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TRRR\_Draft\_PA\_-\_Whereas\_Clauses  
8-15-2014\_rev...

(Moving to 3<sup>rd</sup> Monday in October on 10/20/2014 to avoid schedule conflict.) This is a reminder that we will be holding our **Section 106 monthly conference call** for the Tongue River Railroad Construction (TRRC) Project on **at 1 PM EST/11 AM MST on October 20, 2014**. The overall purpose of the call is for us to seek your insights and suggestions regarding the Section 106 process for the TRRC Project.

Attached for discussion on Monday's call, and your review and comment, are Stipulations I-IV of the Draft PA, and for your reference, the current version of the recitals or WHEREAS clauses. These stipulations begin to address comments from the Advisory Council that the draft PA include two new stipulations for roles and responsibilities and reviewing alternatives, and to re-organize the remaining stipulations to reflect the steps in the Section 106 four-step process into the format of a "process PA."

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

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

For your reference, the Final Scope of Study was published on March 22, 2013, and the following link on the project website includes the text and maps of the alternatives under consideration:  
[http://www.tonguerivereis.com/documents/final\\_scope\\_of\\_study.pdf](http://www.tonguerivereis.com/documents/final_scope_of_study.pdf)

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**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 be the basis for determining the potential impacts on historic properties, cultural resources, and tribal sites of significance for 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 will be comparing the potential impact 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,

**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,

**Commented [SR1]:** Clause added per NTHP comment

**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**, in the event that the STB approves any build alternatives, this PA would be included in its record of decision to guide the resolution of adverse effects to historic properties and tribal sites of significance; and,

**WHEREAS**, the STB may or may not approve construction and operation of the TRRC rail line, 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**, pursuant to 36 CFR § 800.4(b)(2) and 36 CFR § 800.5(a)(3), the STB, through the phased identification, evaluation and effect assessment, has established the likely presence of historic properties and tribal sites of significance within the area of potential effects (APE) for each alternative or inaccessible area through background research, consultation and the appropriate level of field investigation, taking into account the number of alternatives under consideration, the magnitude of the undertaking and its likely effects, and the views of the consulting parties; and,

**WHEREAS**, upon approval of the project, the STB would develop a treatment plan as an amendment to this PA that would outline the specific measures that would be implemented to resolve adverse effects to historic properties and tribal sites of significance for any approved alternative; 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, who have been invited to participate in the development of the PA as concurring parties, and who are hereafter referred to as consulting tribes; and,

Deleted: and

Commented [SR2]: Per TRRC request to identify consulting tribes

**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,

**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,

Executive Order 13175 – Consultation and Coordination with Indian Tribal Governments, 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 STB has been advised by some consulting parties, including tribal members and ranchers, that the Tongue River Valley is an area of rich cultural heritage; and,

**WHEREAS**, the STB in collaboration with the ACHP, SHPO and consulting parties, will include specific mitigation in its treatment plan to resolve project related adverse effects within the APE for any licensed alternative; and,

**WHEREAS**, all the data gathered under the terms of this PA will be made available to consulting tribes to inform any future undertakings that may take place in the Tongue River Valley; 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.

**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

[Insert into the draft PA after previously circulated WHEREAS clauses (8/15/2014). The ACHP asked that the first two stipulations be added (roles and responsibilities and review of alternatives) and that subsequent stipulations follow the format of a “process PA.”]

[Note to reviewers: the verb tense used throughout is based on the time we expect the PA to be signed, at approximately the time of the Final EIS but before STB makes a decision, not at the time of your review. Therefore, some events that have not happened yet will be described in the past tense.]

## **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. ROLES AND RESPONSIBILITIES**

#### **A. Federal Agency**

Consistent with the requirements of 36 CFR 800.2(a), the STB remains legally responsible for ensuring that the terms of this PA are carried out. The STB is responsible for notifying the ACHP if a Memorandum of Agreement (MOA) is required and determining ACHP’s participation and for notifying the signatories to this PA when Section 106 is concluded. STB reserves the right to seek qualified independent expert consultation through a third-party contractor in order to fulfill its responsibilities under this PA.

