

EO-2411

CN

Letter from Victoria Rutson

Catherine Nadals

to:

ngabriel, cvaughn

11/28/2014 01:02 PM

Cc:

rutsonv

Hide Details

From: Catherine Nadals/STB

To: ngabriel@achp.gov, cvaughn@achp.gov

Cc: rutsonv@stb.dot.gov

3 Attachments



ACHPPACommunicationsMatrix.pdf Draft_PA_Whereas Clauses_and_Stipulations_I - VI.docx VictoriaRutsonletter.docx

Hi Charlene,

Please see attached letter from Vicki. Included with the letter are two attachments. See below.

Best Regards,

Cathy

Catherine Nadals

Environmental Protection Specialist

Office of Environmental Analysis

Surface Transportation Board

Washington, DC 20423

(202) 245-0293



SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Environmental Analysis

November 28, 2014

Charlene Dwin Vaughn,
Assistant Director
Office of Federal Agency Programs
Federal Permitting, Licensing and Assistance Section
Advisory Council on Historic Preservation
401 F Street NW, Suite 308
Washington, DC 20001-2637

Re: Docket No. FD 30186, Tongue River Railroad Company, Inc.—Rail Construction and Operation—in Custer, Powder River and Rosebud Counties, Montana

Dear Ms. Vaughn:

I am writing to assure you that my office—the Office of Environmental Analysis (OEA) within the Surface Transportation Board—has carefully considered and taken actions in response to the recommendations made by the Advisory Council on Historic Preservation (ACHP) in your September 3, 2014, September 8, 2014, and October 30, 2014 letters to me. My staff and I, as well as our third party consultants, ICF International Inc., carefully considered ACHP's letters. We then reviewed the changes that we have made to the draft Programmatic Agreement (draft PA). Working with our Section 106 consulting parties, we have made (and continue to make) amendments to the draft PA, including changes in response to ACHP's letters.

OEA held a Section 106 consulting party meeting in Billings, Montana on February 13 and 14, 2014. At the meeting, several of the attendees began work on a draft PA. Since then, OEA has worked with the consulting parties on a regular basis to further develop the draft PA. In April 2014, upon the advice of ACHP, OEA provided the consulting parties with a justification statement for developing a Programmatic Agreement. In June through July 2014, OEA worked with the consulting parties to develop the recitals, or Whereas clauses, of the draft PA. From August 2014 through the present time, OEA has continued to work with the consulting parties to develop other sections of the draft PA, including the stipulations and appendices.

The draft PA stipulates measures that would be taken to complete the identification and evaluation efforts in accordance with 36 C.F.R. Part 800.4(b)(2) and to phase the application of the criteria of adverse effects in accordance with 36 C.F.R. Part 800.5(a)(3). It also outlines measures that would be taken to avoid, minimize, or mitigate the effects on historic properties (per 36 C.F.R. Part 800.6(a)) and tribal sites of significance. We have now reorganized the PA to more closely follow the four-step process as you recommended. The draft PA will be attached to the Draft Environmental Impact Statement (EIS) for further review and comment by the consulting parties and public.

As you know, OEA has created a working group as a way to address consulting party comments more effectively. We requested participation of individuals to represent a broad spectrum of opinions and have been fortunate to have key parties agree to participate. Stan

Wilmoth, the Montana Deputy State Historic Preservation Officer (SHPO), agreed to participate, as did representatives from the U.S. Army Corps of Engineers, the Department of the Interior-Bureau of Land Management, the Northern Cheyenne Tribe, the Rosebud Sioux Tribe, the National Trust on Historic Preservation (NTHP), and the Tongue River Railroad Company, Inc. (TRRC). We thank you for ACHP's willingness to participate in the working group's recent calls.

The working group has been holding conference calls on a regular basis. Following each call, OEA has created revised drafts of the PA that reflect their changes and any comments of the consulting parties. The working group's revisions to the draft PA have been circulated to the consulting parties before each monthly call to which each of the Section 106 consulting parties is invited. This way, we are able to engage the far larger group of consulting parties and request their review and comment on the various changes to the draft PA.

I have attached the most recent draft of the PA promulgated by the working group for your reference. Please note that in this draft, as with prior drafts, we have added "bubble comments" in the draft PA indicating each place where we have included new language in response to a comment or where we have decided to not make a change to the language. I believe this makes it easier for parties to track exactly where in the draft PA their comments have been addressed. I have also attached a matrix that highlights key correspondence, principally with the ACHP, in the development of the project PA. Included in the matrix are hyperlinks that will guide you to the document in question. Please let me know if you believe the matrix is helpful and/or if you recommend any changes or additions.

We are also creating a matrix that lists all the written comments received on the PA process to date and the disposition of each of the issues addressed in the comments. Our goal with this particular matrix is to ensure that it provides information of use to the Section 106 consulting parties. Once finalized, we will post the matrix on the project website (www.tonguerivereis.com) and would appreciate any suggestions you may have about the matrix at that time. We will alert the Section 106 consulting parties when we have the matrix posted and will be updating the matrix monthly as comments are received on the draft PA.

Below, I address each of the issues raised in your letters:

Issues Raised in ACHP's September 3rd Letter and OEA's Response/Action

Section 106 Consulting Parties' Consideration of Alternatives

ACHP guidance: ACHP noted that the NTHP had raised a concern regarding the proposed language in the Whereas clauses regarding how STB intends to involve consulting parties in the analysis of alternatives to the proposed undertaking. Although STB has indicated that it will consider the effects of each of the alternative routes on historic properties, such analysis should not be conducted in a vacuum.

OEA action: We revised the language in the Whereas clauses to incorporate this comment in the draft PA distributed on October 17, 2014.

Development of a Process Programmatic Agreement

ACHP guidance: ACHP recommended in late July that STB develop a process PA which would outline the procedures to be followed as STB selects the preferred alternative for the Tongue River Project. The ACHP further believes that in this particular undertaking, it is critical that STB have transparency and stakeholder engagement in all aspects of decision making. Therefore, the ACHP

urges STB to take appropriate measures to engage consulting parties as each alternative is considered so that issues related to the area of potential effect (APE), scope of work for identification and evaluation and assessment of effects are considered in a timely manner as provided for under 36 C.F.R. Part 800.6(a).

OEA action: When ACHP raised the issue of a process PA, OEA requested example “process PAs” to aid in the development of such a PA. On September 2, 2014, ACHP helpfully provided examples. OEA began incorporating the elements of these process PAs into the draft distributed on September 26, 2014 and continued to do so in subsequent drafts. As ACHP knows, the PA development process began (at the recommendation of consulting parties at the Billings meeting in February 2014) by using the 2011 Tongue River PA as a starting template with the stated understanding that the template (which was not a process PA) would be substantially revised for the current Tongue River proceeding.

Moreover, the involvement of the consulting parties in the consideration of alternatives has been provided for in several drafts of the PA, and revisions related to that involvement continue as new sections are addressed by the working group and will be shared with the full group of Section 106 consulting parties for their review and comment. This concern is addressed more fully below.

Issues Raised in ACHP’s Sept. 8th Letter and OEA’s Response/Action

Analysis of Alternatives

ACHP guidance: ACHP requests OEA add a Stipulation at the beginning of the Stipulations section clarifying that we are coordinating the review of alternatives for the TRRC proposal to build and operate a rail line as part of our NEPA review. We should also clarify how the review process outlined in the draft PA will inform the analysis of alternatives, including the selection of a preferred alternative.

OEA action: On September 26, 2014, we added Section II, Review of Alternatives, to the draft PA. Here, we clarify that we are coordinating the NEPA review and Section 106 process. We also state that we are assessing 10 alternatives (5 build alternatives with variations yielding a total of 10 alternatives) and the No Action alternative in the NEPA process. The draft PA states that the Draft EIS will set forth a comparative analysis of all alternatives (including No-Action) and that the consulting parties, as well as members of the public and other stakeholders, will have the opportunity to comment on the draft EIS and the draft PA, which will be made available to the public in the Draft EIS. Comments received from the consulting parties and others will inform the STB’s consideration of the preferred alternative. Additional revisions were made to the Whereas clauses and Section II of subsequent drafts of the PA (distributed on October 17 and November 10) that further outline the review process and how it will inform selection of a preferred alternative for the decision maker.

Roles and Responsibilities

ACHP guidance: ACHP requests that OEA add a Stipulation clarifying the roles and responsibilities of key consulting parties.

