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Organization: Tongue River Railroad Company, Inc. and BNSF Railway Company, Inc.

State: District of Columbia

Agency: Surface Transportation Board

Initiative: Tongue River Railroad

Submission Text

Please see attached comments submitted on behalf of Tongue River Railroad Company, Inc. and BNSF Railway Company, Inc.

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September 23, 2015

VIA ELECTRONIC SUBMISSION

Ken Blodgett
Office of Environmental Analysis
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

**Re: Finance Docket No. 30186 – Tongue River Railroad Company, Inc.’s
Comments on Draft Environmental Impact Statement**

Dear Mr. Blodgett:

Applicant Tongue River Railroad Company, Inc. (“TRRC”) and BNSF Railway Company, Inc. (“BNSF”), the proposed operator of the TRRC line, hereby submit the following comments in response to the Surface Transportation Board’s (“STB” or “Board”) Draft Environmental Impact Statement (“DEIS”) for the proposed Tongue River Railroad (“Project”) that was issued for public comment on April 17, 2015.¹

TRRC agrees with the DEIS’s conclusion (also articulated in the Board’s prior EISs on the TRRC project) that the proposed rail line will not have any significant adverse impacts on the environment that cannot otherwise be adequately avoided, minimized or otherwise addressed through the imposition of mitigation measures that are set forth in Chapter 19. Consistent with NEPA’s requirements, the DEIS provides a robust and thorough analysis to fully inform the public and the Board of the potential environmental impacts that may occur as a result of the construction and operation of the proposed rail line. The DEIS addresses the comments that were received by the Board through the extensive scoping process, and also assesses in detail the wide array of alignment alternatives for the rail line, including a no-action alternative, as identified by TRRC, the Board, and the public.

¹ As a general matter, we will refer in this comment letter to TRRC, other than where the comment pertains to operation of the TRRC line, in which case the comment will reference BNSF.

The DEIS also sets forth facts and analysis that would support a recommendation in the Final EIS in favor of construction of the Colstrip Alternative as among the various alternatives under review. As the shortest rail alternative with the fewest length and total acreage impacts, the Colstrip Alternative would generally have fewer environmental impacts than the other alternatives that are under consideration by the Board. Notably, the Colstrip Alternative will have a significantly lower cost due to the fact that it is the shortest alternative, it will require the least amount of cut and fill, and will require the least right-of-way acquisition when compared to other alternatives. As recognized in the DEIS, the Colstrip Alternative will also have other environmental benefits relative to other alternatives, including: the fact that it parallels the Tongue River valley for the shortest distance; it would not impact endangered pallid sturgeon because its routing avoids the Miles City Fish Hatchery; it avoids the U.S. Department of Agriculture Livestock and Range Research Station; it would follow existing transportation corridors to a far greater extent than the other rail alternatives; and it has the fewest number of stream crossings. Construction impacts will also be less than other alternatives because the Colstrip Alternative can be constructed within a much shorter timeframe than the other alternative alignments.

In addition, as demonstrated by the Draft Section 404(b)(1) Evaluation (Appendix N to the DEIS), the Colstrip Alternative represents the least environmentally damaging, practicable alternative because it will have the fewest impacts on waters subject to U.S. Army Corps of Engineers (“Corps”) jurisdiction. The Colstrip Alternative thereby meets the Corps’ requirements for permitting. For these reasons, and for the additional reasons set forth in TRRC’s application and in the comparative alternative analyses submitted by TRRC to the Board’s Office of Environmental Analysis,² the Colstrip Alternative continues to be TRRC’s preferred alternative and the alternative that should be authorized by the Board.

As the applicant for the Project, TRRC hereby provides its views and additional relevant information with respect to several additional matters raised in the DEIS.

I. TRRC Comments on Chapter 2: Proposed Action and Alternatives

i. Colstrip Subdivision

TRRC requests that minor corrections be made to Section 2.2.13, which concerns upgrades to the Colstrip Subdivision, which is the existing BNSF track between the BNSF mainline and the Colstrip area. First, the Section incorrectly states that “TRRC would likely

² See TRRC Alternatives Screening Analysis, at pg. 8, Table 1 (January 11, 2013), *available at* http://www.tonguerivereis.com/documents/011113_alt_screening.pdf; TRRC Supplement to Alternative Screening Analysis (April 30, 2013), *available at* http://www.tonguerivereis.com/documents/043013_alt_screening_supp.pdf; Supplement to Alternatives Screening Analysis (August 23, 2013), *available at* http://www.tonguerivereis.com/documents/082013_alt_screen_supp.pdf.

upgrade all sections of the Colstrip Subdivision track ... TRRC would also replace existing ties on the full length of the Colstrip Subdivision ..." DEIS, at 2-26 (emphasis added). TRRC requests that the Section be corrected to state that BNSF, as the owner and operator of the Colstrip Subdivision, is the entity that would be undertaking the upgrades, including the replacement of existing ties. TRRC further notes that while BNSF has applied for authorization to be the operator of the TRRC line (and TRRC does not seek such authorization for itself), BNSF is not an applicant to construct the upgrades at the Colstrip Subdivision. Nor has BNSF requested any Board authority to undertake such upgrades. Rather, BNSF may undertake the proposed activities on its own Colstrip Subdivision without any form of Board approval and would do so were the Board to choose the Colstrip Alternative for construction.

Second, Section 2.2.13 states that "[a]n average of three trains per day travel the Colstrip Subdivision." DEIS, at 2-26. This is incorrect. While the Colstrip Subdivision is not abandoned, no revenue trains have traversed the Subdivision for the last three (3) years. Over the last three (3) years, the Subdivision has only been used for purposes of equipment storage. To the extent that the Board's DEIS analysis is based on the assumption that three trains per day currently move on the Colstrip Subdivision, that analysis also needs to be corrected. For example, Chapter 7 states that "[a]pproximately three trains per day operate on the existing Colstrip Subdivision, but the noise levels for this section of rail would increase substantially on a DNL basis because of the increased rail traffic." DEIS, at 7-10 to 7-11. Likewise, Chapter 3, which concerns transportation impacts, also states that "... the predicted interval between accidents at grade crossings on the existing Colstrip Subdivision, where existing rail traffic is three trains per day, ranges from 110 years to 402 years." DEIS, at 3.4-4. The data reported in these statements needs to be corrected to account for the fact that no trains currently operate on the existing Subdivision. Any other statements, assumptions and analysis that are based on some level of existing rail traffic on the Colstrip Subdivision similarly need to be corrected.

ii. Material Acquisition

Section 2.2.5 of the DEIS indicates that "ballast material used in construction would be acquired from the Pipestone Quarry near Whitehall, Montana" DEIS, at 2-20. TRRC submits that this language should be revised to indicate that ballast "~~would~~ **is anticipated to** be acquired from the Pipeline Stone Quarry near Whitehall, Montana **or other nearby quarry sources**" As indicated in TRRC's response to Data Request No. 4, it is anticipated that quarry material will be obtained from the Pipeline Stone Quarry, although it may be obtained from other sources due to unforeseen circumstances. TRRC thus recommends that the Board revise Section 2.2.5 accordingly.

II. TRRC Comments on Fuel Efficiency Methodology

BNSF believes that the methodology used by the Board to calculate fuel efficiency is incorrect. Specifically, it appears that the wrong fuel efficiency input was used in Appendix E at Table E.1-1. The general Gross Ton Mile/gallon ("GTM/gallon") efficiency published by BNSF and the other Class 1 railroads does not include the weights of the locomotives. Rather, a Total GTM/gallon efficiency taking into account the weights of locomotives must be calculated and

used when analyzing the fuel efficiency of the train to take into account the weight of the locomotive (which appears to be the analysis provided in the DEIS). An example of BNSF data, as set forth below, indicate that there is roughly a nine percent (9%) difference between the GTM/gallon and Total GTM/gallon estimates.

BNSF 2012 R1

schedule 750	line 4		gallons of fuel	1,334,487,598
Schedule 755	line 98	Road Locomotives	Gross Ton Miles	104,736,846,000
	line 99	Freight Trains/unit trains		541,372,595,000
	line 100	way trains		11,688,402,000
	line 101	Through trains		558,617,758,000
	line 102	Passenger Trains		
	line 103	Non-Revenue		12,953,689,000
	line 104	Total (lines 98-103)		1,229,369,290,000
		Total Gross ton mile/gallon		
		= schedule 755 lines 98,99,100,101/schedule 750 line 4		911.52
		Gross ton mile/gallon without locomotives		
		= sum of lines 99,100,101/schedule 750 line 4		833.04

III. TRRC Comments on Chapter 19: Mitigation

In Chapter 19, TRRC is pleased to see the inclusion of the extensive voluntary mitigation measures that TRRC has voluntarily proposed to implement to minimize, avoid, and/or compensate for potential impacts to environmental resources along the proposed rail line. In total, TRRC has proposed to voluntarily implement forty-six (46) mitigation measures to address the multitude of potential resources that are present along the alignment alternatives. TRRC believes that such voluntary measures are sufficient to effectively minimize, avoid and/or compensate for any potential significant impacts, and that further mitigation is not necessary.

Nonetheless, TRRC understands the Board's reasoning for proposing to impose many of the additional mitigation measures for the various environmental resources at issue, in total an additional eighty-three (83) mitigation measures. TRRC understands that these additional measures, as well as the mitigation measures that it voluntarily offered, would become mandatory measures if adopted by the Board in any final decision approving construction and operation of the railroad.

TRRC submits that the vast majority of the measures proposed by the Board are acceptable, and TRRC understands that many of the measures may in fact help to avoid or minimize potential impacts that could occur as a result of the construction and/or operation of the rail line along the preferred alignment chosen by the Board.

TRRC, however, does have a number of comments and concerns with respect to several of the measures that have been proposed by the Board. As explained below, several of the proposed measures are vague, while others are not feasible as currently drafted. TRRC has thus

proposed below several minor revisions to help clarify the scope of activities required under the measures.

Further, as TRRC's application in this proceeding makes clear, BNSF is the sole proposed operator of the TRRC line. Thus, in the Final EIS, any recommended mitigation measure that would impose obligations on the operator (e.g., mitigation measures 18-22) should be revised to refer to BNSF.

- **MM-12:** The Board has proposed that TRRC require its contractors to use a diesel fuel that contains a minimum biodiesel content of 5 percent, or if such a blend is not available locally, to use the "highest biodiesel content possible." DEIS, at 19-7.

TRRC takes no issue with imposing a biodiesel content requirement. TRRC, however, submits that MM-12, as currently written, is not clear with respect to the "highest biodiesel content" that is to be utilized if a biodiesel content of 5 percent is not locally available. TRRC, for example, believes that the intent of the measure is to require contractors to utilize the highest biodiesel content available locally in the area, but the measure is not expressly worded as such.

TRRC also believes that the measure must acknowledge that construction equipment used for project construction may be maintained and operated pursuant to manufacturer warranties. Such equipment warranties frequently require the use of diesel fuel with a specific biodiesel content in order for the warranty to apply. Thus, if contractors utilized a diesel fuel that conflicted with the manufacturer warranty requirement, the warranty would no longer be applicable. TRRC thus requests that the measure be revised to clarify that the biodiesel content must be compatible with applicable equipment warranties, which may specify the biodiesel content of diesel fuels.

Accordingly, TRRC recommends that the Measure be rephrased as follows:

"... TRRC shall use fuel with the highest biodiesel content ~~possible that is locally available and complies with applicable construction equipment warranties~~ in order to reduce greenhouse gas emissions."

- **MM-15:** The Board has proposed to require TRRC to develop and implement an approved construction noise and vibration control plan to minimize project-related construction noise and vibration affecting communities along the rail line. See DEIS, at 19-8. TRRC is not aware that the Board has ever required this type of plan with respect to the construction of another rail line. Here, there are few noise receptors along any of the proposed alternative alignments for the TRRC line, including the TRRC-preferred Colstrip Alternative, as to which there are only five receptors (when accounting for those on the proposed new rail line and excluding those at the existing Colstrip Subdivision). DEIS, at 7-1. The DEIS concludes that "vibration associated with the operation and construction [of the TRRC line] would not exceed regulatory thresholds." DEIS at 7-1.

Further, Chapter 7 of the DEIS describes the noise and vibration impacts on humans and structures that could result from construction and operation of each of the build alternatives. The analysis shows that "... noise impacts from construction would be comparable for all build alternatives and would not exceed regulatory thresholds except at one receptor location on the Ashland East Alternative, if pile driving were to occur at night." DEIS at 7-1. The estimated construction noise and vibration (Table 7-4) and pile driving noise and vibration (Table 7-5) at the nearest receptors are below the construction noise criteria of the Federal Transit Administration (Table 7-3), which indicate that "no adverse community reaction would be expected."

In these circumstances, development of a noise and vibration plan does not appear to be warranted or appropriate, particularly given the analysis conducted in the DEIS and the fact that noise impacts will be adequately mitigated through other recommended measures, including VM-10 to VM-11 and MM-16 to MM-22. Further, TRRC submits that the best practice for the Board is to spell out any appropriate specific mitigation, as it has done in the DEIS, rather than defer mitigation to the future development of plans.

For example, MM-16 proposes that TRRC shall minimize construction-related noise in residential areas by avoiding nighttime construction and employing quieter vibratory pile driving or noise curtains. TRRC believes that MM-16, together with the other proposed measures, are adequate to minimize noise and that the plan proposed under MM-15 will merely duplicate the measures that are already proposed. Indeed, it is doubtful that a plan will succeed in identifying additional noise measures other than those already required under Section 19.2.4. TRRC thus recommends that MM-15 not be included in the Final EIS and/or the Board's decision.

If MM-15 is to remain in the Final EIS as a required mitigation measure, TRRC believes that the measure is vague and fails to adequately limit the scope of the plan to only those areas where noise receptors are located. For example, the measure, as currently written, would appear to apply to the entire proposed rail line even though noise receptors are not located along its entire length and receptors may not be located within close enough proximity to be impacted by noise or vibration impacts resulting from project construction. TRRC thus recommends that MM-15 be revised to expressly indicate that the plan (including the study area for the plan) is required only for those locations along the rail line where noise receptors are located within close enough proximity to construction activities to experience noise impacts that may exceed Federal Transit Administration construction noise criteria, i.e., a 65 day-night average noise level (DNL) and +3 dBA increase from ambient sound levels as identified in the DEIS. Further, as noted above, the Colstrip Subdivision, which is owned and operated by BNSF, is not part of the proposed rail line project that is pending before the Board. Therefore, to the extent that MM-15 remains in the Final EIS as a mitigation measure, it should only apply to the approved TRRC alternative and should not apply to the Colstrip Subdivision or any other railroad line other than the line to be constructed by TRRC.

Accordingly, if MM-15 is to remain in the Final EIS as a required mitigation measure, TRRC requests that the measure be revised to state:

“TRRC shall ... to minimize project-related construction noise and vibration ~~affecting communities in locations~~ along the rail line ~~where noise receptors identified in the DEIS are located within such a close proximity that construction noise criteria of the Federal Transit Administration may be exceeded.~~”

- **MM-18:** The Board has proposed that TRRC shall “consult with interested communities along the existing Colstrip Subdivision and the Fargo to Willmar downline rail segment ... and work with these communities to [sic] establish quiet zones, if requested.” DEIS, at 19-8.

The Federal Railroad Administration’s regulations at 49 C.F.R. Part 222 set forth the requirements for establishing quiet zones. Those regulations are directed towards the public, and not railroad owners or operators, and provide a framework under which communities may seek to establish quiet zones in their neighborhood consistent with FRA horn requirements. MM-18 adds nothing to the FRA’s regulations and, if anything, could be read to conflict with the process that has already been established in the FRA regulations. TRRC, accordingly, recommends that MM-18 not be included in the Final EIS and/or the Board’s decision. Further, for the reasons set forth in Section I(i) above, TRRC maintains that the Colstrip Subdivision, which is owned and operated by BNSF, is not part of the proposed rail line project that is pending before the Board. Any upgrades or other activities at the Colstrip Subdivision that may be undertaken by BNSF, including the operation by it of trains on that line, may occur without Board approval and regardless of whether the proposed rail line is authorized by the Board.

- **MM-22:** The Board has proposed that TRRC shall install and properly maintain rail and rail beds “according to American Railway Engineering and Maintenance of Way Association standards” DEIS, at 19-9. TRRC submits that the measure should be revised to accurately indicate that the American Railway Engineering and Maintenance of Way Association (“AREMA”) publishes “guidelines,” and not “standards.” TRRC suggests that the Board make this change throughout the DEIS wherever AREMA “standards” are incorrectly referenced.
- **MM-24:** The Board has proposed that “[d]uring project-related construction, TRRC shall comply with weed control plans developed for Rosebud, Big Horn, Custer, and Power River Counties, Montana.” DEIS, at 19-10.

TRRC believes that the entire first sentence of the measure (as quoted above) should be deleted because it appears to be redundant and/or conflict with the sentences that follow. For example, the first sentence indicates that TRRC must comply with weed control plans, while the following sentences indicate that TRRC must develop a weed control program in consultation with the weed districts. Compliance with the “plan” required

under the first sentence, and compliance with the “program,” including the approval process for such a program, in the following sentences would appear to conflict and not add any additional requirement not specified elsewhere. TRRC thus recommends that the entire first sentence be deleted and/or revised to be consistent with the subsequent sentences.

The measure should be further revised to limit review and approval to weed districts in only those counties crossed by the rail alignment alternative ultimately authorized by the Board. For example, TRRC’s preferred Colstrip Alternative crosses only Powder River and Rosebud Counties. If the Board were to authorize construction of the rail line along the Colstrip Alternative, MM-24 should be revised to reflect that TRRC is only required to comply weed control plans in these counties.

- **MM-29:** The Board has proposed that TRRC shall clear vegetation in preparation for project-related construction before or after the breeding bird nesting season (April 15 to July 15) to avoid inadvertent removal of active nests and to ensure compliance with the Migratory Bird Treaty Act. DEIS, at 19-12.

TRRC understands MM-29 to allow TRRC the ability to construct during the breeding bird nesting season as long as it consults with BLM and USFWS, and conducts a survey of “all habitats that would be disturbed by project-related construction during the breeding bird nesting season.” TRRC does not object to the prohibition on construction during the bird nesting season given that it is able to do so as long as it consults with BLM/USFWS and conducts appropriate surveys. TRRC submits, however, that the Measure is overly broad and should be limited to requiring surveys only in those areas where nesting bird habitat may be present.

Accordingly, TRRC believes that the Measure should be revised as follows:

“TRRC shall clear vegetation in preparation for project-related construction **in areas where bird nesting habitat may be present** before or after the breeding bird nesting season ... TRRC shall conduct a survey of all habitats **where bird nesting may occur** that would be disturbed ...”

- **MM-32:** The Board has proposed that TRRC comply with certain requirements for any construction activities and equipment servicing and maintenance activities that are conducted below the ordinary high water line of fish-bearing streams in order to reduce water quality impacts. DEIS, at 19-12 to 19-13. The third sub-bullet requires equipment fueling and servicing to occur in an established staging area. Due to the size and immobility of certain equipment, such as large cranes that may be used for bridge construction, it may be impractical to refuel all equipment outside the riparian corridor of a waterbody. In such instances, TRRC proposes to require the equipment operator to implement appropriate spill containment measures to prevent release of petroleum into the waterbody.

