



EO-1411
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SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Section of Environmental Analysis

March 2, 2010

Mary Hopkins
Interim State Historic Preservation Officer
Wyoming State Historic Preservation Office
2301 Central Avenue,
Cheyenne, WY 82002

Re: Finance Docket No. 33407, Dakota, Minnesota & Eastern Railroad
Corporation Construction into the Powder River Basin: Request for Review and
Comment on 21 Archaeological Sites (SHPO File #0498RLC044)

Dear Ms. Hopkins:

I have received your February 19, 2010 letter regarding our January 6, 2010 "Request for Review and Comment on 21 Archaeological Sites" that provided our determinations of eligibility (DOE) for 21 archaeological sites based on the input of participating tribes (DOE letter attached: EO-1388). Our DOE for these sites augmented those included in the Surface Transportation Board (STB) cultural resource survey report, A Class III Cultural Resources Inventory for the Dakota, Minnesota, and Eastern Railroad Corporation's Powder River Basin Expansion Project, Segments 3 and 4, Campbell and Converse Counties, Wyoming (WY2), which your office has reviewed and provided comments on. In your letter, you note that you are unable to review our January 6, 2010 letter as it did not meet the Wyoming State Historic Preservation Office (SHPO) standards required under the Section 106 Programmatic Agreement (PA) developed for this project. You additionally state that STB has consistently failed to conform to the standards of the PA in past interactions with your office.

Before addressing the points in your letter, I would like to thank you for your continued assistance in reviewing the multiple reports that have been produced for the Dakota, Minnesota and Eastern Railroad (DM&E) Project. I know that this has been a complex project and that it has required a great deal of time and effort of your staff and staff resources. Ms. Catherine Glidden, of my staff, advises me that Mr. Richard Currit of your office has provided us with insightful and timely comments to our survey reports.

Below, I clarify our agency's stance regarding some of the points that you brought up in your letter. I begin by addressing the statement in your letter that that we have shown a consistent failure to conform to the terms of the Section 106 PA, and your request that our January 6, 2010 DOE letter conform to the Wyoming State formatting standards before you are able to provide your comment on the eligibility of the 21 sites. I also address additional details that came out of your February 19, 2010 conversation with Ms. Glidden of my staff, but not discussed in your letter, specifically relating to your requirement that we update sites forms with sensitive tribal information submitted to us by participating tribes prior to agreeing to provide comment on the eligibility of the 21 archaeological sites.

1. STB's Compliance with the PA

Your concern regarding STB's compliance with the PA appears to be centered on the format of documents and timeframes for review and comment by your office.

a. Formatting

As you know, the DM&E Project has required the development of multiple cultural resources survey reports. Although the PA contemplated the development of just one survey report for the Wyoming portion of the project, the project actually resulted in the development of three primary reports (WY1, WY2, WY3) each of which was reviewed by your office and each of which STB produced in accordance with the State of Wyoming standards. A fourth survey report, an addendum to the WY1 report, also followed the State of Wyoming standards. In fact, all of the cultural resource survey reports submitted by the STB to the respective tribes, Federal agencies and SHPOs followed the exact specifications of the PA including required formatting and review times. (As you know, the review times call for the submission of survey reports to the tribes and federal agencies for a 30-day review period, followed by a 60-day review period by the SHPO.)

b. Review Times

As you also know, DM&E has produced several documents (Visual Effects Assessment and Deeply Buried Sites proposal) that are not classified as survey reports, but documents written to address concerns that Section 106 consulting parties had regarding what were perceived as gaps in the cultural resources work that had been completed thus far (in addition, we also sent you a technical geomorphology report that was not a survey document). The PA does not specify review times for such documents, only survey reports. This language is specified in Appendix D, Attachment A, Section 5 which states that: "Each report will be modified from the outline below to address the specific requirements of the state where the **survey** (our emphasis) was conducted."

