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**Larry W. Minor,**

*Associate Administrator for Policy.*

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## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

[Docket No. FD 30186]

#### **Tongue River Railroad Company, Inc.—Rail Construction and Operation—In Custer, Powder River and Rosebud Counties, Mont.**

**AGENCY:** *Lead:* Surface Transportation Board; *Cooperating:* U.S. Army Corps of Engineers, U.S. Bureau of Land Management, U.S. Department of Agriculture, Montana Department of Natural Resources and Conservation (acting as lead agency for other Montana State agencies).

**ACTION:** Notice of Availability of the Final Scope of Study for the Environmental Impact Statement.

**SUMMARY:** On October 16, 2012, Tongue River Railroad Company, Inc. (TRRC) filed a revised application with the Surface Transportation Board (Board) pursuant to 49 U.S.C. 10901 in Docket No. FD 30186. TRRC intended to construct and operate<sup>1</sup> an approximately 83-mile rail line between Miles City, Montana, and two ending points, one near the site of the previously planned Montco Mine near Ashland, Montana, and another at the proposed Otter Creek Mine in the Otter Creek area east of Ashland, Montana. On November 1, 2012, the Board issued a decision requesting additional information from TRRC. On December 17, 2012, TRRC filed a supplemental application that supersedes the October 16, 2012 application. As discussed in the supplemental application, TRRC modified its proposal by identifying its preferred routing for the proposed line as the Colstrip Alternative between Colstrip, Montana, and Ashland/Otter Creek, Montana. On January 8, 2013, the Board issued a decision accepting TRRC's supplemental application and

later denied a request to reconsider that decision and reject the supplemental application in a decision served on February 26, 2013. The purpose of the proposed line is to transport low sulfur, sub-bituminous coal from proposed mine sites in Rosebud and Powder River Counties, Montana. Because the construction and operation of this project has the potential to result in significant environmental impacts, the Board's Office of Environmental Analysis (OEA) has determined that the preparation of an Environmental Impact Statement (EIS) is appropriate pursuant to the National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*).

To help determine the scope of the EIS, and as required by the Board's regulations at 49 CFR 1105.10(a)(2), OEA published in the **Federal Register** on October 22, 2012, a Notice of Intent to Prepare an Environmental Impact Statement, Notice of Availability of the Draft Scope of Study, Notice of Scoping Meetings, and Request for Comments. OEA also prepared and distributed to the public a postcard that introduced TRRC's proposed rail line, announced OEA's intent to prepare an EIS, and gave notice of scoping meetings to residents of Powder River, Custer, and Rosebud Counties. In addition, OEA sent letters to elected officials, federal, state, and local agencies, tribal organizations, and other potentially interested organizations providing similar information. OEA held ten public scoping meetings in Lame Deer, Forsyth, Ashland, and Miles City, Montana, on November 12, 13, 14, 15, and 16, 2012. On November 30, 2012, OEA extended the scoping comment period from December 6, 2012 to January 11, 2013 in response to a number of requests for an extension and because the Board's November 1, 2012 decision had required TRRC to file additional information by December 17, 2012.

The U.S. Army Corps of Engineers (Corps), the U.S. Bureau of Land Management (BLM), the U.S. Department of Agriculture (USDA) and the Montana Department of Natural Resources Conservation (DNRC), acting as lead agency for other Montana State agencies, are participating as cooperating agencies in the preparation of the EIS. OEA is also consulting with tribes and other agencies, including the Northern Cheyenne Tribe, the U.S. Environmental Protection Agency (USEPA), and the Montana Department of Environmental Quality (MDEQ).

After review and consideration of all comments received, this notice sets forth the Final Scope of the EIS. The Final Scope reflects additions and

changes to the Draft Scope as a result of comments received during the scoping comment period. The Final Scope also summarizes and addresses the principal environmental concerns raised by the comments on the Draft Scope and explains if and how these issues will be addressed in the EIS.

**FOR FURTHER INFORMATION CONTACT:** Ken Blodgett, Office of Environmental Analysis, Surface Transportation Board, 395 E Street SW., Washington, DC 20423, or call OEA's toll-free number for the project at 1-866-622-4355. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339. For further information about the Board's environmental review process and this EIS, please visit the Board's Web site at [www.stb.dot.gov](http://www.stb.dot.gov) or the Board-sponsored project Web site at [www.tongueriverreis.com](http://www.tongueriverreis.com).

*Background:* In 1986, the Board's predecessor agency, the Interstate Commerce Commission (ICC), gave approval to TRRC's predecessor to build and operate an 89-mile rail line between Miles City, Montana, and two termini located near Ashland, Montana, a proceeding known as *Tongue River I*.<sup>2</sup> The purpose of the line was to serve proposed new coal mines in the Ashland area. In 1996, the Board authorized TRRC to build a contiguous 41-mile rail line from Ashland to Decker, Montana, in *Tongue River II*.<sup>3</sup> In 2007, the Board authorized TRRC to build and operate the Western Alignment, a 17.3-mile alternate route for a portion of the route already approved in *Tongue River II* in a proceeding known as *Tongue River III*.<sup>4</sup> The ICC/Board's environmental staff, now OEA, prepared EISs in all three proceedings.

Petitions for review of *Tongue River II* and *Tongue River III* were filed in the United States Court of Appeals for the Ninth Circuit, and, in 2011, the court affirmed in part, and reversed and remanded in part, those decisions for additional environmental review.<sup>5</sup>

<sup>2</sup> *Tongue River R.R.—Rail Constr. and Operation—In Custer, Powder River and Rosebud Cntys., Mont. (Tongue River I)*, FD 30186 (ICC served Sept. 4, 1985), modified (ICC served May 9, 1986), *pet. for judicial review dismissed*, *N. Plains Res. Council v. ICC*, 817 F.2d 758 (9th Cir.), *cert. denied*, 484 U.S. 976 (1987).

<sup>3</sup> *Tongue River R.R.—Rail Constr. and Operation—Ashland to Decker, Mont. (Tongue River II)*, 1 S.T.B. 809 (1996), *pet. for reconsider. denied* (STB served Dec. 31, 1996).

<sup>4</sup> *Tongue River R.R.—Rail Constr. and Operation—Ashland to Decker, Mont. (Tongue River III)*, FD 30186 (Sub-No. 3) (STB served Oct. 9, 2007), *pet. for reconsider. denied* (STB served Mar. 13, 2008).

<sup>5</sup> *See N. Plains Res. Council v. STB*, 668 F.3d 1067 (9th Cir. 2011).

<sup>1</sup> TRRC has stated that the proposed line would be constructed by TRRC and would be operated by BNSF Railway Company (BNSF).

Although the *Tongue River I* proceeding was not before the court, the Board determined that the court's decision required the Board to revisit the environmental analysis for *Tongue River I* because the Board had conducted a cumulative impacts analysis for the entire line in *Tongue River III* and had made the resulting mitigation conditions applicable to the entire line in its *Tongue River III* decision. TRRC subsequently informed the Board that it no longer intended to build the *Tongue River II* and *Tongue River III* portions of the railroad.

On June 18, 2012, the Board issued a decision dismissing the *Tongue River II* and *Tongue River III* proceedings and reopening *Tongue River I*.<sup>6</sup> As explained in more detail in that decision (which is available on the Board's Web site at [www.stb.dot.gov](http://www.stb.dot.gov)), the Board required TRRC to file a revised application that presents the railroad's current plans to build a rail line between Miles City and Ashland, Montana. In addition, the Board decided to conduct a new environmental review rather than a supplemental environmental review based on the three prior environmental reviews that began in the 1980s. The Board found that a new EIS (including a new scoping process) is appropriate given the passage of time since *Tongue River I* was decided, the railroad's failure to begin construction of any part of this proposed railroad and other changes that have taken place, the nature of the court's partial remand, and the fact that most of the Board's more recent environmental analysis pertains to *Tongue River II* or *Tongue River III*, neither of which the railroad still proposes to build. The Board also stated that a new EIS will encourage and facilitate public participation.<sup>7</sup>

In its revised application filed on October 16, 2012, TRRC proposed to go forward with the *Tongue River I* project, although in modified form.<sup>8</sup> After reviewing the submission, the Board, in a decision served on November 1, 2012, clarified that the Board's review in this proceeding would include not only the new environmental review of the entire construction project, but also an examination of the transportation merits supporting the entire *Tongue River I*

line.<sup>9</sup> The November 1, 2012 decision also directed TRRC to supplement the revised application to provide a sufficient record for the Board's review, including additional evidence and argument in support of the transportation merits. Finally, the decision established a new procedural schedule for filings on the transportation merits appropriate for this proceeding and required that TRRC publish notices consistent with that decision. On December 17, 2012, TRRC filed a supplemental application intended to supersede the October 16, 2012 filing. TRRC explained that, in its October 16, 2012 application, it had proposed the construction of a line between Miles City, Montana, and Ashland/Otter Creek, Montana, following a line similar to that approved by the ICC in *Tongue River I* in 1986. However, TRRC identified a different routing, known as the Colstrip Alignment, as its preferred alignment in its December 17, 2012 supplemental application.<sup>10</sup> The supplemental application was accepted by the Board in a decision issued on January 8, 2013. On January 7, 2013, Northern Plains Resource Council and Rocker Six Cattle Company filed a petition to reconsider that decision and reject TRRC's supplemental application, which the Board denied on February 26, 2013. The Board also extended the procedural schedule for filing comments on the transportation merits. Under the Board's revised schedule, comments on the transportation merits of the supplemental application will be due by April 2, 2013, and a reply by TRRC will be due by May 16, 2013.

