



EO-1137
Letter sent to CG
Federal agencies + Tribes - see
distribution list attached

SURFACE TRANSPORTATION BOARD

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Section of Environmental Analysis

December 24, 2008

Sandra Barnum
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**Re: STB Finance Docket No. 33407, Dakota, Minnesota & Eastern Railroad
Corporation Construction into the Powder River Basin: December 2, 2008 Meeting
Summary**

Dear Ms. Barnum:

The Surface Transportation Board's (STB) Section of Environmental Analysis (SEA) is pleased to provide you with the following summary of its December 2, 2008 meeting with representatives of the State Historical Preservation Offices (SHPOs), cooperating Federal agencies, and the Dakota, Minnesota and Eastern Railroad (DM&E) held in Sioux Falls, South Dakota. The meeting was requested by DM&E to present its response to procedural issues and concerns expressed by the STB, as well as participating Federal agencies and SHPOs, regarding archaeological survey reports distributed for review. The meeting was planned and presented by DM&E, at its expense, to assist it in resolving those concerns.

There was a general consensus amongst the meeting participants on how to address three main issues of concern regarding the project survey reports. The issues involve: (1) the use of the term "unevaluated" for sites in project reports and the development of a plan on how to assess such sites; (2) the need to better establish the potential for the project to have indirect effects on historic properties located outside the area of potential effect for direct impacts; (3) the necessity for STB to better assess project impacts to previously unidentified buried or deeply buried sites. The following planned courses of action are proposed to resolve these and other procedural issues.

Unevaluated Sites

During the meeting, it was agreed that several actions will be taken to further assess sites that have been designated "unevaluated" in project reports. To begin with, STB will initiate a "traditional sites evaluation study" in January 2009 with a kickoff meeting between participating tribes and the STB on January 15th. The study will be conducted by STB and its third-party

contractor and will include tribal involvement to help resolve the National Register eligibility of unevaluated sites that may be eligible for listing as traditional cultural properties under criterion "a." This study is scheduled for completion by the end of May 2009 (a scope of work for this study is currently being prepared by SEA).

The completion of the traditional sites evaluation study will be followed by subsurface testing of any sites that remain unevaluated with regard to their National Register eligibility under criterion "d." Such testing will occur in instances where the traditional sites study concludes that sites are not otherwise eligible under criterion "a" and/or where tribes have no objection to testing sites deemed eligible under criterion "a."

Archaeological fieldwork is scheduled to begin as early as April 2009 at previously identified sites for which subsurface testing has not yet been conducted. Tribal monitors will be invited to be present when the archaeological evaluation work is initiated and may recommend against the continuation of such fieldwork at any point during the excavations. In addition, as part of its traditional sites evaluation study, the STB will work with tribal representatives and SHPOs to develop approaches to individual sites scheduled for such activity to resolve their eligibility under all applicable National Register criteria.

For sites that extend outside the project's right-of-way (ROW), DM&E will attempt to evaluate eligibility for the entire site wherever possible. In those instances where survey teams are denied access to part of the site, eligibility will be evaluated on the basis of information gathered from the portion of the site for which access is available. Unevaluated portions of such sites will be recommended "unevaluated" or "ineligible," depending on the outcome of consultations with the relevant SHPO(s).

Indirect Effects Area of Potential Effect (APE)

The assessment of potential indirect effects (visual, audible, and vibration) to historic properties located within the New Build section of the project area will be followed in accordance with the procedural clarification paper provided at the meeting (see attached statement). DM&E and its consultants have already completed a file search for listed and eligible properties in South Dakota and the file search for listed and eligible properties in Wyoming is currently underway as requested by Wyoming SHPO at the December meeting. The file search results will provide the data necessary for determining which National Register listed and eligible properties within a six-mile-wide corridor may be affected by project construction and operation through line-of-sight analyses. Visual and audible impacts will be assessed based on elevation and topographic information for those properties where integrity of setting contributes to their significance. DM&E will submit its findings of potential effects to STB for consultation with SHPOs and appropriate consulting parties.

