

EO-318
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SURFACE TRANSPORTATION BOARD

Washington, DC 20423

Office of Economics, Environmental Analysis, and Administration

August 22, 2006

Herb M. Jones
Director, Government Affairs
Dakota, Minnesota & Eastern Railroad Corp.
140 North Phillips Avenue
Sioux Falls, SD 57104

Dear Mr. Jones:

Thank you for your recent letter updating the status of Dakota, Minnesota & Eastern Railroad Corporation's (DM&E) plans for complying with the environmental mitigation conditions imposed by the Board in its February 15, 2006 decision. I look forward to hearing from you following your meetings with two U.S. Army Corps of Engineers offices concerning Mitigation Measure Number 74.

I would like to clarify one point that you raise regarding the Programmatic Agreement (PA). You mention in your letter that DM&E is expecting to

resume the identification of historic properties pursuant to the Programmatic Agreement's condition soon. The treatment plan for any adversely effected properties will be submitted for review upon completion of that survey. And, in preparation of the Compliance Plan we anticipate initiating face-to-face meetings with the [State Historic Preservation Officers] during the week of 7 August, to discuss our Section 106 compliance efforts.

In reviewing the terms of the PA, I note that the Surface Transportation Board is the party responsible for preparing intensive survey and cultural resource reports, and findings of effect for areas surveyed. See PA, Section A.2. Survey Reports. The Reports are to include results of literature review, results from intensive and reconnaissance surveys (to the extent access from landowners is granted), and recommendations regarding evaluation. Id. Once the Reports are completed, the Board must then provide the Reports on the surveys to DM&E, the cooperating agencies, the Tribal Historic Preservation Officers, and the State Historic Preservation Officers for their review and recommendations of site eligibility.

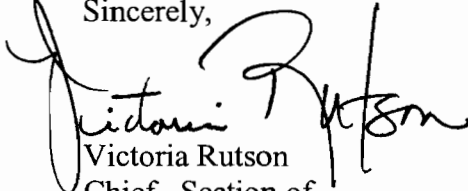
Upon completion of the Survey Reports by the Board, and review and concurrence by the parties listed above, the Board must then develop and implement a Treatment Plan for each property, group of properties, or category of properties

determined to constitute a historic property. See PA, Section B. Treatment Plans for Historic Properties.

The PA provides that the Board may use an independent third party contractor, working under the Board's sole direction, control, and supervision, and at DM&E's expense to assist in meeting the Board's responsibilities set forth in the stipulations to the PA. See PA at 3. I note that in your letter, you indicate that you plan on retaining a third-party contractor, but only for reviewing the railroad's compliance measures. While this would comply with Mitigation Measure 146, it would not assist the Board in meeting its obligations under the PA.

As I know you understand, it is essential that all signatories to the PA comply with the various stipulations set forth in that document. In reading your letter, it appears that you contemplate that DM&E would undertake the work and drafting of the Survey Reports, and possibly even the Treatment Plan(s), which is not consistent with the terms of the PA as I read them. If I am misunderstanding your letter, please do not hesitate to correct my interpretation. I have attached a copy of the PA for your reference and convenience.

I am anxious to clarify this matter at your earliest convenience. Please feel free to contact me at (202) 565-1545. I look forward to hearing from you.

Sincerely,

Victoria Rutson
Chief, Section of
Environmental Analysis

Enclosure

APPENDIX D
PROGRAMMATIC AGREEMENT

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May 14, 2003

Victoria Rutson, Chief
Section of Environmental Analysis
Surface Transportation Board
Washington, DC 20423

RE: STB Finance Docket 33407, Dakota, Minnesota & Eastern Railroad Corporation, Powder River
Basin Expansion Project; Programmatic Agreement.

Dear Ms. Rutson:

The enclosed agreement regarding the above referenced project has been executed by the ACHP. This action constitutes the comments of the ACHP required by Section 106 of the National Historic Preservation Act and the Council's regulations. Please provide a copy of the fully-executed agreement to the other signatories and your Federal Preservation Officer.

The Council appreciates your cooperation in reaching a satisfactory resolution of this matter. You and your staff have been a pleasure to work with. Should you have any questions, please contact me at 303/969-5110 or via e-mail at cllegard@achp.gov.

Sincerely,

Carol Gleichman Legard

Carol Gleichman Legard
Program Analyst
Western Office of Federal
Agency Program

Enclosure

ADVISORY COUNCIL ON HISTORIC PRESERVATION

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MARCH, 2003
PROGRAMMATIC AGREEMENT

AMONG

ADVISORY COUNCIL ON HISTORIC PRESERVATION
SURFACE TRANSPORTATION BOARD

WYOMING STATE HISTORIC PRESERVATION OFFICER
SOUTH DAKOTA STATE HISTORIC PRESERVATION OFFICER

MINNESOTA STATE HISTORIC PRESERVATION OFFICER
THE U.S.D.A. FOREST SERVICE, REGION 2

U.S.D.I. BUREAU OF LAND MANAGEMENT, MONTANA/DAKOTA STATE
OFFICE

U.S.D.I. BUREAU OF LAND MANAGEMENT, WYOMING STATE OFFICE
U.S. ARMY CORPS OF ENGINEERS, OMAHA DISTRICT

U.S. ARMY CORPS OF ENGINEERS, ST. PAUL DISTRICT
U.S.D.I. BUREAU OF RECLAMATION

AND

DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION

REGARDING THE
POWDER RIVER BASIN EXPANSION PROJECT
Finance Docket No. 33407

WHEREAS, the Surface Transportation Board (STB)¹, the lead Federal agency, has received an application for the construction and operation of a rail line by the Dakota, Minnesota & Eastern Railroad Corporation (DM&E), extending its existing system into the Powder River Basin of Wyoming (undertaking) as defined in STB decisions of December 10, 1998 and January 30, 2002; and,

WHEREAS, the STB has determined that the proposed project is an undertaking which may have an effect upon historic properties included on or eligible for inclusion on the National Register of Historic Places (NRHP), and is in consultation with the Advisory Council on Historic Preservation (Council); the United States Department of Agriculture, Forest Service Region 2 (USFS); the United States Department of the Interior - Bureau of Land Management Montana/Dakotas State Office and Bureau of Land Management Wyoming State Office (collectively referred to as BLM), the United States Army Corps of Engineers, Omaha District and the United States Army Corps of Engineers, St. Paul District (collectively referred to as COE), the United States Department of Interior - Bureau of Reclamation (BOR), the State Historic Preservation Officers of Wyoming, South Dakota, and Minnesota (collectively referred to as SHPOs), and the DM&E, pursuant to Section 800.14(b) of the regulations (36 CFR Part 800) implementing Section 106 of the National Historic Preservation Act, 16 U.S.C. 470f (NHPA). And all of the above are signatories to this Agreement (Signatories); and,

WHEREAS, the STB has consulted with and has invited the Cheyenne and Arapaho Tribes of Oklahoma, Cheyenne River Sioux Tribe, Comanche Nation of Oklahoma, Crow Tribe, Crow Creek Sioux Tribe, Eastern Shoshone Tribe, Flandreau Santee Sioux Tribe, Fort Peck Tribes, Ho-Chunk Nation, Kiowa Tribe, Lower Brule Sioux Tribe, Lower Sioux Community, Menominee Indian Tribe, Northern Arapaho Tribe, Northern Cheyenne Tribe, Oglala Sioux Tribe, Omaha Tribe, Pawnee Nation of Oklahoma, Ponca Tribe, Prairie Island Sioux Community, Rosebud Sioux Tribe, Sac & Fox Nation of Oklahoma, Sac & Fox Nation in Iowa, Santee Sioux Tribe, Shakopee Mdewakanton Sioux, Sisseton-Wahpeton Sioux Tribe, Spirit Lake Tribe, Standing Rock Sioux Tribe, Three Affiliated Tribes, Turtle Mountain Band of Chippewa Tribe, Upper Sioux Community, Winnebago Tribe, and the Yankton Sioux Tribe (collectively referred to as "Invited Signatories" or "Tribes") to sign this agreement; and,

WHEREAS, the Medicine Wheel Coalition for Sacred Sites of North America, the Minnesota Indian Affairs Council, The Medicine Wheel Alliance, the Gray Eagle Society and the Black Hills Sioux Nation Council (collectively referred to as "Invited Signatories" or "Indian Organizations") are also invited to sign this agreement; and,

WHEREAS, the STB, in consultation with the Signatories and Invited Signatories, has developed an Identification Plan (ID Plan) for inventory of cultural resources prior to construction; and,

¹ The Surface Transportation Board (STB) was created with the passage of the ICC Termination Act of 1995 (Pub. L. No. 104-88). STB, an independent body within the U.S. Department of Transportation, is responsible for administering rail, pipeline, and certain adjudicatory function involving motor and water carriers. These responsibilities are similar to those duties formerly administered by the Interstate Commerce Commission. The STB is the lead agency under the National Environmental Policy Act (NEPA) for the Powder River Basin Expansion Project.