OEA action: We added Section I, Roles and Responsibilities, to the draft PA and expanded Subsection B, Other Federal Agencies, to include BLM. Further, we expanded “Subsection, E. Tribes,” to provide additional information about the Tribes’ role in assisting in the identification of and determining effects on historic properties and tribal sites of significance. We added a clause to the “Subsection F. Applicant” explaining that, in certain circumstances, TRRC shall be

responsible for providing access to the APE. We also added language regarding consultant roles and input to the Whereas clauses in Sections II and IV. The first of these changes was made to the draft PA distributed September 26, with additional revisions being made to the drafts distributed on October 17 and November 10.

Identification Plan

ACHP guidance: ACHP emphasizes that the draft PA more clearly recognize that OEA may recommend the No Action alternative to the decision makers, the three members of the Board, and that OEA could identify the No Action alternative as the environmentally preferable alternative. Consequently, the draft PA should outline specific measures that will be taken following completion of the NEPA process and a decision by the STB either granting, or granting with the imposition of conditions, a build alternative. (If the Board decides to deny TRRC's proposal or decides to approve the No Action alternative, then further review under Section 106 would be moot.) The draft PA should set forth how the four-step Section 106 process will be coordinated during the analysis of alternatives and what role the consulting parties will have as determinations and findings are made. It would be imprudent to defer involvement of consulting parties in findings and determinations until a preferred alternative is selected.

OEA action: We added several references to the No Action alternative throughout the draft PA where the alternatives are discussed. We have clarified that the consulting parties are involved throughout the process, including in considering and commenting upon impacts of each alternative (*see e.g.*, September 26 draft PA (Section I, Roles and Responsibilities); October 17 Draft PA (Whereas clauses, Section II, Review of Alternatives, Section IV.B, Identification and Evaluations); November 10 Draft PA (Whereas clauses, Section II, Review of Alternatives, Section IV.B, Identification and Evaluation). As stated earlier, we included the four-step Section 106 process language and will include the draft PA in the Draft EIS when we issue that document this spring. OEA will specifically request comments on alternatives from all stakeholders, including the consulting parties.

In the Final EIS, we will summarize and respond to comments and will be recommending an environmentally preferred alternative based on a comparative evaluation of each alternative's impacts to the environmental disciplines (*e.g.*, air, water, biological resources, land use, safety, noise, and cultural resources). As a result, well before any decision is made with respect to TRRC's request for approval of the construction and operation of a line of railroad, the consulting parties, as well as all the stakeholders interested and involved in this matter, will have had a full opportunity to be heard. Moreover, OEA will, as part of its NEPA and Section 106 duties, respond to comments and will disclose impacts to the Board so that it is able to make a fully-informed decision.

The samples of process PAs that ACHP helpfully provided do not contain Identification Plans. Nevertheless, we are continuing to revise the Identification Plan to ensure that ACHP's concerns are fully addressed.

Development of Treatment Plans

ACHP guidance: ACHP states that more explanation about how applicant TRRC will consult with consulting parties to develop treatment plans is needed in the draft PA. Clarity is needed regarding the timing of the development of treatment plans and how consultation will occur. For example, will the treatment plans be developed before or after selection of the preferred alternative? ACHP is also concerned that a treatment plan could be developed for a portion of the

rail line. This needs to be better explained in the draft PA and have the agreement of the affected consulting parties. The treatment of the Wolf Mountains Battlefield requires a higher consideration of alternatives (under Section 110(f) and Section 800.10 of ACHP's regulations) to minimize harm to the National Historic Landmark.

OEA action: The draft PA we are currently developing with the Section 106 consulting parties sets forth the four-step Section 106 process through consideration of alternatives and sets forth the process for developing treatment plans should the STB approve a build alternative. We understand that, unless and until the STB approves a specific build alternative, the treatment plan(s) cannot be finalized. Should the STB approve a specific build alternative, the treatment plan(s) will be developed with the full participation of consulting parties identified for the specific alternative approved. Obviously, if the STB were to deny TRRC's proposed rail line construction and operation, or if were to approve the No Action alternative, there would be no need for subsequent development of treatment plan(s).

Revised Section V, Subsection B, Development of the Treatment Plan(s) provides timing, process, and participation of Montana SHPO, applicant TRRC, STB and the consulting parties identified for the specific alternative, assuming that the STB approves a build alternative. At the working group call on November 21, 2014, language was added to the mitigation measures to bolster avoidance. Moreover, clauses addressing the treatment plan were included in the Whereas clauses of the October 17 and November 10 drafts of the PA.

While ACHP expresses concern in its letter that treatment plan could be developed for a portion of the rail line, such an approach is expressly provided for under the regulations and this approach was discussed and agreed upon at the February 2014 meetings in Billings. Specifically, OEA is conducting a phased identification of historic properties pursuant to 36 C.F.R. Part 800.4(b)(2) which states, "where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process to conduct identification and evaluation efforts...." This approach is addressed in the PA justification statement and was deemed necessary because the alternatives under consideration consist of corridors or large land areas and OEA was not granted access to large portions of the APE for all alternatives.

Furthermore, the draft PA discusses the treatment of the Wolf Mountain Battlefield in multiple places. Clauses addressing treatment of the Wolf Mountain Battlefield were added to the draft PA distributed on October 17, 2014 (Whereas clauses, Section I, Roles and Responsibilities, Section III, Area of Potential Effects) and to subsequent drafts (November 10 Draft (Whereas clauses, Section I, Roles and Responsibilities, Section III, Area of Potential Effects)).

Consultation on Developing Treatment Plans

ACHP guidance: It is important that the consulting parties have an opportunity to share their comments on all alternatives under consideration in advance of the Board decision. The stipulations section must, therefore, emphasize that the identification and evaluation process will be coordinated with Montana SHPO and Tribal Historic Preservation Officers to ensure that adequate baseline information is prepared for each group of historic properties, cultural landscapes and traditional cultural properties associated with each alternative.

OEA response: As noted above, the Draft EIS will set forth each alternative analyzed and will make a comparative assessment of each alternative's effects on the environmental disciplines required under NEPA and the National Historic Preservation Act (including the No Action

alternative). For impacts to historic and tribal sites of significance, we conducted extensive surveys in 2013 and 2014 and set forth the data collected during those surveys (with the exception of specifics regarding confidential tribal data). The consulting parties, as well as members of the public and other stakeholders, will have the opportunity to comment on the EIS and the draft PA, which will be made available to the public in the Draft EIS. Comments received from the consulting parties and others will inform the Board's consideration of the preferred alternative.

Moreover, clauses addressing coordination with the Montana SHPO and the Tribal Historic Preservation Officers and the consulting parties' ability to comment on the alternatives were added to the draft PA distributed on September 26, 2014 (Section II, Review of Alternatives) and to subsequent drafts (October 17 Draft (Whereas clauses, Section I, Roles and Responsibilities, Section II, Review of Alternatives); November 10, Draft (Whereas clauses, Section I, Roles and Responsibilities, Section II, Review of Alternatives, Section III, Area of Potential Effects)).

Data Recovery Plan

ACHP guidance: Other treatment options, in addition to data recovery, should be consulted upon and considered in cases in which avoidance of adverse effects is not feasible. This is particularly important when properties of religious and cultural significance to Indian tribes are involved. Other treatment options should be outlined in the draft PA. Also, any archeological data recovery plan should have a public benefit that is explained. How would data recovery plans benefit the State, Region, and Tribes?

OEA response: Under Section VI, Subsection B, a new Part 5 has been added:

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 historian, archaeologists and tribal members for sites of significance during construction.

We will discuss this language with the working group and then share it with all the Section 106 consulting parties to ensure that it addresses the concerns raised. The draft PA requires that the consulting parties see the treatment plan(s) in draft form and have the opportunity to comment on the plans. We understand that data recovery is a treatment, albeit not a preferred one, and, therefore, the term "data recovery" is no longer used in the provisions discussing the treatment plan(s). As you are aware, the working group is moving through the PA one section at a time starting from the beginning with the Whereas clauses. This is why clauses addressing treatment when adverse effects are not avoidable has not been addressed in the drafts already circulated to the working group.

Construction

ACHP guidance: A stipulation needs to be added that makes it clear that good faith consultation will occur for the No Action alternative. Stipulations should be added to be precise about how construction management, staging areas, use of Tribal monitors, etc., will be determined for the preferred alternative, and what consulting parties will be involved in this decision making.

