COMMENTS ON SUPPLEMENT TO

TONGUE RIVER RAILROAD

DRAFT ENVIRONMENTAL IMPACT STATEMENT

RESPONSE TO COMMENTS FROM ROBERT GREEN (March 9, 1984)

Robert Green
Tongue River Stage
Miles City, MT 59301

March 9, 1984

Section of Energy and Environment, Room 4143
Interstate Commerce Commission
Washington, DC 20423

Dear Mr. Bausch:

Following are my comments on the EIS Addendum. Please include these comments in the official record. I request that these comments be attached to the supplemental or final EIS and that the ICC respond to each comment or question in writing.

Page 1 1.1 Para. 3 This rail traffic scenario is based on MontCo's market assumptions which should be viewed with suspicion. Has any analysis been made other that MontCo's? Is the ICC confident that the MontCo analysis can be relied on for decisionmaking?

Page 1 1.2 Para. 1 The statement that impacts associated with construction scheduling and labor projections will not change is not necessarily true. Since it will likely be the end of 1984 or later before a decision is reached by the ICC and land acquisition and financing won't begin until after that, scheduling construction to start in 1985 is very optimistic to say the least.

Page 2 1.2.1 Who would be expected to pay for the relocation of the fish hatchery? No mention is made of this. That and the fact that it would have to be relocated at all are very significant to the environment.

How much is "slightly more" acreage required from LARRS?

Page 2 1.2.3 How much reduction in Traffic Delays is to be expected ? Is it going to be significant?

Page 3 1.2.7 Is TRRC proposing to construct this crossing? Since TRRC traffic will be the major cause of the problem if their projections are right, it would be only fair that they should be held accountable for the impact and the cost of the crossing.

(cont.)

Page

1 1.1, ¶3 - The derivation of the rail traffic scenario is discussed in the DEIS. All analysis is based on this scenario. The accuracy of the scenario will finally be determined by market dynamics that are beyond the scope of this inquiry.

1 1.2, ¶1 - The statement refers to the overall impact analysis. Our investigations have shown that the statistical analysis will not change significantly (except in terms of dates) in response to delays. The impacts will remain the same, starting with construction at whatever date that may be.

2 1.2.3 - This is being discussed with personnel from the State Department of Fish, Wildlife and Parks in a preliminary way.

Approximately five more acres.

2 1.2.3 - The reduction in delays would be significant from the standpoint that under the BM option no delays would occur along the former Milwaukee ROW in Miles City; delays would be confined to the BN.

3 1.2.7 - See response to comments from State of Montana and Northern Plains Resource Council.

Page 3 1.1.10 How much will the cost to the state be to acquire Fish from Minnesota for the hatchery? Does the TRRC propose to pick up the tab for this expense which is directly related to TRR's proposed activity?

Page 4 1.2.13 How large is the immediate vicinity? It would seem quite large if it includes the area from which the proposed yards would be visible.

Page 5 Table 1 One page 2, section1.2.2, the conclusion was that the net fiscal balance would not be affected, but in this table the cumulative projected net fiscal balance is reduced by more than $1 million. If a million dollars represents no affect, what change would be allowed before an affect would be admitted? After all, a million dollars here and there can add up to a considerable sum after a while.

Also on page 2, section 1.2.3, the statement is made that "overall traffic delays would be reduced under the BN option." Yet this table projects a nearly 50% increase in daily vehicular delays. It reflects poorly on the entire process when such misleading and false statements are made in a document which is puportedly to assess the social and environmental impacts of the project. Anyone who did not purposely search for the mistakes could be misled into thinking this project is a viable proposal and the damage would be negligible, when neither is actually true.

Page 6 Table 1 Safety How does the accident rate translate into actual accident numbers? The figures given in these tables need to be identified. .178 what? If taxpayer time and money is to be spent on these things, the results should be at least understandable if not accurate. Table 7 is another example (page 17). We have to guess at what the average delay figues are. (minutes?) Other commenters have complained about this type of problem since the PDEIR came out in 1982. Will it ever be corrected?

Page 8 3.0 Has TRRC discussed the acquisition of Branum Lake and the fish hatchery with the State of Montana?

Page 11 4.1.1 Who characterized the research of the affected LARRS sites? What does the term "limited" mean in this context? Why aren't these things explained?

Page 11 4.1.2 The first sencence should read "the estimated operational effects of TRRC. . . "

Page 12 4.2.1 What basis does TRRC have for projecting the expenditure in Table 3? What happened to the other 100-odd million dollars which TRRC is expecting this project to cost according to the financial application?

(cont.)

3 1.1.10 - This issue is currently under discussion. See response to State of Montana comments.

4 1.2.13 - The "immediate vicinity" refers in this case to areas from which the facility is in full view. It would likely be limited to portions of LARRS, the hatchery site and perhaps Spotted Eagle Lake Recreation Area.

5 Table 1 - This is a cumulative figure over 25 years and represents .025% less than the total. In comparative terms it is of little significance.

5 1.2.3 - The figure 2829 for daily traffic delays is a missprint. The figure should read 829.

6 Table 1 - The figure represents the expected annual accidents per expected traffic or about .015%. Table 7 is explained in the footnotes (a, b and c) with the exception of average delay, which is expressed in minutes.

8 3.0 - We are discussing a variety of possibilities regarding Branum Lake with the State of Montana. These discussions are very preliminary.

11 4.1.1 - Mr. Joe C. Elliott, Ph.D., in his report, "Impacts of the Tongue River Railroad Alignment Option E on the Livestock and Range Research Station," prepared as part of the technical support documentation for the DEIS, in May 1982.

11 4.1.2 - Thank you for your comment.

12 4.2.1 - These figures represent capital expenses for the construction phase. Labor, engineering, etc., are not included.

Page 12 4.2.1 (cont.) What type of "equipment" does TRR propose to purchase in Miles City? Is Miles City the least expensive place to acquire fencing materials? If not, why does TRRC propose to buy most of its required fencing supplies there? This Table appears to be an attempt to buy off the local Chamber of Commerce rather than an effort to determine where their money would have the most purchasing power.

Page 14 Table 4 Why wasn't the more realistic low production scenario included here? Or an even more realistic no production scenario?

Page 17 Table 7 I find the figures presented here hard to accept. Since the BN tracks split the town nearly in half, much more traffic crosses the BN tracks than the Milwaukee tracks and since most of the traffic TRR adds will go through Miles City on the BN tracks, the delay projections in this table must be unrealistic or is it another misprint?

Page 20 There has not been any basis for the assumption that 1/3 of the TRRC's market is going to be in the Pacific Northwest or that they will have a market at all. This entire process seems to be a waste of time and taxpayer money without some positive assurances that there is a real need for this railroad, not just a proposed mine to serve.

I look forward to your response to these comments.

Sincerely,

/S/ Robert Green

Robert Green

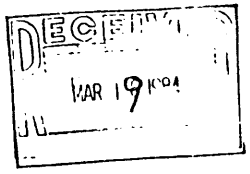
12 4.2.1 - A variety of construction equipment is available through suppliers in Miles City and the project area.

14 Table 4 - During scoping it was determined to apply the medium scenario as a means of demonstration that the overall difference between the BN Option and the Proposed Action is not large. The same applies to both the low and high scenarios.

17 Table 7 - The table is accurate. Under the Proposed Action, all traffic downline in either direction would route through Miles City. Under the BN Option only eastbound traffic will go through town.

20 The assumptions regarding traffic routing are based on marketing projections.

RESPONSE TO COMMENTS FROM MR. A.E. WASSERBACH (March 11, 1984)



Mr. Carl Bausch
Office of Transportation Analysis
Section of Energy and Environment
Interstate Commerce Commission
Washington, D.C. 20423

March 11, 1984

RE:Comments:DEIS Tongue River Railroad Co. Construction and Operation of a line of RR in Custer, Rosebud, & Powder River Counties, Montana

Dear Sir:

The referenced proposed railroad repeatedly states that it, and its alternatives, are for the purpose of transporting coal from mines to be developed to markets in the "Midwest". Why isn't the specific market identified? Is the "Midwest" market the final destination or is it only a stop for a foreign destination?

Page 4-54 states that should "herbicides enter a project area stream, its water quality would be impacted temporarily" with impact from 1 week to 1 year. What impact would routinely used herbicides have on the project area streams water quality? What impacts will routine spraying have on fish? A hazardous materials response "plan" may mitigate an accidental spil but cannot remove the herbicides once they enter the streams. The TRRC "plan" is a desk-top response to sooth the public, but it is quite another matter to translate a paper plant into real life. What funding would an emergency response require and how is that matter being handled? Is there a set amount in a fund? Local spills have seen the insurance company refusing to pay for 'clean-up", with the insurance company stating they were only responsible for the trucks and contents, NOT clean-up.

Why aren't Suffolk sheep used in place of herbicides as in earlier part of 20th century? It would be a benigh vegetation control, employ local people, and create a useful product of wool and meat.

Section B 3.2.4 Mine Mouth Generation: Would not be as efficient a use of coal for electrical generation due to losses between source and customer (transmission line in "Midwest").

3.6 Footnotes says "The Nature of mine development is extremely speculative" The coal market in Montana is even now in a ~~slump~~ slump, therefore, isn't this project(to paraphrase) putting the coal cars before the market? If there is not much market now for existing coal, why strip more of Montant? I hope this project is not being pushed through due to the economic ~~slump~~ slump in Montana and, therefore, pressure for "jobs", regardless of what that does to the ~~it~~ environment on a long range basis.

Is the reported unofficial route approval through Federal land merely

Paragraph 2 - The Draft EIS contains detailed information regarding your concerns. These issues will be dealt with in accordance with all applicable rules and regulations.

Mr. Carl Baushh
U.S. ICC

March 11, 1984
RE:TRRC DEIS

an economic pressure to complete the rest of the line at the expense of property owners whose land will betaken by TRRC? If the markets for the coal are ultimately foreign, it would seem addinginsult to injury to the affected private landowners.

Since the markets in the "midwest" are not identified, I would wonder if those markets are not as speculative as mine development. The national and international debate and court suits due to acid percipitation would make those speculations even more uncertain.

I strongly feel the land and water of Montana should not be compromised for a market that may not exist and certainly never for a foreign market to provide their industries fuel while Americans are unemployed due to high energy costs.

If the TRRC ~~xxxx~~ traverses the Livestock and Range Research Station, what mitigation will take ~~xxxx~~ place for effects of ~~X~~ microwaves? Can there be mitigation? ~~XXXX~~ Do mitigations include side loop or only line of sight effects?

I don't feel that the issue of NEED for the proposed TRRC has been addressed. Leaving the line construction to the no action alternative, leaving the proposed strip mining also in that alternative would be like leaving money in the bank. The coal could~~x xxxx~~ appreciate in value, but, in worst case, it would simply not appreciate in value, but certainly not loose any value, with the demand for energy sources projected. The no action alternative would have the benefit of not severing parcels of land, or all the other impacts the various alternatives pose.

The issue of NEED also should take into account that theUS imports of Canadian electricity have been increasing and are expected to do so in the future. Since, as mentioned on page 1 of this letter, coal markets are in a slump, and acid rain are a remaining issue, the "Midwest" markets for the proposed TRRC and associated mines are probably an diminishing goal on the horizon for U.S. consumption. ~~XXXX~~ Therefore, unless the TRRC and mines are for the benefit of U.S. consumers, the line should not be built. If it is built, it should only be done if there is no alternative energy source to meet U.S. needs available. The NEED for this project should only be an energy need of national importance, not one of speculative profits derived from foreign sources.

A. E. Wasserbach
Box 2308 W. Saug.Rd.
Saugerties, N.Y.12477

CC:U.S.Dept. of Agriculture

Last Paragraph - No "unofficial approval" has been granted.

Page 2, Paragraph 4 - Concerns regarding LARRS are being addressed in negotiations between the USDA and LARRS. Specifics that have been agreed upon at this time are contained in the Mitigation Plan (Appendix B).

Thank you for your comments.

MONTANA STATE RURAL AREAS DEVELOPMENT COMMITT

February 23, 1984

EXECUTIVE COMMITTEE

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Mr. Carl Bausch
Section of Energy and Environment
Room 4143
Interstate Commerce Commission
Washington DC 20423

Dear Mr. Bausch:

Montana's Rural Area Develoment, Range Subcommittee was extremely disappointed in the supplement to the Draft Environmental Impact Statement (Finance Document No. 30186). By considering the Burlington Northern Option, the Tonuge River Railroad Company is continuing to show a total disregard for Montana's environment and livestock industry. It is the most insensitive, inadequate and illogical alternative that anyone has tried to railroad through an ES.

Our earlier comments (mailed to your office on September 14, 1983) clearly described the reasons why we feel that a railroad constructed along the Tongue River would not be in the best interests of Montana. We are opposed because of its adverse impact on: 1) Research at the USDA Livestock and Range Research Station, 2) Agricultural production in southeastern Montana, 3. the environmental quality (recreation, scenic beauty, wildlife resources) of eastern Montana, and 4. the absence of an adequate economic analysis. Unfortunately, each of our concerns would be aggravated by the BN option. To us, this latest alternative is most undesirable and unacceptable.

Rather that preparing additional supplements--we feel that it is time for the Tongue River Railroad Company to address the above concerns. At this time, we have no recourse but to question their integrity and intent to conform to the guidelines established in NEPA.

Please advise us of the upcoming public hearings.

Sincerely,

P.T. Hacker

Chairman, RAD Range Subcommittee

The programs of the Montana Cooperative Extension Service are available to all people regardless of race, creed, color, sex or national origin.

Issued in furtherance of cooperative extension work in agriculture and home economics, acts of May 8 and June 30, 1914, ... the U.S. Department of Agriculture, Carl J. Hoffman, Director, Cooperative Extension Service, Montana State University.

Paragraph 2 - Each of these issues has been thoroughly examined in both the DEIS and the supplement.

RESPONSE TO COMMENTS FROM NORTHERN PLAINS RESOURCE COUNCIL
(March 7, 1984)

NORTHERN PLAINS RESOURCE COUNCIL

Field Office
Box 858
Helena, MT 59624
(406) 443 4965

Main Office
419 Stapleton Building
Billings, MT 59101
(406) 248-1154

Field Office
Box 886
Glendive, MT 59330
(406) 365-2525

March 7, 1984

Mr. Carl Bausch
Section of Energy and Environment, Room 4143
Interstate Commerce Commission
Washington, DC 20423

Dear Mr. Bausch:

Attached are comments of the Northern Plains Resource Council on the Tongue River Railroad Company's Impact Report, Burlington Northern Option, Finance Docket #30186.

NPRC must again advise the Commission and SE&E that the public notice, public involvement and agency decisionmaking aspects of this proceeding have been irregular at best. Even though the ICC may not feel bound by all aspects of the National Environmental Policy Act, cooperating agencies are. The ICC must take the Council on Environmental Quality's NEPA regulations seriously and make diligent efforts to encourage and facilitate public involvement in federal decisionmaking.

NPRC hereby requests that a hearing or hearings be scheduled in the affected area to allow the general public to comment on all issues related to the Supplemental DEIS (DEIR Addendum) as well as the July, 1983 Draft EIS. The hearings should be widely noticed and be open to any interested party. The format should be informal, with no requirement for pre-filed testimony or representation by counsel.

We request that the information gathered in response to public and government agency comments and questions be published in a supplemental EIS so that the information can be reviewed and commented on prior to decisionmaking. The Draft EIS on Docket #30186 remains significantly incomplete. It needs to be supplemented so that important information can be commented on for the Final EIS.

Please make this letter and the attached comments part of the official record of the proceeding. We further request that all comments be attached to the Final EIS, along with a response from the ICC to each comment and/or question.