WHEREAS, the applicable requirements of the NHPA, the American Indian Religious Freedom Act, 42 U.S.C. 1996 et. seq. (AIRFA), and the Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001 et. seq. and 43 CFR 10 (NAGPRA), have been considered in the development of the ID plan and this agreement does not waive the responsibilities of the Signatories and Invited Signatories under these regulations; and,

WHEREAS, the lead Federal agency (STB) in cooperation with the USFS, BLM, COE, and BOR has prepared an Environmental Impact Statement (EIS) in accordance with the requirements of the National Environmental Policy Act (NEPA) to address the potential impacts of the undertaking on a variety of human and natural resources; and,

WHEREAS, the STB may use an independent third party contractor, working under its supervision, direction, and control, and at DM&E's expense, to assist in meeting the STB's responsibilities defined in the stipulations below; and,

NOW, THEREFORE, the Signatories and Invited Signatories to this agreement consent that the proposed undertaking shall be implemented in accordance with the following stipulations in order to consider the effect of the undertaking on historic properties and to satisfy all Section 106 NHPA responsibilities for all aspects of the project.

STIPULATIONS

The STB has a statutory obligation as the lead Federal agency to fulfill the requirements of Section 106 (36 CFR 800), therefore the STB shall ensure that the measures in the following parts are carried out.

A. IDENTIFICATION PLAN

The portions to be surveyed on the existing rail line and new construction will be determined through consultation with SHPOs, Tribal Historic Preservation Officer(s) (THPO)/cultural resource representative(s) designated by the Tribe(s), DM&E, and Federal agencies. If requested by a SHPO, this consultation will include a meeting with SHPO representatives to further discuss the Area of Potential Effect (APE) and other ID Plan concerns. Any unresolved objections that result from these consultations shall be addressed in accordance with Stipulation M.

The ID Plan describes the APE, the methodology for the location, inventory, identification, recording, and evaluation of all cultural resources that have surface and exposed profile indications along the alignment(s) approved for construction. The ID Plan also describes the APE, the methodology for location, inventory, identification, recording, and evaluation of all cultural resources in portions of the existing rail line. The ID Plan generally consists of a literature review to identify previously recorded sites along the approved alignment(s), for both new construction and the existing rail line, an intensive survey for identification and evaluation of cultural resources, and preparation of reports of these investigations.

A.1. IDENTIFICATION

The Signatories and Invited Signatories to this Agreement consent that historic properties will be identified in accordance with the ID Plan (Attachment A) which was developed for this project in coordination with the Federal agencies, SHPOs, and consulting tribes. Sites will be identified in accordance with each individual state definition of what constitutes a site.

A.2. SURVEY REPORTS

STB shall prepare intensive survey and cultural resource NRHP evaluation recommendations (Reports), and findings of effect for those areas surveyed as outlined in the ID Plan. Separate reports will be prepared for each of the states of Wyoming and Minnesota. Two reports will be prepared for South Dakota with one covering the existing system and one covering the new construction. Reports will include the results of literature review, intensive and reconnaissance surveys (to the extent that access from landowners is available), and the evaluation recommendations regarding cultural resources. Surveys of any additional ancillary facilities or reroutes, or non-accessible areas on either the new construction or the reconstruction portions found to be necessary after submittal of these reports will be addressed in addendum reports and submitted to the parties that reviewed the original reports.

A.3. SURVEY REPORT REVIEW

STB shall provide Reports on the surveys conducted in accordance with the ID Plan to DM&E; the USFS, BLM, COE, and BOR (collectively the Federal agencies); and appropriate THPO(s)/cultural resources representative(s) designated by the Tribes (collectively the Tribal representatives); and the appropriate SHPOs. These reviewing parties may review the Reports and comment upon them to the STB as outlined below. Comments shall address the adequacy of the intensive survey results, the eligibility of cultural resources identified during the intensive survey for inclusion on the NRHP and the effects of the project on any cultural resources considered to be historic properties.

The reviewing parties will provide their recommendations for determinations of site eligibility based upon NRHP criteria (36 CFR 60.4) and their comment on STB's application of the criteria at 36 CFR 800.5(a)(1) to the STB.

A.3.1 Report Reviews by DM&E, Federal Agencies and Tribal Representative

STB shall provide Reports on surveys to DM&E, the Federal agencies and appropriate Tribal representatives for concurrent reviews. DM&E will have a 15-day review and comment period. DM&E's comments will be forwarded immediately to the reviewing Federal agencies and appropriate Tribal representatives for consideration during their review of the Reports.

The Federal agencies and appropriate Tribal representatives will have a 30-day review and comment period.

Based on the comments received, the STB may revise the Report(s) or may conduct additional intensive survey(s), or both. Any revised Report(s) will be submitted by the STB to DM&E for a second 15-day review period and to the Federal agencies and appropriate Tribal representatives for a second 30-day review period.

If any reviewing party has an objection to the Report(s), they shall notify STB within 30 days of receiving the Report(s) for review in accordance with Stipulation M.

A.3.2 Reports Reviews by SHPOs

Upon completion of the review cycles by DM&E, the Federal agencies and appropriate Tribal representatives described in Stipulation A.3.1, STB shall provide the Report(s) to the appropriate SHPO(s) for review of survey adequacy, and consensus of determinations of eligibility and of effect for all properties identified in the APE is described in the ID Plan. SHPO(s) shall be provided 60 days for this review and comment period.

A.3.3 Public Participation

The STB shall take reasonable steps to provide opportunities for members of the public to express their views on the identification of historic properties that may be eligible for inclusion in the National Register. Opportunities for public input may include the distribution of Reports for public comment upon concurrence of the appropriate SHPO(s); and public meetings, hosted by DM&E, to explain how the surveys were conducted, discuss the historic properties identified in the Reports, and to outline the framework for how Treatment Plan(s) will be developed. Any public comments received will be considered in determining the need for additional surveys and in the development of Treatment Plan(s).

A.3.4 Addendum Reports

Intensive surveys resulting from public participation, or of any additional ancillary facilities or reroutes on either the new construction or the reconstruction portions found to be necessary after submittal of these Report(s), will be prepared as addendum to the original Report(s) and will be submitted to the same reviewing parties. Addendum reports will be reviewed as outlined in Stipulations A.3.1 and A.3.2.

A.4. ELIGIBILITY DISAGREEMENTS

The STB shall forward a finding of eligibility to the Keeper of the National Register (Keeper) for resolution in accordance with 36 CFR 800.4(c)(2) if:

- A SHPO or Federal agency with jurisdiction over the involved lands objects in writing within 30 days to a finding of eligibility, or
- A THPO or Indian tribe that ascribes traditional religious and cultural significance to a property objects in writing within 30 days to a finding of eligibility regarding that property; and
- The STB is not able to resolve that objection through consultation with the SHPO and the objecting party.

A.5. CONSTRUCTION AREAS WITH NO HISTORIC PROPERTIES (Phased Approval)

If after full review by the appropriate Federal agencies, appropriate Tribal representatives and appropriate SHPOs, the construction area or portions of the construction area have been determined by STB to be negative for historic properties, and the Report(s) have been accepted by the STB, appropriate Federal agencies with jurisdiction, appropriate SHPO(s), and appropriate Tribal representatives, then construction of project facilities in these areas may be allowed by STB, upon concurrence by the appropriate SHPOs and appropriate Tribal representative, subject to DM&E obtaining permits or approvals as required.

B. TREATMENT PLANS FOR HISTORIC PROPERTIES¹

B.1. FORMAT

Upon completion of identification activities, and as early as reasonable during project development, the STB will develop a Treatment Plan for each property, group of closely related properties, or category of properties determined to constitute a historic property. Each Treatment Plan will be developed in consultation with the appropriate Federal agency(s), the appropriate SHPO(s), and appropriate Tribal representative(s), DM&E, and the Council. If requested by a SHPO, this consultation will include a meeting with SHPO representatives, and others the SHPO may deem appropriate, to further review the framework for how treatment plans will be developed, and to review opportunities and alternatives that could avoid or minimize adverse effects to a historic property, group of closely related historic properties, or category of historic properties. Any unresolved objections that result from these consultations shall be addressed in accordance with Stipulation M.

¹ Properties may include sites, buildings, structures, bridges and other objects that are eligible for inclusion in the National Register of Historic Places.

Each Treatment Plan will address the historic property adversely affected and set forth means to mitigate the undertaking's effects where the STB, in consultation with the appropriate Federal agency(s), appropriate SHPO(s), appropriate Tribal representative(s) and DM&E determine it is not feasible or prudent to avoid effects by project relocation. The Treatment Plans will conform to the principles of the Council's *Treatment of Archaeological Properties: A Handbook, Parts I and II*, the "Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation" (Federal Register, Vol. 48 No. 190, September 29, 1983, pp. 44716-44742) and appropriate SHPO guidelines. The STB will ensure the measures to be implemented will be responsive to the concerns of the Consulting Parties (as defined in the Glossary to this document).

B.2. CONTENT

The Treatment Plans for the undertaking will include, but not be limited to:

a. Historic Properties

Specification of all historic properties to be affected by the project, including a description of the nature of the effects.

b. Treatment

A detailed description of the treatments proposed for historic properties or portions of historic properties eligible for the NRHP under 36 CFR Part 60.4 criteria (a), (b), (c) and/or (d), with an explanation or rationale provided for the choice of the proposed treatments. These treatments will take into account the setting, including, but not limited to, visual, auditory, and atmospheric elements, as appropriate, and be responsive to the qualities that contribute to the significance of the affected properties.

c. Research Design

An archaeological research design for adversely affected properties eligible for the NRHP under 36 CFR Part 60.4 criteria (d) will be developed. The research design will specify and explain the following:

- Where data recovery is determined by the STB to be appropriate mitigation response. Research questions to be explored through the data recovery efforts (taking into consideration that data recovery is an adverse effect).
- Justification of the appropriateness of the chosen research questions.
- Data needed to explore the questions posed.

