

October 12, 2015

Via Electronic Delivery:

Diana Wood
Office of Environmental Analysis
Surface Transportation Board
Room 1110
395 E Street S.W.
Washington, DC 20243
ph: 202.245.0302

Re: Missouri Central Railroad Company – Abandonment Exemption – in Cass, Pettis, Benton, Morgan, Miller, Cole, Osage, Maries, Gasconade, and Franklin Counties, Missouri, STB Docket No. AB-1068 (Sub-No. 3X)

Dear Diana:

I am writing in response to the recent request by Osage Nation for shovel testing to be conducted within the Area of Potential Effect (“APE”) for the above-referenced abandonment. For the reasons addressed below, we believe this untimely request is unwarranted and not supported by the National Historic Preservation Act (“NHPA”). The Missouri Central Railroad Company (“MCRR”) certainly understands the Osage Nation’s concerns. We have confidence, however, that those concerns have been appropriately addressed and that there is no reason to re-visit any determinations that would require the Section 106 process to be re-opened.

As you know, the MCRR has sought and obtained authorization from the Surface Transportation Board (“STB”) to abandon approximately 144.3 miles of its rail line through central Missouri. The STB’s determination is considered an undertaking under Section 106 of NHPA. Based upon information from the Missouri State Historic Preservation Office (“SHPO”), the STB’s Office of Environmental Analysis (“OEA”) initiated the Section 106 process for the abandonment.

On March 27, 2015, OEA sent letters to various federally-recognized Tribes, including Osage Nation, identifying the Tribe as a potential consulting party and inviting the Osage Nation to participate in the Section 106 process. No response was received by the Osage Nation during the 30-day comment period.

On June 4, 2015, a negotiated and signed Memorandum of Agreement (“MOA”) was filed with the Advisory Council on Historic Preservation (“ACHP”). MCRR, the STB, and SHPO were Signatory Parties, the Missouri Department of Natural Resources (Division of State Parks) (“MDNR”) signed as an Invited Signatory Party, and the City of Stover signed as a Concurring Party. The potential for cultural resources was carefully considered during the development of the MOA. Section IV of the MOA was included to address unanticipated discoveries and this provision requires additional consultation with federally-recognized Tribes in the event of discoveries during salvage operations. In addition, as addressed below, shovel testing was

October 12, 2015

Page - 2 -

specifically discussed with SHPO and it was determined to **not** be necessary in light of the scope of the work for this salvage project.

It was not until June 11, 2015, that the Osage Nation initially contacted the STB (more than three months after the Osage Nation was invited to participate in the Section 106 process).

Importantly, this first contact was after the MOA had already been developed, executed and submitted to the ACHP. Notwithstanding the fact that the Osage Nation did not respond within the 30-day period, OEA responded to the Tribe on June 16, 2015 and re-invited the Osage Nation to be a concurring party. The Tribe was requested to respond by July 6, 2015, but again no response was received.

On August 11, 2015, the STB removed the Section 106 condition that had been imposed on the abandonment exemption (which had become effective January 7, 2015). In the August 11 decision, the STB imposed the unanticipated discoveries provision of the MOA as a new condition to the abandonment.

As a result of the items outlined above, **the STB has concluded the Section 106 process**. The MOA is a final document and the unanticipated discoveries provision adequately takes into consideration any potential for cultural resources during salvage. In addition, the NHPA does not support the Osage Nation's position that would require the parties to go back and reconsider previous findings and determinations at this late point.¹

One consideration for why the Osage Nation's late request is unsupported is that MCRR has already done the field work for the historic and cultural resources. MCRR completed a Phase I survey of the APE and submitted a written Draft Report as required by the MOA, entitled *Phase I Archaeological Survey of Approximately 144.30 Miles of the Missouri Central Railroad Company Right-of-Way in Benton, Cole, Cass, Franklin, Gasconade, Maries, Miller, Morgan, Osage, and Pettis Counties, Missouri*. The Draft Report was provided to the signatory parties, concurring parties and the Osage Nation on August 27, 2015. A 30-day comment period was provided for the Draft Report. Another key consideration of why shovel tests are not warranted is that before MCRR's contractors began this field work, MCRR discussed shovel testing with SHPO. Based upon the scope of work for this salvage project, as described more fully below, it was determined that shovel tests were not needed. The Osage Nation should not be permitted to force the parties to reconsider this decision as a result of their late request.

