

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

**Sent:** Mon 11/10/2014 11:40 AM

**To:**

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Dear Consulting Parties:

This is a reminder that our next monthly Tongue River Section 106 call is today at 1 PM EST/11 AM MST.

We will be spending some time on the call explaining our Programmatic Agreement (PA) development process. As you know, we have formed a small focus group to assist us in revising the PA in response to consulting party comments. However, there has been some concern expressed regarding how we are addressing comments. In an effort to respond to this concern, we have developed a PA document that includes all comments received (**see attached**). We are also working diligently to assemble all the comments and responses into a matrix that will be distributed to you.

I have attached a PA timeline to assist you during the call.

The agenda for today's call:

1. NEPA Updates: Ken Blodgett
2. Status of PA Development: Vicki Rutson
3. Timing of Site Forms: Vicki Rutson
4. Other

Please use the following call-in number and password for the call:  
Toll-free number: 1-877-423-6338,  
Participant Passcode: 364456

We look forward to your participation on the call today.

-Cathy

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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

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

**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 decision on 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,

**Commented [SR2]:** In an e-mail dated 10/27/2014, Lana Gravatt of the Yankton Sioux suggested the beginning of this clause be revised as: "Whereas, because of the several alternative build routes, the effects on historic properties (which include tribal sites of significance)..."

**Deleted:** approval

**Deleted:** f

**Commented [SR3]:** The Colstrip Alternative Landowner Group letter dated 9/30/2014, had multiple comments about this WHEREAS clause. The letter stated that this clause appears to contemplate the choice of a route by STB prior to the full identification and consideration of potentially significant cultural resources, did not agree the Tongue River Railroad is a complex project, and did not agree that a PA is appropriate for this project. In terms of specific language in this clause, the letter stated: "Finally, we do not agree that the language of 36 C.F.R. § 800.14(b)(1)(ii) – 'When effects on historic properties cannot be fully determined prior to approval of an undertaking' – applies to this proposed project. To the contrary, determining effects on historic properties along all alternative routes is feasible prior to the agency's final decision. As the agency appears to believe otherwise, we request an explicit property description of which portions of the alternatives cannot be fully analyzed prior to the agency's final decision."

"Even if the regulations authorized use of a PA in this situation, it would be inadvisable as a practical matter for STB to wait until after authorizing construction – if that is the outcome – to identify some effect on historic properties. If effects turn out to be more serious or widespread than understood at the decision point, the No Action Alternative will no longer be available."

The Colstrip Alternative Landowner Group letter dated 11/4/14, stated: "Landowners continue to object to the wording of this item. The agency has not produced any written record showing that effects "cannot be fully determined prior to any approval of the TRRC project by the STB." Without such a written showing, the decision to use a PA on this basis is arbitrary, capricious, and unsupported by substantial evidence."

**Commented [SR4]:** In Lana Gravatt's e-mail dated 10/27/2014, she asked that the following clause be added: "Whereas, historic properties (which includes tribal sites of significance) within the actual boundaries of APE, will be protected and given every consideration under the American Indian Religious Act of 1978 within the NEPA Process and before approval of TRRC by STB, etc."

**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 [SR5]:** 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,

**Commented [MS6]:** The Colstrip Alternative Landowner Group letter dated 11/4/14, requested that OEA "Please clarify legal significance – if any – of 'concurring' versus 'consulting' parties."

**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

**Commented [MS7]:** Add to this list of definitions and create a Glossary for the PA based on comments from WG meetings, Section 106 meetings, and written comments.

## 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 southern route was selected BLM would also need to add a sentence saying that the ROW would avoid the BLM Wolf Mountain Battlefield Area of Critical Environmental Concern (ACEC) since the ACEC is closed to ROWs.
3. Montana DOT-note any special responsibility for alternatives that cross a highway or modify a highway alignment.
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 to assist 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 and also sites of tribal significance. [Add tribes' role to assist in identification of and determination of effect assessing 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.

**Commented [MS8]:** Colstrip Alternative Landowners Group letter dated 11/4/14: The 10/17/14 version "of the Stipulations lacks many sections for which the Landowners proposed changes in their 9-30-14 letter to Vicki Rutson. Are we to understand that STB has fully reviewed and decided to reject all those comments?"