Sincerely,

Dennis J Unsworth
NPRC Staff, Helena

Enclosures
cc Montana Congressional Delegation
Governor Ted Schwinden
CEQ, Washington, DC

COMMENTS OF THE NORTHERN PLAINS RESOURCE COUNCIL

Finance Docket #30186
TRRC Addendum Filed January 6, 1984

March 8, 1984

Purpose and Need (p. 7) At whose "option" will the various alternate routes (Ashland, BN) be exercised? Will it be the TRRC's option or will the ICC designate one of the options as part of certification?

Transportation (p. 16-17) How can the ICC justify the statement that "vehicle delays would not occur during construction of grade separated crossings"? How can a construction project of such magnitude occur without some disruption?
How can the statement "no emergency service delays would occur in Miles City", page 16, last paragraph be reconciled with the last sentence in that paragraph?

Noise (Sec. 4.6) What is the proposal for mitigating noise impacts? Will either of the ideas in the last paragraph here be implemented? How can the public comment on these environmental issues when there is no specific proposal?

Aquatics (Sec. 4.10) Will a study of impacts to the fish hatchery be made? Will TRRC monitor the hatchery through the life of the project? What mitigation has TRRC proposed? Who will pay?

Unavoidable Adverse Impacts (Sec. 5.0) What are the impacts to LARRS? Are five additional acres of research land significant and, if so, does the impact to this land warrant analysis? Is the assessment contained here sufficient for the purposes of USDA decisionmaking?

(more)

General Comment This document, as well as the July '83 DEIS would more accurately be titled Applicant's Summary of Perceived Environmental Concerns and Response. The analysis is not thorough, nor is it objective, nor is it concise, clear and to the point. Is it the ICC's opinion that these documents will meet the NEPA requirements of the co-operating agencies? Of the ICC?

(###)

RESPONSE TO COMMENTS FROM NORTHERN PLAINS RESOURCE COUNCIL
(March 7, 1984)

Purpose and Need (p. 7). The TRRC has requested the permitting of all "options." The ICC can permit any or all of these options.

Transportation (p. 16-17). Some delay will take place; the statement is in error. However, with one traffic lane open at all times, such delays should be minimal.

Emergency service delays could occur in the event that the grade-separated crossing in Miles City is flooded. When this occurs, special plans should be enacted to prohibit the blocking of certain grade crossings. This will have to be arranged with the Burlington Northern Railway and local officials.

Noise (Sec. 4.6). The TRRC will work with local officials to develop acceptable mitigation measures for noise impacts. Those cited in the Mitigation Plan (Appendix B) could be easily implemented.

Aquatics (Sec. 4.10). See response to State of Montana comments.

Unavoidable Adverse Impacts (Sec. 5.0). We are involved in ongoing discussions with USDA personnel and LARRS staff in an effort to work out an acceptable mitigation plan. We are keenly aware of the importance of LARRS and are doing everything possible to assure that impacts do not have serious effect on ongoing research. The Mitigation Plan (Appendix B) reflects some specific measures thus far identified.

General Comment. Thank you for your comments.

RESPONSE TO COMMENTS FROM THE DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS (Feb. 22, 1984)

DEPARTMENT OF THE ARMY
OMAHA DISTRICT CORPS OF ENGINEERS
6014 U.S. Post Office and Courthouse
Omaha, Nebraska 68102

REPLY TO ATTENTION OF:

February 22, 1984

Planning Division

Mr. Carl Bausch
Section of Energy and Environment
Office of Transportation Analysis
Room 4143
Interstate Commerce Commission
Washington, D.C. 20423

Dear Mr. Bausch:

We have reviewed your Supplement to Draft Environmental Impact Statement, Finance Docket No. 30186, Tongue River Railroad Company - Construction of a line of railroad in Custer, Rosebud, and Powder River Counties, Montana, and have the following comments.

a. If the construction right-of-way for the BN Option has not been surveyed for cultural resources, this task should be completed prior to the beginning of construction. Any new construction in the Branum Lake yards should also be surveyed prior to construction. This survey should be conducted by a qualified archeologist.

b. Federal Flood Plain Management criterion basically states that construction which can be damaged by floodwaters or which can obstruct floodflows should not be located in the 100-year flood plain. If this is not praticable, nonresidential construction which can be damaged by floodwaters should be above or flood proofed to above the 100-year flood water surface elevation and should be designed to minimize potential harm to or within the flood plain. Montana State law requires that flood plain construction not increase the water surface elevation of the 100-year flood water surface elevation of any stream more than 0.5 foot relative to existing conditions.

c. Activities requiring compliance with Section 404 of the Clean Water Act are the same as stated in our previous letters to you on September 1 and 12, 1983.

d. Mitigative measures pertaining to Branum Lake, the Fish Hatchery and Livestock Range Research Station experimental plot area, should be decided prior to initiation of construction.

If you have any questions on these comments or any other related matter, please contact Doug McDonald at (402) 221-4579.

Sincerely,

Richard D. Corton
Chief, Environmental Analysis Branch
Planning Division

a. These concerns will be addressed in accordance with all applicable guidelines and regulations. A Memorandum of Agreement will be executed between the Montana State Historic Preservation Officer and the TRRC.

b. Any construction in floodplains will be designed to meet all applicable federal and state criteria, and will comply with all permit requirements.

c. Comment noted.

d. This is the subject of ongoing discussions between the TRRC and the Montana Department of Fish, Wildlife and Parks, as indicated in the Mitigation Plan (Appendix B).

RESPONSE TO COMMENTS FROM Miles City-Custer County, City-County Planning Board (Feb. 29, 1984)

Miles City - Custer County

City-County Planning Board

1905 Main
Miles City, Montana 59301

President: Fred B. Hunnes
Vice President: Les Mahon

Mr Carl Bausch
Section of Energy & Environment
Room 4143
Interstate Commerce Commission
Washington, D.C. 20423

February 29,1984

Re: Finance Docket No. 30186

Dear Mr. Bausch:

The City-County Planning Board met Monday, February 20, 1984 to consider comments on the Supplement to Draft Enviromental Impact Statement for the above-named proceeding. The Board now submits the following comments.

p. 1 paragraph 4: "The BN Option will be considered as an option within the Proposed Action." Does this mean that TRRC seeks approval of this option, but retains authority to select what is actually built, or is this option to be considered the Proposed Action?

p. 12 paragraph 6 and continuation: Please explain the last sentence in this paragraph. The amount of revenue to each jurisdiction should not be affected by the number of jurisdictions. The amounts may be affected by the construction of a new facility.

p. 14 Table 14: Please explain the source of revenues flowing to the City of Miles City under the BN Option.

p. 16 paragraph 3: Are the three public grade-separated crossings north of station 180+00? If so,please identify their location on a map similar to the one preceding page 8. Also, please identify relative location of mainline, turnouts, and siding with respect to Burlington Northern trackage. There is concern that conflicts may interfere with potential productive use of BN's "Reservation Track."

p. 16 paragraph 5: The BN underpass in Miles City has been known to remain flooded for periods of up to two days. The conditions which bring about this flooding (heavy thundershowers and/or hail) also tend to lead to more emergency vehicle calls.

Board Members: Bruce Bergerson, Dr. Lloyd Bowmen, George Kurkowski, Les Mahon, Dr. Arlo Nansel, Otto Neuhardt, Tom Pettigrew, Pat Rogers, Ole Sherwood, Tom Marum

Page

1, ¶4 - Yes, the TRRC is seeking approval of both options.

12, ¶6 - The amount of revenue by jurisdiction is affected by the total number receiving revenues. The tax valuation for the new facility will, of course, be the basis for these revenues.

14, Table 14 - Tax revenue projections for Miles City are based on personal property tax and those monies reverting to the city through state and county taxation and distribution procedures.

16, ¶3 - Yes, the crossings are north of station 180+00. They include I-94 (railroad overpass), U.S. 10 (which has a vehicle overpass that will be extended to accommodate the TRRC), and a grade-separated crossing which will be required at an, as yet, undetermined location in Miles City.

16, ¶5 - Location, timing and financial responsibility for construction of a grade-separated crossing in Miles City will require a cooperative effort among the TRRC, the Burlington Northern Railway and state and local officials.

The issue of a second grade-separated crossing of BN becomes more critical under the BN Option than under the original Proposed Action. Since 2/3 of TRRC traffic would pass through Miles City on the BN line under the BN Option, as opposed to 1/3 under the Proposed Action, another such crossing "would be required sooner under the Bn Option..." (see p. 18, paragraph 4). The Supplement fails to address two important questions: When such a crossing will be required, and who will be responsible for it.
The timing of the additional crossing involves more than the hazard index criteria on page A3-31 of the Draft. The Supplement begins to consider accessibility on page 18, but stops short of any recommendation. The Supplement fails to discuss who would pay for the additional crossing. Two facts are quite clear, however. The City of Miles City will experience "fiscal deficits" throughout most of the period, and could therefore not pay. Custer County, which would receive tax revenue from TRRC, is pre-empted from spending for this project because county road and bridge taxes are not levied within the City. The Board recognizes that construction of such a crossing is costly, but feels the issue bears discussion and investigation of financing options in this Supplement.

p. 18 paragraph 1: Burlington Northern at-grade crossings in Miles City are already protected with flashing lights and gates.

p. 20 paragraph 3: The City-County Park and Recreation Commission (now disbanded) at one time received assurance from TRRC that the railroad would plant sufficient trees to significantly reduce noise impacts to Spotted Eagle Recreation Area. The Planning Board supports such mitigation efforts, and requests their confirmation in these documents.

What public utilities and/or services will be required at the Branum Lake railyard facility? Depending on whether operations at the yard generate any uncommon wastewater, a septic tank and drainfield may or may not be adequate. If connection to municipal sanitary sewer is required, questions regarding construction and maintenance finance need to be worked out. Such a project has the potential to serve other areas west of the Tongue River currently without public sewer.
Municipal water is now available west of the Tongue but, like sewer service, would not be extended without guaranteed payment for construction and maintenance.

The Board appreciates the opportunity to comment on this supplement.

sincerely,

Richard W. Jones
Planning Director

18, ¶1 - Thank you for your comments; neceesary revisions will be made.

20, 3 - The TRRC will address these issues in ROW negotiations and easement applications. The particular commitment mentioned here is reiterated in the Mitigation Plan (Appendix B).

It has not been determined that the TRRC will require public facilities with the exception of power and telephone access at the site. Third-phase planning on a site-specific basis will clarify this. The TRRC will work with the appropriate agencies to see that such matters are worked out in the most reasonable and efficient manner.

RESPONSE TO COMMENTS FROM THE COOPERATIVE EXTENSION SERVICE (March 1, 1984)

Cooperative Extension Service
MONTANA STATE UNIVERSITY, U.S. DEPARTMENT OF AGRICULTURE AND MONTANA COUNTIES COOPERATING
MONTANA STATE UNIVERSITY
BOZEMAN, MONTANA 59717

March 1, 1984

Section of Energy and Environment
Attn: Mr. Carl Bausch
Room 4143
Interstate Commerce Commission
Washington, DC 20423

Dear Mr. Bausch:

I have reviewed the Supplement to the Draft Environmental Impact Statement (Finance Docket No. 30186). In my opinion, the BN option is the most unacceptable alternative that the Tongue River Railroad has proposed.

My earlier comments (dated 16 September 1983) were especially critical of any alternative that proposed the construction of a railroad along the Tongue River and across LARRS. I tried to explain why some ranchers would likely be forced out of the agricultural business when their prodoctive hayland was disected by a railroad, noxious weeds were introduced, and their production costs increased.

As an Extension Range Specialist, I also explained that the Livestock and Range Research Station was invaluable to our range livestock industry. Any disruption of their research effort would have an immediate negative economic impact on every livestock producer in the Northern Great Plains. The end result of constructing a railroad through LARRS would be higher taxes to support research at other locations (less representative of the Northern Great Plains) and higher food costs for all consumers.

Although the agricultural losses were my greatest concern, a railroad line along the Tongue River would also be very damaging to the recreational industry of southeastern Montana. A railroad right-of-way along the river would destroy wildlife habitat, impair the scenic quality of the area and severely restrict recreational access to the river.

The BN option would also be most harmful from a fishing standpoint. Montana's Department of Fish, Wildlife and Parks has been evaluating a plan that would extend the fish hatchery and divide Branum Lake into fishery rearing ponds. I do not know whether the possibility of relocating the facility is feasible or not.

Paragraph 3 - Every effort is being made through cooperation with the USDA and LARRS staff to satisfactorily deal with concerns regarding the station. This ongoing effort is reflected in the Mitigation Plan (Appendix B). Any easement will include detailed stipulations regarding mitigation requirements. The TRRC is committed to preserving the integrity of the LARRS research mission.

Paragraph 4 - The issues mentioned have all been examined and discussed in the DEIS and supplement.

Paragraph 5 - The concerns regarding the Miles City Fish Hatchery are being considered in discussions with the Montana Department of Fish, Wildlife and Parks staff. All of these issues will be dealt with in the State of Montana easement application process.

Montanans cannot afford to: 1. lose the agricultural production along the Tongue River, 2. damage or destroy the range livestock research at LARRS, and 3. impair the recreational potential of the Tongue River resource. These negative impacts should be addressed as

> "irreversible and irretrievable commitments of resources and environmental values".

In addition, until they are economically quantified---the ES is inadequate.

In summary, the BN option is the least acceptable alternative. I am still waiting for the Tongue River Railroad to justify their destruction of viable cattle ranches, productive range livestock research programs, and valuable riparian habitat. Please notify me when and where the public hearings are going to be held.

Sincerely,

John R. Lacey

John R. Lacey
Extension Range Specialist
221 Linfield Hall

JRL:rw

United States Department of the Interior
OFFICE OF THE SECRETARY
OFFICE OF ENVIRONMENTAL PROJECT REVIEW
Room 488, Building 67
Denver Federal Center
Denver, Colorado 80225

March 8, 1984

IN REPLY REFER TO:
ER 84/115

Mr. Carl Bausch
Office of Transportation Analysis
Section of Energy and Environment
Interstate Commerce Commission
Washington, DC 20423

Dear Mr. Bausch:

This is in response to your request for the Department of the Interior's review and comments and on the Supplement to the Draft Environmental Impact Statement (DEIS) for the Tongue River Railroad, Custer, Rosebud, and Power River Counties, Montana.

Recreational Resources

Both the Branum Lake Fishing Access Site and the Spotted Eagle Recreation Area have received matching assistance from the Land and Water Conservation Fund (L&WCF). Therefore, they are subject to the provisions of Section 6(f) of the L&WCF Act, as amended. This section of the Act requires that changes from outdoor recreation use involving land from areas receiving L&WCF assistance be approved by the Secretary of the Interior, and requires the substitution of other properties of at least equal fair market value and reasonably equivalent usefulness and location.

Information on page 2 and in Table 1 on page 5 of the subject document indicates that both of these areas will be impacted by loss of all or part of the acreages under either the Proposed Action or the BN Option. Therefore, the project sponsors should contact the Montana State Liaison Officer (SLO), who is responsible for administering the L&WCF in Montana. He is Mr. Donald Hyyppa, Administrator, Parks Division, Montana Department of Fish, Wildlife and Parks, 1420 East 6th Avenue, Helena, Montana 59601. He can inform them as to the proper procedures for compliance with Section 6(f) of the L&WCF Act.

Recreational Resources. We are in contact with the Montana Department of Fish, Wildlife and Parks regarding this issue. All necessary procedures will be followed.