Buried Archaeological Sites

DM&E and STB will develop a plan to identify and evaluate buried archaeological sites that may be located within the New Build portion of the project. This plan will be circulated to consulting parties for review and comment in February 2009 and will include copies of

geomorphological survey reports completed for the project as attachments. The plan is expected to make use of existing geomorphological information to assess the project area's potential to contain buried archaeological deposits. Areas with buried site potential will be sampled and tested for the presence or absence of archaeological deposits in order to model or predict where additional buried sites may exist within the New Build segment. The results of the predictive model will be circulated to the consulting agencies in the Spring or early Summer of 2009 for additional discussion and refinement. The predictive model will then be used to guide subsequent investigations conducted thereafter prior to construction. Additional opportunities to examine subsurface deposits are expected to continue through the construction monitoring program based on a construction monitoring plan that will be developed in consultation with the consulting parties.

Report Review Schedules

The information package distributed at the December 2nd meeting included a table entitled "PRB Report Review Schedule" (found under the tab labeled "Next Steps" and also attached to this letter). This table identifies each archaeological survey report prepared for this project by its report title and the date that it is scheduled to be distributed to the various consulting parties for review (or the date for which it has already been distributed). We expect to hold to the dates as indicated on that spreadsheet; in fact, we recently mailed four new reports associated with archaeological surveys conducted along the South Dakota Rehab/PRC Segment to Federal agencies and participating Tribes for review and comment.

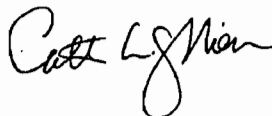
Follow-Up Meetings with SHPOs

DM&E will schedule meetings with the Wyoming and South Dakota SHPOs to review construction plan maps and profiles for all properties recommended as eligible or unevaluated within the New Build segment. These meetings will likely occur in middle to late January after the SHPOs have received associated reports for their review and comment.

Please feel free to contact me at 202-245-0293 (email gliddenc@stb.dot.gov) or Randy Withrow at 319-373-3043 (email rwithrow@louisberger.com) if you have any concerns regarding the meeting summary or our plans for moving ahead in addressing the issues discussed in this letter.

Best of wishes to you throughout the Holiday Season!

Sincerely,



Catherine Glidden
Section of Environmental Analysis

Enclosures: Distribution List
Procedural Clarification For Resolving the Eligibility of Unevaluated Sites
Procedural Clarification For Assessing the Project's Direct and Indirect Impacts
to Historic Properties
PRB Report Review Schedule
CD: Copy of All Materials Distributed at December 2, 2008 Meeting
CD: December 2, 2008 Meeting Transcript

PROCEDURAL CLARIFICATION FOR RESOLVING THE ELIGIBILITY OF UNEVALUATED SITES

Issue

The Surface Transportation Board (STB) and the Dakota, Minnesota and Eastern Railroad (DM&E) have developed the following plan/clarification statement to help resolve and establish the National Register eligibility of archaeological sites located within the project's Area of Potential Effect (APE). This plan is intended to provide clear guidance to project participants regarding procedures for applying all evaluation criteria (as defined at 36 CFR 60.4) to previously unevaluated and newly recorded sites located within the APE.

Evaluating Significance to Tribes and Information Potential

A number of archaeological sites located within the project's APE currently remain unevaluated with regard to National Register eligibility. Many of these remain unevaluated due to the need for additional input from tribes regarding the association of suspected traditional religious and cultural values that could qualify these sites for listing in the National Register under Criterion "A". A majority of the sites in this group include surface features such as stone circles and/or rock cairns which were consistently identified as potentially sensitive areas by tribal monitors who accompanied the archaeological survey teams. In most cases, tribal monitors recommended against archaeological testing at these locations pending further consultation.