**Commented [SR9]:** Colstrip Alternative Landowners Group letter dated 9/30/2014: "*Preamble.* We would like a clarification here that STB's duty extends to the full scope of NHPA and its implementing regulations, not just the section mentioned here. We would also like some commitment as to the overall timeline in which STB would carry out its legal duties under the PA, if the PA takes effect. The twelve-year lifetime of the proposed PA is far too long for the Landowners to live in limbo, especially given the decades this proposal has already dragged on."

**Commented [rs10]:** In ACHP's letter dated 9/8/2014, ACHP asked that a stipulation for "roles and responsibilities" be added as follows: "Given the prominent role that the applicant, Tongue River Railroad Company (TRRRC), will assume in project planning and implementation, we recommend that a stipulation be added to the stipulations section that clarifies the roles and responsibilities of key consulting parties. We believe that all consulting parties would find this information useful since other Federal agencies such as BLM will be involved in project reviews. Further, it will help to avoid confusion in implementing the PA once it is executed."

**Commented [MS11]:** Doug Melton's recommended language for BLM Roles and Responsibilities.

**Commented [MS12]:** MDT: In B. Other Federal Agencies, #3 MDT requests that this be changed to the following:

Montana DOT- note any special responsibility for alternative that cross a highway or modify a highway alignment. (This means that the railroad impacts the highway in any way that they must comply with MDT's requirements.)

Rick, this language appears to need further revision.

**Deleted:** responsibilities

**Commented [SR13]:** Rick and Najah have traded voice mails about this, but not conversed as of 10/31/2014.

## 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, and SHPO 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 be responsible for providing access until the line constructed. [Check transmission line PAs]

## 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 (09/26/2014 session)

- 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 STB compared the potential impact of each of the alternatives on historic properties, cultural resources and tribal sites of significance to inform its eventual selection of the preferred alternative. The EIS was distributed to all PA consulting parties for their review and comment. Comments received by STB from the PA consulting parties informed the STB's consideration 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, 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 2104. 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.

**Commented [rs14]:** In ACHP's letter dated 9/8/2014, ACHP asked that a stipulation for "analysis of alternatives" be added, as follows: "A stipulation should be inserted at the beginning of the Stipulations section that clarifies that STB is coordinating the review of alternatives for this undertaking as part of its NEPA review. STB also should clarify how the review process outlined in the draft PA will inform the analysis of alternatives, including the selection of a preferred alternative. Although we understand that STB intends to address this matter in the Whereas Section, it also needs to be addressed in the Stipulations section."

**Commented [MS15]:** Per 11/7/14 Working Group discussion: need to go through Stipulation II and clarify how the Board makes their decision and that it will take into account the work done thus far and the relative adverse effects

**Commented [rs16]:** This section was added to address the following comment in ACHP's letter dated 9/8/2104: "We, therefore, suggest that the PA outline specific measures that will be taken once the analysis of alternatives is completed and STB makes a decision. [SEE STIPULATIONS III AND ABOVE] Accordingly, STB should clarify in the draft PA how the four-step Section 106 review process will be coordinated during the analysis of alternatives, and what role the consulting parties will have as determinations and findings are made."

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. [\[Add Draft EIS and public comments received.\]](#)

**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.

**Commented [MS17]:** Colstrip Alternative Landowners Group letter dated 11/4/14: "With regard to activities completed to date, the Landowners dispute the statement that the information gathering process has been consistent with federal guidelines."

**Commented [MS18]:** Colstrip Alternative Landowners Group letter dated 11/4/14: "With regard to activities completed to date, the Landowners dispute the statement that the agency has fully documented potential adverse effects."