OEA response: Under Section II, "Review of Alternatives," OEA added the No Action alternative at the beginning of the list of alternatives under consideration. Under NEPA, OEA is conducting a

comparative analysis of 10 alternatives (5 build alternatives with variations yielding a total of 10 alternatives) and the No Action alternative. As noted above, the consulting parties, as well as members of the public and other stakeholders, will have the opportunity to comment on the draft EIS and the draft PA, which will be made available to the public in the Draft EIS. Comments received from the consulting parties and others will inform the STB's consideration of the preferred alternative.

Details such as construction management, staging areas, and the use of Tribal monitors will be set forth in the treatment plan(s) once the STB has made a decision. If the STB should deny TRRC's proposed rail line construction and operation or approve the No Action alternative, then there will be no need for the development of the treatment plan(s). If the STB should approve a specific build alternative, construction would be able to proceed, but only after development and agreement on the treatment plan(s).

Emergency Situations

ACHP guidance: ACHP encourages OEA to add a new section related to emergency situations. This provision should be developed with the consulting parties so that it addresses the concerns of the residents in the project area and provides for contingencies, as appropriate.

OEA action: OEA has added this topic to the next working group call to be held on Dec. 5 and the Section 106 consulting party call on Dec. 8. In preparation for those two conference calls, we have developed draft language concerning inadvertent discovery of tribal sites of significance, cultural resources and human remains. Again, this topic has not been previously discussed because each comment and issue must be addressed in turn and not all can be addressed at once.

Dispute Resolution

ACHP guidance: This stipulation as it is currently drafted allows "any party to this PA" to object. Does this mean that all consulting parties can file objections? Are objections during the alternative analysis to be handled differently from objections during project implementation? This stipulation needs to be revised.

OEA response: Again, revisions relating to this comment have not yet been made to the PA because it is a topic that was identified as being on the agenda for the two upcoming meetings. Therefore, while the issue has not yet been explicitly addressed, OEA fully plans to address this issue raised by ACHP.

Tribal Coordination

ACHP guidance: This stipulation should recognize that there may be a need to amend tribal protocols if new tribal leadership is elected and proposes a different approach to coordinating the undertaking. To address this potential change to approved tribal protocols, we recommend that language be included in the PA that recognizes the need for amendments to the ID Plan.

OEA response: Revisions relating to this comment have not yet been made to the PA because it is a topic that was identified as being on the agenda for the two upcoming meetings. Therefore, while the issue has not yet been explicitly addressed, OEA fully plans to address this issue raised by ACHP.

Public Participation

ACHP guidance: Language should be included in the stipulations section allowing the public to file objections regarding the implementation of the terms of the PA. While filing reports is helpful, it is unclear what steps should be taken if the public wants to file objections to the actions, findings, or determinations that are required under the terms of the PA.

OEA response: Provisions addressing public participation were added to the draft PA (and are addressed above) and further revisions relating to this comment have not yet been made to the PA because it is a topic that was identified as being on the agenda for the two upcoming meetings.

Confidentiality

ACHP guidance and OEA response: In your October 30, 2014 letter, you added one new topic for our consideration: our duty to keep the location of sites of religious importance to tribes confidential. We received a letter in October 2014 from Carrie LaSeur, attorney for the Colstrip Alternative Landowners. Ms. LaSeur described in general terms the location of a site discovered during the fall surveys. With Ms. LaSeur's approval, we redacted sensitive information from that letter and posted it to the Board's website under Environmental Correspondence, consistent with our practice. During a subsequent conference call with the Section 106 consulting parties, one of our consultants at ICF mentioned the name of the ranch where the site is located. The information relating to the relevant landowner is in Ms. LaSeur's letter and was not redacted. No confidential information was revealed during the conference call. We take our duty to keep sensitive information confidential with the utmost seriousness.

I hope the information set forth in this letter assures you that OEA values ACHP's guidance and is taking appropriate action in working with our Section 106 consulting parties in developing the draft PA. If you still have questions or concerns, please do not hesitate to contact me at 202-245-0295 or Catherine Nadals of my staff at 202-245-0293 (nadalsc@stb.dot.gov). I am grateful for your guidance on our Section 106 compliance. I look forward to our continued consultations with ACHP and our Section 106 consulting parties as we continue with the Section 106 process for the TRRC Proposal.

Sincerely,

A handwritten signature in black ink, appearing to read "Victoria Rutson". The signature is fluid and cursive, with a large initial "V" and "R".

Victoria Rutson
Director
Office of Environmental Analysis

cc: Najah Duvall-Gabriel

Encls.

Draft PA with "bubble comments"
Draft ACHP PA communications matrix

ACHP PA Communications Matrix for Tongue River Railroad Project (FD 30186)

Date	Type	Parties	Summary of Communication	Links
12/10/2012	Letter	OEA to ACHP	Letter inviting ACHP to participate in Section 106 process for the proposed Tongue River Railroad undertaking. The letter referenced the Board's intention to execute a Programmatic Agreement (PA) for the project.	Letter - EO-2002
4/16/2013 4/18/2013	Meeting on the Northern Cheyenne Reservation	Hosted by Northern Cheyenne Tribe – attended by OEA and consulting parties	The meeting agenda, sent via email prior to the meeting, included a draft methodology indicating that phased identification of historic properties would be completed pursuant to 800.4(b)(2) (Link - EO-2080). During the meeting, OEA and ICF affirmed the need to complete a PA (see pages 26, 74-75 and 88-89 of transcript text).	Day 1 Transcript, EI-20582a Day 2 Transcript, EI-20582b
5/23/2013	Phone call	Call between Stan Wilmoth, MT SHPO, ICF Staff	Stan Wilmoth spoke with ICF staff and agreed that a phased approach for developing a PA was appropriate for the project. He said he wanted a PA before the NEPA ROD.	Notes - EO 2380
10/28/2013	Phone Call	Call among OEA, ICF, ACHP and MT SHPO	Purpose of the call was to discuss the TRRC Project including plans for the development of a PA. The call was requested by ACHP. OEA sent an invitation for the call to Najah Duvall-Gabriel on 10/21/2013 that included a copy of OEAs 12/10/12 letter to ACHP. It includes a review of the participation of 13 tribes in the field work completed along each of the 10 alternatives under consideration by the Board.	10/21/2013 Call invitation from OEA to Najah Duvall-Gabriel - EO-2177
2/13/2014 2/14/2014	Two-Day Section 106 Meeting in Billings, MT	Section 106 Consulting Parties, OEA Staff, ACHP, ICF, tribes, MT SHPO. Sign-In Sheets EO-20181	During the meeting, Catherine Nadals explained the need for OEA to complete a PA. Immediately following the meeting, a small group of participants began working on modifying the Tongue River III PA from 2011 to create a new PA.	Transcript - 2/13/14 , Transcript - 2/14/14
3/10/2014	Monthly Section 106 conference call	Section 106 Consulting Parties (see notes for list of callers)	During the call, Charlene Dwin Vaughn suggested mitigation, phased identification and evaluation, analysis of alternatives, public participation strategy, use of NEPA process for public participation, confidentiality concerns, and natural or cultural landscapes as topics to address in a PA.	Transcript - EO-2374

ACHP PA Communications Matrix for Tongue River Railroad Project (FD 30186)

Date	Type	Parties	Summary of Communication	Links
4/09/2014	Monthly Section 106 call invitation	OEA to Section 106 Consulting Parties (see notes for list of callers)	Meeting invitation included a PA Justification Statement requested by Charlene Dwin Vaughn during the March 2014 Section 106 call.	Call invitation - EO-2373
4/14/2014	Monthly Section 106 conference call	OEA to Section 106 Consulting Parties (see notes for list of callers)	Vicki Ruston discussed the PA Justification Statement attached to the meeting invitation. She explained the Board's intention to develop a PA using a phased approach allowable under the Section 106 regulations and as described in the statement.	Transcript – EO-2382
4/25/2014	Letter with attachments	Victoria Rutson to Charlene Dwin Vaughn copied to Najah Duvall-Gabriel	Letter notifying the ACHP of OEAs intention to complete a PA. Letter included the following attachments: PA Justification Statement, Summary of Section 106 Process, March 12, 2014 letter to SHPO, and map of alternatives.	Letter with Attachments - EO-2387
5/29/2104	E-mail Invitation to monthly Section 106 conference call	OEA to Section 106 Consulting Parties (see notes for list of callers)	Email included 5/29/2014 draft of “whereas clauses” based on comments of consulting parties and tribes who attended February meeting in Billings, MT.	Meeting Invitation EO-2270 Draft “Whereas Clauses” EO-2383
6/09/2014	Monthly Section 106 conference call	Section 106 Consulting Parties (see notes for list of callers)	Purpose of teleconference was to discuss the draft “whereas clauses” (see EO-2383). Edits from the ACHP, National Trust and others were then incorporated into the clauses.	Transcript - EO-2384
7/14/2014	Monthly Section 106 conference call	Section 106 Consulting Parties (see notes for list of callers)	Richard Starzak noted that a PA would allow for a phased identification and evaluation process for sites along any licensed alternative.	Transcript - EO-2385
8/04/2014	Email Invitation to monthly Section 106 conference call	OEA to Section 106 Consulting Parties (see notes for list of callers)	Invitation included 7/31/2014 draft “whereas clauses” revised based on comments made during the July monthly call and subsequent comments from the MT SHPO, ACHP, NTHP and applicant.	E-mail - EO-2377
8/11/2014	Monthly Section 106 conference call	Section 106 Consulting Parties (see notes for list of callers)	Discussion of “whereas clauses” and stipulations. During the call, Betsy Merritt of the National Trust said OEA needed to include language in the PA indicating that consulting parties could weigh in on their choice of 10 alternatives. Ms. Nadals agreed and sent Ms. Merritt example language that she accepted (see EO-2393)	Transcript - EO-2390 Updated Whereas Clauses see EO-2377