*Environmental Review Process:* The NEPA process is intended to assist the Board and the public in identifying and assessing the potential environmental impacts of a proposed action before a decision on the proposed action is made. OEA is responsible for ensuring that the Board complies with NEPA and related environmental statutes.

ICF International, OEA's independent third-party contractor, is assisting in the environmental review process, pursuant to 49 CFR 1105.10(d). OEA is directing and supervising the preparation of the EIS. The Corps, BLM, USDA, and Montana DNRC, acting as lead agency

for other Montana State agencies, are cooperating agencies, pursuant to 40 CFR 1501.6. The Board will decide whether or not to grant authority to TRRC to construct and operate the proposed rail line pursuant to 49 U.S.C. 10901. The Corps will decide whether or not to issue permits pursuant to Section 404 of the Clean Water Act (33 U.S.C. 1251–1376, as amended) and/or Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403). BLM will decide whether or not to issue a right-of-way (ROW) grant for BLM-administered lands under Title V of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1737). Portions of some of the alternatives under consideration would cross the USDA Livestock and Range Research Laboratory (LARRL) located near Miles City, Montana. The crossing of LARRL land would require an easement from USDA. Montana DNRC, acting as lead agency for other Montana State agencies, will ensure the State's environmental concerns are addressed in a manner consistent with the Montana Environmental Policy Act (MEPA). In addition, portions of some of the alternatives being considered would cross state lands and require an easement from the State of Montana. The EIS will include the information necessary for the Board, the Corps, BLM, USDA and Montana DNRC to make their final decisions under the authorities discussed above. OEA is also working closely with tribes and other agencies, including the Northern Cheyenne Tribe, USEPA, and MDEQ, the state agency responsible for preparing documentation for the proposed Otter Creek Mine, pursuant to MEPA.

As part of the NEPA review, OEA is gathering and analyzing environmental information and data that will be used to compare the potential environmental effects of possible rail alignments and the "no action" alternative in the EIS. This includes conducting aerial and on-the-ground environmental surveys. To complete this survey work, OEA must first get permission from landowners to access properties located along each of the alternatives under consideration. OEA has already begun this process of requesting access by sending letters to landowners and hopes to receive positive responses from landowners. If OEA is unable to secure property access from landowners, OEA's ability to gather information by on-the-ground surveys may be limited.

After issuance of this Final Scope, OEA and the cooperating agencies will prepare a Draft EIS (DEIS) for the proposed line. The DEIS will identify

<sup>6</sup> *Tongue River R.R.—Rail Constr. & Operation—In Custer, Powder River & Rosebud Cntys., Mont.*, FD 30186 *et al.* (STB served June 18, 2012).

<sup>7</sup> *Id.* at 9–10.

<sup>8</sup> Although the decision granting *Tongue River I* authorized the construction of an 89-mile line, TRRC described the line in its October 16, 2012 filing as being approximately 83 miles in length, based on refinements that would straighten and shorten the alignment.

<sup>9</sup> The Board's review of construction applications is governed by 49 U.S.C. 10901, its regulations at 49 CFR 1150.1–1150.10, and the requirements of NEPA and related environmental laws.

<sup>10</sup> The ICC had examined a variation on the Colstrip Alignment as a potential route in *Tongue River I*. The Colstrip Alignment was also identified as a potential alternative alignment at the scoping meetings held by the Board in November 2012 in the project area.

the potential environmental impacts from the proposed rail line and alternatives, and address those environmental issues identified during the scoping process and detailed in this Final Scope. It will also discuss a reasonable range of alternatives to the proposed action, including a no-action alternative, and recommend environmental mitigation measures, as appropriate.

The DEIS will be made available upon its completion for public review and comment and review and comment by other agencies. A Final EIS (FEIS) will then be prepared that will respond to the public and other agency comments received on the DEIS and include further analysis by OEA and the cooperating agencies, if needed. In reaching their final decisions in this case, the Board and the cooperating agencies will take into account the full environmental record, including the DEIS, the FEIS, and all public and agency comments received.

*Purpose and Need:* TRRC has stated that the principal purpose of the construction and operation of the proposed rail line is to transport low sulfur, sub-bituminous coal from mine sites developed in Rosebud and Powder River Counties, Montana, including proposed mines in the Otter Creek area.<sup>11</sup> In its December 17, 2012 supplemental application and in response to an information request from OEA,<sup>12</sup> TRRC has stated that U.S. domestic electric utilities, specifically those in Montana and possibly the Midwest, represent the prime demand potential for Otter Creek coal. In addition, TRRC states that additional coal tonnages could be transported to export markets, which TRRC identifies as markets in Asia and Europe, through U.S. ports along the Atlantic, Pacific, Great Lakes or Gulf Coasts. Because, TRRC reasons, the construction and operation of the proposed rail line is several years in the future and the coal market is highly volatile, it is impossible for TRRC to define its target markets with greater specificity.

The proposed project involves an application by TRRC for a license or approval from the Board. The proposed project is not a federal government-proposed or sponsored project. Thus, the project's purpose and need should be informed by both the private applicant's goals and the agency's

enabling statute here, 49 U.S.C. 10901.<sup>13</sup> Section 10901 provides that the Board must approve a construction application unless it finds that the construction is "inconsistent with the public convenience and necessity."

*Proposed Action and Alternatives:* NEPA regulations require federal agencies to consider a reasonable range of feasible alternatives to the proposed action. The President's Council on Environmental Quality (CEQ), which oversees the implementation of NEPA, has stated in *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations* that "[R]easonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense \* \* \*."<sup>14</sup> In this EIS, OEA will consider a full range of feasible alternatives that meet the purpose and need of the project, as well as the no-action alternative.

Major elements of the proposed project would include a single track constructed of continuous-welded rail; a 200-foot-wide ROW; one passing siding with 8,500 foot clear length; and three set-out tracks between 500 feet and 4,000 feet in length to provide for temporary storage of cars requiring repair and for storage and clearing of maintenance equipment. TRRC anticipates that train traffic on the proposed rail line would consist of 26 round trips per week, or 3.7 loaded 150 car unit coal trains daily on average, with 7.4 trains per day total (empty and loaded).<sup>15</sup> The proposed rail line would carry approximately 20 million tons of coal annually. The EIS will analyze and compare the potential impacts of (1) Construction and operation of the proposed rail line, (2) a reasonable range of feasible alternative routes, and (3) the no-action alternative (denial of the application).

*Alternatives To Be Carried Forward In The EIS:* Based on analysis conducted to date, OEA has determined that the reasonable and feasible alternatives that will be analyzed in detail in the EIS are:

*Tongue River Alternative*—This alternative (TRRC's original preferred alignment) would follow the Tongue River between Miles City, Montana, and two terminus points south of Ashland, Montana, see Final Scope Figures 1 and 2 (all figures are available for viewing on the Board's Web site at [www.stb.dot.gov](http://www.stb.dot.gov) and on the Board-sponsored project Web site at

[www.tonguerivereis.com](http://www.tonguerivereis.com)). It would begin at the existing BNSF rail line between the Miles City Fish Hatchery and Spotted Eagle Lake, proceeding south along the west side of the Tongue River and crossing through the LARRL. Approximately 10 miles north of Ashland, Montana, this alternative would cross the Tongue River and continue south. After crossing Otter Creek approximately 3 miles southeast of Ashland, it would branch into two spurs. One spur would follow the Tongue River Valley approximately 7 miles south to Terminus Point 1 near the site of the previously planned Montco Mine Terminus 1). The other spur would follow the Otter Creek approximately 5 miles south to Terminus Point 2 at the proposed Otter Creek Mine (Otter Creek Spur).

*Colstrip Alternative*—This alternative would extend from the existing BNSF line, known as the Colstrip Subdivision, at Colstrip, Montana towards Ashland, see Final Scope Figures 1 and 2. TRRC would upgrade the existing BNSF line to current main line standards. The Colstrip Subdivision connects with the Forsyth Subdivision at Nichols Wye, approximately 6 miles west of Forsyth and approximately 50 miles west of Miles City. This alternative would cross Cow Creek and Rosebud Creek as it heads south and east, following the Greenleaf Creek Valley to the Rosebud Creek/Tongue River divide. From there it would descend into the Tongue River Valley and join the Tongue River Alternative at the Tongue River crossing north of Ashland. This alternative is TRRC's preferred alignment based on its supplemental application.