### 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, will define the APE based on the vertical and horizontal direct effects, indirect, 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), 50 vertical feet below the construction area 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. 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 associated features, will be included in the APE for indirect effects. If a build alternative is approved, the STB will consult with the MT SHPO, 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

**Commented [ADS19]:** Colstrip Land Owners Group, letter dated 10/14/14: A cultural resources site was identified but not recorded as part of the cultural resources survey because it was beyond the APE (the 200-foot buffer on either side of the ROW). The land between the site and the railroad is steep and would likely require cut and fill which would impact (if not destroy) the cultural resources site. Requests that ICF reconsider its exclusion of this site. Additional engineering analysis of proposed route will be needed to determine necessary ROW width. Concerned that lack of detail from TRRC is impeding a complete study of impacts.

**Commented [MS20]:** Cathy Nadals: We need to define the vertical limits as well.

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**Commented [MS24]:** Cathy Nadals: suggested 50 feet ...

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**Commented [rs26]:** From 2/2014 CP meeting

**Commented [DC27]:** This sentence is very broad and ...

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The identification of the APE 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.

## 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 areas one mile away from each of the alternatives (2 miles total), also helped in determining the potential for previously unidentified historic properties to be located within the project area. [Include results table as attachment]
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 survey was 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. [Include survey results as an attachment]

### 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).
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,

**Commented [SR28]:** Per NTHP comment on 10/10/2014 We should coordinate with analysis for cumulative impacts being developed for the EIS. Specifically for induced development at the mine itself

**Deleted:** For the purposes of this PA, the APE for cumulative effects is the same as that for direct and indirect effects. [This is consistent with the PAs the ACHP provided as templates.]

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**Commented [SR29]:** A.The Boardman to Hemingway PA provided by ACHP has the following text for the WG to consider: "Modifications to the APE

1. An APE may be modified where tribal consideration, additional field research or literature review, consultation with parties to this agreement, or other factors indicate that the qualities and values of historic properties that lie outside the boundaries of the APEs may be affected directly, indirectly and/or cumulatively.
2. Any party to this agreement may propose that the APEs be modified by submitting a written request to the BLM providing a description of the area to be included, justification for modifying the APE(s), and map of the area to be included. The BLM [change to STB] will notify the parties to this agreement of the proposal with a written description of the modification requested with ...

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**Commented [SR30]:** Colstrip Alternative Landowners Group letter dated 9/30/2014: ...

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**Commented [SR31]:** For WG consideration, suggest replacing with: "The Phase I Inventory, completed for an ...

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**Commented [SR32]:** Based on PA working group comments, 10/10/2014, a summary of the records search at ...

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**Commented [SR33]:** Based on PA working group comments, 10/10/2014, a summary of the field survey ...

**Commented [SR34]:** ACHP in their letter dated 9/08/2014: "The draft PA starts with the assumption that a ...

**Commented [MS35]:** NTHP asked to check this citation for 1983 and sent the published draft standards from 1997 ...

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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, collect information from landowners and other knowledgeable parties, 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 consulting tribes 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 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 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.

### 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 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.

<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).

**Commented [SR36]:** Added to address 9/30/2014 comment from Colstrip Landowners Group that the ID plan obtain more information from landowners.

**Commented [MS37]:** Rick Starzak: Per applicant during 10/10/2014 call, define which Tribal Members would participate.

**Commented [SR39]:** Added per Standing Rock Sioux during 10/10/2014 call.

**Deleted:** tribal members

**Commented [MS40]:** Cathy Nadals: Let's use the term, "consulting tribes" to distinguish those tribes that have been consulting with us (or will be) on the project. We can define the term in the whereas clauses.

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**Commented [SR41]:** Per 10/10/2014 PA Working Group call, add that Tribal Members are not required to meet secretary standards mentioned above.

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**Commented [MS42]:** Per 10/10/2014 PA Working Group call, Make this more focused. Cathy may have language for this.

From Rick: [see also footnote, as that may be useful to make more focused terms.

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**Commented [SR43]:** David Coburn, representing TRRR, suggested the time frame be reduced from 15 to 10 days.

In the Colstrip Alternative Landowner Group letter dated 9/30/2014: "The 15-day timeline for response by PA consulting parties on each Phase I ID Report, and again for submitting final comments, is far too short. The Landowners are working people participating in this process in their spare time. At some points during the agricultural calendar, they are effectively unavailable for weeks. To ensure the Landowners' ability to participate meaningfully, the minimum turn-around for their response should be 45 days."

