-foot buffer zone	4	4	0	7	0	0	6	13	34	12	46
TOTAL	12	5	4	13	2	2	19	23	80	15	95
Colstrip East Alternative											
Within or intersected by the right-of-way	16	5	4	10	2	2	15	14	68	4	72
Within 200-foot buffer zone	8	4	3	8	0	0	10	22	55	5	60
TOTAL	24	9	7	18	2	2	25	36	123	9	132
Tongue River Road Alternative											
Within or intersected by the right-of-way	14	11	3	2	0	3	5	13	51	4	55
Within 200-foot buffer zone	8	3	0	4	0	0	8	13	36	3	39
TOTAL	22	14	3	6	0	3	13	26	87	7	94

	Lithic Scatter	Lithic Scatter with other components	Stone Circle/Tini Rims	Cairn	Historic Water Associated	Historic Trail or Fence	Other	Isolate	TOTAL Archaeological Resources	TOTAL Tribal Resources	TOTAL
Tongue River Road East Alternative											
Within or intersected by the right-of-way	14	10	3	4	0	1	7	14	53	5	58
Within 200-foot buffer zone	9	3	3	5	0	0	11	20	51	2	53
TOTAL	23	13	6	9	0	1	18	34	104	7	111
Moon Creek Alternative											
Within or intersected by the right-of-way	23	8	2	6	3	2	2	17	63	3	66
Within 200-foot buffer zone	6	1	0	2	0	0	3	15	27	2	29
TOTAL	29	9	2	8	3	2	5	32	90	5	95
Moon Creek East Alternative											
Within or intersected by the right-of-way	23	7	2	8	3	0	4	18	65	4	69
Within 200-foot buffer zone	7	1	3	3	0	0	6	22	42	5	47
TOTAL	30	8	5	11	3	0	10	40	107	9	116
Decker Alternative											
Within or intersected by the right-of-way	18	5	0	7	0	2	4	18	54	8	62
Within 200-foot buffer zone	9	0	0	1	0	1	2	5	18	6	24
TOTAL	27	5	0	8	0	3	6	23	72	14	86
Decker East Alternative											
Within or intersected by the right-of-way	17	6	0	6	0	0	4	16	49	8	57
Within 200-foot buffer zone	9	1	0	1	0	1	2	9	23	5	28
TOTAL	26	7	0	7	0	1	6	25	72	13	85

Table A3 tallies and categorizes the built resources that were identified by OEA’s survey effort in 2013 and 2014 within the accessible areas of the APE of each alternative.

Table A3. Number of Built Resources surveyed within the APE

	Barn	Bridge	Dam/Levee	District	Homestead	Irrigation Ditch	Railroad	Ranch	Road/Trail	Utility	Windmill	Other	TOTAL
Tongue River Alternative													
Within or intersected by the right-of-way	0	0	0	1	1	0	1	0	1	0	0	3	7
Within 1,500-foot buffer zone	2	3	0	2	3	0	1	6	2	3	1	3	26
TOTAL	2	3	0	3	4	0	2	6	3	3	1	6	33
Tongue River East Alternative													
Within or intersected by the right-of-way	0	0	0	0	0	0	1	0	1	0	0	3	5
Within 1,500-foot buffer zone	2	2	0	2	0	0	0	4	2	3	1	2	18
TOTAL	2	2	0	2	0	0	1	4	3	3	1	5	23
Colstrip Alternative													
Within or intersected by the right-of-way	0	0	2	2	1	2	0	0	0	0	0	1	8
Within 1,500-foot buffer zone	0	1	1	0	4	0	3	2	0	0	1	2	14
TOTAL	0	1	3	2	5	2	3	2	0	0	1	3	22
Colstrip East Alternative													
Within or intersected by the right-of-way	0	0	2	1	0	2	0	0	0	0	0	1	6
Within 1,500-foot buffer zone	0	0	1	0	1	0	2	0	0	0	1	1	6
TOTAL	0	0	3	1	1	2	2	0	0	0	1	2	12
Tongue River Road Alternative													
Within or intersected by the right-of-way	0	0	0	1	1	1	1	0	1	0	0	3	8
Within 1,500-foot buffer zone	2	4	0	2	5	1	1	4	2	3	1	5	30
TOTAL	2	4	0	3	6	2	2	4	3	3	1	8	38