In addition, the final sentence of the third sub-bullet provides that “[s]taging areas shall be located a minimum of 150 feet from surface waters or other sensitive habitats such as wetlands.” *Id.*, at 19-13. TRRC believes that a 150-foot buffer is too large of a buffer zone distance for purposes of construction activities. For example, it may not be possible to move all large machinery, such as cranes, away from water at all times when not in use. Large machinery, such as cranes, may be used only intermittently during construction activities and such equipment can take substantial time to move from one location to another, resulting in otherwise avoidable diesel usage and air emissions in the process. One hundred and fifty feet (150) is also larger than the 50-foot buffer zone buffer zone that is generally required by the Corps, the federal agency that is responsible for regulating construction activities in proximity to water crossings.

TRRC thus submits that a more reasonable, and typical buffer zone of 50 feet, should be required under MM-32 to account for large machinery and to be consistent with Corps buffer distances. At a minimum, TRRC believes that the MM-25 should be revised slightly to allow for flexibility where the 150-foot buffer requirement cannot be met.

Accordingly, TRRC requests that the third sub-bullet of the measure be revised to state:

“TRRC, **to the extent practicable**, shall not fuel and service equipment used for project-related construction work below the ordinary high water line or in a riparian corridor; equipment fueling and servicing ~~would~~ **should** occur in an established staging area. **If equipment fueling and servicing must occur within a riparian corridor, TRRC shall implement appropriate spill containment measures to prevent release of petroleum to the waterbody.** When not in use, TRRC shall, **to the extent practicable**, store equipment and vehicles in the staging area. Staging areas shall be located a minimum of ~~150~~ **50** feet from surface waters or other sensitive habitats such as wetlands.”

- **MM-61:** The Board has proposed that “TRRC shall install visual barriers, as appropriate, to obstruct undesirable views of project-related construction activities and to maintain the privacy of adjacent viewers.” DEIS, at 19-20. TRRC believes that MM-61 is vague and cannot be implemented in a feasible manner.

It is not clear, for example, what is meant by “undesirable views of the project” and/or who may be considered “adjacent viewers.” Accordingly, this measure could conceivably apply to any portion of the line where some individual (e.g., a non-resident) believes the view of project construction to be undesirable, such as in a recreational or agricultural area. TRRC presumes, however, as discussed in Section 10.5.1.1, that the measure is intended to apply only to permanent residences that are located immediately adjacent to the construction activity such that construction workers and construction activities may evoke a sense of invaded privacy. DEIS, at 10-23.

Further, it is not possible for TRRC to install visual barriers to obstruct views of all construction activities that someone may consider to be “undesirable.” The long, linear

rail line would extend to the visual horizon in both directions, and large equipment such as cranes, due to their height, cannot be entirely fenced off from surrounding viewers. TRRC thus believes that the measure should be revised to limit applicability of the measure to only instances where the installation of visual barriers would be “practicable” and only where an immediately adjacent homeowner has requested some form of barrier.

Accordingly, TRRC recommends that that MM-61 should be revised as follows:

“TRRC shall consult with residents whose residences are located immediately adjacent to the construction activity and, to the extent practicable, install visual barriers ~~as appropriate~~ if requested by the homeowner, to obstruct undesirable views from project-related construction activities and to maintain the privacy of residents.”

- **MM-62:** The Board has proposed that “TRRC shall grade contours to create slopes with undulations and topographical variations that mimic natural terrain, where possible.” DEIS, at 19-20. TRRC understands that, as currently written, contouring is not required where grading would result in larger cut or fill areas, or where grading may result in additional adverse impacts, such as cutting trees. To the extent that TRRC’s understanding of the measure is incorrect – i.e., that contouring/grading is required in areas that will not be cut/filled for purposes of project construction – TRRC objects to the measure since it would add significant costs to construction, estimated to be approximately \$10-15 million.

Assuming that TRRC’s understanding of the measure is correct, TRRC does not oppose grading cut and fill areas that will occur as a result of project construction. TRRC, however, believes that the measure should be more clearly worded to specify that TRRC must only grade those areas that are cut or filled as a result of project activities, and not engage in additional contouring of natural areas. For example, if an area is cut, TRRC would grade that cut area to create slopes or undulations. TRRC, however, would not engage in any additional cut activities to create those slopes or undulations. Likewise, TRRC would grade any fill areas so that they are generally more rounded, but it would not add additional fill to further create undulations or topographical variations.

Accordingly, TRRC thus proposes that MM-62 be revised as follows:

“TRRC shall grade ~~contours to create slopes with undulations and topographical variations that~~ cut and fill areas resulting from construction activities to mimic natural terrain, where possible.”

- **MM-64:** The Board has proposed that TRRC utilize specific paint colors for new structures, including bridges and telecommunication towers, by utilizing a BLM colors chart. DEIS, at 19-20 to 19-21. TRRC does not oppose the requirement to paint telecommunication towers with a particular paint color, but does not agree with a

requirement that rail bridges or other structures be painted, let alone that the measure specify the particular colors that must be chosen.

TRRC intends to construct rail bridges out of weathering steel that allow for self-sealing oxidation which will produce an aesthetically-pleasing deep-brown color. This is consistent with generally accepted railroad practices and avoids the need for long-term ongoing maintenance, such as painting, that results in extensive costs and potentially adverse environmental impacts. For example, before the re-painting of surfaces may occur, existing painted surfaces must be sandblasted (or scraped/sanded by other means) to expose the steel surface. The debris from this process may flow into rivers or be transported by air to nearby environmental receptors. In addition, re-painting of bridges or other structures will also result in the emissions from paint and/or the deposition of paint or other material into nearby resources, such as the river itself. These adverse consequences are otherwise avoided through the use of weathered steel.

TRRC therefore requests that all requirements under MM-64 that specify particular paint colors be deleted. TRRC does not otherwise object to the design requirements pertaining to telecommunication towers specified in MM-64.

- **MM-66:** The Board has proposed that TRRC “negotiate compensation—for direct loss of agricultural land in the right-of-way and the indirect loss of agricultural land from severance—with each landowner whose property would be affected by construction and operation of the rail line.” DEIS, at 19-22 to 19-23. TRRC opposes this measure as entirely unnecessary and unduly vague. It goes without saying that TRRC will negotiate with those landowners whose property it will need for its rail line and that it is prepared to pay reasonable compensation to such landowners. Thus, a mitigation measure beyond VM-35 (which requires good faith negotiation with landowners and an attempt by TRRC to pay fair market compensation) is simply not necessary. In fact, MM-66 could complicate matters in the event that any particular landowner refuses to negotiate with TRRC – would TRRC then be in violation of the measure? Also, it is not clear what OEA means by requiring compensation for indirect loss from severance, i.e., would this be required if the landowner were able to fully access and use the severed property?

TRRC notes that STB has not imposed similar mitigation in other major recent rail construction proceedings. For example, the STB did not impose any mitigation concerning direct or indirect land losses due to severance in the Alaska Railroad – Northern Rail Extension proceeding. In the DM&E proceeding and the Southwest Gulf RR proceeding, the mitigation measures also did not concern compensation owed to land owners. For example, the mitigation measures imposed in the Southwest Gulf RR proceeding required only that, where unavoidable property severance occurs, the applicant must negotiate to ensure that access to the severed property is provided, and realign the track to avoid taking houses and/or to minimize impacts. *See, e.g.*, Southwest Gulf RR, Finance Docket No. 34284, MM-62 (Dec. 17, 2008).

In sum, TRRC believes that compensation for land acquisition or loss of use is a matter best left for marketplace negotiation rather than mandatory mitigation of the sort proposed in MM-66. Further, landowners that refuse the compensation offered by TRRC are not left unprotected – rather, they may resort to judicial proceedings to ensure that just and reasonable compensation is paid for any required property.

- **MM-70:** The Board has proposed that “TRRC shall coordinate with landowners while negotiating the railroad right-of-way easement ...” to identify key access points and to install at-grade crossings to provide access to existing properties. DEIS, at 19-23. TRRC questions whether this requirement is necessary because it appears to be duplicative of VM-35, which requires TRRC to negotiate in good faith with landowners. Nonetheless, TRRC does not object to the proposed mitigation measure being included in the Final EIS, but does believe that it incorrectly references the term “easement.”

Specifically, TRRC currently plans that it will not be obtaining any railroad right-of-way necessary for rail operation through the acquisition of land easements. Rather, TRRC anticipates that such right-of-way will be obtained from landowners through fee ownership.

IV. TRRC Comments on Appendix P: Draft Programmatic Agreement

TRRC has a number of concerns regarding the draft Programmatic Agreement (“PA”) that is included as Appendix P to the DEIS. On January 16, 2015, TRRC submitted draft comments to the Board to address many concerns regarding the draft Programmatic Agreement as it existed at that time. TRRC is disappointed to see that the large majority of its prior comments were not incorporated into the current draft of the PA. TRRC requests that the Board once again take into consideration the revisions identified in TRRC’s January 2015 comments, which are enclosed as Attachment 1. Several of TRRC’s January 2015 comments are once again reiterated below, including: (i) how further consultation should not be required to define the Area of Potential Effects (APE); (ii) amendment to the APE should not be allowed following survey work; (iii) the cultural resources contractor should be retained within a specified timeframe; and (iv) the STB should specify the number of tribal representatives that may participate in field surveys. TRRC also sets forth below new concerns regarding the overall PA timeline.

TRRC’s primary concerns with respect to the current draft of the PA are as follows:

- Consultation Regarding Scope of Area of Potential Effects (APE): Section III(B)(1) of the PA currently provides that “[t]he STB, in consultation with the SHPO, consulting tribes and other consulting parties, will define the APE for any STB-approved build alternative based on the vertical and horizontal direct effects, indirect effects, and cumulative effects.” PA, at P-9. TRRC believes that the APE should be (and already is) expressly defined in the PA, and that further consultation should and need not occur to identify the APE at some future point in time.

TRRC, for example, believes that the APE for second phase survey work is already defined in Section III(B)(1)(a), which expressly defines the vertical and horizontal limits for the APE to include: (i) the vertical lower limits of the APE for direct effects includes the depth of natural ground disturbance plus the depth of soil compaction ... but does not exceed the depth beyond which such resources are reasonably expected to occur; and (ii) the horizontal Direct APE includes up to 200 feet on either side (up to a total of 400 feet) of the authorized construction right-of-way (ROW), to include a twenty-foot buffer ...” TRRC believes that this description should serve as the APE for the Project, and that direct, indirect, and cumulative effects be considered with respect to any resources occurring within that geographic area.

Any effort to re-define the APE for purposes of indirect and cumulative effects would be inconsistent with ACHP regulations. Section 800.4 requires that the APE first be defined to allow for the proper identification of properties within that area. However, as currently drafted, the PA would allow for identification of cultural sites to occur, and that the existence of such sites (to the extent that they are located outside the direct effects APE) could then modify the scope of the APE for purposes of indirect and cumulative effects APE. This is not the process that is envisioned by the ACHP’s regulations implementing Section 106 – rather, the indirect and cumulative effects should be defined with respect to the sites included in the direct effects APE. TRRC thus proposes that Section III(B)(1)(b)-(c) reference that indirect and cumulative effects will be assessed with respect to the APE that is defined in Section III(B)(1)(a).

TRRC also believes that expressly defining the APE in the PA avoids any potentially prolonged consultations to further re-define the APE at some future point in time. Such consultations could substantially delay the initiation and implementation of other activities under the APE. To the extent that the Board continues to believe that further consultations are required to define the APE, TRRC also requests that a specific timeline be identified for completing such consultations. Otherwise, the APE consultation process could drag out indefinitely, thereby impacting the ability of TRRC and other consulting parties to complete PA obligations.

- Amending the APE: TRRC also requests that some time limitation be specified under Section III(B)(2) in which parties may request that the APE be amended. Currently, the PA would allow the APE to be amended at any time in the process, even after survey work has been completed. Thus, as the PA is currently written, additional survey work may conceivably need to be re-conducted if the APE is later amended to include an area that was not previously surveyed. Surely, such a result was not imagined by the Board, which could result in a never-ending process of conducting additional surveys after the APE has been re-defined. Nor is such a result envisioned under ACHP regulations, which seek to expressly define the scope of study at the earliest point in time to allow sites within that area to be identified and adverse effects to be resolved. *See* 36 C.F.R. § 800.4 (requiring identification of APE at beginning of consultation process).

- Retaining a Cultural Resources Contractor: The draft PA at Section IV(B)(2) currently requires that the STB will retain the services of a Cultural Resources Contractor (“Contractor”) “within a reasonable time frame.” TRRC appreciates that the Board has revised the draft PA to indicate that the Contractor must be chosen within a “reasonable” time frame, but TRRC continues to believe that an express time frame should be included. For example, TRRC, in its January 2015 comments, suggested that a Contractor be retained within 60 days of the Board having authorized a project alignment. TRRC believe that 60 days is a reasonable time, and any failure to retain a contractor within that timeframe could significantly delay work under the PA, and hence project construction.
- Participation in Field Surveys by Participating Tribes: TRRC continues to believe that Section IV(B)(3) is too broadly worded with respect to TRRC’s financial reimbursement obligations. TRRC objects to any open-ended obligation to provide financial reimbursement for an unidentified number of tribal representatives. TRRC thus maintains that Section IV(B)(3) of the PA must identify a specific number of tribal representatives who will be provided with financial reimbursement, e.g., one representative for each consulting tribe, by TRRC. At a minimum, the PA must acknowledge that financial reimbursement for tribal representatives will be subject to future negotiation between TRRC and the tribal representatives.
- Concerns Regarding Overall PA Timeline: TRRC’s most serious concerns are with respect to the timeline proposed under the PA to complete all cultural resource obligations. As currently proposed, the timeline set forth under the draft PA is unworkable and has the potential to lead to significant project delays that could undermine the ability of TRRC to complete construction in a cost-effective and timely manner.

To illustrate, TRRC has set forth below the timelines (or lack thereof) that are currently contemplated in the draft PA:

1. Consultations to define APE (**no timeline specified**) (Section III(B)).
2. Completion of Phase II Surveys (**no timeline specified**) (Section IV(B)).
3. Preparation of ID Reports (**no timeline specified**) (Section IV(B)(4)).
4. Review/Comment on ID Reports (Section IV(B)(4)):
 - o **15 days** for consulting parties to review ID Report to identify missing information;
 - o **5 days** for STB to provide missing information;
 - o **45 days** for consulting parties to review and comment on ID Report.
 - o Total review period: **65 days**.
5. Preparation of Evaluation Report (**no timeline specified**) (Section IV(C)(3)).
6. Review/Comment on Evaluation Report (Section IV(C)(3)-(6)):
 - o STB will circulate the Evaluation Report within **15 days** of receipt from contractor;

- o Comments on Evaluation Report are due within **15 days** of receipt from STB;
 - o STB will make a determination on eligibility within **45 days** of receipt of comments;
 - o STB will direct Contractor to make changes and finalize the Evaluation Report per the ID Plan within **40 days** (it is not clear whether this deadline runs concurrently with the 45-day period identified above).
 - o Total review period: **75-115 days**.
7. Preparation of Finding of Effect (**no timeline specified**) (Section V(C)).
8. Review/Comment on Finding of Effect (runs concurrently with review of Evaluation Report above) (Section V(E)-(F)).
9. Consultation to resolve adverse effects and identify appropriate treatment (Section VI(B)(1)):
- o STB will notify consulting parties of proposed treatment options within **45 days** from issuance of Final Phase II Evaluation Reports.
10. Preparation of treatment plans (**no timeline specified**) (Section VI(C)(1));
11. Review/comment on treatment plans (Section VI(D)):
- o Consulting parties will have **60 days** to review/comment on treatment plans if no additional information is requested;
 - o If additional information is requested:
 - i. Such information must be requested within **30 days**;
 - ii. STB will have **10 days** to provide information;
 - iii. Consulting parties will have **45 days** to review treatment plans;
 - o STB will revise treatment plans within **45 days**;
 - o Approval of treatment plans by STB (**no timeline specified**).
 - o Total review time: **at least 105-135 days**.

In total, the PA contemplates a process that would take a minimum of **290-360 days** to complete. This timeframe, however, does not include the time necessary to: (i) consult with parties to define APE; (ii) conduct Phase II studies; (iii) draft ID Reports; (iv) draft Evaluation Reports; (v) prepare finding of effect; (vi) prepare treatment plan; and/or (vii) consult with PA parties regarding any other issues that may arise, including the potential for dispute resolution. In other words, the PA obligations will very likely take **significantly longer than 290-360 days to complete** given the length of time that must be taken into account to complete these other activities. This could postpone construction along portions of the authorized alignment by 1-2 years or more after the Board has issued its decision. Thus, while the proposed timelines may seem reasonable when viewed individually, they are clearly unreasonable when viewed cumulatively, and would lead to significant construction costs, such as mobilization and de-mobilization costs.

The timelines proposed under the draft TRRC PA are also significantly longer than PAs for other projects, which provide much shorter (and defined) timelines to complete PA obligations. For example, the PA for the Vantage Pipeline, which many of the same consulting tribes were part of and commended the U.S. Department of State for finalizing, generally provides a 14-day comment period for all plans and reports that are

required under the PA. A copy of that PA is enclosed as Attachment 2. TRRC thus recommends that the timelines in that PA be incorporated into the TRRC PA, which would result in generally shortening all timelines into a two week timeframe. TRRC also submits that the time periods currently provided for submitting additional information can be removed from the proposed process – if a consulting party deems information to be missing, they can provide that information to the Board in their comments and the Board can incorporate that information into the final plan or report at issue. In short, TRRC requests that the Board consider ways to minimize the timelines currently provided under the PA so that all PA obligations can be completed in a defined, reasonable manner.

Moreover, TRRC notes that the fact that numerous activities under the PA are not subject to specific deadlines substantially impairs TRRC's ability to meaningfully plan construction activities once an alignment has been authorized by the Board. As indicated above, there are many stages in the PA consultation process that are not limited to any particular timeline. Completion of these activities could take substantial time to complete, and notably, the completion of these activities in a timely manner is outside the control of TRRC since they are generally to be completed by the Contractor or the Board.

TRRC believes that timelines must be added to restrict the time in which these activities must be completed, or TRRC must be provided with the opportunity to control the preparation and completion of these materials. For example, with respect to the Vantage Pipeline PA, the completion of activities, such as the preparation of reports and plans, was the applicant's responsibility and the applicant was not dependent on a non-applicant (or agency) completing the reports or plans required for that project in a timely manner. For project planning purposes, it is thus vital that some specified timeline be provided for all PA activities or that TRRC be responsible for generating the required information so as to allow construction to proceed in an expected timeframe. Failure to do so will inevitably lead to significantly increased construction costs and project delays.

- Construction Should Be Allowable At Any Locations Where Sites Can Be Avoided: Because of the potential for indefinite project delay under the PA as currently drafted, TRRC believes that the PA should provide TRRC with the opportunity to satisfy PA obligations through the implementation of a pre-approved avoidance plan. In its January 2015 comments, TRRC proposed revisions to the PA that would have allowed construction to be initiated before eligibility determinations, findings of effect, and/or treatment were completed provided that the cultural site at issue could be avoided entirely. For unexplained reasons, the STB did not incorporate TRRC's suggestion, and TRRC therefore renews its request with respect to this comment.

