

## **1.1 Introduction**

On October 16, 2012, Tongue River Railroad Company, Inc. (TRRC) filed a revised application with the Surface Transportation Board (Board)<sup>1</sup> pursuant to 49 United States Code (U.S.C.) § 10901 in Docket No. 30186. TRRC requested authority to construct and operate an approximately 83-mile common carrier rail line between Miles City, Montana, and two end points, one near the site of the previously planned Montco Mine near Ashland, Montana, and another at the proposed Otter Creek Mine in the Otter Creek area east of Ashland, Montana. On December 17, 2012, TRRC filed a supplemental application that supersedes the October 16, 2012 revised application. As discussed in its supplemental application, TRRC modified its proposal by identifying its preferred route for the proposed line as the 42-mile Colstrip Alternative between Colstrip, Montana, and Ashland/Otter Creek, Montana.

Including TRRC's preferred alternative, the Office of Environmental Analysis (OEA) identified five build alternatives and two variations for detailed study in this Draft Environmental Impact Statement (EIS). The two variations combine to replace one segment of each build alternative. As a result, 10 point-to-point build alternatives were carried forward for analysis (Chapter 2, Section 2.1.3, *Alternatives Selected for Detailed Study*).

TRRC's preferred alternative and seven other build alternatives would cross portions of Custer, Rosebud, and Powder River Counties, Montana. Two build alternatives would cross Big Horn County (Figure 1-1). BNSF Railway Company (BNSF) is part owner of TRRC's parent company, Tongue River Holding Company, LLC, and is a party to the application because BNSF proposes to operate the rail line once constructed by TRRC.

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<sup>1</sup> The Board is a bipartisan, independent adjudicatory body, organizationally housed within the U.S. Department of Transportation (USDOT). The Board was established by the Interstate Commerce Commission Termination Act of 1995 (49 U.S.C. §§ 10101 *et seq.*; Public Law 104-88, December 29, 1995) to assume some (but not all) functions of the Interstate Commerce Commission (ICC), particularly those related to the regulation of freight rail lines. The Board has jurisdiction over rail line rate and service issues, and rail structuring transactions, such as new line construction, line sales, line abandonments, and rail line mergers.

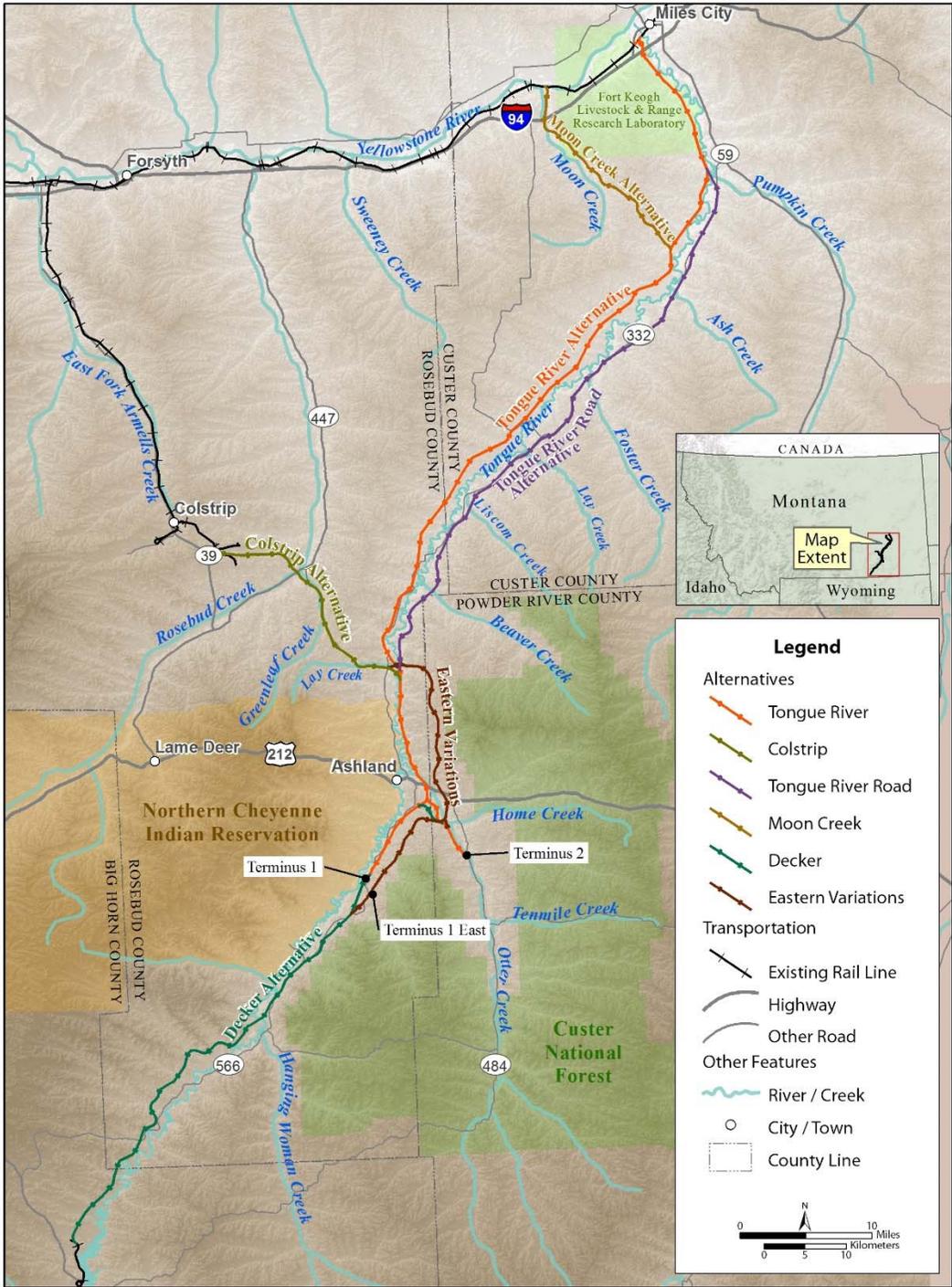


Figure 1-1. Project Area

## 1.2 Background

In 1986, the Board's predecessor agency, the Interstate Commerce Commission (ICC), gave approval to TRRC's predecessor to build and operate an 89-mile rail line between Miles City, Montana and two termini located near Ashland, Montana, a proceeding known as Tongue River I.<sup>2</sup> The primary purpose of the line was to serve proposed new coal mines in the Ashland area. In 1996, the Board authorized TRRC to build a contiguous 41-mile rail line from Ashland to Decker, Montana, in Tongue River II.<sup>3</sup>

In 2007, the Board authorized TRRC to build and operate the Western Alignment, a 17.3 mile alternate route for a portion of the route already approved in Tongue River II in a proceeding known as Tongue River III.<sup>4</sup> The ICC/Board's environmental staff, now OEA, prepared an EIS for each of the three proceedings.

