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The Morning Star

**NORTHERN CHEYENNE TRIBE
ADMINISTRATION**

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The Morning Star

March 5, 2013

Kristi Ponozo
Montana Department of Environmental Quality
1520 East 6th Avenue
Helena, MT 59620
OtterCreekEIS@mt.gov

Sent via Federal Express and email.

Re: Northern Cheyenne Tribe's Scoping Comments for Proposed Otter Creek Coal Mine Project

Dear Ms. Ponozo,

Pursuant to the Montana Environmental Policy Act ("MEPA"), the Northern Cheyenne Tribe ("Tribe") provides these scoping comments on the application submitted by Otter Creek Coal, LLC, on July 25, 2012, to commence coal mining operations at the Otter Creek coal tracts in southeastern Montana ("Otter Creek Mine"). The appendices to this letter are provided on the enclosed DVD.

The proposed Otter Creek Mine, which would have an operating life of approximately 20 years, would be located approximately three miles from the boundary of the Northern Cheyenne Reservation ("Reservation"), in an area of historic and continuing Tribal presence and use. Because the Otter Creek Mine has the potential to significantly impact the Tribe and its members, the Tribe calls on the Montana Department of Environmental Quality ("DEQ") to conduct a thorough assessment of the potential direct, secondary, and cumulative impacts of this proposal on the Tribe, Tribal members, and the Reservation. The Tribe also calls on DEQ to assess the direct, secondary, and cumulative impacts of the Otter Creek Mine on the global and regional climate, and on communities throughout the western United States that will be impacted by increased coal train traffic associated with the Otter Creek Mine. In conducting these assessments, DEQ should closely consult with the Tribe, which is an expert on the relevant local environment and traditional land uses that the Otter Creek Mine could impact.

I. BACKGROUND

The Northern Cheyenne Tribe is a federally recognized Indian tribe that occupies the Northern Cheyenne Reservation, which encompasses over 444,000 acres of land in southeastern Montana. About half of the Tribe's 10,000 members live on the Reservation. The Tribe has a long history of taking extraordinary steps to protect the environment in and around its

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Reservation and to avoid adverse impacts of coal development and related activities. It has done so despite facing severe economic and social challenges and even though revenue and Tribal employment from any source, even coal, is sorely needed.

Energy resources in and around the Reservation have drawn significant attention and controversy over the last fifty years. Appendix A at 2-26 through 2-31. Major interest in coal development on the Reservation first occurred in 1965, resulting in public sales of Reservation coal leases in the late 1960s. *Id.* at 2-27. However, in 1974, upon the Tribe's petition, the Secretary of the Interior issued a decision that effectively blocked all coal development on the Reservation. *Id.* at 2-28.

Since then, the Tribe has not permitted on-Reservation coal mining. However, there has been considerable effort to develop energy resources on lands surrounding the Reservation. For example, in the 1970s, a consortium of utilities launched a plan to build two 750 MW coal-fired power plants in Colstrip, Montana, approximately 15 miles north of the Reservation boundary. Appendix A at 2-28. Concerned with the impacts that the Colstrip facility would have on air quality and human health within the Reservation, the Tribe became the first government in the United States to voluntarily raise the air quality standard within its territory to "Class I," a standard that had previously only applied to parks and wilderness areas. *Id.* at 2-29. As a result, the Colstrip utilities were required to install the most stringent pollution control technology available at the time, fund a Tribal air quality monitoring program, and provide other economic benefits to the Tribe. *Id.* at 2-29.

Additional interest in off-Reservation coal development in the early 1980s led Interior Secretary James Watt to initiate a massive coal lease sale in the Powder River Coal Region of Montana and Wyoming. Appendix A at 2-29. The Montana tracts encircled the Reservation, and the Tribe was again concerned that the mining activities would adversely impact the Reservation environment. *Id.* The Tribe ultimately succeeded in its legal challenge to the 1982 leases—all leases for new production tracts were terminated, and the Tribe reached a settlement with the company holding the Colstrip mine extension leases that provided impact funding and other economic benefits to the Tribe. *Id.* at 2-30. More recently, the Tribe was involved in the 1996 effort to oppose extension of the Montco mining permit, and secured a court-ordered termination of that permit. The Tribe also led successful litigation beginning in 2006 to protect water quality in the Tongue River from impacts associated with coalbed methane operations.

