

***SURFACE TRANSPORTATION BOARD******395 E Street, SW******Washington, DC 20423-0001******Section of Environmental Analysis***

January 28, 2009

Paul R. Lusignan
National Register of Historic Places
1849 C Street NW
Mail Stop 2280
Washington, DC 20240

Re: STB Finance Docket No. 33407, Dakota, Minnesota & Eastern Railroad Corporation Construction into the Powder River Basin; Compliance with Programmatic Agreement

Dear Mr. Lusignan:

I am writing, on behalf of the Surface Transportation Board (STB or Board), to request guidance from the National Register of Historic Places (National Register) regarding our efforts to comply with the Programmatic Agreement (PA) executed in the above-captioned rail construction proceeding approved by the STB in 2006 and affirmed by the Eighth Circuit Court of Appeals. The Board has been working closely with the consulting firm of Louis Berger Group, Inc., who is assisting the Board to fulfill its responsibilities under the PA. The Dakota, Minnesota & Eastern Railroad (DM&E) is responsible (through the terms of the PA) for funding the third-party consultant. The consultant works solely under the control, direction, and supervision of the Board.

The Board has been working through the PA, but the process has stalled in the evaluation phase because the Board and DM&E interpret the provisions of the PA differently. In an effort to resolve the impasse, members of my staff and I recently met with the Advisory Council on Historic Preservation, who advised us to seek guidance from the National Register. By being able to reference guidance from the National Register, all interested parties—including the Board, DM&E, the tribes, and others—could move forward with the PA without dispute.

In response to the Advisory Council's recommendation, I am now requesting guidance from the National Register in two areas. First, what methodology should we use for assessing the National Register eligibility of properties that may have potential traditional religious and cultural significance to tribes? And second, how we can ensure the confidentiality of information tribes may provide us as we assess the eligibility of such sites? I discuss each point in more detail below.

Regarding methodology, I have enclosed the Board's tribal study proposal entitled, "National Register Evaluation of Traditional Sites." STB developed this document to create a clear process for seeking further input from tribes regarding sites that remain unevaluated in archaeological reports completed for this project thus far. Is this study suitable in helping the STB further assess the potential eligibility of sites that we believe could be eligible as either Traditional Cultural Properties or as other property types under one or more of the National Register criteria? The railroad does not believe so. For your information and consideration, I have included the railroad's proposal in addition to the STB's.

Regarding confidentiality, as the Board moves forward in assessing the eligibility of "unevaluated" sites, we must ensure the confidentiality and safety of the information that we receive from tribes. In doing so, we seek to implement the confidentiality provisions outlined in Section 304 of the National Historic Preservation Act. I welcome any guidance you can provide us regarding how we can protect the content of information provided by tribes and ensure we have minimally sufficient data to make firm eligibility assessments that can withstand any potential challenges. In your response, please confirm that the information provided by tribes need not be shared with any party other than your agency.

The Board anticipates beginning our tribal interviews next month as part of the tribal study and will need to coordinate tribal visits to sites with DM&E in early spring. I would very much appreciate your response as quickly as practicable, particularly regarding the Board's proposed tribal study versus the proposal offered by DM&E.

Finally, I very much appreciate your help. I hope that we may ask for further guidance or perhaps even formal determinations in the future, depending on the success and efficiency of the PA process. If you have any questions regarding any of the above, please do not hesitate to contact me at (202) 245-0295, rutsonv@stb.dot.gov or Catherine Glidden of my staff at (202) 245-0293, Catherine.Glidden@stb.dot.gov.

Sincerely,



Victoria Rutson
Chief, Section of Environmental Analysis

Enclosures:

National Register Evaluation of Traditional Sites (STB Proposal)

Context Study for the National Register Evaluation of Petroform Site (DM&E Proposal)

cc: See Distribution List

National Register Evaluation of Traditional Sites

A Study Plan Prepared by the Surface Transportation Board

January 27, 2009

A. Purpose

In its role as lead federal agency for the Dakota, Minnesota & Eastern Railroad (DM&E) Powder River Basin Expansion Project, STB Finance Docket 33407, the Surface Transportation Board (STB) is responsible for determining National Register of Historic Places (National Register) eligibility for currently unevaluated sites located within the project's Area of Potential Effect (APE).