- Properties and portions of those properties to be further investigated.
- Methods used to collect data needed to explore the research questions posed, where the adverse effect of data recovery is deemed the appropriate treatment.
- Laboratory methods used in the examination of the physical material that is recovered.
- Proposed disposition of the recovered materials and records.
- The timing for the preparation and distribution of reports

d. Human Remains

The procedures for consulting about the treatment and disposition of Native American human remains and associated grave goods, if encountered, in accordance with the ID Plan and Stipulations H and J.

e. Monitoring

A description and rationale for selection of the areas proposed for construction monitoring (a qualified archaeologist as defined in the *Secretary of Interior's Professional Qualifications and Standards* (48 FR 22716 September, 1983) and qualified Tribally-recognized American Indian Monitors present to observe ground surfaces exposed during the actual construction activities) and construction inspection conducted by a qualified archaeologist of areas of ground disturbance after specific phases of construction are completed.

f. Distribution of Information

The Treatment Plan must contain provisions for the creation of a popular account for disseminating the results of the Treatment Plans to the general public. These popular accounts will be consistent with the Archaeological Resources Protection Act (ARPA), Executive Order on Sacred Sites 13007 FR 61-104 dated May 24, 1996, NAGPRA, the Freedom of Information Act (FOIA), and Section 304 of the NHPA (16 U.S.C. 4702-3).

C. TREATMENT PLANS - REVIEW

C.1 DEVELOPMENT AND REVIEW

The STB will develop, in cooperation with the appropriate Federal agency (s), appropriate SHPO(s), and appropriate Tribal representative (s), each Treatment Plan to ensure that it addresses the concerns of the appropriate Federal agency(s).

appropriate SHPO(s), appropriate Tribal representatives(s), and DM&E in accordance with Stipulation B.2(b).

STB shall provide Treatment Plan(s) to DM&E, the appropriate Federal agency(s), appropriate SHPO(s) and appropriate Tribal representative(s) for concurrent reviews. DM&E will have a 15-day review and comment period. DM&E's comments will be forwarded immediately to the other appropriate reviewing parties for consideration during their review of the Treatment Plan(s). The appropriate Federal agency(s), appropriate SHPO(s), and appropriate Tribal representatives will have a 30-day review and comment period. If any appropriate reviewing party to this Agreement fails to comment within the review period, the STB shall assume that reviewing party's concurrence. Based upon comments received, revised Treatment Plan(s) will be prepared and submitted to all reviewing parties.

C.2 REVISED TREATMENT PLAN(S) REVIEW

The resultant revised Treatment Plan(s) will be submitted by the STB to the appropriate Federal agency(s), appropriate SHPO(s), and appropriate Tribal representative(s) for a final 30-day comment period. If any reviewing party has an objection to the final Treatment Plan(s) they shall notify STB within the 30-day comment period in accordance with subsection D below. Disputes will be resolved in accordance with Stipulation M.

C.3 PUBLIC PARTICIPATION

The STB shall take reasonable steps to provide opportunities for members of the public to express their views on the Treatment Plan(s). Opportunities for public input may include the distribution of Treatment Plan(s) for public comment upon concurrence of the appropriate SHPO(s), and public meetings, hosted by DM&E, to explain how the Treatment Plan(s) were developed and to discuss the proposed removal or alteration of an historic property, and other modifications to the historic character of the existing DM&E rail line. Any public comments received will be considered, in consultation with the appropriate SHPO(s), in determining the need for Treatment Plan(s) revisions. Any substantial revisions to a Treatment Plan(s) will be reviewed in accordance with Stipulation C.1.

D. TREATMENT PLANS - IMPLEMENTATION

D.1. CONSTRUCTION PLAN

Upon SHPO concurrence, each Treatment Plan will be incorporated by DM&E into their Construction and Use Plan required for the project rights-of-way on Federal lands, and the STB and/or the appropriate Federal or state agency shall provide authorization to proceed with the implementation of the Treatment Plan on lands under their jurisdiction. DM&E or its authorized representative will obtain ARPA excavation and removal permits for Federal lands and/or required state permits.

Termination of the project after initiation of the Treatment Plan(s) will require completion of any work in progress, and amendment of each Treatment Plan as described below.

D.2. AMENDMENTS

Amendments to the Treatment Plans will be incorporated by written agreement among the STB, the appropriate SHPO(s), appropriate Tribal representative(s), DM&E, and the Council. The appropriate Federal agency(s) will also be party to the written agreement if their managed lands are involved. Amendments to the appropriate ARPA permits will be submitted as part of the approval of the amendments.

D.2.1 DM&E or its authorized representative shall prepare a progress report(s) to the STB, appropriate SHPO(s), and appropriate Tribal representative(s) every two weeks documenting progress in the implementation of each Treatment Plan. The appropriate Federal agencies will be provided with a report every two weeks if their managed lands are involved or if requested. These progress reports will include:

- Dates of mitigation work included in the progress reporting period.
- Historic properties where treatment was conducted.
- Type and amount of treatment performed.
- Brief summary of the treatment results during the period covered by the report.
- Concerns or comments of the principal investigator for plan implementation.

E. CHANGES IN ANCILLARY AREAS/CONSTRUCTION RIGHT-OF-WAY

The STB will notify the appropriate Federal agency(s), appropriate SHPO(s), appropriate Tribal representative(s) of changes in the size or location of ancillary areas or the construction right-of-way that may become necessary during actual construction. If any changes result in the use of unsurveyed areas, the STB will ensure that these areas are subject to intensive survey in order to locate any potentially significant cultural resources and that those resources are evaluated for NRHP eligibility. The Reports addressing these areas will be reviewed in accordance with Stipulation A and Treatment Plans will be developed in accordance with Stipulations B and C and implemented for those sites, structures, buildings, bridges and other objects determined to be Historic Properties.

F. CONSTRUCTION AREAS WITH HISTORIC PROPERTIES

In those areas where historic properties are present, the STB will be notified and will provide the results of the completed Treatment Plan to the appropriate SHPO(s) when implementation of the Treatment Plan is completed. Within 45 days of this notification of Treatment Plan completion, the STB, the appropriate Federal agency(s), appropriate SHPO(s), appropriate Tribal representative(s), will be invited to inspect the site of the historic property to concur that Treatment Plan implementation is complete. Upon concurrence of complete Treatment Plan implementation, STB may authorize construction along that portion of the project addressed by the completed Treatment Plan. If concurrence of complete Treatment Plan implementation cannot be reached the dispute will be resolved in accordance with Stipulation M.

G. DOCUMENTATION OF TREATMENT

The STB will prepare a report documenting the implementation and results of the Treatment Plan(s). This report will be the Draft Final Cultural Resource Report for the project. The report will contain a detailed account of the information gained during implementation of the Treatment Plan(s), and the effectiveness of the work measures implemented to mitigate the adverse effects of construction. A review copy of the report will be distributed to the appropriate Federal agency(s), appropriate SHPO(s), appropriate Tribal representative(s), the Council, and DM&E. There will be a 30-day period to review and comment on the report. The Final Cultural Resource Report will be prepared within 120 days of receipt of the comments from the appropriate Federal agency(s), appropriate SHPO(s), appropriate Tribal representative(s), and the Council.

H. DISCOVERY

If a previously-undiscovered archaeological, historical, or cultural property is encountered during construction, or previously-known properties will be affected in an unanticipated manner, all activity will cease within 300 feet of the property to avoid or minimize harm to the property until the STB, in consultation with the appropriate Federal agency(s), appropriate SHPO(s), and appropriate Tribal representative(s), can evaluate and, if necessary, authorize steps to mitigate impacts to the new discovery. Evaluation and mitigation will be carried out by the STB in consultation with the appropriate Federal agency(s), the appropriate SHPO(s), appropriate Tribal representative(s), DM&E, and the Council as expeditiously as possible in accordance with 36 CFR 800.13(b).

I. CONFIDENTIALITY

All Signatories and Invited Signatories shall ensure that shared data, including data concerning the precise location and nature of historic properties and properties of religious and cultural significance are protected from public disclosure to the greatest extent permitted by law, including conformance to Section 304 of the NHPA, as amended and Section 9 of the ARPA and Executive Order on Sacred Sites 13007 FR 61-104 dated May 24, 1996.

J. HUMAN REMAINS

J.1. NOTIFICATION AND TREATMENT

If human remains are encountered on Federal lands, the STB shall notify the appropriate Federal land management agency, other consulting agencies if requested, appropriate SHPO(s), and designated NAGPRA tribal contact. Treatment and disposition of remains and associated grave goods will be consistent with measures outlined in the ID Plan, Stipulation H, and applicable Federal and state laws. If human remains are encountered on state or private lands, the STB will notify and consult with the appropriate SHPO(s), and appropriate Tribal representative(s). Treatment and disposition of remains and associated grave goods will be consistent with measures outlined in the ID Plan and applicable Federal, state and local laws.

J.2. REINTERMENT

STB will insure that every effort is taken to avoid disturbing known human burial sites. Where avoidance is not possible, and in consultation with appropriate Tribal representative(s), burials will be removed prior to construction and reinterred in accordance with reburial procedures outlined in the ID Plan and any applicable Federal and state laws.