Petitions for review of Tongue River II and Tongue River III were filed in the U.S. Court of Appeals for the Ninth Circuit, and, in 2011, the court affirmed in part, and reversed and remanded in part, those decisions for additional environmental review.<sup>5</sup> Although the Tongue River I proceeding was not before the court, the Board determined that the court's decision required the Board to revisit the environmental analysis for Tongue River I, because the Board had conducted a cumulative impacts analysis for the entire line in Tongue River III and had made the resulting mitigation conditions applicable to the entire line in its Tongue River III decision. TRRC subsequently informed the Board that it no longer intended to build the Tongue River II and Tongue River III portions of the railroad (the portions from Ashland to Decker).

On June 18, 2012, the Board issued a decision dismissing the Tongue River II and Tongue River III proceedings and reopening the Tongue River I proceeding.<sup>6</sup> As explained in more detail in that decision (available on the Board's website at <http://www.stb.dot.gov>), the Board required TRRC to file a revised application that presents the railroad's current plans to build a rail line between Miles City and Ashland, Montana. TRRC filed its revised application on October 16, 2012, and proposed to go forward with the Tongue River I project, although in a modified form.<sup>7</sup>

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

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

<sup>4</sup> Tongue River R.R.—Rail Constr. and Operation—Ashland to Decker, Mont. (Tongue River III), FD 30186 (SubNo. 3) (STB served Oct. 9, 2007), pet. for reconsid. denied (STB served Mar. 13, 2008).

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

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

<sup>7</sup> Although the decision granting Tongue River I authorized construction of an 89-mile line, TRRC described the line it now proposes to build in its October 16, 2012, filing as being approximately 83 miles in length, based on refinements that would straighten and shorten the proposed alignment.

In its June 18, 2012 decision, the Board also decided to conduct a new environmental review rather than a supplemental environmental review based on the three prior environmental reviews. The Board found that a new EIS (including a new scoping process) was appropriate given the amount of time that had passed since the Tongue River I decision, the railroad's failure to begin construction of any part of this proposed railroad and other changes, the nature of the court's partial remand, and the fact that most of the Board's more recent environmental analysis pertains to Tongue River II or Tongue River III, neither of which TRRC still proposes to build. The Board also stated that a new EIS would encourage and facilitate public participation.<sup>8</sup> On October 22, 2012, the Board issued a Notice of Intent to Prepare an EIS and Draft Scope of Study in which OEA sought comments on potential alternatives to TRRC's proposed alignment.

In a decision served on November 1, 2012, the Board clarified that its review in this proceeding would include not only the new environmental review of the entire construction project, but also an examination of the transportation merits supporting the entire Tongue River I line.<sup>9</sup> The November 1, 2012 decision also directed TRRC to supplement the revised application to provide a sufficient record for review, with additional evidence and argument in support of the transportation merits. Finally, the decision established a new procedural schedule for filings on the transportation merits appropriate for this proceeding and required that TRRC publish notices consistent with that decision.

On December 17, 2012, TRRC filed a supplemental application intended to supersede the October 16, 2012 revised filing. TRRC explained that, in its October 16, 2012 application, it had proposed construction of a line between Miles City, Montana, and Ashland/Otter Creek, Montana, following a line similar to that approved by ICC in Tongue River I in 1986, as its preferred alignment. TRRC identified a different route, known as the Colstrip Alignment, as its preferred alignment in its December 17, 2012 supplemental application.<sup>10</sup> The supplemental application was accepted by the Board in a decision issued on January 8, 2013. On January 7, 2013, Northern Plains Resource Council and Rocker Six Cattle Company filed a petition to reconsider that decision and reject TRRC's supplemental application, which the Board denied on February 26, 2013. The Board extended the procedural schedule for filing comments on the transportation merits. On March 22, 2013, the Board served a Notice of Availability of the Final Scope of Study for the EIS and published it in the *Federal Register* on the same day. Since then, the procedural schedule for filing comments on the transportation merits has been extended to permit discovery, which is still ongoing.

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<sup>8</sup> Tongue River R.R.—Rail Constr. & Operation—In Custer, Powder River & Rosebud Cntys., Mont., FD 30186 et al. (STB served June 18, 2012) at 9-10.

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

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

## 1.3 Purpose and Need

TRRC seeks authority from the Board to construct and operate a common carrier rail line. If approved, the rail line's operator, BNSF, a common carrier, would be required to provide service to any shipper upon reasonable request. TRRC states that the principal purpose of the proposed Tongue River Railroad project is to transport low sulfur, subbituminous coal from mine sites in Rosebud and Powder River Counties, Montana, including a proposed mine in the Otter Creek area. TRRC stated that coal reserves subject to existing leases between the Ark Land Company, a subsidiary of Arch Coal, Inc., and the State of Montana and the lease between Ark Land Company and Great Northern Properties Limited Partnership in the Otter Creek area near Ashland contain approximately 1.5 billion tons of low sulfur, subbituminous coal. TRRC also stated that the proposed rail line would provide, for the first time, rail service to one of the largest remaining undeveloped reserves of low sulfur, subbituminous coal in the United States. TRRC indicated that the proposed rail line would provide the only rail service available to this resource and to other considerable coal resources in the Ashland area.

