



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

Attention: Scoping Comments on Environmental Filing, Docket No. FD 30186

Dear Mr. Blodgett:

These comments are submitted in response to the Surface Transportation Board's (STB) Notice of Intent to prepare an environmental impact statement (EIS) on the revised application of the Tongue River Railroad Company (TRRC) to construct and operate a rail line originating in the Otter Creek region of Montana. TRRC previously proposed, in its October 16 Revised Application, the construction of a rail line between Miles City, Montana and Ashland/Otter Creek. However, TRRC herein proposes as its preferred alignment a different routing, hereafter referred to as the "Colstrip Alignment" that will run between Colstrip, 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.

In this letter, the National Wildlife Federation identifies the topics that the STB should address in the Draft EIS for the proposed Tongue River Railroad (TRR) project.

The National Wildlife Federation (NWF) was founded in 1936 as the national voice of state and local conservation groups, and has since emerged as the nation's foremost grassroots conservation organization, leading an integrated network of members and supporters and 47 affiliated organizations throughout the United States and its territories. NWF has been involved in environmental issues – including coal development – in the Rocky Mountain West for decades. NWF has a strong presence in Montana, with a regional office in Missoula, staff presence throughout the state, and an active state affiliate in the Montana Wildlife Federation.

NWF is concerned with the manner in which the STB handled the scoping process under the National Environmental Policy Act (NEPA). On December 17, 2012, after all the public scoping hearings regarding the proposed TRR project had concluded, the TRRC submitted a supplemental revised application for the construction and operation of the TRR in which it identified the "Colstrip Alternative" as the company's preferred route for the railroad. A new map of this route was provided in the application and on the STB's website. However, maps sent to the landowners whose land would be severely impacted by the Colstrip Alternative were significantly different than the maps presented to the public. The maps sent to the landowners show the route going through land owned by an Amish community, which is not shown in the public maps. This situation is unacceptable.

Because of the lack of consistent data and maps from the STB and TRRC, we believe that the scoping and public comment period should be extended and additional public hearings held. Although the Colstrip Alternative has been included in the TRRC's alternatives since the project was first proposed, it has always been rejected as technically infeasible. Prior to December 17, when TRCC announced that the Colstrip Alternative was not only feasible, but now the preferred alternative, Colstrip area residents and landowners had no reason to believe that they would likely be affected by this railroad. They deserve a chance to attend public hearings and to comment on the new proposal.

The following are the issues that we believe the STB must analyze in an Environmental Impact Statement.

I. EIS must analyze the direct, indirect and cumulative impacts of the proposed project as well as the impacts of connected and cumulative actions

NEPA requires that federal agencies "provide full and fair discussion of significant environmental impacts" of proposed actions.¹ The EIS must analyze direct, indirect and cumulative impacts of the proposed project.² In addition, the EIS must analyze the impacts of any connected or cumulative actions.³

A. EIS must analyze the climate change impacts of mining, transporting and burning coal from the Otter Creek area.

Global climate change is perhaps the greatest threat to humankind. Scientists maintain that warming of the global climate system is unequivocal and that many natural systems are being affected by regional climate changes.⁴ The single greatest cause of increasing global temperatures is the observed increase in anthropogenic greenhouse gas (GHG) concentrations

¹ 42 U.S.C. § 4332.

² 40 C.F.R. §§ 1502.16, 1508.25(a)(1)-1508.25(a)(2). Direct effects "are caused by the action and occur at the same time and place." *Id.* at § 1502.8(a). Indirect effects "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems." *Id.* at § 1502.8(a). Cumulative impact is "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1502.7.

³ 40 C.F.R. § 1508.25. "Actions are connected if they: (i) Automatically trigger other actions which may require environmental impact statements; (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously; (iii) Are interdependent parts of a larger action and depend on the larger action for their justification." *Id.* "Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement." *Id.*

⁴ Intergovernmental Panel on Climate Change, Fourth Assessment Report: Climate Change 2007: Synthesis Report, p. 30-31.

resulting from the combustion of fossil fuels.⁵ Coal is one of the dirtiest fossil fuels in terms of contributing to the GHGs that are causing climate change.

The total amount of coal reserves available in the Otter Creek area is estimated to total some 1.5 billion tons, which includes coal in the leases secured through Great Northern Properties. This is in addition to billions of tons of coal in the Powder River Basin that is not leased.

Just taking into consideration the possible development of the Otter Creek tracts, the combustion of this amount of coal will result in some 2.4 billion tons of CO₂ emissions. Assuming this amount of emissions is generated over a 20 year period, the average annual emissions of burning Otter Creek coal will be 120 million tons per year. For comparison, this is equivalent to approximately two percent of the total annual CO₂ emissions of the entire United States (6,821.8 million metric tons of CO₂ eq. in 2010).⁶ and is nearly five times higher than the minimum standard for reporting emissions under the Clean Air Act.⁷ While this calculation may not be exact (because the exact quantity of coal that will eventually be extracted from the Otter Creek mine is unknown), it is in the correct order of magnitude to illustrate that the greenhouse gas emissions from the combustion of Otter Creek coal is a significant connected and cumulative impact that must be analyzed in the EIS. This would be the case even if only half of the 1.5 billion tons was available for extraction and transportation.

Current annual CO₂ emissions from burning coal in the United States is about 2 billion tons/year. The 120 million tons of annual CO₂ emissions derived from the Otter Creek mine development, wherever it is burned, represents approximately 6% of this total. This number is significant.

From a local, national, and global perspective, the GHG emissions that will result from the development of a coal mine the size of Otter Creek and the transport and combustion of that coal are significant. This is especially true if the coal will be burned in countries, like China, that do not mandate measures to minimize greenhouse gas emissions from coal-fired generation facilities and where emission controls for coal combustion are highly inadequate. The EIS must analyze the impacts of the projected emissions from mining, transporting and burning coal from the Otter Creek mines.

Our recommendation that these cumulative and connected climate change impacts be addressed in the EIS is consistent with the Council on Environmental Quality's (CEQ) *Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions*, in which the CEQ advises Federal agencies to "quantify and disclose its estimate of the expected annual direct and indirect GHG emissions in the environmental documentation for the proposed action" and to "consider opportunities to reduce GHG emissions caused by proposed Federal actions and adapt their actions to climate change impacts throughout the NEPA process and to address these issues in their agency NEPA procedures."⁸

⁵ *Id.* at 39.

⁶ U.S. Environmental Protection Agency, U.S. Greenhouse Gas Inventory Report, <http://www.epa.gov/climatechange/ghgemissions/usinventoryreport.html>.

⁷ *See, e.g.*, U.S. Environmental Protection Agency, Mandatory Reporting of Greenhouse Gases Final Rule, 74 FR 56260 (Oct. 30, 2009).

⁸ Nancy H. Sutley, Memorandum for Heads of Federal Departments and Agencies re: Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions (Feb. 18, 2010), *available at*

B. EIS must analyze all impacts – direct, indirect and cumulative – of the proposed Otter Creek Mine, including the possibility that the Otter Creek mine is not constructed.

As described in the TRRC’s application, the principal purpose of the proposed rail line is to transport coal from the proposed mine in the Otter Creek area.⁹ If not for the need to transport coal from the Otter Creek mines, there would be no need to construct and operate the TRR. Because these two projects are inexorably linked, the impacts of the Otter Creek mine must be included in the TRR EIS.

The Otter Creek mine proposal has many barriers including but not limited to extensive cultural and historic resources in the Valley, an Alluvial Valley Floor designation by the USGS¹⁰, and high public opposition to the development, locally, in Montana and throughout the United States. In addition, the spur that is proposed to run to the defunct Montco Mine site is an absurd proposal. There is **no** viable mining operation that could occur in that site and it should be roundly rejected by the STB as an option for an additional mine.

The proposed TRR project and the proposed Otter Creek mines are clearly connected actions. Correspondingly, an EIS on the TRCC proposal must consider and analyze the direct, indirect and cumulative impacts resulting from the development, extraction, transportation, and use of coal from the Otter Creek mine.

C. EIS must analyze the public health and public safety impacts of increased coal train traffic from the mine sites all the way to destination facilities.

It is a fact that Arch Coal’s only potential market for this coal is an Asian market. To reach this market, they are planning to transport this coal over 1,000 miles by rail from the proposed Otter Creek mine to export port facilities in the Pacific Northwest. The EIS must consider the cumulative impacts of increased coal train traffic along the entire route. An increase in coal train traffic will result in the release of significant amounts of airborne pollutants from diesel engines¹¹ and coal dust.¹² The increased train traffic will also cause significant delays at many

http://ceq.hss.doe.gov/nepa/regs/Consideration_of_Effects_of_GHG_Draft_NEPA_Guidance_FINAL_02182010.pdf.

