

APPENDIX Q

Draft Section 4(f) and Section 6(f) Evaluation

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Acronyms and Abbreviations

ACHP	Advisory Council on Historic Preservation
APE	area of potential effects
BLM	Bureau of Land Management
BNSF	BNSF Railway Company
Board	Surface Transportation Board
C.F.R.	Code of Federal Regulations
EIS	Environmental Impact Statement
FHWA	Federal Highways Administration
I-94	Interstate 94
LWCF	Land and Water Conservation Fund Act
Montana FWP	Montana Department of Fish, Wildlife & Parks
National Register	National Register of Historic Places
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NPS	National Park Service
OEA	Office of Environmental Analysis
SAFETEA-LU	Safe, Accountable, Flexible, Efficient Transportation Equity Act
SHPO	State Historic Preservation Office
TRRC	Tongue River Railroad Company, Inc.
U.S.C.	United States Code
USDOT	U.S. Department of Transportation

Draft Section 4(f) and Section 6(f) Evaluation

This appendix provides impact analyses for resources under Section 4(f) of the U.S. Department of Transportation Act and Section 6(f) of the Land and Water Conservation Fund Act. This analysis supports the summary evaluations provided in Chapter 12, Section 12.4, *Section 4(f) and 6(f) Evaluation Summary*.

Q.1 Section 4(f) Evaluation

Q.1.1 Regulatory Setting

The regulation known as Section 4(f) was originally established in the U.S. Department of Transportation Act of 1966 (49 United States Code [U.S.C.] §1653(f) and later recodified as 49 U.S.C. § 303. In 2005, Congress enacted legislation that required the U.S. Department of Transportation (USDOT) to issue additional regulations that clarify Section 4(f) standards and procedures (U.S. Department of Transportation 2012). These new regulations were finalized in March 2008 (23 Code of Federal Regulations (C.F.R) Part 774). Section 4(f) mandates that the Secretary of Transportation will not approve any transportation project requiring the use of publicly owned parks, recreation areas, wildlife and waterfowl refuges, or significant historic sites, regardless of ownership, unless the following conditions apply.

- There is no prudent and feasible alternative to using that land.
- The program or project includes all possible planning to minimize harm to the public park, recreation area, wildlife or waterfowl refuge, or significant site, resulting from that use.

To be protected under Section 4(f), public parks, recreation facilities, and wildlife or waterfowl refuges must be considered *significant* (U.S. Department of Transportation 2012). Pursuant to 23 C.F.R. 771.135(c), Section 4(f) resources are presumed to be significant unless the official having jurisdiction over the site concludes that the entire site is not significant. Historic sites qualifying for Section 4(f) protection must be officially listed on or eligible for inclusion on the National Register of Historic Places (National Register), or contribute to a historic district that is eligible for or listed on the National Register.

A *use* of properties protected under Section 4(f) occurs under either of the following conditions (23 C.F.R. 771.135(p)).

- Land from a qualifying Section 4(f) property is acquired and permanently incorporated into a transportation facility.

- There is a temporary occupancy of Section 4(f) land during construction of the transportation facility that is considered adverse to the preservationist purposes of the Section 4(f) statute.

In addition, a *constructive use* could occur when no land is acquired from a Section 4(f) property but the proximity of the project results in indirect impacts that would *substantially impair* the current use of the property, such as visual, noise, or vibration impacts or impairment of property access.

Section 6009(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2003: A Legacy for Users (SAFETEA-LU) amended existing Section 4(f) legislation to simplify the processing and approval of projects that have only *de minimis* impacts on resources protected by Section 4(f). A *de minimis* impact determination refers to a finding that a project would have little or no influence on the activities, features, or attributes of the Section 4(f) resource. Pursuant to 23 C.F.R 774.3(b), *de minimis* impact determinations are made only by the Administration, which by regulatory definition includes the Federal Highway Administration (FHWA) or the Federal Transit Administration.¹

Once it is determined that the transportation use of any Section 4(f) property would result in a *de minimis* impact on that property, after consideration of any impact avoidance, minimization, and mitigation or enhancement measures, an analysis of alternatives that would avoid the impact is not required and the Section 4(f) evaluation process is complete for that resource.

A finding of *de minimis* impact on a historic site may be made when any of the following events occur.

- The process required by Section 106 of the National Historic Preservation Act (NHPA) of 1966 results in the determination of *no adverse effect* or *no historic properties affected* with the concurrence of the State Historic Preservation Office (SHPO) if participating in the Section 106 consultation.
- SHPO is informed of the lead agency's intent to make a *de minimis* impact finding based on their written concurrence in the Section 106 determination.
- The lead agency has considered the view of any consulting parties participating in the Section 106 consultation.

A transportation project's use of a park, recreation area, or wildlife and waterfowl refuge that qualifies for Section 4(f) protection may be determined to be *de minimis* if the following criteria are met.

- The transportation use of the Section 4(f) resource, together with any avoidance, minimization, and mitigation or enhancement measures incorporated into the project,

¹ The *Administration* is the agency making the approval for the transportation project. In the case of Section 4(f) approvals for the Tongue River Railroad, the Administration is the Federal Highway Administration.

does not adversely affect the activities, features, and attributes that qualify the resource for protection under Section 4(f).