In TRRC's Supplemental Alternative Screening Analysis submitted to OEA on April 30, 2013, TRRC defined the following target markets.

- Upper Midwest utilities (primarily in Michigan and Minnesota) that have historically used Montana coal.
- Asia, by export through the existing Westshore Terminal located south of Vancouver, British Columbia, and possibly through other Pacific Northwest port facilities presently in the planning stages.

TRRC also identified secondary markets for the coal, including Europe, through a Great Lake port at Superior, Wisconsin, and relatively smaller utilities markets in other Midwestern states (e.g., Wisconsin, Illinois, and Ohio) or Arizona. TRRC stated that some volume of Otter Creek/Ashland coal could also be used for power generation in Montana.

In addition to considering TRRC's estimates of the coal shipments that the proposed rail line would accommodate, OEA conducted, for this Draft EIS, an analysis of the potential coal markets for coal deposits that could feasibly be mined within the service area of the proposed rail line. That analysis is contained in Appendix C, *Coal Production and Markets* and summarized in Chapter 2, Section 2.3.3, *Rail Traffic*.

The proposed rail line involves an application by TRRC for a license or approval from the Board to construct a common carrier rail line as part of the interstate rail network. The proposed rail line is not a federal government-proposed or sponsored project. Thus, the project's purpose and need should be informed by both the private applicant's goals and the agency's enabling statute here, 49 U.S.C. § 10901.<sup>11</sup> Construction and operation of new rail

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<sup>11</sup> See *Alaska Survival v. STB*, 705 F.3d 1073, 1084-85 (9th Cir. 2013).

lines requires prior authorization by the Board under 49 U.S.C § 10901(c), which is a permissive licensing standard. It now directs the Board to grant construction proposals “unless” the Board finds the proposal “inconsistent with the public convenience and necessity (PC&N).”<sup>12</sup> Thus, Congress presumes that rail construction projects are in the public interest unless shown otherwise.<sup>13</sup>

## 1.4 National Environmental Policy Act Process

The Board is the agency responsible for granting the authority to construct and operate proposed rail lines and associated facilities under 49 U.S.C. § 10901. OEA is the office within the Board responsible for carrying out the Board’s responsibilities under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332, and related environmental laws. Accordingly, the Board, through OEA, is the lead agency responsible under NEPA for preparing this Draft EIS to identify and evaluate the potential environmental impacts associated with the proposed action and alternatives. The proposed action is the potential approval of construction and operation of a rail line from the existing BNSF rail line, known as the Colstrip Subdivision, at Colstrip, Montana, to two terminus points. One terminus point would be near the site of the previously planned Montco Mine near Ashland, Montana, and another at the proposed Otter Creek Mine in the Otter Creek area near Ashland, Montana (TRRC’s preferred route). The following 10 build alternatives are analyzed in detail in this Draft EIS, as described in Chapter 2, Section 2.1.3, *Alternatives Selected for Detailed Study*, and depicted in Figures 2-1 through 2-5.

- Tongue River Alternative
- Tongue River East Alternative
- Colstrip Alternative
- Colstrip East Alternative
- Tongue River Road Alternative
- Tongue River Road East Alternative

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<sup>12</sup> Although the statute does not define the term *public convenience and necessity*, historically, a three-part test has been used to evaluate that term: whether an applicant is financially fit to undertake proposed construction and provide the proposed service; whether there is public demand or need for the proposed service; and whether the proposal is in the public interest and will not unduly harm existing services.

<sup>13</sup> See *N. Plains Res. Council v. STB*, 668 F.3d 1067, 1091-92 (9<sup>th</sup> cir.2011); *Mid States Coalition for Progress v. STB*, 345 F.3d 520, 552 (8<sup>th</sup> Cir. 2003); *Alaska R.R. - Constr. and Operation Exemption – Rail line Between North Pole and Delta Junction, Alaska*, FD 34658, slip op. at 5 (STB served January 5, 2010). Congress first relaxed the section 10901 standard in the Staggers Rail Act of 1980, Pub. L. No. 96-448, 96 Stat. 1895. Before 1980, Congress directed ICC, the Board’s predecessor agency, to scrutinize rail construction proposals closely to prevent excess rail capacity. ICC was to issue a license only if it found that the PC&N “require” the construction. See former 49 U.S.C. § 10901(a) (1978); see, e.g., *Chesapeake & Ohio Ry. v. United States*, 283 U.S. 35, 42 (1931). In the Staggers Act, Congress made it easier to obtain agency authorization for a new line by providing that ICC need only find that the PC&N “permit,” as opposed to “require,” the proposed new line. See former 49 U.S.C. § 10901(a) (1995); H.R. Rep. No. 1430, 96<sup>th</sup> Cong., 2<sup>d</sup> Sess. 115-16 (1980), reprinted in 1980 U.S.C.C.A.N. 4147-48. With ICCTA, Congress completed its policy shift, directing that the Board “shall” issue construction licenses “unless” the agency finds a proposal “inconsistent” with the PC&N. See 49 U.S.C. § 10901(c).

- Moon Creek Alternative
- Moon Creek East Alternative
- Decker Alternative
- Decker East Alternative

The impacts of the Board’s potential denial of the application, referred to as the No-Action Alternative, are also analyzed in this Draft EIS.

Three federal agencies and one state agency, acting as lead agency for other Montana State agencies, assisted in the preparation of this Draft EIS as cooperating agencies, pursuant to Council on Environmental Quality (CEQ) regulations at 40 Code of Federal Regulations (C.F.R.) § 1501.6. The CEQ regulations emphasize agency cooperation early in the NEPA process and allow a lead agency (in this case, the Board) to request the assistance of other agencies with either jurisdiction by law or special expertise in matters relevant to preparing an EIS. Table 1-1 lists each cooperating agency and describes its role and responsibilities. The cooperating agencies are the U.S. Army Corps of Engineers (USACE), U.S. Department of the Interior, Bureau of Land Management (BLM), U.S. Department of Agriculture (USDA), Agricultural Research Service, and the Montana Department of Natural Resources and Conservation (DNRC), acting as lead agency for other Montana State agencies.