Most of the sites identified as sensitive areas by tribal monitors also remain unevaluated with respect to establishing their archaeological information potential under Criterion "D" due to restrictions imposed by STB on archaeological testing pending resolution of Criterion "A" eligibility. In a few instances, DM&E's contractors were able to offer recommendations in their survey reports regarding the eligibility of properties under Criterion "D" based on surface assessments and other observations which indicated no possibility that any subsurface cultural remains (or important scientific information) could exist. Consequently, in these rare instances, properties are recommended "not eligible" under Criterion "D", but remain unevaluated under Criterion "A" pending tribal input.

In their survey reports, DM&E's contractors referenced the comments of tribal monitors as part of their description of unevaluated sites to alert tribal reviewers of their presence so they could either notify STB if further field work (e.g., site visits by elders and traditional practitioners) might be necessary to determine whether any were of traditional religious or cultural importance, or to issue their comments to STB where information contained in the reports was sufficient to determine their traditional cultural values. To date, STB has received very few comments from tribes regarding the traditional significance of sites described in these reports; however, tribal representatives have provided STB with general information that emphasizes the traditional cultural

significance of places marked by stone features like those found at a number of archaeological sites located within the project's APE.

Recommendations

1. STB will continue to seek assistance from interested tribes who wish to accompany archaeological survey crews for the purpose of identifying places of traditional religious and cultural significance within the project's construction ROW. Sites identified by tribal representatives as having potential traditional value will not be tested to assess their scientific research potential if the representatives object or request a delay in archaeological testing pending an evaluation of eligibility under Criterion "A."
2. STB will continue to process survey reports for review by cooperating agencies, interested tribes and State Historic Preservation Officers (SHPOs) in accordance with the procedures specified in the Programmatic Agreement (PA). Sites that require additional tribal consultation or subsurface testing to resolve eligibility under one or more evaluation criteria will continue to be reported as "unevaluated" pending further investigations. In each instance, STB will ensure that DM&E's consultants provide clear recommendations regarding the nature of additional work needed to eventually apply all evaluation criteria. Reports submitted by STB to cooperating agencies and interested tribes where no comments are received within the review period specified in the PA (PA Stipulation A.3.1) will be forwarded to SHPOs for review. STB will provide clarification in its cover letter regarding STB's eligibility determinations, effect findings, and specifications for any subsequent procedural steps needed to resolve eligibility for all unevaluated sites.
3. STB will work with tribes to develop a cultural context to identify places within the project's APE that have potential traditional religious and cultural significance to interested tribes. The main purpose of this study will be to assist STB in determining the eligibility of prehistoric stone feature sites and other site types that have already been identified in the project area that may be significant to tribes. As part of the context development effort, STB will work with DM&E and participating tribes to arrange and schedule field visits by traditional leaders, identified by the tribes, to archaeological sites and other places of traditional religious and cultural importance to tribes that may be identified as a result of the context study.
4. DM&E will redeploy its archaeological contractors and tribal representatives to those archaeological sites where Criterion "A" does not apply to resolve the applicability of Criterion "D" through archaeological testing and to acquire sufficient information to formulate treatment plans (see PA's Identification Plan Section 3.2.6 and Section 3.4.4). In effect, the identification and evaluation of these sites will be conducted in two phases, with the first involving site visits by tribal representatives for the purpose of resolving Criterion "A" applicability and

the second phase focused on archaeological testing for the purpose of resolving Criterion "D" eligibility.

5. The results of traditional cultural and archaeological evaluations under Criterion "A" and Criterion "D" will be provided for review by consulting parties as addenda to the original archaeological survey reports in accordance with the terms of the PA (PA, Stipulation A.3.4). Some information regarding the basis for Criterion A eligibility may be withheld from these addenda in accordance with the confidentiality provisions of the PA (PA, Stipulation I).
6. Unevaluated sites eventually determined eligible under Criterion "A", or other criteria, as properties of traditional religious and cultural significance will be subject to consultation with relevant tribes to develop appropriate treatments to mitigate any potential impacts to such sites.
7. Tribes will continue to have opportunities throughout the PA process to issue comments and eligibility recommendations on properties described in future survey reports. Tribes may also offer information relevant to the reassessment of any property identified at any time during the implementation of the PA process.

