

# APPENDIX F: NORTHERN CHEYENNE TRIBE'S PROPOSED STIPULATIONS

[Note: The following is the text of the report submitted to the BLM by the Northern Cheyenne Tribe.]

## INTRODUCTION

The Department of the Interior is obliged to consider, fashion and adopt measures to mitigate the adverse impacts of the proposed Powder River Regional coal development. The goals of impact mitigation are twofold: (1) to assure that the benefits of development are shared by local residents, and (2) to prevent or ameliorate the adverse effects of development. The duty to mitigate is especially strong as to the Northern Cheyenne Tribe, to which the Secretary of the Interior owes a solemn trust obligation.

The Northern Cheyenne Tribe proposes five types of mitigation measures—measures I through V set forth below. Measures I and II are designed primarily to achieve the first goal of mitigation. Measures III, IV and V are designed to achieve the second goal. Each of the measures addresses major concerns and vulnerabilities of the Tribe which have been described extensively in the Tribe's prior written and oral communications to the Department.<sup>1</sup>

Each mitigation measure should be implemented through the adoption of a suitable coal lease stipulation embodying the terms and conditions of the measure. The resulting five lease stipulations should be inserted in each federal coal lease arising from the second Powder River Sale that includes federal coal reserves lying within 25 miles of the borders of the Northern Cheyenne Reservation.

Each mitigation measure contemplates some form of financial assistance to the Tribe. Although, as set forth below, these measures place the burden of providing such assistance on the lessees, the Tribe is, in fact, indifferent as to the source of such assistance. Other sources of financial assistance, including existing sources of federal funds administered by the Department, should be considered.

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<sup>1</sup>These consist of written and oral Tribal statements made during the formulation of the first Powder River Sale, in the Tribe's lawsuit against that Sale, at the three Regional Coal Team meetings held subsequent to the Sale, at the Ashland, Montana scoping meeting for the second Powder River Sale, and in subsequent communications to BLM.

## MITIGATION MEASURE I

### Employment Preference

Historically, the Northern Cheyenne have been deprived of equal opportunity to participate in off-Reservation workforce. An employment preference will counteract this and assure that the employment benefits of development will reach the Northern Cheyenne and their families.

The appropriateness of an employment preference has been demonstrated at the Colstrip Powerplant Project. There, an employment preference has—for the first time—achieved the employment of significant numbers of Northern Cheyenne at Colstrip. We believe that the Montana Power Company would confirm that, on the basis of this preference, the Northern Cheyenne have established an admirable employment record which has served the Project well. However, this preference exists only because it was imposed on the Montana Power Company as part of a settlement of litigation brought by the Tribe against the project to protect the Reservation's Class I air quality standard. Similarly, other projects, such as those arising from the second Powder River Sale, will not adopt an employment preference unless compelled to do so.

It is the current perception of the Tribe that encirclement by large-scale coal development portends uniformly negative consequences for the Northern Cheyenne. The natural environment of the Reservation will be degraded, major social and cultural stresses will occur, and unmitigated financial burdens will be visited on a tribal government which presently is unable to provide adequate public services and facilities. Therefore, adopting an employment preference will endow the planned development with one positive attribute insofar as the Northern Cheyenne are concerned. This will serve federal regional coal development policy by generating significant grass roots support among the Northern Cheyenne.

The standard of living on the Northern Cheyenne Reservation is substantially lower than that which prevails off-Reservation. In light of his trust responsibility to the Tribe, the Secretary would be acting appropriately in ameliorating the harsh economic conditions prevailing on the Reservation by providing to the Northern Cheyenne the advantage of an employment preference.

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Industry should prefer the development of an indigenous workforce: relocation costs are avoided, stability is enhanced, and much local goodwill is created. Also, to the extent that labor force is drawn from the local community, socio-economic impacts resulting from the in-migration of workforce will be decreased. We believe that the validity of these observations has been demonstrated in the employment preference program adopted at Colstrip.