**Table 1-1. Cooperating Agencies**

<b>Agency</b>	<b>Nexus</b>
U.S. Department of Agriculture, Agricultural Research Service	Two build alternatives could cross USDA-ARS Agriculture Livestock and Range Research Laboratory.
U.S. Department of the Interior, Bureau of Land Management	May approve or deny a right-of-way grant for the proposed rail line across BLM-managed lands.
U.S. Army Corps of Engineers	May issue or deny a Section 404 Clean Water Act permit and/or a Section 10 Rivers and Harbors Act permit.
Montana Department of Natural Resources and Conservation	Will act as the liaison between several Montana state agencies and the Board to gather information and coordinate comments. Will ensure Montana’s environmental concerns are addressed in a manner consistent with the Montana Environmental Policy Act (MEPA). May approve or deny an easement to cross state lands.

OEA and the cooperating agencies prepared this Draft EIS<sup>14</sup> in accordance with NEPA, the CEQ regulations, and the Board’s environmental regulations (49 C.F.R Part 1105). This Draft EIS is intended to provide the Board; the cooperating agencies; other federal, state, and local agencies; federally recognized tribes; and the public with clear and concise information on the potential environmental impacts of the proposed rail line and the No-Action Alternative.

<sup>14</sup> While much of this Draft EIS generally refers only to OEA, the document reflects input from all four cooperating agencies.

OEA is issuing this Draft EIS for public review and comment. OEA will consider all comments received on the Draft EIS and respond to all substantive comments in a Final EIS. The Final EIS will include final recommended environmental mitigation conditions, as warranted and applicable. The Board will consider the entire environmental record, the Draft and Final EISs, all public and agency comments, and OEA's environmental recommendations in making its final decision on TRRC's application to construct and operate the proposed rail line.

The Board will decide whether to approve, approve with conditions (which would include conditions designed to mitigate impacts on the environment), or deny TRRC's request for authority to construct and operate a new rail line between the existing main line and two end points south of Ashland, Montana. The cooperating agencies that will be issuing individual decisions concerning the project intend to use information in this Draft EIS for their decision-making purposes.

## **1.5 Agency Responsibilities**

This Draft EIS considers potential action primarily by the Board, but also by BLM, USDA, USACE, and Montana DNRC. The Board and these cooperating agencies all have jurisdiction by law or special expertise related to the proposed rail line. They may issue decisions concerning the proposed rail line and intend to use this Draft EIS for the disclosure and analysis of potential environmental impacts related to those decisions. These agencies and their responsibilities are briefly discussed below.

### **1.5.1 Lead Agency**

#### **1.5.1.1 Surface Transportation Board**

The Board, pursuant to 49 U.S.C. § 10901, is the agency responsible for granting authority for construction of new rail lines and their subsequent operation. Accordingly, the Board, through OEA, is the lead agency responsible under NEPA for the preparation of the Draft EIS in this proceeding. The Board is a bipartisan, independent adjudicatory body, organizationally housed within the U.S. Department of Transportation (USDOT).

In 1995, Congress revised the Interstate Commerce Act and established the Board to assume some (but not all) functions of ICC, particularly those related to the regulation of freight rail lines. The Board has jurisdiction over rail line rates, service issues, and rail structuring transactions such as new line construction, line sales, line abandonments, and rail line mergers.

## 1.5.2 Cooperating Agencies

### 1.5.2.1 Bureau of Land Management

BLM is organizationally housed under the U.S. Department of the Interior. BLM is responsible for managing 245 million surface acres of federal land, about one-eighth of the land in the United States, and about 700 million additional acres of subsurface mineral resources. BLM is also responsible for wildfire management and suppression on 388 million acres.

BLM administers federal land in the project area and has authority under the Federal Land Policy and Management Act (43 U.S.C. §§ 1701 *et seq.*) to issue a linear right-of-way grant for the proposed rail line to pass through those federally managed lands. The BLM Miles City, Montana Field Office administers more than 2.7 million surface acres of public land and more than 12.4 million acres of subsurface mineral estate in eastern Montana. The Miles City Field Office is responsible for BLM lands that cover the eastern third of Montana from the border with Canada, extending southward to the border with Wyoming, and extending eastward to the border with North Dakota and South Dakota. This area of responsibility includes 16 counties in eastern Montana, including those where the proposed rail line could occur. Under 43 U.S.C. § 1701, BLM would be required to approve a right-of-way grant to TRRC so that the rail line could cross these lands. TRRC submitted an Application and Draft Plan of Development for its preferred alternative, the Colstrip Alternative, on March 9, 2015. The Miles City Field office is in the process of reviewing this Application and Draft Plan of Development. Chapter 12, Section 12.2, *Land Use*, includes details on the locations of BLM lands that would be crossed by the proposed rail line. BLM intends to use the Board's EIS process to fulfill its NEPA requirements in its consideration of any right-of-way application filed under 43 C.F.R. Part 2800.

### 1.5.2.2 U.S. Department of Agriculture Agricultural Research Service

USDA manages the Fort Keogh Livestock and Range Research Laboratory (Fort Keogh), which is a 55,000-acre rangeland beef cattle facility. Fort Keogh's mission is to develop ecologically and economically sustainable range animal management systems. The focus of research at Fort Keogh is to develop profitable management tactics that enhance the efficiency of the production and nutritional value of agricultural products. USDA has authority under the Federal Land Policy and Management Act (43 U.S.C. §§ 1701 *et seq.*) to issue a linear right-of-way grant for the proposed rail line to pass through this federally managed land. Certain build alternatives under consideration (Tongue River Alternatives, Tongue River Road Alternatives, and Moon Creek Alternatives) cross USDA lands. If the Board licenses one of these build alternatives, TRRC would need a right-of-way grant from USDA to acquire the right to use the land needed to construct the rail line and ancillary

facilities. USDA intends to use the Board's EIS process to fulfill its NEPA requirements under 7 C.F.R. Part 520.

