

**From:** Catherine.Nadals@stb.dot.gov

**Sent:** Mon 9/8/2014 12:21 PM

**To:**

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Hello All,

This is a reminder that we are having our monthly Consulting Party call today at 1PM EST. I hope you have had a chance to review our draft stipulation language that Rick sent to you on August 28th (see below). We intend to make the stipulations the primary discussion item on today's call. I have resent the stipulations with this reminder along with the table showing the timing of 106 and NEPA for this project. I am also attaching the whereas clause we recommended to Betsy Merritt in order to address her concerns expressed during our last monthly call (email to her attached).

The agenda for today is as follows:

1. NEPA Update - Ken Blodgett
2. Draft Stipulations: Overview - Rick Starzak
3. NEPA/Section 106 Timeline - Rick Starzak
4. Unfinished Business - Cathy Nadals
5. Other - Cathy Nadals

I hope you are able to join the call today.

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

Toll-free number: 1-877-423-6338,

Participant Passcode: 364456

-Cathy

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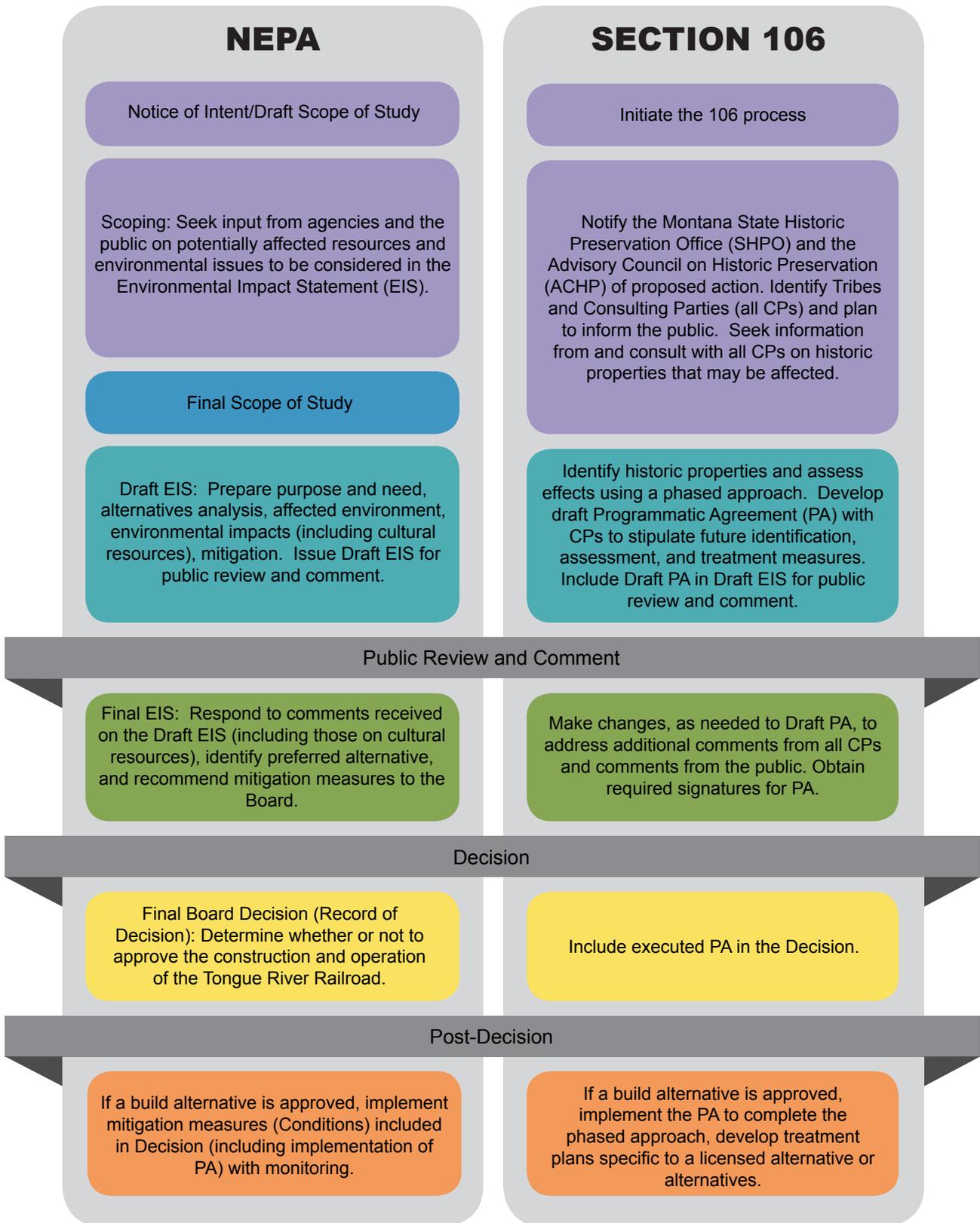
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Hi everyone,