*Tongue River Road Alternative*—This alternative would depart Miles City along the Tongue River Alternative route, and continue along that alternative to a point just north of Pumpkin Creek, see Final Scope Figures 1 and 2. There it would cross the Tongue River, turn south and continue along the east side of the river to rejoin the Tongue River Alternative about 10 miles north of Ashland.

*Moon Creek Alternative*—This alternative would start at the BNSF main line approximately 8 miles southwest of Miles City, and run south and southeast along the east side of Moon Creek to the divide separating the Tongue River and Yellowstone River drainages, see Final Scope Figures 1 and 2. From there, the alternative would descend to the Tongue River Valley floor and join the Tongue River Alternative about 14 miles south of Miles City. This alternative would cross the LARRL through its far southwest corner.

<sup>11</sup> TRRC supplemental application at 6.

<sup>12</sup> OEA's information request and TRRC's response are available both on the Board's Web site, [www.stb.dot.gov](http://www.stb.dot.gov), and on the Board-sponsored project Web site, [www.tonguerivereis.com](http://www.tonguerivereis.com).

<sup>13</sup> See *Alaska Survival v. STB*, 705 F.3d 1073, 1084–85 (9th Cir. 2013).

<sup>14</sup> *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 FR 18026 (1981), Question 2a.

<sup>15</sup> TRRC supplemental application, Exhibit D at 2.

*Other Alternatives Under Consideration:* The following additional alternatives and variations were identified and developed during the preparation of this Final Scope as a result of comments received from the public during the scoping comment period and an additional review of the project area for potential alternatives conducted by OEA.<sup>16</sup> OEA is considering whether or not to carry these alternatives forward for more detailed analysis in the EIS. If any of the following alternatives are eliminated from detailed study, the DEIS will explain the reasons why they were eliminated in accordance with 40 CFR 1502.14(a).

As noted above, TRRC has stated that it no longer intends to build the portions of the rail line approved in *Tongue River II* and *Tongue River III*. However, because the Board has approved a route from Ashland, Montana to Decker, Montana in the past, and several commenters suggested that we consider routes going south from Ashland during scoping, OEA will examine the two southern alignments described below to determine whether or not to carry these alternatives forward for more detailed analysis in the EIS.

*Decker 1 Alternative*—Several scoping comments suggested that OEA consider routes going south from the Ashland, Montana area to the Decker, Montana area in this EIS. This alternative would depart from Terminus Point 2 at the proposed Otter Creek Mine, and follow the Otter Creek approximately 5 miles north along the same route used for the Otter Creek Spur and then travel southwest generally paralleling the Tongue River through Terminus Point 1, see Final Scope Figures 1 and 3. It would run along the eastern side of the Tongue River and pass through the Wolf Mountains Battlefield National Historic Landmark. From there it would cross to the west side of the Tongue River and continue to its connection with the BNSF rail line via the Spring Creek Railroad Spur near Decker, Montana. This alternative is identical to the alignment from Ashland to Decker including the Western Alignment that was approved in *Tongue River III*.

*Decker 2 Alternative*—In addition to the Decker 1 Alternative, a new alternative heading south from Ashland to Decker, not considered in previous Tongue River proceedings, was developed in an effort to consider a southern route that would avoid the Wolf Mountains Battlefield National Historic Landmark (as shown on existing maps). This alternative would be almost identical to the Decker 1 Alternative. However, it would cross from the east to the west side of the Tongue River just north of Birney. It would pass west of the Wolf Mountains Battlefield National Historic Landmark and, with the exception of a short segment approximately 3 miles north of the Tongue River Dam, this alternative would continue on the west side of the Tongue River for the remainder of its course, see Final Scope Figures 1 and 3.

*Alternative Variations:* Alternative variations are short sections of rail alignments that could be used to replace segments of the alternatives discussed in the previous section. Two potential alternative variations that will be considered in the EIS have been developed to date.

*Ashland East Variation*—The Ashland East Variation was developed in response to a scoping comment from the Northern Cheyenne Tribe requesting an alternative as far as possible from the eastern Reservation boundary and the Tongue River, see Final Scope Figures 1 and 4. It could be used to replace segments of the Tongue River Alternative, Tongue River Road Alternative, Moon Creek Alternative, and/or the Colstrip Alternative. Starting at its northern end, this variation would connect to the Colstrip Alternative where it begins to curve to the south, at a location just east of its crossing with the Tongue River Road. The Ashland East Variation would connect to the Tongue River Alternative approximately 0.8 miles east of the intersection of Greenleaf Road and Tongue River Road. From there, the Ashland East Variation would continue east for approximately 3 miles before curving to the south. This variation would generally parallel the Tongue River, but would be offset to the east at distances ranging from approximately 2 miles to 4 miles. To lower the grade for the Otter Creek crossing, it would include a gradual westward bulge which would be located approximately 2 miles from Ashland at its closest point. The variation would pass approximately 2 miles east of Ashland before connecting to the Otter Creek Spur, and either Terminus 1 Variation or Terminus 1 through a wye track approximately 2.5 miles northwest of Terminus Point 2.

*Terminus 1 Variation*—The Terminus 1 Variation was designed in response to scoping comments from the Northern Cheyenne Tribe requesting an alternative as far as possible from the eastern Reservation boundary and the Tongue River, see Final Scope Figures 1 and 4. This variation would start at a point approximately 1.8 miles southeast of the proposed Terminus Point 1. From there, it would travel northeast, largely paralleling the spur leading to Terminus Point 1 before joining with the Ashland East Variation. The Terminus 1 Variation connects to the Ashland East Variation and from there could connect to any of the northern alternatives (i.e., Tongue River, Colstrip, Tongue River Road and Moon Creek alternatives) and could also connect to the southern alternatives (i.e., Decker 1 and 2 alternatives).

*Alternatives Considered But Eliminated From Detailed Study:* Based on analysis conducted to date, OEA has determined that the following two alternatives are not reasonable and feasible and will not be carried forward for detailed analysis in the EIS.

*212 to 59 to Gillette Alternative*—This route was developed in response to a scoping comment requesting that an alternative be considered that would transport the coal east by rail along Highway 212, before turning south at Highway 59 and connecting to the existing rail line near Gillette, Wyoming. The total length of this alternative is approximately 138 miles. OEA has determined that this is not a reasonable and feasible alternative based on the challenges that would be posed by the undulating terrain and the costs and environmental impacts that would be associated with the significantly longer length of the route.

*Otter Creek Alternative*—This route was developed in response to a scoping comment requesting that an alternative be considered that would follow the Otter Creek south and connect with the existing BNSF mainline somewhere between Sheridan and Gillette, Wyoming. The route would run south up the Otter Creek drainage through Custer National Forest to the Montana-Wyoming border, at which point it would turn to the southwest and continue for approximately 30 miles before reaching the existing BNSF mainline near the town of Clearmont, Wyoming. OEA has determined that this is not a reasonable and feasible alternative based on the excessive changes in elevation and the steep grade along the route.

*Public Participation, Agency Consultation and Government-to-Government Consultation:* As part of the

<sup>16</sup>OEA has also revisited other alternatives that were eliminated from detailed study in the *Tongue River I* EIS and has determined that the issues raised at that time, such as challenging grade or large amounts of cut and fill, are still valid. Moreover, OEA received no comments during the scoping comment period requesting that the Board reconsider any of the alternatives previously eliminated in the *Tongue River I* EIS. Therefore, these alternatives will continue to be treated as not reasonable and feasible, and they will not receive any detailed analysis in this EIS.

environmental review process to date, OEA has conducted broad outreach to inform the public, federally recognized tribes, and agencies about the proposed action and to facilitate participation in the NEPA process. OEA consulted with, and will continue to consult with federal, state, and local agencies, tribes, affected communities and all interested parties to gather and disseminate information about the proposal. As part of that process, OEA has initiated government-to-government consultation with federally-recognized Tribal Governments to seek, discuss, and consider the views of the tribes regarding the proposed action and alternatives. In addition, OEA intends to hold meetings in the vicinity of the project area to address potential project impacts to cultural resources during the EIS process.

*Defining the Project Area:* A challenging issue presented by TRRC's proposal is how to define the project area. The vast majority of scoping comments addressing the destination of the coal presumed that coal carried on TRRC's proposed line would eventually be carried to ports proposed for development in the Pacific Northwest, and then onto electric utilities in Asia. According to TRRC, some coal may be used for electricity generation within Montana, it may move some coal to the Midwest, and it may export some coal to Asia and to Europe via ports widely spread throughout the country. The coal market, TRRC asserts, is so volatile that more accurate predictions are impossible.