Evaluating Sites Located Partially Within the Construction Right-of-Way

Sites situated partially within the project's construction right-of-way (ROW) and partially outside the ROW also remain "unevaluated" in the archaeological survey reports. This is due in part to lack of access to private property located adjacent to the existing or construction ROW or landowner refusal to allow subsurface testing. In such cases, National Register evaluations recommended in reports have been, and will continue to be, based on the best available information, including archival research, historic maps, aerial photography, and archaeological testing within the ROW to an appropriate level. In most cases, DM&E's consultants have not provided specific recommendations regarding National Register eligibility due to their inability to characterize or evaluate the site as a whole; instead, the portions of sites which extend into the ROW have been described as either "contributing" or "non-contributing" to indicate whether the archaeological deposits that extend into the ROW retain important information potential regardless of the overall eligibility of the partially accessible site.

Recommendations

1. DM&E and its consultants will attempt to gather sufficient information to fully evaluate the National Register eligibility of properties that extend outside the ROW. This will be accomplished "...to the extent that access from landowners is available" (PA Stipulation A.2). In instances where DM&E's consultants are unable to gain access to the entire site for purposes of evaluating National Register eligibility, and where DM&E is unable to avoid the site during construction, DM&E's consultants will attempt to estimate the boundaries of the site from within the ROW and will ensure that the unavoidable portion of the site

is evaluated and considered on its own merits using the best available information derived from background and archival research and direct observation. Properties will be considered to be eligible if the accessible portion of a property supports this finding. If eligible, the property will be considered in accordance with the terms of any treatment measures developed through consultation in accordance with the terms of the PA. Sites will not be recommended as eligible under any criteria unless available information supports such a finding. Inaccessible portions of sites will continue to be considered unevaluated until or unless additional information is obtained to indicate otherwise.

PROCEDURAL CLARIFICATION FOR ASSESSING THE PROJECT'S DIRECT AND INDIRECT IMPACTS TO HISTORIC PROPERTIES

Issue

The Surface Transportation Board (STB) and the Dakota, Minnesota and Eastern Railroad (DM&E) propose the following plan/clarification for assessing direct (ground disturbance) and indirect effects (noise, visual, vibration) of the project on properties listed on or eligible for listing on the National Register of Historic Places (National Register).

Indirect Effects

The Environmental Impact Statement (EIS) prepared by STB's Section of Environmental Analysis (SEA) for the DM&E Project included information regarding potential noise and vibration impacts to historic properties within the project area. In the Draft EIS, SEA determined that "structures within 100 feet of a new rail line of the type contemplated as part of this project could experience some damage by project-related vibration." In the Final EIS, however, SEA concluded that "...structures would likely need to be within 50 feet of the rail line to potentially be damaged by rail vibration (Final EIS, Volume 1, Chapter 3 at page 3-65)."

SEA also assessed potential audible impacts to the project area in the EIS. SEA concluded that audible impacts would not be adverse. However, STB included Conditions 86-96 in its 2006 Decision to assure that if noise levels increase due to increased haul tonnage levels, mitigation measures would be imposed to address any potential adverse effects including consultations with the appropriate State Historic Preservation Officer (SHPOs) for impacts that could affect historic properties. In Condition 95:¹

...Should noise mitigation be required at locations identified as containing structures that are potentially eligible for listing on the National Register of Historic Places, Applicant shall consult with the appropriate State Historic Preservation Officer to assess effects and implement appropriate mitigation measures...