	Barn	Bridge	Dam/Levee	District	Homestead	Irrigation Ditch	Railroad	Ranch	Road/Trail	Utility	Windmill	Other	TOTAL
Tongue River Road East Alternative													
Within or intersected by the right-of-way	0	0	0	0	0	1	1	0	1	0	0	3	6
Within 1,500-foot buffer zone	2	3	0	2	2	1	0	2	2	3	1	4	22
TOTAL	2	3	0	2	2	2	1	2	3	3	1	7	28
Moon Creek Alternative													
Within or intersected by the right-of-way	0	0	0	1	1	0	1	0	2	0	0	0	5
Within 1,500-foot buffer zone	1	1	1	0	3	0	1	5	2	0	3	2	19
TOTAL	1	1	1	1	4	0	2	5	4	0	3	2	24
Moon Creek East Alternative													
Within or intersected by the right-of-way	0	0	0	0	0	0	1	0	2	0	0	0	3
Within 1,500-foot buffer zone	1	0	1	0	0	0	0	3	2	0	3	1	11
TOTAL	1	0	1	0	0	0	1	3	4	0	3	1	14
Decker Alternative													
Within or intersected by the right-of-way	0	0	0	2	0	0	1	0	0	0	0	0	3
Within 1,500-foot buffer zone	0	1	0	0	1	0	0	2	1	0	1	0	6
TOTAL	0	1	0	2	1	0	1	2	1	0	1	0	9
Decker East Alternative													
Within or intersected by the right-of-way	0	0	0	2	0	0	1	0	0	0	0	0	3
Within 1,500-foot buffer zone	0	0	0	0	0	0	0	0	1	0	1	0	2
TOTAL	0	0	0	2	0	0	1	0	1	0	1	0	5

Figure 1 presents the information contained in Tables A2 and A3 on a map of the project area. We are happy to provide more detailed maps upon request.