As a follow up to the discussion during our August 11 call, we've attached a chart showing the NEPA/Section 106 timing, and a draft of the PA Stipulations for your review and comment. The Stipulations form the second part of the PA, following the WHEREAS clauses. The draft Stipulations were lightly edited from the 2011 PA, but changed where necessary to reflect the current approach. We look forward to our next call with you, on September 8. Thank you and have a great holiday weekend.

Rick

# Relationship Between the National Environmental Policy Act (NEPA) & National Historic Preservation Act Section 106 Processes for the Proposed Tongue River Railroad Project



## STIPULATIONS

STB has a statutory obligation as the lead federal agency to fulfill the NHPA requirements of Section 106; therefore, STB will ensure that the measures in the following parts are carried out.

### **I. Identification Plan**

- a) The ID Plan, Attachment B to this PA, defines the Area of Potential Effects (APE), and describes the methodology for the identification, evaluation, and treatment of historic properties within the APE of the approved alignment. The ID Plan involves two steps:
  1. completing the Phase I Inventory Survey conducted in 2013 and 2014 that consisted of pedestrian field surveys within the APE for those portions of the approved alignment that were not previously completed; and
  2. conducting Phase II testing and evaluation of identified sites to determine those that qualify for listing on the National Register of Historic Places (National Register).
- b) The ID Plan was developed for this project in coordination with the PA consulting parties who agree with its provisions.
- c) Prior to TRRC initiating construction of any portion of the rail line, STB will retain a Cultural Resources Contractor (Contractor). The Contractor shall meet the professional qualifications standards provided in the Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation, 48 Fed. Reg. 44716-44742 and 48 C.F.R §§ 44720-44723. The Contractor shall work under the STB's sole direction, control and supervision but will be paid by TRRC. The Contractor will conduct the additional Phase I Surveys, conduct Phase II Testing and National Register Evaluations, and prepare the Identification Reports (Phase I ID Report) and Evaluation Reports (Phase II Evaluation Report) required by the ID Plan. The Contractor will obtain any needed federal or state agency permits necessary to conduct the work required under the ID Plan. The Contractor must have experience working in the field with tribal members.
- d) The STB shall invite tribal members to help plan and participate in the Phase I Surveys to identify, document, and evaluate properties within the APE to which they attach traditional religious and cultural significance. The STB will invite such tribal representative(s) to work with the Contractor to identify and compile a list of traditionally-important plants that occur in the APE, and identify gathering sites and access points for the plant gathering areas. TRRC will provide reasonable financial reimbursement<sup>1</sup> for professional services provided by the designated tribal members(s).

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<sup>1</sup> Reasonable financial reimbursement shall include payment for professional services (based on an agreed upon hourly rate), travel and expenses incurred by the tribal member(s).

- e) STB will review each Phase I ID Report prepared by the Contractor pursuant to the ID Plan and provide copies to the PA consulting parties for their review and comment. Each Phase I ID report provided by the Contractor will include the results of identification, National Register eligibility recommendations and summarize potential adverse effects. The timeline for PA consulting party review of each Phase I ID report will be as follows:
1. The PA consulting parties will have 15 days after receipt of each Phase I ID Report to notify STB in writing if information is missing and/or provide any recommendations.
  2. STB will have five days to provide any missing information to the PA consulting parties, or to determine that additional information is not needed to complete National Register evaluations included in a given Phase I ID Report.
  3. STB will provide a 45-day comment period to the PA consulting parties beginning from their receipt of the additional information or STB's determination that additional information is not needed.
- f) In the Phase II Evaluation Reports, STB will make its National Register eligibility determinations in consultation with the MT SHPO and federally recognized tribes that attach traditional religious and cultural significance to identified historic properties. STB will seek to reach concurrence on the National Register eligibility of all historic properties identified in the project area within 45 days of receipt of comments. STB will finalize determinations of eligibility in a manner consistent with 36 CFR § 800.4(c) and pertinent guidance of the National Park Service, ACHP, and MT SHPO.
1. STB will rely on the special expertise of tribes to determine the eligibility of tribal sites of significance as these may or may not meet the eligibility criteria of the National Register.
  2. Once STB has finalized its determinations of eligibility, and within 40 days of receipt of comments from the MT SHPO and tribes, it will apply the criteria of adverse effect (36 CFR § 800.5(a)) to any tribal sites of significance or properties determined eligible for listing in the National Register. STB will direct the Contractor to make any required revisions and finalize the Phase II Evaluation Report per the ID Plan.
  3. Within 15 days of receipt of a final Phase II Evaluation Report from the Contractor, STB will send approved Final Phase II Evaluation Reports to the PA consulting parties.
  4. The PA Consulting Parties will have 15 days to provide any final comments to the STB.