In 2002, after asserting claims challenging coal-related development at Otter Creek, the Tribe entered into a settlement agreement with the Montana State Board of Land Commissioners. Among many other terms, the Land Board agreed to ensure that, upon its authorization of the leasing of Otter Creek, operating plans would be implemented to promote Tribal employment and contracting, ensure proper on-Reservation conduct by the lessee and its employees/contractors, require environmental monitoring to identify impacts on the Reservation, and provide some protection of the Tribe's cultural resources. The final versions of these operating plans, which were approved in November 2012 and are currently in force, are attached as Appendix B.

The Otter Creek operating plans are limited. The plans address impacts to the Tribe that would result from the Otter Creek Mine to an extent, but they fail to address many impacts that would result from the proposed action. For example, the operating plans obligate the project proponent to monitor for certain air, water, and wildlife impacts on the Reservation caused by the Otter Creek Mine, but do not require the proponent to avoid, minimize, or mitigate such impacts. Appendix B, Part VIII. In addition, the project proponent is required develop guidelines for appropriate on-Reservation conduct of its employees and contractors, but is not required to consent to Tribal jurisdiction over on-Reservation conduct of its employees and contractors. Appendix B, Part VII. The project proponent is also required to provide notice to the Tribe and Tribal contractors regarding employment and contracting opportunities at the Otter Creek mine, but is not required to hire or give any preference to Tribal members or Tribal contractors. Appendix B, Parts V-VI. Accordingly, despite these operating plans, the Tribe remains concerned that activities associated with the Otter Creek Mine will have significant adverse impacts on the Tribe and the Reservation.

II. SCOPE OF REVIEW

MEPA requires DEQ to “take a ‘hard look’ at the environmental impacts of a given project or proposal.” *Montana Wildlife Fed’n v. Montana Bd. of Oil & Gas Conservation*, 365 Mont. 232, 248-49, 280 P.3d 877 (2012) (citation omitted). In doing so, DEQ must to consider the direct, secondary, and cumulative impacts of the proposal. *See* ARM 17.4.609(3)(d)-(e); ARM 17.4.617(4). This analysis should include assessment of the impacts of the proposal “in conjunction with other past and present actions related to the proposed action by location or generic type” as well as impacts “that may be stimulated or induced by or otherwise result from a direct impact of the action.” ARM 17.4.603(7), (18).

Under these standards, DEQ is required to evaluate the direct impacts that the Otter Creek Mine will have on the Tribe and the Reservation as well as the secondary impacts caused by other actions associated with the Otter Creek Mine, including development of the Tongue River Railroad, which is being designed to transport coal from the Otter Creek Mine. *See N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1082 (9th Cir. 2011). DEQ should also consider the secondary impacts to communities throughout Montana, Idaho, Oregon, and Washington that may be adversely affected by additional coal train traffic resulting from operations at the Otter Creek Mine, as well as impacts to the global and regional climate caused by the combustion of coal extracted from the Otter Creek Mine.

In addition, DEQ’s scope of review for the Otter Creek Mine should be informed by consultation with federal agencies, since the Otter Creek Mine proposal may trigger review under the National Environmental Policy Act (“NEPA”). The Tribe suspects that NEPA review is necessary because federal land is located within the project area, and also because the project may require federal permits (such as a permit from the Army Corps to fill wetlands under § 404 of the federal Clean Water Act). DEQ should work with the relevant federal agencies to ensure that scope of review for the Otter Creek Mine satisfies the requirements of both MEPA and NEPA. DEQ should also consider all available data on the potentially impacted environment

generated by federal, state, and Tribal entities, including relevant reports generated by the United States Geological Service and the Montana National Heritage Program.

