NORTHERN PLAINS
RESOURCE COUNCIL

Department of Natural Resources and Conservation
P.O. Box 201601
Helena, Montana 59620-1601
Attn: Monte Mason, Minerals Management Bureau Chief

July 31, 2009

Dear Mr. Mason and members of the Montana Land Board:

Northern Plains Resource Council (Northern Plains) appreciates the opportunity to comment on the appraisal, "Montana Otter Creek State Coal Valuation," prepared by the Norwest Corporation for the proposal to release the Otter Creek coal tracts for bid. Northern Plains formed in 1972 because of proposed plans to develop vast coal resources in eastern Montana. Those plans designated eastern Montana as a sacrifice zone. Northern Plains and its affiliates opposed that designation and for more than 37 years have advocated for responsible energy development that does not harm the land, air, water, and social and economic fabric of Montana.

Northern Plains and its affiliates are opposed to sacrificing the Otter Creek watershed and the Tongue River Valley in the name of coal development. We are opposed because we believe that releasing the Otter Creek coal tracts appraisal for bid should not be done until all costs associated with this proposal to strip mine coal are fully analyzed and then compared to the perceived benefits of the project. Without an environmental analysis of the impacts to the land, air, wildlife, surface and underground water resources, the social and cultural resources of the area, and the area's rural agricultural economy, this appraisal is an artificial and misleading document.

Additionally, the Otter Creek coal tracts cannot be developed without rail transportation for that coal; thus, the Tongue River Railroad (TRR) – which Northern Plains has opposed for nearly 30 years – is integrally tied to this project. This is a connected and cumulative action, and the railroad's environmental and social consequences must also be fully considered along with those of Otter Creek coal.

We strongly believe that it is the public trust responsibility of the Land Board to ensure that the environmental analysis is done before the state releases the appraisal. Issuing the appraisal without truly understanding the consequences ignores the potentially unacceptable costs, provides some with a false hope for economic development, and could potentially lead to a "bait-and-switch" situation (*e.g.*, a company submits a bid, is awarded a lease, and then finds out – after the environmental analysis is completed – that only a portion of the coal lease is viable for development). Issuing the appraisal for bid without an environmental analysis is essentially making an irretrievable and irrevocable commitment

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of resources. Our legal counsel, Jack R. Tuholske, Esq., has prepared a legal overview (attached) supporting our demand for completing the environmental analysis of mining this coal prior to leasing.

Northern Plains and its affiliates are opposed to the release of the Otter Creek coal tracts appraisal as written because we believe the appraisal is erroneous. Northern Plains' has contracted with Dr. Thomas Power of the University of Montana to analyze the reliability and accuracy of the appraisal. Dr. Power's detailed and illuminating analysis is attached and clearly shows the problems and errors in the appraisal.

Northern Plains believes that the acquisition of the Otter Creek coal tracts was a politically motivated action that was not in the best interests of the people of Montana. These coal tracts were acquired in the late 1990s at the insistence of then-Governor Marc Racicot for a perceived loss of mining jobs as part of the agreement to retire the hard-rock mining claims of the New World Mining District, northeast of Yellowstone National Park. The federal government, while not agreeing with the state's premise that they were owed anything for jobs that might never materialize, nonetheless, agreed to compensate the state for this perceived loss in order to finalize the New World Mine deal and ensure that area's cleanup from past mining abuses. The federal government offered $10 million to the state and, later, many other land trade options in lieu of the Otter Creek tracts – most near active coal-mining operations – because of the severe environmental consequences of mining the Otter Creek area and because of the lack of viable transportation for that coal. But, Governor Racicot insisted on Otter Creek.

If the true costs of this coal strip mine project as well as the Tongue River Railroad were considered now, then both of these projects would fail the "red-faced" test. The direct and indirect costs of these projects to the land, surface waters, aquifers, abundant wildlife, soils and vegetation, air, ranching operations, and communities are too overwhelming, thus, any "benefits" to the State, its schools, and its people are speculative at best.

For example, the actual physical impacts to surface water resources from pollution and siltation could be significant. Otter Creek enters the Tongue River at Ashland and flows on to the Yellowstone River at Miles City. The Tongue River is one of the last, fairly pristine prairie ecosystem streams in Montana (except for the problems with highly saline coal bed methane (CBM) wastewater discharges that the State is charged with controlling). The Yellowstone is a world-renowned river and is the last major undammed river in the lower 48 states. Water from both of these rivers is used beneficially by farmers and ranchers for agricultural purposes, including irrigation.