**Commented [SR44]:** In the Colstrip Alternative Landowner Group letter dated 9/30/2014: "The five days allowed for STB to provide missing information or determine that additional information is not needed may be inadequate where a significant data gap is identified. We a ...

**Commented [SR45]:** David Coburn, representing TRRR, suggested the time frame be reduced from 45 to 30 days.

**Commented [DC46]:** We see no point in doing a Phase II evaluation if the railroad can avoid the site.

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.

**Commented [DC47]:** This term was defined above.

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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.~~

**Commented [DC48]:** We assume that you intend that the comments described in paragraphs 7 and 8 will be the comment on the Phase II report. We see no need for a second round of comments. We have built the timelines from paragraphs 7 and 8 into this paragraph.

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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.

6. 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.

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**Deleted:** 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. ¶  
The PA Consulting Parties will have 15 days to provide any final comments to the STB.

## Remnants of Attachment B-Identification Plan (from 2011 Draft PA)

### 3. IDENTIFICATION AND EVALUATION

[Additional detail in the ID Plan from the 2011 PA that is more detailed than the ACHP templates.]

The Phase I Inventory will be performed for the entire approved alignment within the ROW; however, the Phase I Inventory may be performed for a portion of the alignment at one time, such that once TRRC has access to a portion of the alignment TRRC may direct the Contractor to perform a Phase I Inventory for that portion and prepare the Phase I Inventory Report for that portion. If the Decker Alternative is approved, the Phase I Inventory will be extended to 400 feet on either side of the ROW for sections of the alignment located within the Wolf Mountains Battlefield NHL. TRRC will provide the PA consulting parties with a map of the area to be inventoried prior to performing each Phase I Inventory. Representatives of the tribes will be invited by STB to participate in the Phase I Inventory to help identify, document, and evaluate properties within the APE to which they attach traditional, religious, and cultural significance.

The Phase I Inventory will include the following activities:

1. An intensive pedestrian survey of the construction ROW plus 20 feet on either side of the fenced construction ROW.
2. An intensive pedestrian survey of all the lateral areas, borrow areas, haul roads (new and upgraded), staging areas, and other ancillary areas related to the Undertaking.
3. A geomorphological survey of the construction ROW will be conducted to identify areas where buried historic properties may exist and where deep testing, as identified by the geomorphologist, may be necessary to identify cultural resources. The geomorphologist will also recommend construction monitoring areas and assist in evaluating the National Register eligibility of any newly identified buried historic properties by providing identification of the soil(s), soil characteristics, soil dating, and analysis of the probability of the soils to contain cultural material.
4. An intensive pedestrian survey of the construction ROW using transects no more than 30 meters apart to complete the Phase I effort. If necessary, Phase II testing and evaluation excavations will be conducted **on any sites that cannot be avoided by the rail line construction** to locate, record, and evaluate the National Register eligibility of any identified historic properties within the APE of the approved route and only when **consulting tribes** do not consider such properties sensitive to testing. Test Phase II Testing and Evaluation excavations may include shovel testing, augering, 1 x 1m or 50 x 50 cm test units, and use of heavy equipment such as backhoes in certain cases. Tribal input will be sought when assessing the National Register eligibility of any properties of traditional religious and cultural significance to **consulting** tribes. If, in the opinion of the Contractor and the cultural resource representative designated by the tribes, an historic property is eligible for

**Commented [MCR50]:** This is out of order, but in the interests of light editing, is left in place.

**Deleted:** alternative

**Commented [rs51]:** This phrase was added to include the areas where the Class II survey area was already completed in 2013-2014, as well as areas where landowner access won't be granted until after there is an approved alternative.

The additional text also makes it clear that testing not be done if tribal members consider them sensitive to testing.

**Deleted:** tribal members

the National Register as a traditional cultural property,<sup>2</sup> sufficient information to formulate Treatment Plan(s) will be obtained.