The Wyoming (WY) and South Dakota (SD) SHPOs have requested that STB assess potential visual or audible adverse effects on historic properties extending three miles on either side of the construction corridor or New Build Segment. The WY SHPO asked that STB conduct a file search to locate all properties within the 6-mile corridor currently listed on the National Register while the SD SHPO requested an inventory of properties that are both listed and considered eligible for listing on the National Register. Preliminary site file searches conducted by DM&E indicate that approximately 35 sites are located within the six-mile corridor encompassing the New Build Segment in WY and SD.

¹ See 2006 Decision at page 39.

Recommendations

1. DM&E will analyze the results of its site file search to determine what qualities of each individual site contribute to its historic significance and what kinds of indirect impacts could potentially affect the integrity of each site. DM&E will also conduct an analysis to determine which of these sites is situated within the viewshed of the rail corridor and which may be visually or audibly adversely affected by the project.
2. DM&E will prepare a report consolidating the site file searches and viewshed analyses and provide it to STB for review and consideration in accordance with the terms of the Section 106 Programmatic Agreement (PA).
3. Depending on the results provided in the above report, DM&E recognizes that further consultation may be necessary under the terms of the PA to assess any adverse effects and discuss the development of treatment measures intended to avoid, minimize or mitigate such effects.

Construction Impacts/New Build - Direct Effects

DM&E has prepared detailed project maps showing the location of planned cut and fill activity within the construction right-of-way. DM&E provided examples of these maps in recent meetings it held with the SD and WY SHPOs. The SD SHPO suggested that information regarding project impacts and determination of effect could be submitted as a separate companion volume. The maps will be provided as part of that volume.

Recommendation

1. DM&E will prepare large-scale maps that show the construction ROW and the proximity of proposed cut & fill activity within the construction ROW to all historic properties. These maps will be provided to SHPOs following comment on STB's determinations of eligibility and as supporting information accompanying STB's determinations of adverse effect.

PRB Report Review Schedule

Report Title	Submittal to Cooperating Agencies and Tribes for Review and Comment	Submittal to SHPO for Review and Comment
Minnesota - Rehab		
Phase Ia Overview and Phase I Survey Methodology for Cultural Resources for the Minnesota Rehabilitation Segment and Mankato South Alignment Two Pines Resource Group (2006) SHPO #2002-0815PA	21-Jan-08	21-Jan-08
Phase I and II Archaeological Investigations of the Minnesota Rehabilitation Segment Two Pines Resource Group (2007) SHPO #2002-0815PA	16-Jan-09	27-Mar-09
Phase I Archaeological and Geomorphological Survey for the New Ulm Yard Project, MN Rehabilitation Segment Two Pines Resource Group (2007) SHPO #2002-0815PA	23-Jun-08	19-Dec-08
Historic District Treatment Plan for DM&E's PRB Expansion Project HDR (2007) SHPO #080515042F	23-Jun-08	23-Jun-08

PRB Report Review Schedule

Report Title	Submittal to Cooperating Agencies and Tribes for Review and Comment	Submittal to SHPO for Review and Comment
South Dakota - New Build Segment		
A Level III Cultural Resource Inventory of the DM&E's PRB Expansion Project, Custer, Fall River, and Pennington Counties, South Dakota SWCA/ARCHLAB (1999/2007) SHPO #99223006F	22-Feb-08	9-Jan-09
A Level III Cultural Resource Inventory of DM&E's PRB Expansion Project, Custer, Fall River, And Pennington Counties, South Dakota Addendum 1 (SWCA/ARCHLAB) ALAC (2007) SHPO #99223006F	6-Jun-08	9-Jan-09
A Level III Cultural Resource Inventory of DM&E's PRB Expansion Project, Custer, Fall River, and Pennington Counties, South Dakota Addendum 2 (SWCA/ARCHLAB) SWCA (2007) SHPO #99223006F	1-Jul-08	9-Jan-09
A Level III Cultural Resource Inventory of DM&E's PRB Expansion Project, Custer, Fall River, and Pennington Counties, South Dakota Addendum 3 (SWCA/ARCHLAB) SWCA (2007) SHPO #99223006F	19-Dec-08	27-Feb-09
A Level III Cultural Resource Inventory of DM&E's PRB Expansion Project, Custer, Fall River, and Pennington Counties, South Dakota Addendum 4 TRC ARCHLAB USD (2007) SHPO #99223006F	19-Dec-08	27-Feb-09
A Level III Cultural Resource Inventory of DM&E's PRB Expansion Project, Custer, Fall River, and Pennington Counties, South Dakota ALAC (2006-2007) SHPO #990223006F	30-May-08	9-Jan-09
A Level III Cultural Resource Inventory of DM&E's PRB Expansion Project, Custer, Fall River, and Pennington Counties, South Dakota Addendum 1 ALAC (2007) SHPO #990223006F	30-May-08	9-Jan-09

