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Subject DM&E Project, FD 33407: Summary of Current Issues and
Disagreements

Charlene:

We are currently at an impasse with the Dakota, Minnesota and Eastern Railroad (DM&E) regarding the scope of a tribal study that we agreed to complete for this project. In a meeting held in D.C. on October 20, 2008, DM&E and the Board determined the need to complete a focused tribal study at this juncture in order to assist us in making National Register eligibility assessments regarding sites that DM&E consultants recommended as "unevaluated" in project reports (6 of 22 reports have gone to SHPOs for review, 21 just to tribes and agencies, others are currently under STB review). During the course of the meeting, we agreed that the study would be conducted by STB's third party consultants, The Louis Berger Group, Inc. (LBG, Inc.), rather than DM&E and its consultants in order to preserve our government-to-government and tribal trust responsibilities. (A copy of the LBG, Inc. tribal study proposal is attached.)

As you may know, the DM&E and its consultants have completed archaeological surveys of most of the project right-of-way which includes 280 miles of new rail construction in Wyoming and South Dakota as well as 600 miles of existing rail located in South Dakota and Minnesota that will be rehabilitated. The "New Build" section would run through ancestral tribal territories and is in an area that some of the participating tribes (about 20 tribes have actively participated in consultation meetings) have described as potentially containing a burial of great importance. DM&E had tribal monitors accompany the archaeologists during most of the survey work. The tribal monitors then provided their opinion regarding whether or not certain sites could be important to tribes as properties of traditional and religious significance. However, the monitors did not always represent Federally recognized tribes and none were qualified to provide definitive assessments regarding the National Register eligibility of sites. The sites that the monitors flagged as potential properties of traditional cultural significance were those that were listed by DM&E as "unevaluated" in their project reports.

Our current guiding document for completing the cultural resources work for this project is a Section 106 Programmatic Agreement (PA) (see link below). The PA was one of 147 environmental conditions included in the NEPA Record of Decision (ROD). The PA, while clear in outlining how tribes must respond to project reports, does not specify (in detail) how we conduct tribal consultation overall. What the PA does do, is state that the tribes have special expertise regarding properties important to them and that we should consult with them to gain their assistance in properly evaluating such sites. Our opinion has been, and continues to be, that the archaeological surveys conducted for this project did not provide an adequate assessment of the project area's APE to contain tribal properties eligible for the National Register. However, we have not requested a tribal survey of the line (although tribes have requested this). Our proposed remedy, and what we and DM&E agreed to, is to complete the National Register eligibility assessment for the sites that were not fully evaluated by DM&E and its consultants in the first place. These are sites that DM&E itself acknowledges still need to be evaluated under all the National Register criteria (none of the "unevaluated" sites" were subject to subsurface testing to determine eligibility under "D" pending tribal input).

For whatever reason, the tribes have generally not provided input or feedback to us on reports and only one tribe (Northern Cheyenne) has requested tribal visits to individual sites listed in the reports. However, we have had the tribes tell us that their lack of response to project reports does not mean that they are not interested in providing input on the project area including "unevaluated sites." To the contrary, tribes involved in this project have told the Board by letter, and in several meetings, that they want input on our evaluation of the "unevaluated" sites and that site visits by elders are necessary for them to comment on eligibility. (See copies of tribal letters attached.) In addition, the three participating SHPOs, particularly the SD and MN SHPOs, have told us that not hearing back from the tribes on project reports does not mean we are done seeking tribal input. DM&E disagrees and believes that if we do not hear back from tribes on the National Register eligibility of sites noted in project reports within the specified deadline that we can then move on with the PA process.

In meetings and correspondence, Federally recognized tribes including the Rosebud Sioux Tribe, Lower Brule Sioux Tribe, and the Standing Rock Sioux Tribe, have advised the Board that stone circles, cairns and other similar features could be properties of importance to them and that these sites, in particular, need to be assessed by the Board on a case-by-case basis. We currently have 74 unevaluated sites, 54 of which are stone circles and cairns, for which we believe tribal input is needed. The tribal study was designed to lay out a process to complete a targeted assessment of these unevaluated sites at this point in time (a tribal MOU included as a condition in our ROD requires that we complete an ethnographic study, but we agreed to complete this more expansive study as part of mitigation and just do this focused tribal study for now specifically to help resolve site evaluations). The tribal study was to include: archival research, tribal interviews, and field visits to sites, as needed or as requested by tribal experts charged with assessing the sites on behalf of the Federally recognized tribe(s). We intended to begin the study with a kick-off-meeting with interested tribes to be held on January 15th. However, we have since cancelled the meeting due to our disagreements with DM&E regarding the tribal study scope and budget.

DM&E has told us that, in their view, the tribal study goes too far. For one, they do not support the Board meeting directly with tribes to discuss the study. They also believe that the Board should limit the number of "unevaluated" sites that the tribal experts may visit. They further believe that the Board should coordinate any field visits with the archaeologists who would apparently be ready to excavate the site at the same time (pending tribal input). While the coordination of activities would be possible in most instances, we think there might be instances where the tribal expert would need to visit the site at another time or alone. We believe that we need to leave in some flexibility regarding what the tribal issues will be including their needs in visiting the sites. We also think that we cannot presume to know which sites we think the tribes need to see. We have stated to DM&E that the background research may provide information regarding specific types of stone circles and provide categories of sites that may help tribes to limit that number of sites that they may need to see. But ultimately, it seems only reasonable, that the tribal experts will need to tell the STB of their needs first upon which we can then make informed decisions on how to proceed. Certainly, there are logistical issues that would have to be considered in getting tribal reps. out to specific sites.

That's about it in a nutshell. This is a simplification to be sure, but I can fill you in on the details when we meet, or sometime before, at your convenience.

I have attached what I believe are some relevant documents. However, you can also find documentation including letters on our web site at <http://www.stb.dot.gov>

under "E-Library" - you should conduct your query using the project Docket No. 33407.

Project information, including a copy of the PA, can also be found under our Key Cases Link at:
http://www.stb.dot.gov/stb/environment/key_cases_dme.html

See you on Friday! Randy Withrow with LBG, Inc. (our third-party contractor) will also be joining us on Friday.

-Cathy

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