Based on information received from tribes and tribal monitors, a number of unevaluated sites located within the project's APE may have traditional cultural and religious significance to tribes. STB has therefore determined that additional data is needed regarding the traditional cultural significance of these sites in order to make its final National Register eligibility determinations.¹

STB will assume a leadership role in coordinating the study to ensure that it is completed in a timely fashion, that it addresses STB site evaluation requirements, and that it focuses on the National Register evaluation of known sites located within the project's APE. STB's third-party contractor (The Louis Berger Group, Inc.) will assist STB with this effort.

B. Tribal Participation

This study is proposed as part of STB's ongoing consultation with tribes and with STB's firm understanding that tribes possess special expertise in assessing the National Register eligibility of historic properties that may have traditional religious and cultural significance [36CFR 800.4(c)(1)]. Therefore, STB will seek involvement and assistance from appropriate tribal members, tribal entities, and tribal contractors wherever possible.

C. Programmatic Agreement Guidance

All sites located within the project's APE must be evaluated in accordance with the identification and evaluation procedures described in the project's Section 106 Programmatic Agreement (PA) and Identification Plan (ID Plan). Sections 3.2.4 and 3.2.6 of the PA provide the following instructions regarding the identification and evaluation of properties with traditional religious and cultural significance:

¹ A separate ethnohistoric study will be completed pursuant to STB's Record of Decision (Condition 107) issued on February 13, 2006 in this case.

“The intensive survey shall gather information from American Indian tribes and elders to assist in identifying properties of traditional religious and cultural significance to them and identifying properties that may [be] eligible for the NRHP” [ID Plan, Section 3.2.6, page A-3].

“If the cultural resource is in the APE, necessary information to evaluate the cultural resource against NRHP eligibility criteria (36 CFR 60.4) shall be obtained. The guidance in National Park Service [NPS] 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.” [ID Plan, Section 3.2.4, pages A-2 and A-3. Similar wording is repeated in Section 3.4.4, page A-4].

D. Scope of Work

1. **Tribal Notification**

STB will notify interested tribes of its intent to conduct the study and will request assistance from tribes with archival research, interviews, and field visits. A group meeting may be held with interested tribes to review the work plan and initiate the study.

2. **Archival Research**

This task will include literature review of ethnohistoric and ethnographic sources to establish a record of existing historical and anthropological documentation regarding tribes with ancestral or traditional cultural interests in the project area, places of known cultural significance within the project area, and traditional cultural values or activities that may be associated with specific areas classified archaeologically as petroform sites, such as stone circles, rock cairns, rock alignments, etc. This research may also be used as a basis for developing questions for informant interviews.

3. **Oral History Review and Informant Interviews**

Tribes will be contacted to request interviews with individuals who have knowledge of tribal history, traditional culture, and spiritual values relevant to the project's APE. Letters will be sent to Tribal Chairs and Tribal Historic Preservation Officers (THPOs) and/or cultural resource representatives appointed by the tribal governments. STB will also contact individuals by phone and email as necessary to determine each tribe's interest or lack of interest in participating in the study and to seek assistance from tribes in scheduling interviews.

STB's third-party contractor and/or contracted tribal sub-consultants will conduct the interviews. Wherever possible (allowing for confidentiality and proprietary concerns) interviews will be transcribed to establish an information record. Where oral history records already exist, STB will request assistance from participating tribes in reviewing

that information as it pertains to the project area. STB will also ask for specific information from tribes regarding which unevaluated sites may be eligible based on the data collected as part of the literature review.

4. Field Visits to Evaluate National Register Eligibility

Field visits to recorded archaeological site locations by qualified tribal representatives may be needed to resolve National Register eligibility for properties considered to have potential traditional religious or cultural significance.

Based in part on the results of the archival literature review, oral history review, and informant interviews, STB will consult with interested tribes to compile a list of sites that warrant field visits by traditional leaders, to establish a list of individuals qualified and available to conduct site visits on behalf of participating tribes for the purpose of assessing National Register eligibility, and to develop a schedule for conducting the site visits.

Field visits will be arranged by the STB and scheduled in coordination with DM&E and tribal representatives. For safety reasons, it is understood that a DM&E representative will need to be present in the vicinity of scheduled site visits that occur within existing railroad property and during visits to new construction right-of-way in accordance with private property agreements currently held by DM&E.

STB will ask that interested tribes issue a formal letter of evaluation to STB within 30 days of completing a field visit. This letter should identify the sites that were visited and whether the tribe considers the site(s) to meet the National Register eligibility criteria. If no response is received within 30 days of the site visit, then STB will proceed to make its decision regarding site eligibility without input from tribes.