## **II. Consultation on Developing Treatment Plans**

- a) STB will consult with the MT SHPO, PA consulting parties and participating tribes to develop measures that would avoid, minimize or mitigate adverse effects to tribal sites of significance or identified National Register-eligible or -listed historic properties and memorialize such measures in a Treatment Plan(s). The STB will meet with the MT SHPO, TRRC, the managing

federal agency (for sites on federal land), and participating tribes to further review the framework for how individual treatment plans will be developed, and to consider ways to avoid or minimize adverse effects to tribal sites of significance, individual historic properties, groups of closely related historic properties, or category of historic properties including traditional cultural properties and historic or tribal landscapes. STB will notify the PA consulting parties and participating tribes of the proposed treatment options within 45 days of the date of issuance of complimentary Final Phase II Evaluation reports.

- b) Nothing in this PA will preclude any PA consulting party from communicating with any other PA consulting party, nor with any other person or entity, during any period of consultation specified in this PA or at any other time.
- c) Copies of all reports and notices distributed by STB to the PA consulting parties and participating tribes under the terms of this PA will in all cases be transmitted by expeditious means which provides for verification of delivery. This includes email sent with a “return receipt” message provided upon delivery.

#### **V. Development of the Treatment Plan(s)**

- a) The STB will ensure that the Contractor prepares a Treatment Plan(s) that will address the adverse effects of the proposed Undertaking on historic properties, including direct and indirect impacts (visual, noise, aesthetic, etc.). A separate Treatment Plan will be developed for the Wolf Mountains Battlefield NHL if the Decker Alternative is approved; and one or more Treatment Plans may be prepared for other sections of the APE affected by the Undertaking. A Treatment Plan may be prepared for a portion of the line provided that the ID Report for that portion has been completed and approved in accordance with Stipulation I.a. Each Treatment Plan will be amended, if necessary, after the finalization of any supplemental Phase II Evaluation Report(s).
- b) Each Treatment Plan will do the following:
  - 1. identify tribal sites of significance and National Register-eligible historic properties in the APE or portion thereof;
  - 2. identify the nature of the effects to which each property will be subjected; and
  - 3. identify the treatment strategies proposed to avoid, minimize or mitigate the effects of the Undertaking on the historic properties.

- c) Each Treatment Plan will incorporate, to the extent feasible, measures identified by tribal representatives to resolve adverse effects to properties significant for their traditional cultural values and, if possible, the protection and continuing access to gathering sites of traditionally-important plants. If appropriate, TRRC may attempt to negotiate tribal access to public or private lands that are not currently accessible to tribes for plant gathering purposes. The Treatment Plan(s) will conform to the principles of the Council's Treatment of Archaeological Properties: A Handbook, Parts I and II, the "Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation" (48 Fed. Reg. pp. 44716-44742), and appropriate MT SHPO guidelines. Each finalized Treatment Plan will be implemented by TRRC prior to the onset of construction activities.
- d) Each Treatment Plan will examine the feasibility of avoiding National Register-listed or -eligible historic properties, or tribal sites of significance. These measures may include modifications to the rail alignment, to the extent feasible, to avoid adverse impacts.
- e) If avoidance is not possible, in-place preservation will be the preferred option. TRRC will work with the consulting parties to develop specific procedures to preserve historic properties and sites of significance in-place and minimize visual and noise impacts to such resources as well as impacts to tribal, historic and rural landscapes. These procedures may include minor changes to the rail alignment or construction methods, to the extent feasible, to reduce impacts, and/or monitoring of historic properties by historians, archaeologists and tribal members for sites of significance during construction.

