



EI-18426

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November 23, 2010

Ms. Catherine Glidden
Office of Environmental Analysis
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001

RE: STB Finance Docket No. 33407, Dakota Minnesota & Eastern Railroad Corporation
Construction Into the Powder River Basin Project: Request for Comment on 21
Archaeological Sites

Dear Ms. Glidden:

Thank you for sending us the referenced report for our review and comment. We are pleased to provide the following comments for your consideration. We also wish to provide a clarification regarding a statement in your cover letter. Your letter suggests that STB received no consulting party comments responding to the initial letter report rejected by the Wyoming State Historic Preservation Office. However, DM&E sent comments to STB responding to the initial letter report on February 9, 2010. We believe the Forest Service also sent comments for your consideration. These comments may be found at files EI-18071 and EI-18039 on STB's environmental correspondence website. DM&E did not receive a response to those comments and several of the concerns raised in our letter remain unaddressed in this report.

We understand that certain confidential information was withheld from the report at the request of the tribes. In the absence of this confidential information, we wish to focus our comments not on the specific eligibility determinations reached for each of the 21 sites, but rather on the findings in general, and STB's justifications for determinations of eligibility.

I. Criterion A Determinations

We are concerned that the report does not provide sufficient explanation for how the STB applied the National Register criteria and the Secretary's guidance to justify its finding that all 21 stone feature sites visited by the tribes qualify for listing in the National Register under Criterion A. The findings seem to be based on at least three assumptions:

1. All stone features represent ritual or ceremonial activities;
2. All ritual or ceremonial activities constitute important historic events; and

consequently

3. All stone feature sites qualify for listing in the National Register under Criterion A.

A fourth assumption may also be operating here:

4. Native American groups living in the region today are historically and culturally related to Native American groups who lived in the region throughout prehistory.

We believe STB's application of the National Register criteria for evaluation is not consistent with the Secretary's Standards and Guidance for evaluating historic properties. We do not contest the tribes' ascription of values to these properties. If the tribes say they are valuable for whatever reasons, we accept their assessment. However, as indicated in the regulations, 36CFR Part 800, properties of traditional religious and cultural importance "may" (or may not) be eligible for listing in the National Register. The regulations do not state that properties ascribed religious values by a tribe automatically qualify for listing in the National Register as STB seems to assume. Instead, the regulations direct agencies to resolve eligibility by applying the National Register criteria guided by the Secretary's Standards and Guidelines for Evaluation to distinguish which properties of traditional religious and cultural importance are eligible and which are not.

As you are aware, the Secretary's guidance notes that: "A religious property's significance under Criterion A, B, C or D must be judged in purely secular terms" (National Register Bulletin 15: How to Apply the National Register Criteria). However, it appears that the STB's determinations were based solely on the perceptions from tribes that the sites may be locations where religious ceremonies and rituals may have occurred. The supposition that religious activities occurred at a site would not seem to provide sufficient justification for finding the site to be eligible for the National Register. Further, the supposition that these sites are all eligible under Criterion A because they "...exhibit a quality of significance that possess integrity of feeling and association with events that have made a significant contribution to the broad patterns of Native American history," is vague at best, and fails to explain what those significant events were, or how they relate to, or are associated with, the salient broad patterns of Native American history, beyond the suggestion that religious activities may have occurred there.

Although the report indicates that stone features have "traditional cultural significance" to the tribes, the report does not assess or designate these sites as Traditional Cultural Properties as defined at National Register Bulletin 38, with one exception. Indeed, National Register Bulletin 38, the National Register Guidelines for Evaluating and Documenting Traditional Cultural Properties, is not referenced in the report. Nevertheless, Bulletin 38 provides useful guidance with regard to the standards to be met for documenting and justifying determinations of eligibility under Criterion A. As stated in Bulletin 38, a traditional cultural property is "...defined generally as one that is eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community." The report, however, does not establish that these sites are historically or culturally associated with or rooted in the history of those living communities who ascribe value to them, or that they are important for maintaining their cultural identities.

As STB is aware, the age of most of these sites has not been established to demonstrate that they were occupied ca. 1720 or later, when Lakota, Nakota and Dakota groups, who ascribe traditional values to the sites, first arrived and occupied this area of the Northern Plains, generally displacing preceding groups. Indeed, several sites produced diagnostic artifacts (ascribed to the Middle Archaic period and earlier) indicative of much earlier occupations, prior to the arrival of any living community in the region today, including the Northern Cheyenne Tribe. Further, none of the tribes were aware of the presence of these sites until identified in cultural resource inventory reports for the Powder River Basin Project, and none of the sites were used for traditional religious purposes or recognized as places where important historic events occurred by any of the tribes within the context of their folklore or past experiences.

Anthropologists, historians and tribes are aware that there is no single Northern Plains Culture characterized by a single set of cultural practices or beliefs among the many groups who occupied this area historically. It stands to reason that the cultural practices, religions and beliefs of the various groups who occupied the Northern Plains also varied prehistorically. Therefore, the groups who created and occupied these sites in the past may have held very different values and belief systems from those who may ascribe cultural value to these sites today. Absent cultural or historical associations rooted in a community's history, the use of these properties by their original occupants in a manner similar to or compatible with the values ascribed by extant communities cannot be established (See National Register Bulletin 15: How to Apply the National Register Criteria for Evaluation). Consequently, the eligibility of these sites as Traditional Cultural Properties or as properties which qualify under Criterion A due to their association with significant historical events within the experience or memory of living communities has not been established. According to Bulletin 15, "The property you are evaluating must be documented through accepted means of historical or archaeological research (including oral history), to have existed at the time of the event or pattern of events and to have been associated with those events. *A property is not eligible if its associations are speculative.*" (emphasis added) Further, Bulletin 15 states, "Mere association with historic events is not enough, in and of itself, to qualify under Criterion A: the property's specific association must be considered important as well."