In most rail construction and operation proposals, the applicant-railroad defines the potential market areas that it intends to transport goods to and from. OEA then is able to assess potential environmental impacts within a defined geographic area. Here, the potential geographic area is vast. Commenters from Washington State are concerned about impacts from increased coal train traffic, including the potential addition of TRRC coal trains, within their state. Commenters from Oregon, including Senator Ron Wyden and the Oregon Department of Environmental Quality, have similar concerns that their state would suffer adverse impacts from potential increased coal train traffic, specifically through the Columbia River Gorge. Government officials and residents of Billings and Missoula, Montana are concerned with the potential for congestion and pollution that additional train traffic associated with the TRRC proposal could bring to their communities.

In preparing the EIS, OEA will use modeling and other available

information to project economically reasonable and feasible transportation movements. OEA will define a project area in the EIS that will inform the public, enable all interested parties to participate in the environmental review process, and disclose the potential impacts of TRRC's proposal to the Board so that it can take the requisite hard look at the environmental effects before making a fully informed decision in this case.

*Summary of Scoping Comments:* OEA received more than 2,500 comments on the Draft Scope, of which most of the comments were form letters that contained the same general content as other letters already received. Of the remaining public comments, more than 500 were written comments, and approximately 150 were oral comments delivered during the public scoping meetings. Comments were submitted by federal, state, and local agencies, tribes, interested groups, elected officials, and individual citizens. In preparing this Final Scope, OEA considered all of the comments received. The Final Scope of Study reflects changes to the Draft Scope as a result of these comments. Additional changes from the Draft to the Final Scope were made for clarification or because of additional analysis conducted by OEA. In developing additions and modifications to the Final Scope, OEA has summarized and considered the comments by first dividing them into two broad categories: procedural issues and environmental resource issues.

#### Procedural Issues

- *Reopening the Scoping Process.* Commenters requested that the Board issue a new Notice of Intent and reopen the public scoping period as a result of the changes that were made to TRRC's preferred alternative in its December 17, 2012 supplemental application. Because TRRC's new preferred alignment, the Colstrip Alternative, was specifically identified as a potential alternative in the Draft Scope of Study and OEA held scoping meetings in Forsyth, Montana, near the Colstrip alternative's connection with the BNSF Forsyth Subdivision main line, OEA has determined that the scoping process provided sufficient notice of this potential alternative and the ability of the public to provide input on it and will not reopen the scoping period. Moreover, OEA had previously extended the comment period on the Draft Scope from December 6, 2012 to January 11, 2013.

- *Programmatic EIS.* Several commenters suggested that OEA prepare a programmatic EIS that evaluates

allegedly related proposals, e.g., the proposed coal terminals in Washington State and Oregon. CEQ guidance suggests the preparation of a programmatic EIS when an agency evaluates broad policies, plans, or programs. Here, however, the decision before the Board is whether or not to grant TRRC authority to construct and operate a proposed rail line pursuant to 49 U.S.C. 10901. The Board does not have jurisdiction over the alleged related proposals and thus, has not been asked to approve any such proposals. Moreover, where there is no programmatic plan proposed for the extraction of resources in a region, a programmatic EIS is not required.<sup>17</sup> Therefore, a project-specific EIS is the appropriate approach. OEA will, however, examine any actions in the project area that may impact the same environmental resources as the proposed project as part of its cumulative impacts analysis in the EIS.

- *Public Information.* Commenters requested more detailed maps than those distributed during scoping. All available maps to date can be found on the Board-sponsored project Web site at [www.tonguerivereis.com](http://www.tonguerivereis.com), including the Final Scope Figures referenced in this document. Additional maps may be generated during the preparation of the EIS. Any new or updated maps will be presented to the public in the DEIS and/or FEIS.

- *Cooperating Agencies.* The Northern Cheyenne Tribe requested information during scoping about cooperating agency status and about obtaining funding to facilitate its participation in the NEPA process. A cooperating agency is defined as any federal or state agency or tribe that has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposed project. 40 CFR 1501.6. As defined by the CEQ regulations, "special expertise" means statutory responsibility, agency mission, or related program experience. 40 CFR 1508.26. In addition, "when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency." 40 CFR 1501.5.

As previously noted, OEA has invited 4 agencies to be cooperating agencies that have decision-making authority independent of the Board, are agencies from which TRRC must obtain separate approvals or permits, and/or the proposed line would cross that agency's land. The purpose of having these agencies serve as cooperating agencies is

<sup>17</sup> *Kleppe v. Sierra Club*, 427 U.S. 390, 408-415 (1976).

to help these agencies fulfill their regulatory responsibilities and functions and to avoid duplicative environmental analysis.

OEA understands the importance of working closely with the Northern Cheyenne Tribe throughout every step of the EIS process. The Northern Cheyenne Tribe has explained to OEA that the tribe is responsible for ensuring that the air quality and water quality on the Northern Cheyenne Reservation comply with the Clean Air and Clean Water Act. Moreover, OEA has already initiated consultation with the Northern Cheyenne Tribe through the EIS process. OEA has concluded, however, that because neither the applicant's preferred alignment nor any of the alternatives summarized above cross the Northern Cheyenne Reservation, and because the Northern Cheyenne Tribe does not need to issue a license or a permit for the proposed rail line; the Northern Cheyenne Tribe does not meet the definition stated above of a cooperating agency. OEA also lacks the ability to provide any funding to the Northern Cheyenne Tribe or any other tribe to facilitate their participation. Nevertheless, OEA has and will continue to consult with the Northern Cheyenne Tribe and other tribes. OEA is committed to working closely with the Northern Cheyenne Tribe and other tribes, will continue to keep the tribes informed and involved, and will continue to seek input from the Northern Cheyenne Tribe and other tribes throughout the EIS process.

• *Government-to-Government Consultation.* Commenters requested that OEA engage affected tribes in government-to-government consultation. For example, the Northern Cheyenne Tribe requested that the EIS evaluate water rights associated with the Indian Homestead Act. USEPA requested that OEA engage in meaningful government-to-government consultation with the Northern Cheyenne, the Crow, and several bands of the Sioux Nation. Another commenter recommended that OEA conduct substantial, on-going, in-person consultation with affected federally-recognized tribes and that planning for the DEIS should be conducted in consultative partnership with affiliated tribes, to guarantee essential tribal involvement throughout the EIS process. OEA has contacted the Northern Cheyenne, the Crow, and bands of the Sioux Nation to determine which tribes would like to engage in government-to-government consultation with the Board. OEA expects that government-to-government consultation with interested tribes will help to

identify and evaluate potential effects from the TRRC proposal to tribal lands, rights, resources, religious or cultural sites, and subsistence activities.

• *The Board's Procedures and Jurisdiction.* Commenters raised concerns regarding the Board's jurisdiction and the merits of the public need for the proposed project.

○ *Public Convenience and Necessity.* Commenters questioned whether the proposed action would meet the "public convenience and necessity" standard in 49 U.S.C. 10901 when the purpose and need of the project is only to serve a privately-owned coal mine. Additionally, commenters felt that the proposed action would not serve the public interest, especially if the coal is exported to foreign markets.

The Board's review of the TRRC proposal consists of two processes—consideration of (1) the transportation merits under 49 U.S.C. 10901 of the Interstate Commerce Act, and (2) the environmental impacts under NEPA and related environmental laws. The comments concerning the "public convenience and necessity" and public interest regarding the proposal relate to the transportation merits review by the Board. Under 49 U.S.C. 10901(c) of the Interstate Commerce Act, the Board must approve a proposal to construct or operate a rail line unless it finds that such activities are inconsistent with the "public convenience and necessity." The statute does not define "public convenience and necessity" but historically, the Board has evaluated whether there is a public demand or need for the proposed service; whether the applicant is financially able to undertake the construction and provide rail service; and whether the proposal is in the public interest and will not unduly harm existing services. The interests of shippers are accorded substantial importance in assessing the public interest. Safety and environmental concerns are also considered and weighed against transportation concerns in evaluating the public interest. When the environmental review here is completed and the Board decides whether to authorize the proposed line, it will consider arguments raised by commenters that the TRRC proposal is inconsistent with "the public convenience and necessity."

○ *Eminent Domain.* Commenters expressed concern over just compensation if the proposed rail line were to traverse their land and the railroad's ability to use eminent domain to acquire land. In Board-approved rail construction cases, it is the railroad's responsibility to acquire land it needs to

implement the approved project under state law. If the railroad needs to acquire property associated with a Board-approved line by using condemnation (also known as eminent domain) it must do so in accordance with the State of Montana's railroad condemnation law. The Board plays no role in any eminent domain proceedings and does not approve or disapprove any condemnation of private property under state law.

• *Proposed Action.* Commenters suggested that if the Colstrip Alternative was determined to be infeasible in the previous *Tongue River I* EIS, it would not be feasible today. But while the *Tongue River I* EIS determined that the Colstrip Alternative had a higher grade against load compared to other alternatives considered (0.85 percent versus 0.2 percent), the *Tongue River I* EIS did not determine, at that time, that the Colstrip Alternative was infeasible; rather it was not selected as the preferred alternative because it was a longer route to TRRC's then-identified target markets in the Midwest.