Pollution runoff and siltation from activities at the mine site, if not strictly controlled, would eventually get to the Tongue and Yellowstone rivers. Of much more significant concern is the sedimentation that would occur if the TRR is built. This railroad is a connected and cumulative action and must be considered as part of this coal strip mine project. According to the TRR Supplemental Environmental Impact Statement (EIS), construction of the TRR would result in one million cubic yards of dirt per mile being moved for 17 miles below the Tongue River Dam (the Western Alignment). During

construction this would result in 20,000 tons of sediment being released into the Tongue River. It is projected that 5,000 to 10,000 tons of additional sediment per year would impact the river during operation of the railroad. No analysis has been done on additional sediment from the TRR route downstream of the Western Alignment. It is obvious that surface water quality is at grave risk should the coal at Otter Creek be mined and transported.

The actual physical impact to area aquifers during coal strip mining is known to be significant. These aquifers are critically important to Montana's agricultural economy. Scientific studies and first-hand accounts of strip mine impacts to aquifers are numerous. For example, one scientific study examined the potential hydrologic impacts of strip mining near and within the Northern Cheyenne Reservation. This study indicated that an extensive groundwater flow system exists within the coal formations of the Tongue River Valley area. These studies have also indicated that strip mining in this area could have major groundwater impacts and water quality impacts to surface waters that could last for hundreds of years (see attachment, W.W. Woessner, *et al*., "Hydrologic Impacts from Potential Coal Strip Mining – Northern Cheyenne Reservation," EPA Project Summary).

When coal is strip mined, aquifers that are interconnected with or that cross the coal seam are cut by the strip mine, and the aquifer above the mine is drained. Artesian springs above the mine eventually dry up. Sub-irrigated meadows and bottomland above the mine dry up. This has happened in the Colstrip area following the strip mine activity that began in the 1970s. Additionally, the West Fork of Armells Creek, which Colstrip area residents knew as a small perennial stream (with interconnection to shallow aquifers) prior to strip mining, dried up after mining began in area in the 1970s.

Eventually a strip mine is "reclaimed" with rock material (spoils), but disturbed aquifers are not generally restored. Additionally, water quality down-gradient from the mine is now compromised. Precipitation that soaks into the ground and re-enters the aquifer system becomes more saline as the water flows through the coal spoils. The concentration of dissolved solids increases dramatically in the groundwater after passing through the spoils. This increase in salinity of the water not only affects the shallow alluvium, but can re-surface and potentially adversely affect aquatic ecosystems as well. Agricultural production depends on subsurface and surface waters. In the Colstrip area, some productive bottomlands down-gradient from the mines have developed a white, saline crust on the soil and are no longer productive hay meadows. (See web page attachments: Wayne Van Voast, "Hydrologic Characteristics of Coal-mine Spoils, Southeastern Montana," Montana University System Water Center report 1.094; M.R. Cannon, "Effects of Potential Surface Coal Mining on Dissolved Solids in Otter Creek and in the Otter Creek Alluvial Aquifer, Southeastern Montana" in U.S. Geological Survey Water-Resource Investigation Report 85-4206.)

More than 2,000 individual water rights (both surface and underground) are listed on the Department of Natural Resources and Conservation's website for the Otter Creek area. These water rights would be impacted by coal development.

The impact and possible permanent impairment of the soils and vegetation of the Otter Creek Valley, especially its alluvial bottom, when coal strip mining occurs must be considered. Reclamation is integrally tied to any mitigation of this impact, and we believe that the high-sodium, thin, shale soils and the lack of topsoil as well as the steep terrain would make reclamation impossible in many areas. One of the many reasons that the Montco Mine, which is near the Otter Creek coal tracts and similar in geology and soils, was not developed was that it was recognized that it would be difficult to impossible to reclaim the land after coal strip mining.

The disruption of wildlife in the area would be significant. Based on information in other regional environmental compliance documents, there are 76 species of mammals, 250 species of birds, 9 species of amphibians, and 14 species of reptiles in the area. There is little data regarding existing population levels, existing distribution, existing trends and reasons for trends, habitat requirements including critical habitat requirements and/or habitat conditions, however, it is recognized by biologists that several species have already suffered substantial habitat loss and population declines.

It is known that development/industrialization of an area negatively affects wildlife. Studies in Wyoming related to oil and gas drilling show dramatic declines in antelope and mule deer numbers during development and production. Hunting in Region 7 is a multi-million dollar industry, and includes mule deer, antelope, and elk as well as bird species. While, generally, population numbers and distributions are better known for big game species, the impacts of this major coal strip mine and the connected and cumulative TRR project to both big game and non-game species need to be understood prior to leasing.