Specifically, TRRC submits that a new section be added to the PA that sets forth general requirements for avoidance and the procedures to prepare, review, and implement an avoidance plan. Doing so would: (1) ensure that construction could proceed in a timely manner in all areas where sites can be avoided in accordance with the approved plan; (2) ensure protection to cultural resource sites through the implementation of approved

avoidance measures; and (3) avoid needless steps in the PA process, i.e., eligibility determinations, findings of effect, and treatment, that are not necessary to complete where all impacts to the site will be avoided through an approved avoidance plan. While the steps that are proposed to be bypassed through this procedure may potentially provide the Board and consulting parties with additional information concerning cultural sites, that information would not be necessary to achieve the purpose and intent of Section 106—to ensure that adverse effects to cultural sites are avoided as they would be through such an avoidance plan. If for some reason a site could not be avoided through implementation of the plan, then the eligibility, findings of effect, and treatment procedures would be required to ensure adequate protection of the site at issue.

TRRC further submits that this same concept – i.e., the ability of the applicant to bypass steps under the PA through avoidance measures – was set forth in the Vantage Pipeline PA and was successfully implemented to minimize project delay and to ensure protection of identified sites with respect to that project. TRRC thus requests that the PA be revised to incorporate avoidance provisions similar to those included in the Vantage PA, or other measures that would allow steps in the PA process (which may result in excessive delay) to be bypassed where adequate protection of cultural sites can be assured.

TRRC respectfully requests that the Board take the above comments into consideration when preparing the Final EIS. TRRC continues to appreciate the Board's work on this matter and looks forward to the issuance of the Final EIS in the near future.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "David H. Coburn", with a long, sweeping horizontal line extending to the right.

David H. Coburn
*Attorney for Tongue River Railroad
Company, Inc. and BNSF Railway
Company, Inc.*

ATTACHMENT 1

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

17 **WHEREAS**, the Tongue River Railroad Company Inc. (TRRC), the project applicant, filed a
18 revised application with the Surface Transportation Board (STB) proposing to construct and
19 operate a new, approximately 42-mile rail line between Colstrip, Montana, to two terminus
20 points, near Ashland, Montana in Custer, Powder River and Rosebud Counties to transport low
21 sulfur, sub-bituminous coal from proposed mine sites in the Tongue River Valley and Powder
22 River Basin (TRRC project) (Map, Attachment A); and,
23

24 **WHEREAS**, the STB is preparing an Environmental Impact Statement (EIS) in accordance with
25 the requirements of the National Environmental Policy Act (NEPA) to address the potential
26 impacts of the TRRC project on the environment, including on cultural resources. Review under
27 Section 106 of the National Historic Preservation Act (NHPA) is being coordinated with the
28 NEPA process and cultural resources documentation prepared will be the basis for determining
29 the potential impacts on historic properties, cultural resources, and tribal sites of significance for
30 both reviews; and,
31

32 **WHEREAS**, the STB is considering the No Action Alternative and five build alternative routes,
33 and certain variations on the five build alternative routes, to be carried forward in the EIS: the
34 Colstrip Alternative (the applicant's preferred alternative), the Tongue River Alternative, the
35 Tongue River Road Alternative, the Moon Creek Alternative, and the Decker Alternative, some
36 of which traverse portions of Custer County as well as Powder River and Rosebud Counties; and,
37

38 **WHEREAS**, the STB will be comparing the potential impact of each of the build alternatives on
39 historic properties, cultural resources and tribal sites of significance to inform its selection of any
40 build alternative, in addition to considering selecting the No Action Alternative, as a "preferred
41 alternative,"; and
42

43 **WHEREAS**, the STB is the lead federal agency responsible for compliance with Section 106 of
44 the NHPA, ~~5416 U.S.C.-306108 Part 470f~~ and its implementing regulations at 36 CFR Part 800;
45 and,
46

Comment [A1]: Effective December 19,
2014, the NHPA was moved to title 54.

1 **WHEREAS**, the STB's potential approval of the TRRC project is an Undertaking as defined at
2 36 CFR § 800.16(y); and,

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

8
9 **WHEREAS**, tribal sites of significance identified and evaluated by tribal experts or authorities
10 may be eligible for listing in the National Register as historic properties of religious and cultural
11 significance to tribes; and,

12
13 **WHEREAS**, the build alternatives under consideration consist of multiple corridors where
14 access to property is restricted on approximately 50 percent of the combined Area of Potential
15 Effects (APE), as shown in Attachment D (Table 3 and Figure 1), thereby necessitating a phased
16 approach for identification and evaluation of historic properties pursuant to 36 C.F.R. §
17 800.4(b)(2); and,

18
19 **WHEREAS**, STB's use of a phased approach for the identification, evaluation, and assessment
20 of effects of historic properties is allowable under 36 C.F.R. § 800.4(b)(2) and 36 C.F.R. §
21 800.5(a)(3) if memorialized in a Programmatic Agreement (PA) pursuant to 36 C.F.R. §
22 800.14(b); and

23
24 **WHEREAS**, in the event that the STB approves any build alternatives, this PA would be
25 included in its record of decision to guide the resolution of adverse effects to historic properties
26 and tribal sites of significance; and,

27
28 **WHEREAS**, the STB may or may not approve construction and operation of the TRRC rail line,
29 the STB developed this PA to defer final identification and evaluation of historic properties
30 pursuant to 36 CFR § 800.4(b)(2), to phase the application of the criteria of adverse effect
31 pursuant to 36 CFR § 800.5(a)(3), and to continue consultation to avoid, minimize and mitigate
32 the potential adverse effects of the Undertaking to historic properties and tribal sites of
33 significance in accordance with 36 CFR § 800.6(a); and,

34
35 **WHEREAS**, pursuant to 36 CFR § 800.4(b)(2) and 36 CFR § 800.5(a)(3), the STB, through the
36 phased identification, evaluation and effect assessment, has established the likely presence of
37 historic properties and tribal sites of significance within the APE for each alternative or
38 inaccessible area through background research, consultation and the appropriate level of field
39 investigation, taking into account the number of alternatives under consideration, the magnitude
40 of the undertaking and its likely effects, and the views of the consulting parties; and,

41
42 **WHEREAS**, upon approval of the project, the STB would develop a treatment plan as an
43 amendment to this PA that would outline the specific measures that would be implemented to
44 resolve adverse effects to historic properties and tribal sites of significance for any approved
45 alternative; and,

1 **WHEREAS**, this PA was developed in consultation with the Advisory Council on Historic
2 Preservation (ACHP) and the Montana State Historic Preservation Officer (SHPO) pursuant to
3 36 CFR § 800.6, who are signatories to this PA; and,

4
5 **WHEREAS**, the U.S. Army Corps of Engineers (COE), U.S. Department of Interior Bureau of
6 Land Management (BLM), and the U.S. Department of Agriculture Agricultural Research
7 Service (ARS) are cooperating agencies under NEPA and invited signatories to this PA pursuant
8 to 36 C.F.R § 800.6(c)(2)(iii); and,

9
10 **WHEREAS**, the Montana Department of Natural Resources and Conservation (MT DNRC)
11 (acting as lead agency for all Montana State agencies, including the Montana Department of
12 Transportation (MDOT)) is a cooperating agency and an invited signatory to this PA pursuant to
13 36 C.F.R § 800.6(c)(2)(iii); and,

14
15 **WHEREAS**, the MDOT has the responsibility for complying with Section 4(f) of the
16 Department of Transportation Act where applicable; and,

17
18 **WHEREAS**, the TRRC, the project applicant, is an invited -signatory to this PA, pursuant to 36
19 C.F.R. § 800.6(c)(2)(iii); and,

20
21 **WHEREAS**, the STB has consulted by letter, email, monthly teleconferences, and face-to-face
22 meetings with the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation,
23 Montana; the Crow Tribe of Montana; the Crow Creek Sioux Tribe of the Crow Creek
24 Reservation, South Dakota; the Lower Brule Sioux Tribe of the Lower Brule Reservation, South
25 Dakota; the Standing Rock Sioux Tribe of North & South Dakota; the Cheyenne River Sioux
26 Tribe of the Cheyenne River Reservation, South Dakota; the Yankton Sioux Tribe of South
27 Dakota; the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, South Dakota; the
28 Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana; the Flandreau
29 Santee Sioux Tribe of South Dakota; the Shakopee Mdewakanton Sioux Community of
30 Minnesota; the Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota; the
31 Santee Sioux Nation, Nebraska; the Arapaho Tribe of the Wind River Reservation, Wyoming;
32 Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota; the Cheyenne and
33 Arapaho Tribes, Oklahoma; the Fort Belknap Indian Community of the Fort Belknap
34 Reservation of Montana; the Oglala Sioux Tribe, the Shoshone Tribe of the Wind River
35 Reservation, Wyoming; and the Spirit Lake Sioux Tribe, North Dakota concerning properties of
36 traditional religious and cultural significance, who have been invited, in accordance with 36
37 C.F.R. § 800.6(c)(2)(ii), to participate in the development of the PA as concurring parties, and
38 who are hereafter referred to as **consulting tribes**; and,

39
40 **WHEREAS**, the STB has contacted the Lower Sioux Indian Community in the State of
41 Minnesota; the Upper Sioux Community, Minnesota; and the Blackfeet Tribe of the Blackfeet
42 Indian Reservation of Montana by letter, email and phone, and invited them to participate as
43 consulting parties in the development of this PA, however each of these tribes has either not
44 responded to STB's invitation or declined to participate in the development of this PA; and,

1 **WHEREAS**, other consulting parties, including the Colstrip Alternative Landowners Group, Fix
2 Ranch, National Trust for Historic Preservation (NTHP), Montana Preservation Alliance (MPA),
3 National Wildlife Federation (NWF), Northern Cheyenne Otter Creek Descendants (NCOCD),
4 Northern Plains Resource Council (NPRC), Rocker Six Cattle Company (RSCC), and the Sierra
5 Club have been invited, in accordance with 36 C.F.R. § 800.6(c)(3), to participate in the
6 development of the PA as concurring parties; and,
7

8 **WHEREAS**, the Wolf Mountains Battlefield, a property located within the view shed of the
9 Decker Alternative, was designated a National Historic Landmark (NHL) on October 6, 2008;
10 and,
11

12 **WHEREAS**, the Wolf Mountains Battlefield Site may be indirectly affected if the STB licenses
13 the Decker alternative; and,
14

15 **WHEREAS**, given the designation of the Wolf Mountains Battlefield as an NHL, the STB must
16 adhere to Section 110(f) of the NHPA and Section 800.10 of the ACHP's regulations, which
17 requires a higher consideration of alternatives to minimize harm to the NHL and has invited the
18 U.S. Department of Interior, National Park Service, National Landmarks Program (NLP), and the
19 NLP has agreed, to participate in consultation and invited to be a concurring party in the
20 development of this PA; and,
21

22 **WHEREAS**, the signatories, invited signatories and concurring parties to this PA are hereafter
23 collectively referred to as ***PA consulting parties***; and,
24

25 **WHEREAS**, TRRC, the applicant, would not be required to act under the terms of this PA
26 unless or until the STB authorizes the construction and operation of a new rail line; and,
27

28 **WHEREAS**, the TRRC project's Area of Potential Effects (APE), as defined at 36 CFR §
29 800.16(d), is outlined and identified in the Identification Plan (ID Plan), Attachment B of this
30 PA; and,
31

32 **WHEREAS**, the definitions of 36 CFR Part 800 and the definitions and acronyms in Attachment
33 C are applicable throughout this PA and any attachments to this PA; and,
34

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

43 **WHEREAS**, in 2013 and 2014, during Phase I as defined in Attachment C, the STB conducted a
44 SHPO records search for previously recorded archaeological and historic sites, for a one-mile
45 area on either side of the proposed right-of-way of the five build alternative routes, and
46 variations, being considered for the TRRC project under NEPA; and,

1
2 **WHEREAS**, in 2013 and 2014, during Phase I as defined in Attachment C, the STB conducted
3 pedestrian transect surveys by tribal members, contracting archeologists, historians and
4 architectural historians along portions of each of the alternatives considered under NEPA; and,
5

6 **WHEREAS**, the STB has been advised by some consulting parties, including tribal members
7 and ranchers, that the Tongue River Valley is an area of rich cultural heritage; and,
8

9 **WHEREAS**, the STB in collaboration with the ACHP, SHPO and consulting parties, will
10 include specific mitigation in its treatment plan to resolve project related adverse effects within
11 the APE for any licensed alternative; and,
12

13 **WHEREAS**, all the data gathered under the terms of this PA will be made available to
14 consulting tribes to inform any future undertakings that may take place in the Tongue River
15 Valley; and,
16

17 **WHEREAS**, the ID Plan in Attachment B requires that TRRC complete identification and
18 evaluation during Phase II as defined in Attachment C and the ID Plan for the entire line
19 approved by the STB in order to take into account any potential adverse effects to historic
20 properties and tribal sites of significance; and,
21

22 **WHEREAS**, if a build alternative is selected, assessment of effects and resolution of effects on
23 historic properties and tribal sites of significance will be addressed during Phase II as described
24 in Stipulations V and VI of this PA; and,
25

26 **WHEREAS**, the STB will use an independent third-party contractor, working under its sole
27 supervision, direction and control, and at TRRC's expense, to assist STB in implementing the
28 Stipulations below; and,
29

30 **NOW, THEREFORE**, the signatories to this PA agree that the proposed TRRC project will be
31 implemented in accordance with the following stipulations in order to take into account the
32 effects of the TRRC project on historic properties and sites of significance.
33
34
35
36
37

1 **STIPULATIONS**

2
3 STB has a statutory obligation as the lead federal agency to fulfill the NHPA requirements of
4 Section 106; therefore, STB will ensure that the measures in the following parts are carried out.

5
6 **I. ROLES AND RESPONSIBILITIES**

7
8 **A. Federal Agency**

9 Consistent with the requirements of 36 CFR 800.2(a), the STB remains legally responsible
10 for ensuring that the terms of this PA are carried out. In addition to Section 106, the STB is
11 responsible for complying with other sections of the NHPA, including Section 101(d)(6)(B)
12 for consultation with tribes that attach religious and cultural significance to historic
13 properties, Section 110(f) for NHLs, and Section 304 for confidentiality of location or
14 character of certain properties. The STB is responsible for notifying the ACHP if a
15 Memorandum of Agreement (MOA) is required and determining ACHP's participation and
16 for notifying the signatories to this PA when Section 106 is concluded. STB reserves the
17 right to seek qualified independent expert consultation through a third-party contractor in
18 order to fulfill its responsibilities under this PA.

19
20 **B. Other Federal Agencies**

- 21 1. **USACE:** The United States Army Corps of Engineers (Corps or USACE) has regulatory
22 responsibility under Section 10 of the Rivers and Harbors Act and Section 404 of the
23 Clean Water Act. Any permitting action would be considered a federal undertaking and
24 require the Corps to comply with NHPA and 36 CFR 800. The Corps acknowledges STB
25 as the lead agency responsible for Section 106 compliance in fulfilling our collective
26 responsibilities under Section 106 of the NHPA. The Corps will review STB Section 106
27 compliance documents to ensure they are acceptable to meet the Corps' Section 106
28 compliance responsibilities.
- 29 2. **BLM:** If a selected alternative or associated infrastructure crosses lands managed by the
30 U.S. Bureau of Land Management, BLM is responsible for issuing a right-of-way under
31 Title V of the Federal Land Policy and Management Act (43 U.S.C 1701) as amended.
32 Crossing BLM managed lands would be considered a Federal undertaking and require
33 BLM to comply with NHPA and 36 CFR 800. If the southern route (Decker Alternative)
34 is selected the right-of-way would avoid the BLM Wolf Mountain Battlefield Area of
35 Critical Environmental Concern (ACEC) because the ACEC is closed to rights-of-way.
- 36 3. **MDT:** If STB selects a build alternative that crosses a highway, modifies a highway
37 alignment, or the railroad would impact the highway right-of-way in any way, MDT will
38 notify STB of specific MDT's requirements with which STB must comply.
- 39 4. **USDA-ARS:** If a selected alternative or associated infrastructure crosses land managed
40 by the United States Department of Agriculture, Agricultural Research Service, USDA-
41 ARS is responsible for negotiating changes to the Easement Deed entered into between
42 USDA-ARS and the applicant on May 24, 1989 and its amendments (1994 and 1996).
43 Changes will be based on current conditions on the grounds of Fort Keogh.
44
45

1 **C. ACHP**

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

5
6 **D. SHPO**

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

9
10 **E. Tribes**

11 1. In 2013 to 2014, participating tribes were consulted during initial identification efforts,
12 participated in field identification efforts and in the development of this PA. During
13 circulation of the Draft EIS in 2015, tribes were requested to comment on the Draft EIS,
14 which included an analysis of the alternatives being considered, potential eligibility, and
15 effects.

16
17 2. If the STB decides to license any build alternative, the consulting tribes shall be
18 responsible to assist in the identification of tribal sites of significance in the APE and to
19 ~~provide the~~ notify STB and SHPO information to allow them to make a determination
20 regarding whether the properties would appear are to be eligible for the National
21 Register. Below ground excavation is not anticipated. Consulting tribes shall be
22 responsible to assist STB in assessing effects on sites of tribal significance in the APE
23 and how to resolve adverse effects. Tribes will adhere to the time frames in the
24 stipulations.

Comment [A2]: This section has been revised in accordance with Section 800.4(c) which requires the agency, and not the consulting tribes, to make the eligibility determination. Thus, the language as revised would require that the tribes provide information to the STB to allow it, in consultation with the SHPO, to make the eligibility determination, as is required under the applicable regulations.

25
26 **F. Applicant**

27 Once the TRRC has gained access to the right-of-way, the TRRC shall be responsible for
28 providing information to accurately delineate the APE, and providing access to the right-of-
29 way so that STB and its contractor, tribes, and SHPO can complete the stipulations set forth
30 in this PA. If specific circumstances arise that other consulting parties need to access the
31 APE in order to complete their review under the PA, and the STB authorizes the request, the
32 TRRC shall be responsible for providing access until construction on the line is
33 constructed has commenced.

Comment [A3]: The PA requires that the identification and resolution of effects be complete before construction can commence. Once construction has commenced, there is no reason to continue to provide access since obligations under Section 106 have been fully satisfied.

34
35 **G. Other Consulting Parties**

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

38
39 **II. REVIEW OF ALTERNATIVES**

40
41 A. Consistent with 36 C.F.R. § 800.3(b) and § 800.8, the STB coordinated its NEPA review
42 with the Section 106 process. Under NEPA, the STB considered the No Action Alternative
43 and five build alternative routes, and certain variations on the five build alternative routes:
44 the Colstrip Alternative (the applicant's preferred alternative), the Tongue River Alternative,
45 the Tongue River Road Alternative, the Moon Creek Alternative, and the Decker Alternative.

