**From:** Coburn, David <DCoburn@steptoe.com>
**Sent:** Sun 7/13/2014 8:50 AM
**To:** Vicki.Rutson@stb.dot.gov; Kenneth.Blodgett@stb.dot.gov; Catherine.Nadals@stb.dot.gov; Theodore.Hunt@stb.dot.gov; Danielle.Gosselin@stb.dot.gov; Summerville, Alan <Alan.Summerville@icfi.com>; Davis, Colleen <Colleen.Davis@icfi.com>; Reynolds, Alisa <Alisa.Reynolds@icfi.com>; Robinson, Mark <Mark.Robinson@icfi.com>; Mello, Sarah <Sarah.Mello@icfi.com>; Starzak, Richard Richard.Starzak@icfi.com cvaughn@achp.gov; ngabriel@achp.gov; wdancingfeather@achp.gov

Thank you, Rick, for forwarding a revised version of the Whereas clauses for the PA. In reviewing these, we have noticed one phrase that I assume you will want to review and fix. In the fifth Whereas clause on page 3, there is a reference which states that the PA "encompasses all alternatives." Of course, the operative provisions of the PA will only apply to the route licensed by the Board and impose no requirements relative to any alternative routings which, by the time the PA becomes effective, will have been rejected by the Board. Other provisions of the PA make this clear – see the 7th clause on page 3 (TRRC not required to act under PA until the STB licenses a route) and the third clause on page 4 (requiring more intensive surveys for the line approved by the STB). Thus, the above-quoted references to "all alternatives" should be stricken as TRRC will not be obligated to adhere to the PA's terms relative to any route other a route that is both approved by the Board and (given that the Board's action in construction cases is permissive) as to which TRRC chooses to construct the railroad.

I will raise this point during the call on Monday, but thought I would give you heads up about it. Further, for additional clarity, I will also propose that the words "on the line licensed by the STB" be added at the end of the "Now, Therefore" clause at the end of the PA.

Regards. David

**From:** Starzak, Richard [mailto:Richard.Starzak@icfi.com]
**Sent:** Tuesday, July 08, 2014 5:59 PM
**To:** cvaughn@achp.gov; ngabriel@achp.gov; wdancingfeather@achp.gov; dlanders@blm.gov; msant@blm.gov; sfindlay@blm.gov; d1melton@blm.gov; Coburn, David; Matthew.jones@bnsf.com; Scott.castleberry@bnsf.com; Barbara.Ranf@bnsf.com; Karen.Everitt@BNSF.com; jennifer.sheetz@bnsf.com; trent.hudak@bnsf.com; Daniel.Hadley@missionenginc.com; rhamm@transystems.com; Shannon.l.johnson@usace.army.mil; joel.o.ames@usace.army.mil; Matthew.t.mccullor@usace.army.mil; Todd.N.Tillinger@usace.army.mil; laxline@mt.gov; jriley@mt.gov; natalie@northernplains.org; Olivia@northernplains.org; adam@northernplains.org; teresa@northernplains.org; maggie@northernplains.com; mfix@rangeweb.net; Kaedingl@aol.com; Svein@northernplains.org; brucefnadeau@gmail.com; Erica.Jones@ars.usda.gov; Michael.McGuire@ARS.USDA.GOV; Lindsey.Voigt@ARS.USDA.GOV; Amy.Bontrager@ARS.USDA.GOV; Phil.Smith@ARS.USDA.GOV; Mark.Petersen@ARS.USDA.GOV; Larry.chandler@ars.usda.gov; DDorsey@hanson-inc.com; mbaumler@mt.gov; swilmoth@mt.gov; llevando.fisher@cheyennenation.com; conrad.fisher@cheyennenation.com; Esevone1@yahoo.com; aleda.spang@cheyennenation.com; steve.small@cheyennenation.com; Yulberton@yahoo.com; williamb@crownations.net; burtonpot@crownations.net; emerson_bc@hotmail.com; richardwc@crownations.net; clairgreenoffice@gmail.com; ostnrranrd@gwtc.net; mahpiyamaza@yahoo.com; wanapeyanajica@gmail.com; wyoung@standingrock.org; tclouthier@standingrock.org; stevevance.crstpreservation@outlook.com; dana.dupris@crst-nsn.gov; kevin.keckler@yahoo.com; ghubbz_@hotmail.com; Chairman@swo-nsn.gov; dianned@swo-nsn.gov; jmswhitted@yahoo.com; fazure@fortpecktribes.org; curley_up@yahoo.com; cultres@nemontel.net; fjackson005@yahoo.com; jb.weston@fsst.org; tony.reider@fsst.org; rstthpo@yahoo.com; reaglebear@yahoo.com; brhodd1@yahoo.com; cscott@gwtc.net; rickthomas_06@yahoo.com; rtrudell@santeedakota.org; narapahothpo_2009@ymail.com; wandawells@midstatesd.net; Brandonsazue@hotmail.com; laurie.tolzmann@shakopeedakota.org; texhall@mhanation.com; redhawk@mhanation.com; pcoffey@mhanation.com; ccbrady@umta.com; lowersioux@mnhs.org; denny.prescott@lowersioux.com; marlow@uppersiouxcommunity-nsn.gov; marlow1@uppersiouxcommunity-nsn.gov; willieasharp@yahoo.com;