- The official(s) with jurisdiction over the property are informed of the lead agency's intent to make the *de minimis* finding based on their written concurrence that the project will not adversely affect the activities, features, and attributes that qualify the property for protection under Section 4(f).
- The public has been afforded an opportunity to review and comment on the impacts of the project on the protected activities, features, and attributes of the Section 4(f) resource.

Although the Surface Transportation Board (Board) is administratively affiliated with USDOT, the Board is an independent decision-making body and, as such, Section 4(f) is not applicable to Board actions. Section 4(f) applies to projects that require approval from the FHWA or other USDOT agencies.

Q.1.2 Proposed Action

Q.1.2.1 Purpose and Need

Tongue River Railroad Company, Inc. (TRRC) states that the principal purpose of the proposed rail line is to transport low sulfur, subbituminous coal from mine sites in Rosebud and Powder River Counties, Montana, including proposed mines in the Otter Creek area. To meet this purpose and need, TRRC would construct and the BNSF Railway Company (BNSF) would operate a single-track rail line to transport low-sulfur, subbituminous coal from mine sites to be developed in Rosebud and Powder River Counties, Montana, including the proposed Otter Creek Mine.

Q.1.2.2 Proposed Action and Alternatives

The proposed rail line would consist of the following physical elements (Chapter 2, *Proposed Action and Alternatives*).

- Right-of-way
- Access roads
- Bridges, culverts, and other surface water crossings
- At-grade and grade-separated roadway crossings
- Associated facilities (communications towers, rail sidings and set-out tracks, and power distribution lines)
- Upgrades to the existing Colstrip Subdivision rail line

Construction activities would include clearing within the right-of-way, building a suitable railbed, constructing the track, acquiring construction materials (ballast, subballast, rail ties,

and rails), creating construction staging areas, installing surface water crossings, and constructing permanent associated facilities for the rail line.

TRRC has indicated that—assuming a construction season of 8 months per year—construction of the build alternatives would range from 20 months over approximately 2.5 years to nearly 50 months over approximately 6 years, depending on the build alternative authorized. It is likely that an 8-month schedule would be used to construct the proposed rail line; however, TRRC has indicated that a year-round schedule may be considered if economics and conditions dictate. Assuming a year-round construction schedule, the construction duration could range from 16 to almost 40 consecutive months.

After construction, trains operating along the proposed rail line would transport primarily low-sulfur, subbituminous coal from mines in Rosebud and Powder River Counties, including the proposed Otter Creek Mine. Trains would operate 7 days per week, 365 days per year once the Otter Creek Mine reaches full production. Because the Tongue River region contains additional quantities of coal, future rail traffic could also include shipments of coal from other mines whose development could be induced by the availability of a nearby rail line. The Board's Office of Environmental Analysis (OEA) analyzed the coal production that could be induced by construction and operation of the proposed rail line. This analysis can be found described in Appendix C, *Coal Production and Markets*. Depending on the build alternative licensed, OEA predicts that the volume of rail traffic on the proposed rail line—including mining that could be induced by the proposed rail line—would range from 7.4 trains per day (3.7 each way) under the low coal production scenario to 26.7 trains per day under the high coal production scenario.

Up to four 4,000-horsepower locomotives would move the unit trains. TRRC has indicated that the proposed rail line would be built to accommodate maximum train lengths of 150 cars; however, the actual train size and locomotive configuration would be determined by destination, and OEA has determined that the average train would have 125 cars. TRRC anticipates that average operating speeds would range from 29.7 to 39.5 miles per hour, depending on the build alternative and whether the train is loaded or empty. TRRC would also perform periodic maintenance and inspections during operation to ensure safe and reliable rail line operation.

OEA reviewed alternatives that were analyzed in detail in the 1980s in the Tongue River I² proceeding. OEA also revisited the alternatives that were eliminated from detailed study in the Tongue River I Environmental Impact Statement (EIS). OEA determined that the issues that had eliminated them from further study, such as challenging grades or large amounts of cut and fill, were still valid.

OEA conducted 10 public scoping meetings in November 2012, to provide information about and receive comments on the proposed rail line and the build alternatives identified in the

² 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).

Draft Scope of Study.³ OEA solicited and received feedback from agencies, tribes, and the public on the alternatives. OEA sought ideas for alternatives that could reduce potential environmental impacts or that addressed concerns raised by commenters. During the scoping process, OEA received suggestions on additional alternatives and route variations.

OEA used topographic data and other environmental information to attempt to identify other reasonable and feasible alternatives that could meet the purpose and need of the proposed project and provide environmental benefits over alternatives identified during scoping. The area topography was analyzed to determine routes that were not too steep and that would minimize the need for bridges. This limited feasible routes to those located in natural corridors with rangeland, valleys, plateaus, and other generally flat areas of a consistent grade. The overall length of an alternative was also a constraining factor because increased length generally results in higher construction costs, increased land acquisition or disturbance, more landowners affected, and a greater potential for environmental impacts.

OEA identified five build alternatives and two variation segments for detailed study in this Draft EIS. Because the two variation segments are related and connected to each other, they combine to replace one segment of each build alternative (Chapter 2, Section 2.1.3.1, *Eastern Variation*). The paired alternatives⁴ produced 10 point-to-point build alternatives that were carried forward for analysis. Each build alternative could be modified by a variation segment, resulting in 10 point-to-point build alternatives. All of these build alternatives would connect two terminus points south of Ashland, Montana to an existing BNSF rail line. OEA also analyzed the No-Action Alternative, under which the Board would deny the application and no rail line would be built. A summary of the alignment development process and alternatives analyzed and eliminated from consideration is available in Chapter 2, *Proposed Action and Alternatives*.