- 1 B. In the EIS, the STB compared the potential impact of each of the alternatives on historic
2 properties, cultural resources and tribal sites of significance to inform its eventual selection
3 of the preferred alternative. The EIS was distributed to all PA consulting parties for their
4 review and comment. Comments received by STB from the PA consulting parties informed
5 the STB's consideration of the preferred alternative.
6
- 7 C. Consistent with 36 C.F.R. § 800.3(b) and § 800.8, the STB coordinated the four-step Section
8 106 process set forth in 36 CFR § 800.3 through § 800.6 with the NEPA review of
9 alternatives as follows:
- 10 **1. Step 1: Initiation of the Section 106 Process**
- 11 a. Establish undertaking: Pursuant to 36 C.F.R § 800.3, STB established that its
12 potential approval of the TRRC project is an Undertaking as defined at 36 C.F.R. §
13 800.16(y).
- 14 b. Identify the appropriate SHPO: Pursuant to Section 36 C.F.R. § 800.3(c), STB sent a
15 letter to the Montana SHPO initiating Section 106 consultation on October 22, 2012,
16 and since then actively sought input from the SHPO regarding the Undertaking.
- 17 c. Identify consulting parties: From October 2012 to December 2012, STB sent letters
18 initiating Section 106 consultation with the PA consulting parties, and added
19 additional consulting parties in 2013 and 2104. STB held monthly calls with the PA
20 consulting parties since February 2013 to inform them of updates on the NEPA
21 process, and progress on the Section 106 steps. STB held in person meetings with the
22 PA consulting parties in Lame Deer, Montana on April 16-18, 2013, and in Billings,
23 Montana on February 13-14, 2014, which included information about the alternatives
24 being considered and discussions about the Section 106 process.
- 25 d. Plan to involve the public: STB held ten scoping meetings in multiple locations in the
26 project vicinity from November 12-16, 2012. These meetings included maps of the
27 alternatives and allowed for public comments on environmental topics, including
28 cultural resources and historic properties. The project website, available to the
29 general public at www.tonguerivereis.com, was updated regularly and has a page
30 devoted entirely to historic preservation issues. The Draft EIS was distributed for
31 public comment in [month] 2015, and public comments received were considered in
32 the revisions to this PA. See Stipulation XVI.
- 33 **2. Step 2: Identification of Historic Properties**
- 34 Pursuant to 36 C.F.R. § 800.4(b)(2), the STB is deferring final identification and
35 evaluation of historic properties. For the analysis of impacts under NEPA, STB utilized
36 crews of archaeologists, tribal members, historians and architectural historians to conduct
37 field surveys in the APE of the build alternatives where access was granted to STB by
38 landowners. [This information gathered follows the Section 106 process and is being
39 used to inform the NEPA process and the selection of a preferred alternative.] The
40 results of the identification effort were reported to the PA consulting parties, and were
41 documented in the EIS for additional review and comment by the PA consulting parties,
42 agencies, and the public. See Stipulation IV.
- 43 **3. Step 3: Assessment of Adverse Effect**
- 44 Pursuant to 36 C.F.R. § 800.5(a)(3), the STB phased the application of the criteria of
45 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. See Stipulation V.

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. See Stipulation VI.

D. In the event the STB approves a build alternative, the STB would ensure that the stipulations that follow (i.e., Stipulation III through Stipulation XXII) shall be implemented.

III. AREA OF POTENTIAL EFFECTS (APE)

A. First Phase-APE for Review of Alternatives

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

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

1. Defining the APE

~~The STB, in consultation with the SHPO, consulting tribes and other consulting parties, will define the APE for any STB-approved build alternative~~ based on the vertical and horizontal direct effects, indirect effects, and cumulative effects will be defined as set forth for any STB-approved build alternative below. 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, 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.). The vertical 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. The horizontal APE includes up to 200 feet on either side (up to a total of 400 feet) of the authorized construction right-of-way (ROW), to include a twenty-foot buffer on either side of the fenced construction ROW along the entire route, with the exception of the Wolf Mountains Battlefield NHL site. If the Decker Alternative is approved by STB, the NPS would be consulted about possibly expanding 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

Comment [A4]: These edits are made to reflect that the APE is defined below. The language as is suggests that the STB would undertake a future process to establish the APE, which TRRC does not believe is warranted or consistent with prior PAs. Further, we note that Section III.B.2 allows for amendment of the APE if amendment to the APE is deemed to be necessary at some future point.

Comment [A5]: Expansion may not be required. This language has, thus, been revised to reflect that expansion is only a possibility.

1 within the NHL.

2 **b. Indirect Effects**

3 The APE for indirect effects includes areas outside the construction or ground
4 disturbance ROW where there is the potential for the Undertaking to have an indirect
5 effect, including visual, vibration and noise effects, on historic properties, as defined in
6 36 C.F.R § 800.5. ~~Tribal sites of significance located outside the field survey areas but~~
7 ~~within the line of sight of the proposed railroad including water resources, sacred and~~
8 ~~ceremonial sites, areas where traditional plants are located, and associated features, will~~
9 ~~be included in the APE for indirect effects.~~ If a build alternative is approved, the APE for
10 direct effects shall serve as the APE unless that APE is amended through the process set
11 forth under Section III.b.2 to account for indirect effects. ~~The STB, will consult with the~~
12 MT SHPO, tribes and other consulting parties ~~to may identify propose~~ any locations
13 where the APE should be extended beyond the buffer zones established during the first
14 phase – that is 200 feet for archaeological and tribal resources and 1,500 feet for built
15 resources ~~– to address indirect effects.~~

16 **c. Cumulative Effects**

17 The identification of the APE will consider cumulative effects to historic properties as
18 referenced in 36 C.F.R 800.5, which states: adverse effects may include reasonably
19 foreseeable effects caused by the undertaking that may occur later in time, be farther
20 removed in distance or be cumulative. If a build alternative is approved, the APE for
21 direct effects shall serve as the APE unless that APE is amended through the process set
22 forth under Section III.b.2 to account for cumulative effects.

23 **2. Amending the APE**

- 24 a. ~~An The STB may modify the APE APE may be modified~~ where tribal consideration,
25 additional field research or literature review, consultation with parties to this agreement,
26 or other factors indicate that the qualities and values of historic properties that lie outside
27 the boundaries of the APEs ~~may will~~ be affected directly, indirectly and/or cumulatively.
28 The APE may only be expanded before survey work under Section IV has begun, and
29 VI.
- 30 b. Any party to this agreement may propose that the APEs be modified by submitting a
31 written request to the STB providing a description of the area to be included, justification
32 for modifying the APE(s), and map of the area to be included. The STB will notify the
33 parties to this agreement of the proposal with a written description of the modification
34 requested within 15 days¹ of receipt of such a request. From the date of notification, the
35 STB will consult with the parties to this agreement for no more than 30 days to reach
36 consensus on the proposal.
- 37 c. If the parties to this agreement cannot agree to a proposal for the modification of the
38 APEs, then the STB will consider their concerns and will render a final decision within
39 30 days after the consultation period closes.
- 40 d. For all modifications to the APE(s) the STB will provide a written record of the decision
41 to the parties to this agreement.
- 42 e. Amending the APEs will not require an amendment to the PA.

Comment [A6]: TRRC proposes to delete this sentence because it is redundant of the process to amend the APE that is set forth under III.B.2(a) below. Also, the term “line of sight” is too vague and expands the scope of Section 800.4.

Comment [A7]: TRRC cannot agree to defining the APE for indirect effects based on sites that happen to be in the area and which may be later identified. Indeed, Section 800.4 requires that the APE first be defined to allow for the proper identification of properties within that area. The APE for indirect effects should therefore be independent of the identification of sites and should be based on non-discrete factors that are dependent on the location of the project.

TRRC thus proposes that this paragraph be revised to require amendment to the APE before the APE will be expanded beyond the APE for direct effects. Alternatively, TRRC requests that the Board define the APE for indirect effects by explicitly setting forth a larger buffer zone. Without explicitly defining the APE for indirect effects, the scope for the identification and evaluation of properties cannot be properly limited in scope as is envisioned under Section 800.4(c).

Comment [A8]: See comment JR7 above.

Comment [A9]: TRRC proposes to limit the time in which parties may seek to amend the APE. As envisioned under Section 800.4(c), the APE must be defined before the identification, evaluation, resolution processes have begun. If these steps are underway or have already been completed, the STB should not provide for amendment of the APE.

Comment [A10]: TRRC proposes to add a definition of “days” in the footnote below to clarify that this term means calendar days since “calendar days” is used in Section XIII.

¹ As used in this Agreement, the term “days” means calendar days.

- f. On BLM lands, minor changes to the APE during construction of the Undertaking that may require additional fieldwork may be handled through the BLM ROW grant variance process.

IV. IDENTIFICATION AND EVALUATION

A. First Phase- Review of Alternatives

During Phase I 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. **Inventory:** The Inventory completed during Phase I was 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 Inventory was to obtain sufficient information about the existing or known prehistoric and historic properties, cultural landscapes, and properties of religious and cultural significance located within the project area and to inventory those properties. The Phase I Inventory, completed for areas one mile away from each of the alternatives (2 miles total), also helped in determining the potential for previously unidentified historic properties to be located within the project area. A summary of the Inventory completed during Phase I is included in this PA in Attachment D, Tables 1 and 2.
2. **Alternatives surveys during Phase I:** Pedestrian transect field surveys were conducted by an equal number of tribal members and STB archaeologists of accessible portions of the direct and indirect APE for the alternatives being considered for this Undertaking. Vehicular and pedestrian survey was conducted by historians and architectural historians of the direct and indirect APE. For areas that were not accessible, satellite imagery was used to determine the likely presence or absence of built resources. Alternatives survey results completed during Phase I are included in this PA in Attachment D, Tables 3, 4, and 5, and Figure 1.

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

1. In order to complete step two of the four-step Section 106 process, 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 components:
 - a. Completing the field surveys that were conducted during Phase I in 2013 and 2014 for any portions of the approved build alternative APE that were inaccessible or where surveys were not previously completed; and
 - b. Conducting testing and evaluation of identified sites during Phase II in the APE for any approved build alternative 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, and within 60 days of the STB having chosen an alternative on which TRRC may build its line, the STB will retain the services of -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.

Comment [A11]: A time period should be established so as to not delay a choice of a contractor, and to allow survey obligations under this PA to commence.

44716, September 29, 1983 and 62 Fed. Reg. 33708, June 20, 1997). STB, TRRC and the Contractor will enter into appropriate agreements setting forth the scope of work and the terms of the Contractor's work. The Any agreements shall explicitly state that the Contractor shall work under the STB's sole direction, control and supervision but will be paid by TRRC. For any approved alternative, the Contractor will:

- a. ~~Conduct field surveys in the APE that were not completed during Phase I, conduct interviews and collect additional information from landowners, and prepare the Identification Reports (ID Reports).~~
- b. Conduct Testing and National Register Evaluations, and Evaluation Reports (Evaluation Reports).
- c. Obtain any needed federal or state agency permits necessary to conduct the required work.
- d. The Contractor must have experience working in the field with tribal members.

3. The STB shall invite consulting tribes to work with the Contractor and help plan and participate in the field surveys to identify, document, and evaluate properties within the APE to which they attach traditional religious and cultural significance. Consulting Tribes shall notify TRRC and the Contractor of their desire to participate in the field surveys within 30 days of the STB's invitation. Consulting Tribes need not meet the Secretary of the Interior's Standards specified in section B.2. of this stipulation. The STB will also invite such consulting tribes to work with the Contractor to identify and compile a list of traditionally important plants that occur in the APE, and identify gathering sites and access points for the plant gathering areas. TRRC will provide reasonable financial reimbursement² for professional services provided by one team of the three designees drawn from all of the participating designated consulting tribes.

4. STB will review each ID Report prepared by the Contractor and provide copies to the PA consulting parties for their review and comment. Each 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 ID report will be as follows:

- a. The PA consulting parties will have 15 days after receipt of each ID Report to notify STB in writing if information is missing ~~and/or provide any recommendations. If no PA consulting parties indicate that there is missing information, PA consulting parties shall provide any comments or recommendations to the STB within 15 days of receipt of each ID Report.~~
- b. If PA consulting parties identify any missing information, 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 ID Report.

Comment [A12]: We assume that there would be both a three-party agreement as now exists between the STB, ICF, and TRRC, as well as a bilateral business agreement between TRRC and ICF.

Comment [A13]: TRRC believes that it is important that a timeframe be defined for this activity.

Comment [A14]: TRRC proposes to delete this sentence because it is redundant of the reference to traditional and cultural properties in the first sentence of this paragraph.

Comment [A15]: The survey will be undertaken for a much more confined area, and it would seem both cumbersome and inefficient to have a large number of persons engaged in this survey work.

Comment [A16]: TRRC proposes to tighten the timeframes because of the short construction season.

² 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).

- c. STB will provide a ~~1545~~-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. ~~The provisions of Section IV.C shall apply to For~~ each property identified in the ID Report ~~that cannot be avoided by the rail line construction. For properties that cannot be avoided,~~ the STB, in conjunction with the Signatories, Invited Signatories, and Concurring Parties, will ~~determine-make a recommendation concerning~~ 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. 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. Testing and evaluation procedures during Phase II and a summary of the results will be presented in a combined ID Report/ Evaluation Report. In the Evaluation Reports, STB will make its National Register eligibility determinations in consultation with the MT SHPO and federally recognized tribes that attach traditional religious and cultural significance to identified historic properties. STB will make a determination on the NRHP eligibility of all historic properties identified in the project area within **45 days** of receipt of comments from consulting parties. Such comments shall be due within **15 days** of the receipt by the consulting parties of the Evaluation Report, which STB shall send to the PA consulting parties within no more than 15 days of receipt of the Report from the contractor. STB will finalize determinations of eligibility in a manner consistent with 36 CFR § 800.4(c) and pertinent guidance of the National Park Service, ACHP, and MT SHPO.
4. In making determinations of eligibility, STB will rely on the special expertise of tribes to inform it concerning ~~whether~~ or not tribal sites of significance meet the eligibility criteria of the National Register.
5. For built resources, STB will rely on research and analysis by historians and architectural historians, and the views of consulting parties with an interest or knowledge of built resources.
6. Once STB has finalized its determinations of eligibility, and within **40 days** of receipt of comments from the MT SHPO and tribes, STB will direct the Contractor to make any required revisions and finalize the Evaluation Report per the ID Plan.

Comment [A17]: TRRC cannot agree to require eligibility determinations for properties that will be avoided. Doing so would be inconsistent with Sections 800.4, 800.5 and 800.6 because an eligibility determination is only intended to exclude sites from requirements under these sections.

1
2 **V. ASSESSMENT OF EFFECTS**
3

- 4 A. **On previously surveyed areas:** During Phase I in the EIS, the STB analyzed the impacts
5 of each alternative upon the archaeological resources, tribal resources, and built resources
6 identified through field survey in the APE on areas of accessible parcels. The EIS
7 analyzed the types and numbers of resources that were identified in the proposed right-of-
8 way for each build alternative and would likely be adversely affected by construction and
9 operation activities. The EIS also analyzed potential resources that were not in the
10 proposed right-of-way, but were identified by survey in the buffer area, and could be
11 indirectly affected by construction and operation activities. The right-of-way plus the
12 buffer area is identical to the APE.
- 13 B. **On previously inaccessible areas:** In the EIS, STB also assessed impacts on land that
14 was not accessible and therefore not surveyed during Phase I. STB assessed the
15 likelihood of the presence of archaeological sites on the total acreage (both surveyed and
16 unsurveyed) of each alternative based on the number of archaeological sites identified
17 during the survey, combined with three slope percentage categories (high, moderate, and
18 low). OEA then used this to extrapolate the probability of unidentified archaeological
19 sites that could be located within the total build alternative. The probability of tribal sites
20 of significance located within the build alternative was not assessed in the EIS. To assess
21 impacts on built resources for areas where access was not granted, the STB's built
22 resource survey teams reviewed tax assessor data and geographic information system
23 (GIS) maps using Google Earth Pro satellite imagery.
- 24 C. If the STB makes a decision to approve a build alternative, in order to complete step three
25 of the four-step Section 106 process and in consultation with the PA consulting parties,
26 STB will assess the direct, indirect and cumulative effects of this Undertaking on historic
27 properties consistent with 36 CFR 800.4(d) and identify effects on each historic property
28 within the APE of the approved build alternative in accordance with the ***criteria of***
29 ***adverse effect*** established in 36 CFR 800.5(a)(1-2), and provide the PA consulting parties
30 with the results in a report entitled ***Finding of Effect*** with the content following the
31 documentation standards at 36 CFR 800.11(e)(4-6), as follows:
32 1. A description of the Undertaking's effects on historic properties;
33 2. An explanation of why the criteria of adverse effect were found applicable or
34 inapplicable, including any conditions or future actions to avoid, minimize or mitigate
35 adverse effects; and
36 3. Copies or summaries of any views provided by consulting parties and the public.
- 37 D. The assessment of effects will serve as the basis for the development of one or more
38 Treatment Plan(s) as described in Stipulation VI. The STB, in consultation with the PA
39 consulting parties, will broadly assess cumulative effects under Section 106 in order to
40 identify all reasonably foreseeable potential adverse effects as a result of the Undertaking
41 (36 CFR 800.5 (a)(1)). Potential cumulative or reasonably foreseeable effects will be

1 based on the APEs for direct and indirect effect and be addressed in the Treatment
2 Plan(s) according to the procedures in Stipulation VI.

- 3 E. The STB will provide all assessments of effect to historic properties in the ***Finding of***
4 ***Effect*** to the PA consulting parties. This will be done concurrently with the distribution
5 of the Phase II Evaluation Reports described in Stipulation IV. ~~Reviews will proceed~~
6 ~~according to the procedures and timeframes established in Stipulation IV, sections B.4.,~~
7 ~~C.3, and C.6.~~

- 8 F. Disagreement regarding assessments of effect will be handled according to the
9 procedures established in Stipulation XIV.

Comment [A18]: This timeline is confusing given that different timelines are identified in each of the referenced sections. This sentence is also unnecessary given that the Finding will occur concurrently with the distribution of the Phase II Evaluation Reports.

11 VI. RESOLUTION OF ADVERSE EFFECTS

- 12 A. If the STB licenses any build alternative, -in order to complete step four of the four-step
13 Section 106 process, the STB will consult with the PA consulting parties, ~~and other~~
14 ~~parties who have entered the consultation process with the selection of a build alternative,~~
15 to seek ways to ~~avoid or~~ minimize adverse effects to historic properties ~~where effects~~
16 ~~cannot be avoided. Hereafter, the PA consulting parties and any other parties who enter~~
17 ~~the process will be referred to as “consulting parties.”~~ If historic properties cannot be
18 avoided, subsurface investigation may be necessary for archaeological sites within the
19 direct effect APE which may be adversely affected. Determination of the site boundaries
20 in relation to the direct effect APE, and actual area of ground disturbance, may be
21 analyzed to aid in developing alternative design and or mitigation strategies. If adverse
22 effects cannot be avoided the STB will consult with the consulting parties to determine
23 appropriate measures to resolve adverse effects to be detailed in the Treatment Plan(s).

Comment [A19]: TRRC proposes to delete any reference to parties who may enter the consultation process at a later point in time. If parties have not yet entered the consultation process by this time, it is clear that they have no interest in the issues addressed in this Agreement. Further, Section 800.2(c) sets forth mandatory consulting parties, which does not include such other parties. Also, Section 800.3(f) requires that the Board specifically invite such other parties to participate. Thus, at a minimum, any reference to additional parties must be preceded by an invitation by the Board.