There are 250 species of birds in the Tongue River Valley including 137 species of songbirds. Species richness and breeding bird densities are highest in riparian woodlands and wetland habitats but little is actually known for the specific area to be affected. It is known that burrowing owls of the region are in rapid decline in their numbers (burrowing owls are dependent on mammal burrows, with prairie dog towns providing prime habitat). Ferruginous hawks and merlins have also suffered substantial population declines in the area. Mountain plover and sage grouse (candidate species under the ESA) and bald eagles (threatened species under the ESA) are all present in the area. A wide variety of neotropical migrants pass through or breed in the planning areas and many of these species are declining throughout their range. Without understanding existing population levels, existing distribution, existing trends (increasing, decreasing, steady) and reasons for the trends, habitat conditions and requirements (including critical habitat requirements), proceeding toward leasing would put the “cart before the horse.”

The costs that the 2002 Northern Cheyenne Agreement so justifiably add to this project must be considered. Not only must specific environmental monitoring on the Northern Cheyenne Reservation occur should the Otter Creek tracts be leased, but training programs and road improvement projects have been agreed to once mining begins at the Otter Creek tracts, and these costs must be factored into the analysis.

The impact to the Class I air quality of the Northern Cheyenne lands from pollutants and particulates (dust) is a significant concern should this project move forward. Northern Plains is also concerned about the increased impacts on visibility for the Northern Cheyenne and Crow reservations.

The lack of any actual transportation for this coal is a significant factor that must be considered prior to leasing. As you know, Northern Plains has opposed the Tongue River Railroad for 30 years and we will continue to oppose its construction. Please see additional discussion of this issue below.

The fact that the current federal administration is actively working to curb greenhouse gas emissions—and coal-fired generation plants are a significant contributor to these emissions— should be of concern to the Land Board. The Environmental Protection Agency has declared that greenhouse gas emissions must be regulated. Please see additional discussion of this issue below.

We also would respectfully remind the Land Board that the Otter Creek area – as part of the Powder River and Tongue River basins – is also slated for massive CBM development, which will likely begin in the near future (please see additional discussion below). Any proposal to strip mine coal at Otter Creek (and build the Tongue River Railroad) must take into account the connected and cumulative impacts this project would have on the region. We firmly believe that the industrialization of the productive southeastern Montana agricultural lands and wildlife habitat is not worth the significant costs.

Northern Plains, therefore, requests that the Land Board **ensure that the entire range of issues and costs (environmental, social, and economic) as well as any benefits of the project be carefully examined and analyzed BEFORE this appraisal is offered, bids received, and any lease is offered**. It is not feasible to believe that you can pre-determine all the necessary stipulations such a lease might need in order to protect Montana's resources, its people, and its other economies without doing the necessary environmental analysis prior to leasing.

Montana's Constitutional Protections

The Montana Constitution, in Article II, declares that: "All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways." Further, in Article IX the Constitution specifically provides that "the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations."

In its 1999 landmark decision in *Montana Environmental Information Center v. Department of Environmental Quality*, the Montana Supreme Court held that Articles II and IX of the Constitution are complementary provisions that must be read together. The Court further ruled that the provisions impose affirmative obligations on the legislature to

provide statutory remedies to implement their public health and environmental protections and preserve Montana's priceless natural heritage.

All rules and decisions of Montana's DNRC and the Land Board are subject to scrutiny under Montana's environmental provisions. The duty to "maintain and improve a clean and healthful environment for present and future generations" necessarily requires that all state agencies must not only look at the immediate effects of their actions, but also carefully and thoughtfully consider the potential for future environmental degradation.

Therefore, we strongly believe that prior to approving the release of the Otter Creek appraisal for bid and possibly issuing a coal lease, the State must examine all reasonable foreseeable environmental degradation resulting from the issuance of the coal lease. As described below, coal mining not only has negative impacts during the actual mining process, but burning coal contributes to air pollution and global climate change that threatens serious degradation of Montana's environment now and into the future. We believe that the State must take into account the future impacts that an Otter Creek coal lease would have on continued air pollution and global climate change. The State is obligated to do this in order to ensure Montanan's right to a clean and healthful environment.

