

201643

HOLLAND & HART LLP
ATTORNEYS AT LAW

DENVER • ASPEN
BOULDER • COLORADO SPRINGS
DENVER TECH CENTER
BILLINGS • BOISE
CHEYENNE • JACKSON HOLE
SALT LAKE CITY

2515 WARREN AVENUE
SUITE 450
CHEYENNE, WYOMING 82001-3162
MAILING ADDRESS
P.O. BOX 1347
CHEYENNE, WYOMING 82003-1347

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Office of the Secretary

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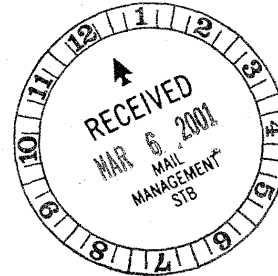
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TELEPHONE (307) 778-4200
FACSIMILE (307) 778-8175

JACK D. PALMA, II, P.C.
jpalma@hollandhart.com

March 2, 2001

Office of the Secretary
Case Control Unit
STB Finance Docket No. 33407
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001



**Re: Comments on Draft Environmental Impact Statement for
the Powder River Basin Expansion Project**

Dear Sir or Madame:

On September 27, 2000, the Surface Transportation Board ("STB") issued the Draft Environmental Impact Statement ("Draft EIS") for the Dakota, Minnesota & Eastern Railroad Corporation's proposed Powder River Basin Expansion Project ("Project"). 65 Fed. Reg. 58146 (Sept. 27, 2000). The comment period for the Draft EIS was originally set to end on Jan. 5, 2001. However, on Dec. 22, 2000, the extended the comment period to March 6, 2001. 65 Fed. Reg. 80987 (Dec. 22, 2000). These comments on the Draft EIS are submitted to the SEA on behalf of the Dakota, Minnesota & Eastern Railroad Corporation ("DM&E"). Please consider these comments and include them in the administrative record for the Project application and Environmental Impact Statement.

1. Draft Programmatic Agreement

All federal activities require compliance with Section 106 of the National Historic Preservation Act in order to protect cultural resources which may be affected by the project. Pursuant to that requirement, the ACHP, DM&E and other interested parties will enter into a Programmatic Agreement ("PA") designed to ensure compliance with Section 106.¹ A draft of that PA is included

¹ The Draft EIS also includes a draft Memorandum of Agreement regarding the PA, in Appendix I, and an Identification Plan, describing the procedures to be used to identify cultural resources, in Appendix J.

Office of the Secretary
March 2, 2001
Page 3

6. Paragraph C-1: The PA should be revised to allow DM&E the opportunity to review and comment on any Treatment Plan(s) formulated for any historic properties affected by the Project.
7. Paragraph C-2: The PA should be revised to allow DM&E to comment on final Treatment Plans.
8. Paragraph G: The PA should be revised to allow DM&E to receive and comment on a copy of the report documenting the implementation of the Treatment Plans.
9. Paragraph H: The PA should be revised to allow DM&E to participate in the evaluation of newly discovered cultural properties and formulation of mitigation plans for those new discoveries.

In addition, the Identification Plan should be revised in all paragraphs that contain the term "other identified consulting parties," to include a specific reference to DM&E. These include, but are not limited to, paragraphs C-1.7, C-2.1, C-2.3, C-2.5, C-2.7, C-3.3, C-4.1, C-4.6.

Attached to these comments are versions of both the Draft Programmatic Agreement and Identification Plan demonstrating the desired changes.

Very truly yours,


Jack D. Palma, II, P.C.
of Holland & Hart LLP

Attachments

cc: Kevin V. Schieffer

2730722_2.DOC

**SEPTEMBER, 2000
DRAFT
PROGRAMMATIC AGREEMENT
AMONG
ADVISORY COUNCIL ON HISTORIC PRESERVATION
SURFACE TRANSPORTATION BOARD
WYOMING STATE HISTORIC PRESERVATION OFFICER
SOUTH DAKOTA STATE HISTORIC PRESERVATION OFFICER
MINNESOTA STATE HISTORIC PRESERVATION OFFICER
U.S.D.I. BUREAU OF LAND
MANAGEMENT, MONTANA STATE OFFICE
U.S.D.I. BUREAU OF LAND
MANAGEMENT, WYOMING STATE OFFICE
THE U.S.D.A. FOREST SERVICE, REGION 2
U.S. ARMY, CORPS OF ENGINEERS, OMAHA DISTRICT
U.S. ARMY, CORPS OF ENGINEERS, ST. PAUL DISTRICT
U.S.D.I. BUREAU OF RECLAMATION
AND
DAKOTA, MINNESOTA, & EASTERN RAILROAD CORPORATION**

REGARDING THE

**POWDER RIVER BASIN EXPANSION PROJECT
Finance Docket No. 33407**

WHEREAS, the Surface Transportation Board (STB)¹, the lead Federal agency, has received an application for the construction and operation of a rail line by the Dakota, Minnesota, & Eastern Railroad Corporation (DM&E), extending their existing system into the Powder River Basin of Wyoming (undertaking) as defined in its decision of December 10, 1998; and,

WHEREAS, the STB has determined that the proposed project is an undertaking which may have an effect upon historic properties included on or eligible for inclusion on the National Register of Historic Places (NRHP), and is in consultation with the Advisory Council on Historic Preservation (Council); the United States Department of Agriculture, Forest Service Region 2 (USFS); the United States Department of the Interior Bureau of Land Management Montana State Office and Bureau of Land Management Wyoming State Office (collectively referred to as BLM), the United States Army Corps of Engineers, Omaha District and the United States Army Corps of Engineers, St. Paul District (collectively referred to as COE), the United States Department of Interior Bureau of Reclamation (BOR), the State Historic Preservation Officers of Wyoming, South Dakota, and Minnesota (collectively referred to as SHPOs), and the DM&E, pursuant to Section 800.14 of the regulations (36 CFR Part 800) implementing Section 106 of the National Historic Preservation Act, 16 U.S.C. 470f (NHPA). And all of the above are signatories to this Agreement (Signatories); and,