III. BASELINE CONDITIONS

In order to properly evaluate the impacts that the Otter Creek Mine would have on the Tribe and the Reservation, it is necessary for DEQ to understand and account for the current conditions on the Reservation. The Tribe intends to seek funding to allow it to assist DEQ in completing a baseline assessment that includes (but is not limited to) evaluation of the following baseline conditions:

- Air quality and visibility on the Reservation, which is already impacted by numerous sources, including the Colstrip power plants.
- Surface water and groundwater quality on the Reservation, including water quality in the Tongue River, which forms the eastern boundary of the Reservation, and its tributaries.
- Water availability on the Reservation.
- Human health conditions on the Reservation, including incidence of health conditions that may be exacerbated by pollution from the Otter Creek Mine.
- Wildlife resources that live on or transverse the Reservation.
- Socio-economic conditions on the Reservation.
- Transportation infrastructure on the Reservation.
- Tribal cultural resources.

Some of the necessary baseline information for the Reservation is available in Appendix A to this letter, although this information needs to be updated. The Tribe recognizes that DEQ will need additional information to adequately evaluate the Reservation baseline, and commits to collaborating with DEQ to fully develop baseline studies for the Reservation to be used in assessing the impacts of the Otter Creek Mine on the Tribe and the Reservation.

IV. IMPACTS TO THE TRIBE AND THE RESERVATION

MEPA requires a thorough assessment of the potential impacts the Otter Creek Mine would have on the Tribe and the Reservation. Such an assessment is also necessary to ensure that the constitutional right of Tribal members to a clean and healthful environment is not infringed. *See* Mont. Const., Art. II § 3, Art. II § 8, Art. II. § 9, Art. IX § 1. DEQ's evaluation of impacts to the Tribe and Reservation should include (but not be limited to) the following issues:

a. Air Quality and Visibility

The Otter Creek Mine's impact on air quality and visibility on and near the Reservation is a significant concern to the Tribe. The Tribe has expended considerable resources to protect air quality on the Reservation. *See generally* Appendix A at 6-40 through 6-42. As mentioned above, the Tribe was the first government in the United States to voluntarily elevate the air quality standard on the Reservation to the most pristine "Class I" designation. *Id.* at 6-40. The Tribe's considerable efforts to protect Reservation air quality and visibility, and efforts to maintain National Ambient Air Quality Standards on the Reservation, would be further undermined if coal dust and other emissions from construction activities and operations associated with the Otter Creek Mine are not adequately mitigated.

b. Water Quality

The Tribe is also concerned with the potential impacts that the Otter Creek Mine would have on ground and surface water quality within the Reservation. Preserving water quality on the Reservation is especially important to the Tribe, as the Reservation is located in an arid portion of the western United States where access to water is limited. *See generally* Appendix A at 6-2 through 6-40. The Tribe is concerned that coal dust and effluent from construction activities associated with the Otter Creek Mine will cause further impairment of Reservation waters and may limit the Tribe's use of water for human consumption, agriculture, cultural and spiritual practices, and other uses. *Id.* at 6-33 through 6-40.

In addition, the Tribe is concerned that the Otter Creek Mine will adversely affect wetlands located on and off the Reservation. Such wetlands act as water filters, store flood waters, provide crucial habitat for wildlife, support plants of great cultural value to the Tribe, and provide many other important functions. The Tribe is concerned that wetlands will be impacted by construction and operation of the Otter Creek Mine and also by climate change resulting from combustion of coal extracted from the Otter Creek Mine. *See generally* Appendix A at 6-61 through 6-63.

c. Human Health

The Tribe is also concerned that the Otter Creek Mine may result in disproportionate adverse health effects to Tribal members. Of particular concern is exposure to coal dust and other air emissions. Exposure to coal dust is associated with a wide range of health effects such as stunted lung development, increased probability of heart attacks, cancer, asthma, kidney disease, and infant mortality. Accordingly, the Tribe calls on DEQ to fully evaluate, minimize when possible, and mitigate potential health effects that the Tribe's members may suffer as a result of the Otter Creek Mine.