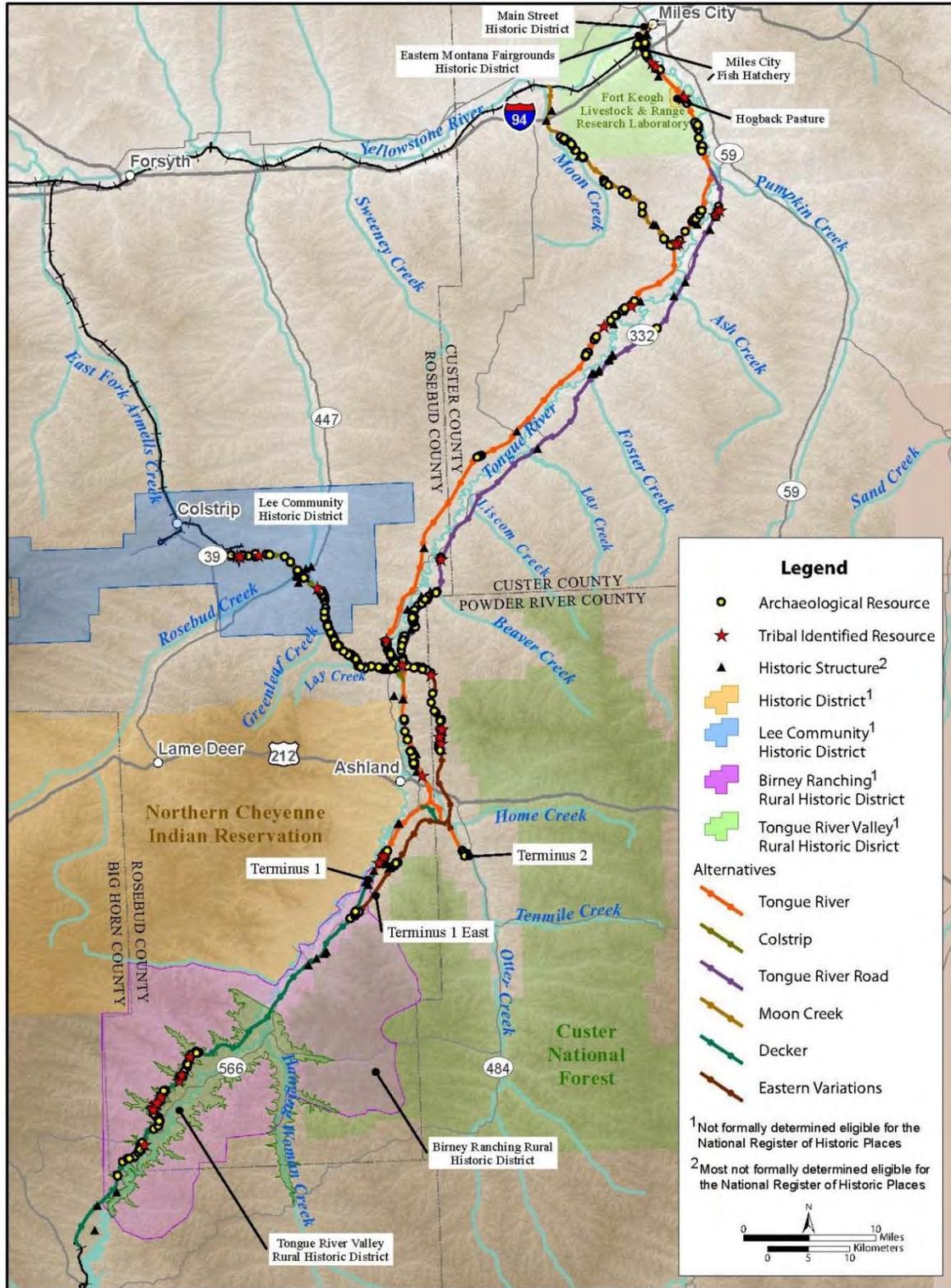


Figure 1. Newly and Previously Identified Cultural Resources in Tongue River Railroad APE

The following text provides a general description of the types of tribal resources, archaeological resources, and built resources identified by tribal members and OEA's archaeologists, architectural historians, and historians and our reasoning regarding their potential eligibility for the National Register.

Tribal Resources

Tribal members that participated in the field surveys used the following terms to describe resources significant to the tribes: cairns, depressions, stone circles, and ceremonial, cosmological, faunal, or spirit track sites. Many of these resources are also considered archaeological resources or resource types as described below.

Potential Eligibility of Tribal Resources

Tribal resources include locations with religious and cultural significance to tribes. OEA acknowledges that tribes possess special expertise identifying cultural resources with religious and/or cultural significance. OEA presumes all of the newly identified tribal resources as eligible for listing in the National Register for the purposes of the EIS. The evaluation of these resources for the National Register would not be undertaken unless the Board licenses a build alternative, and would follow the procedures set forth in the Programmatic Agreement, which would involve participation by the tribes.

Archaeological Resources

Lithic Scatters

Lithic scatters are by far the most common site type (precontact or historic) in the APE. These sites consist of culturally modified stone tool materials, including projectile points (e.g., spear tips, atlatl dart tip, arrowheads), tools (e.g., scrapers, choppers, hammerstones), tested cobbles, waste flakes (associated with cobble testing, and projectile point or tool manufacture), and ground stone artifacts (e.g., manos, metates). Tongue River Silicified Sediment (arenaceous chert) was the principal material represented in chipped stone assemblages, with small quantities of various cryptocrystalline silicates (chert, jasper, chalcedony) and quartzites also present.

Lithic Scatters with Other Components

Lithic scatters, as defined above, are often found associated with other types of precontact cultural features. These often include stone circles and cairns, as described below. Other features often associated with lithic scatters in the APE included quarry sites, bedrock milling features, and historic-period petroglyphs. Quarry sites are, in essence, lithic scatters whose implied origin is that of lithic tool source material extraction and testing. These sites occur at bedrock outcrops or areas of abundant surface cobbles and gravels. By nature, quarry sites are typically fairly large and contain a much higher percentage of primary reduction material and tested cobbles when compared with general lithic scatters. Petroglyphs are rock art created by physical removal of material from natural stone, done by incising and/or pecking. Petroglyphs are found on bedrock exposures that form cliffs, bedrock outcrops, rockshelters, and caves. Bedrock milling features are expanses of natural bedrock that have been used to process plant foods or hides. The bedrock surfaces are worn smooth by these activities.