WHEREAS, the STB has invited the Cheyenne and Arapaho Tribes of Oklahoma, Cheyenne River Sioux Tribe, Comanche Nation of Oklahoma, Crow Tribe, Crow Creek Sioux Tribe, Eastern Shoshone Tribe, Flandreau Santee Sioux Tribe, Fort Peck Tribes, Ho-Chunk Nation, Kiowa Tribe, Lower Brule Sioux Tribe, Lower Sioux Community, Menominee Indian Tribe, Northern Arapaho Tribe, Northern Cheyenne Tribe, Oglala Sioux Tribe, Omaha Tribe, Pawnee Nation of Oklahoma, Ponca Tribe, Prairie Island Sioux Community, Rosebud Sioux Tribe, Sac & Fox Nation of Oklahoma, Sac & Fox Nation in Iowa, Santee Sioux Tribe, Shakopee Mdewakanton Sioux, Sisseton-Wahpeton Sioux Tribe, Spirit Lake Tribe, Standing Rock Sioux Tribe, Three Affiliated Tribes, Turtle Mountain Band of Chippewa Tribe, Upper Sioux Community, Winnebago Tribe, and the Yankton Sioux Tribe (collectively referred to as "invited signatories or Tribes") to sign this agreement; and,

WHEREAS, the Medicine Wheel Coalition for Sacred Sites of North America, the Minnesota Indian Affairs Council, The Medicine Wheel Alliance, the Gray Eagle Society and the Black Hills Sioux Nation Council (collectively referred to as Indian Organizations) are also invited to sign this agreement; and,

WHEREAS, the STB, in consultation with the Signatories, has developed an Identification plan (ID Plan) for inventory of cultural resources prior to construction; and,

¹ The Surface Transportation Board (STB) was created with the passage of the Interstate Commerce Commission Termination Act of 1995 (Pub. L. No. 104.88). STB, an independent body within the U.S. Department of Transportation, is responsible for administering rail, pipeline, and certain adjudicatory function involving motor and water carriers. These responsibilities are similar to those duties formerly administered by the Interstate Commerce Commission. The STB is the lead agency under NEPA for the Powder River Basin Expansion Project.

WHEREAS, the applicable requirements of the NHPA, the American Indian Religious Freedom Act, 42 U.S.C. 1996 et. seq. (AIRFA), and the Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001 et. seq. and 43 CFR 10 (NAGPRA), have been considered in the development of the ID plan and this agreement does not waive the responsibilities of the Signatories under these regulations; and,

WHEREAS, the lead federal agency (STB) in cooperation with the USFS, BLM, BOR, and COE is preparing an Environmental Impact Statement (EIS) in accordance with the requirements of the National Environmental Policy Act (NEPA) to address the potential impacts of the undertaking on a variety of human and natural resources; and,

WHEREAS, the STB may use an independent third party contractor, working under its supervision, direction, and control, to assist in meeting the STB's responsibilities defined in the stipulations below; and,

NOW, THEREFORE, the Signatories to this agreement consent that the proposed undertaking shall be implemented in accordance with the following stipulations in order to consider the effect of the undertaking on historic properties and to satisfy all Section 106 NHPA responsibilities for all aspects of the project.

STIPULATIONS

The STB has a statutory obligation as the lead Federal agency to fulfill the requirements of Section 106 (36 CFR 800), therefore the STB shall ensure that the measures in the following parts are carried out.

A. IDENTIFICATION PLAN

The portions to be surveyed on the existing rail line and new construction will be determined through consultation with State Historic Preservation Officer(s) (SHPO), Tribal Historic Preservation Officer(s) (THPO)/cultural resource representative(s) designated by the Tribe(s), and Federal agencies, and DM&E. The Identification Plan (ID Plan) describes the APE, the methodology for the location, inventory, identification, recording, and evaluation of all cultural resources that have surface and exposed profile indications along the alternative alignment(s) proposed for construction. The Identification Plan also describes APE, the methodology for location, inventory, identification, recording, and evaluation of all cultural resources in portions of the existing rail line. The Identification Plan generally consists of a literature review to identify previously recorded sites along the proposed alignment, for both new construction and the existing rail line, an intensive survey for identification and evaluation of cultural resources, and preparation of reports of these investigations.

1. IDENTIFICATION

The parties to this Agreement consent that historic properties will be identified in accordance with the ID Plan (Attachment A) which was developed for this project, in coordination with the agencies, SHPO(s)'s, and consulting tribes.

2. SURVEY REPORTS

STB shall prepare intensive survey and cultural resource NRHP evaluation recommendations (Reports), and findings of effect for those areas surveyed as outlined in the Identification Plan. Separate reports will be prepared for each of the states of Wyoming and Minnesota. Two reports will be prepared for South Dakota with one covering the existing system and one covering the new construction. Reports will include the results of literature review, intensive and reconnaissance surveys (to the extent that access from landowners is available), and the evaluation recommendations regarding cultural resources. Surveys of any additional ancillary facilities or reroutes, or non-accessible areas on either the new construction or the reconstruction portions found to be necessary after submittal of these reports will be addressed in addendum reports and submitted to the reviewing parties that reviewed the original reports.

3. SURVEY REPORT REVIEW

STB shall provide Reports on the surveys conducted in accordance with the Identification Plan to the USFS, BLM, BOR, COE (collectively the reviewing agencies), and appropriate THPO(s)/cultural resources representative(s) designated by the Tribe(s), and DM&E. The reviewing agencies and appropriate THPO(s)/cultural resources representative(s) designated by the Tribe(s) shall have 30 days to review the Reports and comment upon them to the STB. These comments will address the adequacy of the intensive survey results, the eligibility of cultural resources identified during the intensive survey for inclusion on the NRHP and the effects of the project on any cultural resources considered to be historic properties.

- 3.1** The reviewing agencies and, appropriate THPO(s)/cultural resources representative(s) designated by the Tribe(s), participating in this Agreement, and DM&E will provide their recommendations for determinations of site eligibility based upon NRHP criteria (36 CFR 60.4) and their comment on STB's application of the criteria at 36 CFR 800.5(1) to the STB. Based on the comments received, the Report(s) may be revised or additional intensive survey(s) conducted, or both. Any revised Report(s) will be submitted by the STB to DM&E and the same reviewing agencies and appropriate THPO(s)/cultural resources representative(s) designated by the Tribe(s) that received the

preliminary Report(s) for a second 15 work-day review. If DM&E or any reviewing agency or appropriate THPO(s)/cultural resources representative designated by the Tribe(s) has an objection to the Report(s), they shall notify STB within the 15 work-day review period in accordance with Stipulation M.