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**Cc:** Vicki.Rutson@stb.dot.gov; Kenneth.Blodgett@stb.dot.gov; Catherine.Nadals@stb.dot.gov; Theodore.Hunt@stb.dot.gov; Danielle.Gosselin@stb.dot.gov; Summerville, Alan; Davis, Colleen; Reynolds, Alisa; Robinson, Mark; Mello, Sarah
**Subject:** Tongue River Railroad Company undertaking, Section 106 Programmatic Agreement WHEREAS clauses

Hello all,

Attached are the draft WHEREAS clauses for the programmatic agreement, revised based on consulting party comments made during the June 9 monthly call, and via e-mail from the MT SHPO, ACHP, NTHP, and the applicant. We will provide an overview of the changes on our next monthly call on Monday, July 14, 2014 at 1 PM EST/11 AM MST.

Please use the following call-in number and password for the call:

Toll-free number: 1-877-423-6338,
Participant Passcode: 364456

Thank you for your active participation and thoughtful comments,
Rick

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DRAFT TONGUE RIVER RAILROAD PA WHEREAS CLAUSES AS OF 07/08/2014

**PROGRAMMATIC AGREEMENT AMONG**
**THE SURFACE TRANSPORTATION BOARD,**
**THE ADVISORY COUNCIL ON HISTORIC PRESERVATION,**
**THE U.S. ARMY CORPS OF ENGINEERS,**
**THE U.S. DEPARTMENT OF THE INTERIOR BUREAU OF LAND MANAGEMENT, THE U.S. DEPARTMENT OF AGRICULTURE AGRICULTURAL RESEARCH SERVICE,**
**THE MONTANA STATE HISTORIC PRESERVATION OFFICER,**
**THE MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, AND**
**THE TONGUE RIVER RAILROAD COMPANY, INC.,**
**REGARDING CONSTRUCTION AND OPERATION**
**BY THE TONGUE RIVER RAILROAD COMPANY, INC. OF A RAIL LINE**
**IN CUSTER, POWDER RIVER AND ROSEBUD COUNTIES, MONTANA**

**WHEREAS**, the Tongue River Railroad Company Inc. (TRRC), the project applicant, filed a revised application with the Surface Transportation Board (STB) proposing to construct and operate a new, approximately 42-mile rail line between Colstrip, Montana, to two terminus points, near Ashland, Montana in Custer, Powder River and Rosebud Counties to transport low sulfur, sub-bituminous coal from proposed mine sites in the Tongue River Valley and Powder River Basin (TRRC project) (Map, Attachment A); and,

**WHEREAS**, the STB is preparing an Environmental Impact Statement (EIS) in accordance with the requirements of the National Environmental Policy Act (NEPA) to address the potential impacts of the TRRC project on the environment, including on cultural resources. Review under Section 106 of the National Historic Preservation Act (NHPA) is being coordinated with the NEPA process and cultural resources documentation prepared will inform both reviews; and,