Many commenters raised concerns about the portion of the proposed line from Ashland to the previously planned Montco Mine (i.e., Terminus 1). Commenters suggested that the development of the Montco Mine is not reasonably foreseeable because there is currently no surface mine permit pending. As part of its analysis in the EIS, OEA will consider this issue.

• *Purpose and Need.* Commenters suggested that TRRC's information regarding the purpose and need for the proposed action is based on speculation regarding coal mine feasibility and global and domestic coal markets. Commenters remarked that domestic demand for coal has decreased in favor of natural gas and the most logical destination for the Otter Creek Coal would be to foreign markets. As discussed above, TRRC has indicated a possibility for some portion of the Otter Creek coal to find markets overseas, including markets in Asia and Europe, through ports along the Atlantic, Pacific, Great Lakes, and Gulf Coasts, as well as to coal-fired power plants in the United States. OEA will conduct an analysis to determine if TRRC's projections are reasonable, given the available information, and will present the results of its analysis in the EIS.

#### Environmental Resource Issues

• *Analysis of Transportation Systems.* Commenters requested that the EIS analyze the potential transportation routes for coal export from coal transported on the proposed line. Commenters requested that road traffic

delays be considered at road/rail grade crossings as a result of increased transaction-related rail traffic. Commenters also requested that the EIS evaluate rail line congestion. For the Colstrip Alternative, commenters requested that the EIS consider potential impacts to area roads and public access roads. In addition, commenters requested that the EIS evaluate the ability of the proposed rail line to carry additional resource commodities, such as timber and grain. Commenters requested that the EIS analyze impacts associated with the proposed paving and possible expansion of Tongue River Road.

USEPA commented that the EIS should include analysis of potential impacts of increased transaction-related rail traffic on existing rail lines and the impacts of more frequent coal trains on communities in Montana and beyond. USEPA also requested that the EIS provide details on TRRC's projected daily peak and average train traffic.

The Draft Scope of Study has been revised to reflect that the EIS will evaluate the potential downline rail traffic congestion as well as road traffic congestion at road/rail grade crossings resulting from increased transaction-related rail line traffic. The EIS will describe the existing road/rail grade crossing delay and analyze the potential for an increase in delay related to the proposed rail operations. The EIS will evaluate the potential paving and expansion of Tongue River Road as a cumulative impact. The EIS will consider whether the other issues raised by commenters should be addressed in the EIS, and if so, analyze them as appropriate.

- *Analysis of Safety Impacts.*

Commenters requested that the EIS examine potential safety issues, including accidents at grade crossings, fires, livestock loss, and train derailment. Commenters also requested that the EIS examine the potential delay of emergency service vehicles at grade crossings due to the increase in train traffic and potential collisions with trucks transporting hazardous materials. Additionally, commenters requested that the EIS analyze public safety impacts from coal train traffic on the proposed line as well as an increase in coal train traffic on existing rail lines that may move coal from the Otter Creek area. The EIS will evaluate potential impacts of TRRC's preferred route and each alternative on road/rail grade crossing safety and analyze the potential for an increase in accidents related to the proposed new rail operations. The EIS will also describe projected rail operations and analyze the potential for

increased probability of accidents, including derailments due to the proposed action. The Draft Scope of Study has been revised to reflect that the EIS will evaluate the potential for disruption and delays to emergency vehicles and evaluate the potential for fires and livestock loss. The EIS will consider whether the other issues raised by commenters should be addressed in the EIS, and if so, analyze them as appropriate.

- *Analysis of Land Use.*

- *Agricultural Lands.* Several commenters requested that the EIS evaluate the potential impacts to agricultural lands, including ranchlands, access to water and grazing pastures for livestock, impacts to cattle crossings, access to irrigation systems, and access to roads. The Draft Scope of Study has been revised to reflect that the EIS will evaluate impacts to these agricultural lands.

- *Potential Section 4(f) properties.*

The Montana Department of Transportation requested that the EIS identify and evaluate potential impacts to resources protected under the U.S. Department of Transportation (USDOT) regulation known as "Section 4(f)." Section 4(f) provides that USDOT agencies cannot approve the use of land from publicly owned parks, recreational areas, refuges, or historical sites except under certain conditions. The Board is an independent agency organizationally housed within USDOT. Its governing statute is the Interstate Commerce Act and not the Department of Transportation Act, 49 U.S.C. 1653(f) (1970). Therefore, the Board is not subject to Section 4(f) requirements. However, the Federal Highway Administration (FHWA) is a USDOT agency subject to the Section 4(f) requirements. An underpass at Interstate 94 would need to be built for the Tongue River Road, Tongue River, and Moon Creek Alternatives (should the Board approve one of these alternatives), which would require approval from FHWA in coordination with the Montana Department of Transportation. Therefore, the Draft Scope of Study has been revised to reflect that the EIS will analyze potential impacts to Section 4(f) properties that may be located near Interstate 94 along the Tongue River Road, Tongue River, and Moon Creek Alternatives.

- *Analysis of Recreation.*

Commenters requested that the EIS evaluate potential impacts to recreational activities, including hunting, fishing, and canoeing. Commenters requested that the EIS also evaluate impacts to Montana Fish,

Wildlife, and Parks (MFWP) Conservation Easements and Block Management properties. Additionally, many commenters were concerned about impacts to recreation areas near Miles City resulting from increased train operations. The Draft Scope of Study has been revised to reflect that the EIS will evaluate these issues.

- *Analysis of Biological Resources.*

- *Fisheries.* Commenters requested that the EIS analyze the potential impacts to the Miles City Fish Hatchery, the Tongue River dam, and the Tongue and Yellowstone River ditches. The Final Scope reflects that the EIS will evaluate impacts to the Miles City Fish Hatchery, the Tongue River dam and the Tongue and Yellow River ditches, as appropriate.

- *Birds.* Commenters requested that potential impacts to birds be analyzed in the EIS. Specifically, the U.S. Fish and Wildlife Service (USFWS) requested that ground and aerial surveys be conducted along the different alternatives' right-of-ways in compliance with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. Additionally, one commenter requested the EIS examine potential impacts to burrowing owls, short-eared owls, mountain plovers, and ferruginous hawks. The Draft Scope of Study has been revised to reflect that the EIS will include appropriate aerial and ground surveys along the alternatives in compliance with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act.<sup>18</sup> The EIS will consider whether the other issues raised by commenters should be addressed in the EIS, and if so, analyze them as appropriate.

- *Wildlife.* Commenters requested that the EIS analyze potential impacts of the proposed action to wildlife migration corridors and breeding grounds along with impacts to wildlife as a result of wildlife-train collisions along the proposed rail line and alternatives. The Draft Scope of Study has been revised to reflect that the EIS will analyze impacts to wildlife migration corridors and breeding grounds, along with impacts to wildlife as a result of wildlife-train collisions along the proposed rail line and alternatives.

- *Vegetation.* USFWS requested the development and implementation of a comprehensive restoration plan to address temporarily disturbed areas, in particular the native grassland,

<sup>18</sup> As discussed above, OEA's ability to conduct these surveys depends on landowner permission to access properties located along the alternatives under consideration.



sagebrush-steppe, and riparian areas. Commenters also requested that a detailed vegetative habitat mapping survey be conducted. These requests will be considered in the EIS, as appropriate.

- *Threatened and Endangered Species.* USFWS requested that the EIS evaluate potential impacts to the Black-footed Ferret, Pallid Sturgeon, Interior Least Tern, Whooping Crane, Greater Sage-Grouse (candidate species), and Sprague's Pipit (candidate species). Additionally, USFWS requested that a biological assessment be conducted. The Draft Scope of Study has been revised to reflect that the EIS will evaluate impacts to the Black-footed ferret, Pallid Sturgeon, Interior Least Tern, Whooping Crane, Greater Sage-Grouse (candidate species), and Sprague's Pipit (candidate species) and include a biological assessment for threatened and endangered species.

- *Noxious Weeds.* Commenters raised concerns associated with the spread of noxious weeds resulting from the construction and operation of the proposed rail line. The Draft Scope of Study has been revised to reflect that the EIS will analyze potential impacts from the spread of noxious weeds.

- *Analysis of Water Resources.*

- *Groundwater and Surface Water.* USEPA requested that the EIS analyze potential impacts to water quantity such as changes in stream flow, additional uses of surface or groundwater, groundwater depletions, and reductions in groundwater recharge. MFWP requested that the proposed action maintain the connectivity of prairie streams and rivers to minimize impacts to the area fisheries and study the potential alterations to stream and bank morphology as well as potential sediment impacts from erosion and cut and fill operations. Commenters also requested that the EIS examine where the water needed for construction and operation would be sourced and what impact the proposed action would have on water access for area ranchers and farmers. One commenter requested that the EIS evaluate impacts resulting from pollution runoff into any streams listed under Clean Water Act Section 303d in the project area. The Draft Scope of Study has been revised to reflect that the EIS will evaluate these issues.