#### **IV. Finalization of Treatment Plan(s)**

- a) STB will submit the draft Treatment Plan(s) to the PA consulting parties for review. Within 15 days of receipt of the Treatment Plan(s), a PA consulting party must notify STB in writing of any informational deficiencies in the Treatment Plan(s). STB will then have 10 days to provide the additional information or to determine that such information is not required. The PA consulting parties will have 45 days from the receipt of the complete information, or the determination that additional information is not required, to comment on the Treatment Plan(s). If no additional information is requested, the PA consulting parties will have 60 days from receipt of the initial Treatment Plan(s) to submit comments. A copy of any comments sent to STB will be sent simultaneously to the MT SHPO. If any PA consulting party fails to submit its comments within 45 days of the receipt of the complete information, or 60 days of receipt of the initial Treatment Plan(s) if it is complete, STB may assume that party's concurrence with the Treatment Plan(s). STB will make any required revisions to the Treatment Plan(s), as appropriately, within 45 days of the close of the comment period, taking into consideration the comments received during this review period.
- b) The final decision on the acceptability of the Treatment Plan(s) will be made by STB, in consultation with the MT SHPO. A copy of the final Treatment Plan(s) will be provided by STB to the PA consulting parties.

## **V. Data Recovery Plan**

- a) Where avoidance is not feasible, and data recovery is determined by STB and the PA consulting parties to be the most prudent and feasible treatment option, a Data Recovery Plan will be developed that will include a research design that will specify, at a minimum:
1. the historic properties to be affected and the nature of any effects;
  2. the tribal sites of significance to be affected and the nature of any effects;
  3. the research questions to be addressed through data recovery, with an explanation of their relevance and importance;
  4. the data needed to address specific research questions, the likelihood that this data can be recovered and how the data will be analyzed;
  5. the fieldwork and analytical strategies to be employed, with an explanation of their relevance to the research question;
  6. proposed methods of dealing with individual discovery situations;
  7. methods to be used in data management and dissemination of data, including a schedule;
  8. how findings will be presented to support the research design;
  9. the proposed repatriation of recovered materials and records including the disposition of tribal sacred items, human remains and funerary items;
  10. proposed methods for disseminating results of the work to the public, as appropriate;
  11. proposed methods by which tribal representatives will be afforded an opportunity to participate and be kept informed of the work;
  12. a proposed schedule for the submission of progress reports to STB;
  13. proposed approach for the disposition and curation of data and materials (other than tribal identified items, human remains and funerary items as discussed under item 8 above) upon completion of data collection;
  14. information regarding the tribal value of the affected sites of concern to participating tribes; and,

15. a discussion regarding how the confidentiality provisions at Section 304 of the NHPA will be implemented.

- b) The Data Recovery Plan shall be consistent with the Secretary's Standards for Archaeological Documentation (48 Fed. Reg. 44734-37) and will take into account the ACHP's publications, including Treatment of Archaeological Properties: A Handbook, and The ACHP's Section 106 Archaeology Guidance (<http://www.achp.gov/archguide>). Contractor shall obtain all necessary cultural resource permits for data recovery, including an ARPA permit for excavation completed on federal land; an excavation permit from BLM for any data recovery on BLM land, appropriate ARS permits for any recovery on ARS lands, and appropriate state permits for any recovery on state lands.
- c) The Contractor will conduct data recovery in accordance with the Data Recovery Plan.

## **VI. Review of Data Recovery Reports**

- a) Data Recovery Report(s) resulting from the implementation of the Data Recovery Plan in accord with Stipulation V, will be submitted by the Contractor to STB for review. Within 15 days of receipt of the draft report(s), STB will provide a copy(s) to the PA consulting parties for their review and comment. Within 15 days of its receipt, a PA consulting party must notify STB in writing of any informational deficiencies in the Data Recovery Report. STB then has 10 days to provide the additional information or to determine that such information is not required. The PA consulting parties will have 45 days from the receipt of the complete information, or the determination by STB that additional information is not required, to comment on the Data Recovery Report. If no additional information is requested, the parties will have 60 days from receipt of the report to submit comments to STB. A copy of any comments will be sent simultaneously to the MT SHPO.
- b) Comments will be incorporated, as appropriate, into the Final Data Recovery Report(s) prepared by the Contractor at the direction of STB. The Final Report(s) will be prepared within 45 days of the close of the comment period. The Contractor will ensure that reports are responsive to contemporary professional standards and to the Secretary's Standards for Archaeological Documentation (48 Fed. Reg. 44734-37), as well as the requirements of Section 110(f) of NHPA, where appropriate. A copy of all Final Data Recovery Reports will be provided by STB to the PA consulting parties within 15 days of receipt from Contractor.