ACHP PA Communications Matrix for Tongue River Railroad Project (FD 30186)

Date	Type	Parties	Summary of Communication	Links
8/28/2014	E-mail	ICF to Consulting Parties	E-mail was sent as a follow-up to 8/11/2014 call and Included a table showing relationship between NEPA and 106 processes, and the draft PA stipulations.	E-mail - EO-2392
9/3/2014	Letter	ACHP to OEA	Recommendations from ACHP regarding the draft PA	Letter - EI-20520
9/8/2014	E-mail Invitation to monthly Section 106 conference call	OEA to Section 106 Consulting Parties (see notes for list of callers)	Invitation included NEPA/Section 106 coordination table, and 8/28/2014 draft stipulations.	E-mail - EO-2394
9/8/2014	Monthly Section 106 conference call	Section 106 Consulting Parties (see notes for list of callers)	Richard Starzak explained how the stipulations would be updated based on comments received from the ACHP. He asked the consulting parties to review the stipulations and reviewed the process that had been set up to complete work on the PA (identification, evaluation, effect assessment and treatments).	Transcript - EO-2396
9/8/2014	Letter	ACHP to OEA	Recommendations from ACHP regarding the draft PA (all recommendations were subsequently acted upon and included in future versions of the draft PA).	Letter - EI-20518
9/26/2014	E-mail invitation to Section 106 Working Group	ICF to Working Group	Invitation included the PA draft with ACHP recommendations included in its 9/8/2014 letter to OEA inserted in draft. Attachments also included a PA completion timeline and September 8, 2014 letter from ACHP in which it requested changes to the PA.	E-mail - EO-2395
10/20/2014	Monthly Section 106 conference call	Section 106 Consulting Parties (see notes for list of callers)	Ms. Duvall-Gabriel stated that OEA should address the PA comments as they are being drafted. Ms. Rutson agreed and said she would develop a tracking matrix of consulting party comments and responses.	Transcript - EO-2370
10/30/2014	Letter	ACHP to OEA	Recommendations from ACHP regarding the draft PA	Letter - EI-20571
11/4/2014	E-mail	OEA to ACHP	Catherine Nadals emailed Charlene Dwin Vaughn to request her and/or Najah's participation during the next PA working group call on 11/7/2014.	E-mail - EO-2372

ACHP PA Communications Matrix for Tongue River Railroad Project (FD 30186)

Date	Type	Parties	Summary of Communication	Links
11/7/2014	Working Group Discussion	Najah Duvall-Gabriel, Betsy Merritt, David Coburn, Stan Wilmoth, Conrad Fisher, Ben Rhodd, Catherine Nadals, Rick Starzak	During the call, Najah Duvall-Gabriel explained that the draft PA circulated by OEA was not a “process PA.” She stated that such a PA (or MOA) requires the completion of two documents: one before the ROD is signed to govern consultation up to that point and another to stipulate actions taken following the Board’s decision. The call ended with the following agreed follow-up: OEA would distribute PA examples previously sent by ACHP; Najah Duvall-Gabriel agreed to send specific language to improve the draft PA; Najah Duvall-Gabriel agreed to continue working with the PA working group; OEA agreed to send around the NEPA/106 coordination table it completed and previously sent to consulting parties 8/28/2014 and 9/8/2014.	
11/10/2014	E-mail	ICF to Consulting Parties	Richard Starzak emailed the working group with a brief discussion of the stipulations along with: 9/8/2014 ACHP letter, two BLM example templates for PAs sent by Najah Duvall-Gabriel of ACHP (Boardman to Hemingway and Gateway West PAs), and the consolidated draft PA that was distributed to consulting parties on 11/10/14.	E-mail - EO-2389
11/17/2014	Letter with attachments	OEA to MT SHPO copied to Charlene Dwin Vaughn and Najah Duvall-Gabriel	Letter includes summary of field work conducted along all 10 alternatives with maps, tables of resources identified, percentages of alternatives surveyed, list of tribal participants and table of tribal resource identified.	Letter - EO-2403

**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,

Comment [SR1]: Per ACHP's 9/08/2014 letter: "The draft PA starts with the assumption that an alignment will be chosen. The ACHP has previously advised the STB that it may be premature to make this assumption. Given STB's ability to recommend a "no-build" option, we need to recognize that this option could be selected as the "preferred alternative."

Comment [SR2]: Clause added per NTHP comment

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

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

8 **WHEREAS**, the effects on historic properties and tribal sites of significance cannot be fully
9 determined prior to any decision approval on the TRRC project by the STB, and therefore a
10 programmatic agreement (PA) is appropriate pursuant to the Section 106 regulations at 36 CFR §
11 800.14(b)(1)(ii); and,

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

15 **WHEREAS**, the STB may or may not approve construction and operation of the TRRC rail line,
16 the STB developed this PA to defer final identification and evaluation of historic properties
17 pursuant to 36 CFR § 800.4(b)(2), to phase the application of the criteria of adverse effect
18 pursuant to 36 CFR § 800.5(a)(3), and to continue consultation to avoid, minimize and mitigate
19 the potential adverse effects of the Undertaking to historic properties and tribal sites of
20 significance in accordance with 36 CFR § 800.6(a); and,

21 **WHEREAS**, pursuant to 36 CFR § 800.4(b)(2) and 36 CFR § 800.5(a)(3), the STB, through the
22 phased identification, evaluation and effect assessment, has established the likely presence of
23 historic properties and tribal sites of significance within the area of potential effects (APE) for
24 each alternative or inaccessible area through background research, consultation and the
25 appropriate level of field investigation, taking into account the number of alternatives under
26 consideration, the magnitude of the undertaking and its likely effects, and the views of the
27 consulting parties; and,

28 **WHEREAS**, upon approval of the project, the STB would develop a treatment plan as an
29 amendment to this PA that would outline the specific measures that would be implemented to
30 resolve adverse effects to historic properties and tribal sites of significance for any approved
31 alternative; and,

32 **WHEREAS**, this PA was developed in consultation with the Advisory Council on Historic
33 Preservation (ACHP) and the Montana State Historic Preservation Officer (SHPO) pursuant to
34 36 CFR § 800.6, who are signatories to this PA; and,

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

Comment [SR3]: 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)..."

Comment [SR4]: 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 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."

Comment [SR5]: 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."