The Osage Nation's request, which was made after the completion of the field work, was prompted as a result of OEA reaching out to the Osage Nation to remind them of the end of the 30-day comment period on the Draft Report. The Osage Nation responded to OEA's September 29, 2015 reminder by requesting until October 5th to provide comments on the Draft Report.

¹ Under the NHPA, even where a Tribe has assumed SHPO responsibility as the Tribal Historic Preservation Officer ("THPO"), which is not the case here, the NHPA allows the process to proceed if the THPO does not respond within the 30-day period. In addition, the regulations provided that if the THPO does later respond, the agency is not required to reconsider previous findings or determinations. See 49 CFR 800.3(c)(4).

October 12, 2015

Page - 3 -

However, the Osage Nation October 5th letter does not acknowledge the Draft Report. Instead the Osage Nation requested that a cultural resource survey be done including shovel testing without any apparent consideration for the fact that the survey and written report had already been completed. As stated above, the parties should not be required to turn back the clock and revisit determinations already made and work already completed.

Most importantly, the scope of work for this abandonment and salvage will have no impact on the concerns raised for potential cultural resources in Osage Nation's October 5th letter. The October 5th letter reveals that the Tribe's concern is related to potential cultural resources that may have been buried by the railroad construction in 1901-1905 which might be impacted through future construction. However, there is no future construction authority in front of the STB. MCRR's work will be limited to removal of steel and railroad ties. The ballast will not be removed and the railroad bed will not be disturbed such that no original soil will be removed. In addition, the salvage work will almost entirely remain up on the rail embankment with no subsurface work being performed. Thus, any potential cultural resources will remain where they have been, if there, for more than 100 years. The decision to not perform shovel tests that was made months ago, is consistent with the project scope.

To provide further clarity, the following is a summary of activities that will occur as part of the salvage operations. The salvage contractor ("Contractor") will be removing only the steel track material (rails, tie plates, spikes, switch components, etc.) and the wooden ties from the rail bed with the exception that they will not remove ties from the bridges. Since many locations along the railroad have not seen rail service in a number of years and have become overgrown with trees and other vegetation, the Contractor will need to remove the trees and vegetation from the rail bed. This tree removal, which will also remove root balls, will be limited to an approximate width of 15 – 20 feet all within the rail embankment and ballast area such that no original or subsurface soil will be disturbed. The Contractor may also have to remove tree limbs overhanging the rail bed in order to get their equipment through but the Contractor will not be removing the root ball outside of the limited road bed area.

The Contractor will then unbolt the rail joints and set aside the steel material. Next, the rail bed ballast (the top layer in the rail embankment) will be disturbed just enough to remove the wooden railroad ties. After the ties have been removed, the Contractor will then smooth out the ballast so that the Contractor can drive down the rail bed and pick-up the steel rail components that had been set aside earlier. Whenever possible, existing grade crossings will be used to access the rail bed. The Contractor is not permitted to build temporary haul roads or additional vehicular or pedestrian crossings.

In summary, no excavation will be performed and when the salvation operations have been completed, the rail bed will be essentially unchanged except for the removal of the steel and ties and the clearing of the vegetation that was growing in the rail bed. The Contractor will be working on the rail bed and will not be altering the rail embankment and will not be disturbing subsurface ground.

October 12, 2015

Page - 4 -

In conclusion, MCRR is sympathetic to the Osage Nation's concerns but shovel tests are not warranted. The scope of work will not impact subsurface Osage cultural resources. In addition, any concerns have been appropriately addressed by the unanticipated discoveries provision of the MOA and there is no justification to re-visit determinations that would require the Section 106 process to be re-opened.

Please do not hesitate to contact the undersigned if you have any questions.

Yours very truly,



Sandra L. Brown
Thompson Hine LLP
1919 M Street NW, Suite 700
Washington, D.C. 20036
(202) 263-4101 (telephone)
(202) 331-8330 (facsimile)

Attorney for Missouri Central Railroad Company

cc: Judith Deel, SHPO