

FD 33407

April 21, 2008

Catherine Glidden  
Environmental Protection Specialist  
Surface Transportation Board  
Section of Environmental Analysis  
Washington, DC 20423-0001

RE: Powder River Basin Project Section 106 Compliance

Dear Ms. Glidden:

Having recently concluded eight months of meetings with tribal representatives and the Surface Transportation Board (STB) regarding implementation of the Programmatic Agreement (PA) concerning the Dakota, Minnesota & Eastern (DM&E) Railroad's Powder River Basin Project (Project), we would like to use this opportunity to provide you our position with regard to several outstanding issues.

In addition, I would like to express our appreciation for your work and for that of your third-party contractor, the Louis Berger Group. There is no question that this Project presents unique challenges. Despite those challenges, you have demonstrated a willingness to work with all parties to identify solutions and move forward.

As you directly heard from tribal representatives and the DM&E over the course of the meetings, a consensus opinion has been expressed that the STB has worked in good faith to accommodate the input of all parties. This is evidenced through STB's efforts to implement the PA and Memorandum of Agreement (MOA) through the development of the Work Plan and Office of Tribal Involvement (OTI). Both of these initiatives provide the potential to improve the handling of Project-related materials by the tribes, STB, and the DM&E. OTI provides a model for future projects impacting tribes. We understand and appreciate the effort you are making to move forward in a manner that is consistent with PA and the requirements on you serving as the lead agency in this matter.

We have been pleased to work with the STB and the many tribal representatives who clearly appreciate the benefits of the Work Plan and OTI. The sessions have provided all parties the opportunity to continue building a healthy relationship that will serve us well in the coming years as the Project approaches and moves into the construction phase. We were, however, disappointed to learn at the last meeting that some of the tribal representatives are not interested in bringing the above mentioned initiatives to conclusion. The tone and content of some of the tribes' post-caucus comments expressed on the second day of the session indicates, at the very least, we should not expect tribal consensus any time soon.

The DM&E and the STB have gone to great lengths in order to assist in processing Project-related materials. The following table identifies the dates and locations of the 9 meetings held (including the meeting scheduled for later this month) over the last 9 months.

| <b>Tribal Summit Consultation Meetings</b> |                 |
|--------------------------------------------|-----------------|
| <b>Date</b>                                | <b>Location</b> |
| August 9, 2007                             | Gillette, WY    |
| August 14, 2007                            | Pierre, SD      |
| August 16, 2007                            | Tracy, MN       |
| October 9-11, 2007                         | Rapid City, SD  |
| October 29-30, 2007 (?)                    | Morton, MN      |
| January 15-16, 2008                        | Rapid City, SD  |
| February 12-13, 2008                       | Sioux Falls, SD |
| April 1-2, 2008                            | Pierre, SD      |
| Planned: April 29-30, 2008                 | Morton, MN      |

Additionally, numerous offers were made to hold report review conference calls, additional offers were made to hold report review meetings, a dedicated website was created, lengthy discussion was held on the creation of OTI and a proposal to establish and fund OTI was developed, STB expressed a willingness to accept late comments to reports, STB and SD SHPO offered to accept even later oral comments. These efforts have yet to enhance tribal participation in the review process. As a result, it is abundantly clear that sticking to the PA-established timelines is crucial, and that any delays will only encourage individuals who would undermine the process at the expense of the whole.

The STB has done everything in its power to encourage tribal participation and to enhance that participation through the work plan and OTI. However, instead of working to finalize the documents as was the stated purpose of the last meeting, not a single tribal representative objected to their spokesperson's suggestion to cease any comment related dialogue at the meeting and to, once again, request more time to make comments and hold yet another meeting.

With regard to the Work Plan and OTI documents, we remain committed to bringing the drafting process to resolution, but we also ask that no other activity be suspended in the hope of working out consensus agreement documents. It is our expectation that you will receive formal comments from the tribes on the work plan you sent to all participants before the last meeting and which was discussed in detail at that meeting, and that with or without further comments you will then provide all parties the final work plan.