### **1.5.2.3 U.S. Army Corps of Engineers**

USACE is part of the U.S. Department of Defense, under the Secretary of the Army. USACE has authority over the navigable waters of the United States to ensure and maintain the physical, biological, and chemical quality of the nation's water.

USACE, under Section 404 of the Clean Water Act of 1977 (33 U.S.C. § 1344), has jurisdiction over activities that result in the discharge of dredge or fill material into any waters of the United States, including lakes, rivers, streams, oxbows, ponds, and wetlands. Activities that affect these systems require a Section 404 permit from USACE. Construction of any build alternative would affect waters of the United States; therefore, TRRC would have to obtain a Section 404 permit prior to commencing project construction.

In addition, USACE is responsible for activities that may affect navigable waters of the United States, pursuant to Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. §§ 401 *et seq.*). Section 10 requires that any entity proposing to perform work or place a structure in navigable water obtain a Section 10 permit from USACE prior to commencing the activity. Construction of any build alternative would involve crossing navigable waters of the United States; therefore, TRRC would need to obtain a Section 10 permit prior to commencing project construction.

USACE intends to use the Board's EIS process to fulfill its NEPA requirements associated with permit evaluation under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act.

### **1.5.3 State Agencies**

#### **1.5.3.1 Montana Department of Natural Resources and Conservation**

Montana DNRC was established on July 1, 1995, as the result of a legislative reorganization of Montana's natural resource and environmental agencies. DNRC is responsible for sustaining and improving the benefits derived from Montana's water, soils, forests, and rangeland. To accomplish these goals, DNRC manages the state's trust land resources to produce revenues for the trust beneficiaries; protects Montana's natural resources from wild land fires through regulation and partnerships with federal, state, and local agencies; and promotes conservation of oil and gas through regulation of exploration and production. DNRC also manages or assists in the management of several grant and loan programs, including the renewable resource, reclamation, and development program; the treasure state endowment; and the wastewater revolving fund programs.

DNRC, acting as lead agency for other Montana State agencies, will ensure that this Draft EIS addresses the state's environmental concerns in a manner consistent with the Montana Environmental Policy Act (MEPA). If the Board licenses a build alternative, various Montana State permits and approvals would be required. These state regulatory requirements are identified throughout this Draft EIS.

## **1.5.4 Other Federal Agencies**

### **1.5.4.1 U.S. Environmental Protection Agency**

The U.S. Environmental Protection Agency (USEPA) has broad oversight and implementing responsibility for the following federal environmental laws.

- Clean Air Act
- Clean Water Act
- Comprehensive Environmental Response, Compensation, and Liability Act
- Toxic Substances Control Act
- Resource Conservation and Recovery Act

Under Section 309 of the Clean Air Act (42 U.S.C. § 7609), USEPA reviews and comments on the environmental impacts of major federal actions for which an EIS is prepared under NEPA. USEPA's Office of Federal Activities, which is responsible for reviewing EISs, evaluates and comments on the quality of analysis in the EIS and the extent of the proposal's impact on the environment. USEPA also announces the availability of any Draft EIS for public comment in the *Federal Register*. OEA has consulted with USEPA during preparation of this Draft EIS and will consider and respond to USEPA's evaluations and comments on this Draft EIS in the Final EIS.

### **1.5.4.2 Advisory Council on Historic Preservation**

The Advisory Council on Historic Preservation (Advisory Council) is an independent federal agency created under the authority of the National Historic Preservation Act (NHPA), 54 U.S.C. § 300101 *et. seq.* Among its roles, the Advisory Council is responsible for advocating consideration of historic preservation in federal agency decision-making and promulgating regulations to implement Section 106 of NHPA.

The Section 106 regulations at 54 U.S.C. §306108 require federal agencies to consider the impact of their "undertakings" on "historic properties" listed or eligible for listing in the National Register of Historic Places prior to licensing or providing funds for a project. In considering project impacts, federal agencies are required to consult with their applicants (TRRC, in this case), the state historic preservation officer, the tribal historic preservation officer, tribes, and other consulting parties, including representatives of local government, and certain persons or groups with a demonstrated interest in the undertaking. Agencies

must also make their findings available to the public and provide the Advisory Council an opportunity to comment on the undertaking.

The Advisory Council generally does not participate in individual project reviews but has done so here because the undertaking meets the criteria for council involvement listed under Appendix A of its regulations.

As part of its mission, the Advisory Council encourages agencies to coordinate their Section 106 reviews with other federal laws, including NEPA, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the American Resources Protection Act, and other applicable laws.

### **1.5.4.3 U.S. Fish and Wildlife Service**

The U.S. Fish and Wildlife Service (USFWS) is the federal agency with primary expertise in fish, wildlife, and natural resources issues. USFWS is responsible for implementation of the Endangered Species Act (16 U.S.C. § 1544). It is also responsible for implementation of the Migratory Bird Treaty Act (16 U.S.C. §§ 703–712) and the Bald and Golden Eagle Protection Act (16 U.S.C. §§ 668–668d).

Under Section 7 of the Endangered Species Act (16 U.S.C. § 1536), USFWS is responsible for the review of federal agency actions and impacts on terrestrial and freshwater threatened and endangered species, and could issue a determination, in the form of a biological opinion, that details projected impacts on threatened and endangered species in the area of a proposed agency action. As the lead agency, the Board is responsible for initiating Section 7 consultation with USFWS. OEA is using the EIS process to concurrently complete and document compliance with Section 7. Accordingly, OEA has consulted with USFWS during the development of this Draft EIS and provided USFWS with this Draft EIS for review and comment. This Draft EIS reflects the status of Section 7 consultation, which will be fully completed and documented in the Final EIS.

### **1.5.4.4 Federal Highway Administration**

The Federal Highway Administration (FHWA), a division of USDOT, provides stewardship over construction, maintenance, and preservation of the nation's highways, bridges, and tunnels.