25 B. Consultation on Developing Treatment Plans

- 26
27 1. If the STB licenses any build alternative, ~~and historic or traditional cultural properties~~
28 ~~cannot be avoided,~~ STB will consult with the MT SHPO, consulting tribes and other
29 consulting parties to develop measures that would ~~avoid,~~ minimize or mitigate adverse
30 effects to ~~historic properties or traditional cultural properties tribal sites of significance or~~
31 ~~identified National Register eligible or listed historic properties~~ and memorialize such
32 measures in a Treatment Plan(s). The STB will meet with the MT SHPO, TRRC, the
33 managing federal agency (for sites on federal land), and consulting tribes to further
34 review the framework for how individual treatment plans will be developed, and to
35 consider ways to ~~avoid or~~ minimize adverse effects to tribal sites of significance,
36 individual historic properties, groups of closely related historic properties, or category of
37 historic properties including traditional cultural properties and historic or tribal
38 landscapes.
- 39 2. STB will notify the consulting parties and participating tribes of the proposed treatment
40 options within **45 days** of the date of issuance of complementary Final Phase II
41 Evaluation reports.

Comment [A20]: This language has been added to reflect that a Treatment Plan is required only where avoidance is not possible, as specified in the last sentence of VI.A.

43 C. Development of the Treatment Plan(s)

44

1. The STB will ensure that the Contractor prepares a Treatment Plan(s) that will address the adverse effects of the proposed Undertaking on historic properties, including direct and indirect impacts (visual, noise, aesthetic, etc.) A separate Treatment Plan will be developed for the Wolf Mountains Battlefield NHL if the Decker Alternative is approved; and one or more Treatment Plans may be prepared for other sections of the APE affected by the Undertaking. If the Decker Alternative is approved, STB must adhere to Section 110(f) of the NHPA and Section 800.10 of the ACHP's regulations, which and requires a higher consideration of alternatives to minimize harm to the NHL. Because land acquisition and engineering surveys may be completed in different stages, a Treatment Plan may be prepared for a portion of the line provided that the Phase I ID Report for that portion has been completed and approved in accordance with Stipulation IV. Each Treatment Plan will be amended, if necessary, after the finalization of any supplemental Phase II Evaluation Report(s).
2. Each Treatment Plan will do the following:
- identify tribal sites of significance and National Register-eligible or-listed historic properties in the APE or portion thereof;
 - identify the nature of the effects to which each property will be subjected;
 - identify the treatment strategies proposed to avoid, minimize or mitigate the effects of the Undertaking on the tribal sites of significance and historic properties; and
 - Only include treatments that would be feasible from an engineering standpoint.
3. **Tribal sites of significance:** ~~The STB will consider for inclusion in Treatment Plans~~ ~~Each Treatment Plan will incorporate~~ measures identified by consulting tribes to resolve adverse effects to properties significant for their traditional cultural values and, if possible, the protection and continuing access to gathering sites of traditionally-important plants. If appropriate, TRRC may attempt to negotiate tribal access to public or private lands that are not currently accessible to tribes for plant gathering purposes.
4. **Other properties listed on or eligible for the National Register:** ~~The STB will consider for inclusion in Treatment Plans~~ ~~Each Treatment Plan will incorporate~~ measures identified by other consulting parties who have expertise or interest in properties listed on or eligible for the National Register. The Treatment Plan(s) will conform to the principles of the Council's Treatment of Archaeological Properties: A Handbook, Parts I and II, the "Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation" (48 Fed. Reg. pp. 44716-44742), and appropriate MT SHPO guidelines. Each finalized Treatment Plan will be implemented by TRRC prior to the onset of construction activities.
5. Whenever possible avoidance of adverse effects shall be the preferred alternative. In consultation with the consulting parties, TRRC shall develop specific procedures to preserve historic properties and tribal sites of significance in place. These procedures may include minor changes to the rail alignment or construction method to avoid or reduce impacts, and/or monitoring historic properties by historians, archaeologists and tribal members for sites of significance during construction. Each Treatment Plan will focus on avoidance measures and examine the feasibility of avoiding National Register-

Comment [A21]: Measures must be feasible to be implemented under Section VI.C.2.d. Thus, TRRC requests that the STB (which is the agency here with Section 106 obligations) make a determination as to which measures proposed by the tribes are feasible.

Comment [A22]: Same comment as above.

1 listed or -eligible historic properties, or tribal sites of significance. These measures may
2 include modifications to the rail alignment, to the extent feasible, to avoid adverse
3 impacts.

- 4
5 6. If avoidance is not possible, in-place preservation will be the preferred option. TRRC will
6 work with the consulting parties to develop specific procedures to preserve historic
7 properties and sites of significance in-place and minimize visual and noise impacts to
8 such resources as well as impacts to tribal, historic and rural landscapes. These
9 procedures may include minor changes to the rail alignment or construction methods to
10 reduce impacts, and/or monitoring of historic properties by historians, archaeologists and
11 tribal members for sites of significance during construction.

12
13 **D. Finalization of Treatment Plan(s)**

- 14
15 1. STB will submit the draft Treatment Plan(s) to the consulting parties for review. If no
16 additional information is requested, the consulting parties will have ~~360~~ **days** from receipt
17 of the initial Treatment Plan(s) to submit comments.
18 a. If any consulting party identifies any informational deficiencies in the Treatment
19 Plan(s), the consulting party must notify STB in writing within ~~30-15~~ **days** of receipt
20 of the Treatment Plan(s). A copy of any comments sent to STB will be sent
21 simultaneously to the MT SHPO.
22 b. STB will then have **10 days** to provide the additional information, or provide an
23 explanation why such information is not required, to the MT SHPO and all consulting
24 parties.
25 c. The consulting parties will then have ~~45-30~~ **days** from the receipt of the complete
26 information, or notice that additional information is not required, to comment on the
27 Treatment Plan(s).
28 d. If any consulting party fails to submit its comments within the specified time limits
29 above, STB may assume that party's concurrence with the Treatment Plan(s).
30
31 2. STB will make any required revisions to the Treatment Plan(s), as appropriately, within
32 **45 days** of the close of the comment period, taking into consideration the comments
33 received during this review period.
34
35 3. The final decision on the acceptability of the Treatment Plan(s) will be made by STB, in
36 consultation with the MT SHPO. A copy of the final Treatment Plan(s) will be provided
37 by STB to the PA consulting parties.
38

39 **VII. DATA RECOVERY**

40
41 **A. Consideration of Alternatives to Data Recovery**

42 Where avoidance and in-place preservation have been explored but are not feasible, STB and
43 the consulting parties shall consider alternatives to archaeological data recovery as mitigation
44 for adverse effects. Such approaches can either be implemented alone or as part of a broader
45 mitigation package. Examples of such alternatives to be considered may include:

- 46 1. preserving selected eligible archaeological sites and incorporating them into heritage
47 tourism plans while allowing others to be lost;

Comment [A23]: ACHP regulations provide only for 15, 30, or 45 day review periods. 60-day review periods are not provided for under the regulations. TRRC proposes to shorten all timeframes here due to the short construction season.

2. burying sites under fill or incorporating them into the undertaking;
3. using resources to develop syntheses of existing information on the Tongue River Valley region instead of, or in addition to, using them on data recovery;
4. using resources to develop virtual or Web-based reports or educational media that otherwise would not be produced.
5. Acquiring and preserving of archaeological sites not located in the APE in lieu of direct mitigation of sites within the APE, also known as “mitigation banking”.

B. Where avoidance, in-place preservation, and other alternatives to data recovery are not feasible and data recovery is determined by STB and the consulting parties to be the most prudent and feasible treatment option, the research design proposed in the Treatment Plan(s) will specify, at a minimum:

1. the historic properties to be affected and the nature of those effects;
2. the research questions to be addressed through data recovery, with an explanation of their relevance and importance;
3. the data needed to address specific research questions, the likelihood that this data can be recovered and how the data will be analyzed;
4. the fieldwork and analytical strategies to be employed, with an explanation of their relevance to the research question;
5. proposed methods of dealing with individual discovery situations;
6. methods to be used in data management and dissemination of data, including a schedule;
7. how findings will be presented to support the research design;
8. the proposed repatriation of recovered materials and records including the disposition of tribal sacred items, human remains and funerary items;
9. proposed methods for disseminating results of the work to the public;
10. proposed methods by which tribal representatives will be kept informed of the work and afforded an opportunity to participate;
11. a proposed schedule for the submission of progress reports to STB;
12. proposed approach for the disposition and curation of data and materials (other than tribal identified items, human remains and funerary items as discussed under item 8 above) upon completion of data collection; and,
13. information regarding the tribal value of the affected sites of concern to participating tribes.

C. **Data Recovery Plan:** Following implementation of the research design specified above, a **Data Recovery Plan** will be drafted and incorporated into the Treatment Plan(s). The Data Recovery Plan shall be consistent with the Secretary’s Standards for Archaeological Documentation (48 Fed. Reg. 44734-37) and will take into account the ACHP’s publications, including Treatment of Archaeological Properties: A Handbook, and The ACHP’s Section 106 Archaeology Guidance (<http://www.achp.gov/archguide>). Contractor shall obtain all necessary cultural resource permits for data recovery, including an excavation permit from BLM for any data recovery on BLM land, appropriate ARS permits for any recovery on ARS lands, and appropriate state permits for any recovery on state lands.

D. **Data Recovery Report:** Reports resulting from the implementation of the Data Recovery Plan will be submitted by the TRRC to STB for review. Within **15 days** of receipt of the draft

report(s), STB will provide a copy(s) to the PA consulting parties for their review and comment. Within **15 days** of its receipt, a PA consulting party must notify STB in writing of any informational deficiencies in the **Data Recovery Report**. STB then has **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 Data Recovery Report. If no additional information is requested, the parties will have **60 days** from receipt of the report to submit comments to STB. A copy of any comments will be sent simultaneously to the MT SHPO.

- E. Comments will be incorporated, as appropriate, into the Final Data Recovery Report(s) prepared by the Contractor at the direction of STB in consultation with the MT SHPO. The Final Data Recovery Report(s) will be prepared within **45 days** of the close of the comment period. The Contractor will ensure that reports are responsive to contemporary professional standards, and to the Secretary's Standards for Archaeological Documentation (48 Fed. Reg. 44734-37) as well as the requirements of Section 110(f) of NHPA, where appropriate. A copy of all Final Data Recovery Reports will be provided by STB to the PA consulting parties within **15 days** of receipt from Contractor.

VIII. CONSTRUCTION

~~A. STB shall consider the No Action Alternative during the Phase I review of alternatives (Stipulation II). Construction would only occur during Phase II if STB selects any of the build alternatives.~~

~~B.A.~~ Once STB has agreed in consultation with the PA consulting parties on the adequacy of the ID Report(s) and Evaluation Report(s) as defined in the ID Plan, STB will allow TRRC to begin construction on those portions of the approved rail line which do not contain National Register eligible or listed historic properties or tribal sites of significance within the direct APE or any properties identified in the ID Reports that can be avoided through rail line construction, provided that, to the extent feasible, such construction will not preclude consideration of the full range of treatment options (including avoidance, preservation in place, and other alternatives to data recovery) of historic properties as to which there may be an indirect or situated in the indirect APE and cumulative effect APE.

~~C.B.~~ Where eligible historic properties or sites of significance are present within the direct APE, STB will allow construction to proceed once the agreed upon treatment/data recovery for that portion of the APE as specified in the Treatment Plan is completed and approved by STB, with the concurrence of the MT SHPO. Where tribal sites of significance or eligible historic properties are present on BLM, ARS or state lands, STB will allow construction to proceed in that area only after the agreed upon treatment/data recovery fieldwork is completed and approved by BLM with respect to BLM-administered lands, by ARS with respect to ARS lands, and by MT DNRC with respect to state lands, in addition to STB approval with the concurrence of the MT SHPO.

Comment [A24]: The PA cannot require that the STB make decisions on which alternative to approve. Further, the PA only takes effect once the STB makes a decision to approve a build alternative.

Comment [A25]: This language has been revised to reflect the changes above – as proposed above, the direct APE may not be expanded unless the amendment process under Section III.B.2 is invoked.

1 D. TRRC or STB's Contractor will notify STB when treatment/data recovery fieldwork is
2 completed for an area. Within **45 days** of notification, STB, and BLM if data recovery
3 occurs on BLM-administered lands, ARS if data recovery occurs on ARS-administered
4 land, or the MT DNRC if data recovery occurs on state lands, will inspect the site. Upon
5 STB and MT SHPO's concurrence and, if appropriate, BLM's, ARS's or MT DNRC's
6 concurrence, that the treatment/data recovery fieldwork has been satisfactorily
7 completed, STB will allow construction to proceed in that area prior to the completion of
8 the Data Recovery Report. The Data Recovery Report will be prepared in accordance
9 with Stipulation VII.D. Alternatively, issuance of a Final Data Recovery Report pursuant
10 to Stipulation VII.E. will be considered approval of the data recovery
11 fieldwork/treatment.
12

13 **IX. CHANGES TO THE RAIL LINE ALIGNMENT/OTHER AREAS SUBJECT TO** 14 **DIRECT IMPACTS**

15 A. The STB will notify the consulting parties of proposed changes in ancillary areas (e.g.,
16 staging areas, waste or borrow pits) or modest changes to the right-of-way outside of the
17 originally defined APE. The STB will ensure that the APE of the new ancillary area or
18 reroute is inventoried and evaluated in accordance with Stipulation IV, and will consult
19 with the consulting parties on the proposed APE and the determination of eligibility,
20 finding of effect, and resolution of effect in accordance with Stipulations V. through VII.

21 B. The STB will provide the consulting parties with the revised addendum reports and
22 findings on eligibility and effects for a **30 day** review and comment period. The STB will
23 seek consensus determinations of eligibility for all properties identified in the APEs. If
24 consensus cannot be reached, the process articulated in Stipulation XIV for seeking a
25 determination of eligibility from the Keeper of the NRHP or resolving other disputes will
26 be followed.

27 28 **X. DISCOVERY**

29 A. A **Discovery Plan** for previously undiscovered sites and unanticipated effects on
30 previously evaluated sites will be appended to the Treatment Plan. If a previously
31 undiscovered historic property is encountered during construction, or previously known
32 properties will be affected in an unanticipated manner, all work will cease within 200 feet
33 in all directions until STB can evaluate and, if necessary, authorize steps to mitigate
34 impacts to the new discovery. Evaluation and mitigation will be carried out in
35 consultation with the PA consulting parties as expeditiously as possible in accordance
36 with 36 C.F.R § 800.13(a)(1).

37 B. If historic properties or sites of significance are encountered on federal or state lands, the
38 BLM, ARS or MT DNRC, depending on the agency that controls the land, will be
39 consulted to develop appropriate mitigation measures. TRRC will provide the
40 construction contractor with written notification of the proper protocol for discovery of
41 previously unencountered sites.
42

43 **XI. HUMAN REMAINS**

44 A. If human remains and funerary objects, sacred objects, or items of cultural patrimony
45 associated with human remains are encountered on federal lands, STB or the appropriate
46 federal land management agency will consult with the appropriate tribe(s) to determine

1 treatment and disposition measures consistent with applicable federal laws (such as
2 NAGPRA and NHPA) and guidance documents (such as the ACHP Policy Statement
3 Regarding Treatment of Burial Sites, Human Remains, and Funerary Objects (2007)
4 (<http://www.achp.gov/docs/hrpolicy0207.pdf>). If human remains and funerary objects,
5 sacred objects, or items of cultural patrimony associated with human remains are
6 encountered on state lands, STB will consult with tribes, the MT SHPO, and MT DNRC
7 as to appropriate treatment measures in accordance with Section 106 of NHPA, and the
8 Montana Human Skeletal Remains and Burial Site Protection Act (M.C.A.22-3-801
9 through 811. If human remains and funerary objects, sacred objects, or items of cultural
10 patrimony associated with human remains are encountered on private lands, STB will
11 ensure that they are also treated in accordance with applicable state and federal law and
12 the provisions of M.C.A. §§ 22-3-801 through 811.

- 13 B. TRRC will make every effort to avoid disturbing known human burial sites. Where
14 avoidance is not possible, burials will be removed prior to construction and treated in
15 accordance with procedures established by applicable federal and state law and, culturally
16 affiliated tribes, and in accordance with procedures identified in the Treatment Plan.
- 17 C. In the case of inadvertent discovery of human remains during construction activities, STB
18 will attempt to identify the appropriate tribe(s) that may be affiliated with the burial
19 pursuant to NAGPRA, and consult with them over the treatment of remains in accordance
20 with procedures identified in the ID Plan and the Treatment Plan. All work will cease
21 within 200 feet in all directions of the human remains until the requirements of federal
22 and state laws are satisfied. TRRC will provide the construction contractor with written
23 notification of the proper protocol for discovery of human remains, funerary objects,
24 sacred objects or objects of cultural patrimony.

25 XII. CURATION

- 26 A. As stated in Stipulation VI.C.5 and VI.C.6, avoidance and preservation-in-place are the
27 preferred treatment for historic properties. STB will ensure that curation of all records
28 and other items resulting from identification and data recovery efforts is completed in
29 accordance with 36 C.F.R Part 79, Curation of Federally Owned and Administered
30 Archaeological Collections, and the provisions of NAGPRA. Documentation of the
31 curation of these materials will be prepared by Contractor and submitted to STB. STB
32 will provide copies of the documentation to the signatory and concurring parties to this
33 PA within **15 days** of receipt from Contractor. All archaeological materials recovered
34 from BLM lands shall be curated in accordance with BLM requirements at BLM's
35 Billings Curation Center. All archeological materials recovered from ARS lands shall be
36 curated in accordance with 36 C.F.R Part 79.
- 37
- 38
- 39 B. STB will encourage private land owners to donate collections from their lands to an
40 appropriate facility meeting the requirements of the Department of the Interior's Manual
41 411 on curation.³ The Contractor will provide private landowners with a list of all
42 collected artifact finds from their lands. Materials from private lands to be returned to the

³ Stipulation XII. b. addresses the curation of cultural resources encountered during construction of the Undertaking on land owned by private party(ies) other than TRRC. Materials found on land owned by TRRC will be donated to an appropriate facility meeting the requirements of the Department of the Interior's Manual 411 on curation.

private land owners shall be maintained in accordance with 36 C.F.R Part 79 until any specified analysis is complete. Documentation of the return of these materials to the private land owner will be prepared by Contractor and submitted to STB. STB will provide copies of the documentation to the PA consulting parties within 15 days of receipt from Contractor.

- C. STB shall ensure through consultation with the MT DNRC that all cultural and paleontologic materials discovered on state lands will be curated in accordance with the Montana state Antiquities Act, M.C.A. 22-3-432.
- D. STB will ensure that all archeological materials collected by TRRC and Contractor as part of this project will be processed and curated within two years following the completion of identification and data recovery. In the case where TRRC decides to halt the Undertaking, all recovered archaeological material must be curated within one year following work stoppage. A contingency plan will be developed in such case.