⁹ TRRC Application at 3.

¹⁰ U.S. Geological Survey, Effects of Potential Surface Coal Mining on Dissolved Solids in Otter Creek and In the Otter Creek Alluvial Aquifer, Southeastern Montana by M.R. Cannon, Water Resources Investigations Report 85-4206.

¹¹ Diesel particulate matter is associated with impaired pulmonary development in adolescents; increased cardiopulmonary mortality and all-cause mortality; measurable pulmonary inflammation; increased severity and frequency of asthma attacks, ER visits, and hospital admissions in children; increased rates of myocardial infarction (heart attack) in adults; and increased risk of cancer. See Whatcom Docs, Position Statement on Coal Shipments to Cherry Point, *available at* <http://www.powerpastcoal.org/wp-content/uploads/2011/08/Whatcom-Docs-Position-Statement-Final-July-241.pdf>.

¹² Coal dust is associated with chronic bronchitis; emphysema; pulmonary fibrosis (pneumoconiosis); and environmental contamination through the leaching of toxic heavy metals. See Whatcom Docs, Position Statement on Coal Shipments to Cherry Point, *supra* note 11.

rail crossings,¹³ increased risk of vehicle and pedestrian injuries along the tracks, and increased noise pollution.¹⁴

In addition, increased train traffic will increase the risk of train derailment and resulting release of dangerous materials into the environment.¹⁵ Train traffic also sparks wildfires.¹⁶ The West is experiencing extreme drought due to cumulative impacts of climate change and therefore the fire dangers to people, wildlife and our agricultural system is becoming more severe.¹⁷ The public should not have to pick up the tab for fighting wildfires caused by trains. The EIS must analyze the impacts of these fires to our environment, people's livelihoods and local, state and federal budgets.

Finally, the volume of rail traffic originating in the nearby Bakken oil field of Montana and North Dakota is likely to increase in the near future.* Considering the proximity of the Bakken field to the Otter Creek region, it is likely that there will be some overlap between routes used to transport oil and routes used to transport coal from the Otter Creek mine. The EIS must analyze the cumulative impacts of this potential drastic increase in rail traffic.¹⁸

Increased hazards to public safety and public health are not in the public interest, so the EIS must address ways of mitigating such hazards.

II. EIS must analyze the direct, indirect and cumulative environmental impacts to the resources of the Tongue River watershed

A. EIS must analyze impacts of the rail line to the movement, migration, breeding, health and biodiversity of wildlife species found in southeastern Montana and along the rail route.

¹³ Frequent long trains at rail crossings will mean delayed emergency medical service response times and increased accidents, traumatic injury and death.

¹⁴ Noise exposure causes cardiovascular disease, including increased blood pressure, arrhythmia; stroke and ischemic heart disease; cognitive impairment in children; sleep disturbance and resultant fatigue, hypertension, arrhythmia, and increased rate of accidents and injuries; exacerbation of mental health disorders such as depression, stress and anxiety, and psychosis. *See* Whatcom Docs, Position Statement on Coal Shipments to Cherry Point, *supra* note 11.

¹⁵ *See* Manuel Quinones, *Deraillments Add Fuel to Export Battle*, E&E NEWS GREENWIRE (Jul. 11, 2012), *available at* <http://www.eenews.net/public/Greenwire/2012/07/11/2>.

¹⁶ *Wildfire Today*, *available at* <http://wildfiretoday.com/2010/07/22/railroad-caused-fires-in-michigan-and-washington-two-different-approaches/>.

¹⁷ For example, Seattle's King 5 News exposed the negligence of railroad companies in regards to starting hundreds of wildfires along tracks in Washington state. The news reporter found that during a 10-year period, trains caused 234 fires. One person was killed when he was overrun by one of the fires as he operated a combine. Several people have lost their homes. However the company has never been cited for causing any of the fires. King 5 News, Seattle Washington, *available at* <http://www.king5.com/news/investigators/K5-INVESTIGATORS--Railroad-Pledges-More-Fire-Safety-Following-Investigation-98938179.html>.

¹⁸ Selam Gebrekidan, *Phillips 66 Makes \$1 bln Commitment to ship Bakken Crude*, Reuters (Jan. 8, 2013), *available at* <http://www.reuters.com/article/2013/01/08/refinery-bayway-bakken-crude-idUSL1E9C844X20130108>.

The Tongue River drainage is a high-quality wildlife habitat, home to hundreds of species of fish, animals, birds and plants. Construction and operation of the TRR will result in direct and indirect harm to wildlife and wildlife habitat. Wildlife-train collisions are highly likely in this area, and will result in wildlife injuries and deaths. Indirect harm to wildlife will result from habitat destruction, habitat fragmentation and interruption of wildlife movements.

Wildlife-Train Collisions: Wildlife, especially large hoofed species like antelope, elk and deer, will congregate on the railroad tracks during heavy and deep snow events in order to move more easily. Migrating antelope trying to get away from the snow often end up on the railroad tracks, which are kept clear of snow. In addition, antelope are unable to jump over fences, which is why they often follow the railroad for long distances until they find a break in the fencing or an open gate. High snow makes it hard for pronghorn to cross under cattle fences. With miles of fencing to keep cattle off the tracks, pronghorn will face a double barrier to reaching the Tongue River. The tendency of wildlife to congregate on railroad tracks can lead to a high number of wildlife-train collisions. For example, in 2011, 800 ungulates died in one winter on the Montana Hi-Line.¹⁹ One train killed 270 antelope near Vandalia, Montana where both Amtrak and freight trains run on the Burlington Northern Santa Fe Railway tracks.²⁰

Sidings and Wildlife: The TRR will create a barrier to the movement of wildlife. The TRRC's application indicates that each coal train will have 150 cars and measure over 1.5 miles in length. When trains of this length are parked on sidings or set-out tracks for extended periods, they pose an impenetrable barrier to wildlife movements. This is true for all wildlife and is especially serious for large hoofed species like antelope, elk and deer and during periods of seasonal movements. It is necessary the EIS address this issue and to identify solutions such as avoiding placing sidings in areas frequented by wildlife and not allowing siding use for extended periods especially during times when wildlife are making seasonal movements.

Fences and Wildlife: In addition, because the rail line will cross numerous cattle ranches, fences will have to be constructed along the proposed railroad line to prevent cattle from crossing the tracks. These fences will impede the movement and migration of wildlife. The EIS must address the impacts of at least 40 miles of new fencing on all wildlife species that use the Tongue River as a water source and migrating wildlife. Antelope movements are especially impacted because of their inability to jump fences. The EIS must address such issues as the means of constructing a wildlife-friendly fence and who is responsible for maintaining the fence.

Wildlife Corridors: Additionally, the most important corridors for wildlife movements are typically along creeks, streams and rivers. The EIS must look at the impacts of the rail line and new fencing on riparian habitats and how it will impact the continued use of these riparian corridors by wildlife.

¹⁹ Kate Whittle, *Hundreds of Antelope Hit by Trains on the Montana Hi-Line*, NEW WEST, available at http://www.newwest.net/topic/article/hundreds_of_antelope_hit_by_trains_on_the_montana_hi_line/C41/L41/

²⁰ Associated Press, *Trains Taking Toll on Montana Antelope and Deer*, BILLINGS GAZETTE, available at http://billingsgazette.com/news/state-and-regional/montana/trains-taking-toll-on-montana-antelope-and-deer/article_f3444d60-482c-11e0-8aa8-001cc4c03286.html#ixzz2H1rOzMnq.

The EIS must identify and the TRRC must agree to implement mechanisms to avoid and mitigate wildlife and wildlife habitat impacts and to compensate the state for adverse impacts on wildlife, including animals directly killed by the TRR.

Impacts to mating and breeding behavior: The EIS must analyze the impacts of the train and coal on wildlife's ability to mate and rear young and how the train and mine will impact their behavior.

B. EIS must analyze impacts to endangered and threatened wildlife species.

Because it is unclear whether the route from Otter Creek to Miles City has been taken completely off the table, NWF will retain our comments associated with the Miles City Fish Hatchery. This route passes the Miles City Fish Hatchery, which has a focus on preservation of the endangered pallid sturgeon. The concerns of the Montana Department of Fish, Wildlife and Parks with regard to minimizing or eliminating project impacts on this hatchery must be considered and mitigated. These include impacts from vibrations of the proposed project.