Montana Environmental Policy Act

The Montana Environmental Policy Act (MEPA) was established by the Legislature in order to effectuate its obligations under Articles II and IX of the Montana Constitution. The stated purpose of MEPA is to "create and maintain conditions under which humans and nature can coexist in productive harmony, to recognize the right to use and enjoy private property free of undue government regulation, and to fulfill the social, economic, and other requirements of present and future generations of Montanans." It is the aim of the State to "ensure for all Montanans safe, healthful, productive and aesthetically and culturally pleasing surroundings. . . . [and to] attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences." Thus, MEPA is the principal tool by which the state seeks to ensure that constitutional guarantees are recognized and integrated into every decision affecting Montana's environment.

Consistent with Montana's constitutional provisions and MEPA, the state must administer all laws, regulations, policies, and programs in accordance with MEPA. This means that the State must examine all environmental effects of every action, including coal leases, to ensure the health, safety, and well-being of current and future generations while mitigating undesired and unintended consequences.

It is clear that MEPA applies to "any major state action," including leases. In *Ravalli County Fish and Game Association v. Montana Dept. of State Lands,* the plaintiffs sued Montana's Department of State Lands (DSL) because the DSL approved a renewal of a grazing lease. The new grazing lease was to be changed from grazing cattle to grazing domestic sheep. The DSL approved an environmental assessment (EA) but failed to

perform a satisfactory EIS. The Montana Supreme Court held that a state action that significantly affects the quality of the human environment requires a MEPA analysis. Further, the Court stated that "if a changed use or condition under a state lease or permit significantly affects the quality of the human environment, then the state's allowing that change in use or change in condition is a major state action pursuant to MEPA, triggering the MEPA review process." The Court also held that because the DSL did not consider the significance of the impacts associated with a change in grazing from cattle to sheep, the DSL acted arbitrarily and capriciously and unlawfully by not requiring an EIS.

We believe that the issuance of a coal lease on State lands is a major state action because it transfers the rights of the coal reserves to a private party and forecloses the opportunity to prohibit coal mining should the environmental effects be shown in subsequent environmental analysis to be unacceptable. Federal courts have routinely held that leasing is a "major federal action" that triggers the requirements of the National Environmental Policy Act (NEPA). The rationale of these cases is that leasing constitutes an "irreversible commitment of resources." The same is true of the Otter Creek lease. The Montana Supreme Court has said that NEPA law is directly relevant to interpretation of requirements under MEPA.

An EIS serves a valuable "look before you leap" function that avoids making premature commitments to actions that may have serious long-term consequences for Montana's environment and quality of life. An EIS gathers together all of the relevant information necessary to allow reasoned decision-making by the responsible state officials. It provides a transparent process that promotes more thoughtful decisions on how best to use and conserve the state's natural resources.

Under MEPA, Montana must use a systematic, interdisciplinary approach when planning and making decisions that have an impact on the human environment. Further, the agencies of the State must identify and develop methods and procedures that will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making, along with economic and technical considerations. Therefore, prior to issuing a lease, the State must perform a MEPA analysis that includes the environmental impact of the proposed action, any adverse environmental effects that cannot be avoided if the proposal is implemented, and alternatives to the proposed action. The EIS must also include a "no-action" alternative, a complete analysis of cumulative effects for other foreseeable projects (*e.g.*, the building of the TRR and CBM development), and an analysis of connected actions (*e.g.*, the TRR and the new coal-fired electric generation plant described in the appraisal as "the other potential market"). Without such a full and objective analysis of the project in an EIS, neither the public nor the state officials charged with making this decision can make an informed decision about what is in the "best interests of the state."

The importance of taking long-range impacts into account before committing the state to leasing billions of tons of coal is underscored by the looming threat of climate change. Climate change represents a great threat to Montanans' right to clean and healthful environment as well as to the Montana economy. Additionally, MEPA expressly requires

that state agencies "lend appropriate support to initiatives, resolutions, and programs designed to maximize national cooperation in anticipating and preventing decline in the quality of the world environment." Without performing an EIS prior to issuing a coal lease, the State fails to take into account the long-range character of environmental problems caused by coal which violates Montanan's right to a clean and healthful environment.

The Otter Creek coal tracts appraisal, required by statute prior to the issuance of a lease, only looks at the "fair market value" of the coal. The appraisal does not fully assess the environmental consequences that leasing sets in motion. The appraisal only looks at the economic value of the coal and does not consider any of the possible degradation that will occur from the mining and burning of the coal. Without analyzing these consequences/costs, the true value of the coal is not presented in the appraisal. Without these costs (which would require an EIS to fully assess), the appraisal does not ensure that Montanans are guaranteed the fundamental right to a clean and healthful environment.