### Proposed Lease Stipulation

On the basis of the foregoing considerations, the Northern Cheyenne Tribe proposes the following lease stipulation as a mitigation measure:

1. Members of the Northern Cheyenne Tribe, their children and their spouses ["Preferred Employees"], shall be given preferential consideration in recruitment, training, hiring, promotion, and reductions in workforce, in all categories of employment.
2. The employment preference shall be implemented under the terms of a separate written agreement between the Tribe and each coal lessee, which will be approved by the Secretary. Negotiation of this agreement shall commence promptly after the identification of the successful bidder for the coal lease and shall be conducted thereafter with diligence and good faith. Without limitation, the written agreement shall include terms and conditions providing for the following:
  - a. Quantitative goals, and a timetable for their achievement, for the employment of Preferred Employees in each job classification.
  - b. Preservation of the lessee's authority to establish reasonable, even-handed and job-validated training programs, employment criteria, and work rules for all employees including Preferred Employees.
  - c. Special programs for the recruitment of Preferred Employees.
  - d. Special programs for the training of Preferred Employees, including on-the-job training, and training for advancement into supervisory positions.
  - e. Special scholarships and tuition reimbursement programs for Preferred Employees.
  - f. Special workshops for other project workforce to develop an awareness of Northern Cheyenne culture and concerns and an understanding of the need for and requirements of the employment preference.
  - g. Special programs for the mass transportation of Preferred Employees between their homes and the job site.
  - h. Notification to all involved labor unions of the existence of the employment preference and of the lessee's duty and intent to abide by its terms.
  - i. A requirement that project contractors and subcontractors assume and comply with all terms and conditions of the employment preference in connection with their own project employment practices.
  - j. The establishment of an Employment Preference Committee, consisting of an equal number of representatives from the Tribe and the lessee, which shall supervise, monitor, and assure compliance with the terms of the employment preference.
  - k. Funding provided by the lessee to pay reasonable compensation and expenses of the Tribe's representatives on the Employment Preference Committee and of such staff and advisors as the Tribal representatives reasonably consider necessary to the performance of their responsibilities.

## MITIGATION MEASURE II

### Contracting and Procurement Preference

Indian entrepreneurship on the Northern Cheyenne Reservation has largely been unsuccessful. Indian entrepreneurship off the Reservation is virtually nil. There are approximately 25 businesses on the Reservation, and approximately 30 businesses in off-Reservation Ashland and Birney. About half of the Reservation businesses, including the general store in Lame Deer, are owned by non-Indians. All of the off-Reservation businesses are owned by non-Indians. Although there are several construction service firms on the Reservation owned by Northern Cheyennes, only one has achieved success in obtaining off-Reservation contracts.

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There are a number of reasons for this poor record. As with off-Reservation employment opportunity, historically the Northern Cheyenne have been excluded from an equal opportunity to participate in non-Indian sponsored commercial ventures. In addition, both the Tribe and Tribal members are unable to pledge their trust property as security for the acquisition of capital. Furthermore, with a scant record of previous commercial success, lenders are reluctant to fund Northern Cheyenne entrepreneurs.

Therefore, absent special measures, the Northern Cheyenne will not participate in the entrepreneurial benefits engendered by the planned regional development.

In his Indian Policy Statement of January 24, 1983, President Reagan recognized the need for promoting Indian entrepreneurship and the many institutional barriers to that goal. He acknowledged that a "flexible approach" was needed for "creating a more favorable environment for the development of healthy reservation economies." The Northern Cheyenne propose that in formulating the second Powder River Regional sale, the Secretary implement this policy by adopting special mitigation measures to promote Northern Cheyenne participation in the entrepreneurial opportunity engendered by the resulting development.

### Proposed Lease Stipulation

To provide the Northern Cheyenne with access to the commercial opportunities that will result from regional development, the Northern Cheyenne Tribe proposes the following lease stipulation as a mitigation measure:

1. Businesses controlled by the Northern Cheyenne Tribe or its members ["Preferred Businesses"] shall be given preferential consideration in the awarding of all contracts and subcontracts (a) for the conduct of operations, and (b) for the procurement of materiel and equipment for operations.
2. These preferences shall be implemented under the terms of a separate written agreement between the Tribe and each coal lessee, which will be approved by the Secretary. Negotiation of this agreement shall commence promptly after the identifi-

cation of the successful bidder for the coal lease and shall be conducted thereafter with diligence and good faith. Without limitation, the written agreement shall include terms and conditions providing for the following:

- a. Quantitative goals, and a timetable for their achievement, for the awarding of contracts, subcontracts and procurement contracts to Preferred Businesses.
- b. A certification procedure, under which a business entity applying for the status of Preferred Business may seek certification in the following two respects:
  - (1) as an entity actually controlled by the Tribe or a Tribal member; and
  - (2) as an entity capable of competently providing particular contract services or supplying particular materiel or equipment.
- c. Technical and financial assistance to Preferred Businesses designed to assist them in obtaining such certification.
- d. Advance notice to certified Preferred Businesses of service or procurement contracts to be awarded for which they are qualified.
- e. Where services or procurement contracts are to be awarded by competitive bid, the establishment of formulas whereby a certified Preferred Business is granted a bidding margin, i.e., a reasonable sum by which its bid may exceed all other bids.
- f. A requirement that project contractors and subcontractors assume and comply with all terms and conditions of these preferences in connection with their own project contracting and procurement practices.
- g. Establishment of a Contracting Preference Committee, consisting of an equal number of representatives from the Tribe and the lessee, which shall supervise, monitor, and assure compliance with the terms of the preference.
- h. Funding provided by the lessee to pay reasonable compensation and expenses of the Tribe's representatives on the Contracting Preference Committee and of such staff and advisors as the Tribal representatives reasonably consider necessary to the performance of their responsibilities.

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### MITIGATION MEASURE III

#### Law and Order; Traffic

The Tribe previously has explained its profound concerns about the maintenance of the law and order of the Reservation. In recent years, regional development has led to increased use of the Reservation—its roads, recreation areas, services and facilities—by non-Indians as well as Indians. This has resulted in an increasing incidence of criminal and traffic violations that threaten the safety and tranquility of the Reservation. New leasing of federal coal reserves, bringing substantial population increases to the Reservation and the region as a whole, will multiply these problems. As the Tribe has explained, it is uniquely vulnerable to the resulting threats to law and order because of the anomalous jurisdictional status of non-Indians on the Reservation.

#### Proposed Lease Stipulation

To remedy this jurisdictional problem, the Northern Cheyenne Tribe proposes the following lease stipulation as a mitigation measure:

1. Each coal lessee shall obtain a covenant from each of its employees that while on the Reservation for any purpose the employee will comply with all standards of conduct generally applicable to Tribal members.
2. Each coal lessee shall obtain a covenant from each of its truckers that while operating trucks on the Reservation the trucker will comply with all laws, ordinances and rules applicable to the use of motor vehicles by Tribal members.
3. Each coal lessee shall by contract require (a) each of its contractors and subcontractors to obtain like covenants from their employees and truckers, and (b) each of its suppliers to obtain a like covenant from their truckers.
4. The above described duties imposed on employees and truckers shall be enforced by each coal lessee, and its contractors, subcontractors and suppliers, by taking appropriate employee-related disciplinary action in the event a violation of such duties is reported by the Tribe.
5. These provisions shall be implemented under the terms of a separate written agreement

between the Tribe and each coal lessee, which will be approved by the Secretary. Negotiation of this agreement shall commence promptly after the identification of the successful bidder for the coal lease and shall be conducted thereafter with diligence and good faith. Without limitation, the written agreement shall include terms and conditions providing for the following:

- a. Assumption in writing, as a condition of employment, by each employee and trucker, of the conditions set forth in 1 through 4 above.
- b. Education of employees and truckers with respect to the standards of conduct applicable on the Reservation.
- c. Appropriate employee-related disciplinary action for particular violations.
- d. Resolution of disputes concerning the occurrence of violations.
- e. Notification to all involved labor unions of the existence of the written agreement and the lessee's duty and intent to abide by its terms.
- f. Funding provided by the lessee to pay reasonable costs incurred by the Tribe in implementing the agreement.

### MITIGATION MEASURE IV

#### Environmental Protection

The Northern Cheyenne Reservation serves as the traditional homeland of the Northern Cheyenne people. As the Department knows, the Tribe considers the preservation of the Reservation's physical environment to be of paramount importance. The Tribe has taken decisive action—in adopting a Class I air quality classification and opposing on-Reservation coal development—in pursuit of that goal. Unlike other lands to the north, east, and south, the Reservation is not a fungible piece of real estate. Its preservation is essential to the survival of the Tribe itself.