## **VII. Construction**

- a) Once STB has agreed on the adequacy of the ID and Data Recovery Report(s) as defined in the ID Plan, STB will allow TRRC to begin construction on those portions of the approved rail line which do not contain National Register-eligible or -listed historic properties or tribal sites of significance within areas where Phase I Surveys and Phase II Evaluations have been

completed, provided that such construction will not preclude consideration of the full range of treatment options (including avoidance) of National Register-eligible or -listed historic properties or tribal sites of significance situated in any adjacent portion of the ROW. Where eligible historic properties or tribal sites of significance are present within the Phase I and II survey areas, STB will allow construction to proceed once the agreed upon data recovery fieldwork/treatment for that area as specified in a Treatment Plan is completed and approved by STB, with the concurrence of the MT SHPO. Where sites of significance or eligible historic properties are present on BLM, ARS or state lands, STB will allow construction to proceed in that area only after the agreed upon data recovery fieldwork/treatment is completed and approved by BLM with respect to BLM-administered lands, by ARS with respect to ARS lands, and by MT DNRC with respect to state lands, in addition to STB approval and concurrence of the MT SHPO.

- b) STB's Contractor will notify STB when data recovery fieldwork/treatment is completed for an area. Within 45 days of notification, STB's Contractor, and BLM if data recovery occurs on BLM-administered lands, ARS if data recovery occurs on ARS-administered land, or the MT DNRC if data recovery occurs on state lands, will inspect the site. Upon STB and MT SHPO's concurrence; or BLM, ARS or MT DNRC concurrence, that the data recovery fieldwork/treatment has been satisfactorily completed on lands under their jurisdiction, STB will allow construction to proceed in that area prior to the completion of the Data Recovery Report. The Data Recovery Report will be prepared in accordance with Stipulation VI. Alternatively, issuance of a Final Data Recovery Report pursuant to Stipulation VI will be considered approval of the data recovery fieldwork/treatment.

#### **VIII. Changes to the Rail Line Alignment/ Other Areas Subject to Direct Impacts**

- a) In cases where changes are made to the alignment, staging areas, work camps, unimproved construction access routes, or other areas that could be subject to direct impacts related to the Undertaking outside of the areas previously surveyed, the Contractor will conduct Phase I Survey and Phase II Evaluation of the area(s) not previously surveyed, incorporating sufficient new survey area to allow for minor adjustments. The Contractors will then prepare a Supplemental Phase I ID and Phase II Evaluation Report, including the recommendations of eligibility and findings of effects, prior to construction of the newly surveyed areas. STB will review the supplemental information and will distribute it to the PA consulting parties within 10 days of receipt. STB will require comments within 30 days. A copy of any comments will be sent simultaneously to the MT SHPO for their review. STB will seek to reach concurrence with the MT SHPO and participating tribes on all eligibility recommendations in the Supplemental Phase I ID and Phase II Evaluation Report within 30 days of receipt of comments. STB will finalize determinations of eligibility and effects assessment pursuant to the criteria in Stipulation I.e. within 45 days of the close of the comment period. STB will direct the Contractor to make any required revisions to the Supplemental Phase I ID and Phase II Evaluation Report.