- *Floodplains.* One commenter requested that the EIS include a flood analysis of the construction impacts from the proposed rail line and alternatives on Miles City. Commenters requested that the EIS evaluate potential impacts to irrigation structures along the Tongue River. The Draft Scope of Study has been revised to reflect that the EIS

will evaluate potential floodplain impacts from the proposed rail line and alternatives on Miles City and that the EIS will evaluate potential impacts to irrigation structures along the Tongue River.

- *Stream Morphology.* USEPA suggested that the EIS include an analysis of potential impacts to the stream morphology of the Tongue River and Otter Creek, existing and proposed artificial bank stabilization structures, agricultural practices adjacent to the water bodies, constrictions placed on the river channel and floodplain, fluvial geomorphology, bank stabilization and floodplains, and bank destabilization. The Draft Scope of Study has been revised to reflect that the EIS will assess potential impacts to geomorphology of the Tongue River and Otter Creek. The EIS will consider whether the other issues raised by commenters should be addressed in the EIS, and if so, analyze them as appropriate.

- *Water Quality.* USEPA requested that the EIS utilize existing models to review reasonably foreseeable water quality impacts in the U.S. from coal combustion; summarize existing water quality conditions; evaluate the potential water quality impacts from the proposed rail line and alternatives and potential area mines; and include information about water quality standards, potential discharge from the proposed railroad and potential area mines, and impaired water bodies in the State of Montana and the Northern Cheyenne Reservation. The Draft Scope of Study has been revised to reflect that the EIS will consider USEPA guidance documents concerning non-point source pollution and the USEPA Water Quality Assessment for the Tongue River and will include information concerning State of Montana and Northern Cheyenne Tribe water quality standards. The EIS will consider whether the other issues raised by USEPA should be addressed in the EIS, and if so, analyze them as appropriate.

- *Wetlands.* The Corps recommended that a Draft 404(b)(1) analysis be performed and included as part of the EIS. USEPA requested that the EIS include an analysis of the potential impacts to wetlands and riparian habitats. The Draft Scope of Study has been revised to reflect that the EIS will include an analysis of the potential impacts to wetlands and riparian habitats and include information to support a Draft 404(b)(1) analysis.

- *Analysis of Navigation.*

Commenters requested that the EIS evaluate the impacts of the construction and operation of the railroad on navigability of water bodies. The EIS

will include an analysis of potential impacts to navigation.

- *Analysis of Geology and Soils.* Several commenters requested an analysis of alluvial valley floors, soil erosion, prime farmland, and reclamation activities. One commenter expressed concern about atmospheric deposition of rail traffic emissions on soil, including accumulation of Polycyclic Aromatic Hydrocarbons (PAH) and heavy metals. The EIS will evaluate potential mine reclamation activities as cumulative impacts. The Draft Scope of Study has been revised to reflect that the EIS will evaluate the potential atmospheric deposition of rail traffic emissions on soil including the possible accumulation of PAH and heavy metals from the proposed line.

- *Analysis of Air Quality and Visibility.*

- *Emissions Analysis.* USEPA recommended that the EIS utilize existing models to review reasonably foreseeable air quality impacts in the U.S. from combustion of the coal transported by the proposed line. USEPA also recommended that the EIS discuss practices in use at coal mines in the Powder River Basin for reducing NO<sub>x</sub> emissions from blasting activities, utilize far-field and potentially also near-field air quality modeling to assess potential impacts to Class I areas and visibility because of the proximity to the Northern Cheyenne Class I airshed, as well as the proposed railroad and mines' potential contributions to cumulative impacts on air quality-related values (AQRVs), resources that may be adversely affected by a change in air quality, such as visibility in Class I areas and sensitive Class II areas based upon cumulative impact air quality modeling previously conducted by BLM. USEPA recommended that the EIS analyze potential visibility degradation and incremental consumption under EPA's Prevention of Significant Deterioration (PSD) permitting program from the proposed project and cumulative emissions because of the proximity of the project to sensitive receptor areas and because of previously-modeled air quality impacts. The Draft Scope of Study has been revised to reflect that the EIS will examine potential impacts from the proposed line and any coal mines that the proposed line might serve on visibility degradation and impacts to the Northern Cheyenne Class I airshed and Class II sensitive areas, evaluate incremental consumption under EPA's PSD permitting program for cumulative emissions from the mines and other activities in the project area and include relevant information from BLM's



Resource Management Plan air quality study.

One commenter requested that the EIS determine the impacts of million tons of coal being shipped to China and burned with limited or no pollution control devices. While the Board has noted that Supreme Court precedent suggests that an analysis of impacts related to activities over which the Board has no authority to regulate and are not proximately caused by the Board's decision is not required under NEPA,<sup>19</sup> the Draft Scope of Study has been revised to reflect that the EIS will include an appropriate air quality analysis of the combustion of the coal transported by the proposed TRRC line. The EIS will also evaluate the air quality impacts from mining activities at the coal mines that would produce coal to be carried on the proposed TRRC line as cumulative impacts. The EIS will consider whether the other issues raised by commenters should be addressed in the EIS, and if so, analyze them as appropriate.

○ *Agency Consultation.* USEPA recommended that the EIS include design measures for the coal mines that are likely to be imposed by the State of Montana into the analysis and identify these measures as permit-related conditions in the baseline emission inventory. USEPA recommended that OEA consult with BLM and Montana State agencies on the project's air quality analysis, the results of the analysis, identification of available mitigation measures, and any necessary permitting, as appropriate. The Draft Scope of Study has been revised to reflect that the EIS will consider Montana State emission controls required on permitted sources in the baseline cumulative impacts analysis. BLM and Montana State agencies are cooperating agencies, and OEA will consult with them on these issues.

○ *Diesel Emissions.* Several commenters requested that the EIS analyze an increase in air pollution and associated human health effects from the proposed action. Commenters requested that the EIS analyze potential public health impacts, including impacts associated with diesel emissions from locomotives and increased coal train traffic from the mine sites to the destination facilities. USEPA requested that the EIS evaluate the potential human health impacts to potentially affected communities along existing rail lines that may move coal from the Otter Creek area, including

potential impacts associated with diesel exhaust. The Draft Scope of Study has been revised to reflect that the EIS will include an appropriate evaluation of the effects on human health from locomotive diesel emissions.

○ *Climate Change.* Several commenters requested that the EIS analyze the potential contributions to climate change resulting from the proposed action. Additionally, commenters requested that the EIS analyze potential air quality impacts, including climate change, resulting from the proposed coal export terminals in the Pacific Northwest. USEPA recommended performing a life cycle greenhouse gas (GHG) emissions analysis. While the Board has noted that Supreme Court precedent suggests that an analysis of impacts related to activities over which the Board has no authority to regulate and are not proximately caused by the Board's decision is not required under NEPA,<sup>20</sup> the Draft Scope of Study has been revised to reflect that the EIS will include a life-cycle analysis of potential GHG emissions. The EIS will consider whether the other issues raised by commenters should be addressed in the EIS, and if so, analyze them as appropriate.

○ *Coal Dust.* Numerous commenters addressed the potential impacts of coal dust to air quality, human health, and visibility. Specifically, one commenter requested that the EIS include an analysis of the potential impacts to the Class I airshed of the Northern Cheyenne Tribe. Commenters requested that the EIS evaluate the potential impacts of coal dust emitted from railcars traveling on the proposed line with and without the use of dust control techniques, including chemical surfactants, and analyze the chemical composition of these surfactants. Commenters also requested that the EIS analyze the potential effects of toxic pollutants, including heavy metals, such as cadmium, resulting from the emission of coal dust along the proposed line. These commenters suggested that the EIS include a study of the potential human health effects from coal dust on communities along the proposed line, and around coal stock piles in various weather conditions. USEPA requested that the EIS analyze potential increases in coal dust that would be associated with transaction-related traffic along the proposed line and additional rail traffic along existing lines that may move coal from the Otter Creek area. MFWP commented on potential effects of coal

dust to the Miles City Fish Hatchery. The Draft Scope of Study has been revised to clarify that the EIS will include an appropriate evaluation of impacts from coal dust, including any human health impacts.

• *Analysis of Noise and Vibration.* Several commenters requested that the EIS analyze potential impacts to people and structures along the proposed line and alternatives from potential ground vibrations. Commenters specifically requested a comprehensive vibration study on the Miles City Fish Hatchery. Several commenters requested that the EIS analyze the potential impacts of sound and infrasound (sound below the level of human hearing) from transaction-related rail traffic. One commenter was concerned about the effects of vibration on structures such as bridges, retaining walls, homes, ranch structures, pipelines, and irrigation systems, particularly those areas with underlying clay soils. The Draft Scope of Study has been revised to reflect that the EIS will evaluate potential impacts to the Miles City Fish Hatchery, as appropriate. The EIS will consider whether the other issues raised by commenters should be addressed in the EIS, and if so, analyze them as appropriate.

