

45530  
DO

SERVICE DATE – LATE RELEASE NOVEMBER 9, 2016

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 337 (Sub-No. 9X)

DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION—ABANDONMENT  
EXEMPTION—IN SCOTT COUNTY, IOWA

Decided: November 9, 2016

Dakota, Minnesota & Eastern Railroad Corporation d/b/a Canadian Pacific (DM&E) filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon a 1.95-mile rail line referred to as the Eldridge Line, between milepost 7.52 +/- and milepost 9.47 +/- in Scott County, Iowa. Notice of the exemption was served and published in the Federal Register on October 7, 2016 (81 Fed. Reg. 69,896). The exemption is scheduled to become effective on November 10, 2016.

The Board's Office of Environmental Analysis (OEA) served an environmental assessment (EA) in this proceeding on October 14, 2016. In the EA, OEA states that the State Historical Society of Iowa (SHPO) informed DM&E that it does not have sufficient staffing nor the legal responsibility to conduct extensive background research for review under Section 106 of the National Historic Preservation Act. Further, the SHPO states that it will provide comments when it is provided with: (1) information pertaining to the types of cultural resources that are or may be located in the Area of Potential Effect (APE); (2) the significance of cultural resources in the APE; and (3) an assessment of the effect that the undertaking might have on historic properties within the APE. Further, the SHPO states that it informed DM&E that, based on its review of the information provided by the Office of the State Archeologist, there appears to be no previously recorded archaeological sites or other types of significant historical properties located within or immediately adjacent to the APE. In addition, OEA states: (1) there are no historic properties eligible for listing in the National Register of Historic Places (National Register), that would be affected by the proposed abandonment; (2) DM&E does not intend to conduct any salvage activities; and (3) DM&E intends to sell the right-of-way intact to a trail user for future use as a recreational trail.

OEA further states in the EA that it is specifically inviting the SHPO to concur with its finding within 30 days<sup>1</sup> of receipt of the EA. OEA states that, in order to provide the SHPO and other interested parties with sufficient time to comment on its finding of no affected historic properties, it is recommending that a condition be imposed requiring DM&E to maintain its

---

<sup>1</sup> OEA states that, under its environmental rules, in cases where a notice of exemption has been filed under the Board's rules at 49 C.F.R. § 1152.50, the comment period is typically 15 days from the service date of the EA.

interest in, and take no steps to alter, the historic integrity of all historic properties within the APE until the Section 106 process is complete. Further, if the SHPO does not disagree with OEA's finding within the 30-day review period, and if no other party has raised concerns, OEA will issue a Supplemental Final EA removing the recommended condition and permitting DM&E to consummate the abandonment.

Comments to the EA were due October 31, 2016. OEA states that comments were received from the U.S. Fish and Wildlife Service (USFWS), and that USFWS concurs with OEA's findings that the proposed abandonment would not result in adverse impacts to federally listed threatened or endangered species.

In the EA, OEA also states that the right-of-way may be suitable for other public use following abandonment and salvage of the line. On September 29, 2016, the Iowa Natural Heritage Foundation (INHF)<sup>2</sup> filed a request for the issuance of a notice of interim trail use (NITU) to negotiate with DM&E for acquisition of the right-of-way for use as a trail under the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d), and 49 C.F.R. § 1152.29. Pursuant to 49 C.F.R. § 1152.29, INHF submitted a statement of willingness to assume financial responsibility for the right-of-way and acknowledged that the use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service. By response filed on October 12, 2016, DM&E indicated its willingness to negotiate with INHF for interim trail use.

Because INHF's request complies with the requirements of 49 C.F.R. § 1152.29 and DM&E is willing to negotiate for trail use, a NITU will be issued. The parties may negotiate an agreement for the right-of-way during the 180-day period prescribed below. If an interim trail use agreement is reached (and thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2) and (h). If no agreement is reached within 180 days, DM&E may fully abandon the line. 49 C.F.R. § 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service.

INHF also requested imposition of a public use condition under 49 U.S.C. § 10905. INHF asks that DM&E be prohibited from disposing of the corridor, other than tracks, ties, and signal equipment, except for public use on reasonable terms, and that DM&E be barred from the removal or destruction of potential trail-related structures, such as bridges, trestles, culverts, and tunnels, for a 180-day period from the effective date of the abandonment authorization. The justification for this request is that these structures have considerable value for trail purposes and future reactivation of rail service. INHF states that the 180-day period is needed to begin negotiations with DM&E and to complete a trail plan.