J.3. DISCOVERY

If human remains are inadvertently discovered during construction activities, all construction will cease within 300 feet in all directions of the human remains and the STB will immediately notify the appropriate parties in accordance with the ID Plan. Human remains and grave goods will be treated in accordance with the ID Plan.

K. CURATION

K.1. FEDERAL LANDS

STB shall ensure curation of all records and other archeological items resulting from identification and data recovery efforts is completed in accordance with 36 CFR Part 79, and the provisions of 43 CFR 10 (NAGPRA). STB shall ensure that documentation of the curation of these materials is prepared and provided to the appropriate Signatories and appropriate Invited Signatories to this Agreement within 10 days of receiving it. All archaeological materials recovered from Federal lands shall be curated in accordance with the ID Plan.

K.2. PRIVATE LANDS

Private landowners will be encouraged to curate archeological materials recovered from their lands in accordance with the ID Plan. Materials from private lands to be returned to the private landowners shall be maintained in accordance with 36 CFR Part 79 until all necessary analysis has been completed. STB shall document the return of materials to private landowners and submit copies of this documentation to the appropriate Signatories and appropriate Invited Signatories to this Agreement.

K.3. STATE LANDS

STB will ensure that all cultural materials discovered on state lands will be curated in accordance with the ID Plan.

L. AUTHORITIES

Compliance with the provisions of this Programmatic Agreement does not relieve the STB or other Federal agencies of their responsibilities to comply with other legal requirements, including those imposed by the NAGPRA (25 U.S.C. Section 3001 and 43 CFR 10), the ARPA (16 U.S.C. Section 470 aa-47011), and the NEPA (42 U.S.C. Section 4321-4347), and applicable Executive Orders.

M. DISPUTE RESOLUTION

Should any Signatory to this Agreement object within 30 days to any action proposed or any document provided for review pursuant to this agreement, the STB shall consult with the objecting Signatory to resolve the objection unless otherwise specified in this document. If the STB determines that the objection cannot be resolved, the STB shall forward all documentation relevant to the dispute to the Council. Within 30 days after receipt of all pertinent documentation, the Council shall either: provide STB with recommendations, which STB shall take into account in reaching a final decision regarding the dispute; or notify STB that it will comment in accordance with 36 CFR 800.7(c). Any Council comment provided in response to such a request will be taken into account by STB in accordance with 36 CFR 800.7(c)(4) with reference to the subject of the dispute.

Any recommendation or comment provided by the Council will be understood to pertain only to the subject of the dispute; the STB's responsibility to carry out all actions under this Agreement that is not subject to dispute will remain unchanged.

N. AMENDMENT

Signatories to this Agreement may request that it be amended, whereupon the Signatories will consult in accordance with 36 CFR 800.14 to consider such amendment.

O. TERMINATION

O.1. AGREEMENT

The STB, Council, SHPO(s), or DM&E may terminate this Agreement by providing 30 days written notice to the other Signatories; the Signatories shall consult during the 30-day notice period prior to termination to seek agreement on amendments or other actions that would avoid termination. If the STB, Council, or DM&E individually terminate their participation in the Agreement, then the Agreement is terminated in its entirety. If a SHPO terminates its participation in the Agreement, that termination shall only apply to the state under that SHPO's jurisdiction. In the event of termination, the STB, SHPO(s), and DM&E will comply with 36 CFR 800 subpart B.

O.2. TERM

The term of this agreement shall be five (5) years from the date of execution unless otherwise terminated, in accordance with Stipulation O.1, or amended by the Signatories.

P. FAILURE TO CARRY OUT THE TERMS OF THE AGREEMENT

In the event that the terms of this Agreement are not carried out, the STB and all other appropriate Signatories shall comply with 36 CFR 800 subpart B with regard to individual actions covered by this Agreement.

Q. EXECUTION AND IMPLEMENTATION

This Programmatic Agreement shall take effect when executed by the Council, STB, appropriate SHPOs, USFS, BLM, COE, and BOR. Execution and implementation of this Agreement evidences that the Council, STB, USFS, BLM, COE, and BOR have satisfied their NHPA Section 106 responsibilities for all individual actions of the DM&E's Powder River Basin Expansion Project.

Attachment A - Identification Plan

SIGNATORIES

Federal Agencies

Advisory Council on Historic Preservation

Signature: [Signature] Date: 5/15/03

Printed Name and Title: John L. Klima (for) Executive Director

The Surface Transportation Board

Signature: [Signature] Date: May 9, 2003

Printed Name and Title: Victoria Ryderson, Chief, SEA

The U.S.D.A. Forest Service, Region 2

Signature: _____ Date: _____

Printed Name and Title: _____

The U.S.D.I. Bureau of Land Management Montana/Dakotas State Office

Signature: _____ Date: _____

Printed Name and Title: _____

The U.S.D.I. Bureau of Land Management Wyoming State Office

Signature: _____ Date: _____

Printed Name and Title: _____

The U.S. Army Corps of Engineers, Omaha District

Signature: _____ Date: _____

Printed Name and Title: Kurt F. Ubbelohde, Colonel, Corps of Engineers, District Engineer

RECEIVED
APR 10 2003
BUREAU OF LAND MANAGEMENT
SIO

SIGNATORIES

Federal Agencies

Advisory Council on Historic Preservation

Signature: _____ Date: _____

Printed Name and Title: _____

The Surface Transportation Board

Signature: _____ Date: _____

Printed Name and Title: _____

The U.S.D.A. Forest Service, Region 2

Signature: Rick D. Cobles Date: 4-9-03

Printed Name and Title: Rick D. Cobles, Regional Forester

The U.S.D.I. Bureau of Land Management Montana/Dakotas State Office

Signature: _____ Date: _____

Printed Name and Title: _____

The U.S.D.I. Bureau of Land Management Wyoming State Office

Signature: _____ Date: _____

Printed Name and Title: _____

The U.S. Army Corps of Engineers, Omaha District

Signature: _____ Date: _____

Printed Name and Title: Kurt F. Ubbelohde, Colonel, Corps of Engineers, District Engineer

SIGNATORIES

Federal Agencies

Advisory Council on Historic Preservation

Signature: _____ Date: _____

Printed Name and Title: _____

The Surface Transportation Board

Signature: _____ Date: _____

Printed Name and Title: _____

The U.S.D.A. Forest Service, Region 2

Signature: _____ Date: _____

Printed Name and Title: _____

The U.S.D.I. Bureau of Land Management Montana/Dakotas State Office

Signature: Thomas P. Lewis Date: 4-23-03

Printed Name and Title: Thomas P. Lewis, Deputy Assistant Director

The U.S.D.I. Bureau of Land Management Wyoming State Office

Signature: _____ Date: _____

Printed Name and Title: _____

The U.S. Army Corps of Engineers, Omaha District

Signature: _____ Date: _____

Printed Name and Title: Kurt F. Ubbelohde, Colonel, Corps of Engineers, District Engineer

SIGNATORIES

Federal Agencies

Advisory Council on Historic Preservation

Signature: _____ Date: _____

Printed Name and Title: _____

The Surface Transportation Board

Signature: _____ Date: _____

Printed Name and Title: _____

The U.S.D.A. Forest Service, Region 2

Signature: _____ Date: _____

Printed Name and Title: _____

The U.S.D.I. Bureau of Land Management Montana/Dakotas State Office

Signature: _____ Date: _____

Printed Name and Title: _____

The U.S.D.I. Bureau of Land Management Wyoming State Office

Signature: Robert A. Bennett Date: 4/18/03

Printed Name and Title: Robert A. Bennett State Director

The U.S. Army Corps of Engineers, Omaha District

Signature: _____ Date: _____

Printed Name and Title: Kurt F. Ubbelohde, Colonel, Corps of Engineers, District

Engineer

SIGNATORIES

Federal Agencies

Advisory Council on Historic Preservation

Signature: _____ Date: _____

Printed Name and Title: _____

The Surface Transportation Board

Signature: _____ Date: _____

Printed Name and Title: _____

The U.S.D.A. Forest Service, Region 2

Signature: _____ Date: _____

Printed Name and Title: _____

The U.S.D.I. Bureau of Land Management Montana/Dakotas State Office

Signature: _____ Date: _____

Printed Name and Title: _____

The U.S.D.I. Bureau of Land Management Wyoming State Office

Signature: _____ Date: _____

Printed Name and Title: _____

The U.S. Army Corps of Engineers, Omaha District

Signature: Kurt F. Ubbelohde Date: 29 April 2003

Printed Name and Title: Kurt F. Ubbelohde, Colonel, Corps of Engineers, District

Engineer

The U.S. Army Corps of Engineers, St. Paul District

Signature: Robert L. Ball Date: 4 April 2003

Printed Name and Title: Robert L. Ball, Colonel, Corps of Engineers, District Engineer

The U.S.D.I. Bureau of Reclamation

Signature: _____ Date: _____

Printed Name and Title: _____

State Historic Preservation Offices

Minnesota State Historic Preservation Office

Signature: _____ Date: _____

Printed Name and Title: _____

South Dakota State Historic Preservation Office

Signature: _____ Date: _____

Printed Name and Title: _____

Wyoming State Historic Preservation Office

Signature: _____ Date: _____

Printed Name and Title: _____

Applicant

President, Dakota, Minnesota & Eastern Railroad Corporation

Signature: _____ Date: _____

The U.S. Army Corps of Engineers, St. Paul District

Signature: _____ Date: _____

Printed Name and Title: Robert L. Ball, Colonel, Corps of Engineers, District Engineer