d. Cultural Resources

The Tribe also calls on DEQ to evaluate the effects of the Otter Creek Mine on sites of religious and cultural significance to the Tribe. *See generally* Appendix A at 7-1 through 7-30. Sites of religious significance often feature graves, cemeteries, and other burials; large cairns and

pilgrimage/trail marker cairns; vision quest and fasting structures; eagle trapping pits; medicine wheels, arrows, alignments, and prayer lines; very large and very small rings; and rock art motifs. *Id.* at 7-6 through 7-7. Sites of cultural importance include springs, rivers, swamps, and groundwater; ceremonial sites; and places where special plants, animals, and minerals are found. *Id.* at 7-9 through 7-16. These types of sites occur throughout the Tongue River Valley and may be impacted by construction activities and operations associated with the Otter Creek Mine. *Id.* at 7-26 through 7-29.

e. Wildlife

The Otter Creek Mine may also impact the Tribe's wildlife resources, which are culturally and economically important to the Tribe. *See generally* Appendix A at 6-45 through 6-54. Construction and activities associated with the Otter Creek Mine could disturb a wide variety of wildlife and their longstanding migration patterns on and near the Reservation, including big game animals, small mammals, migratory birds, raptors, waterfowl, amphibians, reptiles, and fish. Many of these species are already impaired, and some are listed as "threatened" or "endangered" under the Endangered Species Act. *Id.* at 6-51.

f. Other impacts to the Tribe

In addition to the potential impacts discussed above, the Otter Creek Mine could have numerous other adverse effects on the Tribe that should be evaluated and avoided, minimized, or mitigated. These include the following:

- Impacts to the Reservation transportation systems caused by increased traffic and congestion associated with the Otter Creek Mine;
- Impacts to the Tribe's land uses in areas adjacent to the Otter Creek Mine;
- Navigability impacts to the Tongue River and other waterbodies caused by activities associated with the Otter Creek Mine;
- Impacts to water availability in the Tongue River Basin (including impacts to the Tribe's Federal Indian Reserved Water Rights in the Tongue River Basin);
- Fire-related impacts to Tribal lands and resources on and near the Reservation;
- Noise and vibration impacts caused by construction and operation of the Otter Creek Mine;
- Socio-economic impacts to the Tribe that result from an influx of workers for the construction and operation of the Otter Creek Mine, including impacts to the Tribe's ability to maintain law and order on the Reservation and to ensure proper on-Reservation conduct of non-members associated with the Otter Creek Mine;

- Aesthetic impacts to the Tongue River Valley, Otter Creek Valley, and the Reservation;
- Impacts to Tribal members' recreational, ceremonial and cultural activities in the Tongue River Valley, Otter Creek Valley, and on the Reservation in areas impacted by the Otter Creek Mine; and
- Environmental justice implications of the Otter Creek Mine, including the inequity of allowing the Tribe to suffer disproportionate impacts while receiving very limited benefits from the proposed mining activities.

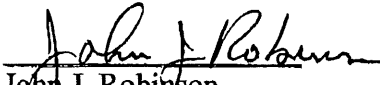
V. OTHER CONCERNS

DEQ must consider numerous other direct, secondary, and cumulative impacts that could result from construction and operation of the Otter Creek Mine and associated activities (including construction and operation of the Tongue River Railroad). Such assessment should include impacts to the global and regional climate resulting from combustion of coal extracted from the Otter Creek Mine, and impacts to communities throughout Montana, Idaho, Oregon, and Washington that may be adversely affected by additional coal train traffic and coal dust resulting from operations at the Otter Creek Mine. These concerns are thoroughly addressed in comments submitted by Earthjustice on behalf of Montana Environmental Information Center, National Wildlife Federation, and Sierra Club, which the Tribe hereby adopts and incorporates by reference to the extent consistent with this letter.

VI. CONCLUSION

The Tribe looks forward to working with DEQ to ensure that the potential impacts of the proposed Otter Creek Mine on the Tribe and the Reservation are thoroughly evaluated and avoided, minimized, and mitigated. You may contact my office to discuss this further.

Sincerely,


John J. Robinson
President
Northern Cheyenne Tribe

cc: Shannon Johnson, U.S. Army Corps of Engineers
Shane Findlay, U.S. Bureau of Land Management
Ken Blodgett, Surface Transportation Board

Attachments Appendix A: *The Northern Cheyenne Tribe and Its Reservation* (2002)
(on enclosed DVD): Appendix B: Otter Creek Operating Plans (2012)