Miles City Fish Hatchery

The Miles City Fish Hatchery is the property of the U.S. Fish and Wildlife Service (FWS) and is operated by the State of Montana under a long term cooperative agreement. Any occupancy of hatchery property by the railroad company would require a right-of-way permit from the Fish and Wildlife Service.

We have serious concerns about potential project impacts to our lands and facilities, as well as hatchery operations. Approval of the right-of-way will be contingent upon avoidance or mitigation of these impacts. Besides replacement of lost hatchery land, potential adverse impacts that must be avoided or

Miles City Fish Hatchery. Comment noted; the suggestion will be followed.

adequately mitigated are: (1) loss of forage fish from Branum Lake (which are used as fish food at the hatchery), (2) noise and vibration problems that may affect fish production at the hatchery, (3) chemical spills, and (4) use of herbicides. Mitigation could take the form of partial or total relocation. Total relocation could cost upwards of 5 million dollars.

We suggest that the Interstate Commerce Commission and the Tongue River Railroad Company enter into negotiations with the FWS and the Montana Department of Fish, Wildlife and Parks (MDFWP) to discuss and settle all issues related to impacts to the fish hatchery before any Final Environmental Impact Statement is prepared.

Until acceptable mitigation to the FWS and the MDFWP can be agreed on, we will strongly oppose any railway routes that would cross lands occupied by the Miles City Fish Hatchery or any routes that would have negative impacts on the operation of the fish hatchery.

Specific Comments

4.6.2 Operation and Maintenance

This section addresses the noise levels expected during operations. It states the city would expect lower noise levels but the fish hatchery might receive noise levels of a nuisance nature. The final statement should define these levels and identify impacts to the hatchery.

4.10.1

We agree with your statement that the long term effects will be of a more serious nature than the construction related impacts. These concerns relate to vibration and spills. The long term vibrational problems must be monitored and all effects to the facilities mitigated over the life of the rail project. There is only a passing reference to herbicide applications on the right-of-way or yard area. This is a serious problem that must be addressed.

The three mitigative measures presented (1) bonding for long term effects, (2) relocating the yard west of Branum Lake, and (3) relocating the hatchery must be more thoroughly evaluated.

We appreciate the opportunity to provide comments and recommendations on the document.

Sincerely,

Robert F. Stewart

Robert F. Stewart
Regional Environmental Officer

4.6.2. A more detailed analysis of impacts to the facility may be required during easement application proceedings. The State of Montana has authority to grant such an easement and to attach such stipulations as necessary to protect the facility.

4.10.1. The three suggested measures will be thoroughly explored in coordination with the U.S. Fish and Wildlife Service and the Montana Department of Fish, Wildlife and Parks.

RESPONSE TO COMMENTS FROM HON. SEN. MAX BAUCUS (March 9, 1984)

MAX BAUCUS
MONTANA

WASHINGTON D.C.
(202) 224-2651

MONTANA TOLL FREE NUMBER
1-800-332-6106

United States Senate
WASHINGTON, D.C. 20510

March 9, 1984

Ms. Carole Dawkins
Interstate Commerce Commission
Office of Policy and Analysis
Energy and Environment Branch
Washington, D.C. 20423

Dear Ms. Dawkins:

During the summer of 1983 I was contacted by the Northern Plains Resource Council regarding the possible violation of Section 2(c) of the Mineral Leasing Act by the Tongue River Railroad Company's proposed railline through Custer, Powder River, and Rosebud Counties, Montana (Finance Docket number 30186). Attached is a copy of my letter of August 18, 1983 to the Department of Justice regarding this possible violation. Also attached is the September 28, 1983 reply I received from the U.S. Department of Justice, Antitrust Division.

I have been asked by a number of constituents to forward a copy of this correspondence to you for inclusion in the permanent application record of the Tongue River Railroad Company.

I would also like to comment on the Supplement to the Draft Environmental Impact Statement filed by the Tongue River Railroad Company on January 19, 1984. I would like to request that the Interstate Commerce Commission schedule public hearings in Miles City, Montana, for the purpose of reviewing the impacts the proposed project would have on the local economy, agriculture, natural resources and the social implications for the area. I believe it is essential that the general public be given the opportunity to publicly state their support or opposition to the proposed project.

Thank you for your consideration of my requests.

With best personal regards, I am

Sincerely yours,

Max Baucus

attachments

cc: Mr. Carl Bausch

Thank you for your comments.

BILLINGS (406) 657-6790 · BOZEMAN (406) 586 6104 · BUTTE (406) 782-8700 · GREAT FALLS (406) 761-1574 · HELENA (406) 449-5480 · MISSOULA (406) 329-3123

MAX BAUCUS
MONTANA

WASHINGTON, D.C.
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MONTANA TOLL FREE N.
1-800-332-6106

United States Senate
WASHINGTON, D.C. 20510

August 18, 1983

The Honorable William French Smith
Attorney General
Department of Justice
Washington, D.C. 20530

Dear Mr. Attorney General:

The Northern Plains Resource Council has brought to my attention a possible violation of Section 2(c) of the Mineral Leasing Act. I would appreciate your review of the matter.

According to information that has been provided to me, the four companies proposing to run a railroad up the Tongue River in Monta from Miles City to Birney also have an interest in federal coal leases. Tongue River Resources, a subsidiary of Diamond Shamrock the major partner in both the Tongue River Railroad Company (TRRC) and Montco, a company that holds coal leases in Montana. Thermal Energy, a subsidiary of Washington Energy Company, is the second major partner in both projects. Wesco Resources has royality interests in Montco, and is the managing partner in TRRC. Consolidated Coal, owned by DuPont has a minor interest in the railroad. They are not a partner in Montco, but do hold federal leases in the Otter Creek area.

Since Section 2(c) prohibits a corporation from operating a common carrier railroad that holds a permit or lease for coal deposits except for its own use for railroad purposes, I believe it is important to determine whether that prohibition includes subsidiaries of companies from holding federal coal leases. I wou appreciate receiving your view on this matter.

Thank you for your attention to this matter.

With best personal regards, I am

Sincerely,

Max Baucus

Billings (406) 657-6790 | Bozeman (406) 586-6104 | Butte (406) 782-8700 | Great Falls (406) 761-1574 | Helena (406) 449-5480 | Missoula (406) 329-3123

U.S. Department of Justice

Antitrust Division

1983 OCT -3 PM 3:45

Office of the Assistant Attorney General *Washington, D.C. 20530*

SEP 26 1983

Honorable Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

This letter is in response to your letter of August 18, 1983 to Attorney General William French Smith concerning a possible violation of Section 2(c) of the Mineral Lands Leasing Act of 1920.

As you have pointed out, Section 2(c) prohibits a company or corporation operating a common-carrier railroad from holding a federal coal lease. 30 U.S.C. § 202. You have asked whether that section prohibits subsidiaries of companies operating a common carrier railroad from holding federal leases. Both the Department of Justice 1/ and the Solicitor of the Department of the Interior 2/ have determined that subsidiaries of railroads and subsidiaries under common control with railroads are within the prohibition of Section 2(c).

The Department of the Interior is the Executive Branch agency charged in the first instance with enforcing Section 2(c). Precise guidelines for enforcing that prohibition in particular circumstances have yet to be developed by the Department of the Interior. 3/ However, I should point out that no violation of Section 2(c) can occur until a company holding a federal lease controls, is controlled by, or is under common control with, a company operating a common carrier railroad.

1/ U.S. Department of Justice, Competition in the Coal Industry 84-88 (November 1980)("Coal Report")(copy enclosed).

2/ Memorandum of William Coldiron to Secretary Watt, dated December 6, 1982 at 9 (copy enclosed).

3/ The Department of Justice has suggested guidelines for interpreting Section 2(c). Coal Report at 86-7.

The available information indicates that the Tongue River Railroad Company is not, at present, a common carrier railroad. No certificate granting the railroad that status has been issued by the Interstate Commerce Commission. The company has no employees or operating assets. Consequently, Section 2(c) is not currently being violated. Please be assured that the Department of Justice and the Department of the Interior are aware of the Tongue River Railroad situation. The Department will continue to be available to consult with the Department of the Interior on the matter as is deemed necessary.

Sincerely yours,

William F. Baxter

William F. Baxter
Assistant Attorney General
Antitrust Division

Enclosures

cc: Larry McBride, Esq.
Office of the Solicitor
Department of the Interior
18th & C Sts., N.W.
Washington, D.C.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON D.C. 20240

DEC 6 1982

Memorandum

To: Secretary

From: Solicitor William H. Coldiron

Subject: Railroad affiliates and coal leasing

INTRODUCTION

Recent increases in coal leasing activities by the Department require a critical reexamination of section 2(c) of the Mineral Lands Leasing Act, 30 U.S.C. § 202(c) and the conflicting positions adopted by this Department and the Antitrust Division of the Justice Department. For the reasons set forth below, I conclude that both interpretations of this ambiguous provision are lawful and judicially defensible, and the Secretary has the authority to change his interpretation prospectively. Further, I recommend that this Department abandon the alter ego test previously adhered to, and maintain that section 2(c) prohibits certain railroad affiliates from holding federal coal leases.

BACKGROUND

Section 2(c) of the Mineral Lands Leasing Act (Leasing Act), 30 U.S.C. § 202,1/ provides in relevant part:

> No company or corporation operating a common-carrier railroad shall be given or hold a permit or lease under the provisions of this Act for any coal deposits except for its own use for railroad purposes; [with express limitations for acreage holdings for coal leases used for railroad purposes].

1/ As enacted, the provision at issue was a proviso within section 2 of the Leasing Act, 30 U.S.C. § 201. 41 Stat. 438. It was labeled section 2(c) of the Leasing Act by section 1 of the Act of June 3, 1948, 58 Stat. 275, which did not amend the substance of the provision.

This provision was interpreted in a Solicitor's opinion dated May 18, 1976, captioned "Colowyo Coal Project." The Solicitor advised the Under Secretary that this provision was narrow in scope, and the prohibition applied only to companies "operating" a railroad. He concluded that the prohibition applied to a corporate affiliate of the company operating a railroad only when the affiliate was the "alter ego" of the operating company. The Solicitor concluded that the Colowyo Coal Company could hold a federal lease, because it was not an "alter ego" of the Escanaba and Lake Superior Railroad, a subsidiary of a subsidiary of the parent of one of the two companies in the Colowyo partnership.

The "Colowyo Coal Project" opinion reached two major conclusions. First, it concluded that the legislative history of section 2(c) showed the intent of Congress to limit its scope to companies operating railroads, and to exclude affiliates from its coverage. Second, he concluded that section 2(c) was in drafting and history, and therefore in interpretation, identical to the Commodities Clause of the Hepburn Act, 49 U.S.C. § 1(8), which the Supreme Court had construed not to prohibit railroads from transporting their corporate affiliates' goods. United States v. Delaware & Hudson Co., 213 U.S. 366, 414-15 (1909). In 1979, the Associate Solicitor, Energy and Resources, agreed with the "Colowyo Coal Project" opinion, emphasizing the first of these two conclusions. Memorandum of January 4, 1979, to Assistant Secretary, Land and Water Resources, "Section 2(c) of the Mineral Lands Leasing Act, 30 U.S.C. § 202."

On April 25, 1980, the Antitrust Division of the Justice Department issued a "Memorandum Concerning Section 2(c)" (Antitrust Division Memorandum), which was sent to Interior by the Assistant Attorney General on May 5, 1980, and the substance of which was included in the Justice Department's annual report to Congress for FY 1979, "Competition in the Coal Industry" 81-88 (November 1980), under section 8 of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 208-2 (1976). In this memorandum, the Antitrust Division disagreed with both of the conclusions of the May 18, 1976, "Colowyo Coal Project" opinion. The Antitrust Division rejected the first of the Solicitor's conclusions by emphasizing early congressional debates on railroad participation in the federal coal leasing system. These debates establish the theme that Congress intended to separate the transportation of coal from its production. E.g., 51 Cong. Rec. 15180-83 (1914). It is in light of this history that the Antitrust Division construed the debate on the adopted provision,

reaching the conclusion Congress intended to prohibit railroad affiliates, as well as companies operating railroads, from holding federal coal leases. With respect to the second of the Interior conclusions, the Antitrust Division concluded that the Commodities Clause cases "are not a persuasive basis for interpreting 2(c). The rationale of Delaware & Hudson has been thoroughly discredited by more recent Supreme Court decisions." Antitrust Division Memorandum at p. 19.

No further Interior Department opinions followed that 1980 Antitrust Division memorandum (see letter of January 16, 1981, from Solicitor Martz to Assistant Attorney General Litvack, Antitrust Division), chiefly because the Justice Department's November 1980 report to Congress advocated the repeal of section 2(c) as an anachronism no longer necessary to prevent anti-competitive practices. Both the Interior and Justice Departments endorsed the repeal of section 2(c) in the 97th Congress. See letter of January 5, 1982, from Assistant Secretary Carruthers to Senator McClure on S. 1542. In the absence of Congressional action, however, the continued, adverse intrusion of section 2(c) into the conduct of the federal coal leasing program, and into the promotion of development of federal coal found in mixed ownership with the land grant railroads, has warranted re-examination of these issues.

THE AMBIGUITIES IN SECTION 2(c)

Both of the issues on which Interior and the Antitrust Division have opined are issues which have more than one reasonable interpretation. Both Departments' view of each issue is reasonable, as the Antitrust Division recognized (Antitrust Division Memorandum at p. 3). Both views can be inferred from the literal words of the statute and the context in which they are used, and neither is repudiated by contemporaneous agency construction or authoritative judicial interpretation. "[W]hile the clear meaning of statutory language is not to be ignored, 'words are inexact tools at best,' Harrison v. Northern Trust Co., 317 U.S. 476, 479 (1943), and hence it is essential that we place the words of a statute in their proper context by resort to the legislative history." Tidewater Oil Co. v. United States, 409 U.S. 151, 157 (1972). We examine first the history of the adoption of section 2(c) in the Leasing Act.

A. Congressional intent and the legislative history. Various bills to enact a mineral leasing law were introduced into Congress before passage of the Leasing Act in 1920. In 1914 Congress considered versions of what was to become the section 2(c) prohibition against railroad leasing which contained the sentence, "The term 'railroad' or 'common

carrier' as used in this act shall include any company or corporation owning or operating a railroad, whether under a contract, agreement, or lease, and any company or corporation subsidiary or auxiliary thereto, whether directly or indirectly connected with such railroad or common-carrier." 51 Cong. Rec. 15177 (1914) (emphasis added). In 1919 Senator Smoot had introduced a bill, S. 1269, that contained a similar, broadly-stated prohibition. When this bill was reported out of the Senate Committee on Public Lands as S. 2775, it contained the prohibition against railroad which in substantial part was enacted in the Leasing Act. During the Senate debate on S. 2775, Senator LaFollette introduced an amendment to broaden the prohibition, although its phrasing differed substantially from that quoted above. 58 Cong. Rec. 4591 (1919). To explain why the broader prohibition was no longer in S. 2775, and to oppose Senator LaFollette's amendment, Senator Smoot quoted from a letter that Gifford Pinchot, then President of the National Conservation Association, wrote regarding S. 1269 as it stood in committee. Senator Smoot explained that the broader definition of railroad (for both prohibition and relief purposes) was changed by the Committee in response to Mr. Pinchot's argument, "It is evident that if the relief is given fairly and squarely to common carrier railroads, the full purpose of the Act will be accomplished; and if an attempt is made to do more, we cannot foresee the consequences." 58 Cong. Rec. 4591 (1919). This argument is Delphic, and divergent interpretations of this letter have in part resulted in the divergent interpretations of section 2(c).

