

EI - 16444



"Herb Jones"
<hjones@cedaramerican.com>
03/06/2009 05:27 PM

To <Vicki.Rutson@stb.dot.gov>
cc <Catherine.Glidden@stb.dot.gov>, "Withrow, Randy"
<rwithrow@louisberger.com>, "Randy Henke"
<rhenke@cedaramerican.com>, "Jackson, Doug"
bcc

Subject DM&E Response to STB Study Plan

Vicki—

I will follow this email up with a letter, but wanted to respond by the deadline.

We understand you had the chance to visit with John Morton about our concerns with the present course of the cultural affairs work. And, we appreciate that you are committed to seeing this process through and will make the necessary decisions on behalf of the project and STB. You should also know that we appreciate STB's desire to promote renewed efforts to elicit meaningful information from the tribes to resolve questions about the traditional religious and cultural importance of properties that may be affected by the PRB project.

Since communications have broken down between us and we appear to be at logger heads over the proposed context study, at this point we will defer to your leadership and concur with the STB's study plan in order to move this process forward. From the discussion we have had with you, we do this today with the understanding that with this process in place STB is prepared to move reports forward and make determinations of eligibility in a timely manner.

Vicki, we believe it is critical to reopen the lines of communication. To that end, we propose that Randy Henke and Doug Jackson travel to DC to meet with you to discuss coordination on the path forward. We have practical concerns to discuss with respect to the logistics needed to accomplish site visits and field work anticipated in the context study among other things.

We hope you understand that the concerns we have expressed with regard to the technical aspects of the study were intended to be constructive. We hope, too, that you recognize the stake DM&E has in the successful completion of the terms of the Programmatic Agreement for the PRB project, and our desire to contribute whatever we can to ensure a successful conclusion.

Thank you.

*Herb M. Jones
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Vicki Rutson/STB
02/27/2009 01:18 PM

To: hjones@cedaramerican.com
cc: Catherine Glidden/STB@STB
bcc:
Subject: Response to your message

History: This message has been replied to and forwarded.

Hello, Herb. I understand that Cathy and Randy provided you with the Board's tribal study and cost estimate on Feb. 18. I have attached both files, have added a clarification (explained below), and have re-dated them with today's date.

I have clarified that the cost estimate of visiting 80 sites assumes a "worse case scenario" and that we strongly believe that far fewer visits will be necessary. It would be improper for us to set a limit to the visits, however, given that our government-to-government consultation responsibilities require us to take into consideration information from the tribes.

I would like to start work on the plan immediately, but will wait until next Friday, March 6, for your ok to proceed.

Regards,

Vicki



20090227 Traditional Sites Evaluation Study - STB Final.doc Cost Estimate for Board's Study.xls

Victoria Rutson
Chief, Section of Environmental Analysis
Surface Transportation Board
(202) 245-0295 (phone)
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National Register Evaluation of Traditional Sites

A Study Plan Prepared by the Surface Transportation Board

February 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: March 2009

Archival Research: February 16 - March 2009

Literature Review Due: April 15, 2009

Interviews: April & May 2009

Field Visits: May & June 2009

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

Tribal Report (if any) Due: June 30, 2009

STB Final Report Due: July 15, 2009