1
2 **WHEREAS**, the Montana Department of Natural Resources and Conservation (MT DNRC)
3 (acting as lead agency for all Montana State agencies, including the Montana Department of
4 Transportation (MDOT)) is a cooperating agency and signatory to this PA; and,

5
6 **WHEREAS**, the MDOT has the responsibility for complying with Section 4(f) of the
7 Department of Transportation Act where applicable; and,

8
9 **WHEREAS**, the TRRC, the project applicant, is a signatory to this PA; and,

10
11 **WHEREAS**, the STB has consulted by letter, email, monthly teleconferences, and meetings with
12 the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana; the Crow
13 Tribe of Montana; the Crow Creek Sioux Tribe of the Crow Creek Reservation, South Dakota;
14 the Lower Brule Sioux Tribe of the Lower Brule Reservation, South Dakota; the Standing Rock
15 Sioux Tribe of North & South Dakota; the Cheyenne River Sioux Tribe of the Cheyenne River
16 Reservation, South Dakota; the Yankton Sioux Tribe of South Dakota; the Sisseton-Wahpeton
17 Oyate of the Lake Traverse Reservation, South Dakota; the Assiniboine and Sioux Tribes of the
18 Fort Peck Indian Reservation, Montana; the Flandreau Santee Sioux Tribe of South Dakota; the
19 Shakopee Mdewakanton Sioux Community of Minnesota; the Rosebud Sioux Tribe of the
20 Rosebud Indian Reservation, South Dakota; the Santee Sioux Nation, Nebraska; the Arapaho
21 Tribe of the Wind River Reservation, Wyoming; Three Affiliated Tribes of the Fort Berthold
22 Reservation, North Dakota; the Cheyenne and Arapaho Tribes, Oklahoma; the Fort Belknap
23 Indian Community of the Fort Belknap Reservation of Montana; the Oglala Sioux Tribe, the
24 Shoshone Tribe of the Wind River Reservation, Wyoming; and the Spirit Lake Sioux Tribe,
25 North Dakota concerning properties of traditional religious and cultural significance, ~~and who~~
26 have been invited to participate in the development of the PA as concurring parties, and who are
27 hereafter referred to as *consulting tribes*; and,

28
29 **WHEREAS**, the STB has contacted the Lower Sioux Indian Community in the State of
30 Minnesota; the Upper Sioux Community, Minnesota; and the Blackfeet Tribe of the Blackfeet
31 Indian Reservation of Montana by letter, email and phone, and invited them to participate as
32 consulting parties in the development of this PA, however each of these tribes has either not
33 responded to STB's invitation or declined to participate in the development of this PA; and,

34
35 **WHEREAS**, other consulting parties, including the Colstrip Alternative Landowners Group, Fix
36 Ranch, National Trust for Historic Preservation (NTHP), Montana Preservation Alliance (MPA),
37 National Wildlife Federation (NWF), Northern Cheyenne Otter Creek Descendants (NCOCD),
38 Northern Plains Resource Council (NPRC), Rocker Six Cattle Company (RSCC), and the Sierra
39 Club have been invited, in accordance with 36 C.F.R. § 800.6(c)(3), to participate in the
40 development of the PA as concurring parties; and,

41
42 **WHEREAS**, the Wolf Mountains Battlefield, a property located within the view shed of the
43 Decker Alternative, was designated a National Historic Landmark (NHL) on October 6, 2008;
44 and,
45

Comment [SR6]: Per TRRC request to identify consulting tribes

Comment [MS7]: The Colstrip Alternative Landowner Group letter dated 11/4/14, requested that OEA "Please clarify legal significance – if any – of 'concurring' versus 'consulting' parties."

Comment [SR8]: Added regulatory citation to address comment. Note: § 800.2(c) describes "consulting parties", § 800.6(c)(3) discusses consulting parties who are invited to concur in an agreement, and § 800.14(b)(3) says consultation to develop a PA for a complex project shall follow § 800.6.

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

3
4 **WHEREAS**, given the designation of the Wolf Mountains Battlefield as an NHL, the STB must
5 adhere to Section 110(f) of the NHPA and Section 800.19 of the ACHP's regulations, which and
6 requires a higher consideration of alternatives to minimize harm to the NHL and has invited the
7 U.S. Department of Interior, National Park Service, National Landmarks Program (NLP), and the
8 NLP has agreed, to participate in consultation and invited to be a concurring party in the
9 development of this PA; and,

Comment [SR9]: Clause added per
09/08/2014 ACHP letter.

10
11 **WHEREAS**, the signatory and concurring parties to this PA are hereafter collectively referred to
12 as *PA consulting parties*; and,

13
14 **WHEREAS**, TRRC, the applicant, would not be required to act under the terms of this PA
15 unless or until the STB authorizes the construction and operation of a new rail line; and,

16
17 **WHEREAS**, the TRRC project's Area of Potential Effects (APE), as defined at 36 CFR §
18 800.16(d), is outlined and identified in the Identification Plan (ID Plan), Attachment B of this
19 PA; and,

20
21 **WHEREAS**, the definitions of 36 CFR Part 800 and the definitions and acronyms in Attachment
22 C are applicable throughout this PA and any attachments to this PA; and,

23
24 **WHEREAS**, the PA consulting parties have considered requirements of NHPA, the American
25 Indian Religious Freedom Act, 42 U.S.C. 1996 et. seq. (AIRFA), the Native American Graves
26 Protection and Repatriation Act, 25 U.S.C. 3001 et. seq. (NAGPRA), Executive Order 13007 –
27 Indian Sacred Sites, Executive Order 13175 – Consultation and Coordination with Indian Tribal
28 Governments, the Archaeological Resources Protection Act of 1979 (ARPA) and Section 4(f) of
29 the Department of Transportation Act (49 U.S.C. 303) where applicable in the course of
30 consultation; and,

31
32 **WHEREAS**, in 2013 and 2014, the STB conducted a SHPO records search for previously
33 recorded archaeological and historic sites, for a one-mile area on either side of the proposed
34 right-of-way of the five build alternative routes, and variations, being considered for the TRRC
35 project under NEPA; and,

36
37 **WHEREAS**, in 2013 and 2014, the STB conducted pedestrian transect surveys by tribal
38 members, contracting archeologists, historians and architectural historians along portions of each
39 of the alternatives considered under NEPA; and,

40
41 **WHEREAS**, the STB has been advised by some consulting parties, including tribal members
42 and ranchers, that the Tongue River Valley is an area of rich cultural heritage; and,

43
44 **WHEREAS**, the STB in collaboration with the ACHP, SHPO and consulting parties, will
45 include specific mitigation in its treatment plan to resolve project related adverse effects within
46 the APE for any licensed alternative; and,

1
2 **WHEREAS**, all the data gathered under the terms of this PA will be made available to
3 consulting tribes to inform any future undertakings that may take place in the Tongue River
4 Valley; and,

5
6 **WHEREAS**, the ID Plan in Attachment B requires that TRRC complete Phase I and Phase II
7 surveys as defined in Attachment C and the ID Plan for the entire line approved by the STB in
8 order to take into account any potential adverse effects to historic properties and tribal sites of
9 significance; and,

10
11 **WHEREAS**, the STB will use an independent third-party contractor, working under its sole
12 supervision, direction and control, and at TRRC's expense, to assist STB in implementing the
13 Stipulations below; and,

14
15 **NOW, THEREFORE**, the signatories to this PA agree that the proposed TRRC project will be
16 implemented in accordance with the following stipulations in order to take into account the
17 effects of the TRRC project on historic properties and sites of significance.

18
19
20 **Definitions** [to be developed and added to the acronyms listed in Attachment C]
21

- 22 • *Phase I*
- 23
- 24 • *Phase II*
- 25
- 26 • *The Tongue River Railroad Company, Inc.*
- 27
- 28 • *Tribal Sites of Significance*
- 29

30 Other definitions
31
32
33
34

Comment [MS10]: 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.
- 2-3. Montana DOT-note any special responsibilities responsibility for alternatives 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.)
- 3-4. 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. [Text inserted per Stan Wilmoth's comment, but not yet reviewed by WG]: In 2013 to 2014, participating tribes were consulted during initial identification efforts, participated in sample

Comment [MS11]: 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?"

Comment [SR12]: 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."

Comment [rs13]: 9/26/2014 WG Session. 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 (TRRC), 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 ... [1]"

Comment [MS14]: Doug Melton's recommended language for BLM Roles and Responsibilities.

Comment [MS15]: 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 ... [2]"

Comment [SR16]: TBD: Role and responsibility requested from USDA-ARS.

Comment [SR17]: Stan Wilmoth commented: In answer to Conrad's concern what [about] in role in Stip II "Tribes will be consulted during initial ID efforts and participate in sample field ID efforts and will formally be requested to comment on a proposed PA, Draft EIS and [alternatives, eligibility and effects] at (what time or ... [3]"

field identification efforts and in the development of this PA. During circulation of the Draft EIS in 2015, tribes were requested to comment on the Draft EIS, which included an analysis of the alternatives being considered, potential eligibility, and effects. Circle back to ACHP that they do not anticipate below ground surveys.] Tribes will adhere to the time frames in the stipulations.

Comment [SR18]: 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

- 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).
- 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.
- 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 Lane Deer, Montana on April 16-18, 2013, and in Billings, Montana on

Comment [rs19]: (9/26/2014 WG session.) 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."