#### **B. Other Federal Agencies**

1. USACE-note any responsibilities of the Corps, if applicable.
2. BLM-- If a selected alternative or associated infrastructure crosses lands managed by the U.S. Bureau of Land Management, BLM is responsible for issuing a right-of-way under Title V of the Federal Land Policy and Management Act (43 U.S.C 1701) as amended. Crossing BLM managed lands would be considered a Federal undertaking and require BLM to comply with NHPA and 36 CFR 800. If the Decker Alternative was selected BLM would ensure that the right-of-way would avoid the BLM Wolf Mountain Battlefield Area of Critical Environmental Concern (ACEC) because the ACEC is closed to right-of-ways.
3. Montana DOT-note any special responsibilities for alternatives that cross a highway
4. USDA-ARS-note any responsibilities for alternatives that cross ARS land

#### **C. ACHP**

The ACHP shall be responsible for providing technical guidance, monitoring the effectiveness of this PA, participating in dispute resolutions if needed, and notifying the STB if ACHP will participate in consultation for an MOA if needed.

#### **D. SHPO**

The SHPO shall be responsible for reviewing project documentation in a timely manner and participating in consultation as set forth in this PA.

#### **E. Tribes**

The participating Tribes shall be responsible for assisting in the identification of tribal sites of significance in the APE and notifying STB and SHPO whether the properties are eligible for the National Register. [Add tribes’ role to assist in identification of and determination of effects upon tribal sites of

significance in the APE. Circle back to ACHP that they do not anticipate below ground surveys.] Tribes will adhere to the time frames in the stipulations.

**F. Applicant**

The TRRC shall be responsible for providing information to accurately delineate the APE, and providing access to the right-of-way so that STB, tribes, SHPO, and participating consulting parties can complete the stipulations set forth in this PA. If specific circumstances arise that other consulting parties need to access the APE in order to complete their review under the PA, and the STB authorizes the request, the TRRC shall, to the extent that it may do so consistent with any easement or other property rights it holds in the APE, be responsible for providing access until construction of the line commences.

**G. Other Consulting Parties**

The other participating consulting parties shall be responsible for reviewing project documentation in a timely manner and participating in consultation as set forth in this PA.

**II. REVIEW OF ALTERNATIVES**

- A. Consistent with 36 C.F.R. § 800.3(b) and § 800.8, the STB coordinated its NEPA review with the Section 106 process. Under NEPA, the STB considered the No Action Alternative and five build alternative routes, and certain variations on the five build alternative routes: 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.
- B. In the EIS, the OEA analyzed the potential environmental impacts associated with the construction and operation of the proposed rail line and compared the potential impact of each of the alternatives on, among other factors, historic properties, cultural resources and tribal sites of significance to inform its eventual recommendation of the preferred alternative. The EIS was distributed to the public, including all PA consulting parties, for their review and comment. Comments received from the PA consulting parties were reviewed to inform the STB's choice of the preferred alternative.
- C. Consistent with 36 C.F.R. § 800.3(b) and § 800.8, the STB coordinated the four-step Section 106 process set forth in 36 CFR § 800.3 through § 800.6 with the NEPA review of alternatives as follows:
  - 1. Step 1: Initiation of the Section 106 Process**
  - a. Establish Undertaking: Pursuant to 36 C.F.R. § 800.3, the STB established that its potential approval of the TRRC project is an Undertaking as defined at 36 C.F.R. § 800.16(y).
  - b. Identify the appropriate SHPO: Pursuant to Section 36 C.F.R. § 800.3(c), STB sent a letter to the Montana SHPO initiating Section 106 consultation on October 22, 2012, and since then actively sought input from the SHPO regarding the Undertaking.
  - c. Identify consulting parties: From October 2012 to December 2012, STB sent letters initiating Section 106 consultation with the PA consulting parties, and added additional consulting parties in 2013 and 2014. STB held monthly calls with the PA consulting parties since February 2013 to inform them of updates on the NEPA process, and progress on the Section 106 steps. STB held in person meetings with the PA consulting parties in Lame Deer, Montana on April 16-18, 2013, and in Billings, Montana on



February 13-14, 2014, which included information about the alternatives being considered and discussions about the Section 106 process.

- d. Plan to involve the public: STB held ten scoping meetings in multiple locations in the project vicinity from November 12-16, 2012. These meetings included maps of the alternatives and allowed for public comments on environmental topics, including cultural resources and historic properties. The project website, available to the general public at [www.tonguervereis.com](http://www.tonguervereis.com), was updated regularly and has a page devoted entirely to historic preservation issues. The EIS was circulated to the public and comments received were reviewed to inform the STB's choice of the preferred alternative.