---

<sup>2</sup> The City of Eldridge, Iowa, and INHF jointly requested imposition of interim trail use and public use. Attached to the request is a letter on behalf of the City of Eldridge requesting that INHF represent its interest in the proceeding.

As an alternative to interim trail use under the Trails Act, the right-of-way may be acquired for public use as a trail under 49 U.S.C. § 10905. See Rail Abans.—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986). Under § 10905, the Board may prohibit the disposal of rail properties that are proposed to be abandoned and are appropriate for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment.

To justify a public use condition, a party must set forth: (i) the condition sought; (ii) the public importance of the condition; (iii) the period of time for which the condition would be effective; and (iv) justification for the imposition of the period of time requested. 49 C.F.R. § 1152.28(a)(2). Because INHF has satisfied these requirements, a 180-day public use condition will be imposed, requiring DM&E to keep intact the right-of-way (including trail-related structures such as bridges, trestles, culverts, and tunnels) and to refrain from disposing of the corridor (other than tracks, ties, and signal equipment), commencing from the November 10, 2016 effective date of the exemption.

When the need for interim trail use/rail banking and public use is shown, it is the Board's policy to impose both conditions concurrently, subject to the execution of a trail use agreement. Here, however, while trail use and public use conditions will be imposed at this time, the public use condition will expire on May 9, 2017, while the trail use negotiating period will run 180 days from the service date of this decision and notice, until May 8, 2017. If a trail use agreement is reached on a portion of the right-of-way prior to May 8, 2017, DM&E must keep the remaining portion of the right-of-way intact for the remainder of the 180-day public use condition period to permit public use negotiations. Also, a public use condition is not imposed for the benefit of any one potential purchaser, but rather to provide an opportunity for any interested person to acquire the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, DM&E is not required to deal exclusively with INHF, but may engage in negotiations with other interested persons.

This action, as conditioned, will not significantly impact the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is reopened.
2. Upon reconsideration, the notice served and published in the Federal Register on October 7, 2016, exempting the abandonment of the line described above is modified: (1) to the extent necessary to implement interim trail use/rail banking as set forth below to permit INHF to negotiate with DM&E for trail use for the above-described right-of-way, for a period of 180 days from the service date of this decision and notice, until May 8, 2017, and to permit public use negotiations as set forth below, for a period of 180 days commencing from the November 10,

2016, effective date of the exemption, until May 9, 2017; and (2) DM&E shall retain its interest in and take no steps to alter the historic integrity of all historic properties, including sites, buildings, structures, and objects within the project right-of-way that are eligible for listing or listed in the National Register until the Section 106 process of the National Historic Preservation Act has been completed. DM&E shall report to OEA regarding any consultations with the SHPO and the public. DM&E may not file its consummation notice or initiate any salvage activities related to abandonment (including removal of tracks and ties) until the Section 106 process has been completed and the Board has removed this condition.

3. Consistent with the public use and interim trail use/rail banking conditions imposed on the above-described right-of-way in this decision and notice, DM&E may discontinue service and salvage track and related materials. DM&E shall otherwise keep intact the right-of-way, including potential trail-related structures such as bridges, trestles, culverts, and tunnels, for a period of 180 days until May 9, 2017, to enable any state or local government agency or other interested person to negotiate the acquisition of the right-of-way for public use. If an interim trail use/rail banking agreement is executed before expiration of the 180-day public use condition period, the public use condition will expire to the extent the trail use/rail banking agreement covers the same portion of the right-of-way.

4. If an interim trail use/rail banking agreement is reached, it must require the trail sponsor to assume, for the term of the agreement, full responsibility for: (i) managing the right-of-way; (ii) any legal liability arising out of the transfer or use of the right-of-way (unless the sponsor is immune from liability, in which case it need only indemnify the railroad against any potential liability); and (iii) the payment of any and all taxes that may be levied or assessed against the right-of-way.

5. Interim trail use/rail banking is subject to possible future reconstruction and reactivation of the right-of-way for rail service and to the trail sponsor's continuing to meet its responsibilities for the right-of-way described in ordering paragraph 4 above.

6. If an interim trail use agreement is reached (and thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2) and (h).

7. If interim trail use is implemented, and subsequently the trail sponsor intends to terminate trail use of the right-of-way, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

8. If an agreement for interim trail use/rail banking is reached by [180 days from service date], for the right-of-way, interim trail use may be implemented. If no agreement is reached, DM&E may fully abandon the line, subject to any outstanding conditions.

9. This decision and notice is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.