- 3.2 Intensive surveys of any additional ancillary facilities or reroutes on either the new construction or the reconstruction portions found to be necessary after submittal of these Report(s), will be prepared as addendum to the original Report(s) and will be submitted to the same reviewing agencies that received the Reports and the appropriate THPO(s)/cultural resource representative(s) designated by the Tribe(s). Addendum reports will be commented on as outlined above. STB shall provide the Report(s) to the SHPO(s) for reviewing adequacy of the surveys and for consensus determinations of eligibility and effect for all properties identified in the APE which is described in the Identification Plan. SHPO(s) shall be provided 60 days for this review and comment.

4. **ELIGIBILITY DISAGREEMENTS**

If consensus on the eligibility of any cultural resource cannot be reached, the STB shall forward objections or comments on determinations of eligibility to the Keeper of the National Register (Keeper) for resolution.

5. **NO CONSENSUS**

If a consensus of project effect upon a historic property cannot be reached, the STB will seek the Council's finding. Council's determination in matters pertaining to findings of effect are final (36 CFR 800.5(c)(3)).

6. **CONSTRUCTION AREAS WITH NO HISTORIC PROPERTIES**

(Phased Approval)

If after full review by the agencies and other consulting parties, the construction area or portions of the construction area have been determined by STB to be negative for historic properties, and Report(s) have been accepted by the STB (ELM, USFS, BOR, and COE if appropriate), the appropriate SHPO(s), THPO(s)/cultural resource representative(s) designated by the Tribe(s), and DM&E, then construction of project facilities in these areas may be allowed by STB, upon concurrence by the SHPO(s), THPO(s)/cultural resource representative designated by the Tribe(s), subject to DM&E obtaining permits or approvals as required.

B. TREATMENT PLANS FOR HISTORIC PROPERTIES

1. FORMAT

Upon completion of Stipulation A, the STB will develop a Treatment Plan for each site, group of closely related sites, or category of sites determined to constitute a historic property. Each Treatment Plan will be developed in consultation with the appropriate reviewing agency(s), the appropriate SHPO(s), THPO(s)/cultural resource representative(s) designated by Tribe(s), DM&E, and the Council. Each Treatment Plan will address the historic property adversely affected and set forth means to mitigate the undertaking's effects where the STB, in consultation with the agencies, SHPO(s), and THPO(s)/cultural resource representative(s) designated by Tribe(s), and DM&E, determines it is not feasible or prudent to avoid effects by project relocation. The Treatment Plans will conform to the principles of the Council's "*Treatment of Archaeological Properties: A Handbook*", *Parts I and II*, the "*Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation*" (Federal Register, Vol. 48 No. 190, September 29, 1983, pp. 44716-44742) and appropriate SHPO guidelines. The STB will ensure the measures to be implemented will be responsive to the concerns of the consulting parties.

2. CONTENT

The Treatment Plans for the undertaking will include, but not be limited to:

a. Historic Properties

Specification of all historic properties to be affected by the project, including a description of the nature of the effects.

b. Treatment

A detailed description of the treatments proposed for historic properties or portions of historic properties eligible for the NRHP under 36 CFR Part 60.4 criteria (a), (b), (c) and/or (d), with an explanation or rationale provided for the choice of the proposed treatments. These treatments will take into account the setting, including, but not limited to, visual, auditory, and atmospheric elements, as appropriate, and be responsive to the qualities that contribute to the significance of the affected properties.

c. Research Design

An archaeological research design for adversely affected properties

eligible for the NRHP under 36 CFR Part 60.4 criteria (d) will be developed. The research design will specify and explain the following:

- where data recovery is determined by the STB to be appropriate mitigation response. Research questions to be explored through the data recovery efforts (taking into consideration that data recovery is an adverse effect)
- justification of the appropriateness of the chosen research questions
- data needed to explore the questions posed
- sites and portions of those sites to be further investigated
- methods used to collect data needed to explore the research questions posed, where the adverse effect of data recovery is deemed the appropriate treatment
- laboratory methods used in the examination of the physical material that is recovered
- proposed disposition of the recovered materials and records
- the timing for the preparation and distribution of reports

d. Human Remains

The procedures for consulting about the treatment and disposition of Native American human remains and associated grave goods, if encountered, in accordance with the Identification Plan and Stipulations H and J.

e. Monitoring

A description and rationale for selection of the areas proposed for construction monitoring (a qualified archaeologist as defined in the Secretary of Interiors' Professional Qualifications and Standards 48 FR 22716 September, 1983 and qualified Tribally recognized American Indian Monitors present to observe ground surfaces exposed during the actual construction activities) and construction inspection conducted by a qualified archaeologist of areas of ground disturbance after specific phases of construction are completed.

f. Distribution of Information

The Treatment Plan must contain provisions for the creation of a popular account for disseminating the results of the Treatment Plans to the general public. These popular accounts will be consistent with the Archaeological Resources Protection Act (ARPA), Executive Order on Sacred Sites 13007 FR 6 1-104 dated May 24, 1996, Native American Graves Protection and Repatriation Act (NAGPRA), the Freedom of

Information Act (FOIA), and Section 304 of the NIIPA (16 U.S.C. 4702-3).

C. TREATMENT PLANS REVIEW

1. DEVELOPMENT AND REVIEW

The STB will develop, in cooperation with the reviewing agencies, appropriate SHPO(s), and appropriate THPO(s)/cultural resource representative(s) designated by the Tribe(s), and DM&E, each Treatment Plan to ensure that it addresses the concerns of the reviewing agencies, appropriate SHPO(s), and appropriate THPO(s)/cultural resource representative(s) designated by the Tribe(s) in accordance with Stipulation B 2 (b), and DM&E. Each Treatment Plan shall be submitted to the appropriate reviewing agencies, appropriate SHPO(s), and appropriate THPO(s)/cultural resource representative(s) designated by the Tribe(s), and DM&E for their review. The reviewing parties shall have 30 days to comment on the Treatment Plan. If any party to this Agreement fails to comment within the review period, the STB shall assume that party's concurrence. Based upon comments received, revised Treatment Plan(s) will be prepared and submitted to all parties.

