



Governments' Responses to Informal Public Comments on the Response Action Maintenance Plan

January 22, 2008

The U.S. Environmental Protection Agency, the State of Idaho and the Coeur d'Alene Tribe (collectively "the Governments") have approved the final Response Action Maintenance Plan ("RAMP"), which is posted simultaneously with this statement. The RAMP may be modified in the future by the Governments based on the modification provisions in the RAMP.

From November 20, 2006 through December 4, 2006, the Governments provided the RAMP for an informal public comment period. Written comments were received from five individuals and the Benewah County Commissioners.¹ Although not required by any applicable legal requirement, the Governments have considered those comments and provide the following responses.

The written comments received did not raise any new substantive technical issues regarding activities under the RAMP.² The majority of the comments raised legal issues about the Governments' scope of authority under the RAMP and the Consent Decree entered by Judge Lodge in *United States of America and State of Idaho v. Union Pacific Railroad Company and Coeur d'Alene Tribe v. Union Pacific Railroad Company*, Case number 91-0342-N-EJL ("Consent Decree").

¹ The deadline for receipt of informal comments was December 4, 2006. However, the Governments considered all comments received, even if those comments were received after the deadline.

² Comments regarding causeway sampling were previously addressed when the Governments required UPRR to conduct additional sampling along the causeway. *See* Memorandum in Support of Motion to Enter Consent Decree, Exhibit 2 "Public Comments Regarding Consent Decree and Plaintiffs' Response to the Public Comments" at 16-17. The required sampling was completed and more causeway material was removed and replaced out of an abundance of caution with the encouragement of the Tribe.

Under the Consent Decree, the Decision and Certificate of Interim Use issued by the Surface Transportation Board on June 22, 2000 (Docket No. AB-33 (Sub. No. 70)) and the Interim Trail Use/Rail Banking Agreement between Union Pacific Railroad Company (UPRR), the State of Idaho (State) and the Coeur d'Alene Tribe (Tribe), UPRR is to transfer all of its right, title and interest in the railroad right of way to the State and Tribe. Under the terms of the Consent Decree and the Rail Banking Agreement, the State and the Tribe are to jointly manage and maintain the right of way. The RAMP describes the Governments' joint plan for such management and maintenance. The State conducts RAMP management and maintenance activities on the portion of the right of way located outside the Coeur d'Alene Indian Reservation (Reservation). The Tribe conducts RAMP activities within the Reservation, except for that portion of the right of way through Heyburn State Park, where the State and Tribe jointly conduct RAMP activities.

Certain comments alleged generally that the Governments lack authority to implement the RAMP on the right of way. By way of a general response, the Governments note that the State and Tribe's authority to implement the RAMP on the right of way and to control access and uses of the right of way will derive from their ownership of Union Pacific's right, title and interests therein. These property rights allow the Governments to control access to and the conditions for use of the right of way. By exercising these rights on the right of way through the RAMP the Governments are not violating public or private rights.³

The changes to the RAMP after public comment were minor, e.g., correcting typographical errors, updating contact information in Table 3, and modifying UPRR's Maintenance and Repair (M&R) reporting requirements so that UPRR produces bi-annual M&R reports instead of quarterly reports.

The Governments thank the various individuals for participating in the informal public comment process and look forward to the successful management and maintenance of the railroad right of way.

³ Certain comments imply that federal regulations governing Section "638 contracts" with Indian tribes should apply to the Tribe's RAMP activities on those portions of the right of way within the Reservation. The Governments disagree. The RAMP is not a federally funded Indian program that the federal government has delegated – or the Tribe has otherwise assumed – under the applicable provisions of The Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 et seq. (2007). The Tribe's RAMP activities within the Reservation are the result of a federal court approved consent decree in settlement of the Governments' CERCLA claims against UPRR. The funding of those activities is being provided by UPRR to the Governments under the terms of that decree, not by Congressional appropriations for federal programs that have been delegated or otherwise assumed by the Tribe.