The U.S.D.I. Bureau of Reclamation

Signature: Dennis E. Breitenman Date: 4/21/03

Printed Name and Title: Dennis E. Breitenman, Area Manager, Dakota Area

State Historic Preservation Offices

Minnesota State Historic Preservation Office

Signature: _____ Date: _____

Printed Name and Title: _____

South Dakota State Historic Preservation Office

Signature: _____ Date: _____

Printed Name and Title: _____

Wyoming State Historic Preservation Office

Signature: _____ Date: _____

Printed Name and Title: _____

Applicant

President, Dakota, Minnesota & Eastern Railroad Corporation

Signature: _____ Date: _____

The U.S. Army Corps of Engineers, St. Paul District

Signature: _____ Date: _____

Printed Name and Title: Robert L. Ball, Colonel, Corps of Engineers, District Engineer

The U.S.D.I. Bureau of Reclamation

Signature: _____ Date: _____

Printed Name and Title: _____

State Historic Preservation Offices

Minnesota State Historic Preservation Office

Signature: Nina M. Archabal Date: 4/17/03

Printed Name and Title: NINA M. ARCHABAL, MINNESOTA SHPO

South Dakota State Historic Preservation Office

Signature: _____ Date: _____

Printed Name and Title: _____

Wyoming State Historic Preservation Office

Signature: _____ Date: _____

Printed Name and Title: _____

Applicant

President, Dakota, Minnesota & Eastern Railroad Corporation

Signature: _____ Date: _____

The U.S. Army Corps of Engineers, St. Paul District

Signature: _____ Date: _____

Printed Name and Title: Robert L. Ball, Colonel, Corps of Engineers, District Engineer

The U.S.D.I. Bureau of Reclamation

Signature: _____ Date: _____

Printed Name and Title: _____

State Historic Preservation Offices

Minnesota State Historic Preservation Office

Signature: _____ Date: _____

Printed Name and Title: _____

South Dakota State Historic Preservation Office

Signature: Jay D. VOGT Date: 04-22-2003

Printed Name and Title: JAY D. VOGT, SHPO

Wyoming State Historic Preservation Office

Signature: _____ Date: _____

Printed Name and Title: _____

Applicant

President, Dakota, Minnesota & Eastern Railroad Corporation

Signature: _____ Date: _____

The U.S. Army Corps of Engineers, St. Paul District

Signature: _____ Date: _____

Printed Name and Title: Robert L. Ball, Colonel, Corps of Engineers, District Engineer

The U.S.D.I. Bureau of Reclamation

Signature: _____ Date: _____

Printed Name and Title: _____

State Historic Preservation Offices

Minnesota State Historic Preservation Office

Signature: _____ Date: _____

Printed Name and Title: _____

South Dakota State Historic Preservation Office

Signature: _____ Date: _____

Printed Name and Title: _____

Wyoming State Historic Preservation Office

Signature: Richard L. Currit Date: 4/24/03

Printed Name and Title: Richard L. Currit WSHPO

Applicant

President, Dakota, Minnesota & Eastern Railroad Corporation

Signature: _____ Date: _____

The U.S. Army Corps of Engineers, St. Paul District

Signature: _____ Date: _____

Printed Name and Title: Robert L. Ball, Colonel, Corps of Engineers, District Engineer

The U.S.D.I. Bureau of Reclamation

Signature: _____ Date: _____

Printed Name and Title: _____

State Historic Preservation Offices

Minnesota State Historic Preservation Office

Signature: _____ Date: _____

Printed Name and Title: _____

South Dakota State Historic Preservation Office

Signature: _____ Date: _____

Printed Name and Title: _____

Wyoming State Historic Preservation Office

Signature: _____ Date: _____

Printed Name and Title: _____

Applicant

President, Dakota, Minnesota & Eastern Railroad Corporation

Signature: Richard L. Currit Date: 18 April 2003

INVITED SIGNATORIES

Tribes

Chairman, Northern Arapaho Tribe

Signature: _____ Date: _____

Chairman, Eastern Shoshone Tribe

Signature: _____ Date: _____

Chairman, Northern Cheyenne Tribe

Signature: _____ Date: _____

Chairman, Ft. Peck Tribes

Signature: _____ Date: _____

Chairman, Crow Tribe

Signature: _____ Date: _____

Chairman, Oglala Sioux Tribe

Signature: _____ Date: _____

Chairman, Rosebud Sioux Tribe

Signature: _____ Date: _____

Chairman, Standing Rock Sioux Tribe

Signature: _____ Date: _____

Chairman, Spirit Lake Nation

Signature: _____ Date: _____

Chairman, Turtle Mountain Band of Chippewa

Signature: _____ Date: _____

Chairman, Three Affiliated Tribes

Signature: _____ Date: _____

Chairman, Santee Sioux Tribe

Signature: _____ Date: _____

Chairman, Omaha Tribe

Signature: _____ Date: _____

Chairman, Winnebago Tribe

Signature: *John Stuebner* Date: *5/27/03*

Chairman, Ponca Tribe

Signature: _____ Date: _____

Chairman, Upper Sioux Community

Signature: _____ Date: _____

Chairman, Lower Sioux Community

Signature: _____ Date: _____

Chairman, Prairie Island Sioux Community

Signature: _____ Date: _____

Chairman, Shakopee Mdewakanton Sioux

Signature: _____ Date: _____

Chairman, Kiowa Tribe of Oklahoma

Signature: _____ Date: _____

Chairman, Comanche Nation

Signature: _____ Date: _____

Chairman, Cheyenne-Arapaho Tribes of Oklahoma

Signature: _____ Date: _____

Chairman, Pawnee Nation of Oklahoma

Signature: *Robert D. Chappman* Date: 5-1-03

Chairman, Sac & Fox Nation of Oklahoma

Signature: _____ Date: _____

Chairman, Sac & Fox Nation in Iowa

Signature: _____ Date: _____

Chairman, Menominee Indian Tribe

Signature: _____ Date: _____

Chairman, Ho-Chunk Nation

Signature: _____ Date: _____

Chairman, Cheyenne River Sioux Tribe

Signature: _____ Date: _____

Chairman, Crow Creek Sioux Tribe

Signature: _____ Date: _____

Chairman, Yankton Sioux Tribe

Signature: _____ Date: _____

Chairman, Lower Brule Sioux Tribe

Signature: _____ Date: _____

Chairman, Sisseton-Wahpeton Sioux Tribe

Signature: _____ Date: _____

Chairman, Flandreau Santee Sioux Tribe

Signature: _____ Date: _____

Indian Organizations

President, Medicine Wheel Alliance

Signature: _____ Date: _____

President, Medicine Wheel Coalition for Sacred Sites

Signature: _____ Date: _____

Chairman, Minnesota Indian Affairs Council

Signature: _____ Date: _____

President, Gray Eagle Society

Signature: _____ Date: _____

President, Black Hills Sioux Nation Council

Signature: _____ Date: _____

Glossary of Terms/Acronyms

Adverse Effect

When an undertaking may alter, directly or indirectly, the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.

APE

The Area of Potential Effect (APE) is the geographic area within which the project may cause physical, visual or audible effects to the character or use of historic properties. It includes all areas of construction, such as rights-of-way (ROW), staging areas, extra work spaces, yards, access roads, borrow areas, and other ancillary facilities. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.

Ancillary Areas

A general term that covers any additional areas that may be effected by the undertaking.

Area of Potential Effect

See APE.

Associated Funerary Objects

Objects for which the human remains with which they were intentionally are also in the possession or control of a museum or Federal Agency. The term includes those funerary objects and cultural properties that were made for burial purposes or to contain human remains and those cultural properties that are a part of a burial site.

Borrow Area(s)

An excavated area where material has been or will be dug for use as fill at another location.

Consulting Parties

Consulting parties include SHPO/THPO, Indian tribes, representatives of local governments, applicants for Federal assistance, permits, licenses and other approvals, and certain individuals and organizations with a demonstrated interest in the undertaking.