Of the 10 build alternatives analyzed, six would require construction of an underpass crossing of Interstate 94 (I-94) west of Miles City, Montana. Such a crossing would require FHWA authorization in coordination with the Montana Department of Transportation, and construction of the underpass would constitute a transportation project subject to the Section 4(f) statute. The six build alternatives that would require an I-94 underpass and are subject to the Section 4(f) statute are the two Tongue River Alternatives, the two Tongue River Road Alternatives, and the two Moon Creek Alternatives.

Q.1.3 Section 4(f) Properties

OEA has determined that the proposed rail line would affect one property that is subject to Section 4(f): the Spotted Eagle Recreation Area. OEA has also identified cultural resources that may be eligible for protection under Section 4(f).

³ See Chapter 1, Section 1.6.1, *Scoping Notice and Public Meetings* for details on the scoping meetings held, number of participants, and volume of comments received.

⁴ Each pair of alternatives consists of the primary route and the primary route with the Eastern Variation. For example, the Tongue River Alternatives include both the Tongue River Alternative and the Tongue River East Alternative.

Q.1.3.1 Spotted Eagle Recreation Area

Size and Location

The Spotted Eagle Recreation Area is located southwest of Miles City, Montana, between the BNSF main line and I-94 (Figure Q-1). I-94 crosses through the southeastern corner of the property and the existing BNSF main line forms the northern border. The property is 245 acres and would be crossed by any one of four build alternatives: the two Tongue River Alternatives and the two Tongue River Road Alternatives. The two Moon Creek Alternatives would not cross any portion of the property.

Ownership and Type

The Spotted Eagle Recreation Area is publicly owned and managed by the City of Miles City. The property is managed as an officially designed recreational area. In their letter dated February 25, 2015, the City of Miles City indicated that the Spotted Eagle Recreation Area is a significant recreational resource and is therefore qualifies as a Section 4(f) property.

Function and Available Activities

The Spotted Eagle Recreation Area functions as a park and recreational area. Onsite activities include fishing, swimming, archery, shotgun target shooting, picnicking, hiking, and nonmotorized boating.

Existing and Planned Facilities

Onsite facilities include trails for hiking and nonmotorized use, an archery and shotgun target range, a boat ramp, fishing and swimming access to Spotted Eagle Lake, and picnic grounds. Spotted Eagle Lake is in the larger recreational area and is stocked with a number of game fish species. The majority of the recreational facilities and uses are concentrated in the lake and to the north and east of the lake.

The Miles City Growth Policy states that Miles City will develop a master plan for the Spotted Eagle Recreation Area (Miles City—Custer County 2008). A draft master plan has not yet been released but is expected. The Miles City Community Services and Planning Department has indicated that the plan will include some undefined amount of trail development in the recreational area (Colton pers. comm.).