• *Analysis of Energy Resources.* Commenters requested that the EIS analyze potential impacts to existing and future utility lines underground and overhead and the impact of the construction and operation of the proposed line and Otter Creek Mine's energy needs on the local energy grid. Commenters suggested that the EIS discuss the current and future coal market and the potential switch to natural gas and wind power; analyze whether Asia could be a major destination for Powder River Basin coal; and analyze if China is planning to use inexpensive coal imported from the U.S. as a bridge fuel until it can develop renewable energy. Commenters requested that the EIS evaluate potential impacts from the proposed Young's Creek Mine in Wyoming and possible expansion of the Decker Mines. The Draft Scope of Study has been revised to reflect that the EIS will analyze the potential impact of the proposed action on energy markets and the effect of energy markets on the proposed action, as appropriate. The EIS will consider whether the other issues raised by commenters should be addressed in the EIS, and if so, analyze them as appropriate.

• *Analysis of Socioeconomics and Environmental Justice.* Commenters requested that the EIS analyze any disproportionate adverse impacts on

<sup>19</sup> *Tongue River R.R. Co., Inc.—Constr. And Operation—Western Alignment*, FD 30186 (Sub-No. 3) at 10 n.21 (STB served June 15, 2011).

<sup>20</sup> *Id.*

low-income residents of the Northern Cheyenne Reservation, as well as the Amish Community in the project area. Specifically, commenters requested that the EIS analyze potential impacts to the Northern Cheyenne Reservation's poverty rates, incomes, crime rates, transportation and safety issues, social services, and healthcare. Several commenters requested that the EIS analyze the socioeconomic impacts from an influx of workers in the project area, including demand for local services. Numerous commenters requested that the EIS determine the economic costs to agricultural and tourism operations in the project area. Additionally, several commenters requested that the EIS evaluate the possibility of potential job creation or job loss, especially in mining and law enforcement and as a result of potential coal displacement at the Western Energy mine in Colstrip, Montana. One commenter requested that the EIS analyze potential impacts to the Town of Colstrip due to the change in TRRC's preferred alternative. Numerous commenters requested that the EIS evaluate potential for losses in property values for landowners along the different alternatives. USEPA requested that the EIS include a discussion of potential environmental justice impacts in the air, water, socioeconomics, and traffic analyses, particularly associating specific resource impacts to specific communities, including the Northern Cheyenne and the Crow reservations. The EIS will include an appropriate evaluation of socioeconomic and environmental justice issues.

- *Analysis of Cultural and Historic Resources.* The Northern Cheyenne and other commenters requested that the EIS evaluate the effects of the proposed action on sites and resources of religious and cultural significance to the Northern Cheyenne Tribe. USEPA commented that the Northern Cheyenne Tribe considers the Tongue River and the Tongue River Valley to be places of cultural and spiritual significance. One commenter encouraged OEA to join the December 5, 2012, Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites Memorandum of Understanding (MOU), signed by the Departments of Defense, Interior, Agriculture and Energy and the Advisory Council on Historic Preservation. That MOU outlines a multi-point approach to improve the protection of and tribal access to tribal sacred sites across the country. The commenter recommended that OEA conduct substantial, on-going, in-person consultation with affected federally

recognized tribes and that new cultural resource surveys should be conducted in consultative partnership with affiliated tribes. The commenter also requested that the EIS include a Visual Impact Study to assess the potential indirect impacts to tribal and other cultural resources, a cultural resource survey, landscape-level archeological, historical and architectural surveys (including those for historic ranches), an ethnographic study, and an archeological survey within the Area of Potential Effect (APE) for the project in consultation with the tribes, stakeholders, property-owners and relevant local, state, and federal agencies. The Draft Scope of Study has been revised to reflect that the EIS will include an analysis of indirect and visual effects on cultural and historic resources. The EIS will consider whether the other issues raised by commenters should be addressed in the EIS, and if so, analyze them as appropriate.

- *Analysis of Aesthetics.* Commenters requested that the EIS include a Visual Impact Study to accurately gauge impacts to cultural resources, and to specifically consider impacts to the Northern Cheyenne Tribe and Reservation. Commenters requested that the EIS evaluate the potential impacts from industrialization of an agricultural area. One commenter suggested using the BLM Visual Resource Management Manual. The Draft Scope of Study has been revised to reflect that the EIS will evaluate these issues.

- *Analysis of Cumulative Impacts.* Commenters requested that the EIS analyze the potential cumulative impacts from the proposed Otter Creek Mine, coal bed methane and oil and gas development, exports of Powder River Basin coal to Asian coal markets, and the paving of Tongue River Road. Commenters also requested that any potential discharge from existing mines and effects of discharges from existing mines or runoff into the Tongue River and its tributaries be analyzed for its potential impacts to water quality including increases in salinity and sodic water content. USEPA requested that the EIS include information about the timing and duration of potential mining activities at the proposed Otter Creek Mine and the previously planned Montco Mine, as well as the estimated mine acreage that will be disturbed at any one time. The EIS will evaluate the cumulative and incremental impacts of the proposed action when added to other past, present, and reasonably foreseeable future actions in the project area, including an appropriate analysis

of the actions raised by commenters on the Draft Scope.

### Final Scope of Study for the EIS

#### *Environmental Impacts Analysis*

#### Proposed New Construction and Operation

The EIS will address activities associated with the construction and operation of the proposed rail line and its potential environmental impacts, as appropriate.

#### Impact Categories

The EIS will analyze potential direct, indirect, and cumulative impacts<sup>21</sup> of the proposed construction and operation of the TRRC rail line and each reasonable and feasible alternative on the human and natural environment, as well as the no-action alternative. Impact areas addressed will include the following: Transportation systems, safety, land use, recreation, biological resources, water resources (including wetlands and other waters of the U.S.), navigation, geology and soils, air quality, noise, energy resources, socioeconomics, cultural and historic resources, aesthetics (including visual resources) and environmental justice. The EIS will include a discussion of each of these impact areas and will address the potential direct, indirect, and cumulative impacts associated with the proposed action under each reasonable and feasible alternative and the no-action alternative.

#### 1. Transportation Systems

The EIS will:

- Evaluate the potential impacts resulting from TRRC's preferred route and each alternative<sup>22</sup> on the existing rail and road network. This will include analyzing potential impacts for downline rail traffic congestion, as well as road traffic congestion at road/rail grade crossings resulting from increased transaction-related traffic, as appropriate.

- Describe the existing road/rail grade crossing delay and analyze the potential for an increase in delay related to the proposed rail operations, as appropriate.

<sup>21</sup> NEPA requires the Board to consider direct, indirect, and cumulative impacts. Direct and indirect impacts are both caused by the action. 40 CFR 1508.8(a)-(b). A cumulative impact is the "incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions." 40 CFR 1508.7.

<sup>22</sup> The term "alternative" in this Final Scope refers to reasonable and feasible alternatives and the no-action alternative.

c. Propose mitigation measures to minimize or eliminate potential project impacts to transportation systems, as appropriate.

## 2. Safety

The EIS will:

a. Evaluate potential impacts of TRRC's preferred route and each alternative on road/rail grade crossing safety and analyze the potential for an increase in accidents related to the proposed new rail operations, as appropriate.

b. Describe projected rail operations and analyze the potential for increased probability of train accidents including derailments, as appropriate.

c. Evaluate the potential for disruption and delays to the movement of emergency vehicles.

d. Evaluate the potential for fires and livestock loss as a result of TRRC's preferred route and each alternative, as appropriate.

e. Propose mitigation measures to minimize or eliminate potential project impacts to safety, as appropriate.

## 3. Land Use

The EIS will:

a. Evaluate potential impacts of TRRC's preferred route and each alternative on existing land use patterns within the project area and identify those land uses, including agricultural, that would be potentially affected by the proposed new rail line.

b. Analyze the potential impacts associated with each alternative to land uses identified within the project area, for example, impacts to ranching and other agricultural usage such as access to water and grazing pastures for livestock, impacts to cattle crossings, access to roads, and access to irrigation systems. Such potential impacts may include incompatibility with existing land use and conversion of land to railroad use.

c. Identify and evaluate potential impacts to resources protected under the USDOT Section 4(f) regulation that may be located near Interstate 94 along the Tongue River Road, Tongue River and Moon Creek Alternatives.

d. Propose mitigation measures to minimize or eliminate potential impacts to land use, as appropriate.

## 4. Recreation

The EIS will:

a. Evaluate existing conditions and the potential impacts of the construction of TRRC's preferred route and each alternative, and their operation, on recreational trails, MFWP Conservation Easements and Block Management properties, recreation areas near Miles

City, and other recreational opportunities in the project area.

b. Propose mitigation measures to minimize or eliminate potential project impacts on recreational opportunities, as appropriate.

