

EO - 1270



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

Letter sent to Federal Cooperating
agencies
+ SHPO
+ DM+E

November 25, 2008

Ms. Sandra Barnum
Cultural Resources Director
Department of the Army US Army - Engineer District, Omaha
106 South 15th Street
Omaha, NE 68102-1618

**Re: STB Finance Docket No. 33407, Dakota, Minnesota & Eastern Railroad Corporation
Construction into the Powder River Basin Project: Program Materials**

Dear Ms. Barnum:

This letter is a follow-up to our November 14, 2008 invitation to you to attend a meeting regarding the Dakota, Minnesota and Eastern Railroad Project (DM&E) being held at the Holiday Inn-City Centre, in Sioux Falls, South Dakota on December 2, 2008. Enclosed are some relevant meeting materials for your information and review.

Included in our packet is logistical information regarding the meeting site as well as two documents that will be the subject of discussion at the meeting. These include statements prepared by the Surface Transportation Board's Section of Environmental Analysis and DM&E on resolving eligibility for unevaluated sites, and assessing project effects on historic properties.

Please do not hesitate to contact Randy Withrow of The Louis Berger Group at (319) 373-3043, rwithrow@louisberger.com, or me at (202) 245-0293, Catherine.Glidden@stb.dot.gov if you have any questions regarding the meeting. As before, I recommend that you contact Michael Madson of HDR Engineering Inc., at (612) 501-6237, regarding meeting logistics.

See you in Sioux Falls!

Sincerely,

Catherine Glidden
Environmental Protection Specialist
Section of Environmental Analysis

Powder River Basin Expansion Project

Sioux Falls, South Dakota

December 2, 2008

9:00 a.m. – 2:30 p.m.

DRAFT AGENDA

9:00 a.m.	Welcome	Cathy Glidden (Surface Transportation Board) Herb Jones (Dakota, Minnesota & Eastern Railroad)
9:00 a.m. – 9:30 a.m.	Overview and Tribal Consultation	Cathy Glidden (STB) Herb Jones (DM&E)
9:30 a.m. – 10:15 a.m.	Procedural Concerns Resolving Eligibility for Unevaluated Sites	Alan Stanfill (HDR) Randy Withrow (LBG)
10:15 a.m. – 10:30 a.m.	Break	
10:30 a.m. – 11:15 a.m.	Procedural Concerns (con't) Identifying and Evaluating Buried Sites Assessing Effects	Alan Stanfill (HDR) Randy Withrow (LBG)
11:15 a.m. – 12:00 p.m.	Project Mapping	Doug Jackson (HDR)
12:00 p.m. – 1:00 p.m.	Lunch	
1:00 p.m. – 1:30 p.m.	Survey Status & Report Reviews Archaeological Survey Update Status of Survey Report Reviews Submitting Reports For SHPO Review	Erin Salisbury (SWCA) Randy Withrow (LBG)
1:30 p.m. – 2:00 p.m.	Next Steps	Cathy Glidden (STB) Herb Jones (DM&E)
2:00 p.m. – 2:30 p.m.	Questions & Answers Discussion Adjourn	Cathy Glidden (STB) Herb Jones (DM&E)

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.

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.