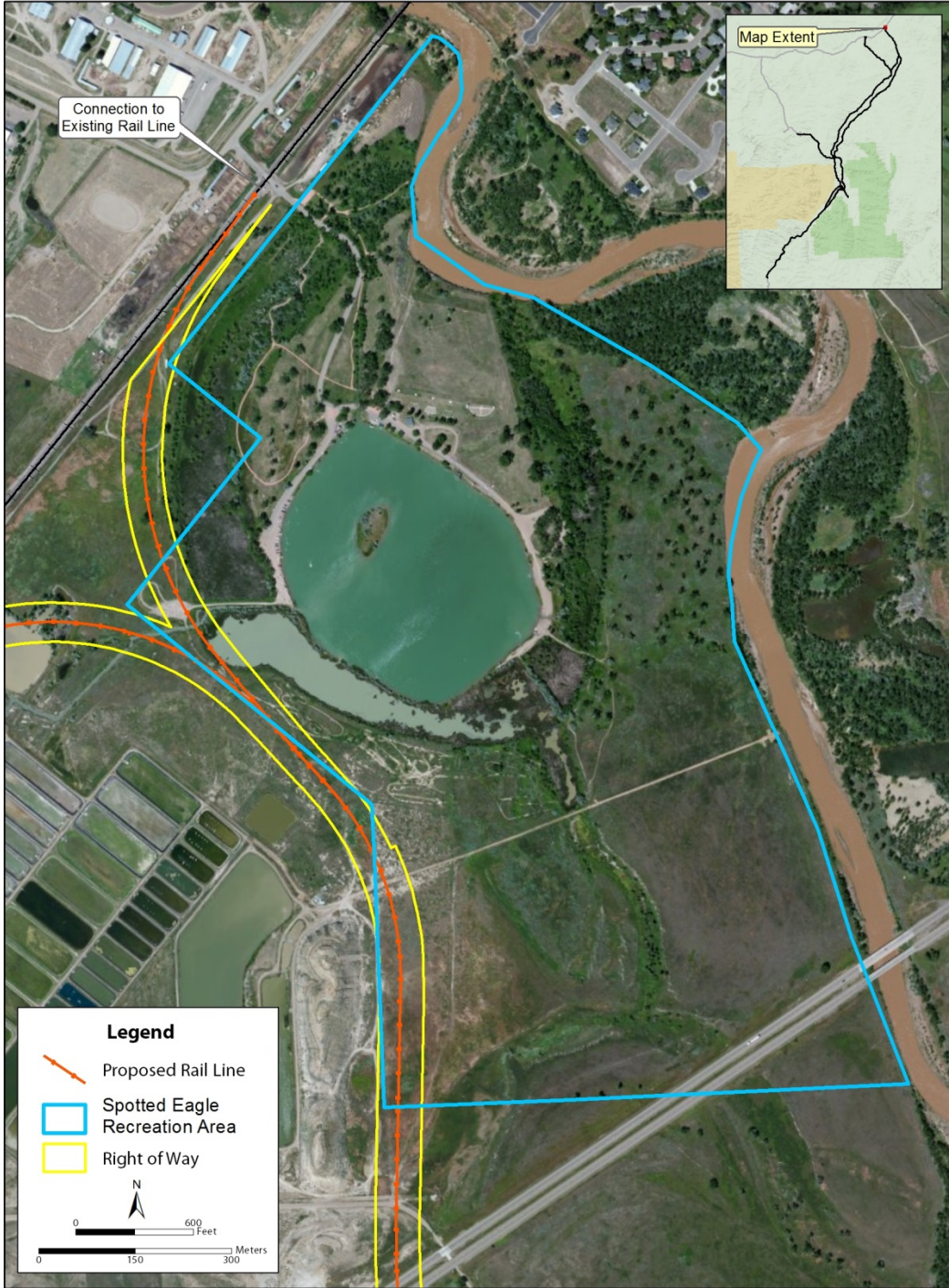


Figure Q-1 Spotted Eagle Recreation Area

Access and Usage

The Spotted Eagle Recreation Area is available to the public from 6:00 AM to 10:00 PM. The public can access the site from the north using Spotted Eagle Road. In 2009, the last year of published data, Montana Fish, Wildlife & Parks (Montana FWP) recorded 4,093 days fished⁵ and 86 fishing trips (Montana Fish, Wildlife & Parks 2015).

Relationship to other Similarly Used Lands in the Vicinity

Nearby properties in and around Miles City that offer similar activities include Riverside Park, Wibaux Park, Milwaukee Park, Bender Park, Pumping Plant Park, Pirogue Island State Park, Strawberry Hills Recreation Area, Signal Butte, Airport Hill, Twelve Mile Dam, Matthews Recreation Area, Pumpkin Creek Ranch and Recreation Area, and Fort Keogh.

Applicable Clauses Affecting Ownership

The City of Miles City owns the property encompassing the Spotted Eagle Recreation Area. The property is designated as Open Space and is intended to be used for active or passive recreation or resource protection in an essentially undeveloped state (City of Miles City 2014). Although the surrounding property is owned and managed by the City of Miles City, Montana FWP manages Spotted Eagle Lake as a recreational fishery under the Statewide Fisheries Management Plan (Montana Fish, Wildlife & Parks 2012).

Characteristics of the Section 4(f) Property

As noted above, I-94 crosses through the southeastern corner, the existing BNSF main line forms the northern border, and there are developed vehicular roads, parking, and other constructed features within Spotted Eagle Recreation Area. The Federal Railroad Administration estimates that 23 trains per day currently pass the Spotted Eagle Recreation Area along the existing BNSF main line and approximately 730 cars travels on Spotted Eagle Road daily (Federal Railroad Administration 2014). An at-grade crossing is located just outside of the property at the intersection of Spotted Eagle Road and the BNSF main line where passing trains sound their horns. Human activity and disturbance—both audible and visual—is a common characteristic of the property.

⁵ Estimated yearly fishing use in angler days (one angler fishing one body of water in one day for any amount of time).

Q.1.3.2 Cultural Resources

Section 4(f) applies to historic sites, defined in 23 C.F.R. § 774.17 to include any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register. *Historic sites* include properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization. For the purpose of Section 4(f) evaluations, historic sites are identified during the process required under Section 106 NHPA and its implementing regulations.

The Section 106 regulations of NHPA require the Board to take into account the potential effects of its licensing of a project, or undertaking, on historic properties. The term *historic properties* describes a subset of cultural resources considered under the National Environmental Policy Act (NEPA) that are listed in or eligible for listing in the National Register (36 C.F.R. Part 60), and is defined by the regulations for implementing Section 106.

For this Draft EIS, OEA conducted an analysis of the impacts of the proposed rail line on a broader array of cultural resources (Chapter 11, *Cultural Resources*). The NEPA term *cultural resources* covers a wider array of resources than the term *historic properties*, including sacred sites, archaeological collections, plant gathering areas, and sites not eligible for listing in the National Register (Council on Environmental Quality and Advisory Council on Historic Preservation 2013).

OEA considered the area of potential effects (APE) for cultural resources potentially affected, directly or indirectly, by the proposed rail line. OEA defined two APEs for cultural resources identification: one for tribal and archaeological resources and one for built resources. OEA obtained site records from the Montana Historical Society for an area 1 mile wide on either side of the centerline for each build alternative. OEA also reviewed the inventory of properties listed in the National Register through the National Park Service (NPS) Focus digital library. OEA made an extensive outreach to landowners to gain access to and survey property within the right-of-way for portions of each build alternative (Appendix B, *Land Access*).

