



## TRIBAL HISTORIC PRESERVATION OFFICE

Date: 02/10/2014

ONHPO File: 1314-518NW-10  
DA 14-97  
WT Docket No. 13-240

**RE: Draft Program Comment to Govern Review of Positive Train Control Facilities under Section 106 of the National Historic Preservation Act**

Geoffrey C. Blackwell, Chief  
Office of Native Affairs & Policy  
Consumer & Governmental Affairs Bureau  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Dear Mr. Blackwell,

Thank you for consulting with the Osage Nation on this very important matter. The Osage Nation recognizes that implementation of the Positive Train Control (PTC) rail safety communications initiative must be expedited in order to meet the Congressionally-mandated deadline; and furthermore, we understand that the intent of the Program Comment to the Advisory Council on Historic Preservation (ACHP) is to tailor the review process under Section 106 of the National Historic Preservation Act (NHPA) in order to help the railroad companies (Roads), as applicants for FCC licensure and subject to the relevant requirements imposed on FCC licensees under the Nationwide Programmatic Agreement (NPA), meet that deadline. The Osage Nation agrees that PTC will enhance safety along the nation's railroad lines and is quite surprised that, as of the Tulsa meeting in December last year, the technology has not been operationalized for nation-wide implementation. In addition to safety, the Osage Nation believes that PTC will ultimately have a positive return on investment for the Roads by way of reducing costly accidents that will be averted by the rail safety communications initiative. The draft Program Comment has been reviewed by the Osage Nation Historic Preservation Office (ONHPO). Our comments follow.



## TRIBAL HISTORIC PRESERVATION OFFICE

It is the opinion of the Osage Nation that an unfunded Congressional mandate should in no way override federal law. In accordance with the National Historic Preservation Act, (NHPA) [16 U.S.C. 470 §§ 470-470w-6] 1966, undertakings subject to the review process are referred to in S101 (d)(6)(A), which clarifies that historic properties may have religious and cultural significance to Indian tribes. Additionally, Section 106 of NHPA requires Federal agencies to consider the effects of their actions on historic properties (36 CFR Part 800) as does the National Environmental Policy Act (NEPA) [43 U.S.C. 4321 and 4331-35 and 40 CFR 1501.7(a)] 1969.

### *Background*

The Osage Nation appreciates the need for PTC and agrees with the information provided in Section II of the draft Program Comment. However, based on language in the *Scoping Document* provided to the Tribes the issue of "disturbed context" needs clarification.

It must be understood that the archaeological context of **ground beneath a railroad right-of-way (ROW) should not be considered inherently disturbed**. It is clear that many of the principal railroad lines still in use today follow Native American trails. For example, two Great Osage villages were located on the Osage River between Joplin and Kansas City, Missouri. Between these villages, Osage people traveled along well-worn trails. These trails were later covered over by railroad lines. In 1804, Lewis and Clark documented that the Osages routinely crossed the Missouri River at Arrow Rock, about fifteen miles upriver from Boonville. Today, this route is marked by a line owned by Union Pacific that runs from the Osage River to Clinton, crossing the gently rolling hills of Pettis and Saline Counties to Arrow Rock.

Before the Osage began treaty-making with the United States in 1808, an extensive network of trails was developed that led from the Great Osage villages in Missouri southwest to hunting grounds on the Verdigris, Arkansas, Canadian, and Red Rivers. This well-documented network reached south from Missouri, through Kansas to Texas and is now covered by Union Pacific and Kansas City Southern lines.

In 1851, the first Indian Appropriations Act inaugurated a series of policies aimed at moving Native Americans from their homelands onto reservations, clearing massive corridors for the westward expansion of railroads. Removal of the Osage from Kansas to Oklahoma was initiated by the Drum Creek Treaty of 1870, which rose out of the controversial Sturgis Treaty, negotiated between the United States and the Osage Nation in 1868. At the center of the controversy was William Sturgis, who had an interest in Lawrence, Leavenworth and Gulf Railroad (LL&G). While the extent of influence LL&G had on the ratified treaty is not known, the Federal Government did make the unprecedented decision to provide ceded Osage land to LL&G without making it available to pioneers, as the standard would dictate.



