

DRAFT TONGUE RIVER RAILROAD PA WHEREAS CLAUSES AS OF 05/29/2014

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

WHEREAS, the Tongue River Railroad Company Inc. (TRRC), the project applicant, filed a revised application with the Surface Transportation Board (STB) to construct and operate a new, approximately 42-mile rail line between Colstrip, Montana, to two ending 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; and,

WHEREAS, the STB is considering five build alternative routes, and certain variations on the five build alternative routes, to be carried forward in the EIS including 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, as well as a No Action Alternative; and,

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

WHEREAS, the Board'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 approval of the TRRC project 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; 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 the approval of the TRRC project by the STB; and,

WHEREAS, the STB has developed this programmatic agreement (PA) to mitigate the adverse effects of the TRRC project to historic properties and tribal sites of significance pursuant to the Section 106 regulations at 36 CFR § 800.14(b)(1)(ii); and,

WHEREAS this PA is being developed in consultation with the Advisory Council on Historic Preservation (ACHP) and the Montana State Historic Preservation Officer (SHPO) pursuant to 36 CFR § 800.5; 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 and signatory parties to this PA; and,

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

WHEREAS, the ACHP, SHPO, and TRRC are also signatories to this PA; and,

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

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

WHEREAS, 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 participated in the development of and are concurring parties to this PA; 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 Board 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 as 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 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 acronyms in Attachment C are applicable throughout this PA and any attachments to this PA; and,

WHEREAS, the PA consulting parties have considered requirements of NHPA, the American Indian Religious Freedom Act, 42 U.S.C. 1996 et. seq. (AIRFA), the Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001 et. seq. (NAGPRA), Executive Order 13007 – Indian Sacred Sites, the Archaeological Resources Protection Act of 1979 (ARPA) and Section 4(f) of the Department of Transportation Act (49 U.S.C. 470 et seq.) where applicable in the course of consultation; and,

WHEREAS, in 2013, STB conducted a records search 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; and,

WHEREAS, in 2013 and 2014, the STB conducted Phase I pedestrian transect surveys by tribal members and contracting archeologists within the right-of-way plus a 200-foot buffer on either side of sections of each of the alternatives under consideration; and,

WHEREAS, the ID Plan in the PA also requires that TRRC complete Phase I and Phase II surveys for the entire line approved by the STB; 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 meeting its responsibilities as defined in 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.

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