2. SHPO AND ADVISORY COUNCIL REVIEW

The resultant revised Treatment Plan(s) will be submitted to the appropriate SHPO(s), and the Council for a final 30-day comment period. The revised Treatment Plan(s) will also be provided to the reviewing agencies, THPO(s)/cultural resource representative(s) designated by the Tribe(s), and DM&E for a final 30-day comment period. If any party has an objection to the final Treatment Plan(s) they shall notify STB within the 30-day comment period in accordance with subsection D. below. Disputes will be resolved in accordance with Stipulation M.

D. TREATMENT PLANS IMPLEMENTATION

1. CONSTRUCTION PLAN

Upon SHPO concurrence, each Treatment Plan will be incorporated by DM&E into their Construction and Use Plan required for the project rights-of-way on Federal Lands, and the STB and/or the appropriate Federal or State agency shall provide authorization to proceed with the implementation of the Treatment Plan on lands under their jurisdiction. DM&E or its authorized representative will obtain Archaeological Resources Protection Act (ARPA) excavation and removal permits for Federal lands and/or required State permits. Termination of the project after initiation of the Treatment Plan(s) will require completion of any work in progress, and amendment of each Treatment Plan as

described below.

2. AMENDMENTS

Amendments to the Treatment Plans will be incorporated by written agreement among the STB, the appropriate SHPO(s), THPO(s)/cultural resource representative(s) designated by the Tribe(s), DM&E, and the Council (BLM, COE, BOR, and USFS will be party to the written agreement if their managed lands are involved). Amendments to the appropriate ARPA permits will be submitted as part of the approval of the amendments.

2.1 DM&E or its authorized representative shall prepare a progress report(s) to the STB, SHPO(s), and THPO(s)/cultural resource representative(s) designated by the Tribe(s) every two weeks documenting progress in the implementation of each Treatment Plan (ELM, COE, BOR, and USFS to be provided with a report every two weeks if their managed lands are involved or if requested). These progress reports will include:

- dates of mitigation work included in the progress reporting period
- historic properties where treatment was conducted
- type and amount of treatment performed
- a brief summary of the treatment results during the period covered by the report.
- concerns or comments of the principal investigator for plan implementation.

E. CHANGES IN ANCILLARY AREAS/CONSTRUCTION RIGHT-OF-WAY

The STB will notify the reviewing agencies and appropriate SHPO(s), THPO(s)/cultural resource representatives(s) designated by the Tribe(s) of changes in the size or location of ancillary areas or the construction right-of-way that may become necessary during actual construction. If any changes result in the use of unsurveyed areas, the STB will ensure that these areas are subject to intensive survey in order to locate any potentially significant cultural resources and that those resources are evaluated for NRHP eligibility. The Reports addressing these areas will be reviewed in accordance with Stipulation A and Treatment Plans will be developed and implemented for those sites determined to be Historic Properties.

F. CONSTRUCTION AREAS WITH HISTORIC PROPERTIES

In those areas where historic properties are present, the STB will be notified and will

provide the results of the completed Treatment Plan to the appropriate SHPO(s) when implementation of the Treatment Plan is completed. Within 45 days of this notification of Treatment Plan completion, the STB, the SHPO(s), THPO(s)/cultural resource representative(s) designated by the tribes, (ELM, USFS, BOR, and COE, if lands under their administration are involved), will be invited to inspect the site of the historic property to concur that Treatment Plan implementation is complete. Upon concurrence of complete Treatment Plan implementation STB may authorize construction along that portion of the project addressed by the completed Treatment Plan. If concurrence of complete Treatment Plan implementation cannot be reached the dispute will be resolved in accordance with Stipulation M.

G. DOCUMENTATION OF TREATMENT

The STB will prepare a report documenting the implementation and results of the Treatment Plan(s). This report will be the Draft Final Cultural Resource Report for the project. The report will contain a detailed account of the information gained during implementation of the Treatment Plan(s), and the effectiveness of the work measures implemented to mitigate the adverse effects of construction. A review copy of the report will be distributed to the reviewing agencies, cultural resource representative(s) designated by the Tribe(s), SHPO(s)/THPO(s), DM&E, and the Council. There will be a 30 calendar-day period to review and comment on the report. The Final Cultural Resource Report will be prepared based on comments received and distributed to the reviewing agencies, SHPO(s), THPO(s)/cultural resource representative(s) designated by the Tribe(s), DM&E, and the Council within 120 calendar-days of receipt of the comments.

H. DISCOVERY

If a previously undiscovered archaeological, historical, or cultural property is encountered during construction, or previously known properties will be affected in an unanticipated manner, all activity will cease within 300 feet of the property to avoid or minimize harm to the property until the STB, the appropriate SHPO(s), THPO(s)/cultural resource representatives(s) designated by the Tribe(s), DM&E, and, if on federal land, the agency responsible for administering the land, can evaluate and, if necessary, authorize steps to mitigate impacts to the new discovery. Evaluation and mitigation will be carried out in consultation with the reviewing agencies, the appropriate SHPO(s), THPO(s)/cultural resource representative(s) designated by the Tribe(s), DM&E, and Council as expeditiously as possible in accordance with 36 CFR 800.13(b).

I. CONFIDENTIALITY

All parties shall ensure that shared data, including data concerning the precise location and nature of historic properties and properties of religious and cultural significance are protected from public disclosure to the greatest extent permitted by law, including conformance to Section 304 of the National Historic Preservation Act, as amended (the Act) and Section 9 of the Archeological Resources Protection Act and Executive

Order on Sacred Sites 13007 FR 61-104 dated May 24, 1996.

J. HUMAN REMAINS

1. NOTIFICATION AND TREATMENT

If human remains are encountered on Federal lands, the STB shall notify the appropriate Federal land management agency, other consulting agencies if requested, appropriate SHPO(s), and designated Native American NAGPRA tribal contact. Treatment and disposition of remains and associated grave goods will be consistent with measures outlined in the Identification Plan, H₂, and applicable Federal and State laws. If human remains are encountered on State or Private lands, the STB will notify and consult with the State SHPO(s), THPO(s)/cultural resource representative(s) designated by the Tribe(s). Treatment and disposition of remains and associated grave goods will be consistent with measures outlined in the Identification Plan and applicable Federal, Local and State laws.