As noted in Chapter 11, *Cultural Resources*, OEA identified cultural resources in the study area through record searches and surveys. For the purpose of this Draft EIS, OEA assumed that all identified resources are eligible for listing on the National Register. However, the cultural resources analyzed in this Draft EIS would not be considered significant Section 4(f) resources unless they are listed on the National Register or determined to be eligible for the National Register by officials with jurisdiction, such as the SHPO. To date, none of the cultural resources identified in the study area that would be affected by the proposed rail line have been determined to be eligible for the National Register by officials with jurisdiction over the resources.

To comply with Section 106 regulations (36 C.F.R. §§ 800.3–800.6), a federal agency may use a phased approach pursuant to 36 C.F.R. § 800.4(b)(2). This process can include deferring some of the identification and evaluation (National Register assessment) of historic

properties (including effects assessment and resolution, or mitigation). A phased approach to identification and evaluation and treatment of historic properties under Section 106 may also be used to satisfy Section 4(f) requirements (U.S. Department of Transportation 2012). OEA used a phased approach due to the large number and length of the build alternatives and because OEA was not granted access to the entire length of all of the build alternatives. On January 23, 2014, OEA met with the Advisory Council on Historic Preservation (ACHP), the Montana Deputy SHPO called into the meeting, and all parties agreed that a phased identification effort was appropriate for the proposed rail line.

If the Board licenses a build alternative, OEA would complete its identification efforts and apply the National Register criteria to each cultural resource identified in the study area. OEA has developed a draft Section 106 Programmatic Agreement in accordance with 36 C.F.R. § 800.14(b) with ACHP, SHPO, tribes and other consulting parties. Provided as Appendix P, *Programmatic Agreement*, to this Draft EIS, the Programmatic Agreement stipulates measures that would be taken to complete the identification and evaluation efforts in accordance with C.F.R. § 800.4(b)(2) and to phase the application of the criteria of adverse effect in accordance with 36 C.F.R. § 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. § 800.6(a). The evaluations of National Register eligibility and the potential protection of qualifying cultural resources under Section 4(f) would be addressed based on the Section 106 Programmatic Agreement and preliminary mitigation.

Q.1.4 Use and Impacts on the Section 4(f) Properties

This section describes the potential impacts of all build alternatives on the recreational Section 4(f) property and cultural resources.

Q.1.4.1 Spotted Eagle Recreation Area

Impacts on the Spotted Eagle Recreation Area Section 4(f) property would result from construction and operation of any of the two Tongue River Alternatives or two Tongue River Road Alternatives, all of which would follow an identical route across the Spotted Eagle Recreation Area. The following potential impacts would be common to all four of these build alternatives.

Any one of these alternatives would cross through the Spotted Eagle Recreation Area and permanently incorporate 11 acres from the western periphery of the property into the railroad right-of-way (Figure Q-1). The majority of the developed recreation facilities and uses are concentrated in Spotted Eagle Lake and to the north and east of the lake and would not be incorporated into the right-of-way; however, some trails would be displaced by the right-of-way. The location of the right-of-way would also preclude future development (e.g., new trails) on those 11 acres. No formal plans for development of the western side of the property have been prepared by the City of Miles City (Colton pers. comm.).

The area potentially affected by the railroad right-of-way would be located 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 train traffic along the BNSF main line that forms the northern border of the property. A perceptible level of anthropogenic disturbance is an existing attribute of this property. OEA is recommending a mitigation measure that would require TRRC 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. Other mitigation measures recommended by OEA would require TRRC to consult with the City of Miles City to develop a plan to limit construction impacts on Spotted Eagle Recreation Area and to develop a means to offset potential losses of recreational use of the property. Any visual or audible disturbances outside the right-of-way encroaching on the Spotted Eagle Recreation Area would be temporary and would not result in change in ownership or require a permanent easement or property interest. Construction disturbances would be minor and would not be anticipated to result in adverse impacts. Any temporary occupancy of Section 4(f) property as result of construction of the proposed rail line would not constitute a use of the Section 4(f) property.

For these reasons, OEA has made the preliminary determination that construction and operation of any of the two Tongue River Alternatives or the two Tongue River Road Alternatives would not adversely affect the activities, features, and attributes of the Spotted Eagle Recreation Area qualifying it for protection under Section 4(f). OEA intends to recommend and seek concurrence from FHWA for a *de minimis* impact determination for these build alternatives as they pertain to the Spotted Eagle Recreation Area.

Q.1.4.2 Cultural Resources

As described in Chapter 11, *Cultural Resources*, cultural resources that are presumed eligible for the National Register could be affected by construction and operation of any build alternative. The number of presumed-eligible cultural resources identified through research findings and field surveys—including archaeological, tribal, and built resources—located in the right-of-way would range from 57 to 78 depending on which of the ten build alternatives are being considered. As discussed in Section Q.1.3.2, *Cultural Resources*, these resources are not currently reviewed for Section 4(f) analysis but may be reviewed based on the Programmatic Agreement. If the Board licenses a build alternative, OEA would complete its identification efforts and apply the National Register criteria to each cultural resource identified in the study area. If any eligible cultural resources were identified through this process, OEA anticipates that the implementation of the Programmatic Agreement would result in either the avoidance of Section 4(f)-eligible cultural resources or the mitigation of impacts on those resources to a level sufficient for a *de minimis* impact determination.