In 1980, the Antitrust Division concluded that Congress, in adopting Mr. Pinchot's language, sought to limit the ability of a railroad affiliate to hold under section 2(c) "for its own use", without implying that railroad affiliates were exempt from the leasing prohibition. In its 1976 and 1979 opinions, Interior concluded that Congress, in adopting Mr. Pinchot's language, sought to exclude railroad affiliates from section 2(c) entirely, and thus make them subject to the limitations of section 27 of the Leasing Act, 41 Stat. 448, which then limited any corporation and its affiliates to one federal coal lease of 2,560 acres per state. Here, both agencies correctly focused on the relief given to railroads by section 2(c), to hold leases to supply coal for locomotive uses. In interpreting the substitute, however, the Antitrust Division focused on the primary Congressional purpose, separation of mining and transportation, while Interior focused on the interrelation of section 2(c) with section 27 of the Act, which then provided strict "anti-monopoly" acreage holding limits on federal leases for coal and other minerals.

The Antitrust Division examined the changes made in the wording of the bill that was introduced and concluded the changes further restricted leasing of federal coal to railroads. Antitrust Division Memorandum at p. 10. Interior considered those

changes to be cosmetic once affiliates were excluded from the scope of section 2(c). 2/ Interior regarded the crucial changes to be the amendments to section 27 (which to it governed rail affiliates after the Pinchot substitute was adopted) in 1948, 1950 and 1964, when Congress increased the coal acreage and lease holding limits that Mr. Pinchot ostensibly wanted to apply to affiliates instead of the relief of section 2(c). 3/ In rebuttal to Interior's reliance on the import of section 27, the Antitrust Division points out that the relationship was never expressed in the debates.

Which of these two views Mr. Pinchot intended when he wrote the Delphic lines quoted above is unknown. In fact, that there were "two views" how the revised provision should be interpreted may never have occurred to the debaters, since the precise means by which Mr. Pinchot's formulation assured that railroad affiliates could not benefit from section 2(c)'s "relief" provision was irrelevant until after 1948, as the acreage limits in section 27 of the Leasing Act were changed. Only then did the question of whether affiliates had been excluded from the operation of section 2(c) take on significance.

The context in which the debate occurred further obscures the matter, and bolsters the conclusion that there is no definitive and unambiguous interpretation. Senator Smoot convinced Senator LaFollette to withdraw his amendment, and thus no vote ever occurred that clearly repudiated inclusion of auxiliaries and affiliates in section 2(c). He persuaded Senator LaFollette largely by offering, and getting passed, a further restriction on the relief accorded companies operating common carrier railroads, namely, the restriction to holding one lease per 200 miles of tract. The quoting of the Pinchot letter, see

2/ The Antitrust Division regards this as an implicit conclusion by Interior that Congress inadvertently narrowed the prohibition. Antitrust Division Memorandum at p. 13. To Interior, the conclusion was express and the Congress acted knowingly, in the sense that the Committee understood that the scope of the relief as well as the prohibition in section 2(c) was narrowed by the deletion of any express reference to railroad affiliates.

3/ Act of June 3, 1948, sec. 6, 62 Stat. 291; Act of Aug. 21, 1950, 72 Stat. 688; Act of Aug. 31, 1964, 78 Stat. 710. The holding of leases by railroads for railroad purposes "used up" the acreage allowed to railroad affiliates, because of section 27's attribution of a lessee's holding to all of the lessee's affiliates. 41 Stat. 448. As these acreage limits were raised, railroad affiliates became eligible to hold acreage above and beyond the acreage held by the railroad for railroad use, but charged under section 27 to the affiliate. See 30 U.S.C. § 184(a), as amended.

58 Cong. Rec. 4591-92 (1919), resulted only in an hour long speech by Senator LaFollette. In this context, no solid inference about Congressional intent on the meaning of Mr. Pinchot's amendment may be drawn. The only conclusion that can be drawn, with caution, is that Congress narrowed the relief given by section 2(c) in the several amendments the Senate made in 1919. Again, this does not provide any instant answer for the question of the treatment of entities not expressly covered by the words of section 2(c).

On this issue, the Antitrust Division concluded, applying a "plain meaning" test, that section 2(c) "would seem to" prohibit railroad affiliates from holding federal coal leases. Antitrust Division Memorandum, Executive Summary at p. 1. In his May 18, 1976, opinion on the Colowyo coal project, the Solicitor found section 2(c) inapplicable where there was at best a remote connection between the railroad company and the coal lessee. In the Colowyo case, the lessee was a partnership of two corporations. One partner was a wholly-owned subsidiary of Hanna Mining Company of Cleveland (Hanna). Hanna owned a different subsidiary corporation which in turn owned all the stock in the Escanaba and Lake Superior Railroad. The 1976 "Colowyo" opinion reached a common sense conclusion that Colowyo itself did not, by any stretch, operate a common carrier railroad, and thus that no "plain meaning" rule would disqualify Colowyo Coal Company from holding a federal lease.

At the same time, however, the contemporaneous history of congressional opposition to mixing transportation and mining of federal coal argues against Interior's "plain meaning" interpretation that no corporate affiliate is subject to the prohibition unless it is the "alter ego" of a company operating a common carrier railroad. In fact, the Department's administration of section 2(c) supports no "plain meaning" view at all. The earlier Interior Department decision under section 2(c), Sheridan-Wyoming Coal Co., A-24158 (October 11, 1945), was distinguished in the 1976 "Colowyo Coal Project" opinion. Under analysis, however, its impact on interpreting section 2(c) is to support the conclusion that the provision is ambiguous. The October 1945, decision dismissed a motion for rehearing of a May 21, 1945, Departmental order that a lessee (Sheridan-Wyoming) show that its parent companies were no longer affiliated with a railroad. The May 21, 1945, order appears to have been Interior action consistent with the Antitrust Division's current position, although it was rendered moot (and arguably without precedential value) by stock transactions not directly occasioned by the Department's order. In any event, Sheridan-Wyoming was not relied on in the "Colowyo Coal Project" opinion as the authority for the "alter ego" test. The basis for that test was the Commodities Clause. 1976 Colowyo Opinion at p. 7.

B. The Commodities Clause. With respect to the Commodities Clause issue, Interior in 1976 relied on the fact that when

section 2(c) was enacted, United States v. Delaware & Hudson Co., supra, was neither old nor stale, and stood for the proposition that "stock ownership by a railroad company in a bona fide corporation, irrespective of the extent of such ownership, did not preclude a rail company from transporting the commodities . . .." 213 U.S. 366, 414-15 (1909). Further, the Commodities Clause was to Interior broader than section 2(c) (as revised at the suggestion of Mr. Pinchot), in that the former prohibited a railroad from transporting any commodity "which it may own in whole or in part, or in which it may have an interest, direct or indirect . . .." 49 U.S.C. § 1(8). Thus if the Commodities Clause did not apply to rail affiliates, a fortiori section 2(c) did not. Finally, Interior relied on the fact that Congress, in its deliberations on the Commodities Clause, rejected an amendment expressly covering railroad affiliates, history that the debate on section 2(c) seemed to imitate, and the Supreme Court in Delaware & Hudson had relied on this legislative history. "Colowyo Coal Project" opinion at p. 7.

For its part, the Antitrust Division maintained that the Commodities Clause is a dangerous analogy to use when construing section 2(c). First, it cited the commentators and later Supreme Court Justices who argued that Delaware & Hudson was wrongly decided, even while extending its shadow, "It is enough to say that if the Elgin [4/] case was before us as a case of first impression, its doctrine might not now be approved. But we do not write with a clean slate." United States v. South Buffalo R. Co., 333 U.S. 771, 774 (1948). With the Delaware & Hudson construction of the Commodities Clause so discredited, the Antitrust Division concluded, it would not be applied by analogy by any court construing section 2(c).

Second, the Antitrust Division pointed out that the Supreme Court was concerned in Delaware & Hudson that broad construction of the Commodities Clause would generate constitutional issues on the scope of the Commerce Clause which at the time were critical. 213 U.S. 366, 410 (1909). Aside from further support for the idea the Delaware & Hudson case is a derelict on the sea of the law, now that the Commerce Clause has been much more broadly construed, this makes these cases inapplicable to section 2(c). Commerce clause problems aside, however, section 2(c) is firmly grounded in the Property Clause (Art. IV, § 3, cl. 2) of the Constitution, and suffers no infirmities if it is construed to prohibit railroad affiliates from holding federal coal leases. See United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915); United States v. Gratiot, 39 U.S. (14 Pet.) 526, 538 (1840); see also Kleppe v. New Mexico, 426 U.S. 529 (1976).

4/ United States v. Elgin, J. & E. Ry., 298 U.S. 492 (1936), followed Delaware & Hudson while criticizing its holding.

In short, the Antitrust Division analysis casts reasonable doubt on the proposition that the Commodities Clause precedent would be applied judicially to support the "alter ego" test established in the 1976 and 1979 Interior opinions. It is, however, overly broad to say that a "review of major cases construing the Commodities Clause shows that they provide no foundation for interpreting section 2(c) to allow leasing to railroad affiliates." Antitrust Division Memorandum at p. 23 (emphasis added). Certainly the first Supreme Court cases were the only law available to the Congress that considered and enacted section 2(c) on the consequences of Congress not clearly listing corporate affiliates in a statutory prohibition. 5/

It is reasonable, however, to conclude that the Commodities Clause cases are dubious precedent and would be unlikely to compel any reviewing court to adopt a narrow reading of the prohibition in section 2(c). Under these circumstances, any judicial inquiry would return to the issues of intent and construction of section 2(c) discussed above.

THE CONSEQUENCES OF AMBIGUITY

Where a statute is susceptible to more than one reasonable construction, prior transactions permissible under one construction are not disturbed by changing, prospectively, to an alternate construction. This principle is generally applicable to administrative agencies, 1 Davis, Administrative Law Treatise § 5.09, at 350-52 (1958), and has been specifically applied by courts to changes in the construction of the Leasing Act and regulations implementing the Leasing Act. E.g., Safarik v. Udall, 304 F.2d 944, 948-49 (D.C. Cir.), cert. denied, 371 U.S. 901 (1962). See also McDonald v. Watt, 653 F.2d 1035 (5th Cir. 1981); Runnells v. Andrus, 484 F. Supp. 1234 (D. Utah 1980). As these cases amply illustrate, this principle has been judicially endorsed in the context of altered positions on public land laws or Interior regulations that are amenable to more than one construction. Interior's long-standing practice is to avoid upsetting settled expectations by applying retroactively new statutory constructions.

5/ In addition to Delaware & Hudson, these cases include United States v. Delaware, L. & W. R.R., 238 U.S. 516, 527 (1915); United States v. Lehigh Valley R.R., 220 U.S. 257, 271-72 (1911).

E.g., Timothy Sullivan, 46 L.D. 110, 113 (1917); Right-of-Way Across Tribal and Allotted Indian Lands . . ., 58 I.D. 319 (1943); Franco Western Oil Co., 65 I.D. 427 (1958), affirmed sub nom; Safarik v. Udall, supra. 6/

As the discussion above illustrates, section 2(c) is a provision reasonably subject to at least two readings. In such circumstances an agency is not bound to continue past policy indefinitely so long as the revised policy is consistent with the enabling statute, and prospective application of the revised policy may be implemented without affecting vested rights. See American Trucking Associations, Inc. v. Atchison, Topeka & Santa Fe Ry. Co., 387 U.S. 397, 416 (1967). The interests of serving current program needs and current understanding of Congressional purposes in enacting the provision, and the important interest of promoting harmony between federal agencies, are sufficient justification for the application of this principle. I conclude that it is lawful to alter the Department's position on the construction of section 2(c), and it is reasonable to abandon the view that only companies operating common carrier railroads and their "alter egos" are subject to the leasing prohibition. I recommend that Interior take the position that railroad affiliates are not excluded from the prohibition in section 2(c) on holding federal coal leases. By so concluding, I do not conclude that the Antitrust Division's guidelines for the scope of the affiliate prohibition (Antitrust Division Memorandum at pp. 29-31) are the only alternate view of the scope of the prohibition. The preceding discussion amply supports the view that Congress had no clear intention to define the statutory phrase "company or corporation operating a common carrier railroad" in a particular and specific manner.

6/ In light of the manifest ambiguity in the meaning of section 2(c), and this policy, it is unnecessary to examine what authority or obligation the Department might have to void actions taken under an unambiguously erroneous construction of law. Compare Enfield v. Kleppe, 566 F.2d 1139, 1142 (10th Cir. 1977) with McDade v. Morton, 353 F. Supp. 1006, 1012 (D.D.C. 1973), aff'd without opinion, 494 F.2d 1156 (D.C. Cir. 1974). McDade approved the statutory construction adopted in Solicitor's Opinion M-36686, 74 I.D. 285, 290 (1967).

You may proceed to define Interior's policy and construction of the statutory phrase, that is, the scope of the affiliate prohibition either by rulemaking or by adjudication. SEC v. Chenery Corp., 332 U.S. 194 (1947). 7/ Finally, I conclude that any change in the Interior Department's construction and implementation of this section is prospective, and does not disturb past transactions. Thus, leases issued, or lease transfers approved, under the old construction were lawful actions not made voidable by the change in agency construction of the statute.

SOLICITOR

Approved:

SECRETARY

cc: Assistant Secretary, Land & Water Resources
Assistant Attorney General, Antitrust Division
Assistant Attorney General, Land & Natural Resources Division

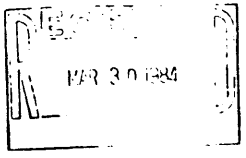
7/ The Department has the authority, in interpreting section 2(c) consistent with the public interest, to fashion guidelines flexible enough to allow "emergency" leasing (43 C.F.R. Subpart 3425) and lease modification (43 C.F.R. Subpart 3432) to railroad affiliates currently holding federal coal leases in order to avoid bypass or waste of federal coal, in order to prevent supply disruption or premature mine closing, or otherwise to serve the public interest.

RESPONSE TO COMMENTS FROM STATE OF MONTANA (March 21, 1984)

State of Montana
Office of the Governor
Helena, Montana 59620

TED SCHWINDEN
GOVERNOR

March 21, 1984



Mr. Carl Bausch
Office of Transportation Analysis
Section of Energy and Environment
Interstate Commerce Commission
Washington, DC 20423

Dear Mr. Bausch:

I have reviewed the supplement to the Draft Environmental Impact Statement, Tongue River Railroad Company, Finance Docket No. 30186, recently prepared by your agency. The following comments supplement my earlier comments on the Tongue River Railroad Draft EIS.

Construction of the Burlington Northern option would effectively preclude current plans by the Montana Department of Fish, Wildlife, and Parks for expansion of the Miles City Fish Hatchery, as well as jeopardize its continued operations. In addition, possible future plans for the relocation of the agency's region 7 headquarters to the hatchery area would be seriously constrained.

Loss of Branem Lake and its use for forage fish rearing could not be effectively replaced by the purchase of forage fish from Minnesota. Increasing production of brood bass at the facility makes this option cost-prohibitive.

Railroad yards are generally a source of oil sludge, diesel fuel, and other substances that are not compatable with a fish hatchery. The proximity of the proposed rail yard would substantially increase the risk for costly damage to the hatchery and its warm water fish rearing efforts. Of the three mitigating measures for impact to the hatchery identified in the supplement, only its relocation could reduce the potential impacts to an acceptable level.

In addition to concerns for the hatchery, I am concerned with the new proposal for the railroad to cross under I-94 and U.S. 10 south and west of Miles City, as well as the traffic related impacts at the At-Grade railroad crossing on Leighton Boulevard. As stated previously in my comments forwarded for the draft EIS, there is a school located two blocks west of this crossing, and a hospital located two blocks east. Delays to emergency vehicles, children walking to school, and urban traffic could be significant.