- b) A copy of the Final Supplemental Phase I ID and Phase II Evaluation Report will be provided by STB to the PA consulting parties.
- c) STB will consult with the PA consulting parties regarding measures to avoid, minimize or mitigate any adverse effects identified in Stipulation VIII.a. above and will prepare a Treatment Plan Amendment. STB will invite participating tribes to discuss how any historic properties and sites of traditional religious and cultural significance should be treated. STB will notify the PA consulting parties of the proposed treatment options within 45 days of the final supplemental Class III Inventory Report.
- d) STB will ensure that its Contractor prepares, and TRRC implements, a Treatment Plan Amendment that will address the adverse effects of the proposed Undertaking on historic properties and tribal sites of significance. Such Treatment Plan Amendment will (1) identify all eligible historic properties and tribal sites of significance in the APE not previously identified, (2) identify the nature of the effects to which each property identified in the Treatment Plan Amendment will be subjected, and (3) identify the treatment strategies proposed to avoid, minimize or mitigate the effects of the Undertaking. The Treatment Plan Amendment shall comply with the provisions in Stipulation III. As agreed by the STB, the Treatment Plan Amendment will incorporate measures identified by tribal representatives as necessary for mitigation of adverse effects to properties that are determined to be significant for their traditional cultural values.
- e) Within 10 days of receipt of the Treatment Plan Amendment from Contractor, STB will distribute copies to the PA consulting parties for a 30 day comment period. Copies of comments sent to STB will be immediately forwarded to MT SHPO. Within 10 days of the conclusion of the comment period, and after taking into consideration the comments received, STB will direct Contractor to make any required changes to the Amended Treatment Plan. The final decision on the acceptability of the Final Treatment Plan Amendment will be made by STB in consultation with MT SHPO within 30 days of the close of the comment period. A copy of the Final Treatment Plan Amendment will be provided by STB to the PA consulting parties within 10 days of receipt from the Contractor.
- f) The Final Treatment Plan Amendment will be incorporated as an addendum to the Treatment Plan.
- g) Activities undertaken pursuant to Stipulation VII shall not impact the ability of TRRC to construct in any areas other than the areas not previously surveyed as described in Stipulation VIII.a. Construction may not begin in the areas described in Stipulation VIII.a. until STB determines that the Supplemental Phase I ID and Phase II Evaluation Reports described in Stipulation VIII.a. are adequate, at which time construction may begin in those areas described in Stipulation VIII.a. that have been subjected to a Phase I Survey and do not contain tribal sites of significance or National Register-listed or -eligible historic properties. Where sites of significance or historic properties are present in those areas described in Stipulation VIII.a., Contractor will notify STB when data recovery fieldwork/treatment is completed for an area.

Within 45 days of notification, STB, and the BLM - if data recovery occurs on BLM-administered lands, ARS - if data recovery occurs on ARS-administered land, or the MT DNRC - if data recovery occurs on Montana lands, will inspect the site. Upon STB and SHPO concurrence and, if appropriate, BLM, ARS or MT DNRC concurrence, that the data recovery fieldwork/treatment has been satisfactorily completed, STB will allow construction to proceed in that area prior to the completion of the Data Recovery Report. The Data Recovery Report will be prepared in accordance with Stipulation VI. Alternatively, issuance of a Final Data Recovery Report pursuant to Stipulation VI will be considered approval of the data recovery fieldwork/treatment.

#### **IX. Discovery**

- a) A Discovery Plan for previously undiscovered sites will be appended to the Treatment Plan. If a previously undiscovered historic property or tribal sites of significance, or human remains, are encountered during construction, or previously known historic properties or tribal sites of significance will be affected in an unanticipated manner, all work will cease within 200 feet in all directions until STB can evaluate and, if necessary, authorize steps to mitigate impacts to the new discovery. Evaluation and mitigation will be carried out in consultation with the PA consulting parties as expeditiously as possible in accordance with 36 C.F.R § 800.13(a)(1).
- b) If historic properties or tribal sites of significance are encountered on federal or state lands, the BLM, ARS or MT DNRC, depending on the agency that controls the land, will be consulted to develop appropriate mitigation measures. TRRC will provide the construction contractor with written notification of the proper protocol for discovery of previously unknown sites.

#### **X. Human Remains**

- a) If human remains and associated funerary objects, sacred objects, or items of cultural patrimony are encountered on federal lands, STB or the appropriate federal land management agency will consult with the likely affiliated tribe(s) to determine treatment and disposition measures consistent with applicable federal laws including Native American Graves Protection Repatriation Act (NAGPRA) and ARPA and guidance documents (such as the ACHP Policy Statement Regarding Treatment of Burial Sites, Human Remains, and Funerary Objects (2007) (<http://www.achp.gov/docs/hrpolicy0207.pdf>)). If human remains and funerary objects, sacred objects, or items of cultural patrimony associated with human remains are encountered on state lands, STB will consult with likely affiliated tribes, the MT SHPO and MT DNRC to determine appropriate treatment measures in accordance with Section 106 of NHPA, and the Montana Human Skeletal Remains and Burial Site Protection Act (M.C.A.22-3-801 through 811). If human remains and funerary objects, sacred objects, or items of cultural patrimony associated with human remains are discovered on private lands, STB will ensure that they are also treated in accordance with applicable state and federal law and the provisions of M.C.A. §§ 22-3-801 through 811.
- b) TRRC and its contractors must make every effort to avoid disturbing known human burial sites. In the case of inadvertent discovery of human remains during construction activities,