Comment [MS20]: 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

Comment [rs21]: This section II.C. 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 SECTION D. and STIPULATIONS III AND HIGHER] 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."

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.tonguerivereis.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.

Comment [MS22]: 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."

Comment [MS23]: 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. ~~STB limited the~~ APE for built resources (historic buildings, structures, objects, and districts) ~~to the~~ 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~~ will defined and documented the APE based on the vertical and horizontal direct effects, indirect, and cumulative effects ~~in the event the for any~~ STB approves a 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 ~~Sensitive sites~~ outside the field survey areas but within the line of sight of the proposed railroad including ~~line of sight~~ water resources, sacred and ceremonial sites, areas where traditional plant-s are located life, and association-associated features, will be included ~~should also be considered for inclusion~~ in the APE for indirect effects. If a build alternative is approved, consultation with the STB will consult with the MT SHPO, tribes and other consulting parties will be undertaken to determine if there are to identify any locations where the APE should be extended beyond the buffer zones beyond the

Comment [SR24]: 10/10/2014 WG session

Comment [ADS25]: 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.

Comment [MS26]: Cathy Nadals: We need to define the vertical limits as well.

Comment [MS27]: Cathy Nadals: “Undertaking” capitalized in places below.

Comment [MS28]: Cathy Nadals: We need to consider a vertical APE as well. How deep?

From Rick--Per the ACHP 2009 guidance, suggest something like: 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.

Comment [MS29]: Per 9/30/2104 comment letter from Baumstark Braaten Law Partners-Colstrip Alternative Landowners Group: “The language of this stipulation represents the first notice the Landowners have had that there are plans for staging areas or work camps. Such facilities represent many potential impacts that have not yet been considered at all in the planning process, such as damage to roads and other infrastructure, and law enforcement ... [4]

Comment [MS30]: Cathy Nadals: suggested 50 feet below

From Rick: As alternative, see ACHP guidance above.

Comment [MS31]: Cathy Nadals: Capitalized

Comment [rs32]: From 2/2014 CP meeting

Comment [DC33]: This sentence is very broad and seems unnecessary given the prior sentence.

~~right-of-way~~ 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 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. 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.] []

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-~~APE for~~ 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, which encompassed completed for areas one-a mile away from each of the alternatives (2 miles total), also assisted 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 ~~resource experts~~ 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

Comment [SR34]: 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

Comment [SR35]: 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 modified.” [5]

Comment [SR36]: Colstrip Alternative Landowners Group letter dated 9/30/2014: Many of the Landowners have long family relationships with the land to be crossed and personal knowledge of historically and culturally significant sites that may be affected by the rail line. Most have had little or no opportunity to share this information. Th... [6]

Comment [SR37]: For WG consideration, suggest replacing with: “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...”

Comment [SR38]: Based on PA working group comments, 10/10/2014, a summary of the records search and literature search would be included as an attachment to the draft PA. This information was included in the letter to SHPO dated 03/12/2014.

Comment [SR39]: Based on PA working group comments, 10/10/2014, a summary of the field survey results, including the sessions from 2014, would be included as an attachment to the draft PA. The next letter to the MT SHPO would include a summary of the field results.

Comment [SR40]: ACHP in their letter dated 9/08/2014: “The draft PA starts with the assumption that an alignment will be chosen. The ACHP has previously advised the STB that it may be premature to make this assumption. Given STB’s ability to recommend a “no-build” option, we need to recognize that this option could be select... [7]

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

a.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. 44716-44742, September 29, 1983 and 48 C.F.R §§ 44720-44723, 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, 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, tribal members 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. Tribal Members Consulting Tribes are not required need not to 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) 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 reimbursement¹ for professional services provided by the designated consulting tribes, tribal members(s);

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.

Comment [MS41]: NTHP asked to check this citation for 1983 and sent the published draft standards from 1997 to be added to the citation.

Comment [SR42]: Added to address 9/30/2014 comment from Colstrip Landowners Group that the ID plan obtain more information from landowners.

Comment [MS43]: Rick Starzak: Per applicant during 10/10/2014 call, define which Tribal Members would participate.

Comment [SR44]: Per applicant during 10/10/2014 call, define which Tribal Members would participate.

Per OEA, tribal members should be defined in the WHEREAS clauses.

Comment [SR45]: Added per Standing Rock Sioux during 10/10/2014 call.

Comment [MS46]: 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.

Comment [SR47]: Per 10/10/2014 PA Working Group call, add that Tribal Members are not required to meet Secretary's Standards mentioned above.

Comment [MS48]: 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.

Comment [SR49]: 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."

¹ 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).

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. 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 Testing and 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 will seek to reach concurrence 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 determine whether or not the eligibility of tribal sites of significance as these may or may not 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.

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

Comment [SR50]: 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 also request an automatic extension period of at least 15 days on any deadline named in the PA, if requested in writing by one of the interested parties, and reasonable financial reimbursement for the Landowners' time required to review reports, or if deemed necessary by the Landowners, reasonable financial reimbursement for a qualified expert approved by the Landowners to assist them with this review."

Comment [SR51]: David Coburn, representing TRRR, suggested the time frame be reduced from 45 to 30 days.

Comment [DC52]: We see no point in doing a Phase II evaluation if the railroad can avoid the site.

Comment [DC53]: This term was defined above.

Comment [DC54]: 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.

1 National Register. STB will direct the Contractor to make any required revisions and finalize the
2 Phase II Evaluation Report per the ID Plan.

3 ~~7. Within 15 days of receipt of a final Phase II Evaluation Report from the Contractor, STB will~~
4 ~~send approved Final Phase II Evaluation Reports to the PA consulting parties.~~

5 ~~The PA Consulting Parties will have 15 days to provide any final comments to the STB.~~

Comment [DC55]: See prior comment.

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

(3. IDENTIFICATION AND EVALUATION)

[For WG reference: 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 alternative route and only when tribal members 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 the National Register as a traditional cultural property,² 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.

Ref: end of remnants from Identification Plan attached to 2011 Draft PA

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

Comment [MCR56]: This is out of order, but in the interests of light editing, is left in place.

Comment [rs57]: This phrase was added to include the areas where the survey 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.

V. **ASSESSMENT OF EFFECTS**

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 sensitivity-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 sensitivity information that could be located within the total build alternative. The probability of tribal sites of significance located within 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.

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:

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.D. ~~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~~

Comment [SR58]: (10/24/2014 session, still in progress)

Comment [MS59]: Define in glossary

Comment [SR60]: The WG asked that the comment received from Lana Gravatt of the Yankton Sioux be added when we were discussion this subsection, but Lana's comments were about the WHEREAS clauses, so they appear there.

Comment [MS61]: Per 11/7/2014 Working Group meeting: Will include an attachment of surveyed sites located in the right-of-way and the Buffer Area.

Comment [MS62]: Betsy Merritt asked for a different term than sensitivity

Comment [MS63]: Use the terms that we use: -eligible -listed tribal sites of significance.

Comment [MS64]: Conrad Fisher asked to specify that tribal resources weren't considered in the sensitivity model. Stan Wilmoth: wanted definition of sensitivity model

Comment [MS65]: Define term in glossary and clarify in whereas clause. Came from David Coburn. Betsy Merritt and Stan Wilmoth both spoke on this matter.

Comment [SR66]: Sections C-H of this stipulation V. have been added to follow the format of the Boardman to Hemingway PA provided by the ACHP as a template for a "process PA".

Comment [SR67]: Stan Wilmoth asks: How about a statement here describing what document and when it will be released (either by date or in milestone order or something) that will ID the preferred PA, the finding of effect and if applicable the Board decision to license what Alt.

In answer to Conrad's concern what [about] in role in Stip II "Tribes will be consulted during initial ID efforts and participate in sample field ID efforts and will formally be requested to comment on a proposed PA, Draft EIS and [alternatives, eligibility and effects] at (what time or step...Spring 2015 for Draft EIS, When for Draft PA, Etc.

[WG to review text added to Stipulation II per Stan's comment.]

~~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).~~

Comment [SR68]: Per Betsy Merritt's request during the 11/7/14 WG meeting, this subsection was moved to the beginning of Stipulation VI.

F.E. 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.F. 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.G. Disagreement regarding assessments of effect will be handled according to the procedures established in Stipulation (TBD).

VI. ~~TREATMENT PLANS~~RESOLUTION OF ADVERSE EFFECTS

Comment [MS69]: Per Betsy Merritt's and Najah Gabriel's request during the 11/7/14 Working Group meeting, Stipulation VI was renamed to be more consistent with the four step process.