## 5. Biological Resources

The EIS will:

a. Evaluate the existing biological resources within the project area, including vegetative communities, wildlife, fisheries, wetlands, and federal and state threatened or endangered species (including candidate species), and analyze the potential impacts to these resources resulting from TRRC's preferred route and each alternative. For example, the EIS will include appropriate aerial and ground surveys along TRRC's preferred route and each alternative in compliance with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act and a biological assessment for threatened and endangered species. The EIS will evaluate impacts to the Black-footed Ferret, Pallid Sturgeon, Interior Least Tern, Whooping Crane, Greater Sage-Grouse (candidate species), and Sprague's Pipit (candidate species). The EIS will also evaluate potential impacts to the Miles City Fish Hatchery, the Tongue River Dam, and the Tongue and Yellowstone River ditches, as appropriate. The EIS will analyze the impacts of the proposed action and alternatives on wildlife migration corridors and breeding grounds along with impacts to wildlife as a result of wildlife-train collisions along TRRC's preferred route and each alternative.

b. Evaluate the potential for the spread of noxious weeds resulting from TRRC's preferred route and each alternative.

c. Identify and describe any wildlife sanctuaries, refuges, or rearing facilities; national or state parks, forests, or grasslands; critical, unique, or high-value habitats that support threatened or endangered species; and riparian habitats; and evaluate the potential impacts to these resources resulting from TRRC's preferred route and each alternative.

d. Propose mitigation measures to avoid, minimize, or compensate for potential impacts to biological resources, as appropriate.

## 6. Water Resources

The EIS will:

a. Describe the existing surface water and groundwater resources within the project area, including lakes, rivers, streams, stock ponds, wetlands, and floodplains, and analyze the potential impacts on these resources resulting

from the construction and operation of TRRC's preferred route and each alternative.

b. Evaluate potential floodplain impacts from the proposed rail line and alternatives on Miles City.

c. Evaluate potential impacts to irrigation structures along the Tongue River.

d. Consider USEPA guidance documents concerning non-point source pollution.

e. Consider the USEPA Water Quality Assessment for the Tongue River.

f. Consider and include information concerning State of Montana and Northern Cheyenne Tribe water quality standards.

g. Assess potential impacts of the project to geomorphology of the Tongue River and Otter Creek.

h. Evaluate potential impacts to water quantity such as changes in stream flow, additional uses of surface or groundwater, groundwater depletions, and reductions in groundwater recharge; describe the connectivity of prairie streams and rivers and study the potential alterations to stream and bank morphology as well as potential sediment impacts from erosion and cut and fill operations; examine the sources for the water needed for the proposed construction and operations and what impact the proposed action will have on water access for area ranchers and farmers; and evaluate impacts resulting from pollution runoff into any 303d listed streams in the project area.

i. Describe the permitting requirements for the railroad's preferred route and each alternative with regard to wetlands, stream and river crossings, water quality, floodplains, and erosion control. Include an analysis of the potential impacts to wetlands and riparian habitats and include information to support a Draft 404(b)(1) analysis.

j. Propose mitigation measures to avoid, minimize, or compensate for potential project impacts to water resources, as appropriate.

## 7. Navigation

The EIS will:

a. Identify existing navigable waterways within the project area and analyze the potential impacts on navigability resulting from TRRC's preferred route and each alternative.

b. Propose mitigation measures to minimize or eliminate potential impacts to navigation, as appropriate.

## 8. Geology and Soils

The EIS will:

a. Describe the geology, soils and seismic conditions found within the

project area, including unique or problematic geologic formations or soils, prime farmland, and hydric soils, and analyze the potential impacts on these resources resulting from construction and operation of TRRC's preferred route and each alternative.

b. Evaluate potential measures that could be employed to avoid or to construct through unique or problematic geologic formations or soils.

c. Evaluate the potential atmospheric deposition of rail traffic emissions on soil, including the possible accumulation of Polycyclic Aromatic Hydrocarbons (PAH) and heavy metals from the proposed line.

d. Propose mitigation measures to minimize or eliminate potential project impacts to geology and soils, as appropriate.

#### 9. Air Quality

The EIS will:

a. Evaluate the potential air quality impacts resulting from the proposed new rail line and the proposed operations, as well as combustion of the coal proposed to be transported on the TRRC line, as appropriate.

b. Evaluate the air emissions associated with the proposed action, including coal dust and diesel emissions from locomotives and the potential associated human health effects, as appropriate.

c. Include a life-cycle analysis of potential GHG emissions.

d. Include relevant information from BLM's Resource Management Plan air quality study and other relevant cumulative impact studies, as appropriate.

e. Examine potential impacts of the proposed line and any coal mines that the proposed line might serve on visibility degradation and impacts to the Northern Cheyenne Class I airshed and sensitive Class II areas.

f. Evaluate incremental consumption under EPA's Prevention of Significant Deterioration (PSD) permitting program for cumulative emissions from the mines and other activities in the project area, as appropriate.

g. Consider Montana State emission controls required on permitted sources in the baseline cumulative impacts analysis.

h. Propose mitigation measures to minimize or eliminate potential project-related impacts to air quality, as appropriate.

#### 10. Noise and Vibration

The EIS will:

a. Describe the potential noise and vibration impacts during rail line construction resulting from TRRC's preferred route and each alternative.

b. Describe the potential noise and vibration impacts of new rail line operation resulting from TRRC's preferred route and each alternative.

c. Evaluate the potential noise and vibration impacts to the Mile City Fish Hatchery, as appropriate.

d. Propose mitigation measures to minimize or eliminate potential project impacts to sensitive noise and vibration receptors, as appropriate.

#### 11. Energy Resources

The EIS will:

a. Describe and evaluate the potential impact of the proposed line on the distribution of energy resources resulting from TRRC's preferred route and each alternative, including petroleum and gas pipelines and overhead electric transmission lines.

b. Describe and evaluate potential impacts of the proposed action on energy markets and the effect of energy markets on the proposed action.

c. Propose mitigation measures to minimize or eliminate potential project impacts to energy resources, as appropriate.

#### 12. Socioeconomics

The EIS will:

a. Analyze the socioeconomic effects of the proposed action, including effects of a potential influx of construction workers to the project area as a result of the proposed action and the potential increase in demand for local services.

b. Propose mitigation measures to minimize or eliminate potential project-related adverse impacts to social and economic resources, as appropriate.

#### 13. Cultural and Historic Resources

The EIS will:

a. Identify historic buildings, structures, sites, objects, or districts eligible for listing on or listed on the National Register of Historic Places (NRHP) within the Area of Potential Effect (APE) for TRRC's preferred route and each alternative and analyze potential project-related impacts to them.

b. In consultation with federally-recognized tribes participating in the Section 106 process, identify properties of traditional religious and cultural importance to tribes and prehistoric or historic archaeological sites evaluated as potentially eligible, eligible, or listed on the NRHP (archaeological historic properties) within the APE for TRRC's preferred route and each alternative, and analyze potential project-related impacts to them, including indirect visual effects.

c. Propose measures to avoid, minimize, or mitigate potentially

adverse project-related impacts to Traditional Cultural Properties (TCPs) and built-environment (e.g., buildings), archaeological historic properties, and cultural and historic resources, as appropriate.

#### 14. Aesthetics

The EIS will:

a. Describe the potential visual impacts of the proposed rail line in the project area, including visual impacts to cultural resources, the Northern Cheyenne Reservation, and agricultural areas.

b. Evaluate the need to use the BLM Visual Resource Management Manual.

c. Propose mitigation measures to minimize or eliminate potential project impacts on aesthetics, as appropriate.

#### 15. Environmental Justice

The EIS will:

a. Evaluate the potential impacts resulting from construction and operation of TRRC's preferred route and each alternative on minority and low-income populations.

b. Propose mitigation measures to minimize or eliminate potential project impacts on environmental justice populations, as appropriate.

#### 16. Cumulative Impacts

The EIS will evaluate the cumulative and incremental impacts of the proposed action when added to other past, present, and reasonably foreseeable future actions in the project area, as appropriate.

Decided: March 19, 2013.

By the Board, Victoria Rutson, Director, Office of Environmental Analysis.

**Jeffrey Herzig,**  
Clearance Clerk.

[FR Doc. 2013-06625 Filed 3-21-13; 8:45 am]

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### DEPARTMENT OF TRANSPORTATION

#### Surface Transportation Board

[Docket No. FD 35723]

#### **Housatonic Railroad Company, Inc., Maybrook Railroad Company, and Housatonic Transportation Company— Intra-Corporate Family Transaction Exemption**

Housatonic Railroad Company, Inc. (HRRC), Maybrook Railroad Company (MRC), and Housatonic Transportation Company (HTC) (collectively, applicants) have jointly filed a verified notice of exemption under 49 CFR 1180.2(d)(3) and 1180.2(d)(6) for an intra-corporate family transaction and a reincorporation in a different State.