5. Confidentiality

STB intends to work with tribes to identify sensitive locations while respecting the need to withhold specific information about such sites in accordance with 36 CFR 800.4(b)(i) and 36 CFR 800.11(c)(1), Section 304 of the NHPA, and guidance provided by National Park Service Bulletin 38. If tribes request that information not be shared with other consulting parties or their contractors, STB will safeguard this information to the best of its ability in accordance with Section 304 and its trust responsibility toward tribes; however, STB cannot insure the complete confidentiality of any information provided in written form.

For this reason, pending a determination of eligibility, STB will request that tribes provide only enough information to identify the existence of a site and a general statement signifying its importance to tribes without disclosing specifics that could compromise the site or its associated significance. National Register staff will be consulted in situations where any uncertainty exists regarding information requirements for making a determination of eligibility.

6. Reporting

A literature review will be prepared by STB with assistance from its third-party contractor and any tribal subcontractors upon completion of the archival research. The literature review will identify tribes with ancestral ties to the project area and will include a summary of findings regarding known sites and site types with potential traditional cultural and religious significance to those tribes. STB anticipates that its initial literature review would be shared with consulting parties.

A separate tribal report is expected to be prepared by tribal subcontractors following completion of the field visits. It is anticipated that the tribal report would draw on the literature review, include a summary of the information gathered during oral history reviews and interviews, as well as any field visits for sites identified within the project area. As such, the information contained in this follow-up report would likely not be shared with consulting parties. No tribal report would be completed without tribal input. However, STB would complete a final report summarizing its findings if no tribal support is forthcoming.

Eligibility recommendations would need to be submitted by THPOs and/or cultural resource representatives appointed by the tribal governments following all field visits conducted for the purpose of evaluating the National Register eligibility of sites located within the project's APE. All letters must be received by STB no later than 30 days following the scheduled field visits. If no site visits are performed, tribes will need to provide input to the STB regarding eligibility of any unevaluated sites located within the project APE within 30 days of receiving copies of the literature review.

STB fully anticipates active participation in this study by interested tribes; however, in the event that tribes do not participate, STB will make its eligibility determinations based on the best information available at the completion of this study, with or without tribal input.

7. Schedule

Tribal Meeting: February 2009

Archival Research: February 2009

Interviews: February & March 2009

Literature Review Due: March 30, 2009

Field Visits: April & May 2009

Tribal Report (if any) Due: May 31, 2009

Tribal Letters of Evaluation: Due 30 days following day of field visits

DRAFT
**Context Study for the National Register Evaluation of
Petroform Sites**

**A Study Plan Prepared by the Dakota, Minnesota & Eastern Railroad
December 24, 2008**

Purpose. In its role as lead federal agency for the Powder River Basin (PRB) Expansion Project, the Surface Transportation Board (STB) is responsible for resolving National Register of Historic Places (NRHP) eligibility for currently unevaluated sites located within the project's Area of Potential Effects (APE). Based on preliminary information received from tribes interested in the PRB Expansion Project, STB has determined that a number of sites located during cultural resource surveys within the project's APE may have potential traditional cultural and religious significance. Most (between 60 and 80) of these are "petroform" sites; that is, archaeological sites with associated stone features such as stone circles, cairns, or rock alignments. At the direction of STB and on the advice of tribal monitors, these sites were characterized as "unevaluated" by cultural resource contractors pending receipt of additional information from tribes regarding their traditional religious and cultural importance.

PA Guidance. All sites located within the project's APE must be evaluated in accordance with the identification and evaluation procedures described in the Programmatic Agreement (PA) and its associated Identification Plan. Sections 3.2.4 and 3.2.6 provide the following instructions regarding the identification and evaluation of properties with traditional religious and cultural significance.

"The intensive survey shall gather information from American Indian tribes and elders to assist in identifying properties of traditional religious and cultural significance to them and identifying properties that may [be] eligible for the NRHP" [ID Plan, Section 3.2.6, page A-3].

"If the cultural resource is in the APE, necessary information to evaluate the cultural resource against NRHP eligibility criteria (36 CFR 60.4) shall be obtained. The guidance in National Park Service [NPS] 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." [ID Plan, Section 3.2.4, pages A-2 and A-3. Similar wording is repeated in Section 3.4.4.]

Pursuant to the terms of the PA, STB actively sought the tribes' input regarding the traditional cultural significance of properties. This effort was conducted through tribal monitor participation in field work, through formal submission of cultural resource survey reports for review and comment, through several government to government meetings with tribal representatives, and through numerous informal discussions to encourage the review of the reports and to clarify the role of tribal participation within the context of the process specified in the PA. STB was unsuccessful in eliciting responses from the tribes sufficient to

determine which, if any, of the identified properties might qualify for listing in the NRHP as traditional cultural properties.