Stone Circles

This site type includes circular or semicircular stone alignments, typically using cobbles, and is one of the most common site types in the APE. These alignments are associated with habitation, fasting and spiritual activities; smaller structures were likely used for a variety of different functions such as hide tanning.

Cairns

Cairns are piles of rocks of various sizes, typically ranging from several stones to larger stacks of rocks (Figure 2). Cairns may be associated with ceremonial or other important functions such as burials, commemoration of people or events, and directional references such as trail marking.

Figure 2. View of a Cairn



Historic Water-Associated Structures

These types of features consist of human-made structures used to direct or retain water. Dams—earthen and made of wood or stone—are a common example of this site type, in addition to canals and water-retention basins. These features are most often constructed through some scale of excavation and piling of local sediment.

Historic Trail or Fence

These are linear human-made features on the landscape. Trail and road sites are linear alignments used for movement of individuals and material. Trails are unimproved alignments and often associated with pedestrian, equestrian, and wagon movement. Roads are typically associated with motorized vehicle use. Both trails and roads may consist of simple dirt alignments. Fences are constructed alignments usually used for partitioning land and/or enclosing livestock. Milled wood, local trees and brush, and barbed-wire are the most common materials used for fence construction.

Other archaeological resources found in small numbers in the APE include stone alignments, rockshelters, depressions, historic period refuse scatters, building remains, survey markers, and hillcuts.

Stone Alignments

Stone alignment sites are generally linear straight to curving arrangements of piles and/or intentionally aligned stone. Alignments may be associated with bison drive lines, trail alignments, effigies, or ceremonial practices, among others. Figure 3 shows an alignment for a fasting circle.

Rockshelters

Rockshelters are natural rock formations, typically semi-enclosed, associated with cultural activities. These activities include general habitation, lithic tool procurement, petroglyphs/pictographs, quarries, and burials.

Depressions

Depressions are areas that may be associated with lookout or hunting activities, both by Native Americans and/or European Americans.

Refuse Scatters

This site type consists of general waste material generated through cultural activities. Refuse scatters can range in density from very sparse to highly concentrated dumps. Typically material present at this type of site are from the historic era and include cans, bottles, domestic ceramics, clothing (e.g., boots, shoes), construction material (e.g., nails, milled wood), among other items.

Building Remains

Building remains refers to foundations or other features associated with a once-standing structure. These resources are historical and may also include chimney remnants, historic debris, privies, collapsed walls, or other structural elements associated with the structure.

Survey Markers

Historic survey markers are typically small metal posts purposefully set in the ground during land surveys to act as a geographic reference and evidence of surveying activities. The posts are set in the ground until flush with ground level, and almost always contain inscribed information about the location and survey (date and responsible party/agency for the survey) on the visible cap.

Hillcuts

Hillcuts are areas where sediment has been physically removed from a slope, by manual and/or mechanical means.

Potential Eligibility of Archaeological Resources

OEA presumes all of the newly identified archaeological resources as eligible for listing in the National Register for the purposes of the EIS. The evaluation of these resources for the National Register would not be undertaken unless the Board licenses a build alternative, and would follow the procedures set forth in the Programmatic Agreement. However, previous excavation and evaluation of precontact archaeological resources indicates in general terms which resource types are more likely to yield important scientific information, and thus to be eligible for the National Register.

Isolated artifacts by their nature as single items or a very sparse collection of items are rarely considered eligible. Very rare artifact types, such as fluted projectile points, may be an exception to this rule. Similarly, *lithic scatters* are usually not eligible. However, test excavations at a small percentage of sites recorded as lithic scatters would uncover subsurface features and components and significant archaeological materials.

Sites recorded as *lithic scatters with other components*, especially habitation-related components such as hearths or tipi rings, are almost always eligible under Criterion D. For example, one type of important information that can be gained at sites of this type is datable material recovered in hearths, with radio carbon dates adding important information to scientific understanding of the region. As noted above, some small number of lithic scatters would be determined to be sites of this

Figure 3. Rocks Aligned for a Fasting Circle



types, and likely eligible. Similarly, *stone circles* often prove to indicate habitation sites, and these are, in turn, considered eligible under Criterion D. However, some stone circles would be excavated, and no other archaeological artifacts or features would be found in association. Archaeologically, these circles would not yield further scientific information being isolated single-use features, and thus would not be considered eligible under Criterion D. However, if tribes viewed the circles as sacred or of a spiritual nature, these features would be eligible as tribal resources under Criterion A and, or D.