The greater sage grouse is an imperiled species and the entire population is a candidate for listing under the Endangered Species Act.²¹ There is critically important sage grouse habitat in the vicinity of the proposed project. Noise and disturbance impacts on sage grouse of the proposed project must be documented and appropriation mitigation measures proposed.

Burrowing owls, short-eared owls, Mountain plovers, golden eagles and ferruginous hawks are other bird species potentially impacted by the proposed project. All of these species are limited by declining habitat quality and quantity and this limitation will likely be exacerbated by the proposed project.

The EIS should address impacts to and mitigation measures designed to protect all other listed species in the area that will be impacted by the TRR and the Otter Creek mine, including downstream waterways.

C. EIS must analyze the direct, indirect and cumulative impacts to the water quality of the Tongue River and all associated creeks that may result from the proposed rail line and the proposed mine operations and those impacts to the Northern Cheyenne water rights.

The Northern Cheyenne Tribe, which is authorized by the U.S. Environmental Protection Agency to administer water quality standards and certification programs, is in the process of enacting stringent water quality standards in the Tongue River, more stringent, even, than the State of Montana.²² Although not yet approved by the EPA, they are expected to be approved

²¹ See U.S. Fish and Wildlife Service, Species Profile, Greater sage-grouse, *available at* <http://ecos.fws.gov/speciesProfile/profile/speciesProfile.action?spcode=B06W>.

²² See Northern Cheyenne Tribe, Surface Water Quality Standards, *available at* <http://www.cheyennation.com/water.html>. These standards were enacted in response to the water quality degradation caused by the disposal of produced water from coalbed methane development upstream of the reservation. Operators in the Powder River Basin pump billions of gallons of water annually from underground

soon. These Northern Cheyenne water standards are meant to ensure that the Tongue River flows clean through the southeastern Montana reservation. The EIS must analyze the water quality impacts resulting from the settling and run-off of airborne pollutants released from coal trains, including diesel emissions, coal dust and other particulates. The EIS must also analyze wastewater treatment and disposal from the Otter Creek mine, including where the wastewater will be disposed, how the wastewater will be treated, the resulting water quality of the wastewater including but not limited to the SAR and EC levels, how much wastewater will make it into waterways, how it will impact the Tongue River water quality, and the cumulative impacts of the coal mine wastewater in addition to the coal-bed methane produced water that is already being dumped into the river system.

Mining in the Otter Creek valley will increase the dissolved solids load to Otter Creek, which in turns runs to the Tongue River, and the alluvial aquifer through the leaching of soluble minerals from mine spoils. The EIS must analyze this water quality change and how it will impact current water use and rights in the region.

This analysis must also include projected impacts to the agriculture-based economy along the Tongue River, as the disposal of CBM produced water into waterways used for irrigation has already resulted in destruction of irrigated lands along many waterways in the Powder River Basin.²³

III. EIS must analyze the socio-economic impacts on the local economy and residents

A. EIS must analyze the impacts on the Tongue River Ranch and other local, state and federal property along the route that is used for grazing allotments and public land for hunting.

There are numerous publically owned lands along the route and near the proposed Otter Creek mine that currently are used by the public, for their “convenience and necessity,” for hunting and grazing for their livestock. The EIS must analyze the rail line and coal mine’s impact on current beneficial and sustainable uses of this land. Will the grazing leases in Custer National Forest be impacted by this rail line and mine? If so, what will the impacts to Custer National Forest be? Will there be an increase in wildfire risk due to decreased grazing and management? How will state and federal land that is now open to hunting be impacted?

In addition, the Tongue River Ranch was acquired by the State of Montana in 2007 and is now managed as part of the school trust by the Montana Department of Natural Resources and Conservation. This ranch is an important recreational site and provides access to adjacent public lands used by many people, including hunters. All impacts of the proposed project on this important state land must be identified and mitigated. If the route to Miles City is still a potential route, the impact to the Tongue River Ranch needs to be analyzed.

aquifers to free trapped coal-bed methane, or natural gas. That water is high in salts and often pumped straight into rivers, a potential threat to the crops of downstream farmers.

²³ U.S. Environmental Protection Agency, Coalbed Methane Extraction: Detailed Study Report (Dec. 2010), at 4-9, available at http://water.epa.gov/lawsregs/lawsguidance/cwa/304m/upload/cbm_report_2011.pdf.

B. EIS must analyze the impacts to southeastern Montana’s hunting and wildlife recreation economy and MT FWP’s Block Management lands.

Montana’s second largest economy is travel and tourism, behind agriculture.²⁴ People flock to Montana from around the world to see its wide expanses of landscape, untouched by human development. A significant portion of the economy in southeastern Montana relies on healthy wildlife populations to support hunting, fishing and wildlife recreation. Out-of-state and in-state hunters flock to the Tongue River drainage and surrounding region for the abundant deer, elk, pronghorn, wild turkey, pheasant, grouse and numerous other game species. These hunters spend a significant amount of money on lodging, food, gas, hunting fees and licenses, hunting equipment and other amenities.

The EIS must analyze how the rail line and the proposed Otter Creek mine will impact the hunting and wildlife recreation economy and the financial impacts to the ranchers who outfit their properties in addition to the block management units that are open to public through Montana Fish Wildlife and Parks Block Management Program. Over nine miles of the proposed rail line will cross one of the largest Block Management ranches in southeastern Montana.

C. The EIS must analyze the economic impacts to agricultural operations and impacts to land values

Current land use in the regions is mostly agricultural with farming and ranching providing a stable and sustainable economy in southeastern Montana. The EIS must analyze the impacts of the industrialization of the Tongue River valley to the current economic driver in the region, agriculture. In addition, there must be an analysis of how the rail line and the proposed Otter Creek coal mine will impact property values of all landowners and homeowners in the region.

IV. STB must engage impacted Native American tribes in government-to-government consultation and EIS must analyze cultural, socio-economic and environmental impacts on tribes and tribal resources

The U.S. government, under its trust obligation to Indian tribes, “has charged itself with moral obligations of the highest responsibility and trust” toward Indian tribes.²⁵ The STB, as an agency of the U.S. government, has a trust responsibility to consult with Tribes in the development of the TRR project and to prevent and/or mitigate the impacts of development on Tribes and their reservations, consistent with federal and state laws and regulations.²⁶ As the Department of Transportation set forth in its Tribal Consultation Plan,

The United States government has a unique legal relationship with Federally-recognized Indian tribal governments as set forth in the

²⁴ The Institute for Tourism and Recreation Research at the University of Montana – Missoula, *The Economic Review of the Travel Industry in Montana* (July 2010), *available at* <http://www.itrr.umt.edu/ecorev/EconomicReview2010ITRR.pdf>.

²⁵ *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

²⁶ See Appendix.

Constitution of the United States, treaties, statutes, and court decisions. The Federal government recognizes the right of self-determination for Indian tribal governments and the obligation to work with Indian tribal governments in a government-to-government relationship. As an executive agency, the U.S. Department of Transportation has a responsibility and is committed to working with Indian tribal governments in this unique relationship, respecting tribal sovereignty and self-determination.²⁷

A. Tribes and Tribal Resources Potentially Affected by the Tongue River Railroad

Tribes that currently occupy the planned activity area include the Crow Tribe and the Northern Cheyenne Tribe. The Northern Cheyenne Tribe occupies a reservation located in southeastern Montana and has property and water rights to the Tongue River. The Tongue River forms the Northern Cheyenne Reservation's eastern boundary. The Crow Reservation, located in south central Montana, is bordered by Wyoming to the south and the Northern Cheyenne Indian Reservation to the east. Some of the headwaters of the Tongue River lie on the Crow Reservation.

Tribes that aboriginally occupied the planned activity area and tribes that have a cultural relationship to the sites in the planned activity area include but are not limited to: Crow, Northern Cheyenne, Arapahoe and numerous Sioux bands including the Oglala, Brule, Minniconjou, Hunkpapa and Sans Arc Lakota. All the Tribes who have cultural and historic sites in the planned development area must be consulted in the EIS process.