STB will attempt to identify the appropriate tribe(s) that may be affiliated with the burial pursuant to NAGPRA, and consult with them over the treatment of remains. All work will cease within 200 feet in all directions of the human remains until the requirements of federal and state laws are satisfied. TRRC will provide the construction contractor with written notification of the proper protocol for discovery of human remains, funerary objects, sacred objects or objects of cultural patrimony.

- c) Where avoidance is not possible, burials will be treated in accordance with procedures established by applicable federal and state law and consultation with culturally affiliated tribes.

## **XI. Curation**

- a) STB will ensure that curation of all records and other items resulting from identification and data recovery efforts is completed in accordance with 36 CFR Part 79, Curation of Federally Owned and Administered Archaeological Collections, and the provisions of NAGPRA. Documentation of the curation of these materials will be prepared by Contractor and submitted to STB. STB will provide copies of the documentation to the signatory and concurring parties to this PA within 15 days of receipt from Contractor. All archaeological materials recovered from BLM lands shall be curated in accordance with BLM requirements at BLM's Billings Curation Center. All archeological materials recovered from ARS lands shall be curated in accordance with 36 CFR Part 79.
- b) STB will encourage private land owners to donate collections from their lands to an appropriate facility meeting the requirements of the Department of the Interior's Manual 411 on curation.  
<sup>2</sup> The Contractor will provide private landowners with a list of all collected artifact finds from their lands. Materials from private lands to be returned to the private land owners shall be maintained in accordance with 36 CFR Part 79 until any specified analysis is complete. Documentation of the return of these materials to the private land owner will be prepared by Contractor and submitted to STB. STB will provide copies of the documentation to the PA consulting parties within 15 days of receipt from Contractor.
- c) On Montana state lands, STB shall ensure - through consultation with the MT DNRC - that all cultural and paleontological materials discovered will be curated in accordance with the Montana State Antiquities Act, M.C.A. 22-3-432.
- d) STB will ensure that all archeological materials collected by TRRC and Contractor as part of this project will be processed and curated within two years following the completion of identification and data recovery. In the case where TRRC decides to halt the Undertaking, all

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<sup>2</sup> Stipulation XI.b. addresses the curation of cultural resources encountered during construction of the Undertaking on land owned by private party(ies) other than TRRC. Materials found on land owned by TRRC will be donated to an appropriate facility meeting the requirements of the Department of the Interior's Manual 411 on curation.

recovered archaeological material must be curated within one year following work stoppage. A contingency plan will be developed in such case.

## **XII. Dispute Resolution**

- a) Should any party to this PA object within 30 days to any actions taken pursuant to this PA, STB will consult with the objecting party to resolve the objection. If STB determines that the objection(s) cannot be resolved, STB will forward all documentation relevant to the dispute to the Council, unless the dispute involves site eligibility. Any unresolved issue regarding site eligibility will be sent by STB to the Keeper of the National Register.
- b) For disputes not involving site eligibility, within 30 days of receipt of all pertinent documentation, the ACHP will, either:
  1. provide STB with recommendations, which STB will take into account in reaching a final decision regarding the dispute; or
  2. notify STB that it will comment pursuant to 36 C.F.R Part 800.7(c)(1) through 36 C.F.R Part 800.7(c)(4), and proceed to comment.
- c) Should the ACHP not exercise one of the above options within 30 days after receipt of all pertinent documentation, STB may assume ACHP concurrence with STB's proposed response to the dispute.
- d) Any ACHP comment provided in response to such a request will be taken into account by STB in accordance with 36 C.F.R Part 800.7(c)(4) with reference to the subject of dispute.
- e) For disputes regarding site eligibility, STB will send all pertinent documentation to the Keeper of the National Register to make a determination on issues regarding site eligibility.
- f) Any recommendation or comment provided by the ACHP or the Keeper of the National Register will be understood to pertain only to the subject of the dispute; and no additional work will occur which could affect the historic property(s) under dispute until resolution of said dispute. STB's responsibility to carry out all actions under this PA that are not the subject of the dispute will remain unchanged.
- g) Should any member of the public with a demonstrated interest in the project or federally recognized tribal member raise a timely and substantive objection pertaining to the manner in which the terms of this PA are carried out, at any time during its implementation, STB will take the objection into account by consulting with the objector to resolve the objection. When STB responds to an objection, it will notify the PA consulting parties of the objection and the

manner in which it was resolved. STB may request assistance of the ACHP to resolve objections.