XIII. EMERGENCY SITUATIONS

Should an emergency situation occur which represents an imminent threat to public health or safety, a natural disaster, or creates a hazardous condition, the STB shall immediately consult with TRRC to develop alternative procedures to relevant Stipulations in this PA, notify the SHPO and the ACHP of the condition which has initiated the situation and the measures taken to respond to the emergency or hazardous condition. Should the SHPO or the ACHP desire to provide technical assistance to the STB, they shall submit comments within seven (7) ~~calendar~~ days from notification, if the nature of the emergency or hazardous condition allows for such coordination. STB shall notify consulting parties of within (7) ~~calendar~~ days after SHPO's or ACHP's response.

XIV. DISPUTE RESOLUTION

- A. During the Phase I alternatives analysis, consulting parties and the public may submit their comments on the Draft EIS.
- B. If STB approves a build alternative, the following process for dispute resolution shall be followed:
 - 1. Should any Signatory or Invited Signatory to this PA provide notice to the STB of its objection to an action under this PA, or implementation of the measures stipulated in this PA, within 30 days of becoming aware of an action, the STB shall consult with all Signatories and Invited Signatories to this PA to resolve the objection, unless otherwise specified in this document, and notify the concurring parties. If the STB determines that the objection cannot be resolved, the STB shall forward all documentation relevant to the dispute to the ACHP. The objecting party must provide reasons for, and a justification of, its objection at the time it initially submits its objection to the STB. Within 30 days after receipt of all pertinent documentation, the ACHP shall either:
 - 2. a. Provide the STB with recommendations, which the STB shall take into account in reaching a final decision regarding the dispute; or

- 1 3. b. Notify the STB that it will comment within an additional 30 days, in accordance
2 with 36 C.F.R. 800.7(c)(4). Any ACHP comment provided in response to such a
3 request will be taken into account, and responded to by the STB in accordance with
4 36 C.F.R. 800.7(c)(4) with reference to the subject of the dispute.
5 4. The STB's responsibility to carry out all actions under this PA that are not the subject
6 of the dispute will remain unchanged.
7

8 **XV. TRIBAL COORDINATION**

- 9 A. Tribal coordination will be conducted pursuant to tribal protocols that will be developed
10 by the STB in consultation with tribes participating in the project, as discussed in the ID
11 Plan.
12
13 B. Tribal protocols may be amended in accordance with Stipulation XIV if new tribal
14 leadership is elected and proposes a different approach to coordinating the undertaking.
15

16 **XVI. PUBLIC PARTICIPATION**

- 17 A. STB will ensure that an active public participation program be carried out. Modified
18 versions of reports required under this PA (locational information removed), will be
19 made available for review to the general public on STB's website at www.stb.dot.gov.
20 The views of the PA consulting parties, interested parties, and the general public will be
21 considered by STB with respect to the terms of this PA.
22
23 B. At any time during implementation of the measures stipulated in this PA, should an
24 objection to any such measure or its manner of implementation be raised by a member of
25 the public, the STB will take the objection into account, consult as needed with the
26 objecting party and the parties to this agreement to resolve the objection. The STB will
27 determine the final resolution.
28
29 C. Consistent with Section 304 of NHPA, Executive Order 13007, and ARPA, the PA
30 consulting parties will withhold from disclosure to the public information about the
31 location, character, or ownership of a historic property, or if it is determined that
32 disclosure may (1) cause a significant invasion of privacy, (2) risk harm to an historic
33 property, or (3) impede the use of a traditional religious site by practitioners.
34

35 **XVII. FINAL REPORT**

36 Within six (6) months of completing construction of the Undertaking or submission of the Final
37 Data Recovery Report, Contractor will prepare a **Final Report** and submit it to STB, which will
38 provide copies of the Final Report to the PA consulting parties. The Final Report will include all
39 ID Reports, Evaluation Reports, Finding of Effect reports, Treatment Plans, and Data Recovery
40 Reports. The Final Report will also include information about the treatment and disposition of
41 any human remains and funerary objects, sacred objects, or items of cultural patrimony
42 associated with human remains encountered during construction.
43

44 **XVIII. EFFECTIVE DATE**

45 This PA shall become effective when executed by the authorized representatives of each
46 signatory party, at which time implementation of the PA may begin.

1
2 **XIX. ANNUAL STATUS REPORT**

- 3 A. Commencing one year from the effective date of this PA, TRRC shall prepare an Annual
4 Report documenting the status of the implementation of the terms of this PA to PA
5 consulting parties. If no work has been conducted under the terms of the PA, TRRC must
6 still submit the Annual Report stating that no action under the PA has begun. TRRC will
7 submit the Annual Report to STB, which will submit the report to the PA consulting
8 parties. The Annual Report will include, at a minimum:
9 1. A list of all studies, reports, evaluations, or monitoring reviewed or generated under
10 the stipulations of the PA.
11 2. Efforts to identify and/or evaluate potential historic properties, monitoring efforts,
12 archaeological management assessments or research designs, and treatment of historic
13 properties.
14 3. Any recommendations to amend this PA or improve communication among the parties.
15 4. A discussion of any inadvertent effect to historic properties occurring during the course
16 of the year.
17 B. The STB will ensure that the Annual Report is made available to the public and that
18 potentially interested persons and members of the public are invited to provide comments
19 to the STB.
20

21 **XX. AMENDMENTS**

22 Any party to this PA may request that it be amended, whereupon the parties will consult in
23 accordance with 36 C.F.R Part 800 to consider such amendment.
24

25 **XXI. TERMINATION**

26 Any signatory party to this PA may terminate it by providing thirty (30) days notice, in writing,
27 to the other parties, provided that the parties will consult during the period prior to termination to
28 seek agreement or amendments or other action that would avoid termination. In the event of a
29 termination, STB will comply with 36 C.F.R Part 800.4 through 800.6 with regard to this
30 Undertaking.
31

32 **XXII. DURATION**

33 This PA shall remain in effect for ten (10) years after its execution by the signatories, at which
34 time STB will notify the PA consulting parties within three months of its impending expiration
35 and request to extend it for a specific time period, but would not go beyond five (5) years. All
36 signatories must respond affirmatively prior to the expiration date for the PA to remain in effect.
37 Once the STB is notified by TRRC that the project is complete, STB will notify the signatories,
38 that the terms of this PA have been fulfilled and the PA shall thereupon terminate.
39

40 **EXECUTION**

41 Execution and implementation of this PA evidences that STB has afforded the ACHP a
42 reasonable opportunity to comment on the Undertaking.
43

44 **SIGNATORIES:**

45
46 SURFACE TRANSPORTATION BOARD

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By:_____ Date:_____

ADVISORY COUNCIL ON HISTORIC PRESERVATION

By:_____ Date:_____

MONTANA STATE HISTORIC PRESERVATION OFFICER

By:_____ Date:_____

INVITED SIGNATORIES:

U.S. ARMY CORPS OF ENGINEERS

By:_____ Date:_____

U.S. DEPARTMENT OF THE INTERIOR BUREAU OF LAND MANAGEMENT

By:_____ Date:_____

U.S. DEPARTMENT OF AGRICULTURE AGRICULTURAL RESEARCH SERVICE

By:_____ Date:_____

MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

By:_____ Date:_____

TONGUE RIVER RAILROAD COMPANY, INC.

By:_____ Date:_____

CONCURRENCE:

U.S. DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, HISTORIC
LANDMARKS PROGRAM

1
2 By:_____ Date:_____
3
4
5 NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN
6 RESERVATION, MONTANA
7
8 By:_____ Date:_____
9
10
11 CROW TRIBE OF MONTANA
12
13 By:_____ Date:_____
14
15
16 CROW CREEK SIOUX TRIBE OF THE CROW CREEK RESERVATION, SOUTH DAKOTA
17
18 By:_____ Date:_____
19
20
21 LOWER BRULE SIOUX TRIBE OF THE LOWER BRULE RESERVATION, SOUTH
22 DAKOTA
23
24 By:_____ Date:_____
25
26
27 STANDING ROCK SIOUX TRIBE OF NORTH & SOUTH DAKOTA
28
29 By:_____ Date:_____
30
31
32 CHEYENNE RIVER SIOUX TRIBE OF THE CHEYENNE RIVER RESERVATION, SOUTH
33 DAKOTA
34
35 By:_____ Date:_____
36
37
38 YANKTON SIOUX TRIBE OF SOUTH DAKOTA
39
40 By:_____ Date:_____
41
42 SISSETON-WAHPETON OYATE OF THE LAKE TRAVERSE RESERVATION, SOUTH
43 DAKOTA
44
45 By:_____ Date:_____
46

1 ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION,
2 MONTANA
3
4 By:_____ Date:_____
5
6
7 FLANDREAU SANTEE SIOUX TRIBE OF SOUTH DAKOTA
8
9 By:_____ Date:_____
10
11
12 SHAKOPEE MDEWAKANTON SIOUX COMMUNITY OF MINNESOTA
13
14 By:_____ Date:_____
15
16
17 ROSEBUD SIOUX TRIBE OF THE ROSEBUD INDIAN RESERVATION, SOUTH
18 DAKOTA
19
20 By:_____ Date:_____
21
22
23 SANTEE SIOUX NATION, NEBRASKA
24
25 By:_____ Date:_____
26
27
28 ARAPAHO TRIBE OF THE WIND RIVER RESERVATION, WYOMING
29
30 By:_____ Date:_____
31
32
33 THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, NORTH
34 DAKOTA
35
36 By:_____ Date:_____
37
38
39 CHEYENNE AND ARAPAHO TRIBES, OKLAHOMA
40
41 By:_____ Date:_____
42
43
44 THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION
45 OF MONTANA
46

1 By:_____ Date:_____

2

3

4 OGLALA SIOUX TRIBE

5

6

7 By:_____ Date:_____

8

9

10 THE SHOSHONE TRIBE OF THE WIND RIVER RESERVATION, WYOMING

11

12 By:_____ Date:_____

13

14

15 SPIRIT LAKE SIOUX TRIBE, NORTH DAKOTA

16

17 By:_____ Date:_____

18

19

20

21 COLSTRIP ALTERNATIVE LANDOWNERS GROUP

22

23 By:_____ Date:_____

24

25

26 FIX RANCH

27

28 By:_____ Date:_____

29

30

31 NATIONAL TRUST FOR HISTORIC PRESERVATION

32

33 By:_____ Date:_____

34

35

36 MONTANA PRESERVATION ALLIANCE

37

38 By:_____ Date:_____

39

40

41 NATIONAL WILDLIFE FEDERATION

42

43 By:_____ Date:_____

44

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46 NORTHERN CHEYENNE OTTER CREEK DESCENDANTS

1
2 By:_____ Date:_____
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5 NORTHERN PLAINS RESOURCE COUNCIL
6
7 By:_____ Date:_____
8
9
10 ROCKER SIX CATTLE COMPANY
11
12 By:_____ Date:_____
13
14
15 THE SIERRA CLUB
16
17 By:_____ Date:_____
18
19
20 ***[LIST OF ATTACHMENTS-FOR REFERENCE***
21 *Attachment A-Map of Alternatives*
22 *Attachment B-Identification Plan (ID Plan)*
23 *Attachment C-Definitions and Acronyms*
24 *Attachment D Phase I Inventory-Literature Search and Field Results*
25 *(From Stipulation IV.A-Identification, Tables 1, 2 and 3 and Figure 1)*
26 *(From Stipulation V.A.-Assess Effects) Tables 4 and 5 from letter to SHPO [If the Board licenses*
27 *any alternative, additional attachments would be developed including a Treatment and*
28 *Mitigation Plan to be developed through consultation for any licensed alternative.]*

ATTACHMENT 2

APPENDIX D

PROGRAMMATIC AGREEMENT AMONG THE U.S. DEPARTMENT OF STATE, NORTH DAKOTA STATE HISTORIC PRESERVATION OFFICE, AND THE ADVISORY COUNCIL ON HISTORIC PRESERVATION REGARDING THE VANTAGE PIPELINE PROJECT

Programmatic Agreement

Among

The U.S. Department of State,
North Dakota State Historic Preservation Office, and
The Advisory Council on Historic Preservation
Regarding the Vantage Pipeline Project

WHEREAS, the U.S. Department of State (DOS) receives and considers applications for permits for cross-border liquid pipelines pursuant to the authority delegated by the President of the United States under Executive Order (EO) 13337 (69 Federal Register (FR) 25299); and

WHEREAS, on November 15, 2010, Vantage Pipeline US LP (Vantage, or the Applicant) applied to DOS for a Presidential Permit for the construction, operation, and maintenance of facilities associated with the Vantage Pipeline (Project) at the United States-Canada border; and

WHEREAS, Vantage, subsequent to submitting the application to DOS, initiated the gathering of background documentation, including cultural resource and archaeological information; and

WHEREAS, DOS has determined that the issuance of a Presidential Permit for the Project triggers review consistent with Section 106 of the National Historic Preservation Act (NHPA) (16 United States Code (U.S.C.) 470f, as amended) and its implementing regulations, “Protection of Historic Properties,” (36 Code of Federal Regulations (C.F.R.) Part 800); and

WHEREAS, DOS is committed to establishing and maintaining a positive and productive government-to-government relationship with the Indian tribes of the United States, including the Consulting Indian tribes for this Programmatic Agreement (PA); and

WHEREAS, the Project consists of the construction of approximately 79.8 miles of 10-inch-diameter high vapor pressure pipeline, including ancillary facilities, in Williams and Divide Counties, North Dakota, that will transport ethane from Tioga, North Dakota, to the Alberta Ethane Gathering System in Alberta, Canada, as described in Attachment A; and

WHEREAS, DOS determined that the Project’s Area of Potential Effects (APE) for effects to historic properties consists of a 300-foot-wide survey area that includes a 70-foot-wide construction corridor and a 30-foot-wide permanent right-of-way. The 300-foot-wide corridor would allow for minor adjustments or route variations as needed. Additional temporary work space, access roads, and ancillary facilities (e.g., yards) that lie outside of the proposed survey corridor are also part of the proposed APE. The APE for indirect effects to historic properties was defined as 0.25 mile around any above-ground ancillary structure; and

WHEREAS, DOS, in consultation with the North Dakota State Historic Preservation Office (SHPO) and Consulting Indian tribes, determined that the APE for properties of religious and cultural significance to tribes is the portion of the pipeline APE for direct effects to historic properties that lies in grasslands, where aligned stone features remain relatively intact. Land that has been repeatedly plowed, planted, and harvested does not retain sufficient integrity of stone

alignments, which are the prevalent type of property of religious and cultural significance to Indian tribes ancestral to the region, to be evaluated for National Register of Historic Places (NRHP) eligibility; and

WHEREAS, DOS has determined that a PA consistent with 36 C.F.R. § 800.14 is appropriate for the Project because the identification of historic properties within the APE that may be affected by the undertaking, the assessment of effects, and consultation to resolve adverse effects on historic properties will not be completed prior to the issuance of a Presidential Permit; and

WHEREAS, consistent with 36 C.F.R. §§ 800.4(b)(2) and 800.5(a)(3), this PA establishes the process by which DOS will complete the identification, evaluation, and assessment of Project effects on historic properties, including eligible properties of religious and cultural significance to tribes; and

WHEREAS, DOS initiated consultation with the SHPO by sending the Deputy State Historic Preservation Officer a December 16, 2011 letter providing a description of the Vantage Project and authorizing Vantage to consult directly with the agency; and the SHPO subsequently participated in meetings and tribal consultations; and

WHEREAS, Vantage, the Project proponent, has participated in consultation and has been invited by DOS consistent with 36 C.F.R. §§ 800.2(c)(4) and 800.6(c)(2) to sign this PA as an Annex II Signatory, as defined in Stipulation III; and

WHEREAS, DOS initiated consultations by letter dated December 16, 2011 (see Attachment B) sent to the Tribal Historic Preservation Officers (THPOs) and Chairpersons or their equivalents of the following Indian tribes, which provided information about the Vantage Project and invited the tribes to consult: the Apsaalooke Crow Tribe, Cheyenne River Sioux Tribe, Crow Creek Sioux Tribe, Flandreau Santee Sioux Tribe, Fort Peck Assiniboine and Sioux Tribes, Lower Brule Sioux Tribe, Lower Sioux Indian Community – Minnesota, Northern Cheyenne Tribe, Oglala Sioux Tribe, Rosebud Sioux Tribe, Santee Sioux Tribe of Nebraska, Sisseton-Wahpeton Oyate, Spirit Lake Tribe, Standing Rock Sioux Tribe, Three Affiliated Tribes, Turtle Mountain Band of Chippewa Indians, Upper Sioux Community – Minnesota, White Earth Nation, and Yankton Sioux Tribe. Subsequent to the initial invitations, DOS sent a February 14, 2012 letter to the Northern Arapaho Tribe, and a March 8, 2012 letter to the Cheyenne and Arapaho Tribes inviting them to participate in consultation for the Project; and

WHEREAS, the Lower Brule Sioux Tribe and the Lower Sioux Indian Community – Minnesota informed DOS that they would not participate in consultation for the Project, but would like to stay informed, and the Flandreau Santee Sioux Tribe, Spirit Lake Tribe, the Upper Sioux Community – Minnesota, and the White Earth Nation did not respond to DOS communications, and the Northern Arapaho Tribe expressed interest but deferred consultation to the other Consulting Indian tribes; and

WHEREAS, DOS hosted a consultation meeting, consistent with DOS practice, in New Town, North Dakota on March 21 – 22, 2012 attended by the Fort Peck Assiniboine and Sioux Tribes, Cheyenne River Sioux Tribe, Crow Creek Sioux Tribe, Apsaalooke Crow Tribe, Northern

Cheyenne Tribe, Sisseton-Wahpeton Oyate, Standing Rock Sioux Tribe, Three Affiliated Tribes, and the Yankton Sioux Tribe, and in which SHPO participated; and

WHEREAS, DOS made a field visit to the Project location in Divide County, North Dakota on July 10, 2012 with representatives of the Standing Rock Sioux Tribe and the Sisseton-Wahpeton Oyate; and DOS hosted a consultation meeting, consistent with DOS practice, on July 11, 2012 in Minot, North Dakota that had limited attendance; and

WHEREAS, DOS hosted another consultation meeting, consistent with DOS practice, on January 14, 2013 in Bismarck, North Dakota and the Apsaalooke Crow Tribe, Cheyenne River Sioux Tribe, Crow Creek Sioux, Fort Peck Assiniboiné and Sioux Tribes, Northern Cheyenne Tribe, Oglala Sioux Tribe, Rosebud Sioux Tribe, Standing Rock Sioux Tribe, Three Affiliated Tribes, the Yankton Sioux Tribe, SHPO, and Advisory Council on Historic Preservation (ACHP) attended; and

WHEREAS, DOS hosted another consultation meeting, consistent with DOS practice, in Bismarck, North Dakota on February 8, 2013 to review and provide comments on the Draft PA, attended by the Fort Peck Assiniboiné and Sioux Tribes, the Three Affiliated Tribes, the Yankton Sioux Tribe, the Cheyenne River Sioux Tribe, the Northern Cheyenne Tribe, the Sisseton-Wahpeton Oyate, the Rosebud Sioux Tribe, the Turtle Mountain Band of Chippewa Indians, and the Standing Rock Sioux Tribe, as well as SHPO and ACHP; and