In regard to concerns over impacts to the Miles City Fish Hatchery, the TRRC has been involved in discussions with personnel from the Montana State Department of Fish, Wildlife and Parks in an effort to develop acceptable mitigation plans. These are open-ended discussions, and a wide variety of possible solutions have been considered. It can be assumed that the critical concerns of the state will be addressed in an acceptable manner prior to the granting of any easements.

The applicant should be prepared to submit site specific plans to the Montana Department of Highway identifying the location of the proposed interstate crossing, and also the proposed primary route crossing south and west of Miles City. Included with these plans should be a proposal of how the applicant plans to physically cross under I-94, U.S. 10, and also safeguard minimal disruptions to traffic.

Thank you for the opportunity to comment on the supplement. The State of Montana continues to have the greatest possible interest in the Tongue River Railroad proposal, and its review and approval process by the Interstate Commerce Commission. I strongly support the request of local residents to your agency to hold public hearings in Miles City, Montana prior to any decision regarding the proposed railroad.

Sincerely,

TED SCHWINDEN
Governor

cc: Gary Wicks
Jim Flynn
Congressional Delegation
Rich Bechtel

Plans for the I-94 crossing are not definite, but TRRC analysis suggests that a railroad overpass at I-90 would be preferable. This would preclude re-construction of I-94 and would eliminate considerable traffic delay during construction. It would also avoid drainage problems which might arise from crossing under the highway.

Analysis indicates a future requirement for a grade-separated crossing in Miles City. Location of the crossing, construction and financial responsibility for such will require cooperation among the TRRC, Burlington Northern Railway, and state and local government agencies. It is a problem that must be resolved prior to railroad construction.

Detailed plans will be available after 3rd-phase engineering is complete.

APPENDIX B

A MASTER MITIGATION POLICY AND PLAN

FOR THE PROPOSED TONGUE RIVER RAILROAD PROJECT

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APPENDIX B

A MASTER MITIGATION POLICY AND PLAN

FOR THE PROPOSED TONGUE RIVER RAILROAD PROJECT

1.0 INTRODUCTION

Environmental impacts associated with the construction and operation of the Tongue River Railroad are discussed in the environmental documentation prepared for this proceeding. Numerous suggested mitigation measures to be applied to avoid or lessen impacts are also presented in the documentation. It was recognized, during preparation of the Draft Environmental Impact Statement (DEIS), that final and more specific mitigative measures would have to await comments on the DEIS and testimony at the proceedings. With these aspects of the proceedings now completed, it is appropriate to consider specific mitigative measures that can be applied in this case. The purpose of this Master Mitigation Plan is to provide a more definitive framework for mitigation planning and to provide ultimately for the just compensation of economic and environmental loss due to the Tongue River Railroad Company (TRRC).

The plan is divided into various sections, conforming to the topics discussed in the environmental documentation. Potential impacts and suggested mitigative measures are discussed for each discipline. It should be noted that many of the topics presented during the proceedings relate to site specific concerns of individual landowners. To the extent that these issues relate to environmental matters, they are discussed in this document. However, the Section on Energy and Environment (SEE) recognizes that many of the site specific concerns will be the topics of negotiation between the Applicant and affected landowners.

The Section of Energy and Environment emphasizes that this plan is not the only method available to protect the interests of the affected landowners or other affected parties. Many of the specific mitigation measures mentioned in the hearings and in comments on the draft mitigation plan are subject to negotiations for right-of-way purchase or easements. The State of Montana's concerns have been addressed in this document. However, the State retains the right to expand these mitigation measures in granting easements across state lands.

Similarly, the areas subject to landowner/railroad negotiations have been identified in this and other documents and mechanisms have been suggested to facilitate right-of-way discussions. Montana statute protects the integrity of those negotiations. Montana law provides for the appointment of qualified, disinterested condemnation

commissioners, should right-of-way negotiations between the parties be unsuccessful. The commissioners are required to assess compensation at current, fair, market value (MCA 70-30-207, 70-30-302). There is significant latitude available to the commissioners to provide compensation to the affected landowners to cover direct acquisition of land, severance, and depreciation damages for non-contiguous lands.[1] A combination of provisions outlined in this mitigation plan and the negotiation process, protected by Montana law, will place the affected landowners on strong footing with regard to addressing the environmental impacts to their property.

2.0 LAND USE IMPACT MITIGATION

Land use impacts can be divided into three groups for mitigation purposes: (1) impacts to agricultural operations; (2) impact to the Livestock and Range Research Station (LARRS); and (3) impacts to the Miles City Fish Hatchery. Many of the procedures and measures implemented under this topic will be useful under other disciplines, as well. As a result, Land Use is considered to be of primary importance in terms of both impact and mitigation. This is underscored by the primacy of agriculture as the regional land use and economic base, not only for the Tongue River/Otter Creek area, but on a regional and statewide basis. It should be noted that the level of specificity varies in terms of mitigation suggested for the three groups listed here. This is due in part to the varying requirements placed on the applicant by federal law.

The LARRS is federal property and subject to Department of Agriculture easement procedures and requirements. TRRC's easement application for the proposed crossing of LARRS was filed with the Department of Agriculture in January 1985. The application for an easement across the facility constitutes an independent permitting process and requires the level of detail presented in this Draft Master Mitigation Plan. Similar efforts will be undertaken with the State of Montana when easement applications are filed with the Department of State Lands and the Department of Fish Wildlife and Parks. The same specificity will undoubtedly result from negotiations with the 39 individual ranchers along the proposed right-of-way (ROW). As previously noted, that negotiation process is subject to provisions in Montana law concerning eminent domain. At this point, it would be inappropriate to bind either the railroad or an individual landowner to detailed measures that either party might want to change at some future date.

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[1]Meagher County Newlan Creek Water District v. Walter, 169 M 358, 547 P2d 850 (1976); State Highway Commission v. Renfro, 161 M 251, 505 P2d 403 (1973); State v. Hoblitt, 87 M 403, 288 P 181 (1930).

2.1 Agricultural Operations

2.1.1 General

The major goal of all mitigation measures directed at individual agricultural operations should be to minimize the effect of the railroad on day-to-day operations of the existing ranches. The negotiations and planning process should focus on the following objectives:

(a) Maintaining the integrity of each operation as an independent agricultural enterprise.

(b) Maintaining the economic vitality and productivity of each operation at levels generally approximating the current situation.

(c) Developing and implementing measures which will preclude the necessity for significant time/labor increases due to the existence of the railroad.

(d) Identifying parcels which will no longer be economically viable for present uses, and developing alternative uses or appropriate compensation.

(e) Implementing measures to limit or preclude nuisance impacts of the railroad.

With these goals in mind, the Applicant should undertake negotiations with individual landowners during acquisition of the ROW. By law, the Applicant will be required to negotiate in good faith with the individual landowners. Firm commitments as to the specific measures to be taken to attain the above-stated goals will be made and documented by the parties. Areas of concern that should be addressed include, but are not limited to, the following items.[2]

(1) Direct and Indirect Land Loss. Each agricultural operation that is crossed by the Tongue River Railroad will experience some loss of agricultural land due to inclusion in the ROW. The mitigation for such loss is direct compensation. This compensation is properly negotiated on an individual basis between each landowner and the Applicant.

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[2]These areas of concern have been identified through review of the comments on the Draft EIS and supplement thereto, review of testimony delivered at hearings, and consultation with NPRC staff members. NPRC's suggested mitigation recommendations were attached to its post-hearing brief as Appendix 4.

Indirect land loss, due to severance of parcels, will also occur in certain situations. The standards to be used in assessing that indirect loss will differ by landowner, and landowners will be given the opportunity to identify severed parcels in negotiations. It is possible to use some severed parcels for alternate agricultural purposes, thus mitigating to some extent the total loss. The Applicant should assist landowners in identifying and developing such uses where appropriate, and in applying a combination of such assistance and compensation, where necessary and agreed upon during ROW negotiations.

(2) Displacement of Capital Improvements. Where capital improvements such as fences, wells, corrals, and irrigation systems are displaced, the Applicant should relocate or replace these improvements where possible. Generally, these capital improvements can be replaced. In some instances, it may be necessary to provide compensation for such displacements. Specifically, fences should be reconstructed according to the design specifications previously existing on the ranch or to specifications requested by the landowner and agreed to during negotiation. Where parcels have been redesigned, the Applicant should erect new fences to conform to the redesigned pasture parcel. Similarly, corrals, haysheds, etc., should be relocated within the redesigned land parcels.

Where wells and springs are displaced, the Applicant should replace the existing improvements to the current standard. For instance, every effort should be made to assure the continued use of natural springs. Often, this can be accomplished by the installation of culverts of proper design and location. In instances where a well is displaced, the Applicant should construct a new well and insure that there will be no additional cost to the rancher for the operation of that well beyond the cost incurred with the previous well.

Where irrigation systems, whether they be gravity or mechanical, are disrupted or displaced, the first goal of the Applicant should be to assist the landowner in redesigning the system in order to continue its current use. For instance, culverts should be installed and ditches reconstructed for gravity systems. For sprinkler systems and other mechanical devices, all attempts should be made to substitute a redesigned system. Where this is not possible, the Applicant should negotiate with the landowner for a combination of compensation and reuse of the parcel for some other purpose.

(3) ROW Fencing. The Applicant should construct ROW fencing along the entire line according to specifications most

suitable to the landowners and consistent with industry standards. If special fencing needs or specifications are requested on individual ranches, it will become a matter for negotiation. Likewise, if, in some cases, landowners would prefer to forego fencing of the ROW in order to provide easier access for livestock across the rail line, the Applicant should consider such a request. It should be noted that such a request could be honored only after matters of safety and liability are considered.

(4) Access Restrictions. The Applicant has tentatively identified 77 cattle passes that would be installed along the ROW. These cattle passes would consist of an oval, corrugated metal structure, roughly 12 ft. high and 11.5 ft. wide at the base. The proposed locations for these cattle passes were developed by the engineering consultants, using aerial photography, on-the-ground inspection, and information from individual landowners. The locations of these cattle passes were indicated in second phase engineering plan and profile sheets, which were provided to the individual landowners for comment. The Applicant should work with landowners during third phase engineering and ROW negotiations to identify the locations of any additional cattle passes and to finalize the placement of those previously identified. In addition, locations for grade crossings for equipment, etc., will also be determined through negotiations and engineering practicality.

In some cases, landowners may prefer a different type of cattle pass than that currently proposed by the Applicant, e.g., box culvert, trestle, etc. Recognizing that different types of cattle passes could be far more costly than those currently proposed, the Applicant should work with the individual landowners to develop an acceptable alternative. For instance, one alternative might be to install a trestle-type structure in lieu of two or three corrugated metal culverts. In such a case, the cost of the trestle could be basically the same as the culverts, and thus an acceptable compromise. In other instances, such as where the placement of a cattle pass is not feasible from an engineering standpoint due to an extensive cut, the Applicant should discuss with the landowner the possibility of a bridge over the railroad to provide access for cattle.

(5) Impacts During Construction. During third phase engineering, the Applicant should work with individual landowners to avoid unnecessary conflict between construction-related activities and ranching operations, such as moving cattle between pastures during certain seasons of the year. However, it is recognized that inconvenience to the ranchers cannot totally

be avoided if a construction schedule is to be maintained. Temporary inconvenience to the rancher from construction-related activities should be considered during ROW negotiations.

All construction-related activities should be confined to the purchased or leased ROW, and to the construction camps located along the rail line. The specific location of construction camps should be solely a matter of negotiation between individual landowners and the Applicant.

Construction of the rail line will require bonding for Applicant's contractors. In the event of contractor-caused damage to a landowner's property, lengthy negotiations between the individual landowner and the contractor's bonding agent could ensue. In order to speed this process of negotiation, the Applicant should require its contractors to place sufficient funds in an escrow account to pay for incidental damages incurred during construction. Payment could be advanced from this fund, pending resolution of any liability on the part of the contractor for the damages incurred. Specifics of such a plan, including definitions of liability, would have to be negotiated between the parties, ICC, TRRC and affected landowners, prior to construction.

The Applicant should require its contractors to police construction camps during operation, to control the personnel in camps, and limit those personnel to workers directly involved in the project. Upon completion of construction, the camps should be reclaimed to their previously existing use.

The Applicant should appoint a railroad representative to work with the prime and subcontractors and the landowners to resolve any problems developing during construction. This individual should have direct access to the management of the Tongue River Railroad Company.

(6) Impacts from Operation. Although every effort has been made to identify impacts from operation of the Tongue River Railroad, unanticipated problems could develop once the line has been constructed. In order to address these problems, the Applicant should appoint a representative to meet with landowners to discuss these problems after the railroad has become operational. The Applicant's representative should work with individual landowners to resolve any unforseen problems that develop and to establish good landowner/railroad relations.

2.2 Impacts to Fort Keogh Livestock and Range Research Station (LARRS)

2.2.1 General

The potential impacts to LARRS have been explored in detail, both by the ICC's consultants and by LARRS personnel. LARRS personnel have taken an active role in development of the proposed route in coordination with the Applicant's engineers. In addition, LARRS personnel have examined the proposed route in detail and have developed a series of mitigation needs and procedures that were submitted to the Applicant. Those measures to which the Applicant has committed are included here. It is expected that these and other mitigation measures will be attached to a final easement agreement for ROW across the facility.

2.2.2 Specific Mitigation Concerns and Resolutions

(1) LARRS has requested a grade-separated crossing for primary access to the southeast portion of the station. Access is currently obtained through a box-type culvert beneath U.S. Interstate 94. The alignment, as detailed in the proposed Branum Lake Option, calls for crossing under I-94. If this option is utilized, the Applicant will provide a non-blocked, grade-separated crossing from LARRS to insure adequate access to the southeast portion of the station. The Applicant is currently exploring the possibility of bridging over I-94 at this point. If this plan is feasible, then existing access would not be affected or altered by the railroad.

(2) LARRS has requested that sufficient flood drainage be provided north of the Camel's Back. The Applicant will provide drainage with culverts designated to pass 100-year design floods.

(3) LARRS has requested that a grade-separated crossing be located on the Burlington Northern Railroad (BN) ROW adjacent to the LARRS headquarters facilities. The Applicant has agreed to provide a grade-separated crossing at this location.

(4) LARRS has requested two wells in the No. 3 pasture. One well is located in Section 13 and the other in Section 12. The Applicant has agreed to construct two new, non-electrified, wells or one non-electricfied well and a pipeline, whichever is most appropriate.[3]

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[3]LARRS staff have assumed responsibility for electrifying these and other wells, should they so desire.

(5) LARRS has requested two railroad crossings in the No. 3 pasture. Underpasses would be desirable; however, crossings over the track would work. One is located from Section 13 to 18 and the other from Section 12 to 7. A road (all weather) from the Section 12 to 7 crossing along the track to Section 18 would also work. The Applicant has agreed to provide at least one separated grade crossing. The other crossing would be at grade.

(6) LARRS has requested rip-rapping along the river in Section 6 in the 2C Bend pasture, if necessary. The Applicant plans to provide all necessary rip-rapping to insure the integrity of the railroad embankment.

(7) LARRS has requested an underpass for cattle movement in Section 6. The Applicant has agreed to provide this underpass.

(8) LARRS has requested a vehicle pass (18x14 ft.) in Section 36 near the existing road to allow access to Lower 2C Bend. The Applicant has agreed to a cattle underpass and an at-grade crossing for equipment at this location.

(9) LARRS requests a track crossing for equipment where the track crosses Paddy Fay Creek. This concern should be resolved by Applicant's commitment to construct a bridge at Paddy Fay Creek.