The documents noted above were not anticipated and were not discussed in the PA. As such, we sent copies of the reports to your office and the tribes, and Federal agencies concurrently which would have allowed Federal agencies and tribes to have a 30-day review period and your office 60 days (this would have provided your office with 30 days to review the documents with any Federal agency and tribal comments in hand). When your office objected to

these review times, we deferred to your request and fell back on the review times specified in the PA for survey reports. The above then, is clearly the result of a misunderstanding regarding the nature of the documents and what process should be followed and not a desire by the STB to violate the provisions of the PA. Our correspondence with you on this point is documented in several email threads, one of which I have attached for your information (EO-1380). Again, it is our stance that no violations of the PA have in fact occurred.

2. Reporting Format for our January 6, 2010 DOE Letter

Our January 6, 2010 DOE letter to you was developed in-house by the STB's Section of Environmental Analysis to provide our final determinations of eligibility (DOE) on 21 of the archeological sites discussed in the WY2 report for which we believed we needed additional tribal input. The letter augmented information that was provided in the WY2 report, but was not a survey report. The letter provided our final DOE on the 21 sites and was based on sensitive information that was provided by tribes. It is for this reason that the letter report did not conform to the Wyoming State standards. There was never any attempt in sending this letter to circumvent the requirements of the PA.

3. Confidentiality Issues Regarding Tribal Information

Though not mentioned in your letter, our primary point of disagreement with your office has to do with your requirement that we provide updated site forms to you including detailed information about the features that were identified by participating tribes during their visits to the 21 archaeological sites. Ms. Glidden has advised me that you will withhold your opinion regarding the eligibility of the 21 sites pending our submission of these updated records stating that you cannot determine eligibility without this additional information. However, we believe that information contained in the WY2 report as well as the documentation provided by tribes is more than sufficient for your office to weigh in on eligibility. (Note that the site forms for the 21 sites, updated based on the archaeological surveys, were included in our January 6, 2010 DOE letter, per your instructions).

We object to providing you with site forms updated with the tribal information based on the request of tribes who explicitly stated to us in an October 27, 2009 meeting in Pierre, SD that they did not want site forms to be updated with their confidential information (see our letter to the Rosebud Sioux Tribe on this point: EO-1352). As I understand from Ms. Glidden, during your conversation with her, you noted that some of the new features that were identified by tribes could be archaeological in nature. While this is undoubtedly the case, the point of the site visits was not to conduct an archaeological survey of the area (this had already been done as part of this project and as summarized in the WY2 report) but to acquire input from tribes on the ground, per your request, to determine if any of the 21 stone feature sites could also be eligible under any other criteria than those recommendations provided by the archaeological survey crews. As it turns out, most of the 21 sites were determined by our office to be eligible for listing under at least one National Register criteria based on the tribal information.

4. Next Steps

I believe that the issue regarding the formatting of our January 10, 2010 DOE letter is easily resolved and I have directed Mr. Randy Withrow of the Louis Berger Group, our third-party contractor, to reformat our letter to conform to your standards. Regarding review times: we will ensure that we consult with you prior to sending any future documents to your office to ensure that we are in agreement regarding review times. I am sure that you understand that we must stand firm on our commitment to the tribes regarding the withholding of sensitive information from the site forms. I hope that we can agree to an approach that will allow us to update the site forms without violating our promise to the tribes.

Thank you for your continued hard work and professionalism throughout this project. We look forward to continuing to work with you in a spirit of cooperation as we move through the Section 106 process.

Sincerely,

Victoria Rutson
Section of Environmental Analysis

cc: Sarah Needles, Division Administrator, Cultural Resources, WY SHPO
Reid Nelson, Director ACHP
Charlene Dwin Vaughn, Assistant Director, ACHP
Valerie Hauser, Coordinator, Native American Program, ACHP
Herb Jones, DM&E
Randy Withrow, LBG

Enclosures (3)