Cultural Resource

A cultural resource is any prehistoric or historic district, site, building, structure or object in American history, architecture, engineering, archeology, or culture. This term includes artifacts, records, and remains that are related to

High Probability Area(s)	An area suspected to have a better than average chance of containing cultural resources (e.g. water crossings, paralleling watercourses, historically prominent areas etc.).
Historic Property	Any prehistoric or historic district, site, building structure, or object included in or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian Tribe that meet the National Register criteria.
Human Remains	The physical remains of a human body.
ID Plan	Identification Plan.
Indian Tribe	An Indian Tribe, band, nation, or other organized group or community, including a Native Village, Regional Corporation or Village Corporation, as those terms are defined in Section 3 of the Alaska Native Claims Settlement Act (43 T.I. S. C 1602) which is recognized eligible for the special programs and serviced provided by the United States to Indians because of their status as Indians.
Intensive Survey	An intensive survey is a systematic, detailed examination of an area designed to gather information about cultural resources sufficient to evaluate them against NRHP eligibility criteria of significance within specific historic contexts.
Keeper of the National Register	The Keeper is the individual who has been delegated the authority by the National Park Service (NPS) to list properties and determine their eligibility for the National Register. The Keeper may further delegate this authority as he or she deems appropriate.
Lateral Area	Any subsequent branch from the main line that may as yet not be identified but is a part of the undertaking.
NAGPRA	Native American Graves Protection and Repatriation Act.
National Register	The National Register lists properties formally determined eligible for the NRHP.
National Register Criteria	National register criteria are criteria established by the Secretary of the Interior for use in evaluating the eligibility

Page 24 of 27

Cultural Resource Management Group	and located within such properties. The term also includes properties of traditional religious and cultural importance to an Indian Tribe that may meet the National Register criteria.
Curation	A professional archaeological firm that performs cultural resource investigations for a fee.
Days	The preservation of material remains that are excavated or removed during a survey, excavation, or other study of a prehistoric or historic resource, and associated records that are prepared or assembled in connection with the survey, excavation or other study.
Eligible for the National Register of Historic Places	Calendar days. The term eligible for the National Register includes both properties formally determined as such in accordance with the regulations of the Secretary of the Interior and all other properties that meet the National Register criteria.
Evaluation Testing	Archaeological investigation of a prehistoric or historic site with a purpose of evaluating the site against National Register of Historic Places criteria contained in 36 CFR 60.4.
Exposed Profile	Any area where the soils are exposed such as stream cut banks, road cut banks, erosion gullies etc.
Federal Agency(s)	Any Federal entity with a statutory obligation to fulfill the requirements of Section 106 who has jurisdiction over an undertaking and takes legal and financial responsibility for section 106 compliance in accordance with Subpart B 36 CFR 800. The Federal Agency(s) has approval authority for the undertaking and can commit the Federal agency to take appropriate action for a specific undertaking as a result of Section 106 compliance.
Ground Disturbance Area	The surface area that will be impacted by construction.
Haul Roads (New)	Roads constructed where none previously existed to facilitate hauling of construction materials.
Haul Roads (Upgraded)	Roads or trails that require upgrading to accommodate hauling construction materials.

Page 23 of 27

of properties for the National Register (36 CFR 60). The NRHP criteria are listed below:

The quality of significance in American history, architecture, archaeology, and culture is present in districts, sites, buildings, structures, and objects of state and local importance that possess integrity of location, design, setting, materials, workmanship and feeling and:

- that are associated with the events that have made a significant contribution to the broad patterns of our history; or
- that are associated with the lives of persons significant in our past; or
- that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic value, or that represent a significant and distinguishable entity whose components may lack individual distinction; or
- that yielded, or may be likely to yield, information on prehistory or history.

Criteria considerations: ordinarily cemeteries, birthplaces, or graves of historical figures; properties owned by religious institutions or used for religious purposes; structures that have been moved from their original locations, commemorative in nature; and properties that have achieved their significance within the past 50 years shall not be considered eligible for the National Register of Historic Places (36 CFR 60.4).

National Register of Historic Places.
Occupational Safety & Health Administration.
Programmatic Agreement.

A popular account is a comprehensive discussion of the information contained in professional report(s) on archaeological investigations that is written for the general public. A popular account will not contain any sensitive material, removes the technical language, yet can serve as an informational and educational tool.

Reconnaissance Survey

A reconnaissance survey is an examination of all or part of an area accomplished in sufficient detail to make generalizations about the types and distributions of historic properties that may be present.

SADI's

Scale Accurate Digital Image photographs with depictions of the construction right-of-way superimposed and geo-referenced.

SHPO

State Historic Preservation Officer.

Shovel Test

A small circular test excavation, approximately 40 centimeters in diameter that is dug to a sufficient depth to reach culturally undisturbed soils.

Site

Site definition is different for each state but is generally defined by Willey and Phillips (1958:18), as any reasonably definable spatial unit that contains features or is fairly continuously covered with artifacts that are indicative of an occupation 50 years or older. A site may be defined as "a spatial cluster of cultural features, or items, or both" (Binford 1972:46). These definitions apply to both prehistoric and historic sites. Archaeological context may be defined by the inclusion of any of the following: soil staining, associated fire-cracked rock, ceramics, features, or a concentration of materials within a reasonably defined spatial boundary.

Staging Area(s)

Those areas outside the construction disturbance area used for storage of supplies and equipment used for construction.

STB

Surface Transportation Board.

Testing

See Evaluation testing.

THPO

Tribal Historic Preservation Officer appointed or designated in accordance with the Act is the official representative of an Indian tribe for the purposes of Section 106.

Traditional Cultural Properties

A traditional Cultural Property can be defined generally as one that is eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that communities history, and (b) are important in maintaining the continuing cultural identity of the community.

Treatment Plan

A proposal for the mitigation of effects upon any historic property that a project would affect. It can include data recovery, documentation, restoration or other measures.

Unassociated funerary Objects

Those funerary objects for which the human remains with which they were placed intentionally are not in the possession or control of a museum or Federal agency. Objects that were displayed with individual human remains as part of a death rite or ceremony of a culture and subsequently returned or distributed according to traditional custom to living descendants or other individuals are not considered unassociated funerary objects.

Undertaking

An undertaking is a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; those requiring a Federal permit; license or approval; and those subject to state or local regulation pursuant to a delegation or approval by a Federal agency.

USGS

United States Geological Survey.

Attachment A

March, 2003
Identification Plan
for the Dakota, Minnesota & Eastern Railroad Corporation's Proposed
Powder River Basin Expansion Project

March, 2003
Identification Plan
for the Dakota, Minnesota & Eastern Railroad Corporation's Proposed
Powder River Basin Expansion Project

1. PURPOSE

The development of this plan is required by the Programmatic Agreement (PA) to ensure the successful completion of the National Historic Preservation Act (NHPA) Section 106 process for this project and in compliance with E.O. 13175. The purpose of this Identification Plan (ID Plan) is to ensure that the identification and evaluation of cultural resources is conducted in accordance with the *Secretary of Interior's Standards and Guidelines for Archeology and Historic Preservation (Standards and Guidelines)* (48 FR 44716-44742) and 36 CFR 800.4. The ID Plan and the Treatment Plan(s), developed for the identified historic properties, are integral parts of the PA. While the *Standards and Guidelines* are not regulatory and do not set or interpret policy, they do provide technical advice about archeological and historic preservation activities and methods.

Identification of historic properties is regulatory in nature. The historic properties that should be identified include any prehistoric or historic district site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places maintained by the Secretary of Interior. The term historic properties includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian Tribe or Native Hawaiian organization and that meet the National Register criteria. The term eligible for inclusion in the National Register includes both properties formally determined as such in accordance with regulations of the Secretary of Interior and all other properties that meet the National Register criteria. The level of identification needed varies depending on the nature of the property or property type, the nature of the agency's management authority, and the nature of the agency's possible effects on the property.

This ID Plan describes the three key elements: the Area of Potential Effect (APE), minimum standards and qualifications required for the cultural resource investigations, and American Indian and consulting party involvement.

2. SAFETY

All contractors and sub-contractors shall adhere to Occupational, Safety, and Health Administration (OSHA) standards while conducting related activities covered in the PA and ID Plan. Additionally, Corps of Engineers, U.S. Forest Service, Bureau of Land Management (BLM) and DM&E safety rules shall be adhered to when conducting activities on lands under management or jurisdiction of these parties.

A-1

3. AREA OF POTENTIAL EFFECT (APE)

The APE and the methods of identification and evaluation will be in accordance with the *Standards and Guidelines*. The project has two distinct parts generally described as: (1) the portion of the proposed project that will involve reconstruction of existing lines, and (2) the portion of the proposed project that will involve new construction where rail lines currently do not exist.

3.1 APE for Reconstruction

The APE for that portion of the project involving reconstruction, from Winona, Minnesota to Wall, South Dakota, and new line construction in Minnesota will include:

1. The existing DM&E right-of-way (ROW).
2. Any newly acquired ROW needed for cut and fill.
3. Any newly acquired ROW for proposed new connecting track near Owatonna, Minnesota.
4. Existing rail corridor and newly acquired ROW required for new DM&E rail line through Mankato, Minnesota.
5. All lateral areas, borrow areas, haul roads (new or upgraded), staging areas and other ancillary areas related to the undertaking.
6. Any newly acquired ROW for proposed yards and sidings.
7. That area outside the existing ROW or outside any newly acquired ROW where there is potential for the undertaking to have an adverse effect on historic properties as defined in 36 CFR 800.5. Identification of these areas will include consultation with the State Historic Preservation Officer (SHPO), Tribal Historic Preservation Officer (THPO)/cultural resource representative designated by the tribes, DM&E, and other identified consulting parties and Federal agencies.

3.2 Reconstruction Identification and Evaluation

Identification and evaluation for the reconstruction will include:

1. Identification of known cultural resources through records search and literature review and through consultation with the SHPO, THPO/cultural resource representatives designated by the tribes, other identified consulting parties, and Federal agencies in accordance with 36 CFR 800.4.
2. Field identification and Section 106 evaluation of all structures within the APE by a qualified architectural historian.
3. Intensive survey of the known cultural resources and other areas identified by the SHPO, THPO/cultural resource representatives designated by the tribes, other identified consulting parties, and Federal agencies in accordance with 36 CFR 800.4.
4. If the cultural resource is in the APE, necessary information to evaluate the cultural resource against NRHP eligibility criteria (36 CFR 60.4) shall

A-2

be obtained. The guidance in National Park Service Bulletin 38 and E.O. 13007 shall also be considered when evaluating sites for NRHP eligibility. If, in the opinion of the investigator and cultural resource representative designated by the tribes, the cultural resource is recommended NRHP

eligible, sufficient information to formulate Treatment Plan(s) shall be obtained. (The cultural resource representative designated by the tribes will only make recommendations on cultural resources having a prehistoric or historic Native American component). No backhoe or block excavations shall be undertaken without a written plan and SHPO consultation and approval.