(10) LARRS requests an access road along the river from Section 23 (Lower Flood) to Section 25, 25 and 36 (2C Bend). The Applicant has agreed to provide a road parallel to the railroad ROW for access.

(11) LARRS requests that the Applicant relocate the water tank and pipeline in Lower 2C Bend and locate a new tank in the north end of Lower 2C Bend. Applicant has agreed to relocate the existing water tank as well as to locate a new tank in the north end of Lower 2C Bend.

LARRS requests that the proposed alignment be located as close to the hill between Upper and Lower 2C Bend as possible to eliminate the waste land. The alignment submitted to the ICC in June 1983 incorporates this suggestion and is incorporated as the the Applicant's proposed action.

(13) LARRS requests rip-rap along the river in the North Tongue River Bend. The Applicant has agreed to rip-rap along the river in the North Tongue River Bend, and has initiated 404 applications for this site with the U.S. Army Corps of Engineers.

(14) LARRS requests that the TRRC relocate the well in North-South Tongue River fence line to water both pastures. The Applicant has agreed to relocate this well.

(15) LARRS requests a vehicle underpass 18 ft. wide by 14 ft. high on the road from Lower Flood to North Tongue River Bend. After considerable discussion with LARRS, it was determined that a cattle pass under the tracks with an equipment crossing "at grade" with the tracks could be used in place of the 18 x 14 ft. underpass.

(16) LARRS requests that the Applicant relocate the well between Lower Flood and Lower Flood Bend. (Pipeline system to serve Lower Flood, Lower Flood Bend, South Lower Flood Bend, and Middle Flood.) The Applicant has agreed to relocate the well between Lower Flood and Lower Flood Bend.

(17) LARRS requests that the TRRC relocate the fence between Lower Flood and Lower Flood Bend pastures. The Applicant has agreed to relocate the fence.

(18) LARRS requests that the Applicant place culverts under the track through Lower Flood to accommodate the flood dike system. Applicant has agreed to place culverts under the trackage through the Lower Flood area which will accommodate the flood dike system.

(19) LARRS requests a road along the east side of Hill pasture, and a vehicle pass to North Tongue River pasture. The Applicant has agreed to these requests.

(20) LARRS requests a vehicle pass by old Lone Pine road to access Lower Flood Bend. The Applicant has agreed to construct a vehicle pass adequate for pickups and cattle, with an at-grade crossing for larger equipment.

LARRS requests that, where the railroad meets and removes the all-weather road in Hill Pasture, provisions for new road be provided. The Applicant has agreed to replace this road.

(22) LARRS requests that an underpass be provided where the railroad crosses the gravel road in Hill Pasture. The Applicant has agreed to provide a grade-separated crossing.

(23) LARRS requests that a well be located in Hill Pasture to replace pit reservoir. The Applicant has agreed to provide a non-electrified well.

(24) LARRS requests that the Applicant relocate the tank between Russian wildrye and Hill Pasture in Section 9. The Applicant has agreed to relocate the tank.

(25) LARRS requests an 18x14 ft. vehicle underpass for access to highway tube and 3C Bend Pasture. The Applicant has agreed to provide a grade-separated crossing at this location.

(26) LARRS requests that a well for 3C Bend and fish hatchery be provided. The Applicant has agreed to provide a non-electrified well at this location.

(27) LARRS staff note that they may need a well relocated if the track is too close in the Nursery area. Should the proposed action be constructed, a relocation of the well would be provided by the Applicant. However, under the Branum Lake option, the Nursery will not be affected or disturbed.

Further discussion with LARRS personnel is expected, and it is likely that further detail and clarification will be required. This does ot constitute a final easement agreement.

2.3 Impacts to the Miles City Fish Hatchery

The Supplement to the DEIS presents a discussion of potential impacts to the Miles City Fish Hatchery. Since the issuance of that document, the State of Montana has completed further studies related to future development of the hatchery and adjacent lands. Expansion of the hatchery would conflict with the proposed routing of the Tongue River Railroad. It should be noted that acquisition of ROW across State of Montana property requires a formal application process that affords adequate safeguards and mechanisms to assure that the hatchery, either in its present form or after expansion, will not be adversely affected.

The proper forum for detailed mitigation plans and commitments regarding the hatchery will be the State of Montana easement application process. The state is fully empowered to delineate the terms or conditions under which it will allow a railroad ROW across state property.

(1) If the Branum Lake Option is built, it will require that the Fish Hatchery expansion plans be altered, either by moving a portion or all of the facility. In doing so, new plans will have to be prepared for the project. The Applicant should assist the Department of Fish Wildlife and Parks in the revised planning process, specifically as the new plans would focus on effects of the railroad on hatchery operations, e.g. noise, vibration, potential fuel leaks, etc.

(2) The Applicant should continue to confer with the Department of Fish, Wildlife, and Parks in regard to expansion plans for the hatchery. Every effort should be made by both parties to inform the other as to continuing developments.

3.0 SOCIAL AND ECONOMIC IMPACT MITIGATION

3.1 General

The environmental documentation provides detailed information on those social and economic changes that are associated with development of the Tongue River Railroad. The projections contained in the documents cannot be expected to reflect perfectly every possible impact, but the data will serve to provide state and community planning agencies and personnel with the necessary information to meet the demands for increases in public facilities, personnel, and services.

The environmental documentation demonstrates how, in most cases, the increase in tax revenues accruing to local governments will more than offset increases in the costs of providing increased services and new or expanded public facilities. Local government planning agencies will be able to incorporate this information in their short term and long range planning efforts, thus assuring that proper planning and effective mitigation will be in place prior to the incurrence of impact.

In certain cases, local government and, thus, planning capabilities do not exist in any form capable of addressing the problems that could be presented by the construction and operation of a railroad and accompanying mining development. The community of Ashland, in particular, is not prepared to confront the changes and problems that will occur there. Of particular importance to Ashland will be population growth in the community and the corresponding increased demand for community services.

The Applicant should consult with the county and local governments for the purpose of assisting impacted communities in addressing the problems they face. Among the goals of such an effort would be to:

(1) Assist the community of Ashland in developing a community organization representative of diverse opinion and point of view, for the purpose of addressing and dealing with railroad-related social and economic impacts.

(2) Assist planning agencies and community groups in interpretation and understanding of the data developed in the environmental documentation. The ultimate goal of this task would be to make the information useful on an individual level for businesses and agencies. As the information is updated, for one reason or another, by state or federal agencies, the new information would be made available to these local groups.

(3) Assist planning agencies and community groups in identifying those resources available to them to help deal with antici-

pated impacts, and as a follow-up, to assist these groups in taking advantage of those resources as appropriate. A prime example of such a resource would be monies generated by the Montana Coal Severance Tax, administered by the Montana Coal Board. Numerous other resources and avenues of dealing with problems exist, and the individual would provide guidance in identifying same.

To accomplish these goals, the TRRC will provide all practical assistance to those government planning agencies involved. Of primary importance will be making available the social and economic data generated in baseline studies. This should be quite useful if understood and practically applied by planning agencies.

4.0 TRANSPORTATION IMPACT MITIGATION

4.1 General

Impacts to local transportation systems and facilities that will occur as a result of the development of the proposed Tongue River Railroad can be divided into two general categories. The first category is impacts that will occur during construction of the rail line. The second category is impacts that will result from actual train traffic over the line. Much of the mitigation that will occur for the anticipated impacts will result from ROW negotiations between the Applicant and private landowners or governmental agencies. Some of these anticipated impacts are discussed in the Land Use section, already presented. Most important in terms of this discussion are those impacts that will directly affect public roadways and other existing affected public roadways and other existing transportation systems.

4.2 Construction Impacts

Construction-related impacts will generally involve either increases in vehicular traffic on local public roadways, with the attendant likelihood of greater inconvenience and increased likelihood of accidents, or direct disruption of normal traffic patterns due to construction activities across a road or highway.

The Applicant could mitigate the problem of increased vehicular traffic on local public roads and highways by implementing the following measures during construction activities:

(1) During construction, contractors should be encouraged to provide transportation to the work site from some central location on a daily basis. This central location may be one of the work camps, a point near the northern terminus at Miles City, or some predesignated point elsewhere along the line,

selected to prevent an unnecessary traffic on public roads in the area. Details should be worked out with contractors based on final design criteria, specific tasks or phase of construction, numbers of personnel and equipment and work site.

(2) To the greatest extent possible, all construction-related traffic, including worker transportation as well as equipment movement should be confined to the "pioneer road" that will be developed within the ROW. In instances where it is not practical to confine all traffic to this road, the Applicant or the individual contractors should make necessary arrangements with the appropriate landowners or agencies to gain access from private or public roadways which will minimize traffic impacts to the greatest extent possible. (The "pioneer" road would be used only during construction of the railroad grade and would be relaced by the grade prior to the placement of track).

(3) All Applicant vehicles and equipment, and vehicles and equipment owned and operated by contractors working on the project, should strictly adhere to speed limits and other applicable laws and regulations when operating such vehicles and equipment on public roadways.

(4) In cases where traffic along a public roadway may be disrupted during construction of the railroad, the Applicant should comply with all requirements of the Montana Department of Highways or other appropriate agency. In the absence of such requirements, the Applicant should endeavor to maintain at least one open lane of traffic at all times. Specific plans should be developed by the Applicant, and adhered to by contractors, to assure the quick passage of emergency vehicles. These plans should be coordinated through appropriate local agencies. All construction plans affecting public roadways will have to be submitted to the Montana Department of Highways for review and approval.

(5) The Montana Department of Highways will provide various guidelines and stipulations for crossing such highways as Interstate 94 and U.S. 212. Maintaining normal traffic flows on these roadways throughout construction should be the principal goal of mitigation planning. When this is not possible, the Applicant should provide temporary detours and comply with mitigation measures required by state or local agencies.

(6) In those instances where the disruption of normal traffic patterns or the temporary blockage of important roads or

highways is inevitable, the Applicant should work with the Montana Department of Highways or other appropriate agencies and the contractors to develop plans to time construction activities to coincide with periods of least impact. This may include such measures as working through the night time hours, or perhaps around the clock to speed construction in some locations.

(7) All signing and work zone safety shall be in accordance with the Manual of Uniform Traffic Control Devices.

4.3 Operational Impacts

A significant impact from operation of trains along the new railroad line will be traffic delays at crossings which are not grade separated. Just as important, but less frequent, is the possibility of accidents involving trains and vehicles or pedestrians. To address that impact, the Applicant should undertake the following:

(1) All grade crossings of the new rail line by public roadways should be equipped with warning signs and devices in compliance with current state and federal regulations, requirements and suggestions. To determine the appropriate warning devices for each new crossing, the policy for Railroad Crossing Protection of the Montana Department of Highways should be applied to each crossing, and the appropriate measures implemented.

(2) A combination of Tongue River Railroad and BN traffic immediately downline from the connection at Miles City may require the elimination of certain at-grade crossings and their replacement with grade-separated structures. The Applicant should commit to working with the BN, the Montana Department of Highways, and the Town of Miles City to alleviate any traffic problems in the future. Data developed by the Applicant and the commission on the eventual problem at crossings in Miles City could be used as a starting point in these discussions.

(3) The Applicant should adhere to all state and federal regulations regarding train operations. Such regulations provide for maximum durations of crossing blockage, speed limits within and outside of incorporated areas, candlepower for train lighting, etc.

It should be noted that the State of Montana ROW easement process discussed under 2.3 affords the opportunity to apply specific stipulations and requirements to the TRRC, thus safeguarding the public interest as regards traffic safety.

5.0 AIR QUALITY IMPACT MITIGATION

5.1 General

Impacts to air quality resulting from construction and operation of a new rail line will fall into two general categories. These categories include: (1) the introduction of air pollutants in the form of the products of combustion, generated by construction equipment and railroad engines; (2) the generation of increased quantities of fugitive dust into the air as a result of devegetation, earth moving, general equipment operation, wind; and (3) increased vehicular traffic on unpaved roadways. Simple techniques are available to mitigate these impacts. Since these techniques are universally applicable, and it is not necessary to delineate those that will be used only during construction. The Applicant should commit to the application of the following measures, either as company operational policy or as stipulations for contractors during construction:

(1) All heavy equipment and vehicles used in the construction, operation, and maintenance of the railroad should be subjected to regular inspection and maintenance to ensure that operation is in compliance with manufacturer's specifications and that equipment is running as cleanly and efficiently as possible.

(2) Strict speed limits should be established and adhered to on all access roads and within the ROW, to assure that fugitive dust emissions will be minimized.

(3) The Applicant should recommend to the individual contractors that they provide group transportation (as discussed under transportation impacts) to minimize vehicular traffic on unpaved roads in the area.

(4) When vegetation is removed from the ROW during the early stages of construction, the cleared areas should be kept to the minimum necessary. This will aide in the mitigation of the problems caused by wind erosion and vehicle borne fugitive dust.

(5) In areas where devegetation has taken place, revegetation efforts should commence at the earliest possible opportunity. In those areas where immediate revegetation is not possible, alternative stabilization measures should be implemented. These measures could include matting, mulching, and even mulching with seed and fertilizer. (More details on revegetation are presented section 10.3 of this Master Mitigation Plan.)

(6) Dust suppression at all work areas within the ROW and at work camps, staging areas, etc., should be accomplished with the use of water trucks. Arrangements for the acquisition of water should be made with either local landowners, agencies or associations. It is anticipated that such activities would occur regularly and frequently during the driest periods.

(7) Any open burning required for the purpose of slash disposal or for any other reason during construction or operation of the rail line should be conducted in strict accordance with local regulations. All necessary permits should be obtained and all necessary safety precautions observed.

6.0 NOISE IMPACT MITIGATION

6.1 General

Noise impacts that are likely to occur as a result of construction and operation of a new railroad fall into two distinct categories. The first category is noise associated with construction activities, heavy equipment operation, a variety of vehicular traffic, etc. The second category is the noise that will result from trains operating along the new rail line. Several mitigation strategies listed here can be employed to mitigate construction noise impacts. It should be noted that the level to which construction noise impacts will occur to sensitive receptors is dependent upon route selection and final centerline location. More specific measures will be apparent at that time. Mitigation of noise impacts from train traffic is difficult, and is dependent to some degree upon volume of traffic as well as volume of downline traffic of all types on the BN mainline. As a result, most of the measures suggested here would require negotiations between the Applicant and the BN for any final implementation.

(1) When feasible, all major noise-producing activities during construction should be scheduled to occur during the weekday and daylight hours.

(2) In cases where such activities as the normal schoolday would be interrupted by noise interference, the Applicant should make every attempt to schedule the activities in a manner most acceptable to those impacted. This could include weekend or evening work in some cases. If this is not possible, consultation with school officials may result in workable solutions. This concern is specific to the Ashland area and St. Labre school.

(3) The Applicant should require all contractors to use internal combustion equipment only if properly installed mufflers are

provided. Further, all equipment used for construction should comply with all applicable federal, state, and local noise regulations which reflect the current feasibility and practicality of equipment and activity noise reduction.

(4) During operation, Tongue River Railroad trains will have to observe standard regulations regarding speed limits in incorporated areas to limit noise impacts. The Applicant should observe those same speed limits while trains are passing through the unincorporated community of Ashland due to the proximity of numerous dwellings.

(5) The TRRC rail corridor extends through primarily rural and sparsely populated areas. Most of the dwellings in these areas are outside of the threshold for significant disturbance from noise. However, specific areas in Ashland and Miles City could experience interruptions from noise associated with TRRC trains. A noise monitoring program should be established at these locations to measure the noise levels as train traffic increases during later years of operation. This information would assist the TRRC and community officials in developing noise abatement strategies as they are needed.