**2. Step 2: Identification of Historic Properties**

Pursuant to 36 C.F.R. § 800.4(b)(2), the STB is deferring final identification and evaluation of historic properties. For the analysis of impacts under NEPA, STB utilized crews of archaeologists, tribal members, historians and architectural historians to conduct field surveys in the APE of the build alternatives where access was granted to STB by landowners. This information gathered follows the Section 106 process and is being used to inform the NEPA process and the selection of a preferred alternative. The results of the identification effort were reported to the PA consulting parties, and were documented in the EIS for additional review and comment by the PA consulting parties, agencies, and the public.

**3. Step 3: Assessment of Adverse Effect**

Pursuant to 36 C.F.R. § 800.5(a)(3), the STB phased the application of the criteria of adverse effect. The EIS documented the adverse effects of the build alternatives for cultural resources identified by the field crews, and predicted the potential adverse effects in areas that were not surveyed.

**4. Step 4: Resolution of Adverse Effect**

A Draft of this PA, which includes ways to avoid, minimize, and mitigate potential adverse effects on historic properties discussed among the PA consulting parties, was included in the Draft EIS for further review and comment. In accordance with 36 C.F.R. § 800.6(a), should the STB approve a build alternative, the STB shall continue consultation with the PA consulting parties to avoid, minimize and mitigate the potential adverse effects of the Undertaking to historic properties and tribal sites of significance.

- D. In the event the STB approves a build alternative, the STB would ensure that the stipulations that follow shall be implemented.

### III. AREA OF POTENTIAL EFFECTS (APE)

[The text below takes portions of the draft PA from 2011, and puts it within the framework of a “process PA” requested by the ACHP. It is organized by what was completed during the first phase of TRRR-the review of alternatives, followed by what would need to be completed if the STB approves a build alternative.]

#### A. First Phase-APE for Review of Alternatives

STB defined two APEs during the effort to identify historic properties as alternatives were being reviewed. The APE for tribal and archaeological resources was the right-of-way for each build alternative plus a 200-foot-wide buffer zone on either side of the right-of-way edge. The APE for built resources (historic buildings, structures, objects, and districts) included the proposed right-of-way with a maximum 1,500-foot buffer measured from the outer edges of both sides of the proposed right-of-way.

#### B. Second Phase-APE if a Build Alternative is Approved

##### 1. Defining the APE

The STB, in consultation with the SHPO, consulting tribes, and other consulting parties, has defined the APE based on the vertical and horizontal direct effects, indirect effects, and cumulative effects for any STB-approved build alternative. The APE will apply to federal, state, tribal and private lands that may be affected by the construction and operation of this Undertaking.

##### a. Direct Effects

The APE for direct effects is the vertical and horizontal area within which historic properties may sustain physical alteration, damage, or destruction as a result of the construction of the Undertaking. The APE for direct effects includes all areas where the ground will be disturbed such as staging areas, work camps, cut and fill areas, material sources/gravel quarries, overburden disposal areas, associated buildings/structures (e.g., sidings, bridges etc.) and associated infrastructure (e.g., communication towers, power lines etc.). This includes up to 200 feet on either side (up to a total of 400 feet) of the authorized construction right-of-way (ROW), to include a twenty-foot buffer on either side of the fenced construction ROW along the entire route, with the exception of the Wolf Mountains Battlefield NHL site. [Need to define vertical APE, for example: The lower limits of the APE for direct effects includes the depth of natural ground disturbance plus the depth of soil compaction that could affect the integrity of deeply buried archaeological or tribal resources, but does not exceed the depth beyond which such resources are reasonably expected to occur.] If the Decker Alternative is approved by STB, the NPS would be consulted to expand the APE for consideration of moving the alignment in order to avoid or minimize, to the extent feasible, adverse impacts on identified historic properties within the NHL.

##### b. Indirect Effects

The APE for indirect effects includes areas outside the construction or ground disturbance ROW where there is the potential for the Undertaking to have an indirect effect, including visual, vibration and noise effects, on historic properties, as defined in 36 C.F.R § 800.5. Tribal sites of significance located outside the field survey areas but within the line of sight of the proposed railroad, including water resources, sacred and ceremonial sites, areas where traditional plants are located, and association features are included in the APE for indirect effects. If a build alternative is approved, the STB will consult with the MT SHPO, consulting tribes and other consulting parties to identify any locations where the APE should

be extended beyond the buffer zones established during the first phase—that is, 200 feet for archaeological and tribal resources and 1,500 feet for built resources.