5. Intensive survey to identify all cultural resources in other designated areas within the APE which have been identified by the SHPO, THPO/cultural resource representatives designated by the tribes, DM&E, other identified consulting parties, and Federal agencies.

6. The intensive survey shall gather information from American Indian tribes and elders to assist in identifying properties of religious and cultural significance to them and identifying properties that may be eligible for the NRHP.

7. A reconnaissance level survey of those areas outside the ground disturbance area where there is the potential for the undertaking to have an adverse effect, as defined in 36 CFR 800.5 on historic properties. Identification of these areas will include consultation with the SHPO, THPO/cultural resource representatives designated by the tribes, DM&E, other identified consulting parties, and Federal agencies.

3.3 APE for New Construction

The APE for the new construction portion of the project in South Dakota and Wyoming will include:

1. The construction ROW to include a twenty-foot buffer on either side of the fenced construction ROW along the entire new construction route (ground disturbance area).
2. All lateral areas, borrow areas, haul roads (new or upgraded), staging areas, and other ancillary areas related to the undertaking.
3. That area outside the construction or ground disturbance ROW where there is the potential for the undertaking to have an adverse effect on historic properties, as defined in 36 CFR 800.5. Identification of these areas will include consultation with the SHPO, THPO/cultural resource representatives designated by the tribes, DM&E, other identified consulting parties, and Federal agencies.

A-3

3.4 Construction Identification and Evaluation

Identification and evaluation for the new construction will include:

1. Identification of known cultural resources through records search and literature review and through consultation with the SHPO, THPO/cultural resource representatives designated by the tribes, other identified consulting parties, and Federal agencies in accordance with 36 CFR 800.4.
2. An intensive survey of the construction ROW plus 20 feet either side of the fenced construction ROW.
3. An intensive survey of all the lateral areas, borrow areas, haul roads (new and upgraded), staging areas, and other ancillary areas related to the undertaking.
4. An intensive survey of the construction ROW to identify all cultural resources. Testing will be done to evaluate cultural resources against NRHP eligibility criteria (36 CFR 60.4). The guidance in National Park Service Bulletin 38 and E.O. 13007 shall also be considered when evaluating sites for NRHP eligibility. If, in the opinion of the investigator and the cultural resource representative designated by the tribes, the cultural resource is to be recommended as a historic property, sufficient information to formulate Treatment Plan(s) shall be obtained. (The cultural resource representative designated by the tribes will only make recommendations on cultural resources having a prehistoric or historic Native American component). No backhoe or block excavations shall be undertaken without a written plan and SHPO consultation and approval.
5. A geomorphological survey of the construction ROW will be conducted to identify areas where buried cultural resources may exist and where deep testing may be necessary to identify cultural resources. The geomorphologist will also recommend construction monitoring areas and assist in evaluation of cultural resources against NRHP eligibility criteria (36 CFR 60.4) by providing identification of the soil(s), soil characteristics, soil dating, and analysis of the probability of the soils to contain cultural material.
6. A reconnaissance level survey of those areas outside the ground disturbance area where there is the potential for the undertaking to have an adverse effect, as defined in 36 CFR 800.5, on historic properties. Identification of these areas will include consultation with the SHPO, THPO/cultural resource representative designated by the tribes, DM&E, other identified consulting parties, and Federal agencies.

Any areas not originally identified within the APE but potentially affected by the undertaking must be identified by the SHPO, THPO/cultural resource representative designated by the tribes, DM&E, other identified consulting parties, and Federal agencies. The Surface Transportation Board (STB) will consult with the SHPO, THPO/cultural resource representative designated by the tribes, DM&E, other identified

A-4

consulting parties (as defined in 36 CFR 800.2(c)), and Federal agencies to address their concerns.

4. STANDARDS AND QUALIFICATIONS

The intensive survey and NRHP eligibility recommendations will be consistent with the *Standards and Guidelines* and the *Secretary of the Interior's Professional Qualifications and Standards (Professional Qualifications and Standards)* (48 FR 22716, September 1983), 36 CFR 800, 36 CFR 60.4, National Park Service Bulletin 38, and E.O. 13007.

If there are unanticipated discoveries of cultural resources during implementation of the undertaking, the Agency Official (STB) shall satisfy the requirements of Section 106 in accordance with 36 CFR 800.13. Prior to conducting any work for which a permit is required, the Cultural Resources Management group(s) (Contractor(s) who meet the *Professional Qualifications and Standards*) shall obtain any necessary Federal, state and local permits/licenses.

5. REPORTS

All reports for the ID Plan will be submitted in two parts designed to be one report when combined. Each report will be modified from the outline below to address the specific requirements of the *state* where the survey was conducted. The first part of the report will include comprehensive records search and literature review. The second part will include the results of field investigations, including NRHP evaluations of all cultural resources that are known to be within the APE.

The combined report should provide information for future research and justifiable and defensible NRHP recommendations for those historic properties identified as NRHP eligible. The report must also provide justifiable and defensible explanations of potential effects on historic properties and must comply with 36 CFR 800.5

The reporting of results and discussions of the cultural resources investigations shall be organized in a logical sequence. (The Wyoming report will be sequenced by site number). In tables, site numbers shall be organized in sequence. A detailed outline of the required elements for the report is contained as following:

PART 1

Cover

Must include report title, date of report, project number(s), authors, organizations or who prepared the report.

Cover Page

Must include authors, report title, date of report, lead agency, preparer's organization, type of report (ID Plan/Class III, Phase I and II), survey methods (transects in meters), county(s), USGS quad(s), landowner(s), legal description (reference to project maps may be appropriate), acreage (Federal, non-federal, block and linear with total), file search date(s), field personnel, and a site summary table.

Abstract

Table of Contents

List of Figures

List of Tables

Appendix(s)

- | | | |
|----|-----------------------------|--|
| 1. | Introduction | |
| | Project Description | (include appropriate permit and agency file numbers) |
| | Personnel | (their roles and duties on the project) |
| | Report Format | (what is in each chapter of the report and who wrote or contributed to each chapter) |
| 2. | Environmental Overview | |
| | Topography | |
| | Geology | |
| | Drainages | |
| | Flora | |
| | Fauna | |
| | Climate | |
| | Paleoenvironment | |
| 3. | Culture History | |
| | Paleoindian | (includes a discussion of pre-Clovis) |
| | Archaic etc. | (varies widely along the project) |
| | Woodland and Plains Village | (Plains Indian) |
| | Contact Period | (Protohistoric) |
| | Historic | |

4. Research Design and Materials

Archaeological Site Definition

Prehistoric Archaeological Research Orientation

Prehistoric Archaeological Research Questions

Historic Archaeological Research Orientation

Historic Archaeological Research Questions

Inventory and Research Methods

Record Search and Literature Review

Known Sites

Previous Investigations

Field Survey

Methods

Expected site types/locations

Field and Site Records

Methods

Laboratory Analysis

Prehistoric Artifact Collection and Analysis

Methods

Chipped-stone Technological and Functional Analysis

Methods

Historic Artifact Collection and Analysis

Methods

Curation

Methods

Facilities/Disposition

References

Appendix(s)

(Geomorphological Report)

Detailed Project Location Maps

and

Ethnographic Reports for all TCPs recommended for the NRHP (if required to justify recommendations)

Part 2

Update and revise Part 1 by chapter and section if additional information is needed.

5. Results of Investigation
(A detailed discussion of each site that will include, as a minimum, the following information)

Site type, component, USGS 7.5 minute quadrangle, site area, topography, elevation, soil type, nearest water, survey method, site condition, site description, artifact descriptions and disposition, interpretation, and recommendation.

A-7

Legal and UTM locations will be confidential and only included in a removable appendix.

6. Research Findings (answer research questions presented in Chapter 4)

Prehistoric Context

Site distribution relative to environmental variables potential for unanticipated discovery

Site density

Site function

Temporal and cultural affiliation

Historic Context

Site distribution relative to environmental variables potential for unanticipated discovery

Site density

Site function

Temporal and cultural affiliation

7. Conclusions and Recommendations (appropriate text but also include tables to explain the recommendations)

Conclusions

Prehistoric Sites

Historic Sites

Recommendation (eligibility recommendations)

Prehistoric Sites

Site Specific/Avoidance/Mitigation/Other Historic Sites

Site Specific/Avoidance/Mitigation/Other

8. References

9. Appendix(s)

(Geomorphology report)

(Ethnographic)

(Site forms)

(Maps)

(Correspondence)

(American Indian coordination and consultation documentation and description)

(American Indian monitor reports)

(Other ancillary studies for example: radiocarbon, AMS, faunal analysis, phytolith analysis, pollen analysis, etc)

A-8

6. FIELDWORK – Project Requirement

6.1 Survey Methods

- Shovel Testing

Shovel testing will be required if the surface visibility is less than 50% in the opinion of the project archaeologist/principle investigator, or if the terrain warrants the shovel tests. The shovel tests will be approximately 30x30 centimeters to minimum depth of 50 centimeters or until sterile subsoil, or bedrock, or water is encountered. The shovel test will be spaced no further than 30 meters apart or closer if required by the state. Shovel tests will not be done if, in the project archaeologist's justifiable judgment (such as steep terrain or rocky or other etc.) they are unnecessary.