(6) In special cases, more direct noise abatement measures may be required. For example, the Applicant has agreed to provide a tree buffer between the Spotted Eagle Lake recreation area and the ROW. This buffer would serve the dual purpose of easing the impact of noise upon those pursuing recreational activities and also moderating the visual impact to that area. Similar measures may be required on certain private holdings along the ROW. These would be identified during negotiations between the individual landowners and the Applicant.

7.0 SAFETY IMPACT MITIGATION

7.1 General

The heading Safety Impacts encompasses several broad areas of potential impacts. The first consideration under this heading is the prevention of construction-related accidents. A second consideration is the public safety as it relates to such occurrences as derailments, fuel spills, other toxic material spills, and other catastrophic events. A third general category includes the prevention and suppression of railroad-caused wildfire. Concerns regarding the potential for and response to train/vehicle and train/pedestrian crossing accidents are also topics considered here.

7.2 Construction Safety

Adherence to normal construction safety practices will minimize the potential for construction-related accidents. All contractors should hold safety meetings for their workers and assure that each person is cognizant of the safety measures and procedures expected in each work situation. Other actions which will enhance the overall safety situation include:

(1) Contractors should be encouraged to provide group transportation to the job site, as discussed under that heading.

(2) Speed limits for all construction vehicles and equipment, both on and out of the ROW, should be enforced.

7.3 Emergency Situations

A variety of events here classified as "emergency situations" could occur along the ROW, during either construction or operation of the railroad. These include such things as derailments, oil spills, and toxic substance spills. The Applicant should implement a number of general measures that can be used to initiate specific actions in response to emergency situations.

(1) Planning Framework. The Applicant should develop an internal emergency response plan, which is consistent with Montana State plans authorized under Title 10 Montana Code Annotated (MCA), in an effort to avoid duplication. Such plans could include:

a. Emergency notification plan whereby a priority list of agencies and individuals to be notified in a specific emergency is prepared. The plan would include names and phone numbers of individuals to be contacted in case of such events as an herbicide spill, fuel spill, range fire, and medical emergency.

b. Procedures to be followed by railroad operation and maintenance personnel in case of such an event, including specific responsibilities by individual.

c. Directions for most timely response and fastest emergency vehicular access to any particular section of the rail line.

d. Locations and inventories of all emergency equipment, and any standard operational equipment which may be useful in dealing with emergencies.

(2) Cooperative Planning/Contacts. The Applicant should establish cooperative relationships with all local and state agencies that have responsibilities for disaster/emergency planning and response. The Applicant should provide operation plans and copies of the response plans noted in item (1) above to such agencies for review and suggestions. Comments from these organizations should be incorporated as necessary. These state and local agencies are to include, but are not limited to:

a. Fire departments in Miles City, Broadus, Ashland, and other rural units along the route.

b. Local ambulance and emergency medical services, as well as air evacuation services in Billings.

c. Disaster and Emergency Services Division of the Department of Military Affairs, Helena. This is likely the most important contact in case of a major emergency in terms of developing a coordinated response.

d. The Montana Department of Health and Environmental Sciences (especially the Water Quality Board).

e. The Montana Department of Fish, Wildlife, and Parks.

f. The Montana Department of State Lands, Land Administration Bureau.

g. The Montana Department of Natural Resources and Conservation, Water Resources Bureau.

h. U.S. Department of Agriculture, Fort Keogh Livestock and Range Research Station.

i. U.S. Bureau of Land Management or U.S. Forest Service (recent reorganization proposals may transfer local segments of the Custer National Forest to the BLM for management).

j. Other local agencies or groups which are identified as key to disaster.

(3) Fire Prevention and Suppression. The Applicant should develop a wildfire suppression and control plan for fires occurring on the ROW as a result of traffic or undetermined causes. The following considerations should be included in the plan.

a. The plan should be developed after final engineering and overall operation plans are complete. This will afford planners the benefit of special information regarding exact location of centerline, access points, and equipment and personnel which might be of use in case such an event occurs.

b. State-of-the-art techniques for fire prevention and suppression should be evaluated and included in the plan as applicable. Where an industry-wide standard exists, it should be adhered to or improved upon.

c. During third phase engineering, the Applicant should attempt to provide the greatest possible access to all portions of the ROW, in terms of grade crossings and gates, in an effort to minimize response time. Certain areas adjacent to the ROW are more accessible than others. The Applicant should recognize topographic differences in providing access for emergency vehicles crossing the rail line. While there are no industry standards for determining the preferable distance between crossing points, it should be shorter in rougher terrain than it would be in more accessible areas. The Applicant should consult other railroads to ascertain the appropriate distance between access points.

d. Since the Applicant will be a significant taxpaying entity, it can be assumed that the emergency assistance of the various tax-supported fire districts will be an integral part of this plan [see item (2) above]. It should be noted, however, that many rural fire districts operate on a strictly volunteer, unfunded basis. In such cases, the Applicant should develop relationships with these local organizations for the purpose of implementing funding agreements. A formula should be established, based on criteria applied by other railroads in the region, to determine the amount of funding per group.

e. The Applicant should commit to all reasonable efforts to protect property, livestock, and the general public from damage due to Tongue River Railroad-caused fires. In addition, the Applicant should make every effort to assure adequate access to all areas on all sides of the ROW. All serious concerns and suggestions should be explored for practicality, usefulness, economic considerations, etc.

f. The Applicant should observe all applicable operational regulations promulgated by the Federal Railroad Adminis-

tration. This will also serve to minimize the potential for railroad-caused fires.

(4) Oil Spill Prevention and Control Plan. The Applicant should develop, in concert with the appropriate agencies and private concerns, plans to prevent spills of oil or other petroleum products, both during construction and operation and maintenance. The plans developed should include those stipulations that would be imposed on firms involved in construction of the rail line. An aspect of such plans would be the emergency notification procedures, discussed in item (1) above. Other items that would be included are:

a. Procedures for reporting spills.

b. Definition of what constitutes a spill.

c. Methods of containing, recovering, and cleaning up spilled oil.

d. A list of needed equipment and locations of same.

e. A list of all agencies and management personnel to be contacted, as in item (2) above.

f. Assurances that techniques and procedures to be employed in cleanup are representative of the best technology currently available.

In addition to the items listed here, the stipulations to be followed during construction would be developed, in the form of guidelines based on the tasks to be accomplished by the individual contractors. Among the stipulations that could be employed are:

a. Care during refueling to guard against overflows.

b. Storage of fuel only in metal storage tanks surrounded by impervious dikes capable of containing greater than the capacity of the tank.

c. Removal of waste oil to appropriate sites, away from the ROW.

d. Keeping equipment in good running order and conducting routine maintenance activities at locations removed from the ROW.

Specifics of these plans should be discussed and refined with the appropriate agencies, and the plans should be in force at the start of construction.

(5) Toxic Materials Spills. It is not anticipated that the Applicant will be involved with the transport of toxic materials. This consideration is included to account for the possibility that herbicides may be accidentally introduced to other than the designated portions of the ROW. (See vegetation discussion of noxious weed control.) The same general approach discussed under items (3) and (4) above should be taken, with immediate notification of the appropriate agencies and personnel being given priority equal to immediate containment. Procedures should comply with the law, regulatory guidelines, and the best technology currently available. Application of herbicides is a licensed activity and is done under strict supervision, and as such, response should be nearly instantaneous.

8.0 HYDROLOGY AND WATER QUALITY IMPACT MITIGATION

8.1 General

A wide variety of state and federal regulations and permit processes are in place to assure that overall water quantity and quality is not altered or diminished by activities such as the proposed Tongue River Railroad. Detailed permit applications are submitted to various agencies for the purpose of assuring that construction and operational activities on or near any waterways are conducted in such a manner as to provide minimal impact to those areas. Permit processes in which the Applicant is currently involved include:

(1) U.S. Army Corps of Engineers "404" Permit process for all bridges and other structures occurring on designated streams (perennial). This process is required for each major bridge crossing of the Tongue River and Otter Creek as well as each area where rip-rap is to be installed. This process requires detailed environmental data as well as construction data. Permits are issued with accompanying stipulations to limit environmental impact to the greatest degree possible.

(2) The "310" Permit process, jointly administered by the local Conservation Districts and the Water Quality Bureau of the Montana Department of Health and Environmental Sciences. This process is very similar to the "404" process previously discussed. Similar procedures for attaching stipulations to a permit also are followed.

(3) Temporary Discharge or "Turbidity Exemption" permits are being sought from the Water Quality Bureau of the Montana Department of Health and Environmental Sciences. These permits are required wherever construction activities may cross any stream bed or bank (ephemeral or perennial). As a

result, each crossing of a stream bed, dry or not, requires such a permit.

(4) Since the State of Montana holds title to the stream bed of the Tongue River, the bridge crossing will require additional authorization under the easement application process. The regulatory authority of the state, administered by the Department of State Lands, will further safeguard the public interest and the affected resource.

In addition to these very detailed permit processes, a number of other safeguards can be built into the final design of the rail line. Some of these include:

(1) All culverts and other drainage structures installed at ephemeral and perennial stream crossings will be designed to pass the projected 100-year flood.

(2) Where possible, the proposed route is designed to avoid the flood plain. Where the railroad grade does infringe upon the flood plain, drainage structures should be installed to assure that the grade does not restrict or re-route the 100-year flood.

(3) To prevent unnecessary degradation of water quality due to erosion, revegetation efforts should begin as soon as possible after construction is complete in a given area. (See revegetation section, 10.3.)

(4) Spills of fuel or other toxic or hazardous substances which may affect water quality should be addressed in the manner described in the section on safety.

(5) Construction of all stream crossings, including bridges and culverts and such activities as require stream bank encroachments (rip-rap, for example), should be timed to occur during periods of low or no flow in the streams affected. The vast majority of stream beds traversed by the railroad are dry most of the year, so such scheduling should not be difficult.

It also should be noted that a study has been conducted to determine the extent to which the Tongue River Railroad would constrict the flood waters from a disaster such as a breach of the Tongue River Dam. The study shows that the railroad grade would, to some extent, alter the inundation pattern, but would not lead to any increase in damages to humans, livestock or prop-erty. Further, it would not appreciably affect the disaster plans as discussed in the Tongue River Dam Emergency Warning and Evacuation Plan, published by the Montana Department of Natural Resources and Conservation.

9.0 AQUATIC ECOLOGY IMPACT MITIGATION

9.1 General

Impacts to acquatic resources from the proposed Tongue River Railroad are likely to occur only in those areas where the railroad grade directly infringes upon the stream bank or stream bed. Such places include river crossings requiring bridge construction and areas where rip-rap is required for stream bank stabilization. In coordination with state agencies, primarily the Department of Fish, Wildlife, and Parks (MFWP), the Applicant should proceed with detailed, site-specific inventory work of potential impact sites, upon the completion of third phase engineering. Based upon the results of the work, specific mitigative measures can be determined and applied. The biologist conducting the work would be subject to the approval of MFWP personnel.

(1) Aquatic Resource Sampling. For those locations where the proposed Tongue River Railroad would cross the Tongue River, or where extensive rip-rapping would occur, a three-part plan of study should be undertaken to identify aquatic resources. The results of the study would be utilized in the development of mitigation plans. The three-part plan of study includes: (a) a stream habitat survey to identify existing habitat features and values; (b) benthic macroinvertebrate sampling to identify community composition and numbers; and (c) fish spawning survey to determine the importance of the area to spawning of game fish.

a. Stream Habitat Survey. The stream habitat survey should utilize methods described in "Methods for Evaluating Stream, Riparian, and Biotic Conditions."[4] Stream transects would be established in appropriate locations to evaluate existing conditions and to monitor changes during construction. Along each transect, the following variables would be measured:

1. stream width
2. stream shore depth
3. stream average depth
4. pool (ft.)
   (a) quality

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[4]William S. Platts, Walter F. Megahan, and G. Wayne Minshall, "Methods for Evaluating Stream, Riparian, and Biotic Conditions," General Technical Report Int-138, Intermountain Forest Range and Research Experiment Station, Ogden, Utah.

(b) forming feature
5. riffle (ft.)
6. run (ft.)
7. substrate
   (a) boulder (greater than 12 inches)
   (b) cobble (12-2.5 inches)
   (c) coarse gravel (2.4-.5 inches)
   (d) fine gravel (.4-.1 inches)
   (e) sand
   (f) clay
8. stream bank soil alteration rating
9. stream vegetative stability rating
10. stream bank undercut and angle
11. vegetation overhang
12. embeddedness

b. Benthic Macroinvertebrates. Quantitative samples of benthic macroinvertebrates should be collected immediately upstream and downstream of each proposed location of disturbance. The collected specimens should then be counted and identified at least to genus and to species where possible. The composition of the community should be described.

c. Fish Spawning Survey. Several species of game fish spawn in the Tongue River, including sauger, walleye, channel catfish, smallmouth bass, and sturgeon. A game fish spawning potential survey should be conducted at each proposed bridge location as well as areas of proposed extensive riprapping. Sampling periods for the spawning survey would be early spring after ice breakup, after peak runoff, and in the fall. Collection methods would include electro-shock, seining, trap netting, and fry sampling.

(2) Mitigation Techniques. Once sampling has been completed and detailed data on the aquatic resource to be affected have been obtained, mitigative measures can be delineated. Some of the measures that could become necessary include:

a. Preparation of a construction schedule which provides for instream work at those times least critical to the specific fishery or aquatic resource occurring at a site, as well as the period least conducive to sediment transport. Such periods differ by stream and species affected.

b. Developing special procedures for handling of displaced materials and petroleum products to prevent introduction

of such materials into the aquatic system. The procedures referred to here would be dictated by site-specific geographic and construction criteria.

c. Running silty water through settling pond systems when dewatering for footing construction is required.

d. Assuring that backfill at crossing and rip-rap sites is washed and essentially silt-free.

e. Double-shifting at crossing sites to minimize the duration of construction activities in or near stream banks.

It should be further noted that all sampling activities have been suggested by and would be coordinated with the Montana Department of Fish, Wildlife, and Parks. It is likely that MFWP personnel will be responsible for any electrofishing aspects of the inventory.

10.0 TERRESTRIAL ECOLOGY IMPACT MITIGATION

10.1 General

Two areas of concern are addressed under the overall heading of terrestrial ecology -- wildlife and vegetation. The thrust of the terrestrial mitigation plan will be to provide additional information and options for avoiding unnecessary impacts to vegetation and wildlife. All individuals conducting further wildlife or vegetation studies will be qualified individuals, as is the policy of the ICC. If necessary, these individuals will be approved by the MFWP.

It should also be noted that the State of Montana has expressed an interest in the possibility of some form of compensation for habitat loss due to ROW construction. Through the Department of Fish, Wildlife and Parks, the State of Montana has suggested five additional areas that could be considered by the TRRC as part of final ROW negotiations with individual landowners. These are:

(1) The participation by the TRRC in the development of a "compensation" program for lost wildlife habitat along the rail line. Compensation could include the purchase by the TRRC of "cut-off" land parcels containing good wildlife habitat, and the donation of these lands to the Department of Fish, Wildlife and Parks for beneficial wildlife management.

(2) The construction of wildlife-related ponds adjacent to, or using the railroad grade as a dam. These could include "dugout" type ponds, and "bypass" ponds de signed to be filled during high flows.

(3) The providing of public access, in appropriate locations, along the rail line ROW.

(4) The granting of conservation easements by the TRRC along the rail line.

(5) Fencing that would not restrict the movement of big game animals wishing to cross the railroad ROW.