If the Board were to approve one of the Tongue River Alternatives, Tongue River Road Alternatives, or Moon Creek Alternatives, an underpass would need to be built at Interstate 94, which would require approval from FHWA in coordination with the Montana Department of Transportation. This FHWA approval is subject to compliance with NEPA and is also subject to review under Section 4(f) of the U.S. Department of Transportation Act

of 1966 (49 U.S.C. § 303(c)). Section 4(f) states that USDOT agencies<sup>15</sup> such as FHWA cannot approve the use of land from publicly owned parks, recreation areas, wildlife and waterfowl refuges, or public and private historical sites unless there is no feasible and prudent alternative to the use of such land or the action includes all possible planning to minimize harm resulting from the use. This Draft EIS includes an analysis of impacts of the proposed rail line on Section 4(f) properties. If the Board approves one of the build alternatives mentioned above, FHWA and the Montana Department of Transportation intend to use the Board's EIS process to support the completion of NEPA and Section 4(f) requirements associated with a decision to approve an Interstate 94 underpass.

## 1.6 Scoping and Public Involvement

### 1.6.1 Scoping Notice and Public Meetings

To help determine the scope of this EIS, and as required by the Board's regulations at 49 C.F.R. § 1105.10(a)(2), OEA published in the *Federal Register* [Fed. Reg.] on October 22, 2012, a Notice of Intent to Prepare an Environmental Impact Statement, Notice of Availability of the Draft Scope of Study, Notice of Scoping Meetings, and Request for Comments (77 Fed. Reg. 64592 [Oct. 22, 2012]). OEA also prepared and distributed a postcard that introduced TRRC's proposed rail line, announced OEA's intent to prepare an EIS, and gave notice of scoping meetings to residents of Powder River, Custer, and Rosebud Counties. In addition, OEA sent letters to elected officials; federal, state, and local agencies; tribal organizations; and other potentially interested organizations providing similar information. OEA placed notices of the scoping meetings in several newspapers, including the *Miles City Star Newspaper* and the *Billings Gazette*.

Public scoping meetings were held in the following locations and on the indicated times and dates.

- November 12, 2012, 2 to 4 pm and 6 to 8 pm at the Charging Horse Casino, Bingo Hall, ½ Mile E Lame Deer Highway 212, Lame Deer, Montana.
- November 13, 2012, 2 to 4 pm and 6 to 8 pm at the Rosebud County Library, 201 North 9th Avenue, Forsyth, Montana.
- November 14, 2012, 2 to 4 pm and 6 to 8 pm at the St. Labre Indian School Auditorium, 1000 Tongue River Road, Ashland, Montana.
- November 15, 2012, 2 to 4 and 6 to 8 pm at the Elks Lodge #537, 619 Pleasant Street, Miles City, Montana.

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<sup>15</sup> While the Board is organizationally housed within the U. S. Department of Transportation, it is an independent agency and its governing statute is the Interstate Commerce Act, not the Department of Transportation Act. Therefore, Board actions are not subject to Section 4(f).

- November 16, 2012, 2 to 4 pm and 6 to 8 pm at the Chief Little Wolf Capital Building, Northern Cheyenne Tribal Chambers, 600 South Main Cheyenne Avenue, Lame Deer, Montana.

The scoping meetings were held in an open house format for the first hour with the second hour consisting of a brief presentation by OEA followed by public comments.

Approximately 525 people attended the scoping meetings including citizens; tribal members; representatives of organizations; elected officials; and officials from federal, state, and local agencies. Some attendees submitted oral and/or written comments during the meetings, and OEA received additional scoping comment forms and letters by mail. The scoping comment period, initially scheduled to close on December 6, 2012, was extended until January 11, 2013, in response to a number of requests for an extension.

OEA received 2,666 comments during the scoping comment period and considered all comments received in preparation of the Final Scope of Study for this EIS. On March 22, 2013, OEA issued the Final Scope of Study and published it in the *Federal Register* (78 Fed. Reg.17752) on the same day. OEA also posted the Final Scope of Study on the Board's website and mailed it to approximately 2,940 individuals, agencies, and other interested parties.

As part of the environmental review process to date, OEA has conducted broad public outreach activities to inform the public about the project and to facilitate public participation. OEA consulted with and will continue to consult with federal, state, and local agencies; tribal organizations; affected communities; and all interested parties to disseminate information about the proposal and gather comments. In addition, OEA developed a website to communicate project-related information ([www.tonguerivereis.com](http://www.tonguerivereis.com)) to the public. This website is being updated throughout the NEPA process.

## **1.6.2 Agency and Tribal Consultation**

### **1.6.2.1 Agency Consultation**

Prior to the issuance of the Notice of Intent to Prepare an EIS, OEA invited three federal agencies and one state agency to participate in the EIS process as cooperating agencies (Section 1.4, *National Environmental Policy Act Process*). After the Notice of Intent to Prepare an EIS was published, OEA sent consultation letters to the following agencies soliciting their input, comments, ideas, and concerns regarding this Draft EIS: National Resources Conservation Service, USEPA, USFWS Montana Ecological Services Field Office, State Historic Preservation Officer with the Montana Historical Society, Miles City, Custer County, Powder River County, and Rosebud County.

OEA held several meetings with the four cooperating agencies during the scoping period. These included a series of meetings during a site visit over the week of October 22, 2012, and during the public scoping meetings held over the week of November 12, 2012. OEA

also met with several cooperating and consulting agencies to discuss wildlife fieldwork methodologies in December 2012. Lastly, OEA held several teleconferences with USEPA during the scoping period and preparation of this Draft EIS to solicit their input on several resource area topics. OEA continued to meet with cooperating and other agencies throughout the course of developing this Draft EIS (Appendix A, *Agency and Tribal Consultation*).

### **1.6.2.2 Tribal Consultation**

OEA consulted with tribes under NHPA Section 106, NEPA, and Executive Order 13175. Executive Order 13175 requires that federal agencies conduct government-to-government consultations with federally recognized Indian tribes in the development of federal policies (including regulations, legislative comments or proposed legislation, and other policy statements or actions) that have tribal implications. Tribes may have concerns about natural resources that would not be brought up during the NHPA Section 106 process and these concerns can be voiced during government-to-government consultation.