Consequently, STB intends to conduct this context study to acquire information regarding the traditional religious and cultural significance of these sites in order for STB to make its determinations of NRHP eligibility as required by the PA, and in accordance with this study plan. This study plan is proposed specifically for compliance with STB's statutory obligations under Section 106 of the National Historic Preservation Act. This study is not proposed to comply with other conditions imposed by STB on the Dakota, Minnesota & Eastern Railroad (DM&E) as part of the agency's review of this project under the National Environmental Policy Act. An ethnohistoric study, as stipulated in the Tribal Memorandum of Agreement, will be completed independent of this effort as part of DM&E's compliance with STB's Record of Decision issued on February 13, 2006 (STB Decision, Condition 107, page 43).

This study is proposed as part of STB's ongoing consultation with tribes interested in the PRB Expansion Project and the PA process, and is conducted with STB's understanding that Indian tribes possess special expertise in assessing the NRHP eligibility of historic properties that may possess religious and cultural significance to them [36CFR 800.4(c)(1)]. STB will seek involvement and assistance from appropriate tribal members, tribal entities, and tribal contractors wherever possible and in accordance with the Scope of Work provided below.

STB will assume a leadership role in developing and coordinating the study to ensure that it is completed in a timely fashion, and that it focuses on the NRHP evaluation of known sites located within the project's APE. STB's third-party contractor (The Louis Berger Group, Inc.) will assist STB with this effort. In the event that tribes are unable to provide needed assistance with this study, STB will complete the study by relying on information sources currently in the public domain and will use the best information available to make its eligibility determinations.

Scope of Work:

This petroform site evaluation study seeks to include information from a variety of sources including archival review of relevant ethnohistoric and ethnographic sources, review of oral histories, and interviews with traditional experts identified by the tribes. STB will produce a written report that compiles existing information regarding the traditional religious and cultural significance of petroform sites known to exist within the project's APE. The existing record will be reviewed to generate a systematic means of evaluating petroform sites. Variables keyed to the significance of physical attributes, as described in the literature, and from informant interviews will be used to form a typology for evaluating the NRHP significance of individual properties. The typology will be refined with information obtained from informants and site visits to establish standards for assessing integrity and relevance to the traditional belief systems of living communities.

Throughout the course of this work, STB will concurrently work with participating tribes to arrange and schedule field visits by traditional leaders identified by the tribes. Field visits will be conducted at a select sample of places of interest or concern for the purpose of determining their eligibility for listing in the NRHP. These site visits will focus on known site locations identified by previous surveys within the APE, but may also include visits to other specific locations identified within the APE as a result of the archival research and

interviews. Site visits will help to refine the typology and, through this sampling strategy, provide a check of its accuracy for distinguishing eligible from ineligible properties under criteria "a" and "b".

I. Tribal Notification

STB will broadcast this study plan to the tribes with an invitation to participate under its terms. Upon request, STB will meet with tribal representatives to review the study plan and identify tribal members who may be available for interviews regarding relevant information about the traditional importance of specific properties and site types.

II. Archival Research

Archival research will include review of ethnohistoric, ethnographic, historical and anthropological documentation regarding tribes with ancestral or traditional cultural interests in the project area to identify specific and general types of properties of traditional religious and cultural significance within the project area, and traditional cultural values or activities that may be associated with specific locations classified archaeologically as petroform sites. This research will be used as a basis for developing a traditional cultural property evaluation typology and questions for informant interviews.

III. Oral History Review and Informant Interviews

With the initiation of this study, STB will submit written requests to Tribal Chairs and Tribal Historic Preservation Officers and/or cultural resource representatives appointed by the tribal governments to identify informants who have knowledge of tribal history, traditional culture, and spiritual values relevant to the evaluation effort. STB will also contact tribal representatives by phone and email as necessary to determine each tribe's interest in participating in the study and to seek assistance from the tribes in scheduling interviews. STB's third-party contractor and/or contracted tribal subconsultants will conduct the interviews. Wherever possible (allowing for confidentiality and proprietary concerns) interviews will be transcribed to establish an information record. Where oral history records already exist, STB will request assistance from participating tribes in reviewing that information as it pertains to the project area. Oral interviews will be conducted in accordance with a set series of questions aimed at refining the utility of the petroform site typology for evaluating their NRHP significance under criteria "a" or "b". STB anticipates that up to ten interviews will be needed for this task.