2. REINTERMENT

STB will insure that every effort is taken to avoid disturbing known human burial sites. Where avoidance is not possible, and in consultation with appropriate [tribal] parties, burials will be removed prior to construction and reinterred in accordance with reburial procedures outlined in the Identification Plan and any applicable Federal and State laws.

3. DISCOVERY

If human remains are inadvertently discovered during construction activities, all construction will cease within 300 feet in all directions of the human remains and the STB will immediately notify the appropriate parties in accordance with the Identification Plan. Human remains and grave goods will be treated in accordance with the Identification Plan.

K. CURATION

1. FEDERAL LANDS

STB shall ensure curation of all records and other items (archaeologic and paleontologic) resulting from identification and data recovery efforts is completed in accordance with 36 CFR Part 79, and the provisions of 43 CFR 10 (NAGPRA). STB shall ensure that documentation of the curation of these materials is prepared and provided to the signatory and concurring parties to this Agreement within 10 days of receiving it. All archaeological materials recovered from Federal lands shall be curated in accordance with the

Identification Plan.

2. PRIVATE LANDS

Private landowners will be encouraged to curate materials (archaeologic and paleontologic) recovered from their lands in accordance with the Identification Plan. Materials from private lands to be returned to the private landowners shall be maintained in accordance with 36 CFR Part 79 until all necessary analysis has been completed. STB shall document the return of materials to private landowners and submit copies of this documentation to the signatory parties to this Agreement.

3. STATE LANDS

STB will ensure that all cultural and paleontologic materials discovered on State lands will be curated in accordance with the Identification Plan.

L. AUTHORITIES

Compliance with the provisions of this programmatic agreement does not relieve the STB or other federal agencies of their responsibilities to comply with other legal requirements, including those imposed by the Native American Graves Protection and Repatriation Act (NAGPRA) (25 U.S.C. Section 3001 and 43 CFR 10), the Archeological Resources Protection Act (ARPA) (16 U.S.C. Section 470aa-47011), and the National Environmental Policy Act (NEPA) (42 U.S.C. Section 4321-4347), and applicable Executive orders.

M. DISPUTE RESOLUTION

Should any party to this Agreement provide notice, within 30 calendar-days of becoming aware of an action, to the STB of their objection to an action under this Agreement, the STB shall consult with the objecting party to resolve the objection unless otherwise specified in this document. If the STB determines that the objection cannot be resolved, the STB shall forward all documentation relevant to the dispute to the Council. Within 30 calendar-days after receipt of all pertinent documentation, the Council shall either; provide STB with recommendations, which STB shall take into account in reaching a final decision regarding the dispute; or notify STB that it will comment in accordance with 36 CFR Part 800 Subpart B. Any Council comment provided in response to such a request will be taken into account by STB in accordance with 36 CFR Part 800 Subpart B with reference to the subject of the dispute.

Any recommendation or comment provided by the Council will be understood to pertain only to the subject of the dispute; the STB's responsibility to carry out all actions under this Agreement that are not subject to dispute will remain unchanged.

N. AMENDMENT

Signatories to this Agreement may request that it be amended, whereupon the parties will consult in accordance with 36 CFR 800.14 to consider such amendment.

O. TERMINATION

1. PARTICIPATION

Any party to this Agreement may terminate their participation by providing 30 calendar-days written notice to the other parties. The parties shall consult during the period prior to termination of participation to seek agreement on amendments or other actions that would avoid termination. The Council will be afforded an opportunity to comment during this period as well.

2. AGREEMENT

The STB, SHPO(s), or DM&E may terminate this Agreement by providing 30 calendar-days written notice to the other parties; the parties shall consult during the period prior to the termination to seek agreement on amendments or other actions that would avoid termination. The Council will be afforded an opportunity to comment during this period as well. In the event of termination, the STB, SHPO(s), and DM&E will comply with 36 CFR 800 subpart B.

3. TERM

The term of this agreement shall be five (5) years from the date of execution unless otherwise terminated or amended by the signatory parties.

P. FAILURE TO CARRY OUT THE TERMS OF THE AGREEMENT

In the event that the terms of this Agreement are not carried out, the STB and all other agencies shall comply with 36 CFR 800 subpart B with regard to individual actions covered by this Agreement.

Q. EXECUTION AND IMPLEMENTATION

This Programmatic Agreement shall take effect when executed by the Council, the Agency Official and the appropriate SHPO(s). Execution and implementation of this Agreement evidences that the 5Th, BLM, COE, BOR, USFS and the Council have satisfied their National Historic Preservation Act Section 106 responsibilities for all individual actions of the Dakota, Minnesota & Eastern Railroad Corporation's Powder River Basin Expansion Project.

Attachment A – Identification Plan(s)

Attachment B – MOA

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----- COMPARISON OF FOOTNOTES -----

-FOOTNOTE 1-

The Surface Transportation Board (STB) was created with the passage of the Interstate Commerce Commission Termination Act of 1995 (Pub. L. No. 104.88). STB, an independent body within the U.S. Department of Transportation, is responsible for administering rail, pipeline, and certain adjudicatory function involving motor and water carriers. These responsibilities are similar to those duties formerly administered by the Interstate Commerce Commission. The STB is the lead agency under NEPA for the Power River Basin Expansion Project.

----- COMPARISON OF FOOTERS -----

-FOOTER 1-

12

Identification Plan

September, 2000
DRAFT
Identification Plan
for the Dakota Minnesota and Eastern Railroad Corporation's Proposed
Powder River Basin Expansion Project

A. PURPOSE

The development of this plan is required by the Programmatic Agreement (PA) to ensure the successful completion of the National Historic Preservation Act (NHPA) Section 106 process for this project. The purpose of this Identification Plan (ID Plan) is to ensure that the identification and evaluation of cultural resources is conducted in accordance with the Secretary of Interior's *Standards and Guidelines for Archeology and Historic Preservation* (48 FR 44716-44742) and 36 CFR 800.4. The Identification Plan and the Treatment Plan(s), developed for the identified historic properties, are integral parts of the Programmatic Agreement. While the Standards and Guidelines are not regulatory and do not set or interpret agency policy, they do provide technical advice about archeological and historic preservation activities and methods.