### **Government-to-Government Consultation**

In October 2012, OEA emailed federally recognized tribes (listed below) with current and ancestral connections to the project area to provide information regarding the Board's responsibility for preparing the appropriate NEPA documentation for the proposed rail line. In December 2012, OEA sent letters to these tribes initiating government-to-government consultations.

- Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana
- Crow Tribe of Montana
- Crow Creek Sioux Tribe of the Crow Creek Reservation, South Dakota
- Lower Brule Sioux Tribe of the Lower Brule Reservation, South Dakota
- Standing Rock Sioux Tribe of North Dakota and South Dakota
- Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota
- Yankton Sioux Tribe of South Dakota
- Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, South Dakota
- Flandreau Santee Sioux Tribe of South Dakota
- Shakopee Mdewakanton Sioux Community of Minnesota
- Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota
- Santee Sioux Nation, Nebraska
- Arapaho Tribe of the Wind River Reservation, Wyoming
- Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota

- Cheyenne and Arapaho Tribes, Oklahoma
- Oglala Sioux Tribe
- Shoshone Tribe of the Wind River Reservation, Wyoming
- Blackfeet Nation
- Lower Sioux Community
- Upper Sioux Community

In its letter, OEA requested that the tribes consult with the Board regarding the broader range of impacts assessed under NEPA, including impacts on tribal lands and resources such as plant gathering areas and religious sites. Attached to this letter was a comment card on which the tribe could indicate whether they wanted to participate in government-to-government consultation. Both the Oglala Sioux and Northern Cheyenne Tribes indicated they wanted input regarding the broader range of impacts analyzed under NEPA. Subsequent attempts were made to reach them and the Oglala Sioux Tribe responded by email, outlining general concerns. However, ensuing attempts by OEA to arrange government-to-government consultation were unsuccessful and no further correspondence was received from the Oglala Sioux Tribe.

Government-to-government consultation with the Northern Cheyenne Tribe continued throughout the development of this Draft EIS. OEA consulted with the natural resource specialists and tribal historic preservation officer for the Northern Cheyenne Tribe. Appendix A, *Agency and Tribal Consultation*, contains further details on consultations with the Northern Cheyenne Tribe. The Northern Cheyenne tribal reservation is just west of where the Decker Alternatives would be located and would be indirectly affected by the proposed rail line (Figure 1-1).

## **Tribal Consultation under NHPA Section 106**

In December 2012, OEA mailed a letter to the 106 consulting parties that laid out the Board's responsibilities to consult regarding potential impacts of the proposed rail line on historic properties as defined under Section 106 of the NHPA. This letter was sent to the following tribes.

- Crow Tribe
- Lower Brule Sioux Tribe
- Oglala Sioux Tribe
- Standing Rock Sioux Tribe
- Cheyenne River Sioux Tribe
- Yankton Sioux Tribe
- Sisseton-Wahpeton Oyate

- Flandreau Santee Sioux
- Rosebud Sioux Tribe of Indians
- Santee Sioux Tribe of Nebraska
- Cheyenne and Arapaho Tribes
- Northern Arapaho Tribe
- Crow Creek Sioux Tribes
- Shakopee Mdewakanton Sioux
- Three Affiliated Tribes: Mandan, Hidatsa & Arikara Nation
- Lower Sioux Indian Community
- Upper Sioux Community
- Blackfeet Nation
- Shoshone Tribe of the Wind River Reservation
- Northern Cheyenne Tribe
- Assiniboine and Sioux Tribes
- Arapaho Tribe of the Wind River Reservation
- Fort Belknap Indian Community
- Spirit Lake Sioux Tribe

OEA held a consulting party meeting on the Northern Cheyenne Reservation in Lame Deer, Montana, from April 16 to 18, 2013. OEA held a second consulting party meeting in Billings, Montana, in February 2014. In addition to the face-to-face meetings, OEA held monthly conference calls with tribes and other consulting parties in which it provided important updates as well as a venue for tribes to express any concerns regarding the proposed rail line. OEA made important project information relevant to tribes, including meeting and call transcripts, available on the OEA websites.

## 1.7 Request for Comments on This Draft EIS

The public and any interested parties are encouraged to submit written comments on all aspects of this Draft EIS. OEA will consider all such comments in preparing the Final EIS, which will include responses to all substantive comments received, OEA's conclusions on potential impacts, and OEA's final recommendations, including mitigation. All comments on this Draft EIS must be submitted within the published comment period, which will close on June 23, 2015, 60 days after the Notice of Availability of the EIS is published in the *Federal Register*. When submitting comments on this Draft EIS, the Board encourages commenters to be as specific as possible and substantiate concerns and recommendations.

Written comments on this Draft EIS may be mailed to the following contact and address.

Ken Blodgett  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423-0001  
Attention: Environmental filing, Docket No. 30186

Comments on this Draft EIS may also be submitted electronically on the Board-sponsored website ([www.tonguerivereis.com](http://www.tonguerivereis.com)). Comments submitted electronically will be given the same weight as mailed comments. Therefore, persons submitting comments electronically do not have to send comments by mail.

Please refer to Docket No. 30186 in all correspondence addressed to the Board, including all comments submitted on the Draft EIS.

Further information about the project can be obtained by calling OEA's toll-free number at 1-866-622-4355. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.

This Draft EIS is available for viewing and downloading on the Board's website (<http://www.stb.dot.gov>) and on a Board-sponsored project website ([www.tonguerivereis.com](http://www.tonguerivereis.com)).

## 1.7.1 Public Meetings

In addition to receiving written comments on the Draft EIS, OEA will host 10 public meetings during which interested parties may make oral comments in a formal setting and/or submit written comments. OEA will begin each meeting with a 30-minute open house followed by a brief overview of the proposed project and the environmental review process. During a formal comment period, each interested individual will be given several minutes to convey his or her oral comments. A court reporter will be present to record these oral comments. If time permits, the court reporter will be available at the conclusion of the formal segment of the meeting to record oral comments from individuals not interested in addressing the meeting as a whole. Meeting transcripts will be available on the project website after the meetings. Meeting locations, dates, and times are as follows.