The EIS must address the following potential direct and indirect impacts from the rail line and the coal mines to the Northern Cheyenne Tribe. Reservation demographics confirm that the Northern Cheyenne community is a distinct community from other populations and communities in the region. For this reason, the Northern Cheyenne community should be neither ignored nor averaged into county-wide or regional analyses for EIS or land use planning purposes. For instance, the Northern Cheyenne Reservation is much more densely populated than the surrounding highly rural, ranching areas. The age and income profile of the Reservation population is much younger and poorer than non-Indian populations elsewhere in the region.²⁸

The EIS must analyze following subjects in detail:

- 1. Impacts to the Northern Cheyenne Class I Airshed.** In 1977, the Northern Cheyenne voluntarily classified their reservation as a “Class I Airshed,” which puts the reservation on par with national parks and wilderness areas. The proposed coal mine and rail line will impact the Northern Cheyenne air quality. How does the TRRC propose to mitigate these impacts?

²⁷ U.S. Department of Transportation, Tribal Consultation Plan, *available at* <http://www.dot.gov/sites/dot.dev/files/docs/Tribal%20Consultation%20Plan.pdf>.

²⁸ Northern Cheyenne Tribe, Report to the U.S. Bureau of Land Management, 2002, p. 1-2.

- 2. Impacts to the Northern Cheyenne resident's health including asthma, cancer and other diseases associated with air and water pollution.** Compared to the general U.S. population, Native American populations suffer higher rates of poverty, earlier onset of disease, shorter life spans, lower levels of education and a lack of truly comprehensive care in many rural Indian Health Services facilities.²⁹ Air quality and water quality heavily impact people's health and overall quality of life, especially vulnerable populations like the Native American population in southeastern Montana. The coal mine and rail line will impact air quality and water quality in the region (see comments associated with these issues above).

Exposure to air pollution is associated with numerous effects on human health, including pulmonary, cardiac, vascular, and neurological impairments. High-risk groups such as the elderly, infants, pregnant women, and those who suffer from chronic heart and lung diseases are more susceptible to air pollution. Children are at greater risk because they are generally more active outdoors and their lungs are still developing. Exposure to air pollution can cause both acute (short-term) and chronic (long-term) health effects. Acute effects are usually immediate and often reversible when exposure to the pollutant ends. Some acute health effects include eye irritation, headaches, and nausea. Chronic effects are usually not immediate and tend not to be reversible when exposure to the pollutant ends. Some chronic health effects include decreased lung capacity and lung cancer resulting from long-term exposure to toxic air pollutants. The scientific techniques for assessing health impacts of air pollution include air pollutant monitoring, exposure assessment, dosimetry, toxicology, and epidemiology.³⁰

The EIS must analyze the health impacts to the Northern Cheyenne people and the impacts to their health system on the reservation. Does the Northern Cheyenne healthcare system have the resources to deal with increased cases of asthma, cancer, and other diseases caused by air and water pollution from the Otter Creek mine and Tongue River Railroad? What is an "acceptable" increase in health problems among an impoverished community that the STB is willing to permit?

- 3. Impacts to Northern Cheyenne socio-economic conditions, including poverty rates, incomes, crime rates, transportation and safety issues, social services and health care system.** In 2002, the U.S. Bureau of Land Management (BLM) and the State of Montana Department of Natural Resources and Conservation received a report prepared by the Northern Cheyenne Tribe about the Tribe's culture and history, the social and economic conditions, demographics, environmental resources, cultural and archaeological sites, health and well-being and the tribal government as well as numerous other subjects. This study found that "previous energy development boom in the immediate area, centered on coal mining and power plant construction at Colstrip just north of the Reservation, worsened conditions on the Reservation. These effects have

²⁹ Indian Health Services, Trends in Indian Health, *available at* http://www.ihs.gov/nonmedicalprograms/ihs_stats/index.cfm?module=hqPubTrends03

³⁰ U.S. Environmental Protection Agency, Effects of Air Pollutants, *available at* <http://www.epa.gov/apti/course422/ap7a.html>

been documented in studies performed in connection with regional coal leasing in the early 1980s. The EIS must analyze the realistic economic impacts of this rail line and coal mine to the Northern Cheyenne Tribe. The STB should be wary of coal company promises of “jobs and training” for Northern Cheyenne people, as similar past promises have come to naught. One only has to look at adjacent coal mines and coal fired power plants to see the lack of employment opportunities for the Northern Cheyenne.

In addition, the Tribe will be heavily impacted by the influx of large numbers of non-Native outsiders that will work to construct the rail line and work in the mine. As the report to the BLM stated, this situation will increase crime, drug use and other social ills that the Tribe is not properly equipped to handle. The report also found severe public services deficits in the areas of housing, utilities, and crime and fire protection. The Reservation has a severe housing shortage with more than 800 families needing new housing and fully two-thirds of the existing housing stock in substandard condition. Some Northern Cheyenne residents must find housing off the Reservation, in Colstrip and Ashland. How will the influx of workers impact the ability of tribal residents to find and keep affordable housing? Existing housing programs on the Reservation are barely able to prevent further deterioration in the housing situation let alone address these severe deficiencies. The rail line and coal mine will only exacerbate these problems.

The Reservation’s fire protection system is essentially unfunded. More than half of the fire hydrants in Lame Deer do not properly function and the Tribe lacks a formal spill contingency plan. Due to lack of funding, volunteer fire fighters have only the most basic training and operate with severely outdated equipment. The rail line will increase fires. These fires will threaten the lives and homes of reservation residents. The EIS must address how this issue will be handled.

Law enforcement, transportation and social services are three other areas where public services are deficient on the Northern Cheyenne Reservation. The Reservation is suffering from a crime epidemic already. The Reservation police force is underfunded and understaffed. At times only one officer is on-duty for the entire Reservation. The Tribal Court lacks adequate facilities and the Tribe’s detention center is chronically overcrowded. Existing law enforcement deficiencies have the potential to be exacerbated by jurisdictional gaps which threaten to make the Reservation a haven for non-Indian lawbreakers with an influx of new workers from the rail line and coal mine.

Although the Reservation’s road network has recently been improved, accident rates on Reservation highways remain much higher than on comparable off-Reservation highway segments. The Reservation lacks basic traffic safety laws or the means to enforce them. Again, the Reservation’s traffic problems are made worse by non-

Natives who take advantage of the Reservation's lack of traffic law enforcement.³¹ The proposed rail line and coal mine will increase traffic through the reservation exponentially. The EIS must analyze the impacts if increased traffic on accidents, traffic violations, safety of residents and roads.

- 4. Impacts to Northern Cheyenne cultural and historic resources on and off the Reservation and the ability of Northern Cheyenne to gather important cultural plants and harvest wildlife in the Tongue River region.** The Northern Cheyenne's "cultural resources" are not necessarily limited to specific historical or archeological sites, but also include natural resources that support ceremonial and subsistence uses, and landscapes needed to perform important rituals. These cultural resources can be found both on and off the Reservation and especially in the Tongue River valley, an area that was homesteaded by Tribal members in the 1880s and with which many Cheyenne still feel an intense bond. There are an immense number of cultural, burial and historic sites in the region that will be destroyed or heavily impacted by the proposed rail line and coal mine. The EIS must look at the impacts of this rail line and coal mine to the cultural resources of the Northern Cheyenne Tribe off the Reservation.

B. Development of a Consultation Plan

First and foremost, the STB needs to develop a comprehensive tribal consultation plan that is made widely available to tribes affected and potentially affected by construction of the Tongue River Railroad. The STB cannot simply rely on the information and results that it gathered from earlier consultation efforts with tribes concerning the TRR project.³² Therefore, the STB must begin the consultation process anew while also taking into account previous comments and recommendations made by tribes about how consultation should take place.

Some recommendations to help the STB conduct effective consultation with tribes include:

- Develop guidance on how the STB intends to assure that consultation meetings result in meaningful dialogue rather than simply pro forma consultation.
- Start the consultation process early in the planning stages. Because the STB has initiated the scoping process, we hope the STB has already initiated the tribal consultation process.
- Assign a tribal liaison to the TRR project who has extensively worked with tribes on similar construction projects.

³¹ Northern Cheyenne Tribe, Report to the U.S. Bureau of Land Management, 2002, p. 1-5.

³² *Tongue River R.R.—Rail Constr. and Operation—In Custer, Powder River and Rosebud Cnty., 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); *Tongue River R.R.—Rail Constr. and Operation—Ashland to Decker, Mont. (Tongue River II)*, 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. (Tongue River III)*, FD 30186 (Sub-No. 3) (STB served Oct. 9, 2007), *pet. for reconsid. denied* (STB served Mar. 13, 2008).