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 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).~~

Comment [SR70]: This Stipulation based on the 2011 PA.

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.

1
2 **B. Development of the Treatment Plan(s)**
3

- 4 1. The STB will ensure that the Contractor prepares a Treatment Plan(s) that will address
5 the adverse effects of the proposed Undertaking on historic properties, including direct
6 and indirect impacts (visual, noise, aesthetic, etc.). A separate Treatment Plan will be
7 developed for the Wolf Mountains Battlefield NHL if the Decker Alternative is approved;
8 and one or more Treatment Plans may be prepared for other sections of the APE affected
9 by the Undertaking. A Treatment Plan may be prepared for a portion of the line provided
10 that the Phase I ID Report for that portion has been completed and approved in
11 accordance with Stipulation IV. Each Treatment Plan will be amended, if necessary, after
12 the finalization of any supplemental Phase II Evaluation Report(s).
13
- 14 2. Each Treatment Plan will do the following:
15
16 a. identify tribal sites of significance and National Register-eligible historic properties in
17 the APE or portion thereof;
18
19 b. identify the nature of the effects to which each property will be subjected; and
20
21 c. identify the treatment strategies proposed to avoid, minimize or mitigate the effects of
22 the Undertaking on the historic properties.
23
- 24 3. Each Treatment Plan will incorporate, to the extent feasible, measures identified by tribal
25 representatives to resolve adverse effects to properties significant for their traditional
26 cultural values and, if possible, the protection and continuing access to gathering sites of
27 traditionally-important plants. If appropriate, TRRC may attempt to negotiate tribal
28 access to public or private lands that are not currently accessible to tribes for plant
29 gathering purposes. The Treatment Plan(s) will conform to the principles of the Council's
30 Treatment of Archaeological Properties: A Handbook, Parts I and II, the "Secretary of the
31 Interior's Standards and Guidelines for Archaeology and Historic Preservation" (48 Fed.
32 Reg. pp. 44716-44742), and appropriate MT SHPO guidelines. Each finalized Treatment
33 Plan will be implemented by TRRC prior to the onset of construction activities.
34
- 35 4. Each Treatment Plan will examine the feasibility of avoiding National Register-listed or -
36 eligible historic properties, or tribal sites of significance. These measures may include
37 modifications to the rail alignment, to the extent feasible, to avoid adverse impacts.
38
- 39 5. If avoidance is not possible, in-place preservation will be the preferred option. TRRC will
40 work with the consulting parties to develop specific procedures to preserve historic
41 properties and sites of significance in-place and minimize visual and noise impacts to
42 such resources as well as impacts to tribal, historic and rural landscapes. These
43 procedures may include minor changes to the rail alignment or construction methods, to
44 the extent feasible, to reduce impacts, and/or monitoring of historic properties by
45 historians, archaeologists and tribal members for sites of significance during construction.
46

Comment [SR71]: 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."

C. Finalization of Treatment Plan(s)

1. STB will submit the draft Treatment Plan(s) to the PA consulting parties for review. Within ~~15 days~~ 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.

Comment [SR72]: 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."

Comment [SR73]: Per 9/30/2014 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."

1	[Additional Stipulations in 2011 PA:]
2	VII. <u>Data Recovery Plan</u>
3	VIII. <u>Construction</u>
4	IX. <u>Changes to the Rail Line Alignment/Other Areas Subject to Direct Impacts</u>
5	X. <u>Discovery</u>
6	XI. <u>Human Remains</u>
7	XII. <u>Curation</u>
8	XIII. <u>Emergency Situations</u>
9	XIV. <u>Dispute Resolution</u>
10	XV. <u>Tribal Coordination</u>
11	XVI. <u>Public Participation</u>
12	XVII. <u>Final Report</u>
13	XVIII. <u>Effective Date</u>
14	XIX. <u>Annual Status Report</u>
15	XX. <u>Amendments</u>
16	XXI. <u>Termination</u>
17	XXII. <u>Duration</u>
18	Execution
19	• <u>Signatories</u>
20	• <u>Invited Signatories</u>
21	• <u>Concurring Parties</u>
22	
23	ATTACHMENTS
24	Attachment A-Map of Alternatives
25	Attachment B-Identification Plan (ID Plan).
26	Attachment C-Definitions and Acronyms
27	Attachment D (refer to Stipulation IV.A.-Identification and Evaluation)
28	Phase I Inventory-Literature Search
29	Alternatives Survey Results
30	Table A1 and Map Figure 1 from letter to SHPO dated 11/17/2014
31	(From Stipulation V.A.-Assess Effects)
32	Tables A2 and A3 from letter to SHPO dated 11/17/2014
33	If the Board licenses any alternative, additional attachments would be developed including a
34	Treatment and Mitigation Plan to be developed through consultation for any licensed
35	alternative.]

Comment [SR74]: ACHP 09/08/2014 Data Recovery Plan If avoidance of adverse effects to historic properties is not feasible, we do not believe that it is a forgone conclusion that data recovery the appropriate treatment. There should be some consultation regarding this matter, particularly when properties of religious and cultural significance to Indian tribes are involved. There are other treat...	... [8]
Comment [SR75]: Per 9/30/2014 letter from Baumstark Braaten Law Partners-Colstrip Alternative Landowners Group: Data Recovery Plan	... [9]
Comment [SR76]: ACHP 09-08-2014 Construction We are concerned that we are being asked by STB to provide comments on a build...	... [10]
Comment [SR77]: Per 9/30/2014 letter from Baumstark Braaten Law Partners-Colstrip Alternative Landowners Group: The Landowners are concerned that the...	... [11]
Comment [SR78]: Per 9/30/2014 letter from Baumstark Braaten Law Partners-Colstrip Alternative Landowners Group: Changes to the Rail Line Alignment/	... [12]
Comment [SR79]: Per 9/30/2014 letter from Baumstark Braaten Law Partners-Colstrip Alternative Landowners Group: Discovery	... [13]
Comment [SR80]: Per 9/30/2014 letter from Baumstark Braaten Law Partners-Colstrip Alternative Landowners Group: Curation	... [14]
Comment [SR81]: ACHP 09/08/2014 Emergency Situations We encourage STB to add a new section that is related to emergency situations. Emerg...	... [15]
Comment [SR82]: ACHP 09/08/2014 Dispute Resolution As currently drafted, the stipulation for dispute resolution allows "any party to this PA"	... [16]
Comment [SR83]: Per 9/30/2014 letter from Baumstark Braaten Law Partners-Colstrip Alternative Landowners Group: Dispute Resolution	... [17]
Comment [SR84]: ACHP 09/08/2014 Tribal Coordination This stipulation should recognize that there may be a need to amend tribal protocols	... [18]
Comment [SR85]: ACHP 09/08/2014 Public Participation The STB needs to include in the Stipulations section language that allows the public	... [19]

9/26/2014 WG Session. 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."

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.)

(To be clarified further by MDT)

Stan Wilmoth commented: In answer to Conrad's concern what [about] in role in Stip II "Tribes will be consulted during initial ID efforts and participate in sample field ID efforts and will formally be requested to comment on a proposed PA, Draft EIS and [alternatives, eligibility and effects] at (what time or step...Spring 2015 for Draft EIS, When for Draft PA, Etc.

Per 9/30/2104 comment letter from Baumstark Braaten Law Partners-Colstrip Alternative Landowners Group: "The language of this stipulation represents the first notice the Landowners have had that there are plans for staging areas or work camps. Such facilities represent many potential impacts that have not yet been considered at all in the planning process, such as damage to roads and other infrastructure, and law enforcement needs. We are very concerned that STB would propose to consider these impacts, along with those created by construction access routes and completely unknown "changes to the alignment," after selecting an alternative. These impacts are completely knowable in advance if the agency makes the effort to acquire the information. Again we object to any plan to postpone collection of this vital data until after an alternative is chosen."

"As above, the Landowners will require expert assistance to review the sufficiency and quality of supplemental reports. We request reasonable financial reimbursement for a qualified expert approved by the Landowners to assist them with this review. The Landowners request at least 45 days to provide comments."

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 within 15 days of receipt of such a request. From the date of*

notification, the BLM [change to STB] will consult with the parties to this agreement for no more than 30 days to reach consensus on the proposal.