5. A reconnaissance level survey of those areas outside the ground disturbance area where there is the potential for the Undertaking to have an adverse effect, as defined in 36 C.F.R 800.5, on historic properties. A reconnaissance survey is an on the ground or pedestrian examination of all or part of an area accomplished in sufficient detail to make generalizations about the types and distributions of historic properties that may be present. Identification of these areas will include consultation with the MT SHPO, THPO/cultural resource representative designated by the consulting tribes, TRRC, other identified consulting parties, and federal agencies.

Contractor will use GPS units that meet BLM requirements when conducting Phase I Inventory surveys. The resulting shapefiles will be made available to the PA consulting parties.

Any areas not originally identified within the APE, but potentially affected by the Undertaking, will be identified by STB in consultation with the MT SHPO, THPO/cultural resource representative designated by the consulting tribes, TRRC, other identified consulting parties, and federal agencies. STB will consult with the MT SHPO, THPO/cultural resource representative designated by the tribes, TRRC, other identified consulting parties (as defined in 36 C.F.R 800.2(c)), and federal agencies to address their concerns.

Phase II Testing and Evaluation procedures and a summary of the information to be presented in the combined Phase I Survey/Phase II Testing and Evaluation Report is presented below.

## V. ASSESSMENT OF EFFECTS (10/24/2014 session, still in progress)

- a. **On surveyed areas:** In the EIS, the STB analyzed the impacts of each alternative upon the archaeological resources, tribal resources, and built resources identified through field survey in the APE on areas of accessible parcels. The EIS analyzed the types and numbers of resources that were identified in the proposed right-of-way for each build alternative and would likely be adversely affected by construction and operation activities. The EIS also analyzed potential resources that were not in the proposed right-of-way, but were identified by survey in the buffer area, and could be indirectly affected by construction and operation activities. The right-of-way plus the buffer area is identical to the APE.
- b. **On inaccessible areas:** In the EIS, STB also assessed impacts on land that was not accessible and therefore not surveyed during Phase I. STB assessed the likelihood of the presence of archaeological sites on the total acreage (both surveyed and unsurveyed) of each alternative based on the number of archaeological sites identified during the survey, combined with three slope percentage categories (high, moderate, and low). OEA then used this to extrapolate the probability of unidentified archaeological sites that could be located within the total build alternative. The probability of tribal sites of significance located within

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Commented [MS52]: Define in glossary

Commented [SR53]: The WG asked that the comment received from Lana Gravatt of the Yankton Sioux be added here, but Lana's comments were about the WHEREAS clauses.

Commented [MS54]: Per 11/7/2014 Working Group meeting: Will include an attachment of surveyed sites located in the right-of-way and the Buffer Area.

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Commented [MS55]: Betsy Merritt asked for a different term than sensitivity

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Commented [MS56]: Use the terms that we use: -eligible -listed tribal sites of significance.

<sup>2</sup> See National Register Bulletin 38, Guidelines for Evaluating and Documenting Traditional Cultural Properties.

the build alternative was not assessed in the EIS. To assess impacts on built resources for areas where access was not granted, the STB's built resource survey teams reviewed tax assessor data and geographic information system (GIS) maps using Google Earth Pro satellite imagery.

**Commented [MS57]:** Conrad Fisher asked to specify that tribal resources weren't considered in the sensitivity model. Stan Wilmoth: wanted definition of sensitivity model

- c. If the STB makes a decision to approve a build alternative, in consultation with the PA consulting parties, STB will assess the direct, indirect and cumulative effects of this Undertaking on historic properties consistent with 36 CFR 800.4(d) and identify effects on each historic property within the APE of the approved build alternative in accordance with the *criteria of adverse effect* established in 36 CFR 800.5(a)(1-2), and provide the PA consulting parties with the results of the finding in writing, following 36 CFR 800.11(e)(4-6), as follows:

**Commented [MS58]:** Define term in glossary and clarify in whereas clause. Came from David Coburn. Betsy Merritt and Stan Wilmoth both spoke on this matter.

**Commented [SR59]:** Sections C-H of this stipulation follow the format of the Boardman to Hemingway PA provided by the ACHP as a template for a "process PA".