Rock cairns and *rock alignments* are feature types that can be eligible under Criterion D depending on what other archaeological artifacts or features are found in association with the cairns or alignments, in a manner similar to stone circles. A cairn marking human remains would obviously be eligible, while an isolated trail marker might not be. Similarly, *rock shelters and depressions* may be eligible depending on what archaeological items and information could be recovered from them, if any. However, again, if this use is of a spiritual nature, any features of these types may be eligible as tribal resources.

Historical archaeological resources also fall into broad categories in terms of eligibility for the National Register. *Refuse scatters and building remains* are typically not eligible but can be eligible under Criterion D if sufficient new information can be gathered from the site. Sparse refuse or very fragmentary remains would be not eligible. *Historic water-associated structures* and *historic trail or fence* sites are usually not eligible under Criterion D. However, some trails and irrigation structures would be eligible under Criterion A, associated with events that have made a significant contribution to the broad patterns of history. *Survey markers* and *hillcuts* on the other hand, are almost always considered not eligible under Criterion D.

In summary, while all archaeological sites identified are presumed eligible for listing in the National Register, none have been formally evaluated. However, there are some indications—such as possible burial remains or other indications noted previously—that suggest some sites may address research issues and meet Criterion D or Criterion A, including the following.

- Lithic scatters with other components
- Stone circles/tipi rings
- Rock cairns and rock alignments
- Rock shelters and depressions

Built Resources

The field survey team of architectural historians and historians observed built resources in the survey areas for all build alternatives that fall within the following categories.

Ranches

Previously documented ranches are reflected in the records search and additional examples were recorded during the field survey. A ranch is an existing group of related buildings and/or structures that represent the primary residence and operations of a working ranch. The grouping most often consists of a farmstead with a main house and multiple outbuildings, such as barns, equipment sheds, and livestock corrals. A ranch might also contain the remnants of an original homestead or log cabin and be the amalgamation of multiple periods of development.

Homesteads

Previously documented homestead cabins and sites are reflected in the records search and additional examples were recorded during the field survey. A homestead is an extant building or group of buildings (and/or structures) in a single location associated with the early settlement of the Tongue

River region. Most often characterized by a log cabin, a homestead could also include a dugout, barn, or other related structures of this early time period. These elements would have been constructed by a settler attempting to homestead a tract of land, and may represent the development of this land over time. Some elements of a homestead are sometimes found in close proximity to, or exist as a part of, an active ranch or farm. Figure 4 shows an example of a homestead in the APE.

Figure 4. Example of a Homestead in the APE



Transportation and Water Conveyance

A variety of resources including roads, trails, bridges, dams, levees, windmills, pumphouses, and park facilities have been identified in the Tongue River Valley. Figure 5 depicts a windmill in the APE.

Figure 5. Example of a Windmill in the APE



Potential or Designated Historic Districts

Historic districts possess a significant concentration of built resources united historically or aesthetically by plan, design, or physical development. Seven potential or designated Historic Districts are present in the Project Area, and are described below. At this time, only the Main Street Historic District (Miles City) has been determined eligible and is listed on the National Register.

Fish Hatchery (Potential Historic District)

The Miles City Fish Hatchery was established in late 1958 by the U.S. Fish and Wildlife Service (Figure 1). The Montana Department of Fish, Wildlife & Parks (Montana FWP) became the operator of the hatchery in the early 1980s. It is accessible from Main Street via Fish Hatchery Road. The geography is generally flat, although there is a low butte to the east of the buildings and ponds. There are two 1-story, midcentury residences situated parallel to the road and west of the main entrance to the facility. There is a midcentury concrete block building, the Administration Building, with an attached one-and-a-half-story, two-bay garage just north of the entrance. Behind the Administration Building are several large garages with gable roofs, and smaller outbuildings, mostly used for equipment storage. Northeast of the Administration Building on a small rise are two large ponds with metal platforms extending out from the banks on the southern end. There is some additional utility equipment in this area. Northwest of the Administration Building are three rows of smaller, rectangular ponds lined up generally on a northeast-southwest axis. Three additional ponds are located northwest of this set. Most of the ponds are not visible from the Administration building area, and are only accessed by a series of internal gravel roads.

