

EI-1489
R B

May 11, 2005

In reply refer to:
R&C#: 010577126

Victoria Rutson, Chief
Section of Environmental Analysis
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423

RE: STB – POLK COUNTY – BURLINGTON NORTHERN & SANTA FE RAILWAY CO.. –
NOTIFICATION OF PLAN TO FILE EXEMPTION TO ABANDON ITS RAILROAD LINE
FROM MILEPOST 67.38 AND .40 IN DES MOINES – OSA/CCR#1192 – PHASE IA
RECONNAISSANCE - ADDITIONAL CORRESPONDENCE AND AGENCY
DETERMINATION

We have received and reviewed the information that you provided to our office regarding the above referenced project. We understand that this project is a federal undertaking for your agency, the Surface Transportation Board (STB). We make the following comments and recommendations based on our examination of this material and in accordance with Section 106 of the National Historic Preservation Act of 1966 and its implementing regulations, 36 CFR Part 800 (revised, effective August 5, 2004).

In our correspondence dated May 3, 2002 to Brian Nettles (Freeborn and Peters representing Burlington Northern Santa Fe Railway Company (BNSF)), we requested that the Area of Potential Effect be further clarified and defined. The information we have received from both the BNSF and your agency has defined the horizontal dimension of the Area of Potential Effect, the vertical dimension or depth of the Area Potential Effect still remains unclear.

Based on our records and on your correspondence and submitted information, we understand that two historic properties and one historic district were located within the horizontal dimensions of the Area of Potential Effect for this undertaking. The historic properties are the Chicago, Burlington & Quincy Railroad Bridge No. 89 (aka Burlington Northern Santa Fe Railroad Bridge) and archaeological site 13PK61. The Chicago, Burlington & Quincy Railroad Bridge No. 89 was considered eligible for listing on the National Register of Historic Places. Archaeological site 13PK61 is a multicomponent archaeological site that includes a prehistoric Oneota component, the remains of Fort Des Moines II, and the remains of the early town of Fort Des Moines and several other less well-defined prehistoric components. This site was determined eligible for listing on the National Register of Historic Places by the Keeper's Office on April 9, 1986. A small portion of the line is located within Civic Center Historic District which is listed on the National Register of Historic Places.

Our office participated in previous Section 106 consultations with the Federal Highway Administration, the Iowa Department of Transportation, and the City of Des Moines about adverse effects to these historic properties in regard to undertakings involved with the Martin Luther King, Jr. Parkway construction project. The Chicago, Burlington & Quincy Railroad Bridge No. 89 was demolished in 2004 in accordance with the Memorandum of Agreement between our office, Federal Highway

Administration, the Iowa Department of Transportation, and the City of Des Moines that became effective January 8, 2004. The adverse effects to site 13PK61 involved with the Martin Luther King, Jr. Parkway construction project were mitigated through archaeological data recovery per several Memoranda of Agreements and amendments. The archaeological data recovery activities were limited to the Area of Potential Effect for the Martin Luther King, Jr. Parkway construction project.

Per your investigation, we understand that Part 2 (Milepost 67.38 to Milepost .40) which is located within site 13PK61 was sold by BNSF to the City of Des Moines on June 20, 2000. We also understand that Part 4 (Milepost .79 to Milepost .90) which involved the Chicago, Burlington & Quincy Railroad Bridge No. 89 was sold by BNSF to the City of Des Moines on July 31, 2001. According to our records, we were first contacted and notified about the abandonment of this 1.88 mile rail line segment by Mr. Brian Nettles (Freeborn and Peters who represented BNSF at the time) in correspondence dated May 18, 2001. The transfer of these two parts of the railroad line for this undertaking involving both of the historic properties was completed prior to the initiation of the Section 106 Consultation Process by your agency with our office and other potential interested parties. While other agencies consulted our office about the adverse effects to the historic properties resulting from the other undertakings, the STB was not involved in any of the consultations with our office or the other agencies. In view of these circumstances, we can not concur with your No Adverse Effect Determination for this undertaking as this was made after the property transfers occurred. In our consulting opinion, our opportunity and that of the Advisory Council to provide meaningful comments concerning this undertaking has been foreclosed. In accordance with 36 CFR Part 800.9(b), and Section 110(k), the responsible federal agency will need to request the views of the Advisory Council on Historic Preservation to determine:

- if, in this instance, a foreclosure situation exists;
- whether or not the applicant acted with the intent to avoid the requirements of Section 106;
- if the historical background research performed prior to construction activities began constitutes due diligence on the part of STB,
- if, given the circumstance, agency compliance can still be achieved; and,
- how the agency will proceed with its involvement in this undertaking.

We recommend that, in accordance with sections 106 and 110 of the National Historic Preservation Act and implementing regulations 36 CFR Part 800, STB fulfill its role as the responsible federal agency by acting promptly to resolve this matter. The Agency Official is also advised to identify other parties that may have interests in the historic properties that may have been affected by construction at this location and invite their consultation pursuant to 36 CFR Part 800.2(c)(3).

This unfortunate situation could have been avoided had the STB and the BNSF elected to participate early in the planning process when other agencies were coordinating and consulting with our office on the other undertakings. It appears that the adverse effects on both historic properties were primarily mitigated through consultation by other federal agencies on other undertakings after the properties had been purchased by the City of Des Moines. We believe that there was no clear intent on the part of the Burlington Northern Santa Fe Railway Company or your agency to not complete the Section 106

consultation process on this project. This appears to be established in the documentation that you provided to our office as a result of your inquiry into the matter.

In the future, we encourage both your agency and the railroad companies to consult with our agency very early in the development of these types of complicated projects where multiple federal agencies and federal undertakings are occurring in close proximity to one another. Often, these types of situations should involve coordination efforts regarding historic properties that will be affected by the different undertakings. Early consultation can establish the Area of Potential Effects for the different federal undertakings, can identify particular issues or areas of concern that should be addressed in planning, can establish agreement on what types of cultural resource investigations should be conducted within an Area of Potential Effect, and can establish a timeline for keeping all of the activities on track. In some instances, the multiple federal agencies may be able to come to an agreement to streamline the Section 106 consultation process by designating a lead federal agency to complete the Section 106 consultation process for all of the agencies involved in a project. This would have been very beneficial in this particular case as it would have removed any confusion about what needed to be done, when it needed to be done, and who needed to do the different tasks.

We have made these **comments** and **recommendations** according to our responsibility defined by Federal law pertaining to the Section 106 process. The responsible federal agency does not have to follow our **comments** and **recommendations** to comply with the Section 106 process. It also remains the responsible federal agency's decision on how you will proceed from this point for this project. Should you have any questions please contact myself at the number provided below or Douglas Jones (Archaeologist, SHSI) on my staff at (515) 281-4358.

Sincerely,



Lowell J. Soike, Ph.D.
Iowa Deputy State Historic Preservation Officer
State Historic Preservation Office
State Historical Society of Iowa
(515) 281-3306

cc: Ken Blodgett, Section of Environmental Analysis, Surface Transportation Board
Sydney Strickland, BNSF
Douglas W. Jones, Archaeologist, State Historical Society of Iowa
Ralph J. Christian, Historian, State Historical Society of Iowa
Don Klima, Director, Eastern Office, Advisory Council on Historic Preservation
Karen Theimer-Brown, Advisory Council on Historic Preservation
Daniel Higginbottom, Archaeologist, State Historical Society of Iowa
Mary Neiderbach, Community Planner, City of Des Moines
James Rost, Director, OLE, IDOT
Mike LaPietra, FHWA Iowa Office
Iowa Tribe of Oklahoma
Sac and Fox Tribe of the Mississippi in Iowa
Iowa Tribe of Kansas and Nebraska
Sac and Fox Nation of Oklahoma
Sac and Fox Nation of Missouri in Kansas and Nebraska
Otoe-Missouria Tribe of Indians
Ho-Chunk Nation of Wisconsin