Identification of Historic properties 36 CFR 800.4 is regulatory in nature. The historic properties that should be identified include, any prehistoric or historic district site, building, structure, or object included in or eligible for inclusion in the National Register of Historic places maintained by the *Secretary of the Interior*. The term historic properties includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian Tribe or Native Hawaiian organization and that meet the National Register Criteria. The term eligible for inclusion in the National Register includes both properties formally determined as such in accordance with regulations of the *Secretary of the Interior* and all other properties that meet the National Register criteria. The level of identification needed varies depending on the nature of the property or property type, the nature of the agency's management authority, and the nature of the agency's possible effects on the property.

This Identification Plan describes three key elements: the Area of Potential Effect (APE), minimum standards and qualifications required for the cultural resource investigations, and American Indian and consulting party involvement.

B. SAFETY

All contractors and sub-contractors shall adhere to Occupational, Safety, and Health Administration (OSHA) standards while conducting activities related activities covered in the PA and II) Plan. Additionally, Corps of Engineers, U.S. Forest Service, Bureau of Land Management

(BLM) and DM&E Railroad safety rules shall be adhered to when conducting activities on lands under the management or jurisdiction of these parties.

C. AREA OF POTENTIAL EFFECT (APE)

The Area of Potential Effect (APE) and the methods of identification and evaluation will be in accordance with the Secretary of the Interior's Standards and Guidelines for Identification. The project has two distinct parts generally described as; (1) the portion of the proposed project that will involve reconstruction of existing rail lines, and (2) the portion of the proposed project that will involve new construction where rail lines currently do not exist.

1. APE for Reconstruction

The APE for that portion of the project involving reconstruction, from Winona, Minnesota to Wall, South Dakota, and new construction in Minnesota will include:

1. The existing DM&E right-of-way.
2. Any newly acquired right-of-way needed for cut and fill.
3. Any newly acquired right-of-way for a proposed new connecting track near Owatonna, Minnesota.
4. Existing rail corridor and any newly acquired right-of-way required for new DM&E rail line through Mankato, Minnesota.
5. All lateral areas, borrow areas, haul roads (new or upgraded), staging areas and other ancillary areas related to the undertaking.
6. Any newly acquired right-of-way for proposed yards or sidings.
7. That area outside the existing right-of-way or outside any newly acquired right-of-way where there is the potential for the undertaking to have an adverse effect on historic properties as defined in 36 CFR 800.5. Identification of these areas will include consultation with the State Historic Preservation Officer (SHPO), Tribal Historic Preservation Officer (THPO)/cultural resource representatives designated by the tribes, DM&E, other identified consulting parties and Federal agencies.

2. Reconstruction Identification and Evaluation

Identification and evaluation for the reconstruction will include:

1. Identification of known cultural resources through records search and literature review and through consultation with the SHPO, THPO/cultural resource representatives designated by the tribes, DM&E, other identified consulting parties, and Federal agencies in accordance with 36 CFR 800.4.
2. Field identification and Section 106 evaluation of all structures within the APE by a qualified architectural historian.
3. Intensive Survey of the known cultural resources and other areas identified by the SHPO, THPO/cultural resource representatives designated by the tribes, DM&E, other identified consulting parties, and Federal agencies in accordance with 36 CFR 800.4.
4. If the cultural resource is in the APE, necessary information to evaluate the cultural resource against NRHP eligibility criterion (36 CFR 60.4) shall be obtained. The guidance in the National Park Service Bulletin 38 and E. O. 13007 shall also be considered when evaluating sites for NRHP eligibility. If, in the opinion of the investigator and the cultural resource representatives designated by the tribes, the cultural resource is recommended NRHP eligible sufficient information to formulate Treatment Plan(s) shall be obtained. (The Cultural Resource Representative designated by the Tribes will only make recommendations on cultural Resources having a prehistoric or historic Native American Component). No backhoe or block excavations shall be undertaken without a written plan and SHPO consultation and approval.
5. Intensive Survey to identify all cultural resources in other designated areas within the APE which have been identified by the SHPO, THPO/cultural resource representatives designated by the tribes, DM&E, other identified consulting parties, and Federal agencies. (All Minnesota investigations shall be in accordance with approved research design).
6. The intensive survey shall gather information from American Indian tribes and elders to assist in identifying properties of religious and cultural significance to them and identifying properties that may be eligible for the NRHP.
7. A reconnaissance level survey of those areas outside the ground disturbance area where there is the potential for the undertaking to have an adverse effect, as defined in 36 CFR 800.5 on historic properties. Identification of these areas will include consultation with the SHPO, THPO/cultural resource representatives designated by the tribes, DM&E, other identified consulting parties, and Federal agencies.

3. APE for New Construction

The APE for the new construction portion of the project in South Dakota and Wyoming will include:

1. The construction right-of-way to include a twenty-foot buffer on either side of the fenced construction right-of-way along the entire new construction route (ground disturbance area).
2. All lateral areas, borrow areas, haul roads (new or upgraded), staging areas, and other ancillary areas related to the undertaking.
3. That area outside the construction or ground disturbance right-of-way where there is the potential for the undertaking to have an adverse effect on historic properties, as defined in 36 CFR 800.5. Identification of these areas will include consultation with the SHPO, THPO/cultural resource representatives designated by the tribes, DM&E, other identified consulting parties, and Federal agencies.

4. Construction Identification and Evaluation

Identification and evaluation for the new construction will include:

1. Identification of known cultural resources through records search and literature review and through consultation with the SHPO, THPO/cultural resource representatives designated by the tribes, DM&E, other identified consulting parties, and Federal agencies in accordance with 36 CFR 800.4.
2. An intensive survey of the construction right-of-way plus 20 feet either side of the fenced construction right-of-way
3. An intensive survey of all lateral areas, borrow areas, haul roads (new and upgraded), staging areas, and other ancillary areas related to the undertaking.
4. An intensive survey of the construction right-of-way to identify all cultural resources. Testing will be done to evaluate the cultural resources against NRHP eligibility criterion (36 CFR 60.4). The guidance in the National Park Service Bulletin 38 and E. O. 13007 shall also be considered when evaluating sites for NRHP eligibility. If, in the opinion of the investigator and the cultural resource representative designated by the tribes, the cultural resource is to be recommended as a historic property, sufficient information to formulate Treatment Plan(s) shall be obtained. (The Cultural Resource Representative designated by the Tribes will only make recommendations on cultural resources having a prehistoric or historic

Native American component). No backhoe or block excavations shall be undertaken without a written plan and SHPO consultation and approval.