IV. Field Visits to Evaluate National Register Eligibility

Field visits with traditional practitioners may be needed to confirm the veracity of the typology and its reliability for resolving NRHP eligibility of petroform sites with traditional religious and cultural significance. Concurrent with the archival review, and informant interviews, STB will:

- Consult with interested tribes to compile a list of sites that may warrant field visits by traditional leaders;
- Compile a list of qualified individuals available to conduct site visits on behalf of participating tribes for the purpose of assessing National Register eligibility;
- Select a sample of sites to confirm the utility of the typology, taking into consideration accessibility; and

- Develop a schedule for conducting the site visits.

Field visits will be arranged by the STB in coordination with DM&E and tribal representatives. DM&E representatives will be present for site visits that occur both within existing railroad property and during visits to new construction right-of-way in accordance with safety regulations and public and private property agreements currently held by DM&E. STB expects that the number of site visits will not exceed the number of petroform property types to confirm the utility of the typology for distinguishing eligible from ineligible petroform sites.

Documentation of Site Eligibility. STB considers information obtained from recognized tribal experts to be a valid line of evidence in considering determinations of eligibility. However, in accordance with 36 CFR Part 800, eligibility determinations are reached by STB through consensus with the State Historic Preservation Officer. Information may be presented in written form to the STB by the tribe's designated government representative (e.g., Tribal Chair, Tribal Historic Preservation Officers, and/or cultural resource representatives appointed by the tribal governments), and STB will consider written and verbal opinions and observations offered by tribal experts in these matters.

STB will ask that interested tribes issue formal letters assessing the traditional cultural and religious significance of a site to STB within 30 days of completing a field visit. These letters should identify the sites that were visited and whether the tribe considers the sites to be of traditional religious and cultural importance. If no responses are received within 30 days of the site visit, then STB will proceed to make its decision regarding site eligibility without further input from the tribes. If responses are received, STB will take into consideration the views of the tribes in reaching its decisions.

Confidentiality Policy. STB will work with tribes to identify NRHP eligible properties while respecting tribal desires to withhold specific sensitive information about such places in accordance with 36CFR 800.4(b)(i) and 36CFR 800.11(c)(1), Section 304 of the NHPA, and guidance provided by NPS Bulletin 38 when the release of such information could jeopardize their integrity or place them at risk of damage or destruction. Since the Section 304 confidentiality provisions may only apply to properties that have been determined eligible for the NRHP, information disclosed prior to a determination of eligibility may not be protected under this law, but may be exempt from disclosure under the Freedom of Information Act. For this reason, STB staff will consult with its solicitor, the Secretary of Interior and the Advisory Council on Historic Preservation in situations where any uncertainty exists regarding the release of sensitive information, and to obtain clarification of information requirements for making a determination of eligibility.

If tribes request that information not be shared with other consulting parties or their contractors, STB will safeguard this information to the best of its ability in accordance with its trust responsibility toward tribes and its respect for the tribes' status as sovereign governments. However, STB cannot ensure the complete confidentiality of any information provided in written form. STB may withhold such information from the public, but may need to share certain aspects of the information with consulting parties so

that mitigation measures are developed that are responsive to the values and qualities that make these properties eligible for the National Register.

V. Reporting

- An interim report will be prepared by STB with assistance from its third-party contractor and tribal subcontractors upon completion of the archival research and development of the petroform site typology. The interim report will identify tribes with ancestral ties to the project area and will include a summary of findings regarding known sites and site types with potential traditional cultural and religious significance to those tribes.
- A final report will be prepared by STB, its third-party contractor, and tribal subcontractors following completion of the field visits. This final report will incorporate the content presented as part of the interim report and will include a summary of the information gathered during oral history reviews, informant interviews, and field visits as these investigations pertain to sites identified within the project area. Presentation of specific sensitive information in the report and agency review of the final report will be subject to the confidentiality measures presented as part of this work plan. The final report will be circulated for information purposes to each of the signatories of the Programmatic Agreement.
- National Register evaluations will be prepared by STB based on the results of the final report, and submitted to the relevant SHPOs for consensus determinations.

VI. Schedule

Archival Research: January & February 2009

Interviews: February 2009

Interim Report Due: March 15, 2009

Field Visits: March/April 2009

Final Report Due: April 31, 2009

National Register Evaluations: 30 days following final report

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