WHEREAS, since consultations, consistent with DOS practice, began in December 2011, the Santee Sioux Tribe of Nebraska and the Cheyenne and Arapaho Tribes did not attend meetings but participated in conference calls, provided written comments by letter or email, or provided comments by telephone; and

WHEREAS, the Apsaalooke Crow Tribe, Cheyenne River Sioux Tribe, Crow Creek Sioux Tribe, Fort Peck Assiniboiné and Sioux Tribes, Northern Cheyenne Tribe, Oglala Sioux Tribe, Rosebud Sioux Tribe, Santee Sioux Tribe of Nebraska, Sisseton-Wahpeton Oyate, Cheyenne and Arapaho Tribes, Standing Rock Sioux Tribe, Three Affiliated Tribes, Turtle Mountain Band of Chippewa Indians, and Yankton Sioux Tribe, have actively participated in consultation, consistent with DOS practice, for the Project, and are considered “Consulting Indian tribes” for the purposes of this PA and are invited to sign the agreement as Annex II Signatories, as defined in Stipulation III; and

WHEREAS, DOS did not receive public comments regarding cultural resources following publication of the Project in the Federal Register in January 11, 2011, August 19, 2011, and May 3, 2012; or following the August 19, 2011 publication of a *Notice of Intent to Prepare an Environmental Assessment* for the Project sent to stakeholders, landowners, elected officials, newspapers, and libraries; or following the May 3, 2012 issuance of the Environmental Assessment sent to the same entities; and

WHEREAS, no other stakeholders in the Project came forward, and DOS did not receive inquiry or interest from any other stakeholders during the publication of the Project; therefore, no public meetings or further public outreach were warranted; and

WHEREAS, Vantage completed a Class III cultural resources inventory survey for the Project APE in order to identify historic properties. Vantage committed to avoid impacts to all properties identified as eligible for the NRHP, or properties unevaluated for eligibility, by rerouting the pipeline, narrowing the construction corridor, abandoning the route, or boring or drilling under the property; and

WHEREAS, DOS consulted with Indian tribes at the March 20 – 21, 2012 meetings in New Town, North Dakota, and DOS determined that the Class III survey was not sufficient in the identification of properties of religious and cultural significance to Indian tribes, and there was need for further survey work to identify properties of religious and cultural significance to Indian tribes, and further, the APE for properties of religious and cultural significance for Indian tribes was determined to be the 300-foot pipeline survey corridor located in unbroken grassland on the pipeline route, determined by Vantage to be a total of 23.59 miles of uncultivated land; and

WHEREAS, Vantage procured the services of a professional who was recommended by the tribes who conducted a survey for properties of religious or cultural significance to Indian tribes, completing approximately 4 miles of the 23.59 miles of the APE for properties of religious and cultural significance. Approximately 19.59 miles remains to be surveyed under the terms of this PA (see Attachment C for details); and

WHEREAS, DOS formally initiated communication with the ACHP on August 4, 2012, and the ACHP, after providing informal guidance to DOS and consulting parties in 2012 and early 2013, notified DOS of its intention to formally enter Section 106 consultation for the undertaking on February 14, 2013; and

NOW, THEREFORE, DOS, the SHPO, and the ACHP, agree that the following stipulations will be implemented in order to take into account the effect of the Project on historic properties.

STIPULATIONS

DOS, in coordination with Vantage, will ensure that the following measures are carried out:

I. FEDERAL AGENCY RESPONSIBILITIES

- A. DOS will incorporate this PA into its decisional process on any Presidential Permit it may issue for the Project and any permit it issues on the Project will include a condition that Vantage abide by its commitments under this PA.
- B. DOS reserves the right to seek qualified independent expert consultation through a third-party contractor in order to fulfill its responsibilities under this PA.
- C. Identification and evaluation studies and treatment measures required under the terms of this PA will be carried out by or under the direct supervision of a professional(s) who meets, at a minimum, the Secretary of the Interior's Historic Preservation Professional Qualification Standards (48 FR 44716, September 29, 1983; 36 C.F.R. Part 61 (Appendix

A)). Other types of experience with construction monitoring and/or traditional cultural knowledge may be substituted for degrees required by the Standards at the discretion of DOS and in consultation with Consulting Indian tribes, when identifying, evaluating, and treating properties of religious and cultural significance to tribes.

D. For identification and evaluation studies, and treatment measures required under the terms of this PA, including but not limited to stipulations V–VI, DOS will require that these studies and treatment measures take into account the following directives and guidance, as appropriate:

- a. the ACHP’s Section 106 Archaeology Guidance (2007);
- b. the ACHP’s Policy Statement Regarding the Treatment of Burial Sites, Human Remains and Funerary Objects (February 23, 2007);
- c. applicable SHPO guidance and standards, “North Dakota SHPO Guidance Manual for Cultural Resource Inventory Projects”;
- d. the Secretary of the Interior’s Standards and Guidelines for Archaeology and Historic Preservation (48 FR 44716-42, September 29, 1983) with additional guidance from 36 C.F.R. Part 800 (as amended through August 5, 2004) concerning tribal properties of religious and cultural significance and the National Register Bulletins No. 38 and No. 41. noted below;
- e. the “Treatment of Archaeological Properties” (ACHP 1983);
- f. the “Guidelines for Reporting on Cultural Resources Investigations for Pipeline Projects” (Federal Energy Regulatory Commission, Office of Energy Projects, December 2002);
- g. Native American Graves Protection and Repatriation (NAGPRA) Regulations (43 C.F.R. 10);
- h. ACHP, National Park Service, National Association of Tribal Historic Preservation Offices “Tribal Consultation: Best Practices in Historic Preservation” (May 2005);
- i. National Register Bulletin No. 41, “Guidelines for Evaluating and Registering Cemeteries and Burial Places”;
- j. National Register Bulletin No. 38, “Guidelines for Evaluating and Documenting Traditional Cultural Properties”;
- k. North Dakota Century Code (NDCC) §23-06-27 and administrative rules North Dakota Administrative Code (NDAC) Chapter 40-02-03;
- l. Executive Orders 11593, 12898, 13007, 13175, and 13827; and

m. Traditional Indian cultural protocols.

II. CONFIDENTIALITY¹

- A. DOS, the SHPO, the ACHP, and Vantage will safeguard information about historic properties of religious and cultural significance to Indian tribes, including location information, or information provided by Indian tribes to assist in the identification of such properties, as requested by Consulting Indian tribes, and in accordance with Section 304 of NHPA, 16 U.S.C. § 470w-3, and other applicable laws.
- B. Any information provided by Indian tribes regarding properties of religious or cultural significance to Indian tribes will be treated as sensitive and confidential. All hard copies, including maps, will include the words “Confidential – Do Not Disclose (not U.S. Government Classified)” on each page. Hard copies will be stored in a secure location when not in use. Digital information, including GIS shapefiles, will be stored in a password protected location, with access limited to need-to-know parties. For those with limited access, digital information will not be stored or saved on a publically accessible server. When the PA ceases to be in force, Vantage will poll all parties, gather all confidential information, and return it to the tribes at a meeting convened for that purpose.
- C. The State Historical Society of North Dakota (SHSND)/SHPO will retain location information about tribal properties identified during the project, in keeping with its mission to identify and maintain inventories of historic properties (Section 101 of NHPA, 16 U.S.C. 470a(b), NDCC § 55-02-07.1, and NDCC § 55-10-11). Information regarding the location or significance of specific historic properties of tribal cultural or religious significance provided to SHSND/SHPO in the course of the Project will, upon request by one or more tribes, be treated as information subject to Section 304 of the National Historic Preservation Act and 36 CFR § 800.11(c), as well as applicable state law.

III. DEFINITIONS

Annex I Signatory: Consistent with 36 C.F.R. § 800.6(c)(1), DOS, the SHPO, and the ACHP, upon execution this agreement, will have the right to terminate this agreement pursuant to section XIII of this agreement. No other signatory will enjoy the right to terminate this agreement.

Annex II Signatory: DOS has invited Vantage and the Consulting Indian tribes to be signatories to this PA consistent with 36 C.F.R. § 800.6(c)(3). An Annex II Signatory does not enjoy the right to terminate this agreement pursuant to section XIII of this agreement or otherwise. The

¹ “Sensitive” and “Confidential” as used in the PA are not the same as U.S. government “Sensitive But Unclassified,” “Confidential,” or any other U.S. government classification.

refusal of any Annex II Signatory to sign this agreement does not invalidate this agreement. The withdrawal of an Annex II Signatory from this agreement does not invalidate or terminate this agreement.

Class III Cultural Resources Inventory Survey: A systematic, detailed field inspection done by, or under the direct supervision of a professional archaeologist or other historic preservation specialist, preceded by a literature search and background study, with the intention of identifying historic properties that might be impacted by an undertaking. (More fully described in “North Dakota SHPO Guidance Manual for Cultural Resource Inventory Projects” (Revised Edition, 2012), <http://www.history.nd.gov/hp/PDFinfo/NDSHPO%20Guidlines%202012.pdf>).

Consultation: Consistent with 36 C.F.R. § 800.2(c)(ii)(C), is a meeting, either in-person, by conference call, electronic, or other means, between an authorized agency official and a representative(s) of an Indian tribe(s) designated or identified by the tribal government. This DOS definition does not prejudice the individual Indian tribes’ definitions of Government-to-Government Consultation.

Consulting Indian tribes: Indian tribes that have consultative roles in the Section 106 process, as defined in 36 C.F.R. § 800.2(c), and have participated in tribal consultation for the Project, whether they have chosen to become signatories or not.

Consulting Parties: Parties that have consultative roles in the Section 106 process, as defined in 36 C.F.R. § 800.2(c).

Coordination Plan: A plan (more fully explained in Stipulation V.D.) that describes the coordination of construction with identification and evaluation of cultural resources, treatment of adverse effects, and protection of unanticipated discoveries.

Determination of Effect: A determination made by a federal agency in regards to a Project’s effect upon a historic property as defined in 36 C.F.R. Part 800.

Determination of Eligibility: A determination made by a federal agency in regards to a cultural resource’s eligibility for inclusion in the NRHP and more fully described in 36 C.F.R. Part 60 and 36 C.F.R. § 800.16(l)(2), and National Register bulletins.

Effect: An alteration to the characteristics of an historic property qualified for inclusion in or eligibility for the NRHP (see 36 C.F.R. § 800.16(i)).

Environmental Assessment: An analysis of a major federal action’s environmental impacts conducted consistent with National Environmental Policy Act (NEPA).

Historic Property: Any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the NRHP maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian Tribe or Native Hawaiian organization and that meet the NRHP criteria (see 36 C.F.R. § 800.16(l)(a)).

Properties of Religious and Cultural Significance Survey Work: Sec. 110(a)(2)(D) of the NHPA states that properties of traditional religious and cultural importance to Indian tribes, as identified and evaluated by tribal members with traditional cultural knowledge, may be eligible for the NRHP.

Tribal Monitors: Individuals selected and qualified by Consulting Indian Tribes to monitor clearing and construction operations so that historic properties and unanticipated discoveries described herein might be identified.

Tribal Monitoring Plan: A plan (more fully described in Stipulation V.E.) that provides procedures for hiring, training, and supervising Project tribal monitors during the construction phase of the Project.

Treatment Plan: A plan developed by Vantage in consultation with the parties to this PA and approved by DOS that identifies the minimization and mitigation measures for historic properties located within the APE that will be adversely affected by the Project.

IV REVIEW OF DETERMINATIONS AND TREATMENT PLANS

A. Initiation of Review

Pursuant to the procedures set forth in Stipulation V, DOS will afford Annex I Signatories, Annex II Signatories, and Consulting Parties an opportunity to consult on the determinations of eligibility, and the evaluation and resolution of adverse effects to historic properties that have been identified to date and those identified at a later date. This consultation will include identification and evaluation of historic properties of religious and cultural significance to Consulting Indian tribes, and, if required, review of Treatment Plans prepared for adversely affected historic properties. Review periods are stipulated below.

B. Procedure Following the Review Period

1. Subsequent to the procedures outlined in Stipulation V.B, Annex I Signatories, Annex II Signatories, and Consulting Parties have fourteen (14) calendar days to review determinations, Treatment Plans, and requests for consultation. The starting date for a review period is established by the date of transmittal of electronic correspondence by DOS for the respective review.
2. If no comments from Annex I Signatories, Annex II Signatories, or Consulting Parties are received within the review period established by DOS following a determination of eligibility or effect, distribution of a plan for review, or a request for consultation, DOS may proceed with the next step in the review process.

C. Tribal Coordination with Vantage

For the purposes of sharing information, Vantage can coordinate directly with the Consulting Indian tribes by providing information to them regarding the review of determinations of eligibility and effects to historic properties, fieldwork reports, Treatment Plans, or other reports, plans, or communications. Vantage will convey to DOS the content and timing of its direct coordination efforts.

V. VANTAGE PIPELINE PROJECT

A. Background

1. Following Vantage's completion of a Class III cultural resources inventory survey along the APE and DOS consultation with Indian Tribes in March 2012, DOS determined that the Class III survey was insufficient for the identification of property with cultural or religious significance for the Indian tribes. DOS determined the APE for properties of religious or cultural significance for Indian tribes to be the 300-foot pipeline survey corridor over unbroken grassland amounting to 23.59 miles of uncultivated land.
2. Vantage then hired a professional, recommended by the Indian tribes, to conduct a survey for religious or culturally significant properties over the 23.59 mile APE. This professional has completed work over approximately 4 miles; some 19.59 miles have not been surveyed for properties of religious or cultural significance to Indian tribes. Thus, DOS has determined that religious and cultural property identification efforts remain incomplete.
3. Pursuant to the procedures set forth under Stipulation V.C, Vantage will avoid previously identified historic properties or sites treated as historic properties. Vantage will likewise avoid impacting newly identified sites of cultural or religious significance pursuant to the procedures set forth under Stipulation V.C.

B. Identification and Evaluation of Historic Properties

1. DOS, with assistance from Vantage and in consultation with the SHPO and Consulting Parties, will complete the identification and/or evaluation of historic properties in the APE, including historic properties to which Indian tribes attach religious and cultural significance that have already been identified, and those that may be identified during additional work, during construction monitoring conducted pursuant to Stipulation V.E., or as a result of post-review discovery. For those areas that have been surveyed prior to the signing of the PA, but whose specific sites have not been identified by geographic locators adequate for avoidance decisions, DOS may stipulate that further survey is required. For those areas that cannot be surveyed for any reason, construction monitoring conducted pursuant to Stipulation V.E may serve as a substitute for a survey. DOS will assess effects, and resolve any adverse

effects to those historic properties according to the protocols set forth in the following stipulations.

2. Vantage will retain a contractor to facilitate and organize, in collaboration with a working group composed of representatives of the Consulting Indian tribes, a survey of properties of religious and cultural significance to Indian tribes. The contractor will work with the Consulting Indian tribes to develop a Scope of Work and a Work Plan for the methodology, implementation, and reporting of the survey. Vantage will provide to DOS, the SHPO, and the ACHP copies of the Scope of Work and Work Plan as they are completed, but no later than one (1) month following execution of this PA. Disputes arising from Scope of Work or Work Plan development shall be resolved in accordance with Stipulation X.
3. For sites that Vantage or DOS treats as eligible, but have not been determined as eligible for inclusion on the NRHP, that may be adversely affected by Project construction and/or operation, two options are possible:
 - a. For sites treated as eligible for inclusion on the NRHP, Vantage may choose avoidance in accordance with Stipulation V.C.1.
 - b. For sites treated as eligible for inclusion on the NRHP for which Vantage cannot or does not choose avoidance, DOS will seek expert assistance in making a determination of eligibility, including by consulting with Annex I Signatories and the Consulting Indian tribes to this agreement. For those sites determined to be eligible, Vantage will comply with Stipulation V.C.2–4.
4. Subject to confidentiality concerns, DOS will develop and maintain a summary of the results of all identification and evaluation fieldwork, and determinations of eligibility and effect completed after the PA is in effect to update the Section 106 documentation for this Project.
5. DOS will distribute the summary described in Stipulation V.B.4 to the Annex I Signatories, Annex II Signatories, and Consulting Parties within ninety (90) days of the execution of this PA and every ninety (90) days thereafter or on a more frequent basis if requested by Vantage.
6. Following the completion of any inventories, testing, or other Project activities under Stipulation V.B.1., Vantage will submit to DOS a draft cultural resource report for review. Vantage will submit the report to the SHPO for its review and comments. Vantage will submit the same report to the Consulting Parties, who will have fourteen (14) days to review and comment. DOS will take into account any timely comments from SHPO and Consulting Parties prior to approving a final version of the report.
7. Vantage will provide Tribal Monitors access to clearing and construction activities throughout the APE for the duration of work to be completed under this PA in case of unanticipated discoveries during construction described in Stipulation VI.

C. Treatment of Historic Properties

1. Whenever feasible, Vantage will avoid adverse effects to historic properties or sites treated as eligible as the preferred treatment, providing a minimum 45-foot buffer between the site boundary and construction activity. Potential methods of avoidance include but are not limited to:
 - a. Avoidance by route variation or above ground Project facility relocation within the APE;
 - b. Avoidance by abandoning the selected pipeline route or above-ground facility location, and selecting a new route or relocating the above-ground project facility outside the APE;
 - c. Avoidance by narrowing the construction corridor (“necking down”);
 - d. Avoidance through boring or horizontal directional drilling (HDD).
2. When historic properties and sites that are treated as eligible are identified in the APE pursuant to Stipulation V.B, DOS will apply criteria of adverse effect consistent with 36 C.F.R. § 800.5(a) in consultation with the SHPO and other Consulting Parties. If DOS finds that historic properties or sites treated as eligible within the APE may be adversely affected by actions covered under this PA, DOS will consult with the SHPO and Consulting Parties, and, within fourteen (14) days, DOS will determine prudent and feasible ways to avoid adverse effects. Once DOS approves avoidance measures, Vantage will implement those measures.
3. If, after complying with V.B.3.b as appropriate, DOS determines that the adverse effect cannot be avoided, DOS will consult with the SHPO and Consulting Parties to determine the appropriate measures, to be implemented and documented by Vantage, to minimize and mitigate adverse effects on affected historic properties identified within the APE.
4. Vantage will draft a comprehensive Treatment Plan for each adversely affected historic property or sites treated as eligible. The Treatment Plan will describe the measures identified by DOS, in consultation with the SHPO and Consulting Parties, under Stipulation V.C.3 to minimize and mitigate the adverse effect of pipeline construction activities on historic properties, the procedures for executing mitigation measures, and an implementation schedule.

D. Coordination Plan

1. In the event that the identification and evaluation of historic properties of religious and cultural significance to Indian tribes is not completed or treatment plans to resolve adverse effects to historic properties have not been completed prior to the

initiation of construction activities by Vantage, Vantage will develop and submit a Project-wide Coordination Plan to DOS for review and approval.