- June 8, 2015, 2:00 to 4:00 pm and 6:00 to 8:00 pm at St. Labre Indian School, 1000 Tongue River Road, Ashland, Montana
- June 9, 2015, 2:00 to 4:00 pm and 6:00 to 8:00 pm at Miles Community College, Room 316, 2715 Dickinson Street, Miles City, Montana
- June 10, 2015, 2:00 to 4:00 pm and 6:00 to 8:00 pm at Colstrip High School, 5000 Pinebutte Drive, Colstrip, Montana

- June 11, 2015, 2:00 to 4:00 pm and 6:00 to 8:00 pm at the Northern Cheyenne Tribal Building, Council Chambers, 600 South Cheyenne Ave, Lame Deer, Montana
- June 12, 2015, 2:00 to 4:00 pm and 6:00 to 8:00 pm at Forsyth High School, 917 Park Street, Forsyth, Montana

In addition, OEA will hold two online public meetings intended for people who cannot attend the public meetings in the project area. All interested individuals must register to attend the online public meeting and preregister to provide formal comments. OEA will begin the online public meeting with a brief overview of the proposed project and environmental review process. The overview will be followed by a facilitated formal comment session during which each individual that has preregistered will be given several minutes to convey his or her oral comments. If time permits, the facilitator will allow other interested individuals who did not preregister to provide oral comments. Interested individuals can participate in the meeting by phone, computer, or both. The meeting transcripts will be available on the project website after the meetings. The online public meetings will be held at the following date and times.

- June 17, 2015, 12:00 to 3:00 pm and 6:00 to 9:00 pm (Eastern Time).

To register for the online public meeting, visit [www.tonguerivereis.com](http://www.tonguerivereis.com). Additional meeting information and dial-in instructions will be provided at registration.

Following the close of the comment period on the Draft EIS (June 23, 2015), OEA will issue a Final Environmental Impact Statement (Final EIS) that considers and responds to all substantive comments received on this Draft EIS. The Board will then issue a final decision based on the Draft and Final EISs and all public and agency comments in the public record for this proceeding. The final decision will address the transportation merits of the proposed project and the entire environmental record. That final decision will take one of three actions: approve the proposed project, deny it, or approve it with mitigation conditions, including environmental conditions.

## 1.8 Draft EIS Organization and Format

Resource-specific analyses in this document address potential environmental impacts associated with construction and operation of the proposed rail line. This Draft EIS reports the impacts from construction and operation of the 10 build alternatives under consideration and from the No-Action Alternative. Resource areas addressed include transportation, air quality, greenhouse gases and climate change, fugitive coal dust, noise and vibration, biological resources, water resources, visual resources, cultural and historical resources, land resources, geology and soils, energy resources, recreation, socioeconomics, and environmental justice.

This Draft EIS also addresses potential downline impacts from increased train operation as well as the potential cumulative impacts on the environment that could result from the

incremental impact of the proposed rail line when added to other past, present, and reasonably foreseeable future actions, regardless of what agency (federal or nonfederal) or person undertakes such actions.

This Draft EIS is organized in a manner consistent with the CEQ regulations at 40 C.F.R. §1502.10. It is intended to provide clear and concise information on the proposed rail line and alternatives to agency decision-makers and the public. This Draft EIS describes the proposed action and alternatives, existing environmental conditions, and potential environmental impacts associated with the build alternatives. The chapters listed below are outlined in greater depth in the Table of Contents to aid the reader in locating areas of interest. Appendices, also listed below, are ordered alphabetically at the end of this Draft EIS.

- Chapter 1, *Purpose and Need*
- Chapter 2, *Proposed Action and Alternatives*
- Chapter 3, *Transportation*
- Chapter 4, *Air Quality*
- Chapter 5, *Greenhouse Gases and Climate Change*
- Chapter 6, *Coal Dust*
- Chapter 7, *Noise and Vibration*
- Chapter 8, *Biological Resources*
- Chapter 9, *Water Resources*
- Chapter 10, *Visual Resources*
- Chapter 11, *Cultural Resources*
- Chapter 12, *Land Resources*
- Chapter 13, *Geology, Soils, and Paleontological Resources*
- Chapter 14, *Energy Resources*
- Chapter 15, *Socioeconomics*
- Chapter 16, *Environmental Justice*
- Chapter 17, *Downline Impacts*
- Chapter 18, *Cumulative Impacts*
- Chapter 19, *Mitigation*
- Chapter 20, *Short-Term Uses versus Long-Term Productivity of the Environment*
- Chapter 21, *Irreversible and Irrecoverable Commitment of Resources*
- Chapter 22, *References*

- Chapter 23, *Preparers*
- Chapter 24, *Agencies, Organizations, Tribes, and Persons to Whom Copies of the Draft EIS are Sent*
- Chapter 25, *Glossary*
- Chapter 26, *Index*
- Appendices
  - Appendix A, *Consultation*
  - Appendix B, *Land Access*
  - Appendix C, *Coal Production and Markets*
  - Appendix D, *Grade-Crossing Safety and Delay Analysis*
  - Appendix E, *Air Quality, Emissions, and Modeling Data*
  - Appendix F, *Life-Cycle of Greenhouse Gas Emissions*
  - Appendix G, *Coal Dust Analysis*
  - Appendix H, *Noise and Vibration Impact Assessment*
  - Appendix I, *Wildfire Risk to Vegetation*
  - Appendix J, *Wildlife Resources and Special-Status Species*
  - Appendix K, *Fish Resources*
  - Appendix L, *Biological Assessment*
  - Appendix M, *Wetland Resources and Assessments*
  - Appendix N, *Section 404(b)1 Evaluation*
  - Appendix O, *Visual Analysis Context and Methods*
  - Appendix P, *Programmatic Agreement*
  - Appendix Q, *Draft Section 4(f) and Section 6(f) Evaluation*
  - Appendix R, *Hazardous Waste Sites*
  - Appendix S, *Energy Resources Analysis Methods*
  - Appendix T, *Socioeconomic Methods and Tables*
  - Appendix U, *Cumulative Impacts Analysis*
  - Appendix V, *Downline Analysis*