Perhaps the absence of historic or cultural associations explains why, with the exception of 48CA1490/48CO726, STB did not attempt to designate these sites as Traditional Cultural Properties in the report. STB considers site 48CA1490/48CO726 to be eligible under Criteria A, C and D, however, justification provided for Criterion A states this determination is "...based on its association with events *and cultural practices* (emphasis added) that have made significant contributions to the broad patterns of Native American history and culture. STB did not elucidate what events, cultural practices and significant contributions pertain, or whether such associations actually exist. STB notes that a sandstone outcrop in close proximity is considered to have sacred value, but no indication is provided regarding whether the sandstone outcrop was ever actually used for sacred or traditional purposes. Unless indications of actual traditional use are made evident, no historical or cultural associations can be established, which is critical for National Register purposes. The mere presence of a geologic feature on the landscape that may exhibit qualities which are valued by traditional communities today does not imply an actual historic or cultural link between the geological feature and traditional cultural practices or events.

II. Criterion D Determinations

Similarly, we are concerned with STB's interpretation of the qualities needed for a property to qualify under Criterion D. The statements attributed to tribes – upon which STB relied to reach determinations of eligibility under Criterion D at 19 of the 21 sites – are not consistent with the National Register guidelines. The requirement that a property must have yielded or have the potential to yield important information to qualify under Criterion D relates to its potential to address important research questions about human history or prehistory that can be answered through study related to the physical materials of the property. The statements submitted by tribes argue that Criterion D is applicable due to the configuration of stone features within sites reflecting patterns comparable to extant beliefs and cultural practices, and thereby may affirm, in some manner, cultural patterning and cultural continuity. They also suggest that Criterion D applies because tribal visitors to these sites can gain, through experiences such as prayer, fasting and vision questing, traditional knowledge from the original occupants. Such experiences are a function of Criterion A, not D.

The use of sites for intuiting consistency of traditional practices and beliefs, and for gaining spiritual enlightenment is perhaps more appropriately related to possible treatment measures after properties are determined to be of traditional religious and cultural importance and qualify as Traditional Cultural Properties under Criterion A. Potential mitigative uses do not provide the basis for resolving their eligibility under Criterion A or D. With regard to Criterion D, "A property is *not* eligible if it cannot be related to a particular time period or cultural group and, as a result, lacks any historic context within which to evaluate the importance of the information to be gained." (National Register Bulletin 15: How to Apply the National Register Criteria for Evaluation, Criterion D: Information Potential) As stated above, no such relationships have been demonstrated.

III. Criterion C Determinations

STB designates three sites as eligible under Criterion C (48CA1490/48CO726, 48CA1709 and 48CA3781). These findings are based on an archaeological report recommendation that the sites "...possess distinctive features pertaining to structural technology of prehistoric peoples and embodies distinctive characteristics of a type, period, or method of construction..." However, STB's findings and site narratives do not identify which features at these sites embody distinctive characteristics of a type, period or method of construction. Nor is it clear what types, periods or methods of construction pertain to STB's determination that the sites qualify for listing under Criterion C.

IV. Site 48CA211

We are disappointed that STB did not address concerns expressed in our letter of February 9, 2010, regarding the excavation units observed during the tribal visits at site 48CA211. We continue to believe that resolution of this matter is important to assure the tribes that DM&E was not involved and had no knowledge of the excavations that reportedly occurred there in 2008. We also believe STB should consult with SHPO to determine whether the site continues to qualify for the National Register under Criterion D if the intent of those excavations was to

retrieve the important information from the site as part of the mitigation effort for a separate project. Does the site continue to retain important information, or was that information retrieved during the previous excavation? Finally, we request clarification regarding the evaluation of the site for purposes of that separate undertaking. If the site was not considered eligible under Criterion A for purposes of that separate project, conducted within the last two years, why is it considered eligible under Criterion A now?

V. Alternatives for Consideration of Cultural Values

DM&E recognizes that the tribes who participated in the field review of these 21 stone feature sites value them and assign a sense of proprietorship to them. DM&E respects the concerns expressed by the tribes regarding the potential impacts and effects of the PRB Project on places they value. We fully expect to continue discussions and consultation with the tribes to find ways to address their concerns in accordance with the various authorities and conditions imposed on the PRB Project, including the terms of the Section 106 Programmatic Agreement. However, based on our understanding of the Section 106 process and the Secretary's Standards and Guidelines, we do not believe that STB has demonstrated sufficient justification for determinations of eligibility under Criteria A, C or D for the 21 stone feature sites.

Consequently, we believe other avenues for the continued consideration of these sites are available under Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations), or Executive Order 13007 (Indian Sacred Sites) which are not tied to the constraints of Section 106 and its restriction to historic properties, and that more directly relate to the values expressed regarding these sites. Even if these properties do not qualify for consideration as historic properties for Section 106 purposes, they can be further considered separately from Section 106 and the PRB Project's governing programmatic agreement under these other authorities.

We encourage STB to consider these other authorities while reconsidering its National Register eligibility determinations for these 21 sites. We were of the impression that the purpose of the Memorandum of Agreement (MOA) developed, but not executed, between STB and the tribes for the PRB Project was intended to address issues that pertained to matters outside Section 106 review. Although the MOA did not specify the authorities under which it was developed, perhaps STB should reconsider the purpose of that document for addressing concerns about traditional cultural values which are not tied to specific places that are eligible for the National Register. DM&E stands ready to assist STB in that effort.

Sincerely,



Herb M. Jones

U.S. Director - State and Local Government Affairs