- a. This plan will describe measures that will be implemented to ensure that adverse effects are avoided pending the completion of identification and evaluation of cultural resources and historic properties, and the execution of treatment plans. This Coordination Plan, for instance, may utilize construction exclusion zones, so that construction activities or construction-related activities will not occur in, or immediately adjacent to, areas where investigations to identify and evaluate cultural resources, and/or steps to treat historic properties have yet to be completed.
- b. In addition, the plan will include a timeframe for all proposed activities and recommended measures for the protection of unanticipated discoveries in accordance with Stipulation VI, as appropriate.
- c. Once DOS has received the Coordination Plan from Vantage, it will make the plan available to Annex I Signatories, Annex II Signatories, and Consulting Parties for a fourteen (14)-day review period (from date of transmittal to all parties by DOS). DOS will take into account timely comments received and may make appropriate modifications prior to approving the plan for implementation. The DOS-approved Plan will be incorporated into all construction documents and implemented accordingly.

E. Tribal Monitoring Plan

1. Prior to initiating vegetative clearing or construction within any portion of the APE, Vantage will submit a written request to DOS and obtain a written notice from DOS to proceed. Such request will include a Tribal Monitoring Plan prepared by Vantage and submitted to DOS for review and approval.
 - a. The Tribal Monitoring Plan will apply throughout the APE. The Tribal Monitoring Plan will outline the protocols for tribal monitor participation and will comply with Stipulation VI pertaining to unanticipated discoveries. The Tribal Monitoring Plan also must include provisions V.E.1.a.i. through V.E.1.a.iv.:
 - i. Tribal monitors will be present at the commencement of grading and trenching activities throughout the entire APE. The tribal monitors will provide assistance with the identification of previously unidentified historic properties that hold significance to Indian tribes.
 - ii. During grading and trenching, Vantage will retain one tribal monitor and one tribal monitor alternate who will be available when the primary tribal monitor is not available to perform his/her duties.

- iii. Tribal monitors are part of the construction team and, as such, they are required to participate in the safety and environmental training on site as well as in tailgate meetings. They must abide by all safety rules and wear personal protective equipment as required by Vantage's safety protocols.
 - iv. In the event that tribal monitors identify suspected historic properties during Vantage's grading and trenching activities, tribal monitors will immediately inform Vantage of that discovery and Vantage will cease clearing or construction operations in accordance with stipulation VI.
- b. After DOS receives and reviews the plan, DOS will make the Tribal Monitoring Plan available to Annex I Signatories, Annex II Signatories, and Consulting Parties for a fourteen (14)-day review period. DOS will provide any necessary revisions to the plan and written notice to proceed with construction within thirty (30) days following the close of the fourteen (14)-day review period has ended. DOS will take into account timely comments received from any Annex I Signatory, Annex II Signatory, or Consulting Party prior to approving the plan for implementation. The DOS-approved plan will be prepared prior to construction and incorporated into the appropriate construction documents and implemented accordingly.
 - c. Vantage will implement the DOS-approved Tribal Monitoring Plan for the Project. The Plan will stipulate that a weekly tribal monitoring report will be submitted to DOS.
 - d. Tribal Monitoring will be performed by individuals who meet the qualification standards for archaeology established in Stipulation I.C.

F. Construction

1. Training: In consultation with DOS, Vantage will ensure that an appropriate level of training is provided to key personnel regarding historic preservation, the identification of cultural resources, and the terms of this PA so that project personnel and contractors understand the importance of cultural resources and the need quickly to address unanticipated discoveries. This training will be conducted by a professional who meets the standards established in Stipulation I.C.
2. Construction Contract: Vantage will incorporate the terms of Stipulation VI into all construction documents to ensure that its archaeologist and construction contractors meet their notification responsibilities following any unanticipated discoveries.

G. Scheduling

DOS may authorize the start of vegetative clearing and construction for any area of the APE, when the plans prepared in accordance with Stipulations V.C., V.D., and V.E., as

appropriate, have been submitted by Vantage and approved by DOS in accordance with the terms of this PA. DOS will notify SHPO and ACHP of such authorizations.

VI. UNANTICIPATED DISCOVERIES DURING CONSTRUCTION

A. Unanticipated Discoveries (not including human burials, remains, or funerary goods which are covered in Stipulation VI.B.) will be treated in accordance with the following protocols, consistent with 36 C.F.R. Part 800.13(b).

1. If suspected cultural resources (including but not limited to structural ruins, prehistoric/historic artifacts, buried hearths or pits, etc.) are encountered unexpectedly, or unanticipated effects occur to historic properties or properties treated as eligible, during the course of Project activities, Vantage will halt activities within 50 feet of the find, and contact a consulting archaeologist, and the Project tribal monitor in order to confirm that the find is a cultural resource. Within 24 hours, the consulting archaeologist and tribal monitor will examine, record, and analyze the unanticipated discovery, and make a recommendation regarding the find's eligibility for the NRHP to DOS, the SHPO, and Consulting Indian tribe THPOs. If all parties agree that the unanticipated discovery is not eligible for the NRHP, DOS will provide written notice that work may resume at the find location.
2. If the consulting archaeologist recommends that the unanticipated discovery be treated as eligible for the NRHP, the consulting archaeologist will take the following steps:
 - a. Protect the find as appropriate from the elements, construction crews, and onlookers.
 - b. Contact DOS using the contact information in Attachment D.
 - c. Contact the SHPO using the contact information in Attachment D to report the find and consult.
 - d. As directed by DOS, consult with other parties as needed to determine a course of action.
 - e. Within 48 hours, Vantage will submit a summary report to DOS, in consultation as needed with the consulting archaeologist and tribal monitor, describing the find, the recommended determination of its NRHP eligibility, and any recommended treatment or action. The report will be submitted to DOS, and provided DOS agrees with the findings and recommendations of the report, DOS will send the report to the Annex I Signatories, Annex II Signatories, and Consulting Parties for comment and approval; Annex I Signatories, Annex II Signatories, and Consulting Parties will have seven (7) business days to respond.

- f. After the seven (7)-day review period, if no dispute remains regarding the findings and treatment recommendations, DOS will provide written notice to Vantage to carry out any treatment plan. If there is disagreement regarding the eligibility determination or treatment of the find, the steps in Stipulation X will be followed.
- g. When treatment of the find is completed and all issues regarding it resolved, DOS will provide written notice to Vantage to resume work at the find location, and will inform all Annex I Signatories, Annex II Signatories, and Consulting Parties, and other parties as indicated by the archaeological find and subsequent actions, that work can resume at the find location.

B. Unanticipated Discovery of Human Burials or Remains, and Funerary Objects.

1. If a suspected human burial, human remains, or funerary objects are encountered during the course of Project activities, Vantage will halt activities near the find, contact the Project tribal monitor, and a consulting archaeologist. All activities will cease within a 100-foot, or larger if appropriate, diameter of the suspected human remains find. Unless clear evidence indicates otherwise, any human remains discovered during Project activities will be considered to be Indian. The tribal monitor and consulting archaeologist will confirm the find and take the following steps:
 - a. Protect the find from the elements and onlookers. Vantage will assist the tribal monitor with any requests for protection or treatment of the find.
 - b. Contact the appropriate local authority listed in Attachment D and report the find of human remains, as required by North Dakota laws, including NDCC § 23-06-27 and administrative rules NDAC Chapter 40-02-03.
 - c. As soon as possible, but no later than 24 hours after the discovery, contact the Vantage Project manager and DOS using the contact information in Attachment D.
 - d. As soon as possible, but no later than 24 hours after the discovery, contact the SHSND/SHPO to report the find and consult. Assist the SHSND/SHPO as needed to ensure that the North Dakota Intertribal Reinterment Committee is contacted.
 - e. DOS will inform Annex I Signatories, Annex II Signatories, and Consulting Indian tribes, in the event of the discovery of Indian human remains. DOS will work with Vantage, the SHSND/SHPO, the North Dakota Intertribal Reinterment Committee, and other parties as required by North Dakota law to determine the appropriate course of action.

- f. In determining appropriate actions, DOS will be guided by the ACHP's Policy Statement on the Treatment of Burial Sites, Human Remains and Funerary Objects (February 23, 2007). No scientific study will be conducted on grave remains or burials. For any burials that are relocated, Vantage will pay re-interment costs.
- h. DOS will resolve all issues regarding the find, and will determine when the treatment of the human remains, burial, or funerary object is complete. DOS will provide written approval to Vantage to resume work at the find location, and will inform all Annex I Signatories, Annex II Signatories, and Consulting Indian tribes, that work will resume at the find location.

VII. CURATION

- 1. Federal agencies will curate any artifacts, materials, or records that are not subject to NAGPRA or other federal law, but result from archaeological identification and mitigation conducted on federal lands under their jurisdiction in accordance with 36 C.F.R. Part 79, "Curation of Federally-Owned and Administered Archaeological Collections."
- 2. DOS acknowledges that artifacts that were discovered during the Vantage-sponsored cultural resources inventory surveys were observed and analyzed in the field and not required to be collected for curation. If additional cultural resources surveys result in any collections, or if there is a collection associated with an unanticipated discovery during Project implementation, Vantage will return all artifacts, not associated with human burials or remains, recovered from private lands to the respective landowner after analysis is complete in accordance with NDCC § 55-03-05. Vantage will encourage and assist landowners in donating any returned artifacts to a local curation facility identified by the SHSND/SHPO.
- 3. If any artifacts are collected from an Indian human burial, human remains, or funerary object, Vantage and DOS will work with the North Dakota Intertribal Reinterment Committee, and the SHSND/SHPO to resolve any landowner issues regarding ownership of the artifacts pursuant to NDCC § 23-06-27, NDAC Chapter 40-02-03, and other applicable law and regulation.

VIII. REPORTING

Within a year of completing pipeline construction, Vantage will submit a report to Annex I Signatories, Annex II Signatories, Consulting Parties, and Consulting Indian Tribes describing the results and findings of the implementation of the actions and plans specified in the PA with emphasis on Stipulations V.A. through D for review and comment within thirty (30) days. Following the comment period, Vantage will revise its report to address any timely comments received and submit it to DOS for review and approval within thirty (30) days. DOS reserves the right to request further revisions before finally approving the Vantage report. However, in no event will DOS request additional revisions to the Vantage report more than sixty (60) days after

receiving it. Should DOS exercise its right for additional revisions, Vantage will have thirty (30) days to complete and submit the report.

IX. MONITORING IMPLEMENTATION OF THE PA

On a monthly basis, DOS will provide the Annex I Signatories, Annex II Signatories, and Consulting Parties to this PA a progress report summarizing the work carried out pursuant to its terms. Such report will include any scheduling changes proposed, any problems encountered, any disputes and objections received in the efforts to carry out the terms of this PA, and any changes to the contacts listed in Attachment D, CONTACT INFORMATION FOR UNANTICIPATED DISCOVERIES. The Annex I Signatories, Annex II Signatories, and Consulting Parties will be responsible for providing current contact information to DOS for purposes of distribution of these monthly reports as well as any other pertinent communication relevant to this PA.

X. DISPUTE RESOLUTION

1. Should any Annex I Signatories, Annex II Signatories, Consulting Indian tribe, or Consulting Party to this PA object at any time to any actions proposed or the manner in which the terms of this PA are implemented, DOS will consult with such party and Annex I Signatories, Annex II Signatories, Consulting Indian tribes, and Consulting Parties to resolve the objection. If DOS determines that such objection cannot be resolved, DOS will:
 - a. Notify the Annex I Signatories, Annex II Signatories, Consulting Indian Tribes, and Consulting Parties that an objection cannot be resolved.
 - b. Forward all documentation relevant to the dispute, including the proposed resolution, to the ACHP for comment. The ACHP will provide DOS with its advice on the resolution of the objection within fourteen (14) days of receiving adequate documentation. Prior to reaching a final decision on the dispute, DOS will prepare a written response that takes into account any timely advice or comments regarding the dispute from the ACHP, Annex I Signatories, Annex II Signatories, Consulting Indian Tribes, and Consulting Parties and provide them with a copy of this written response. DOS will then make a decision regarding the objection and proceed accordingly.
 - c. If the ACHP does not provide its advice regarding the dispute within the fourteen (14)-day time period, DOS may make a final decision on the dispute and proceed accordingly. Prior to reaching such a final decision, DOS will prepare a written response that takes into account any timely comments regarding the dispute from the Annex I Signatories, Annex II Signatories, Consulting Indian Tribes, and Consulting Parties, and provide them and the ACHP with a copy of such written response.
2. DOS's responsibilities to carry out all other actions subject to the terms of this PA that are not the subject of the dispute remain unchanged.

XI. DURATION

This PA will be in force for a period of four (4) years from the date it is executed or until the final report described in Stipulation VIII has been distributed, whichever occurs first. If work on this Project has not substantially progressed within two (2) years of the execution of the PA, DOS may consult with the other Annex I Signatories and Annex II Signatories either to amend the PA to extend its duration or to modify the terms of the PA, as appropriate in accordance with Stipulation XII. DOS will notify the Annex I Signatories, Annex II Signatories, and Consulting Parties as to the course of action it intends to pursue at least ninety (90) days before the PA would expire.

XII. AMENDMENT

Any Annex I Signatory or Annex II Signatory to this PA may propose in writing to the other Annex I Signatories and Annex II Signatories that it be amended. DOS will consult with the Annex I Signatories and Annex II Signatories in an effort to reach agreement on any proposed amendment. If an amendment is agreed to by the Annex I signatories, it will be effective on the date it is signed by Annex I Signatories, and distributed to the Annex II Signatories for their signature. The failure of Annex II Signatories to sign the DOS-issued amendment will not invalidate that amendment. An amendment to this PA will remain in effect for a period stipulated within the amendment. If there is no stated period contained within the amendment, the amendment will remain in effect for the remainder of the duration of the original PA and any subsequent extensions or revisions.

XIII. TERMINATION

1. If any Annex I Signatory to this PA determines that its terms will not or cannot be carried out, that party will immediately consult with the other Annex I Signatories to attempt to develop an amendment to this PA per Stipulation XII. If within thirty (30) days an amendment cannot be reached, any Annex I Signatory may terminate the PA upon written notification to the other Annex I Signatories.
2. If the PA is terminated, all Project activities will cease. Prior to work continuing on the Project, consistent with 36 C.F.R. § 800.6(c)(8) DOS will consult with ACHP and SHPO, and either execute a new programmatic agreement consistent with 36 C.F.R. § 800.6(c)(1) or request the comments of the ACHP consistent with 36 C.F.R. § 800.7(a). DOS will notify all Annex I Signatories, Annex II Signatories, and Consulting Parties as to the course of action it intends to pursue.
3. If the PA is terminated, all Project activities shall cease consistent with 36 C.F.R. § 800.7(a). Prior to work continuing on the Project, DOS will consult with ACHP and SHPO and either execute a PA with Annex I signatories or request the comments of the ACHP consistent with 36 C.F.R. § 800.7(a).

XIV. ANTI-DEFICIENCY PROVISION

Any obligation of the DOS set forth in this PA is subject to and dependent on appropriations by Congress and allocation of sufficient funds for that purpose.

XV. SCOPE OF THE PA

1. This PA is limited in scope to actions related to the proposed construction of the Vantage Pipeline Project and related facilities and the associated consideration of historic properties, consistent with 36 C.F.R. Part 800 and other federal laws, and is entered into solely for these purposes.
2. This PA in no way restricts any of the Annex I Signatories or Annex II Signatories from participating in similar activities with other public or private agencies, organizations, and individuals.
3. This PA is neither a fiscal nor a funds obligation document. Any endeavor involving reimbursement or contribution of funds between the parties to this instrument will be handled in accordance with applicable laws, regulations, and procedures including those for Federal Government procurement and printing. Such endeavors will be outlined in separate agreements that will be made in writing by representatives of the parties and will be independently authorized by appropriate statutory authority. This instrument does not provide such authority.

EXECUTION of this PA by DOS, the SHPO, and the ACHP, and implementation of its terms, is evidence that, consistent with 16 U.S.C. 470f, DOS has taken into account the effects of the Vantage Pipeline Project on historic properties and afforded the ACHP an opportunity to comment.

List of Attachments

ATTACHMENT A PROJECT DESCRIPTION AND GENERAL OVERVIEW MAP

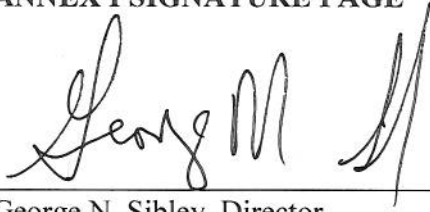
ATTACHMENT B CHRONOLOGY OF CULTURAL RESOURCES AND TRIBAL
CONSULTATIONS AND SURVEYS (Attachment B-1)

U.S. DEPARTMENT OF STATE CONSULTATIONS WITH INDIAN
TRIBES (Attachment B-2)

ATTACHMENT C HISTORIC PROPERTY IDENTIFICATION STUDIES

ATTACHMENT D CONTACT INFORMATION FOR UNANTICIPATED DISCOVERIES

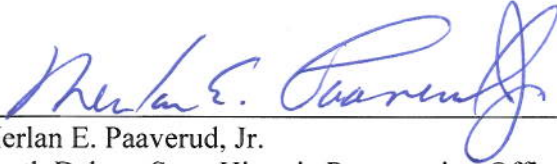
ANNEX I SIGNATURE PAGE



George N. Sibley, Director
Office of Environmental Quality and Transboundary Issues
U.S. Department of State

8 APR 2013

Date



Merlan E. Paaverud, Jr.
North Dakota State Historic Preservation Office

4-8-13

Date



John M. Fowler, Executive Director
Advisory Council on Historic Preservation

4/15/13

Date

ANNEX II SIGNATURE PAGE

David Schmunk
Vantage Pipeline

Date

ANNEX II SIGNATURE PAGE

Darrin Old Coyote, Chairman
Apsaalooke Crow Tribe

Date

ANNEX II SIGNATURE PAGE

Janis Prairie Chief-Boswell, Governor
Cheyenne and Arapaho Tribes

Date

ANNEX II SIGNATURE PAGE

Kevin Keckler, Sr., Chairman
Cheyenne River Sioux Tribe

Date

ANNEX II SIGNATURE PAGE

Brandon Sazue, Sr., Chairman
Crow Creek Sioux Tribe

Date

ANNEX II SIGNATURE PAGE

Floyd G. Azure, Chairman
Fort Peck Assiniboine and Sioux Tribes

Date

ANNEX II SIGNATURE PAGE

Leroy Spang, President
Northern Cheyenne Tribe

Date

ANNEX II SIGNATURE PAGE

John Yellow Bird Steele, President
Oglala Sioux Tribe

Date

ANNEX II SIGNATURE PAGE

Rodney M. Bordeaux, President
Rosebud Sioux Tribe

Date

ANNEX II SIGNATURE PAGE

Roger Trudell, Chairman
Santee Sioux Tribe of Nebraska

Date

ANNEX II SIGNATURE PAGE

Robert Shepherd, Chairman
Sisseton-Wahpeton Oyate

Date

ANNEX II SIGNATURE PAGE

Charles Murphy, Chairman
Standing Rock Sioux Tribe

Date

ANNEX II SIGNATURE PAGE

Tex G. Hall, Chairman
Three Affiliated Tribes

Date

ANNEX II SIGNATURE PAGE

Richard McCloud, Chairman
Turtle Mountain Band of Chippewa Indians

Date

ANNEX II SIGNATURE PAGE

Thurman Cournoyer, Chairman
Yankton Sioux Tribe

Date