PRB Report Review Schedule

Report Title	Submittal to Cooperating Agencies and Tribes for Review and Comment	Submittal to SHPO for Review and Comment
South Dakota - Rehab/PRC		
Level I and II Cultural Resource Survey & Site Testing/Evaluation for 317 miles of Railroad Reconstruction from the MN Border to Wall, SD:DM&E's Proposed PRB Expansion Project Burns & McDonnell (1999) SHPO #080515042F	21-Jan-08	12-May-08
A Level III Cultural Resource Inventory of DM&E's PRB Expansion Project, PRC Segment 1, Haakon, Jones, and Stanley counties, South Dakota ALAC PRC Segment 1 (2007) SHPO #080515042F	6-Jun-08	27-Feb-09
A Level III Cultural Resource Inventory of DM&E's PRB Expansion Project, PRC Segment 1, Haakon, Jones, and Stanley counties, South Dakota SWCA (2008)	19-Dec-08	27-Feb-09
A Level III Cultural Resource Inventory of DM&E's PRB Expansion Project, PRC Segment 2, Haakon and Stanley Counties, South Dakota ALAC PRC Segment 2 (early draft 2007) SHPO #080515042F	30-Jan-09	10-Apr-09
A Level III Cultural Resource Inventory of DM&E's PRB Expansion Project, PRC Segment 3, Pennington, Jackson, And Haakon Counties, South Dakota SWCA PRC Segment 3 (2007) SHPO #080515042F	6-Jun-08	27-Feb-09
A Level III Cultural Resource Inventory of DM&E's PRB Expansion Project, PRC Segment 3, Pennington, Jackson, And Haakon Counties, South Dakota Addendum 1 SWCA (2008) SHPO #080515042F	19-Dec-08	27-Feb-09
A Level III Cultural Resource Inventory of DM&E's PRB Expansion Project, Huron Yard Locale, Beadle County, South Dakota ALAC Huron Yard (2007) SHPO #080515042F	21-Jan-08	12-May-08

PRB Report Review Schedule

Report Title	Submittal to Cooperating Agencies and Tribes for Review and Comment	Submittal to SHPO for Review and Comment
Wyoming - New Build Segment		
A Class III Cultural Resource Inventory of Eight Portions of Segments 1 And 2, Campbell, Niobrara, And Weston Counties, WY TRC (2006)	21-Jan-08	19-Dec-08
A Class III Cultural Resource Inventory of the Seven Remaining Portions of Segments 1 and 2, Campbell, Niobrara, and Weston Counties, WY TRC (2007)	21-Jan-08	19-Dec-08
A Class III Cultural Resource Inventory of DM&E's PRB Expansion Project, Segments 3 and 4, Campbell and Converse Counties, Wyoming SWCA/ACR (2007)	27-Feb-08	19-Dec-08
A Class III Cultural Resource Inventory of Three Wetland Mitigation Sites for the PRB, Converse County, Wyoming TRC (2008) SHPO #0608JRD008	8-Apr-08	2-Jun-08

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