

OCT-31-01 THU 2:01 PM CORPS OF ENGINEERS
OCT. 31. 2001 3:04PM REGULATORY BRANCH

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P. 2

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DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
106 SOUTH 15TH STREET
OMAHA, NEBRASKA 68102-1516

OFFICIAL BUSINESS
October 31, 2001

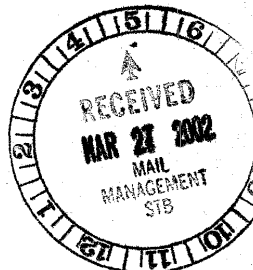
Regulatory Branch

Ms. Victoria Rutson
Surface Transportation Board
1925 K Street, NW
Room 506
Washington, DC 20423

ENTERED
Office of the Secretary

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Dear Ms. Rutson:

This is in response to the Surface Transportation Board's October 5, 2001 request for signature of the Programmatic Agreement (PA) and Identification Plan (ID Plan) addressing cultural resources that may be affected by the Dakota, Minnesota & Eastern Railroad's proposed Powder River Basin Expansion project.

A review of the PA and ID Plan resulted in the following comments and recommendations:

1. Page 5, paragraphs 4 and 5 - The exact meaning of the word "consensus," within the context of the PA, is unclear. Depending on how the word is construed for purposes of the agreement, it is foreseeable that even one signatory, with no direct interest in the resources at issue, could nevertheless withhold agreements and thereby trigger the provisions of these two paragraphs. A definition for this important term should be included to avoid the possibility of differing interpretations.
2. Page 11, paragraph 2 - Taken literally, this provision would allow a State Historical Preservation Organization (SHPO) to force dissolution of the agreement upon all other parties, even insofar as the agreement pertains to resources in areas and states not associated with the SHPO who is exercising the right of termination. It is suggested that some severability clause whereby a SHPO could opt out of the agreement for his or her particular state without negating the agreement as whole in the other states where it could remain in effect. It should be clarified whether the 30-day consultation period identified in this paragraph is meant to serve that purpose. As the language reads now, any of the designated parties retains the right to unilaterally terminate the agreement in its entirety.
3. Page 11, paragraph 3 - Following the word "terminated," add "in accordance with subparagraph O.2., above".
4. Page 12, Attachment B - The MOA was not included with the submission.

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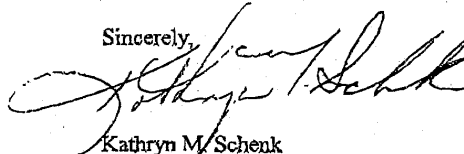
P. 2

5. Page 17, Consulting Parties – With the inclusion of the public, the definition is so broad that it is virtually meaningless.
6. Signature page – It is recommended that Tribal Historic Preservation Officers and the North Dakota Intertribal Reinterment Committee be added as signatories. Additionally, it is noted that there may be inaccuracies relative to Tribal leader titles.

One final comment relates to page 13 of the ID Plan, Confidentiality. The Corps will abide by the requirements of the Freedom of Information Act. We will protect information to the extent permitted by law and will not voluntarily release sensitive information. In light of this issue, the Omaha District cannot sign the document as proposed. However, we are willing to work with you to achieve a revised and suitable agreement. Should the document be revised and there can be a suitable agreement, the signature block should read: Kurt F. Ubbelohde, Colonel, Corps of Engineer, District Engineer.

If you have any questions concerning this matter, please contact Chandler Peter, Regulatory Project Manager, at (307) 772-2300.

Sincerely,



Kathryn M. Schenk
Chief, Regulatory Branch
Operations Division

Copies Furnished:

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