1. A description of the Undertaking's effects on historic properties;
2. An explanation of why the criteria of adverse effect were found applicable or inapplicable, including any conditions or future actions to avoid, minimize or mitigate adverse effects; and
3. Copies or summaries of any views provided by consulting parties and the public.

- d. The assessment of effects will serve as the basis for the development of one or more Treatment Plan(s) as described in Stipulation VI.

- e.   
f. The STB, in consultation with the PA consulting parties, will broadly assess cumulative effects under Section 106 in order to identify all reasonably foreseeable potential adverse effects as a result of the Undertaking (36 CFR 800.5 (a)(1)). Potential cumulative or reasonably foreseeable effects will be based on the APEs for direct and indirect effect and be addressed in the Treatment Plan(s) according to the procedures in Stipulation VI.
- g. The STB will provide all assessments of effect to historic properties in writing to the parties to this agreement. This will be done concurrently with the distribution of the Phase II Evaluation Reports described in Stipulation IV. Reviews will proceed according to the procedures and timeframes established in Stipulation IV.
- h. Disagreement regarding assessments of effect will be handled according to the procedures established in Stipulation (TBD).

**Moved down [1]:** The STB will consult with the PA consulting parties to seek ways to avoid or minimize adverse effects to historic properties. If historic properties cannot be avoided, subsurface investigation may be necessary for archaeological sites within the direct effect APE which may be adversely affected. Determination of the site boundaries in relation to the direct effect APE, and actual area of ground disturbance, may be analyzed to aid in developing alternative design and or mitigation strategies. If adverse effects cannot be avoided the STB will consult with the parties to this agreement to determine appropriate measures to resolve adverse effects to be detailed in the Treatment Plan(s).¶

## VI. RESOLUTION OF ADVERSE EFFECTS

- A. The STB will consult with the PA consulting parties to seek ways to avoid or minimize adverse effects to historic properties. If historic properties cannot be avoided, subsurface investigation may be necessary for archaeological sites within the direct effect APE which may be adversely affected. Determination of the site boundaries in relation to the direct effect APE, and actual area of ground disturbance, may be analyzed to aid in developing alternative design and or mitigation strategies. If adverse effects cannot be

**Commented [MS60]:** Per Najah Gabriel's request during the 11/7/14 Working Group meeting, Stipulation VI was renamed

**Commented [SR61]:** This Stipulation based on the 2011 PA.

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**Moved (insertion) [1]**

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avoided the STB will consult with the parties to this agreement to determine appropriate measures to resolve adverse effects to be detailed in the Treatment Plan(s).

B. Consultation on Developing Treatment Plans

1. STB will consult with the MT SHPO, consulting tribes and other PA consulting parties 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 consulting 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. Development of the Treatment Plan(s)

1. 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 Phase I ID Report for that portion has been completed and approved in accordance with Stipulation IV. Each Treatment Plan will be amended, if necessary, after the finalization of any supplemental Phase II Evaluation Report(s).
2. Each Treatment Plan will do the following:
  - a. identify tribal sites of significance and National Register-eligible historic properties in the APE or portion thereof;
  - b. identify the nature of the effects to which each property will be subjected; and
  - c. identify the treatment strategies proposed to avoid, minimize or mitigate the effects of the Undertaking on the historic properties.
3. 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

**Commented [SR62]:** From ACHP letter, 9/8/2014:  
***“Development of Treatment Plans***

Further explanation is needed in this stipulation regarding how the applicant, TRRC, will consult with consulting parties to develop treatment plans. The timing of the development of these plans is unclear. Will this occur during the analysis of alternatives or after the selection of the preferred alternative? Will the Contractor have sole discretion to carry out this task or will it be done in consultation with STB? The Stipulations section should be explicit in encouraging the Contractor to give priority consideration to measures that would avoid adverse effects to historic properties. We also are concerned about the notion that a treatment plan can be prepared for a portion of the line. This concept needs to be better explained in the PA, and have agreement of affected consulting parties. Finally, the treatment of the Wolf Mountain Battlefield, a National Historic Landmark (NHL) must adhere to Section 110(f) of the NHPA and Section 800.10 of the ACHP's regulations, which requires a higher consideration of alternatives to minimize harm to the NHL.”