Eastern Montana Fairgrounds (Potential Historic District)

The Eastern Montana Fairgrounds (Figure 1) are bounded by Garryowen Road on the west, Pacific Avenue on the south, Tongue River on the east, and Miles City Main Street on the north. The geography is flat. The fairgrounds have been operating at this location since at least 1928. The fairgrounds are accessed via three primary entrances, one from each road, and identified by two-story-high masonry pillars. This is a large property, encompassing approximately 0.12 square mile with buildings clustered in the center. At the center of the property is an oval dirt racetrack with a grandstand on the southwest corner. In addition to the racetrack, the site includes a grandstand, an exhibition hall, stables, an office, possible residence, a variety of barns, and more than 20 buildings and structures on the site of varying sizes and uses. Most of these are clustered on either side of an interior road that leads in from Pacific Avenue.

Figure 6. Eastern Montana Fairgrounds, Miles City



Hogback Pasture (Under Evaluation by USDA as a National Register-Eligible Historic District)

Hogback Pasture is located on the USDA Agricultural Research Service facility at Fort Keogh (Figure 1). The pasture is associated with experimental techniques developed on site that have been widely adopted across the country. The most significant feature of Hogback Pasture is the unique arrangement of pastures around a central feeding area. Otherwise, the site is almost entirely undeveloped, except for gravel roads, transmission lines, windmills, corrals, and fences. USDA is currently preparing a study to determine if Hogback Pasture is eligible for listing in the National Register.

Lee Community Historic District (Potential Historic District)

The Lee Community Historic District is identified in the records search as a homesteading community defined by historic school district number 19 as constituted in 1920 and encompassing approximately 248 square miles (Figure 1). Located south of the town of Colstrip, the period of significance spans the 1880s to the 1930s. The site record only nominally recorded the district and describes it as “temporarily defined as including those homesteads, community buildings, travel routes, which were located within Lee School District 8 (later District 19), and or were served by the Lee Post Office. This description is generalized; further research may result in a more refined boundary for the historic district.” The site record does not identify specific contributors. (Ferguson 2002)

Tongue River Valley Rural Historic District (Potential Historic District)

The Tongue River Valley Rural Historic District covers a large area along the Tongue River Valley extending just north of the town of Birney to the Tongue River Reservoir (Figure 1). This district includes contributing buildings, structures, and clusters and consists of homestead sites, ranches, ranching-related resources, transportation, and water resources. Ranches included in this district include Diamond Cross, 4D Ranch, and Quarter Circle Ranch (Renewable Technologies 2006:109–133). The Tongue River Valley Rural Historic District and Birney Ranching Rural Historic District, discussed below, boundaries overlap. (Renewable Technologies 2006)

Birney Ranching Rural Historic District (Potential Historic District)

The Birney Ranching Rural Historic District covers a large area centered on the Town of Birney (Figure 1). It is bisected by the Tongue River and includes at least eight significant contributing ranches including the Knobloch Ranch, U Cross Nance Ranch, Three Circle Ranch, Quarter Circle Ranch, 4D Ranch, and Diamond Cross Ranch (Montana Preservation Alliance 2007).

Main Street Historic District (Miles City) (National Register-Listed Historic District)

The Main Street Historic District in Miles City, listed on the National Register on July 21, 1989, consists predominantly of two-story commercial buildings constructed between 1882 and 1940 (Figure 1). As one of the oldest cities in the Yellowstone River Valley, Miles City was developed as an important hub for commerce in the area. Serving as the city’s central business district during this important period of its development, the Main Street Historic District reflects a variety of architectural styles popular during the three main growth periods: 1882 to 1887, 1905 to 1920, and 1935 to 1940. In addition to the commercial buildings lining Main Street and its side streets, Riverside Park is an important landscape feature of the district (McDaniel and Sanford 1989).