The major industrial development that will result from federal coal leasing poses a threat to air and water quality on the Reservation, the Reservation's plant and animal life, and the health and welfare of Tribal members. Because the Reservation occupies the geographic center of the planned development, it is especially vulnerable

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to adverse environmental impacts. Furthermore, since the Northern Cheyenne Reservation is the only possible homeland for the Northern Cheyenne people, adverse environmental impacts on the natural resources of the Reservation—which serve as the wellspring of the Northern Cheyenne culture—are of unique concern in the region. This concern is specially relevant to actions taken by the Secretary of the Interior, who has a solemn trust obligation to safeguard the Northern Cheyenne homeland. Thus, special steps should be taken to protect the environmental quality of the Reservation.

### Proposed Lease Stipulation

In order to monitor and prevent degradation of the Reservation's natural environment, the Northern Cheyenne Tribe proposes the following lease stipulation as a mitigation measure:

1. A program shall be established to monitor air quality, visibility, water quality, and biological and other resources on the Reservation which may be affected adversely by the project. The program shall provide for baseline monitoring for a reasonable period before construction of the project and ongoing monitoring thereafter throughout the life of the project.
2. The program shall be conducted under the terms of a written agreement among the Tribe, the coal lessee, and all federal and state agencies with pollution control jurisdiction over the project, which will be approved by the Secretary. Negotiation of this agreement shall commence promptly after the identification of the successful bidder for the coal lease and shall be conducted thereafter with diligence and good faith. Without limitation, the written agreement shall include terms and conditions providing for the following:
  - a. Comprehensive monitoring of Reservation sources as provided in 1 above.
  - b. Utilization of state-of-the-art monitoring equipment and techniques, to be maintained in good operating condition and upgraded to reflect advances in technology.
  - c. Use of qualified professional to design and conduct monitoring and analyze results.
  - d. Recruitment, training (including technical education and on-the-job training), and employment of Tribal members, their children and their spouses ["Preferred Employees"] to assume responsibility to the fullest extent possible for the operation of the monitoring program.
  - e. The establishment of an Environmental Monitoring Committee consisting of four representatives, one each from the Tribe, the lessee, the involved federal agencies, and the involved state agencies, which shall supervise and direct the monitoring program and assure that it is carried out according to the terms of the agreement.
  - f. Remedies in the event that air or water quality standards applicable to the Reservation are violated or that Reservation resources are materially impaired as a result of the construction or operation of the project.
  - g. Funding provided by the lessee to pay: (1) the costs of the monitoring program, including the acquisition, maintenance and upgrading of equipment, the salaries of program employees, and the recruitment and training of Preferred Employees; and (2) reasonable compensation and expenses of the Tribe's representative on the Environmental Monitoring Committee, and of such staff and advisors as the Tribal representative reasonably considers necessary to the performance of his responsibilities. When an environmental monitoring program established for a particular project will contribute to the environmental monitoring program required for one or more other projects, the programs shall be integrated to the fullest extent reasonably possible, and the capital and operating costs of the integrated program shall be equitably apportioned among the projects.

## MITIGATION MEASURE V

### Impact Assistance

The tribe has repeatedly advised the Department of its concerns regarding the increased demands that will be placed on Reservation public services and facilities as a result of regional coal development. The Reservation is in no sense immune from these demands; indeed, given its central location, it is uniquely vulnerable to them. However, as between the Tribe and its off-Reservation counterparts, there is a gross disparity in the availability of funds to satisfy these demands.

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Off-Reservation, state and local governments can draw upon a variety of revenue sources in order to prepare for and meet the impacts of massive coal development. In addition to traditional sources of revenue, such as real and personal property taxes and the sale of tax exempt bonds, these units of government receive a significant portion of the income generated by coal mining. Fifty percent of the federal bonuses, rentals and royalties are returned to the state. In addition, 30% of mine income is collected by the state through its severance tax, and an additional percentage is collected by the counties through the coal gross proceeds tax.

These revenue sources are unavailable to the Tribe: it receives no part of the federal bonuses, rentals or royalties, it cannot collect severance, gross proceeds or any other taxes from the mines, and it has virtually no independent tax base of its own on which to draw. Although new federal legislation (which expires unless reenacted in 1984) permits Indian tribes to sell tax exempt bonds, and state law now permits tribes to apply for grants and loans from Montana's Coal Board, neither will serve as a reliable or adequate source of funding for the Tribe.

In short, off-Reservation governments receive substantial revenues as a result of development from which the Tribe is excluded. Such revenues provide off-Reservation communities with the means to mitigate negative consequences of development. Similar provision should be made for the Tribe.