There is a statutory requirement that a lease of state lands must be in the "best interests of the state" (MCA § 77-3-301). This, then, compels the Land Board and the DNRC to conduct the functional equivalent of a MEPA environmental analysis before leasing the Otter Creek coal tracts for development. As expressed by the Montana Supreme Court decision in *Ravalli County Fish and Game Association, Inc. v. Montana Dept. of State Lands*, there is a "public interest" standard that imposes a fiduciary obligation on the Land Board and the DNRC to conduct a full-scale environmental analysis that is essentially the same as what MEPA requires. Further, this "best interests of the state" determination must be interpreted in light of the overarching constitutional duty to ensure that government decisions properly take into account the long-term negative environmental consequences of short-term uses of exhaustible resources such as coal.

The Otter Creek tracts were acquired for the express purpose of being leased for coal production in order to fund public education. However, as the Montana Supreme Court ruled in *Ravalli*, "the goal of maximizing income derived from school land trusts does not exempt the Department of State Lands or any agency from complying with applicable environmental laws." In that case, DSL argued that the State's trust obligation to secure the greatest dollar value for school trust lands was predominant. The Court rejected this argument, emphasizing that "[i]ncome is 'a' consideration—not 'the' consideration regarding school land trusts: Maximizing income is not paramount to the exclusion of wildlife or environmental considerations in the MEPA context." Instead, "MEPA requires that an agency be informed when it balances preservation against utilization of our natural resources and land trusts."

The leasing of the Otter Creek coal tracts will lead to serious and irreversible environmental consequences. In the near-term, the Otter Creek coal lease will negatively impact the natural resources and human communities of the Otter Creek basin and the Tongue River Valley. Over the long-term, the Otter Creek coal lease threatens even greater harm to Montana's environment from the threat of global climate change. It is incumbent upon the Montana Land Board to ensure that the raising of funds for Montana's public education system is not done in a way that creates harm to Montana's natural, cultural, and socioeconomic environment. Northern Plains, therefore, requests that the Land Board

ensure that a full MEPA analysis in the form of an EIS be completed <u>BEFORE</u> this appraisal for the Otter Creek coal tracts is offered, bids received, and any lease offered.

<u>Coal Bed Methane</u>

We respectfully remind the Land Board that the Otter Creek area – as part of the Powder River and Tongue River basins – is also slated for massive coal bed methane development, which would likely begin in the near future. Any proposal to strip mine coal at Otter Creek must take into account the cumulative impacts this project would have on the region.

Northern Plains and its members have been actively involved in the CBM issue since 1999. We have fully participated in this issue at every opportunity. Our multiple and extensive comments are on record concerning this development. We have petitioned (successfully) the Montana Board of Environmental Review to establish numeric standards for water quality. We have participated in every legislative session where the CBM issue was debated. We have participated at every opportunity in administrative processes such as the Technical Advisory Committee (TAC) and Total Maximum Daily Load (TMDL) discussions. We believe CBM development would have a massive and deleterious impact on southeastern Montana if it is not done correctly and in a responsible manner that ensures that the land, water, and other natural resources as well as the economic viability of agricultural producers are protected.

The Record of Decision for the Final Supplemental EIS for CBM development was approved in December 2008. Because of a number of factors (*e.g.*, water quality standards for the Tongue River and its tributaries prohibiting discharge of saline CBM wastewater into surface waters; the present market cost of natural gas; and the general economic recession), full-scale production has not yet occurred. We continue to have significant problems with CBM development and do not believe that our bottom-line of "Doing It Right" will be attained under the government's mitigation proposals.

However, because CBM development is expected to proceed, the cumulative impacts of developing the Otter Creek coal tracts (and the connected TRR) on this area of Montana must be fully considered prior to moving forward with releasing the appraisal for bid.

<u>Tongue River Railroad</u>

The Otter Creek coal tracts cannot be developed without a mode of transportation for that coal, thus, the TRR is integrally connected to this project and must be fully considered prior to leasing. A brief discussion of the history of this speculative railroad is, consequently, necessary.

In 1983, Tongue River Railroad Company (TRRC) filed its original application with the Interstate Commerce Commission (ICC), the Surface Transportation Board's (STB) predecessor, to construct and operate an 89-mile railroad between Miles City and Ashland, Montana. This section of railroad is referred to as TRR I. On May 9, 1986, the ICC issued

a decision approving the construction and operation of the railroad. However, in the 23 years since the TRRC was authorized to commence construction, the company has not moved a single ounce of dirt much less laid any track. To say that the environmental analysis in the Final EIS prepared for TRR I is stale is an understatement – the ICC's analysis of the environmental and socioeconomic impacts of the railroad and consideration of alternatives is useless in light of developments during the intervening 25 years.