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.

4. 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.
5. 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.

#### C. Finalization of Treatment Plan(s)

1. STB will submit the draft Treatment Plan(s) to the PA consulting parties for review. Within 30 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.
2. 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.

**Commented [SR63]:** From ACHP 9/8/2014 letter: *“Consultation on Developing Treatment Plans*  
During the analysis of alternatives, consulting parties should understand the extent to which STB has considered measures to avoid adverse effects on historic properties on the particular alternative. It is our understanding that once the rail alignment is selected, the planning process will not be very flexible. Thus, once a preferred STB alignment is chosen, consulting parties will be limited in requesting modifications. It is therefore important that the consulting parties be able to share their comments on alternatives during the evaluation of an alternative and in advance of the Board’s decision. The Stipulations section, therefore, needs to emphasize that the identification and evaluation process will be coordinated with the State Historic Preservation Officer (SHPO) and Tribal Historic Preservation Officers (THPOs) to ensure that adequate baseline information is prepared for below ground historic properties, cultural landscapes, and traditional cultural properties associated with each alternative.”

**Commented [SR64]:** Per 9/30/2104 comment letter from Baumstark Braaten Law Partners-Colstrip Alternative Landowners Group: “The 15-day timeline for PA consulting party responses on informational deficiencies is inadequate. To ensure the Landowners’ ability to participate meaningfully, the minimum turn-around for their response should be 45 days. The Landowners will require expert assistance to review the sufficiency and quality of the Treatment Plans for their property. We request reasonable financial reimbursement for a qualified expert approved by the Landowners to assist them with this review.

The Landowners are not willing to be bound by any clause that interprets their failure to comment as concurrence.”

**Deleted:** 15 days

# Tongue River Railroad Environmental Impact Statement

Docket No. FD 30186

## Timeline for Programmatic Agreement

November 7, 2014

<b>Activity</b>	<b>Date</b>	<b>Notes</b>
PA Working Group Conference Call #1	Friday, September 26, 2014	Calls will last one hour. Comments will be exchanged among Work Group members between calls to facilitate the process.  For the first call the group will review and resolve comments on:  Alternative Consultation Stipulation Step 1 - Roles and Responsibilities
PA Working Group Conference Call #2	Friday, October 10, 2014	Group will review and resolve comments on:  Step 2 – Identification and Evaluation
Monthly Section 106 Conference Call	Monday, October 20, 2014	This monthly conference call will address the current versions of:  Alternative consultation stipulation Step 1 - Roles and Responsibilities Step 2 - Identification and Evaluation
PA Working Group Conference Call #3	Friday, October 24, 2014	Group will review and resolve comments on:  Step 3 - Assess Effects
PA Working Group Conference Call #4	Friday, October 31, 2014	Group will continue to review and resolve comments on:  Step 3 - Assess Effects

<b>Activity</b>	<b>Date</b>	<b>Notes</b>
PA Working Group Conference Call #5	Friday, November 7, 2014	Group will review and resolve comments on:  Step 4 - Resolve effects Avoidance measures Minimization measures Treatment plan
Monthly Section 106 Conference Call	Monday, November 10, 2014	Report out on versions resulting from PA Working Group Conference Calls #3 and #4, and discuss any comments from other consulting parties
PA Working Group Conference Call #6	Friday, November 21, 2014	Group will review and resolve comments on: Mitigation measures Data recovery
PA Working Group Conference Call #7	Friday, December 5, 2014	Group will review and resolve comments on:  Administrative measures Signature parties Check draft WHEREAS clauses
Monthly Section 106 Conference Call	Monday, December 8, 2014	For the last monthly conference call report out on versions resulting from PA Working Group Conference Calls #5 and #6, and discuss any comments from other consulting parties. Distribute entire PA for review with comments due prior to the meeting or conference call in January.
Wrap-up meeting or conference call	January 2015	The meeting or conference call would consist of a line-by-line review of any final comments.
Addition of Draft PA to the Draft EIS	January 2015	
Finalize PA and collect required signatures for PA		After Draft EIS is issued, OEA will finalize the PA and obtain required signatures.