- Provide adequate time to tribes to review and provide comments concerning actions involving the TRR project, well beyond the 30- to 60-day periods provided to the public to make its comments.
- Send a letter to each tribal chairperson with copies provided to appropriate staff (*e.g.*, tribal administrator, environmental manager) that asks each tribe how it would like to be consulted on the TRR project. Providing copies to different individuals of authority within the tribe provides better assurances that the tribe will clearly be made aware of the project. Asking each tribe about how it would like to be consulted respects their individual preferences and tribal cultures, and helps to insure that true government-to-government consultation occurs.
- Make every effort to provide tribes with any additional resources and assistance that they might require to engage in effective consultation. Although they consider consultation to be very important, tribes have limited resources and time to expend on it. The STB must be sensitive to this fact.
- Provide assurances to tribes that the most senior-level STB officials will be engaged in consultation with them because tribes will likely be represented by their highest-level officials such as tribal chairpersons and council members.
- Include affected tribes in the EIS process as consulting agencies.
- Keep the channels of communication open throughout the consultation process and throughout development of the TRR, should construction proceed. According to tribes, coming to a final agreement is not as important as building ongoing channels of communication.³³
- Mutual respect must be the basis upon which successful consultation builds.

NWF is available to provide additional recommendations and help the STB coordinate its consultation process with tribes.

C. Government-to-Government Consultation is a Necessity

Government-to-government consultation, as required by federal laws and regulations,³⁴ is necessary for a number of reasons. First, it provides for more candid conversations between individual tribes and the federal government than would occur otherwise during a public or non-public group meeting with multiple tribes. Second, each tribe's circumstances are unique and must be treated as such by the federal government. A group meeting would only give short shrift to these circumstances. Third, most cultural resources information is protected from release under statutory exemptions to the Freedom of Information Act. Discussion of such information as part a group meeting risks its release to the general public and potentially endangers tribal cultural sites and practices. Finally, the subject matter may be so unique, such as a dispute between tribes about whose cultural resources might be located within a given TRR project site, that government-to-government consultation between the tribes and the STB provides the best opportunity for a resolution to the situation versus a group meeting of tribes where any number of tribal issues may be discussed in a finite period of time.

³³ National Association of Tribal Historic Preservation Officers, *Tribal Consultation, Best Practices in Historic Preservation*, iv (May 2005), available at <http://www.nathpo.org>.

³⁴ See Appendix.

The STB must not mistake public and non-public group meetings with tribes as true government-to-government consultation called for under Executive Order 13175.

V. EIS must independently and objectively analyze the TRRC’s claim of public convenience and necessity.

The construction and operation of the proposed project requires STB approval.³⁵ Before it approves a new rail line, the STB must find that construction and operation of the proposed line are consistent with the “public convenience and necessity.”³⁶ Under this standard, the STB weighs the transportation need or benefits against any kind of harm likely to result.

It appears from the Notice of Intent that the STB has already determined that the proposed project meets the statutory “public convenience and necessity” standard. This assumption must be eliminated. The STB cannot make such a determination prior to the preparation of an EIS that fully explores the needs and costs of the proposed action. A full independent analysis of whether this railroad is in the “public convenience and necessity” must consider and weigh the safety, environmental and socio-economic impacts of transporting coal by rail through the largely ranching and rural communities crossed by the proposed line and the impacts that this rail line and the coal that it will transport to coal burning facilities will have on the millions of people along the rail line, in the port regions and who are impacted greatly by global climate change.

The proposed project is strongly opposed by a majority of the current residents of the Tongue River region. The STB’s determination must consider Arch Coal’s business plans to export Otter Creek coal to foreign markets. The EIS must clearly describe the ultimate destinations and markets for the coal that will be transported by the proposed TRR. The costs imposed on local residents whose lands, cultural resources, health and businesses will be harmed by the proposed project are more likely to be unacceptable to those residents if the coal is intended for export rather than for domestic consumption.

VI. EIS must thoroughly, and in good faith, examine the “No Action” alternative.

Regulations implementing NEPA require that the analysis of alternatives in the EIS “include the alternative of no action.”³⁷ It is essential that the EIS include and genuinely examine a “no action” alternative as mandated.

³⁵ 49 U.S.C. §§ 10502, 10901.

³⁶ 49 U.S.C. § 10901(c).

³⁷ 40 C.F.R. § 1502.14(d).



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Appendix

Laws, Executive Orders, and Presidential Memoranda Applicable to Tribal Consultation

The STB must comply with the full slate of laws, Executive Orders, and Presidential Memoranda when determining how to adequately address tribal interests and concerns. These include:

1. National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies (*e.g.* the STB) to complete the procedures prescribed by the statute to account for any adverse effects on historical places that may occur due to any “proposed Federal or federally assisted undertaking” (including approval of a license or permit) on federal, state, tribal, or private land “prior to the approval of the expenditure of any Federal funds . . . or prior to the issuance of any license.”³⁸ NHPA requires consultation with Indian Tribes regarding places of traditional religious and cultural significance, to identify and determine appropriate management within the area of potential effect of an undertaking. Consultation is also required with Tribes that have assumed historic preservation duties as Tribal Historic Preservation Officers (THPOs) for sites on Tribal land and with Tribes on the mitigation of effects to historic and sacred places on federal land.³⁹

Federal Agency Requirements. As the lead federal agency, the STB must ensure that tribal participation “is conducted through the tribe’s [tribes’] official government structure” with formal representation “including designation of . . . [a] tribal signatory for the tribe.”⁴⁰ For any section of the TRR project on tribal lands, the STB must identify the appropriate tribal historic preservation officer or tribe.⁴¹ For portions of the TRR project on federal lands, the STB must make a reasonable and good faith effort to identify any tribes that may attach religious and cultural significance to historic properties in the areas of potential effects (APEs) and invite them to consult.⁴² Any identified tribe that wishes to be consulted will become a consulting party.⁴³

The STB must gather information from any identified tribe to assist in the identification of properties, including those located off tribal lands.⁴⁴ Such properties may (1) have religious and

³⁸ 16 U.S.C. § 470 (1992); *see also Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transp. Bd.*, 252 F.3d 246, 252 (3rd Cir. 2001).

³⁹ The NHPA in section 101(d)(2) creates the Tribal Historic Preservation Officer Program, and reads: “A tribe may assume all or any part of the functions of a State Historic Preservation Officer with respect to Tribal lands.” In section 301(14) “tribal lands” are defined as: “(a) all lands within the exterior boundaries of any Indian reservation, and all (b) dependent Indian communities.” This definition of “tribal lands” excludes Alaskan Natives from having a Tribal Historic Preservation Officer program. (U.S. Department of Interior, Office of the Solicitor, Request for Opinion Regarding National Historic Preservation Act of 1966, as Amended, November 2002.)

⁴⁰ <http://www.achp.gov/regs-tribes.html>

⁴¹ 36 C.F.R. § 800.3(c). The TRR project is not expected to traverse tribal lands.

⁴² 36 C.F.R. § 800.3(f)(2).

⁴³ *Id.*

⁴⁴ Section 304 of NHPA provides that information gathered about cultural resources will be kept confidential if the federal agency determines that the disclosure of such information may cause a significant invasion of privacy, risk harm to the historic resources, or impede the use of a traditional religious site by practitioners.

cultural significance to that tribe and (2) be eligible for the National Register.⁴⁵ Based on gathered information and consultation with the State Historic Preservation Officer (SHPO) and any identified tribes that might attach religious and cultural significance to properties within the APEs, the STB shall make a reasonable and good faith effort to carry out appropriate identification efforts that may include background research, consultation, field surveys, oral history interviews, and sample field investigation.⁴⁶

The remaining steps of the Section 106 process involve (1) an evaluation of the National Register eligibility of all potentially APEs, (2) an assessment of the adverse effects potentially caused by the TRR project, and (3) an assessment of the possible means to “avoid, minimize, or mitigate” the effects, if they are found to be adverse, in consultation with the SHPO and other consulting parties.⁴⁷

Role of License Applicant. License applicants for federal licenses, permits, and other approvals (e.g., Tongue River Railroad Company, Inc.) may voluntarily participate in the section 106 review process as a consulting party.⁴⁸ Further, the responsible STB official “may authorize an applicant to initiate consultation with the SHPO and others, but remains legally responsible for all findings and determinations charged to the agency official.”⁴⁹ The STB also remains responsible for its government-to-government relationship with tribes.⁵⁰

Official communication by the Tongue River Railroad Company with a tribe during the section 106 process depends on the agreement that the tribe has with the STB. The Advisory Council on Historic Preservation explains the different roles of a lead agency and applicant as such:

[F]ederal agencies cannot unilaterally delegate their responsibilities to conduct government-to-government consultation with Indian tribes to non-federal entities. It is important to remember that Indian tribes are sovereign nations and that their relationship with the federal agency exists on a government-to-government basis. For that reason, some Indian tribes may be unwilling to consult with non-federal entities associated with a particular undertaking. Such non-federal entities include applicants for federal permits or assistance (which would include any contractors hired by the applicant), as well as contractors who are not government employees but are hired to perform historic preservation duties for a federal agency. In such cases, the wishes of the tribe for government-to-government consultation must be respected, and the agency must carry out tribal consultation for the undertaking.