**WHEREAS,** the STB is considering the No Action Alternative and five build alternative routes, and certain variations on the five build alternative routes, to be carried forward in the EIS: the Colstrip Alternative (the applicant's preferred alternative), the Tongue River Alternative, the Tongue River Road Alternative, the Moon Creek Alternative, and the Decker Alternative, some of which traverse portions of Custer County as well as Powder River and Rosebud Counties; and,

**WHEREAS**, the STB is the lead federal agency responsible for compliance with Section 106 of the NHPA, 16 U.S.C. Part 470f and its implementing regulations at 36 CFR Part 800; and,

**WHEREAS,** the STB's potential approval of the TRRC project is an Undertaking as defined at 36 CFR § 800.16(y); and,

**WHEREAS,** the STB has determined its potential approval of the TRRC project, the Undertaking, may affect properties listed in or eligible for listing in the National Register of Historic Places (National Register) pursuant to 36 CFR Part 60 as well as tribal sites of significance as defined in Appendix C; and,

**WHEREAS**, tribal sites of significance identified and evaluated by tribal experts or authorities may be eligible for listing in the National Register as historic properties of religious and cultural significance to tribes; and,

**WHEREAS**, the effects on historic properties and tribal sites of significance cannot be fully determined prior to any approval of the TRRC project by the STB, and therefore a programmatic agreement (PA) is appropriate pursuant to the Section 106 regulations at 36 CFR § 800.14(b)(1)(ii); and,

**WHEREAS**, the STB developed this PA to defer final identification and evaluation of historic properties pursuant to 36 CFR § 800.4(b)(2), to phase the application of the criteria of adverse effect pursuant to 36 CFR § 800.5(a)(3), and to continue consultation to avoid, minimize and mitigate the potential adverse effects of the Undertaking to historic properties and tribal sites of significance in accordance with 36 CFR § 800.6(a); and,

**WHEREAS,** this PA was developed in consultation with the Advisory Council on Historic Preservation (ACHP) and the Montana State Historic Preservation Officer (SHPO) pursuant to 36 CFR § 800.6, who are signatories to this PA; and,

**WHEREAS**, the U.S. Army Corps of Engineers (COE), U.S. Department of Interior Bureau of Land Management (BLM), and the U.S. Department of Agriculture Agricultural Research Service (ARS) are cooperating agencies under NEPA and signatories to this PA; and,

**WHEREAS**, the Montana Department of Natural Resources and Conservation (MT DNRC) (acting as lead agency for all Montana State agencies, including the Montana Department of Transportation (MDOT)) is a cooperating agency and signatory to this PA; and,

**WHEREAS**, the MDOT has the responsibility for complying with Section 4(f) of the Department of Transportation Act where applicable; and,

**WHEREAS,** the TRRC, the project applicant, is a signatory to this PA; and,

**WHEREAS**, the STB has consulted by letter, email, monthly teleconferences, and meetings with the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana; the Crow Tribe of Montana; the Crow Creek Sioux Tribe of the Crow Creek Reservation, South Dakota; the Lower Brule Sioux Tribe of the Lower Brule Reservation, South Dakota; the Standing Rock Sioux Tribe of North & South Dakota; the Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota; the Yankton Sioux Tribe of South Dakota; the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, South Dakota; the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana; the Flandreau Santee Sioux Tribe of South Dakota; the Shakopee Mdewakanton Sioux Community of Minnesota; the Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota; the Santee Sioux Nation, Nebraska; the Arapaho Tribe of the Wind River Reservation, Wyoming; Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota; the Cheyenne and Arapaho Tribes, Oklahoma; the Fort Belknap Indian Community of the Fort Belknap Reservation of Montana; the Oglala Sioux Tribe, the Shoshone Tribe of the Wind River Reservation, Wyoming; and the Spirit Lake Sioux Tribe, North Dakota concerning properties of traditional religious and cultural significance, and who have been invited to participate in the development of the PA as concurring parties; and,

