



Dakota, Minnesota & Eastern Railroad Corporation

GI-16430
CG

February 6, 2009

Paul R. Lusignan
National Registry of Historic Places
1201 Eye Street, NW (2280)
Washington, DC 20005

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

Dear Mr. Lusignan:

This letter is being written to offer additional insight with respect to the January 28, 2009 letter you received from Victoria Rutson, Chief, Section of Environmental Analysis with the Surface Transportation Board (STB) concerning the above referenced matter.

Neither the letter we received nor the attached STB study document included any significant background information regarding the extensive consultation that has taken place with the affected Tribes on this Project over the past 11 years. Of particular interest to you may be the ongoing report review process and the many meetings held in 2007 and 2008 with Tribal representative to encourage Tribal participation and discuss process, interests and timelines. To the extent that this history is relevant to your review of the documents attached to the Rutson letter, we would encourage you to familiarize yourself with the record in order to place the request made of you in a proper context. I would be happy to provide you a six inch three-ring binder that documents this record should you so desire.

Background

The documentation is clear: the STB has held dozens of meetings to consult with Tribal representatives, and much of the survey work that was done included the direct participation of Tribal monitors.

The survey report review process included the opportunity for any Tribal reviewer to request additional field visits and the railroad agreed to coordinate such visits within 30 days if we had legal access to the land. In both cases that a request was made that coordination took place. The railroad offered to fund an office, located on Tribal property, staffed only with employees selected by the Tribes, to assist the Tribes with the processing of Project reports. Ultimately, the Tribes rejected that offer, as some considered such an offer "blood money." Report review deadlines were extended with our full support—in many cases extensions exceeded several months. The record shows that the railroad suggested extending report review periods even when the STB was not seeking extensions.

Numerous meetings were held by the STB to consult with Tribal representatives with respect to the National Register significance of properties identified in accordance with the programmatic agreement executed for purposes of Section 106 of the NHPA. Notices on those meetings were made to all affected Tribes and phone calls were made to follow up on the notices. Participation levels were consistent with 15 to 20 Tribal representatives attending most meetings.

To date the railroad has spent in excess of \$8 million on Section 106-related expenditures. Even though we believe every reasonable step has been taken to encourage participation in order to identify eligible properties, we, nevertheless, agreed with the STB to have an additional "context study" done to help the STB in making determinations of eligibility with respect to previously "unevaluated" sites where Tribes did not offer any feedback. "Unevaluated" sites were not fully evaluated due to the fact that they include stone features (stone circles and rock cairns) which the STB suspected might retain spiritual values. STB instructed our field personnel not to conduct archaeological evaluations for criterion "d" in areas where such features were present to avoid damaging potential spiritual values with archaeological test excavations.

Concern

The purpose of the "context study" as it was proposed to the railroad was to provide the STB additional information for making determinations of eligibility where stone features were present at "unevaluated" sites. Our concern arose when details of the proposed study included the possibility of taking Tribal members to all of the "unevaluated" sites so they could evaluate each on its own individual merits. We could see no logical reason for a "context study" if it included Tribal visits to all of the sites. What we could see was another prolonged period of trying to coordinate an activity where we had witnessed little if any interest by the Tribal participants in the past. We believe Tribal participation would be helpful, but we are concerned that the proposed study anticipates a level of Tribal participation that would seem unrealistic. When this study doesn't meet STB's expectations we have no idea what will come next.

Question

On page two of the Rutson letter, in reference to the STB study proposal, a question was posed which reads: "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?" A yes or no answer to that question would have little consequence since, as you just read, "further assess[ing]" is not a concern to either party involved in this matter. We would presume that either the proposed study or any number of other variations could in fact help the STB further assess potential eligibility.

The question in our mind is this, "If you agree the Tribes have been consulted extensively and in good faith in accordance with federal law and if the programmatic agreement has been followed, would you require further input from the Tribes before accepting STB's recommendations for eligible sites? If the answer is yes, then we would ask you to evaluate the two study proposals and indicate if either is inadequate and if so how.

If the answer is no, we are still willing to go beyond the requirements of both the programmatic agreement and the federal consulting requirements and support a "context study" as per the document attributed to the railroad that you received from Ms. Rutson.

We realize the issue is largely a procedural question, and may be better addressed by the Advisory Council on Historic Preservation, given their oversight role in the Section 106 process. However, as you are aware the STB met with the ACHP, which directed STB to you. We did not participate in that discussion.

Sincerely,



Herb M. Jones
Director, Government Affairs
DM&E Railroad

cc: Victoria Rutson
Chief, Section of Environmental Analysis
Surface Transportation Board

Charlene Dwin Vaughn
Assistant Director, OFAP
Advisory Council on Historic Preservation (ACHP)