## TRIBAL HISTORIC PRESERVATION OFFICE

### *Applicability*

The Osage Nation concurs with the provisions set forth in Section III of the draft Program Comment.

### *Exclusions*

The provisions set forth in Section IV regarding categorical exclusions are insufficient. There has been no identification or analysis of the potential for the cumulative impact of PTC wayside poles and base station. There has been no discussion of how to identify Traditional Cultural Property (TCP), and as a result there is insufficient evidence to warrant categorical exclusions without first consulting with tribes about the potential for TCPs in specific areas. There needs to be a discussion in the Program Comment that explains the position of the ACHP, such that when a tribe informs a federal agency (Agency) that a property of religious and/or cultural significance may be affected by the undertaking, the Agency must consider the "special expertise" of the tribe in identifying this property.

### *Enhanced Submission Process*

The Osage Nation concurs with provisions set forth in Section 1, *TCNS and E106*; Section 3, *Reports and Map*; and, Section 7, *Other Federal Agency Involvement*.

Per Section 2, *Batching of Submissions*, the provision to "...provide all parties to the Section 106 process with guidance as to what batching is required or permitted" is vague. While batching requirements may prove too difficult to standardize across geographic regions and tribes, permissions for batching should be consistent and stated in the Program Comment. Perhaps the most important permission for the enhanced submission process is that the number of projects (batched or otherwise) that can be submitted to a tribe in a given comment period must be established.

Per Section 4, *Area of Potential Effect*, the provision to reduce to APE is arbitrary and does not take into account the NHPA requirement that a lead Agency obtain tribal consent prior to implementing a project:

The Agency Official shall invite the State Historic Preservation Officer, and the Council should be sensitive to the special concerns of Indian tribes in historic preservation issues, which often extend beyond Indian lands to other historic properties. When an undertaking will affect Indian lands, the Agency Official shall invite the governing body of the responsible tribe to be a consulting party and to concur in any agreement. *36 CFR Section 800.1(c)(2)(iii)*.



## TRIBAL HISTORIC PRESERVATION OFFICE

Per Section 5, *Compensation for Professional Services*, one requirement of the enhanced TCNS submission process should be that batched projects will be subject to each tribe's fee structure, regardless of the number of projects included in a batch. For example, if there are 20 wayside poles in a batch to be reviewed, the batch fee will be equivalent to reviewing 20 individual projects. Furthermore, in order to retain additional human resources to review TCNS submissions in an efficient and expeditious fashion, the total number of expected submissions (batched and individual), as well as the location and type of projects (wayside pole or base station), must be ascertained and the fees for those submissions must be paid in advance, otherwise the burden of paying for additional staff is on tribes.

Per Section 6, *Timeframes*, there is no justification for reducing the customary comment period. Reducing the comment period places the burden of the mandate on the tribes. Moreover, the reduction is fiscally irresponsible, because if the comment period is reduced, tribes will just increase fees further.

The penultimate section of the draft Program Comment, *Addressing Adverse Effects to Historic Properties* is acceptable; yet the last section, *Previously Constructed Facilities*, is inadequate. With regard to the last section, it is the opinion of the Osage Nation that **Section 106 review of new construction will not begin until a process is established for addressing previously constructed facilities**. Doing so would only set a precedent that diminishes the overall strength of the NHPA.

Though the Osage Nation completely supports and respects the need for PTC, aspects of this Program Comment will create an undue financial burden and result in cultural resource loss. Please consider the points made above before submitting the final Program Comment to the ACHP. Thank you again for consulting with the Osage Nation on this very important matter.

A handwritten signature in blue ink, appearing to read "Rebecca L. Brave", written over a horizontal line.

Rebecca L. Brave  
Interim Director  
Osage Nation Historic Preservation Office

A handwritten signature in blue ink, appearing to read "Barker Fariss", written over a horizontal line.

Dr. Barker Fariss  
Senior Archaeologist  
Osage Nation Historic Preservation Office