In 1989, TRRC submitted an application to extend the railroad another 41 miles from Ashland to Decker. (This segment is referred to as TRR II.) More than six years later, on November 8, 1996, and after considering several alternatives for the southern-most segment of the 41-mile route, the STB issued a decision authorizing TRRC to construct and operate the 41-mile line including the Four Mile Creek Alternative. The STB also imposed a condition requiring the TRRC to complete construction of the entire line between Miles City and Decker within three years. On January 7, 1997, Northern Plains, Native Action, and the United Transportation Union-General Committee on Adjustment (UTU) filed petitions for review of TRR II in the United States Court of Appeals for the Ninth Circuit. These petitions were stayed pending the completion of further changes to the railroad proposal requested by the TRRC (described below).

On April 27, 1998, TRRC submitted an application for an alternative route for the southern-most 17.1 mile segment of the railroad as an alternative to the route approved by the STB in its November 1999 decision. This segment is known as the "Western Alignment" and is referred to as TRR III.

On March 23, 1999, over the objections of Northern Plains and other parties, the STB dissolved the condition requiring TRRC to complete construction of the railroad within three years.

On March 2, 2000, the TRRC asked the STB to suspend work on the Supplemental EIS. The STB suspended such work. On December 19, 2002, the TRRC asked the STB to recommence the Supplemental EIS process. Shortly thereafter, on January 17, 2003, the TRRC requested permission to file supplemental evidence in order to provide a limited update of the record concerning the transportation aspects of this case. The STB resumed work on the Supplemental EIS and on March 11, 2003, issued a decision allowing the TRRC to supplement its application filed on April 27, 1998. On October 9, 2007, the STB granted a permit for TRR III.

In October 2007, Northern Plains, Native Action, and the United Transportation Union-General Committee on Adjustment (UTU) moved to join the TRR III permit to the petition for review of TRR II in the United States Court of Appeals for the Ninth Circuit. That was accepted, and the case is ongoing.

This history is necessary because **TRR I, TRR II, and TRR III are connected and cumulative actions**. **The lack of construction of TRR I since its approval in the 1980s shows that it has no independent utility from TRR II and TRR III**. The significant problems with this railroad proposal must be considered, because if the railroad is never

built, Otter Creek coal has no viable mode for transport, and, if it is built, the extension of the railroad to the Wyoming coal mines will present an entirely different set of problems for Montana.

We consider the various environmental compliance documents completed by the STB for TRR to fall far short of mediocre in scope and analysis. Just a few of the problems are:

The environmental compliance documents never fully assessed the consequences of construction and operation of the TRR on surface water quality. Increased sedimentation will affect aquatic life including macroinvertebrates, periphyton, and fisheries including the endangered pallid sturgeon and other species of concern. The most recent information available from the State of Montana and Environmental Protection Agency as part of its Total Maximum Daily Load (TMDL) process has never been considered. According to the TRR Supplemental EIS, construction of the TRR would result in one million cubic yards of dirt per mile being moved for 17 miles below the Tongue River Dam (the Western Alignment). During construction this brings 20,000 tons of sediment into the Tongue River. There are projected to be 5,000 to 10,000 tons of additional sediment per year after completion. No analysis has been done on additional sediment from the TRR route downstream of the Western Alignment. Surface water quality is at grave risk should this railroad be built.

Add to this the impacts that the hundreds of crossings of intermittent and ephemeral streams would have on natural runoff events and during storm events and snowmelt events and how this then impacts changes to surface water quality. These concerns were never addressed in the environmental compliance documents.

The number of acres of prime farmland and rangeland that would be lost to the TRR has never been fully quantified. The Supplemental EIS for TRR III did not quantify the number of parcels (of prime farmland or rangeland) that would be severed by the TRR or quantify the impacts of such losses and severance on individual farming and ranching operation or what this would do to the market value of ranches in the valley.

The Supplemental EIS fails to discuss the impacts should the TRRC have to use eminent domain to acquire right-of-way for the railroad. There are requirements that must be met under the Montana Eminent Domain law and the impacts of such a process would have ramifications on the financial costs of constructing the railroad as well as the economic impacts on local farmers and ranchers and the viability of their farms and ranches.

The STB in its Supplemental EIS fails to quantify the impacts of the TRR on a single species of wildlife.

The Supplemental EIS fails to quantify the impacts of the construction and operation of the TRR on the spread of noxious weeds.

The Supplemental EIS fails to adequately address the issue of fire along the railroad including increased demands on firefighting services.