- 3. If the parties to this agreement cannot agree to a proposal for the modification of the APEs, then the BLM [change to STB] will consider their concerns and will render a final decision within 30 days after the consultation period closes.*
- 4. For all modifications to the APE(s) the BLM [change to STB] will provide a written record of the decision to the parties to this agreement.*
- 5. Amending the APEs will not require an amendment to the PA.*
- 6. [insert On BLM lands], minor changes to the APE during construction of the Undertaking that may require additional fieldwork, regardless of land ownership, may be handled through the BLM ROW grant variance process."*

Page 10: [6] Comment [SR36]

Starzak, Richard

11/3/2014 9:45:00 PM

Colstrip Alternative Landowners Group letter dated 9/30/2014:

Many of the Landowners have long family relationships with the land to be crossed and personal knowledge of historically and culturally significant sites that may be affected by the rail line. Most have had little or no opportunity to share this information. The oral history surveys prescribed in National Register Bulletin 24 have not taken place. There is no barrier to collecting this information immediately. Participants with relevant knowledge should receive reasonable financial reimbursement for their time.

Page 10: [7] Comment [SR40]

Starzak, Richard

10/31/2014 1:41:00 PM

ACHP in their letter dated 9/08/2014: "The draft PA starts with the assumption that an alignment will be chosen. The ACHP has previously advised the STB that it may be premature to make this assumption. Given STB's ability to recommend a "no-build" option, we need to recognize that this option could be selected as the "preferred alternative." 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. 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. To defer involvement of consulting parties in findings and determinations until the preferred alternative is selected would be imprudent. Moreover, it would likely leave STB open to challenges regarding the preferred alternative and questions about whether other alternatives may have avoided adverse effects of concern to consulting parties."

Page 19: [8] Comment [SR74]

Starzak, Richard

11/20/2014 4:36:00 PM

ACHP 09/08/2014

Data Recovery Plan

If avoidance of adverse effects to historic properties is not feasible, we do not believe that it is a forgone conclusion that data recovery the appropriate treatment. There should be some consultation regarding this matter, particularly when properties of religious and cultural significance to Indian tribes are involved. There are other treatment options for National Register eligible and listed archeological sites that can be considered; however, they are not outlined in the draft PA. Further, any archeology data recovery plan should have a public benefit that is explained. How would data recovery plans benefits the State, Region, and Tribes?

Page 19: [9] Comment [SR75]

Starzak, Richard

11/20/2014 4:46:00 PM

Per 9/30/2014 letter from Baumstark Braaten Law Partners-Colstrip Alternative Landowners Group:

Data Recovery Plan

We are concern that subsection (c), regarding the Contractor's duty to conduct data recovery in accordance with the

Data Recovery Plan, includes no timeline and could potentially be delayed indefinitely. We request a clear timeline.

Review of Data Recovery Reports

The 15-day timeline for PA consulting party responses on informational deficiencies is inadequate. To ensure the Landowners' ability to participate meaningfully, the minimum turnaround for their response should be 45 days.

Page 19: [10] Comment [SR76]	Starzak, Richard	11/20/2014 4:36:00 PM
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ACHP 09-08-2014

Construction

We are concerned that we are being asked by STB to provide comments on a build alternative before STB has demonstrated that a no-build alternative is not appropriate. A stipulation needs to be added that makes it clear that good faith consultation will occur for the no build alternative. Perhaps STB should revise this stipulation to make it clear under what circumstances construction will proceed. We also recommend that stipulations be added to be precise about how construction management, staging areas, use of Tribal monitors, etc., will be determined for the preferred alternative, and what consulting parties will be involved in this decision making.

Page 19: [11] Comment [SR77]	Starzak, Richard	11/21/2014 8:04:00 AM
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Per 9/30/2014 letter from Baumstark Braaten Law Partners-Colstrip Alternative Landowners Group:

The Landowners are concerned that the PA contemplates consideration of "the full range of treatment options (including avoidance)" after a route decision has been made. The only way that STB can realistically consider the full range of options is to analyze all the data described in the Stipulations prior to the route decision. In addition, a phased review of data while construction is underway may foreclose options that would have been available prior to construction. As a practical matter, delays and route changes will be far more costly to TRRC during construction, putting additional pressure on the Contractor and STB to set aside serious concerns. For other interested parties, being forced to raise objections during construction creates the risk of being required by a court to post a bond while attempting to have the PA enforced, which the Landowners cannot afford to do. Only a full review of all data *prior to the route decision* will leave all options open and protect all parties' rights.

The Landowners will require expert assistance to review the sufficiency and quality of the Contractor's data recovery fieldwork/treatment on their land. We request reasonable financial reimbursement for a qualified expert approved by the Landowners to assist them with this review.

Page 19: [12] Comment [SR78]	Starzak, Richard	11/21/2014 8:06:00 AM
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Per 9/30/2014 letter from Baumstark Braaten Law Partners-Colstrip Alternative Landowners Group:

Changes to the Rail Line Alignment/Other Areas Subject to Direct Impacts

The language of this stipulation represents the first notice the Landowners have had that there are plans for staging areas or work camps. Such facilities represent many potential impacts that have not yet been considered at all in the planning process, such as damage to roads and other infrastructure, and law enforcement needs. We are very concerned that STB would propose to consider these impacts, along with those created by construction access routes and completely

unknown "changes to the alignment," *after* selecting an alternative. These impacts are completely knowable in advance if the agency makes the effort to acquire the information. Again we object to any plan to postpone collection of this vital data until after an alternative is chosen.

As above, the Landowners will require expert assistance to review the sufficiency and quality of supplemental reports. We request reasonable financial reimbursement for a qualified expert approved by the Landowners to assist them with this review. The Landowners request at least 45 days to provide comments.

Page 19: [13] Comment [SR79]	Starzak, Richard	11/21/2014 8:08:00 AM
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Per 9/30/2014 letter from Baumstark Braaten Law Partners-Colstrip Alternative Landowners Group:

Discovery

The Discovery Plan creates the same need for expert assistance. We request reasonable financial reimbursement for a qualified expert approved by the Landowners to assist them with this review.

Page 19: [14] Comment [SR80]	Starzak, Richard	11/21/2014 8:33:00 AM
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Per 9/30/2014 letter from Baumstark Braaten Law Partners-Colstrip Alternative Landowners Group:

Curation

The Landowners express their preference for preservation in place of all archeological, cultural, and paleontological materials discovered on their property, and their wish to be consulted on the handling of such materials before any removal from the Landowners' individual properties. The Landowners wish to receive a detailed report on and receipt for any such materials prior to their removal. Finally, the Landowners request that STB require a bond from TRRC prior to the beginning of construction sufficient to cover the expense of handling and returning any such materials to private property owners.

Page 19: [15] Comment [SR81]	Starzak, Richard	11/20/2014 4:37:00 PM
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ACHP 09/08/2014

Emergency Situations

We encourage STB to add a new section that is related to emergency situations. Emergencies occur in a number of ways that could complicate the implementation of a PA. They could change the scope of the project, or compromise the agency's ability to meet the terms of an executed PA. This provision should be developed with the consulting parties so that it addresses the concerns of the residents in the project area and provides for contingencies, as appropriate.

Page 19: [16] Comment [SR82]	Starzak, Richard	11/20/2014 4:38:00 PM
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ACHP 09/08/2014

Dispute Resolution

As currently drafted, the stipulation for dispute resolution allows "any party to this PA" to object. Does this mean that all consulting parties can file objections? Are objections during the alternative analysis to be handled differently from objections during project implementation? This stipulation needs to be revised.

Per 9/30/2014 letter from Baumstark Braaten Law Partners-Colstrip Alternative Landowners Group:

Dispute Resolution

Given the possibility that the Landowners will not ultimately sign the PA, but have participated in its development and will continue to have a significant interest in its enforcement, they request language that would grant them access to review of disputes by the Council as described under subsections (a) - (f), instead of the lesser level of review offered to members of the public at subsection (g). The Landowners also request the right to initiate Council review of an objection in the event that STB declines to do so.

ACHP 09/08/2014

Tribal Coordination

This stipulation should recognize that there may be a need to amend tribal protocols if new tribal leadership is elected and proposes a different approach to coordinating the undertaking. To address this potential change to approved tribal protocols, we recommend that language be included in the PA that recognizes the need for amendments to the ID Plan.

ACHP 09/08/2014

Public Participation

The STB needs to include in the Stipulations section language that allows the public to file objections regarding the implementation of the terms of this PA. While the filing of reports is helpful, it is unclear what steps should be taken if the public wants to file objections to the actions, findings, or determinations that are required under the terms of the PA.