Implementation of any of these measures would have to await ROW negotiations with affected landowners. Therefore, it is not possible or desirable to suggest adoption of any of the specific measures listed at this time. It should be noted that the State of Montana's regulatory authority over easements across state lands would provide a vehicle for addressing the DFWP's concerns.

The TRRC should work with the Montana Department of Fish, Wildlife and Parks to evaluate the feasibility of these actions. Some measures, such as conservation easements, public access, etc. might conflict with adjacent landowner wishes. Implementation of these measures, therefore, would have to be reasonable, practicable, and take into account the concerns of all parties.

10.2 Wildlife

The kinds and amounts of habitats that will be lost during construction of the Tongue River Railroad were identified in the environmental documentation. Avoidance by wildlife of normal use areas adjoining the construction site is considered to be a short term impact that will be mitigated by the completion of construction; wildlife will simply reoccupy those areas where their normal use patterns have been disrupted. Mitigation of other impacts, however, requires identification of those sites where impacts may occur. Once sites are identified, numerous mitigation techniques can be developed and applied to deal with specific cases. The following methods can be used to identify those sites:

(1) An updated aerial survey should be conducted during the winter before construction begins. An aerial survey may identify new winter ranges, as well as locate any new prairie dog colonies along the route.

(2) A thorough ground reconnaissance should be conducted between April 15th and May 15th. During this period, grouse leks will be active, raptors will be nesting, and winter ranges may still be identifiable. The entire ROW should be covered, preferably by walking. In some areas it will be possible to cover the ROW by vehicle, but much of the route will be accessible only on foot.

(3) The purpose of reconnaissance will be to locate big game winter range based on evidence, such as animal remains, hair, pellet groups, etc.; locate any prairie dog colonies that were not recorded during the aerial survey; locate sage grouse and sharp-tailed grouse leks; and locate raptor nests, particularly golden eagles and prairie falcons. Evidence of threatened or endangered species, such as black-footed ferrets and peregrine falcons, would also be sought during the reconnaissance.

(4) Any specific use sites that are located during the reconnaissance should be mapped, described in field notes, and photographed. Nesting raptors should not be disturbed, but nests should be described as active or inactive.

(5) Sage and sharp-tailed grouse leks should be located by listening for displaying males at dawn. Lek locations should be mapped. If possible, a count of the displaying males should be made. If lek sites are discovered later in the day after displaying has ceased and/or birds have left the site, the site should be revisited the following morning or as soon as possible.

(6) Prairie dog colonies that are intersected by the ROW should be mapped to their approximate size on 1:24,000 USGS topographic maps. Following the field reconnaissance, the size of these colonies should be planimetered and a rough estimate of the existing population should then be made by comparison with results reported in the literature.

(7) Prairie dog colonies also should be searched for evidence of black-footed ferrets, following the methods outlined in "Handbook of Methods for Locating Black-footed Ferrets."[5] Ferret presence is most easily detected in late summer and during winter (December 1-April 15). The search along the Tongue River Railroad ROW should occur during the winter period, when evidence is most easily discerned.

Colonies affected by the right-of-way should be searched at least once and preferably three times. All colonies should be surveyed on foot, by walking transects spaced approximately 50 m apart back and forth across the colony. Any evi-

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[5]T.W. Clark, T.M. Campbell III, M.H. Schroeder, and L. Richardson, "Handbook of Methods for Locating Black-footed Ferrets," U.S. Bureau of Land Management, Wildlife Technical Bulletin No. 1 (1983), Cheyenne, Wyoming.

dence of ferrets, such as digging, tracks, scats, skulls, etc., should be photograhed and, where appropriate, collected. Scats and skulls should be identified following the keys in the "Handbook." If ferret evidence is found, the proper authorities should be notified following procedures of the Endangered Species Act.

(8) Similarly, although it is highly unlikely that nesting peregrine falcons will be found along the ROW, any occurrence of nesting activity should be properly recorded and reported.

10.2.1 Mitigative Measures

The TRRC should commit to implementing all reasonable and practical measures that result from studies conducted during third phase engineering. These may include some of the following measures:

(1) Construction Timing. The primary method of impact mitigation for wildlife is timing construction activities. All reasonable attempts should be made to avoid construction at big game wintering sites from December through March.

(2) Fawning Sites. Timing of construction may be less effective in mitigating disturbance at "fawning sites," because this term cannot be consistently applied to a given geographic location. That is, a site where deer or antelope fawns are born in one year may not be used in the following year.

Most fawns are born during the period May 15 - June 30. Late in the reconnaissance period, any single female deer or antelope that are observed should be assumed to be at or near a potential fawning site. The locations of these individuals should be mapped. On an individual basis, it may be possible for construction activities to avoid these sites during the fawning period. However, if construction cannot be delayed, the resulting impact (displacement of pregnant females to another location) should not significantly affect these species.

(3) Black-footed Ferrets. If black-footed ferrets or their evidence are found in any affected prairie dog colony, appropriate regulatory authorities should be consulted. It will probably be necessary to examine these sites on several occasions to determine whether or not ferrets are currently present in the colony. If a ferret population is present, the proper authorities should be consulted to determine the probable long term impact to ferrets if construction proceeds through the colony. Since ferrets are primarily nocturnal and may not be particularly disturbed by human presence, it

may be possible to time construction activities during the day when ferrets are least active.

(4) Raptors. It is highly unlikely that eyries of the endangered peregrine falcon or bald eagle will be encountered along the ROW. If such nests are found, the appropriate authorities should be contacted. Any active golden eagle or prairie falcon eyries located during the reconnaissance should be mapped. If the ROW passes adjacent to such eyries, construction in the affected area should be timed to avoid the critical incubation and early rearing period (April 1-June 30).

10.3 Vegetation

Vegetation concerns related to the Tongue River Railroad are primarily divided into two categories, reclamation and noxious weed control. Reclamation of devegetated areas is important for a variety of reasons, including the prevention of erosion, limitation of air pollution by fugitive dust, contribution to the stability of the railroad grade, and the importance of providing wildlife habitat. Noxious weed control is an area of great concern to local agricultural operations and should be a priority of Applicant operation and maintenance personnel.

(1) Reclamation. Reclamation or revegetation of the ROW should commence at the earliest possible time after clearing has been completed. In most cases, such revegetation cannot begin until construction is complete. But, wherever possible, it should be expedited. The following are general concerns and practices that should be employed in the process:

a. Preconstruction Planning. Successful reclamation begins with thorough preconstruction planning. Elements of such planning should contain the following:

1. Designation of sensitive areas.
2. Proposed time schedule of construction activities.
3. ROW clearing and site preparation plans.
4. Erosion and sediment control plans.
5. Waste disposal plan.
6. Restoration, reclamation, and revegetation plan.

b. Restoration/Reclamation Plan. Elements of an adequate restoration and reclamation plan include:

1. Starting reclamation immediately after construction ends, with the goal of rapidly re-establishing

ground cover on disturbed soils, with all cut and fill slopes mulched and seeded as they are completed.

2. Avoiding reclamation when soil moisture is high or ground frozen.

3. Analyzing site soil requirements and seasonal precipitation patterns to identify planting dates for optimal revegetation success.

4. Use of rapidly establishing plant species for thorough and rapid ground surface protection.

5. Providing a reclamation specialist to determine specific procedures for areas with reclamation problems such as on steep slopes or locations near waterways.

c. Revegetation Success Assurances. To ensure revegetation success, the following measures should be taken:

1. Determination of type and quantity of seed, kind of fertilizer, and other soil amendments based on soil chemical and physical properties should be made, with emphasis on native species where possible.

2. Topsoil should be segregated from subsoil and stockpiled for later application on the reclaimed ROW.

3. Only seed of registered quality and germination success should be utilized.

4. Appropriate seeding techniques should be used, such as drill seeding on level terrain and broadcast or hydroseeding on slopes to ensure distribution of seed mixture on individual microenvironments.

5. The Applicant should use mulch material, such as straw and woodchips, as a temporary erosion measure and to minimize soil temperature fluctuations and soil moisture loss. Mulch should be applied more heavily on slopes than on level terrain and nitrogen levels adjusted to reflect the increased demand during mulch decomposition.

6. The seeded area should be covered and compacted following seeding.

7. A minimum of 20 lbs./acre of pure live seed should be used throughout the route.

8. For slopes and construction areas near waterways, a variety of methods including sediment raps, berms, slope drains, toeslope ditches, diversion channels, sodding, and mulching should be used.

9. Reclamation should be monitored, and regrading eroded surfaces and revegetating areas not successfully reclaimed should be undertaken.

d. Provisions for Areas of Special Concern

1. Stream Crossings. Banks should be stabilized with naturally occurring trees, shrubs, and grass. Riprap or gabions should be used only as a supplement or where such methods would improve fish habitat, or in cases where engineering requirements so dictate.

2. Construction Sites. All litter, debris, and soils associated with petroleum spills should be removed prior to reclamation. An approved landfill may be used.

3. Slopes Greater Than 3:1. On cut and fill slopes steeper than 3:1 but less than 2:1, serrations should be made parallel to the slope to act as stable seed beds and sediment traps. Mulching and seeding should be conducted using hydroseeding/mulching equipment. Every attempt should be made to minimize foot traffic on the reclaimed slopes until vegetation is well established.

(2) Noxious Weed Control. The first step in the control of noxious weeds is reclamation of disturbed land along the railroad construction corridor before use by the railroad. This will limit bare soil required for optimal weed colonization. Following establishment of revegetation species and coincident with the beginning of rail transport, a noxious weed control program should be implemented. This program is intended to control all Montana's designated noxious weeds. It is not intended to control invader grass species.

The program should consist of a spray program using 2-4D at one pound per acre beginning June 1st and at monthly intervals until late September. This formulation should be used

on all areas of the ROW except near waterways, where Weedar 64 (a nontoxic form of 2-4D amine) should be substituted. The spray sequence has been chosen to ensure that weed plants do not reach maturity and therefore seed dispersal before being irradicated by the herbicide. All precautions normally used around herbicides should be followed and it is recommended that 2-4D amine, rather than 2-4D ester, be used because of its lower volatility. Records of application dates should be kept and referenced to ensure that program goals are fulfilled.

All activities should be conducted according to applicable regulations and guidelines, and should be coordinated with local weed control districts. In all cases, only trained, licensed, personnel should be involved in applications. Coordination with local ranchers would be an acceptable element of the overall plan, at the request of those individuals.

The Applicant should work with the local weed control districts to establish schedules for herbicide applications. In establishing the schedule, a provision should be made that, if the Applicant does not apply the measures by an agreed date, the weed control district would have the authority to implement the appropriate measures and to be reimbursed by the Applicant for those efforts.

(3) Threatened and Endangered Plant Species. As of 1984, a document prepared by the Montana Rare Plant Project and titled Vascular Plants of Limited Distribution in Montana contains listings of plants that are currently or likely to become legally protected.[6] As a result of this effort, species that might occur in southeastern Montana have been identified. During the course of other activities, biologists will be aware of potential habitats for the species listed in the document cited. If examples of any such species are encountered, appropriate actions will be determined through consultation with governmental authorities.

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[6]P. Lesica, G. Moore, K.M. Peterson, and J.H. Rumely, "Vascular Plants of Limited Distribution in Montana," Monograph No. 2, Montana Academy of Sciences, Supplement to the Proceedings 43(1984):11-12, 18, 21.

11.0 CULTURAL RESOURCES IMPACT MITIGATION

11.1 General

Construction of the Tongue River Railroad will have an effect upon cultural resources (historic, prehistoric archeological, and architectural) that may be on or eligible for nomination to the National Register of Historic Places (NRHP). After selecting and surveying an alignment, but prior to the initiation of third phase engineering, a Memorandum of Agreement (MOA) should be developed in consultation with appropriate authorities.

The (MOA) would detail: (1) the survey boundaries and methods to be followed in conducting an intensive pedestrian survey of the alignment; and (2) the steps and plans to be followed in treating cultural resources that are determined to be eligible for listing on the NRHP and that may be adversely impacted by the construction and operation of the railroad. The (MOA) should take into account, but not be restricted by, the guidelines set forth in Section 106 and 110f of the National Historic Preservation Act (16 U.S.C. 470) and its implementing regulations, "Protection of Historic and Cultural Properties" (36 C.F.R. 800).

During the preparation of the environmental documentation for the proposed railroad, a number of cultural resources were tentatively identified. A preliminary determination of eligibility was made for each site. The pedestrian survey conducted according to the terms of the SIIAP would provide the TRRC with more complete information about the presence of cultural resources in the study area. Utilizing the SIIAP, the Applicant should provide the following information regarding cultural resources:

(1) Identification. The pedestrian survey should accurately locate all historic, prehistoric, and architectural sites located within the ROW and buffer area. In addition to locating all cultural resources, Applicant should photograph each site, prepare site maps and written descriptions, and document the development of each site, based on records research and oral interviews.

(2) Evaluation. Each cultural resource site should be assessed using the criteria for evaluation (36 C.F.R. 60.6) to determine whether the site meets the eligibility requirements for listing on the NRHP.

(3) Impact Assessment. Based on the above evaluations, the Applicant, in consultation with appropriate authorities, should determine whether eligible cultural resource sites will be impacted, directly or indirectly, by construction and/or operation of the railroad.

(4) Mitigation. The SIIAP should contain a detailed procedure that should be followed if an eligible cultural resource site will be adversely impacted by the construction and/or operation of the railroad. The mitigation measures should include but not be limited to those set forth in the ACHP's "Manual of Mitigation Measures (MOMM)."[7]

The Applicant should prepare a cultural resource technical report that will detail the results of the field survey. The report should contain information on all sites identified, an evaluation of each site, and a recommendation for further work on all eligible sites that may be impacted during construction and/or operation of the railroad. The report also should contain recommendations for mitigating impacts to each site.

12.0 SUMMARY

The successful mitigation of impacts associated with the Tongue River Railroad will require cooperation and coordination among a wide variety of individuals, state and federal agencies, and local governments. A complex body of regulations applies to most aspects of construction and operation of such a project. In order to comply with the regulatory requirements imposed upon the Applicant, it may become necessary to adjust non-regulated aspects of the suggested mitigation procedures. It is safe to assume that certain conflicting mitigation concerns will occur. In such cases, it is important that lines of communication be maintained between all parties.

A number of tasks remain to be accomplished in terms of development of the Final Mitigation Plan. Most of these tasks are presently constrained by the permitting process itself, but will be accomplished once a decision to proceed is made. These tasks include, but are not limited to:

(1) Individual ROW negotiations with landowners, to include site-specific mitigation provisions.

(2) Easement negotiations with the U.S. Department of Agriculture for the ROW through LARRS, to include detailed mitigation stipulations.

(3) Easement negotiations with the Montana Department of State Lands, the Montana Department of Fish, Wildlife, and Parks,

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[7]Department of the Interior, National Park Service, Advisory Council on Historic Preservation, "Manual of Mitigation Measures (MOMM)," October 12, 1982.

and the U.S. Bureau of Land Management for ROW across lands under the control of those agencies. It is assumed that numerous site-specific mitigation stipulations will be included in resulting agreements.

(4) Development of a detailed construction traffic control plan.

(5) Development of construction mitigation stipulations to be required of all contractors providing services to the Applicant.

(6) Conduct field studies of impacted aquatic habitat.

(7) Conduct field wildlife surveys.

(8) Develop site-specific revegetation and weed control plans.

(9) Develop cultural resources management plans.

Where the specific requirements of these various planning instruments come into conflict, certain priorities must be established to resolve differences. In all cases, regulatory requirements should take precedence over matters of convenience, either to the Applicant or to other parties. In cases where the public health or welfare is at issue, such concerns should take precedence over matters of economic, spatial, or temporal convenience.

APPENDIX C

AGENCY SERVICE LIST