⁴⁵ 36 C.F.R. § 800.4(a)(4). Section 101(d)(6) of NHPA provides properties that have religious and cultural significance to a tribe may be determined eligible for the National Register.

⁴⁶ 36 C.F.R. § 800.4(b)(1).

⁴⁷ 36 C.F.R. §§ 800.5, 800.6.

⁴⁸ 36 C.F.R. § 800.2(c)(4).

⁴⁹ *Id.*

⁵⁰ *Id.*

However, *if an Indian tribe agrees in advance*, the agency may rely, where appropriate, on an applicant (or the applicant's contractor), or the agency's own historic preservation contractor to carry out day-to-day, project-specific tribal consultation. In order to ensure that the tribe, the agency, and the applicant or contractor all fully understand that the tribe may request the federal agency to step in and assume consultation duties if problems arise, the agency should obtain the tribe's concurrence with the agency's delegation in writing.

Even when an Indian tribe agrees to consult with an applicant, the federal agency remains responsible for ensuring that the consultation process is carried out properly, meeting the letter and spirit of the law, as well as resolving any issues or disputes. Therefore, any agreement between the agency and an Indian tribe documenting the tribe's willingness to consult with a non-federal entity should contain a provision that explains the agency's responsibility to assume consultation responsibilities at the tribe's request. The government-to-government relationship requires that the federal agency is ultimately responsible for tribal consultation.⁵¹

2. Archaeological Resources Protection Act

The purpose of the Archaeological Resources Protection Act (ARPA) is the "protection of archaeological resources and sites which are on public lands and Indian lands..."⁵² Archaeological resources can include "any material remains of past human life or activities" greater than 100 years old, such as basketry, graves, human skeletal materials, pit houses, rock carvings or paintings, structures or portions of structures, or tools.⁵³

The ARPA is intended to apply to purposeful exploration and removal of archaeological resources,⁵⁴ so it generally does not impose conditions on development projects.⁵⁵ However, the ARPA will come into play when archaeological resources are uncovered during project

⁵¹ Advisory Council of Historic Preservation, Consultation With Indian Tribes in the Section 106 Review Process: A Handbook, 16-17 (Nov. 2008).

⁵² 16 U.S.C. § 470aa(b).

⁵³ 16 U.S.C. § 470bb(1).

⁵⁴ *Attakai v. United States*, 746 F. Supp. at 1410. The court stated NHPA and HADPA address inadvertent discoveries. *Id.*; see also 43 C.F.R. § 7.5(c) (1992). However, an ARPA permit may be required to conduct NEPA compliance work. See 16 U.S.C. § 470cc (1988).

⁵⁵ 16 U.S.C. § 470kk. However, ARPA has been used to help defeat development projects on federal lands. As part of NHPA compliance procedures, an applicant for a federal license to construct a hydroelectric power project in Montana sought an ARPA permit to conduct test excavations of historic properties on National Forest lands. Pursuant to regulations, the Forest Service notified affected tribes of its intent to issue the permit. The tribes objected, and the Forest Service denied the ARPA permit. The tribes then argued that NHPA compliance was impossible and the power license should not be issued. For a variety of reasons, the project ultimately died. See generally *Northern Lights Inc.*, 27 FERC (CCH) ¶ 633,024, 65,080-85 (1984); FERC, Dept. of Energy, Final Environmental Impact Statement, Kootenai River Hydroelectric Project No. 2752 - Montana (1981).

execution and must be excavated or removed.⁵⁶ If project implementation will require excavation of archaeological sites, the ARPA planning should be incorporated into the permit and environmental review process.

The intentional excavation or removal of archaeological resources from federal or tribal lands is unlawful unless a permit to do so has been issued by an appropriate federal land manager.⁵⁷ If the permit may result in harm to or destruction of a religious or cultural site, the federal land manager must notify any tribes that may consider the site to have religious or cultural importance at least 30 days prior to issuance of the permit.⁵⁸ Further, the federal land manager may notify any other Native American groups that consider the site to have religious or cultural importance.⁵⁹ If they so request, the notified tribes and Native American groups can meet with the federal land manager to discuss their interests and concerns, including ways to avoid or mitigate harm or destruction to the site that can be incorporated into an ARPA permit.⁶⁰ On tribal lands, the federal agency must have the permission of the Tribe to issue an ARPA permit.⁶¹

3. Native American Graves Protection and Repatriation Act

The Native American Graves Protection and Repatriation Act (NAGPRA) protects Native American graves and certain cultural artifacts on federal and tribal lands from uncontrolled disturbance.⁶² NAGPRA also accords to living descendants or culturally related tribes certain rights to ownership and control of burial remains and cultural items discovered on federal or Indian lands.⁶³

Consultation. Consultation plays a prominent role under the NAGPRA as it does under section 106 of the NHPA. However, the purpose of NAGPRA consultation is to help the federal agency (*i.e.* the STB) determine ownership and control of Native American cultural items and appropriate treatment of such items. The statute establishes a hierarchy of ownership interest covering all classes of cultural items. NAGPRA's ownership scheme is material to federal agencies and project developers because it determines the tribe or tribes which must approve excavation or which are entitled to notice and consultation with respect to cultural items inadvertently discovered and that must be excavated or removed from a project area.

If Native American graves or cultural items are present in the project area, the responsible STB official⁶⁴ must request from tribes the names and addresses of tribal officials to act as representatives in consultation, the names and appropriate methods to contact lineal descendants

⁵⁶ This may be true even if discoveries occur on private lands. See *United States v. Gerber*, 20 Ind.L.Rep. 2127 (7th Cir. 1993).

⁵⁷ 16 U.S.C. §§ 470cc(a), 470cc(c).

⁵⁸ 16 U.S.C. § 470cc(c).

⁵⁹ 43 C.F.R. § 7.7(a)(2).

⁶⁰ 43 C.F.R. § 7.7(a)(3).

⁶¹ 43 C.F.R. § 7.8(a)(5).

⁶² See 25 U.S.C. §§ 3001-3013; 43 C.F.R. §10.1. Native American cultural items include human remains, funerary objects, sacred objects, and objects of cultural patrimony.

⁶³ *Id.*

⁶⁴ A “federal agency official means any individual authorized by delegation of authority within a federal agency to perform the duties relating to these regulations.” 43 C.F.R. § 10.2(a)(2).

who should be contacted to participate in the consultation process, recommendations on how the consultation process should be conducted, and the kinds of cultural items considered to be unassociated funerary objects, sacred objects, or objects of cultural patrimony.⁶⁵ The STB must work with tribal officials and lineal descendants to protect and mitigate damage to graves and cultural items, to ensure the proper care and handling of cultural items, and to determine who will take possession of the items if they are excavated.

Upon the completion of consultation, the responsible STB official must prepare, approve, and sign a written plan of action that documents the objects to be considered as cultural items and their planned treatment, care, and handling.⁶⁶ Further, the plan must include the information used to determine custody of the cultural objects and the planned disposition of such objects.⁶⁷ The STB is also encouraged to enter into comprehensive agreements with tribes affiliated with any of the cultural items or likely to claim such affiliation.⁶⁸ These agreements should address all federal agency land management activities that could result in the intentional excavation or inadvertent discovery of cultural items on federal lands.⁶⁹ If any of the actions are also subject to Section 106 of the NHPA, the responsible STB official should coordinate consultation and any subsequent compliance agreements conducted under the statute with the requirements of the NAGPRA.⁷⁰

NAGPRA compliance will be facilitated if, early in project planning, the project developer and agency seek to identify and consult with tribes or groups that may own or control cultural items under NAGPRA. Identification of potentially interested tribes at an early stage also will facilitate prompt decisions over disposition or removal of cultural items inadvertently discovered during the project. The consultation participants should aim for agreements between developer, agency, and affected tribes over ownership and control of cultural items, excavation or removal methods, and custody of cultural items immediately following removal.