Q.1.5 Avoidance Alternatives

The Section 4(f) regulations refer to an alternative that would not require the use of any Section 4(f) property as an *avoidance alternative*. Feasible and prudent avoidance alternatives are those that avoid using any Section 4(f) property and do not cause other severe problems of a magnitude that substantially outweigh the importance of protecting the Section 4(f) property (23 C.F.R. § 774.17). This section provides a discussion of avoidance alternatives considered early in the project development.

All build alternatives considered in this Draft EIS are considered feasible because they can be designed and built. An alternative that is not prudent could be eliminated from consideration for the following reasons.

- It does not address the purpose and need of the project.
- It results in unacceptable safety or operational problems.
- After reasonable mitigation, it still causes severe social, economic, or environmental impacts; severe disruption to established communities; severe or disproportionate impacts on minority or low-income populations; or severe impacts on environmental resources protected under other federal statutes.
- It results in additional construction, maintenance, or operational costs of extraordinary magnitude.
- It causes other unique problems or unusual factors.
- It involves multiple factors that, while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude.

Pursuant to 23 C.F.R. § 774.3, an analysis of feasible and prudent avoidance alternatives would be required if the proposed rail line results in a greater than *de minimis* impact on an eligible Section 4(f) property. As noted above, OEA anticipates that construction and operation of any one of four of the build alternatives would result in *de minimis* impacts on the Spotted Eagle Recreation Area and will seek FHWA's concurrence on this determination. However, a *de minimis* impact determination cannot be finalized by FHWA until after considering any comments made by the public after they have been provided with an opportunity to review and comment on the intent to make a *de minimis* impact determination. Pursuant to 23 C.F.R. § 774.5(b)(2), the public involvement requirements for Section 4(f) will be satisfied by the public involvement process for this Draft EIS (see Chapter 1, *Purpose and Need*, of this Draft EIS for more information).

Q.1.5.1 Alternatives Eliminated from Detailed Study

A number of alternatives were considered early in the NEPA process but were eliminated from further consideration. Chapter 2, Section 2.1, *Alternatives*, describes the development

of alternatives, identifies alternatives eliminated from consideration, and describes the reasons eliminated alternatives are not considered feasible and prudent.

Q.1.5.2 Alternatives to Avoid Section 4(f) Properties

No-Action Alternative

The No-Action Alternative would avoid impacts on the Spotted Eagle Recreation Area and potentially eligible cultural resources that may be listed through the Section 106 phased identification process. However, this alternative would not satisfy the purpose and need for the project as described in Section Q.1.2, *Proposed Project Purpose and Need and Alternatives* and is not a feasible and prudent alternative for avoiding impacts on the Spotted Eagle Recreation Area or potentially eligible cultural resources.

Build Alternatives

The only build alternatives that would affect the Spotted Eagle Recreation Area are the two Tongue River Alternatives and the two Tongue River Road Alternatives. Chapter 2, *Proposed Action and Alternatives*, identifies six additional build alternatives, the impacts of which are analyzed in detail in the Draft EIS.

- Colstrip Alternative
- Colstrip East Alternative
- Moon Creek Alternative
- Moon Creek East Alternative
- Decker Alternative
- Decker East Alternative

Because they are not located near the Spotted Eagle Recreation Area, none of these six build alternatives would result in any permanent conversion or temporary occupancy of the Section 4(f) property. Furthermore, all six build alternatives listed above are technically feasible to construct. As noted in Section Q.1.2.2, *Proposed Action and Alternatives*, only those build alternatives that require FHWA authorization for construction of an underpass crossing of I-94 would constitute a transportation project subject to the Section 4(f) statute. If impacts on the Spotted Eagle Recreation Area were not determined to be *de minimis*, and an analysis of avoidance alternatives was required, the two Colstrip Alternatives and the two Decker Alternatives could not be considered avoidance alternatives due to the fact that they are not subject to the Section 4(f) statute.

Each of the build alternatives subject to the Section 4(f) statute could affect cultural resources presumed eligible for the National Register (Chapter 11, *Cultural Resources*). However, if the Board licenses one of these build alternatives, the Section 106 Programmatic Agreement would guide OEA to complete its identification efforts and evaluate each cultural resource

identified in the APE and would outline measures to avoid, minimize, or mitigate the impacts on cultural resources eligible for protection under Section 4(f).

Q.1.6 Minimization and Mitigation of Harm

OEA has identified preliminary measures and TRRC has volunteered certain measures to minimize harm to Section 4(f) resources (Chapter 19, *Mitigation*). As described in Section Q.1.1, *Regulatory Setting*, transportation project use of a park, recreation area, or wildlife and waterfowl refuge that qualifies for Section 4(f) protection may be determined to be *de minimis* though the incorporation of mitigation measures. However, TRRC's voluntary mitigation measures and OEA's preliminary mitigation measures cannot lead to a *de minimis* impact determination without written concurrence of officials with jurisdiction over the Section 4(f) property and until after the consideration of public comments received on the intent to make a *de minimis* impact determination.

Q.1.6.1 Spotted Eagle Recreation Area

If any one of the two Tongue River Alternatives or the two Tongue River Road Alternatives is licensed by the Board, OEA is recommending that TRRC implement the following mitigation.

