

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 SHPOs in accordance with the procedures specified in the 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 ID 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. In the event that insufficient information is obtained to resolve the eligibility of sites under Criterion “A” based on the review of reports, additional opportunities will be provided for tribes to issue comments and eligibility recommendations with the review of additional reports throughout the PA process. Tribes may offer information relevant to the reassessment of any property identified at any time during the implementation of the 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.