Intentional Excavations. NAGPRA requires the responsible STB official to take reasonable steps to determine whether a planned activity may result in the intentional excavation of any cultural items from federal or tribal lands.⁷¹ If such excavation may occur, the official must notify, in writing, any tribes likely to have affiliations with any cultural items to be excavated, prior to issuing any approvals or permits for excavation.⁷² Further, the official must provide written notification to any present-day tribe that aboriginally occupied the planned activity area and any other tribes reasonably believed to have a cultural relationship to the cultural items.⁷³ The written notification must describe the planned activity, its general location, the basis on

⁶⁵ 43 C.F.R. § 10.5(d). An unassociated funerary object is “an object for which the human remains with which they were intentionally placed are not in the possession or control of a museum or federal agency.” 43 C.F.R. § 10.2(d)(2)(ii).

⁶⁶ 43 C.F.R. § 10.5(e).

⁶⁷ *Id.*

⁶⁸ 43 C.F.R. § 10.5(f).

⁶⁹ *Id.*

⁷⁰ 43 C.F.R. § 10.3(c)(3).

⁷¹ 43 C.F.R. § 10.3(c)(1).

⁷² *Id.* Prior to any excavation, a permit must be issued under the Archaeological Resources Protection Act, 16 U.S.C. SS 470aa-11 (1988); 16 U.S.C. § 470cc (1988).

⁷³ *Id.*

which it was determined that cultural items might be excavated, and the basis for determining likely custody.⁷⁴ If the responsible STB official does not receive a response to the written notification within 15 days, he or she must follow up with a telephone call.⁷⁵

NAGPRA allows for the intentional excavation of cultural items. However, four conditions must exist. First, the cultural items must be excavated or removed in accordance with ARPA and its implementing regulations.⁷⁶ Second, the cultural items can be excavated only after consultation with or, in the case of tribal lands, consent of, the appropriate tribe.⁷⁷ Third, the ownership and right of control of the disposition of the cultural items must be consistent with their custody pursuant to NAGPRA.⁷⁸ Fourth, proof of the consultation or consent must be shown to the responsible STB official or other agency official responsible for issuance of the required permit.⁷⁹

Inadvertent Discovery. NAGPRA provides that, if a person makes an inadvertent discovery of cultural items in connection with an ongoing activity on federal or tribal land, he or she must provide both telephonic and written communication to the responsible agency official.⁸⁰ Further, the person must cease the activity and make a reasonable effort to protect the cultural items.⁸¹ No later than three working days after receiving written confirmation of the notification, the responsible the STB official must: (1) certify receipt of the notification, (2) take immediate steps, if necessary, to further protect the cultural items, (3) notify by telephone, with written confirmation, any tribes likely to have cultural affiliations with the inadvertently discovered cultural items, and any present-day tribe which aboriginally occupied the area and any other tribes reasonably believed to have a cultural relationship to the cultural items, (4) initiate consultation with the relevant tribes, (5) follow the requirements and procedures for intentional archaeological excavations if the cultural items must be excavated or removed, and (6) ensure that the requirements and procedures for final custody and disposition of all inadvertently discovered cultural items are properly followed.⁸² The activity that resulted in the inadvertent discovery may resume within 30 days after certification of the written notification confirming the inadvertent discovery if resumption of the activity is otherwise lawful.⁸³

Disposition of Cultural Items. Following consultation and execution of the written action plan, the STB must publicize a “Notice of Intended Disposition” twice in a newspaper of general circulation in the area in which the cultural items were intentionally excavated or inadvertently discovered and, when appropriate, the area where the tribes reside that claim affiliation to the cultural items.⁸⁴ Further, the second publication must occur at least 30 days prior to transfer of

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ 43 C.F.R. § 10.3(b)(1).

⁷⁷ 43 C.F.R. § 10.3(b)(2).

⁷⁸ 43 C.F.R. § 10.3(b)(3).

⁷⁹ 43 C.F.R. § 10.3(b)(4).

⁸⁰ 43 C.F.R. § 10.4(b).

⁸¹ *Id.*

⁸² 43 C.F.R. § 10.4(d)(1).

⁸³ 43 C.F.R. § 10.4(d)(2).

⁸⁴ 43 C.F.R. § 10.6(c). Newspapers serving eastern Montana include: A Cheyenne Voice, Billings Gazette, Billings Outpost, Crow Agency News (<http://www.topix.com/city/crow-agency-mt>), Daniels County Leader, Glendive Ranger-Review, Helena IR, Laurel Outlook, Lewiston News-Argus, Miles City Star, Sidney Herald, Wolf Point

the cultural items to the rightful claimant(s) entitled to their custody and must provide information on the nature and affiliation of such items.⁸⁵ Finally, the responsible STB official must send a copy of the notice and information to the National NAGPRA Program.⁸⁶

4. Historical and Archaeological Data Preservation Act of 1974

The Historical and Archeological Data Preservation Act of 1974 (HADPA) provides for the “preservation of historical and archeological data (including relics and specimens) which might otherwise be irreparably lost or destroyed” due to (1) flooding, the building of access roads, the erection of workmen’s communities, the relocation of railroads and highways, and other alterations of the terrain caused by the construction of a dam by any agency of the United States, or by any private person or corporation holding a license issued by any such agency or, (2) any alteration of the terrain caused as a result of any federal construction project or federally licensed activity or program.⁸⁷ HADPA applies to the preservation of data whereas NAGPRA applies to the physical preservation of historic and archaeological resources. Further, HADPA is intended to protect data during and after ground-disturbing activities.

An STB official must notify the Secretary of the Interior (Secretary) if the agency discovers, or is notified by the appropriate authority, that its activities in connection with the TRR project may cause irreparable loss or destruction of “significant scientific, prehistorical, historical, or archeological data.”⁸⁸ Further, it may request that the Secretary recover, protect, and preserve the data, or may do so itself based on funds appropriated for the TRR project.⁸⁹ If the Secretary determines that the data is significant and may be irrevocably lost or destroyed, he or she will conduct or cause to be conducted a survey of the site and undertake the recovery, protection, and preservation of the data.⁹⁰ However, the Secretary must initiate the survey or recovery effort within 60 days upon notification about the activities or within a time period agreed upon with the the STB.⁹¹

5. American Indian Religious Freedom Act of 1978⁹²⁵⁹

The American Indian Religious Freedom Act provides that it shall be the policy of the United States to “protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of American Indians, . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.”⁹³ No regulations have been implemented for the Act, nor are federal agencies required to consult with tribes. However, a number of tribes consider the statute

Herald News, and Yellowstone County News. In addition, the reservations are served by the Indian Country Today Media Network.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ 16 U.S.C. § 469.

⁸⁸ 16 U.S.C. § 469a-1(a).

⁸⁹ *Id.*

⁹⁰ 16 U.S.C. § 469a-2(a).

⁹¹ 16 U.S.C. § 469a-2(c).

⁹² 42 U.S.C. § 1996.

⁹³ *Id.*

as a source of federal authority that recognizes and protects their rights to engage in activities at sites not necessarily on their lands.

6. Executive Order 13007, Indian Sacred Sites⁹⁴

EO 13007 directs federal agencies with management responsibility over federal lands to accommodate Indian religious practitioners with access to sacred sites and their ceremonial use, and to avoid adversely affecting the physical integrity of such sites. Further, federal agencies are required to maintain the confidentiality of the sacred sites as appropriate.

7. Executive Order 13175, Consultation and Coordination with Indian Tribal Governments⁹⁵

EO 13175 expanded the breadth of tribal consultation to “ensure the meaningful and timely input by tribal officials in the development of regulatory policies [rules, policies, and guidance] that have tribal implications.” Tribal implications are defined as having substantial direct effects on one or more tribes, on the relationship between the federal government and tribes, or on the distribution of power and responsibilities between the federal government and tribes. Among other things, EO 13175 requires federal agencies to respect tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet responsibilities arising from the unique relationship between the federal government and tribes.

8. Executive Order 13604, Improving Performance of Federal Permitting and Review of Infrastructure Projects⁹⁶

Issued in conjunction with President Obama’s commitment to complete construction of the southern terminus of the TRR project, EO 13604 directs federal agencies to improve the performance of the Federal infrastructure permitting and review processes. Federal agencies are required to enhance coordination with tribes and other governments concerning federal government-wide initiative. This includes (1) institutionalizing best practices for enhancing coordination on permitting and review processes, and (2) engaging in early and active consultation to avoid conflicts or duplication of effort, resolve concerns, and allow for concurrent rather than sequential reviews.