Should the TRR be built to the Wyoming coal mines, railroad jobs in Forsyth and Sheridan, Wyoming, would be lost. The socioeconomic impact of the loss of such jobs is important to understand and analyze.

Should the TRR be built to the Wyoming coal mines, Montana coal mining jobs at other southeastern Montana mines would be lost and this must be addressed.

No easements for the TRR have been obtained to date. The TRRC is currently seeking an easement across the Miles City Fish Hatchery, a Montana Fish, Wildlife and Parks facility. The Fish, Wildlife and Parks Commissioners have grave concerns about such an easement across the hatchery because of the potential impact on the hatchery and its mission. The federal government ceded the hatchery to the State for the express purpose of raising pallid sturgeon, a federally endangered species.

Because the environmental compliance documents for TRR I, TRR II, and TRR III did not address (or did not adequately address) these and many other issues, it is incumbent upon the Montana Land Board to ensure such impacts are understood before the Otter Creek coal tracts appraisal is released for bid. Again, the costs far outweigh the benefits of this project IF all costs are identified and honestly examined.

Climate Change

The current federal administration is actively working to curb greenhouse gas emissions because of the scientific evidence that these emissions are contributing to global climate change. According to the U.S. Global Change Report, "The global warming observed over the past 50 years is due primarily to human-induced emissions of heat-trapping gases. These emissions come from the burning of fossil fuels . . ." In 2007 the U.S. Supreme Court ruled, in *Massachusetts v Environmental Protection Agency* (EPA), that greenhouse gases are air pollutants under the Clean Air Act. Earlier this year, the EPA issued a finding that greenhouse gases are a threat to public health and welfare. Coal-fired generation plants are a significant contributor to these greenhouse gas emissions. Any forthcoming regulations concerning greenhouse gas emissions would have an effect on the demand and value of coal.

Coal is one of the most carbon-intensive fuels and accounts for 40% of the world's carbon dioxide (CO_2) emissions. To date, there is no demonstrated technology capable of capturing and permanently sequestering CO_2. While small-scale and localized projects using CO_2 injection have occurred (for secondary recovery of oil and gas), commercial injection of CO_2 is still in the research stage. It is not yet known if it is technologically feasible, environmentally acceptable, or affordable.

In the past number of months, public conservation efforts have led to a significant drop in electricity demand. Additionally more and more utility companies are investing in renewable sources of energy (primarily wind and solar power). While coal will likely continue to be used for a time, during the past two years, on average nearly three coal

plants have been canceled each month. Only five new plants or plant expansions went online in 2008. What this means is that half the coal plants in the country are now more than 44 years old and nearing "retirement," and they are not being replaced.

This is not the time for the State of Montana to be promoting the development of a new coal mine. Until the technology for carbon sequestration has been proven, the best place for Otter Creek coal is where it currently is located: in the ground.

Connected Actions

The appraisal states that "the other potential market [for Otter Creek coal] would be construction of a coal-fired electrical generating plant (specifically designed to handle Otter Creek coal) near the Otter Creek tracts. In addition to the plant, a significant investment in power line infrastructure would be required." We have also heard that a coal-to-liquids plant and/or a coal gasification plant are planned for the area possibly using Otter Creek coal. While we do not believe that any of these projects should be built for a whole host of reasons, nevertheless, these are reasonably foreseeable actions connected to and/or cumulative with the proposal and the Land Board must understand and carefully consider the ramifications and consequences of any of these individual projects to southeastern Montana.

Economic Analysis of the Appraisal

The appraisal of the Otter Creek coal tracts falsely assesses the value of this coal. Northern Plains' has contracted with Dr. Thomas Power of the University of Montana to analyze the reliability and accuracy of the appraisal. Dr. Power's analysis is attached, but we wish to emphasize the following points here.

This "Appraisal" is not really an appraisal in the sense that it does not actually focus on a particular market reality into which the resources at issue could be sold. Instead it seeks to value a very large deposit of coal based on past market transactions that were significantly smaller than the size of the Otter Creek tracts.

The Appraisal describes no economic forces that have made this particular coal deposit more valuable to developers now than in the past. The Appraisal simply assumes that if the coal is offered for lease, it would be leased at very high bids, and over a 40-year period *all* of its recoverable coal would be extracted.