The following table includes the name of each report and the dates on which they were provided to the tribes for review. As you may recall, STB accepted DM&E's offer to restart the 30-day review period on the reports sent between August and December of 2007 in an effort to facilitate orderly processing.

| Report Title                                                                                                                                                                                                                                                | Submitted by STB to Tribes and Agencies for Review and Comment                               |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------|
| A Class III Cultural Resource Inventory Of Eight Portions Of Dakota, Minnesota, And Eastern Railroad Corporation's Powder River Basin Expansion Project, Segments 1 And 2, Campbell, Niobrara, And Weston Counties, Wyoming <b>(TRC 2006)</b>               | Sent on August 31, 2007; Resent on January 21, 2008; Extension granted until March 21, 2008  |
| A Class III Cultural Resource Inventory of the Seven Remaining Portions of Dakota, Minnesota, and Eastern Railroad Corporation's Powder River Basin Expansion Project, Segments 1 and 2, Campbell, Niobrara, and Weston counties, Wyoming <b>(TRC 2007)</b> | Sent on November 9, 2007; Resent on January 21, 2008; Extension granted until March 21, 2008 |
| Level I and II Cultural Resource Survey and Site Testing and Evaluation for 317 miles of Railroad Reconstruction from the Minnesota Border to Wall, South Dakota: DM&E's Proposed Powder River Expansion Project <b>(Burns &amp; McDonnell 1999)</b>        | Sent on November 9, 2007; Resent on January 21, 2008; Extension granted until March 21, 2008 |
| A Level III Cultural Resources Evaluation of the Proposed Dakota, Minnesota & Eastern Railroad Corporation's Powder River Basin Expansion Project Corridor, Huron Yard Locale, Beadle County, South Dakota <b>(ALAC Huron Yard 2007)</b>                    | Sent on November 9, 2007; Resent on January 21, 2008; Extension granted until March 21, 2008 |
| A Class III Cultural Resource Inventory Of Dakota, Minnesota, And Eastern Railroad Corporation's Powder River Basin Expansion Project, Segments 3 And 4, Campbell And Converse Counties, Wyoming <b>(SWCA/ACR 2007)</b>                                     | Sent on February 22, 2008                                                                    |
| A Level III Cultural Resource Inventory of the Dakota, Minnesota and Eastern Railroad Corporation's Powder River Basin Expansion Project Corridor, Custer, Fall River, and Pennington Counties, South Dakota <b>(SWCA/ARCHLAB 1999/2007)</b>                | Sent on February 22, 2008                                                                    |

In that the first four reports listed have been under review for more than five months, when the PA calls for a 30-day review, we request STB to advance all reports consistent with the timelines included in the PA. It is our understanding that three reports will soon be sent to the State Historical Preservation Offices. We ask that these reports continue their progress without delay and that remaining reports be processed in a manner that is consistent with the PA. We trust you will find a way to allow reports to be supplemented after the deadline should there be a need. Information in the above table clearly demonstrates that neither STB nor DM&E is attempting to rush any party. In addition, we ask that STB not delay review and approval of any other reports or actions in

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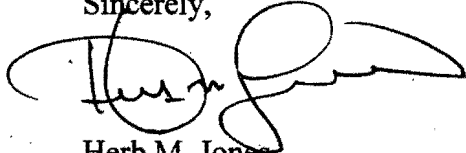
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anticipation of further comments on reports, or in anticipation of receiving a consensus tribal response on either of the documents.

We also have concerns regarding the discussion at the last meeting about the Price site (21BE36) in Minnesota. It is our position that mitigation for the Project can only be for Project impacts. No additional mitigation can be required due to any impacts, real or otherwise, that are not associated with the construction of the Project. For informational purposes, you will find enclosed a copy of the Price Site information that has been assembled to date.

We value the relationship we have established with the STB, the Louis Berger Group and the Tribal community and we look forward to working with you in a constructive manner as we address these and future issues.

Sincerely,

A handwritten signature in black ink, appearing to read 'Herb M. Jones', with a large, stylized flourish extending to the right.

Herb M. Jones  
Government Affairs Director

enclosure