9. Presidential Memorandum, “Government-to-Government Relations with Native American Tribal Governments”⁹⁷

Issued by former President Bill Clinton, the Presidential Memorandum outlines several principles that federal agencies and departments should follow in their interactions with tribal governments. Heads of federal departments and agencies are to (1) operate within a government-to-government relationship with federally-recognized tribes, (2) consult with tribal governments

⁹⁴ Exec. Order. No. 13,007, 61 *Fed. Reg.* 26771 (May 24, 1996).

⁹⁵ Exec. Order. No. 13,175, 65 *Fed. Reg.* 67249 (November 6, 2000).

⁹⁶ Exec. Order. No. 13,604, 77 *Fed. Reg.* 18887 (March 22, 2012).

⁹⁷ Presidential Memorandum on Government-to-Government Relations with Native American Tribal Governments (April 29, 1994).

prior to taking actions that affect them, (3) assess the impact of federal government plans, projects, programs, and activities on tribal trust resources and the related rights and concerns of tribal governments, and (4) take appropriate steps to remove any procedural impediments to working with tribal governments on activities affecting trust property and/or tribal governmental rights.⁹⁸

10. Presidential Memorandum, “Memorandum for the Heads of Executive Departments and Agencies”⁹⁹

As part of a summit with tribal leaders, President Barack Obama issued a memorandum that adopted EO 13175 and reiterated former President Clinton’s directions to federal agencies concerning consultation with tribes as part of his April 29, 1994 Memorandum. Specifically, the Memorandum states that “executive departments and agencies (agencies) are charged with engaging in regular and meaningful consultation with tribal officials in the development of Federal policies that have tribal implications, and are responsible for strengthening the government-to-government relationship between the United States and Indian tribes.” However, THE STB’ responsibility does not begin nor does it end with these laws, Executive Orders, and Presidential Memoranda. It must also honor its trust responsibility to tribes with respect to the TRR project to insure that its actions and those of others do not adversely affect the cultural resources or practices of such tribes.

11. Montana Antiquities Act¹⁰⁰

The Montana Antiquities Act addresses the responsibilities of the State Historic Preservation Office and other state agencies regarding historic and prehistoric sites including buildings, structures, paleontological sites, or archaeological sites on state owned lands. Each state agency is responsible for establishing rules regarding historic resources under their jurisdiction, which address National Register eligibility, appropriate permitting procedures and other historic preservation goals. The Department of Natural Resources and Conservation (Trust Lands) and Montana Fish, Wildlife and Parks have written rules for implementing the Antiquities Act. All other agencies are responsible for following the administrative rules written by the State Historic Preservation Office in 1999. The State Historic Preservation Office also issues antiquities permits for the collection of archaeological or paleontological remains on state owned lands under the Act.

12. Montana Human Skeletal Remains and Burial Site Protection Act¹⁰¹

The Human Skeletal Remains and Burial Site Protection Act is the result of years of work by Montana Tribes and state agencies and organizations interested in assuring that all graves within the State of Montana are adequately protected. The law provides legal protection to all unmarked

⁹⁸ *Id.*

⁹⁹ Presidential Memorandum for the Heads of Executive Departments and Agencies (November 5, 2009).

¹⁰⁰ MCA § 22-3-421 *et seq.* See also Montana Historic Preservation Office, The Law: The Legal Framework for Historic Preservation, at <http://mhs.mt.gov/shpo/>.

¹⁰¹ MCA § 22-3-801 *et seq.* See also Montana Historic Preservation Office, The Law: The Legal Framework for Historic Preservation, at <http://mhs.mt.gov/shpo/>.

burial sites regardless of age, ethnic origin or religious affiliation by preventing unnecessary disturbance and prohibiting unregulated display of human skeletal remains. Anyone who discovers human skeletal remains on public or private lands should immediately contact the county coroner. The Act created a thirteen-member Burial Preservation Board that determines the treatment and final disposition of any discovered human remains and associated burial materials. The Act establishes the preference that human remains be left undisturbed where they are found.

D. Planning for Compliance with NHPA, ARPA, NAGPRA and HADPA

The project applicant and federal agency can minimize project delay and disruption by effective planning during early stages. Native American cultural resources in a proposed project area should be evaluated carefully under NEPA, NHPA, and possibly, other statutes (see above). NAGPRA-protected cultural resources also should be evaluated in the reviews under these statutes, and the project proponent should seek to reach agreements concerning NAGPRA compliance as part of a coordinated consultation process.

Cultural resource inventories prepared under NHPA at the project proposal stage should directly address NAGPRA protected cultural items. Impacts on NAGPRA-protected sites or cultural items should be considered in environmental assessments or environmental impact statements under NEPA and may be pertinent to "adverse effect" determinations under NHPA. The notice and consultation processes under NAGPRA and NHPA also should be coordinated where possible.

Project planning also must accommodate requirements of ARPA that apply to excavation and removal of NAGPRA-protected cultural items. NAGPRA prescribes that excavation and removal of cultural items be pursuant to ARPA permit. ARPA also covers "graves," and "human skeletal materials"¹⁰² and requires notice of proposals to excavate cultural or religious sites to tribes which may consider the site important.¹⁰³ ARPA regulations requires that applicable tribes be notified 30 days before issuance of an ARPA permit and contemplate consultation between agency and tribes upon tribal request.¹⁰⁴ The project proponent should coordinate ARPA compliance at an early stage in the project, with agencies and tribes.

Lastly, a look to state law is necessary to avoid unanticipated conflicts. Increasing numbers of states have enacted statutes protecting Indian burial sites and related items. Where NAGPRA and state law conflict, NAGPRA likely will control; however, state law may be applicable if not inconsistent with federal law.

E. Planning for Inadvertent Discovery of Cultural Items

The STB must provide for a clear process regarding the inadvertent discovery of cultural resources, preferable in the environmental impact statement prepared pursuant to NEPA. Such a

¹⁰² 16 U.S.C. §§ 470bb (1988).

¹⁰³ 16 U.S.C. §§ 470cc (1988); 43 C.F.R. S 7.7 (1992); 25 C.F.R. Part 262 (58 Fed. Reg. 65246, December 13, 1993).

¹⁰⁴ See 43 C.F.R. § 7.7 (1992).

process should include: (1) immediate tribal notification procedures that extend beyond the tribal monitors required to be onsite, (2) a framework for deciding the potential significance of newly discovered cultural resources and development of a mitigation plan that favors avoidance, both of which allow for meaningful consultation with affected tribes, and (3) a procedure for resolving disagreements over a significance determination and the mitigation plan.

Further, excavation and curation should be the last alternative considered for the protection of tribal cultural resources, not the first, since resources that are lost can never be replaced. However, if the excavation and curation of tribal cultural resources is necessary, THE STB should be wary of giving too much discretion to its staff in determining what is significant. The vagueness of the term “significant” necessitates that THE STB should consult with tribes to determine what is significant in regards to tribal cultural resources. For example, while a THE STB staff person may not consider a “bone” to be significant, a tribe may find it significant for various traditional, religious, and spiritual reasons.

Specific Tribal Concerns

NWF recommends that the STB solicit from affected Tribes an assessment of tribal resources – cultural, natural, and socio-economic – that might be impacted by the TRR project. For example, the Crow Tribe and the Northern Cheyenne Tribe each prepared a “Resources Report” at the request of the U.S. Bureau of Land Management in 2002.¹⁰⁵ The STB must provide adequate time and resources to aid the Tribes in preparing these reports.

The sole purpose of the proposed TRR is to transport coal mined at the proposed Otter Creek mine. Indeed, if not for the proposed development of the Otter Creek coal leases, there would be no need to construct and operate a rail line along the Tongue River. The owner of the Otter Creek leases – Otter Creek Coal, LLC, a subsidiary of Arch Coal, Inc. – is pushing to develop the proposed rail line because it is the most economical means of transporting coal from the Otter Creek mine to market.¹⁰⁶ Furthermore, we understand that if the Otter Creek lease tracts are developed, the large majority of this coal will be exported to foreign markets, primarily in Asia, where demand is rising and where emission controls at coal-fired generation facilities are relatively lax.

¹⁰⁵ Both reports are available at http://www.blm.gov/mt/st/en/fo/miles_city_field_office/og_eis.html (see Technical Report Documents). These reports were intended to identify and characterize the affected environment of the reservations for purposes of inclusion in the *Montana Statewide Revised Draft/Final Oil and Gas Environmental Impact Statement and Amendment of the Powder River and Billings Resource Management Plans (Statewide Revised Draft/Final Oil and Gas EIS)*.

¹⁰⁶ Arch Coal, Inc. owns a 34% share of the TRCC.