### Proposed Lease Stipulations

The Northern Cheyenne Tribe proposes two alternative lease stipulations as mitigation measures, either of which may enable it to mitigate adverse socioeconomic impacts on the Reservation:

#### Alternative A

The federal government returns 50% of coal lease bonuses, rentals and royalties to the state ["Off-Reservation Federal Impact Funds"]. By federal statute, these funds are to be used to mitigate adverse impacts of coal development. These impacts can be expected to occur in Big Horn, Rosebud and Powder River Counties [the "Three County Area"], both on and off the Reservation.

No portion of Off-Reservation Federal Impact Funds, however, is made available to the Tribe.

The Tribe proposes that it be provided with a reasonably proportionate level of funding. It should be recognized that such funding will be substantially less than the total funding available to off-Reservation governments, since, as noted above, off-Reservation governments have other sources of funding that are not available to the Tribe.

Specifically, this proposed stipulation is as follows:

1. The lessee shall make contributions to the Tribe for the exclusive purpose of planning and providing public services and facilities on the Reservation.
2. Lessee contributions shall be calculated by taking the amount of Off-Reservation Federal Impact Funds generated by the lease, dividing by the non-Reservation resident population of the Three County Area, and then multiplying the resident population of the Northern Cheyenne Reservation.
3. Lessee contributions shall be provided to the Tribe at the same time that the Off-Reservation Federal Impact Funds are provided to the state.
4. This funding program will be implemented under the terms of a separate written agreement between the Tribe and each coal lessee, which will be approved by the Secretary. Negotiation of this agreement shall commence promptly after the identification of the successful bidder for the coal lease and shall be conducted thereafter with diligence and good faith.

#### Alternative B

Through the existing taxation and impact funding regime, coal lessees will contribute substantial revenues to the increased costs of off-Reservation public services and facilities. However, they will make no significant contribution to such costs on the Reservation. Yet it is clear that development-induced increases in regional population, both on and off the Reservation, will place significant new demands on Reservation services and facilities.

If a coal project causes workforce and their families to reside on the Reservation, the project should bear some portion of the resulting costs incurred by the Tribe for Reservation services and facilities. The Tribe suggests that the Tribe and the project contribute equally to these increased costs. A per capita funding formula is suggested to achieve this.

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In addition, project workforce and their families residing off-Reservation will burden Reservation services and facilities. Here, too, the project should bear some portion of these increased Tribal costs. The Tribe suggests that the project make a reduced contribution to these costs. This contribution will be based only on the number of workers, without including their families as well, and uses a per capita funding rate which is one-third of that applicable to on-Reservation residents.

This would be a most conservative measure of the impact costs to be incurred by the Tribe. First, it provides for cost sharing between the Tribe and the project. Second, the calculation is based only on Tribal expenditures from its own funds, ignoring contributions from other sources. Third, it includes only selected Tribal programs. Fourth, it will not provide to the Tribe the enormous funding which will be provided to the state and its subdivisions. In short, under this proposal a modest level of assistance will be provided to the Tribe to help it meet the service and facility demands engendered by development.

Specifically, this proposed stipulation is as follows:

1. The lessee shall make an annual contribution to the Tribe for the exclusive purpose of planning and providing public services and facilities on the Reservation.
2. Lessee contributions shall be based on the Tribe's own expenditures for Reservation services and facilities ["Tribal Expenditure"]. The Tribal Expenditure shall be calculated by determining the total amount of Tribal funds committed during the previous year to the Tribal programs listed below and dividing that sum by that year's total resident Reservation population. The programs to be included are:

- a. Education
- b. Ambulance service
- c. Health care
- d. Alcoholism and drug abuse treatment
- e. Law and order
- f. Tribal court
- g. Rural officers—game warden program
- h. Recreational facilities
- i. Transportation
- j. Shelter home for children
- k. Day care
- l. Elderly residence and care
- m. Garbage cannister program
- n. Utility commission
- o. Tribal government

3. The lessee shall contribute annually 100% of the Tribal Expenditure for each project employee, and for each member of the employee's household, who resides on the Reservation. In addition, the lessee shall contribute annually 33 1/3% of the Tribal Expenditure for each project employee who resides off the Reservation.
4. This mitigation program shall be implemented under the terms of a separate written agreement between the Tribe and each coal lessee, which will be approved by the Secretary. Negotiation of this agreement shall commence promptly after the identification of the successful bidder for the coal lease and shall be conducted thereafter with diligence and good faith.