5. A geomorphological survey of the construction right-of-way will be conducted to identify areas where buried cultural resources may exist and where deep testing may be necessary to identify cultural resources. The geomorphologist will also recommend construction monitoring areas and assist in evaluation of cultural resources against NRHP eligibility criteria (36 CFR 60.4) by providing identification of the soil(s), soil characteristics, soil dating, and analysis of the probability of the soils to contain cultural material.
6. A reconnaissance level survey of those areas outside the ground disturbance area where there is the potential for the undertaking to have an adverse effect, as defined in 36 CFR 800.5, on historic properties. Identification of these areas will include consultation with the SHPO, THPO/cultural resource representatives designated by the tribes, DM&E, other identified consulting parties, and Federal agencies.

Any areas not originally identified within the APE but potentially affected by the undertaking must be identified by the SHPO, THPO/cultural resource representatives designated by the tribes, DM&E, other identified consulting parties, and Federal agencies. The Surface Transportation Board (STB) will consult with the SHPO, THPO/cultural resource representatives designated by the tribes, DM&E, other identified consulting parties (as defined in 36 CFR 800.2(c)), and Federal agencies to address their concerns.

D. STANDARDS AND QUALIFICATIONS

The intensive survey and NRHP eligibility recommendations will be consistent with the Secretary of the Interior's *Standards and Guidelines for Archaeology and Historic Preservation*, (48 FR 44716/44742), the Secretary of the Interior's *Professional Qualifications and Standards* 48 FR 22716 September 1983, 36 CFR 800, 36 CFR 60.4, National Park Service Bulletin 38, and E. O. 13007.

If there are unanticipated discoveries of cultural resources during implementation of the undertaking, the Agency Official (STB) shall satisfy the requirements of Section 106 in accordance with 36 CFR 800.13. Prior to conducting any work for which a permit is required, the Cultural Resource Management group(s) (Contractor(s) who meet the *Secretary of the Interior's Professional Qualifications and Standards* 48 FR 22716) shall obtain any necessary Federal, State or local permits/license.

E. REPORTS

All reports for the Identification Plan will be submitted in two parts designed to be one report when combined. Each report will be modified from the outline below to address the specific requirements of the *state* where the survey was conducted. The first part of the report will include a comprehensive records search and literature review. The second part will include the results of field investigations, including NRHP evaluations of all cultural resources that are known to be within the APE.

The combined report should provide information for future research and justifiable and defensible NRHP recommendations for those historic properties identified as NRHP eligible. The report must also provide justifiable and defensible explanations of potential effects on historic properties and must comply with 36 CFR 800.5.

The reporting of results and discussions of the cultural resources investigated shall be organized in a logical sequence. (The Wyoming report will be sequenced by site number). In tables, site numbers shall be organized in sequence. A detailed outline of the required elements for the report is contained in the following:

[This portion has been excluded in the interest of brevity]

F. FIELDWORK -Project Requirements Survey Methods

1. Survey Methods

Shovel Testing

Shovel testing will be required if the surface visibility is less than 50% in the opinion of the project archaeologist/principle investigator, or if the terrain warrants the shovel tests. The shovel tests will be approximately 30 X 30 centimeters to a minimum depth of 50 centimeters or until sterile subsoil, or bedrock, or water are encountered. The shovel test will be spaced no further than 30 meters apart or closer if required by the state. Shovel tests will not be done if, in the project archaeologist's justifiable judgment (such as steep terrain or rocky or other etc.) they are unnecessary.

Regardless of surface visibility, a shovel test will be conducted and documented on each identified site or isolated find site. If a shovel test is not conducted, justification for not conducting a shovel test will be noted in the field notes, site form and report. Deviation from the above policies on shovel testing must be justified.

Collection

All subsurface artifacts will be collected and properly labeled in the field. Surface collection of sites not within the ground disturbance area is not required. All obsidian artifacts shall be collected.

Curation

Curation of all records and other items resulting from intensive survey, NRHP evaluation and mitigation efforts shall be completed in accordance with 36 CFR Part 79, and the provisions of the Native American Graves Protection and Repatriation Act: Final Rule (43 CFR 10)

(NAGPRA). Documentation of the curation of these materials shall be provided to the STB, SHPO/THPO, cultural resource representatives designated by the tribes, and where appropriate, other signatories to the Programmatic Agreement within 30 calendar-days of acceptance of the Final Cultural Resource Report for the Project.

Private land owners will be encouraged to curate collections from their lands in an appropriate facility. Materials from private lands to be returned to the private landowners shall be maintained in accordance with 36 CFR Part 79 until any specified analysis is complete. Documentation of the return of these materials to the private land owner shall be provided to the STB, the appropriate SHPO/THPO, cultural resource representatives designated by the tribes, and where appropriate other signatories to the Programmatic Agreement within 30 calendar-days of acceptance of the Final Cultural Resource Reports for the Project.

Materials from State lands in Wyoming, South Dakota, and Minnesota will be provided to a State approved facility for curation. These materials shall be maintained in accordance with 36 CFR Part 79 until any specified analysis is complete. Documentation of the return of these materials to the State approved curation facility shall be provided to the STB and the appropriate SHPO/THPO or cultural resource representatives designated by the tribes within 30 calendar-days of acceptance of the Final Cultural Resources Reports for the project.

Materials from Federal lands will be maintained in accordance with 36 CFR Part 79 until specified analysis is complete. These materials will be curated in a Federally approved curation facility or repository in their state of discovery but shall remain the property of the Federal government. Materials from Native American sites shall be curated in their approved curation facility if these exist within the state of discovery but shall, as with the state curation facilities, remain the property of the Federal government. Documentation of the curation of these materials will be provided to the STB, the appropriate SHPO/THPO, or cultural resource representatives designated by the tribes within 30 calendar-days of acceptance of the Final Cultural Resources Reports for the project.

Materials from Native American sites may be curated in an Indian owned federally approved curation facility if these exist within the state of discovery, but the materials shall remain the property of the state, or if on Federal land, the property of the Federal government.