### **XIII. Tribal Coordination**

Tribal coordination will be conducted pursuant to tribal protocols that will be developed by the STB in consultation with tribes participating in the project, as discussed in the ID Plan.

### **XIV. Public Participation**

STB will ensure that an active public participation program be carried out. Modified versions of reports required under this PA (locational information removed) will be made available for review to the general public on STB's website at [www.stb.dot.gov](http://www.stb.dot.gov). The views of the PA consulting parties, interested parties and the general public will be considered by STB with respect to the terms of this PA.

Consistent with Section 304 of NHPA, Executive Order 13007 and ARPA, the PA consulting parties will withhold from disclosure to the public information about the location, character or ownership of a historic property, or if it is determined that disclosure may (1) cause a significant invasion of privacy, (2) risk harm to an historic property, or (3) impede the use of a traditional religious site by practitioners.

### **XV. Final Report**

Within six (6) months of completing construction of the Undertaking or submission of the Final Data Recovery Report, Contractor will prepare a Final Report and submit it to STB, which will provide copies of the Final Report to the PA consulting parties. The Final Report will include all Phase I Identification Reports, Phase II Evaluation Reports, Treatment Plans and Data Recovery Reports. The Final Report will also include information about the treatment and disposition of any human remains and funerary objects, sacred objects or items of cultural patrimony associated with human remains encountered during construction.

### **XVI. Effective Date**

This PA shall become effective when executed by the authorized representatives of each signatory party, at which time implementation of the PA may begin.

### **XVII. Annual Status Report**

- a) Commencing one year from the effective date of this PA, TRRC shall prepare an Annual Report documenting the status of the implementation of the terms of this PA to PA consulting parties. If no work has been conducted under the terms of the PA, TRRC must still submit the Annual Report stating that no action under the PA has begun. TRRC will submit the Annual Report to STB, which will submit the report to the PA consulting parties. The Annual Report will include, at a minimum:

1. A list of all studies, reports, evaluations or monitoring reviewed or generated under the stipulations of the PA.
2. Efforts to identify tribal sites of significance and/or evaluate potential historic properties, monitoring efforts, archaeological management assessments or research designs, and treatment of historic properties.
3. Any recommendations to amend this PA or improve communication among the parties.
4. A discussion of any inadvertent effect to historic properties occurring during the course of the year.

b) The STB will ensure that the Annual Report is made available to the public and that potentially interested persons and members of the public are invited to provide comments to the STB.

### **XVIII. Amendments**

Any party to this PA may request that it be amended, whereupon the parties will consult in accordance with 36 C.F.R Part 800 to consider such amendment.

### **XIX. Termination**

Any signatory party to this PA may terminate the PA by providing thirty (30) days' notice in writing to the other parties, provided that the parties will consult during the period prior to termination to seek agreement or amendments or other action that would avoid termination. In the event of a termination, STB will comply with 36 C.F.R Part 800.4 through 800.6 with regard to this Undertaking.

### **XX. Duration**

This PA shall remain in effect for twelve (12) years after its execution by the signatories, at which time STB will notify the PA consulting parties within three months of its impending expiration and request to extend it for a specific time period. All signatories must respond affirmatively prior to the expiration date for the PA to remain in effect.

*[end of stipulations]* Execution....



**Whereas Clause**

**Catherine Nadals** to: emerritt, betsy\_merritt

Cc: "Starzak, Richard"

08/19/2014 01:50 PM

Hi Betsy,

Let me know if the following whereas clause addresses the concerns you expressed during our Monday call. I have sandwiched it in between two existing clauses.

If I don't hear from you, we'll just include this in our whereas clauses as shown.

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 comparing the potential impacts of each of the build alternatives on historic properties, cultural resources and tribal sites of significance to inform its selection of any build alternative; 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,

-Cathy

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Surface Transportation Board  
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