Regardless of surface visibility, a shovel test will be conducted and documented on each identified site or isolated find site. If a shovel test is not conducted, justification for not conducting a shovel test will be noted in field notes, site form or report. Deviation from the above policies on shovel testing must be justified.

- Collection

All subsurface artifacts will be collected and properly labeled in the field. Surface collection of sites not within the ground disturbance area is not required. All obsidian artifacts shall be collected.

- Curation

Curation of all records and other items resulting from intensive survey, NRHP evaluation and mitigation efforts shall be completed in accordance with 36 CFR Part 79, and the provisions of the Native American Graves Protection and Repatriation Act: Final Rule (43 CFR Part 10) (NAGPRA). Documentation of the curation of these materials shall be provided to the STB, SHPO/THPO, cultural resource representatives designated by the tribes, and where appropriate, other signatories of the PA within 30 days of acceptance of the Final Cultural Resources Report for the Project. Private landowners will be encouraged to curate collections from their lands in an appropriate facility. Materials from private lands to be returned to the private landowners shall be maintained in accordance with 36 CFR Part 79 until any specified analysis is complete. Documentation of the return of these materials to the private landowner shall be provided to the STB, the appropriate SHPO/THPO, cultural resources representative designated by the tribes, and where appropriate other signatories to the PA

A-9

within 30 days of acceptance of the Final Cultural Resource Reports for the project.

Materials from state lands in Wyoming, South Dakota, and Minnesota will be provided to a state-approved facility for curation. These materials shall be maintained in accordance with 36 CFR Part 79 until any specified analysis is complete. Documentation of the return of these materials to the state-approved curation facility shall be provided to the STB and the appropriate SHPO/THPO or cultural resource representatives designated by the tribes, and where appropriate other signatories to the PA within 30 days of acceptance of the Final Cultural Resource Reports for the project.

Materials from Federal lands will be maintained in accordance with 36 CFR Part 79 until specified analysis is complete. These materials will be curated in a Federally-approved curation facility or repository in their states of discovery but shall remain the property of the Federal government. Materials from Native American sites shall be curated in their approved curation facility if these exist within the state of discovery but shall, as with the state curation facility, remain the property of the Federal government. Documentation of the curation of these materials will be provided to the STB, the appropriate SHPO/THPO, or cultural resource representatives designated by the tribes, within 30 days of acceptance of the Final Cultural Resource Reports for the project.

Materials from Native American sites may be curated in an Indian-owned Federal-approved curation facility if these exist within the state of discovery, but the materials shall remain the property of the state, or if on Federal land, the property of the Federal government.

- Human Remains

General field rules if human remains or associated funerary objects or unassociated funerary objects are encountered:

1. If human remains are discovered, they shall be subjected to review under the discovery clause of the PA.
2. Immediately cease work within 300 feet of the remains.
3. DM&E will provide security for a 300-foot perimeter in all directions around the site.
 - a. The construction contractor (as per DM&E contract) will immediately notify the American Indian monitor on site, the appropriate law enforcement officer, and county coroner.
 - b. If on Federal land the first notification will be to the Federal agency followed by the American Indian monitor

A-10

on site, the appropriate law enforcement officer, and the county coroner.

4. The construction contractor will immediately notify the SHPO/State Archaeologist and STB.
5. The construction contractor and the American Indian monitor will notify NAGPRA representatives of each tribe from a list provided to the contractor and each monitor by DM&E.
6. STB shall notify the cooperating agencies, and if on Federal lands follow the provisions of 43 CFR Part 10.
7. Notification of an inadvertent discovery will be made in two ways:
 - a. By phone immediately.
 - b. By letter notification to the STB and if on Federal lands or lands under Federal permit, to the controlling agency within 24 hours.
8. Do not resume construction within the 300-foot perimeter until the SHPO and STB have authorized it in writing, and, if on Federal lands or land under Federal permit, an authorization in writing from the controlling agency.
9. If on Federal land, refer to 43 CFR Part 10 and Public Law 101-601 25 USC (NAGPRA) procedures.

The STB shall ensure that human remains encountered during the course of this undertaking shall be accorded equal treatment and respect for human dignity without reference to their ethnic origins, cultural backgrounds, or religious affiliations. All human remains shall be handled in accordance with the procedures outlined in the PA, the ID Plan, and in consultation with the Council in accordance with 36 CFR Part 800.13. All unidentified remains or burials found outside of platted, recorded or identified cemeteries and in contexts which indicate antiquity greater than 50 years shall be dealt as follows:

10. Minnesota

Minnesota Statute § 307.08, § 307.082, and Minnesota Sessions Laws 1997, Chapter 215, Sec. 42.

If such burials are not Indian or their ethnic identity cannot be ascertained, they shall be dealt with in accordance with provisions established by the state archaeologist.

If such burials are Indian, efforts shall be made by the state archaeologist, THPO/cultural resource representative designated by the tribes, and the project archaeologists to ascertain their tribal identity.

A-11

If their probable tribal identity can be determined, such remains shall at the discretion of the state archaeologist and the THPO/cultural resource representative designated by the tribes be turned over to the Indian tribes(s) (43 CFR Part 10, Sec. 10.4 and Public Law 101-601 25 U.S.C. Sec 3 Ownership).

If tribal identity cannot be determined, the Indian remains must be dealt with in accordance with provisions established by the state archaeologist and the THPO/cultural resource representative designated by the tribes and 43 CFR Part 10, Sec. 10.4 and Public Law 101-601 25 U.S.C. Sec 3 Ownership.

No authenticated and identified Indian burial ground may be relocated unless the request to relocate is approved by the THPO/cultural resource representative designated by the tribes.

11. South Dakota

Code § 34-25-24, § 34-25-38, § 34-25-38.1, and SD 34-25-21

Shall be the same as Minnesota per agreement with the South Dakota Research Center and South Dakota SHPO.

12. Wyoming

W.S. § 6-4-501, W.S. 35-1-420

The procedures outlined in the General Field rules listed in this section shall apply. (Note: There is no Wyoming statute requiring anyone to report the discovery of a dead body to the county sheriff, county coroner, etc.)

If human remains are encountered on Federal lands, STB and the managing Federal agency shall consult with the Native American tribe or other ethnic groups related to the human remains identified to determine the treatment and disposition measures consistent with the applicable Federal laws (e.g., NAGPRA), regulations, policies.

If human remains are encountered on state lands or private lands, STB shall ensure, in consultation with the appropriate SHPO and the Native American tribe or other ethnic groups related to the human remains, that they are treated according to the applicable Federal and state laws, regulations, or policies.

A-12

STB will ensure that unanticipated discovery of human remains, and associated or unassociated burial objects, found during implementation of the undertaking shall satisfy the requirements of the appropriate Federal and state laws, regulations, policies and Section 106 in accordance with 36 CFR Part 800.13.

- Evaluation Testing

Sufficient subsurface testing, as determined by the project archaeologist/principle investigator, SHPO, Federal agency managing the land, and the Native American monitor on those sites suspected to be NRHP eligible, will be conducted to allow the Cultural Resource Management groups to develop Treatment Plans or other alternatives to address any adverse effects.

- Minimum Field Recordation Standard

1. Prehistoric and Historic Sites

The appropriate site forms for each state will be completed while on site (if possible). A sketch map and field notes (field notes should be kept by each crew member), and photographs of the site will be required. A description of the artifacts and features observed on each site shall be included in the field notes. The site will be noted on a 7.5 minute USGS quad.

All photographs will be keyed in the corresponding roll and frame number and identified as such on a photo log. The photo log will also include the site number or temporary site number, time of day, weather conditions at the time of the photograph, what was photographed, and the direction the photographer was facing. The ASA setting and the type of film (color or B&W) shall also be noted (Once the film is developed this information will be on the individual photograph along with the state-assigned site number). Upon completion of the project and acceptance of the Final Cultural Resources Report all photographs and negatives shall be shipped to the appropriate curation facility.

2. Standing Structures (including buildings, bridges, and other structures)

The appropriate site forms for each state will be completed while on site. The field notes will include the address or location, the present condition and integrity of the property; a description of the prominent architectural/engineering features with emphasis on the primary façade; a documented or estimated date of original

construction; identification of obvious alterations/additions; and a designation of style or vernacular type, when applicable. A 3 1/2-inch by 5-inch black and white photograph of each property will be taken using 35mm format. Each photograph will be keyed with the corresponding roll and frame number and identified as such on individual photographs (see photo log above). Original negatives and contact sheets will be included with the final report (Structures should be evaluated in the field by a qualified architectural historian). Upon completion of the project and acceptance of the Final Cultural Resources report all photographs and negatives shall be shipped to the appropriate curation facility.

CONFIDENTIALITY

All Signatories and Invited Signatories shall ensure that shared data, including data concerning the precise location and nature of historic properties and properties of religious and cultural significance are protected from public disclosure to the greatest extent permitted by law, including conformance to Section 304 of the NHPA, as amended and Section 9 of the ARPA and Executive Order on Sacred Sites 13007 FR 61-104 dated May 24, 1996.