**WHEREAS**, the STB has contacted the Lower Sioux Indian Community in the State of Minnesota; the Upper Sioux Community, Minnesota; and the Blackfeet Tribe of the Blackfeet Indian Reservation of Montana by letter, email and phone, and invited them to participate as consulting parties in the development of this PA, however each of these tribes has either not responded to STB's invitation or declined to participate in the development of this PA; and,

**WHEREAS**, other consulting parties, including the Colstrip Alternative Landowners Group, Fix Ranch, National Trust for Historic Preservation (NTHP), Montana Preservation Alliance (MPA), National

Wildlife Federation (NWF), Northern Cheyenne Otter Creek Descendants (NCOCD), Northern Plains Resource Council (NPRC), Rocker Six Cattle Company (RSCC), and the Sierra Club have been invited to participate in the development of the PA as concurring parties; and,

**WHEREAS**, the Wolf Mountains Battlefield, a property located within the view shed of the Decker Alternative, was designated a National Historic Landmark (NHL) on October 6, 2008; and,

**WHEREAS**, the Wolf Mountains Battlefield Site may be indirectly affected if the STB licenses the Decker alternative; and,

**WHEREAS**, given the designation of the Wolf Mountains Battlefield as an NHL, the STB has invited the U.S. Department of Interior, National Park Service, National Landmarks Program (NLP), and the NLP has agreed, to participate in consultation and invited to be a concurring party in the development of this PA,; and,

**Commented [MS1]:** David Coburn deleted: which encompasses all alternatives

**WHEREAS**, the signatory and concurring parties to this PA are hereafter collectively referred to as PA consulting parties; and,

**WHEREAS**, TRRC, the applicant, would not be required to act under the terms of this PA unless or until the STB authorizes the construction and operation of a new rail line; and,

**WHEREAS**, the TRRC project's Area of Potential Effects (APE), as defined at 36 CFR § 800.16(d), is outlined and identified in the Identification Plan (ID Plan), Attachment B of this PA; and,

**WHEREAS**, the definitions of 36 CFR Part 800 and the definitions and acronyms in Attachment C are applicable throughout this PA and any attachments to this PA; and,

**WHEREAS**, the PA consulting parties have considered requirements of NHPA, the American Indian Religious Freedom Act, 42 U.S.C. 1996 et. seq. (AIRFA), the Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001 et. seq. (NAGPRA), Executive Order 13007 – Indian Sacred Sites, the Archaeological Resources Protection Act of 1979 (ARPA) and Section 4(f) of the Department of Transportation Act (49 U.S.C. 303) where applicable in the course of consultation; and,

**WHEREAS**, in 2013 and 2014, the STB conducted a SHPO records search for previously recorded archaeological and historic sites, for a one-mile area on either side of the proposed right-of-way of the five build alternative routes, and variations, being considered for the TRRC project under NEPA; and,

**WHEREAS**, in 2013 and 2014, the STB conducted pedestrian transect surveys by tribal members, contracting archeologists, historians and architectural historians along portions of each of the alternatives considered under NEPA; and,

**WHEREAS**, the ID Plan in Attachment B requires that TRRC complete Phase I and Phase II surveys as defined in Attachment C and the ID Plan for the entire line approved by the STB in order to take into account any potential adverse effects to historic properties and tribal sites of significance; and,

**WHEREAS,** the STB will use an independent third-party contractor, working under its sole supervision, direction and control, and at TRRC's expense, to assist STB in implementing the Stipulations below; and,

**NOW, THEREFORE**, the signatories to this PA agree that the proposed TRRC project will be implemented in accordance with the following stipulations in order to take into account the effects of the TRRC project on historic properties and sites of significance on the line licensed by the STB.

**Commented [MS2]:** David Coburn's text addition

**Definitions** [to be developed and added to the acronyms listed in Attachment C]

- ***Phase I***
- ***Phase II***
- ***The Tongue River Railroad Company, Inc.***
- ***Tribal Sites of Significance***

Other definitions