- Consult with Montana FWP, Montana Department of Natural Resources and Conservation, Custer National Forest—Ashland District, Bureau of Land Management (BLM), the City of Miles City, and other user groups as appropriate to develop a construction plan to limit, to the extent practicable, impacts on recreational resources. TRRC shall develop the plan prior to completing the final engineering plans and following consultation to determine the location of all public roads that would be crossed by the proposed rail line. The plan shall designate temporary access points if main access routes are obstructed during construction. The plan shall include an agreed-upon number and location of access points as determined during consultation with applicable agencies. Where practicable, TRRC shall limit construction staging areas or other temporary facilities to the right-of-way.

Consult with the City of Miles City, Montana, to identify appropriate enhancement and improvements to the Spotted Eagle Recreation Area. These improvements shall be sufficient to offset the loss of recreation facilities and uses caused by the permanent incorporation of land into the rail line right-of-way. TRRC shall compensate the City of Miles City for agreed-upon improvements.

- Provide a tree buffer between the Spotted Eagle Recreation Area and the railroad right-of-way to reduce visual impacts on users.

Q.1.6.2 Cultural Resources

If any build alternative is licensed by the Board, OEA is recommending that TRRC implement the following mitigation.

- Comply with the terms and conditions of the Section 106 Programmatic Agreement developed by OEA, ACHP, Montana SHPO, other federal and state agencies in consultation with federally recognized tribes, and other consulting parties, including local landowners and preservation groups.
- Develop protocols to inform project-related construction supervisors of the importance of protecting archaeological resources, graves, and other cultural resources. The protocols shall instruct construction supervisors in how to recognize and treat the resources.

Q.1.7 Coordination

Q.1.7.1 Parks and Recreational Area

OEA determined the location and status of recreational features by reviewing scoping comments from public agencies and land managers, evaluating land management plans and other publicly available resources, and communicating with Montana FWP, the City of Miles City, the Montana Department of Natural Resources and Conservation, the U.S. Department of Agriculture, and the BLM. Through these communications, OEA narrowed the list of potentially affected recreational properties that qualify for Section 4(f) to the Spotted Eagle Recreation Area and the Pumpkin Creek Ranch and Recreation Area administered by BLM.

Prior to publishing this Draft EIS, OEA presented a preliminary determination of Section 4(f) properties to the City of Miles City and BLM, and requested that these agencies provide their formal response to the significance of the resources and the preliminary determination of impacts. On January 30, 2015, BLM responded in writing and indicated that they do not own or manage any lands in the project area that qualify for protection under Section 4(f). On February 25, 2015, the City of Miles City provided a written response in which they indicated that the Spotted Eagle Recreation Area is the only land that they own or manage in the project area, that it qualifies for protection under Section 4(f), and that a *de minimis* impact determination would be appropriate with the implementation of mitigation measures not yet identified. OEA will continue to coordinate with the City of Miles City to identify mitigation measures that would be adequate to support a *de minimis* impact determination.

Q.1.7.2 Cultural Resources

From October to December 2012, OEA sent letters to initiate Section 106 consultation to SHPO, ACHP, the Northern Cheyenne Tribe, 20 other 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. In accordance

with 36 C.F.R. § 800.2(b), ACHP accepted OEA's invitation to provide guidance and advice and has entered the Section 106 consultation process for the proposed rail line.

OEA carefully considered the range of consulting parties recommended by the Section 106 regulations. Initially, in late 2012, OEA invited those who had been involved in previous applications to the Board to construct and operate a railroad line in the Tongue River Valley. Subsequently, OEA added several consulting parties over the course of the Section 106 consultation process.

To support its Section 106 outreach efforts, OEA has held monthly calls with consulting parties since February 2013. OEA invited potential Section 106 consulting parties to a meeting held on the Northern Cheyenne Reservation in Lame Deer, Montana, April 16 through 18, 2013; members of the public also attended. Subsequently, OEA held a Section 106 consulting party meeting in Billings, Montana, February 13 and 14, 2014. 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. Since the February 2014 meeting, OEA has worked with the consulting parties to develop the Programmatic Agreement. The draft Programmatic Agreement will be issued for public review and comment as part of this Draft EIS (Appendix P, *Programmatic Agreement*).

As part of the phased identification approach agreed upon by SHPO and ACHP, if the Board licenses a build alternative, OEA would complete its identification efforts and apply the National Register criteria to each cultural resource identified in the study area. In accordance with 36 C.F.R. § 800.6(a), OEA would continue consultation to avoid, minimize, and mitigate the impacts of the proposed rail line on all cultural resources. Under the phased identification approach, OEA would develop a treatment plan as an amendment to the Programmatic Agreement outlining the specific measures that would be implemented to mitigate the impacts for the specific build alternative licensed.

Q.1.8 Section 4(f) Conclusion

Any one of the two Tongue River Alternatives or the two Tongue River Road Alternatives would each cross the Spotted Eagle Recreation Area. Any one of these build alternatives would result in the permanent incorporation of approximately 11 acres of the Section 4(f) property into the railroad right-of-way. OEA has identified preliminary mitigation measures that would reduce the overall impacts on the Spotted Eagle Recreation Area. OEA anticipates that construction and operation of any one of these four build alternatives would not result in adverse impacts on the activities, features, or attributes of the Spotted Eagle Recreation Area qualifying it for protection under Section 4(f). As such, OEA intends to recommend and seek concurrence from FHWA for a *de minimis* impact determination for these build alternatives as they pertain to the Spotted Eagle Recreation Area.