**c. Cumulative Effects**

The identification of the APES will consider cumulative effects to historic properties as referenced in 36 C.F.R 800.5, which states: adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative. [We should coordinate with analysis for cumulative impacts being developed for the EIS. Specifically for induced development at the mine itself.]

**2. Amending the APE**

[Add a process to amend the APE in the event a build alternative is approved and the alignment changes, similar to that provided by the ACHP PA templates.]

**IV. IDENTIFICATION AND EVALUATION (from 08/28-2014 draft PA)**

**A. First Phase- Review of Alternatives**

In 2013 and 2014, as the STB was reviewing the five alternative routes and two variations being considered for this Undertaking, it completed the following tasks:

1. Phase I Inventory: The Phase I Inventory is a professionally prepared study of existing cultural resource data from published and unpublished documents, SHPO and BLM cultural resource inventory records, archival records, geomorphological and soil studies, institutional site files, state and National registers, informant or ethnographic interviews and other information sources. The purpose of the Phase I Inventory was to obtain sufficient information about the existing or known prehistoric and historic properties, cultural landscapes, and properties of religious and cultural significance located within the project area and to inventory those properties. The Phase I Inventory, completed for an area one mile wide on either side of the centerline for each alternative (2 miles total), also helped in determining the potential for previously unidentified historic properties to be located within the project area. The results of the Phase I Inventory are provided in Attachment (TBD).
2. Alternatives surveys: Pedestrian transect field surveys were conducted by an equal number of tribal members and STB archaeologists of accessible portions of the direct and indirect APE for the alternatives being considered for this Undertaking. Vehicular and pedestrian surveys were conducted by historians and architectural historians of the direct and indirect APE. For areas that were not accessible, satellite imagery was used to determine the likely presence or absence of built resources. The results of the alternatives surveys are provided in Attachment (TBD).

**B. Second Phase-Field Surveys if a Build Alternative is Approved**

1. The second phase of the identification and evaluation effort would be implemented if the STB approves a build alternative, and it would involve the following two steps:
  - a. Completing the first phase field surveys that were conducted in 2013 and 2014 for any portions of the approved alignment that were inaccessible or where surveys were not previously completed; and
  - b. 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). Phase II testing may not be required for sites identified by consulting tribes as properties of tribal significance.

2. 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, September 29, 1983 and 62 Fed. Reg. 33708, June 20, 1997). 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). The Contractor will obtain any needed federal or state agency permits necessary to conduct the required work. The Contractor must have experience working in the field with tribal members.
3. The STB shall invite consulting tribes to work with the contractor and help plan and participate in the field surveys to identify, document, and evaluate properties within the APE to which they attach traditional religious and cultural significance. Consulting tribes need not meet the Secretary of the Interior's Standards specified in section B.2. of this stipulation. The STB will also 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 consulting tribes.
4. STB will review each Phase I ID Report prepared by the Contractor 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, preliminary 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 10 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 30-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.

### **C. Second Phase-Determinations of Eligibility if a Build Alternative is Approved**

1. For each property identified in the Phase I ID Report that cannot be avoided by the rail line construction, the STB, in conjunction with the Signatories, Invited Signatories, and Concurring

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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).

Parties, will determine eligibility for inclusion in the National Register pursuant to 36 CFR 800.4(c)(1) for each property, including properties of religious and cultural significance to tribes.

2. Some archaeological sites may be evaluated for National Register eligibility based purely on observed surface characteristics, e.g. a lithic scatter on bedrock. Many other archaeological sites will require test excavations to evaluate the NRHP eligibility of identified historic properties. Specific information should be recovered during a Phase II investigation, including determination of the horizontal and vertical limits of an archaeological site, location of areas of moderate and high artifact densities, if features are present, determining the vertical limits of the site, the presence of intact, sub-surface, and/or stratified deposits, site structure, and site formation processes.
3. Phase II Testing and Evaluation procedures and a summary of the results will be presented in a combined Phase I Survey/Phase II Evaluation Report. 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 make a determination on the NRHP eligibility of all historic properties identified in the project area within 45 days of receipt of comments from consulting parties. Such comments shall be due within 15 days of the receipt by the consulting parties of the Phase II Evaluation Report, which STB shall send to the PA consulting parties within no more than 15 days of receipt of the Report from the contractor. 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.
4. In making determinations of eligibility, STB will rely on the special expertise of tribes to inform it concerning whether or not tribal sites of significance meet the eligibility criteria of the National Register.
5. For built resources, STB will rely on research and analysis by historians and architectural historians, and the views of consulting parties with an interest or knowledge of built resources.