The Appraisal assumes a dramatic expansion of Montana coal mining with the development of Otter Creek, nearly doubling the current coal production figures. However, the Appraisal admits that the high-sodium content of the coal limits the market for this coal to existing electric generators who have built the boilers and emission controls to accommodate high-sodium coal. Great Northern Properties has stated that the size of the current market for this kind of coal in the area where Montana coal is competitive is about 20 million tons a year compared to the proposed output from the Otter Creek Tracts of 35 million tons. Additionally, the market for Montana high-sodium coal appears to be

shrinking (to 16 million tons per year in 2005) as Wyoming-based coal mines made inroads in serving the electric generators that could use Montana's high-sodium coal. It is important to understand that this limited coal market is currently being served. It is not a new, open market, looking for new sources of supply. In fact, Otter Creek would not only have to displace all of the coal currently being supplied to these electric generators that can accommodate high-sodium coal, it would have to then find other new markets.

Thus, Otter Creek will be competing with other Montana coal suppliers to serve the electric generators that can accommodate the high-sodium coal. Does the State of Montana want to be party to pushing existing Montana coal companies out of markets that they have come to rely on? What will the development of Otter Creek do to the Montana communities that now support coal mines? The Appraisal

The Appraisal also ignores another competitive threat to existing Montana coal producers – the Tongue River Railroad, which would reduce the transportation costs associated with Wyoming coal reaching what, until now, have been the areas of the northern tier of states where Montana has had a transportation cost advantage.

Both Montana coal producers and miners' union representatives have pointed out the possibility that the Tongue River Railroad will primarily provide shorter access for Gillette, Wyoming, coal to markets currently served by Montana coal. Thus, rather than opening up new markets for Montana coal, the Otter Creek coal tracts will help construct the Tongue River Railroad and reduce coal production in Montana as Wyoming coal is able to compete successfully in the northern tier market area where Montana currently has a transportation cost advantage.

The Appraisal glosses over the relatively high average weighted strip ratio of Otter Creek coal (4.1) when compared to mines in the Powder River Basin (2.95). When these operational costs are added to the high capital costs associated with opening this new mine and funding a new railroad to transport the coal as well as assuming that all of the state-owned Otter Creek coal can be successfully marketed despite its high-sodium content, one has to wonder how Otter Creek coal could be competitive. Add to this the likely impending regulation and "taxing" of high carbon fuels like coal as well as the on-the-ground environmental, cultural, and social costs. We believe that all of this clearly shows that Otter Creek coal is a high-risk, highly uncertain proposal that is likely to yield little or no revenue to the State.

Funding Montana's Schools and Conclusion

In summary, we do not believe that leasing of the Otter Creek coal tracts is in the best interest of the State or the State's schools. Montana relies on multiple sources to obtain the necessary school funding. In FY 2003, 45.6% of total education funding came from the State, 38.5% came from local funding, and 14.3% came from federal funds. Of the State's share of school funding, only 7.8% came from State land trusts. Within the State lands trust, 48% came from oil and gas royalties, 21% from agriculture and grazing royalties, 20% from timber royalties, and 11% from other royalties (FY 2006 figures). It is entirely

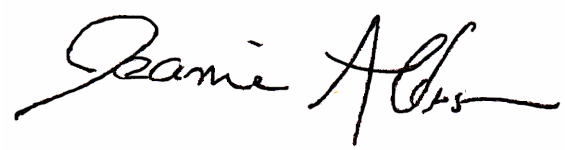
possible to adequately fund Montana's schools without subjecting Montana – its people and its natural and cultural resources – to the devastating environmental consequences that would come with a massive coal strip mine operation at Otter Creek.

Northern Plains Resource Council believes that Norwest Corporation's appraisal of the Otter Creek coal tracts is incomplete, contains major conceptual and factual errors, and has been outdated by changed economic circumstances. Northern Plains, thus, respectfully requests that a new appraisal be completed prior to any further action.

Northern Plains Resource Council also respectfully requests that the Montana Land Board not release this or any other appraisal of the Otter Creek coal tracts for bid until all of the issues and the costs – environmental, social, and economic – are carefully examined and analyzed. We believe that Montanans have a constitutional right to have a full MEPA analysis in the form of an EIS completed **prior** to this appraisal for the Otter Creek coal tracts being offered, bids received, and, potentially, a lease offered.

Sincerely,

Beth Kaeding
Northern Plains' Chair



Jeanie Alderson
Northern Plains' Tongue River Railroad Task Force Co-Chair

Clint McRae
Northern Plains' Tongue River Railroad Task Force Co-Chair

Attachments (5)

cc: Governor Brian Schweitzer
Attorney General Steve Bullock
Superintendent of Schools Denise Juneau
Secretary of State Linda McCulloch
State Auditor Monica Lindeen
Mary Sexton, Director, DNRC