Because the effects on all potentially eligible cultural resources cannot be fully determined prior to the construction phase of the proposed rail line, OEA engaged in a phased resource

identification approach and has developed a Section 106 Programmatic Agreement. Cultural resources eligible for protection under Section 4(f) that could be encountered during construction would be addressed by the Programmatic Agreement. The Programmatic Agreement establishes responsibilities for the treatment of historic properties, the implementation of mitigation measures, and ongoing consultation efforts, thereby ensuring that harm would be minimized to cultural resources.

Q.2 Section 6(f) Evaluation

Section 6(f) of the Land and Water Conservation Fund Act (LWCF) (16 U.S.C. §§ 4601–4 *et seq.*) stipulates that:

No property acquired or developed with assistance under [the Land and Water Conservation Fund Act], without the approval of the Secretary [Interior], be converted to other than public outdoor recreation uses. The Secretary shall approve such conversion only if he finds it to be in accord with the then existing comprehensive statewide outdoor recreation plan and only upon such conditions as he deems necessary to assure the substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location (16 U.S.C. 4601-4 *et seq.*).

The statute is applicable to a property as a whole that has received funding from LWCF, regardless of where the resources were spent within an area.

Q.2.1 Regulatory Setting

Section 6(f) of the LWCF is intended to protect parks and other recreational resources from conversion to other uses. The Section 6(f) parkland conversion process applies only to those state, county, or local recreational resources that have received funding through LWCF. The Parks Division at Montana FWP serves as a liaison with NPS for purposes of administering the LWCF program, including distribution of funds and monitoring the state's compliance with LWCF requirements. NPS makes the ultimate decision on whether to approve a conversion of land that has received LWCF funds.

NPS will consider conversion of public outdoor recreation areas to another use if the following prerequisites have been met.

- All practicable alternatives to the conversion have been evaluated and rejected on a sound basis.
- The property proposed for substitution is of at least fair market value as that of the property to be converted.
- The property proposed for replacement is of reasonably equivalent usefulness and location for recreational purposes as that being converted.

The replacement property need not provide identical recreational activities or resources, but it must meet public outdoor recreation needs as indicated in the Statewide Comprehensive Outdoor Recreation Plan.

Q.2.1.1 Section 6(f) Spotted Eagle Recreation Area

According to the NPS database of LWCF recipient properties for the Big Horn, Custer, Powder River, and Rosebud Counties, the Spotted Eagle Recreation Area is the only potentially affected property that has received funding from the LWCF (National Park Service 2015). It would be crossed by any of the two Tongue River Alternatives or the two Tongue River Road Alternatives. The potentially converted area would include approximately 11 acres on the western side of the park (Figure Q-1).

For a detailed description of the facilities, features, and activities at the Spotted Eagle Recreation Area, see Section Q.1.3.2, *Spotted Eagle Recreation Area*.

Q.2.2 Build Alternatives

In addition to the four build alternatives that would affect the Spotted Eagle Recreation Area, this Draft EIS evaluates six other build rail alternatives and a No-Action Alternative.

- Colstrip Alternative
- Colstrip East Alternative
- Moon Creek Alternative
- Moon Creek East Alternative
- Decker Alternative
- Decker East Alternative
- No-Action Alternative

None of these alternatives, including the No-Action Alternative, would affect Section 6(f) properties.

Q.2.3 6(f) Coordination

OEA engaged in communication with Montana FWP on to determine which areas have received LWCF funding and would require a potential conversion of land. Montana FWP was asked to confirm that the Spotted Eagle Recreation Area is the only recipient of LWCF funds that would be converted by the proposed rail line. Montana FWP indicated that, were TRRC to decide that one of the four alternatives affecting the Spotted Eagle Recreation Area would be considered its preferred project alternative, Montana FWP would need to be formally contacted by TRRC⁶. OEA's recommended mitigation would require TRRC to consult with Montana FWP in the preparation of a 6(f) Conversion Plan if one of the Tongue River Alternatives or Tongue River Road Alternatives is licensed by the Board. Montana FWP would first approve a conversion plan, relate the conversion concept to NPS, and NPS

⁶ On December 17, 2012, TRRC submitted a supplemental application that proposed construction and operation of the Colstrip Alternative as TRRC's preferred alternative.

would have to agree to the conversion before proceeding. According to 36 C.F.R. § 59.3(b), replacement land need not be directly adjacent or close to the converted site, although adjacent, privately owned land may be available and would likely be considered. Regardless of location, replacement land would have to be in a use other than public recreation at the time of consideration. Following approval of a conversion concept, NPS requires that a series of formal appraisals be conducted both for the land to be taken for the project, and of the replacement land (McArthur pers. comm.).

Q.2.4 Section 6(f) Conclusion

A portion of the Spotted Eagle Recreation Area, which has received funding from LWCF, would be permanently converted from recreational to nonrecreational uses if any one of the two Tongue River Alternatives or two Tongue River Road Alternatives is authorized by the Board. No properties protected by LWCF Section 6(f) would be affected by any other build alternative.

Q.3 References

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Q.3.1 Personal Communications

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McArthur, Seth. Parks Division, Montana Department of Fish, Wildlife & Parks. January 28, 2015—Email correspondence with Chris Moelter (ICF International).