Potential Eligibility of Built Resources

OEA presumes all of the newly identified built resources are eligible for listing in the National Register for the purposes of the EIS. The evaluation of these resources for the National Register would not be undertaken unless the Board licenses a build alternative, and would follow the procedures set forth in the Programmatic Agreement. However, to meet National Register criteria, built resources need to demonstrate quality of significance within an important historic context and retain the characteristics and integrity necessary to convey that significance. A formal evaluation of each

resource is necessary to determine eligibility under National Register Criteria A, B, or C. However, it is possible to make general statements for some categories of property types.

Homesteads, which consist of one or more elements (such as log homes and cabins) built by original homesteaders and settlers, are becoming increasingly rare resources, as they succumb to purposeful removal or natural deterioration. Most of the homesteads identified in the APE are likely eligible under Criteria A and C. A finding of National Register eligibility would likely apply to most homesteads erected prior to 1950, but particularly those built in the late 19th and early 20th centuries, a significant period of tribal resettlement and European-American settlement in the region.

Roads, trails, and bridges are other transportation-related resources identified in the APE. The identified roads and trails primarily consist of road traces and former road alignments that often related to existing highways and routes. The identified bridges consist of existing road bridges over the Tongue River or existing railroad lines. Most of these resources are considered not eligible for the National Register, either due to lack of significant association or as common examples of engineering or bridge type. The several *railroad lines* that pass through the APE are generally considered not eligible for listing in the National Register, due to loss of integrity or a lack of significant association. Exceptions to this conclusion would be mainline routes that were a part of or associated with the transcontinental railroad, or routes that were particularly important to the development of a local community. Remnants of the North and South Railway, which exist in the APE between Miles City and Birney, exemplify the latter. However, the remnants' loss of integrity likely prevents them from meeting the National Register thresholds as an eligible resource.

Extant *irrigation ditches* and *dam/levee* structures are generally considered not eligible for listing in the National Register, unless associated with the early management and conveyance of water in the region.

Ranches are complex properties that may be eligible for the National Register when they have associations with important historic events or personages, or retain a good representation of historic-era buildings, structures, and objects. When isolated, individual ranch structures, such as *cattle corrals, barns, and other ancillary ranch structures* are generally considered not eligible for the National Register. If these resources have significant associations with the history of ranching in the region or are good representations of a significant property type, they could be considered eligible under Criteria A or C if they retain integrity.

Several electricity *transmission lines* are located in the APE. Transmission lines are commonplace structures and typically subject to frequent maintenance and changes in materials. These are generally considered not eligible for listing in the National Register, unless they are associated with a historically significant hydroelectric or other type of power-generating project.

Most of the *windmills* identified in the APE are of a similar type, design, and construction and were erected circa 1920 to 1940. Many were reportedly produced by the same company and installed by the same individuals or vendors operating out of Colstrip, Miles City, or another local community. Given their commonplace occurrence, the windmills identified in the APE would generally not be considered for the National Register unless they have a unique design or retain a remarkably high level of integrity.

Finally, several *districts* described above are located in or immediately adjacent to the APE. These include the Lee Community Historic District, the Eastern Montana Fairgrounds, the Tongue River Valley Rural Historic Landscape District, and the proposed Birney Ranching Historic Rural District. Each of these resources have associations with the history and development of the region or individual communities; however, integrity is a factor. The Eastern Montana Fairgrounds, for example, is likely eligible for the National Register under both Criteria A and C, because it is a cohesive collection of buildings with a unique use built in a similar historic time period. The Miles City Main Street Historic District is already listed in the National Register. The Lee Community District,

however, is likely not eligible for the National Register because it does not appear to retain a cohesive collection of contributing buildings, and lacks physical integrity.

In summary, while all built resources identified are presumed eligible for listing in the National Register, none have been formally evaluated. More research and field survey would be needed to adequately apply the National Register criteria and determine their eligibility. However, based on the above discussions, the following categories of built resources are more likely to be eligible for the National Register under Criteria A, B, or C.

- Homesteads
- Irrigation ditches with important historic associations
- Ranches with important historic associations or many historic-era components
- Districts with cohesion and integrity
- Other properties with unique historic associations, such as the Hogback Pasture

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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