Human Remains

General field rules if human remains or associated funerary objects or unassociated funerary objects are encountered:

1. If human remains are discovered, they shall be subjected to review under **the** discovery clause of the PA.
2. Immediately cease work within 300 feet of the remains.
3. DM&E will provide security for a 300 foot perimeter in all directions around the site.
 - a. The construction contractor (as per DM&E contract) will immediately notify the American Indian monitor on site, the appropriate law enforcement officer, and county coroner.
 - b. If on Federal land the first notification will be to the Federal agency followed by the American Indian monitor on site, the appropriate law enforcement officer, and the county coroner.
4. The construction contractor will immediately notify the SHPO/State Archaeologist and STB.
5. The construction contractor and the American Indian monitor will notify the NAGPRA representatives of each tribe from a list provided to the contractor and each monitor by DM&E.
6. STB shall notify the cooperating agencies, and if on Federal lands follow provisions of 43 CFR 10.
7. Notification of an inadvertent discovery will be made in two ways:
 - a. By phone immediately
 - b. By letter of notification to the STB and if on Federal lands or lands under Federal permit, to the controlling agency within 24 hours.
8. Do not resume construction within the 300 foot perimeter until the SHPO and STB have authorized it in writing, and, if on Federal lands or land under Federal permit, an authorization in writing from the controlling agency.
9. If on Federal land, refer to 43 CFR 10 and PL 101-601 25 USC (NAGPRA) procedures.

The STB shall ensure that any human remains encountered during the course of this undertaking shall be accorded equal treatment and respect for human dignity without reference to their ethnic origins, cultural backgrounds, or religious affiliations. All human remains shall be handled in accordance with the procedures in the PA, this ID Plan, and in consultation with the Council in accordance with Section 800.13. All unidentified remains or burials found outside of platted,

recorded or identified cemeteries and in contexts which indicate antiquity greater than 50 years shall be dealt with as follows:

10. Minnesota

Minnesota Statute § 307.08, § 307.082, and Minnesota Session Laws 1997, Chapter 215, Sec. 42

If such burials are not Indian or their ethnic identity cannot be ascertained, they shall be dealt with in accordance with provisions established by the State Archaeologist.

If such burials are Indian, efforts shall be made by the state archaeologist, THPO/cultural resource representatives designated by the tribes, and the project archaeologist to ascertain their tribal identity.

If their probable tribal identity can be determined, such remains shall at the discretion of the state archaeologist and the THPO/cultural resource representatives designated by the tribes be turned over to the Indian Tribe(s) (43 CFR 10 Sec. 10.4 and PL 101-601 25 U.S.C. Sec 3 Ownership).

If tribal identity cannot be determined, the Indian remains must be dealt with in accordance with provisions established by the state archaeologist and the THPO/cultural resource representatives designated by the tribes and 43 CFR 10 Sec. 10.4 and PL 101-601 25 U.S.C. Sec 3 Ownership.

No authenticated and identified Indian burial ground may be relocated unless the request to relocate is approved by the THPO/cultural resource representatives designated by the tribes.

11. South Dakota

Code § 34-25-24, § 34-25-38, § 34-25-38.1, and SD 34-25-21

Shall be the same as Minnesota per agreement with the South Dakota Research Center and South Dakota SHPO.

12. Wyoming

W.S. § 6-4-501, W. S. § 35-1-420

The procedures outlined in the General Field rules listed in this section shall apply. (Note: There is no Wyoming statute requiring anyone to report the discovery of a dead body to the county sheriff, county coroner, etc.,)

If human remains are encountered on Federal lands, STB and the managing Federal agency shall consult with the Native American tribe or other ethnic groups related to the human remains identified to determine the treatment and disposition measures consistent with the applicable Federal laws (e.g. NAGPRA), regulations, and policies.

If human remains are encountered on State or private lands, STB shall ensure, in consultation with the appropriate SHPO and the Native American tribe or other ethnic groups related to the human remains, that they are treated according to the provisions of the applicable Federal and State laws, regulations, or policies.

STB will ensure that unanticipated discovery of human remains, and associated or unassociated burial objects, found during implementation of the undertaking shall satisfy the requirements of the appropriate State and Federal Laws, regulations, policies, and Section 106 in accordance with 36 CFR 800.13.

Evaluation Testing

Sufficient subsurface testing, as determined by the project archaeologist/principle investigator, SHPO, federal agency managing the land, and the Native American Monitor on those sites suspected to be NRHP eligible, will be conducted to allow the Cultural Resource Management groups to develop Treatment Plans or other alternatives to address any adverse effects.

Minimum Field Recordation Standard Prehistoric and Historic Sites

1. Prehistoric and Historic Sites

The appropriate site forms for each state will be completed while on the site (if possible). A sketch map and field notes (field notes should be kept by each crew member), and photographs of the site will be required. A description of the artifacts and features observed on each site shall be included in the field notes. The site will be noted on a 7.5 minute USGS quad.

All photographs will be keyed to the corresponding roll and frame number and identified as such on a photo log. The photo log will also include the site number or temporary site number, time of day, weather conditions at the time of the photograph, what was photographed, and the direction the photographer was facing. The ASA setting and the type of film (color or B&W) shall also be noted (Once the film is developed this information will be on the individual photograph along with the state assigned site number). Upon completion of the project and acceptance of the Final Cultural Resources Report all photographs and negatives shall be shipped to the appropriate curation facility.

2. Standing Structures (includes buildings, bridges and other structures)

The appropriate site forms for each state will be completed while on the site. The field notes will include the address or location, the present condition and integrity of the property; a description of the prominent architectural engineering features with emphasis on the primary facade; a documented or estimated date of original construction; identification of obvious alterations/additions; and a designation of style or vernacular type, when applicable. A 3 ½" x 5" black and white photograph of each property will be taken using 35mm format. Each photograph will be keyed with the corresponding roll and frame number and identified as such on the individual photographs (See photo log above). Original negatives and contact sheets will be included with the final report (Structures should be evaluated in the field by a qualified architectural historian). Upon completion of the project and acceptance of the Final Cultural Resources Report all photographs and negatives shall be shipped to the appropriate curation facility.

G. CONFIDENTIALITY

Maintaining the confidentiality of information provided by tribes and traditional practitioners will be one of the most important issues to be addressed in the consultation process.

Confidentiality of the information received from Native American monitors or other Native Americans shall be maintained and only released to reviewing individuals or agencies identified in the Programmatic Agreement.