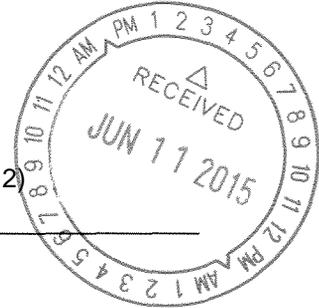


**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 32659 (Sub No. 2)

**CALDWELL RAILROAD COMMISSION –
EXEMPTION FROM 49 U.S.C. SUBTITLE IV**



**PETITION FOR PARTIAL REVOCATION OF EXEMPTION AND
REQUEST FOR EXPEDITED ACTION**

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David H. Coburn
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-8063

Counsel for Caldwell Railroad Commission

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**CALDWELL RAILROAD COMMISSION –
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**PETITION FOR PARTIAL REVOCATION OF EXEMPTION AND
REQUEST FOR EXPEDITED ACTION**

Pursuant to 49 U.S.C. § 10502(d) and 49 C.F.R. part 1121, Caldwell Railroad Commission (“CRC”) hereby seeks partial revocation of the exemption granted by the predecessor of the Surface Transportation Board (“Board”) in 1995, as necessary to permit Caldwell to rail bank the 3.91 miles at the end of the 22.1-mile rail line known as the HG Line (“Line”). A partial revocation of the exemption to permit rail banking of this section of the Line is consistent with the Rail Transportation Policy of 49 U.S.C. § 10101.

BACKGROUND

In 1995, the Interstate Commerce Commission, in Finance Docket 32659, *Caldwell County Economic Development Commission – Exemption From 49 U.S.C. Subtitle IV* (served August 3, 1995) exempted CRC (which was called the Caldwell County Economic Development Commission prior to 2008) from all regulatory requirements with respect to the entire 22.1 mile Line. This decision expressly provided that the broad, blanket exemption granted was subject to the condition that CRC “(1) notify the Commission in advance of any proposed abandonment or discontinuance of service on the line; (2) submit any environmental or historic data that may be required to permit the Commission to conduct an environmental review of the abandonment or

discontinuance; and (3) comply with any conditions that might be found to be required prior to consummation of the abandonment or discontinuance.”

In 2007, the Board granted the operator of CRC’s line, the Caldwell County Railroad Company, a discontinuance of service exemption from milepost 107.5 to milepost 112.7 of the Line, which includes the section of the Line for which CRC now requests partial revocation of the 1995 exemption. *Caldwell County Railroad Company—Discontinuance of Service Exemption—In Caldwell County, NC*, STB Docket No. AB-999X (served July 9, 2007).

However, within the past year, the Board has declined to grant two petitions by CRC with respect to the 3.91 mile section of the Line intended for rail banking based on the 1995 exemption. In November 2014, the Board denied a petition from CRC to revoke the 1995 exemption, but did so “without prejudice to its filing, in [that] docket, a new petition to revoke that provides its reasoning as to why the [rail transportation policy] factors warrant revocation.” *Caldwell R.R. Commission--Exemption from 49 U.S.C. Subtitle IV*, STB Finance Docket No. 32659 (Sub-No.1) (served Nov. 26, 2014). CRC is doing so now.

In addition, in May 2015, the Board dismissed as moot CRC’s April 13, 2015 Verified Notice of Exempt Abandonment seeking to abandon the relevant section of track. The mootness determination was based on the fact that the 1995 blanket exemption, which was noted in CRC’s filing, renders a request for authorization to abandon unnecessary. *Caldwell Railroad Commission—Abandonment Exemption—In Caldwell County, N.C.*, STB Docket No. AB 1112X (served May 22, 2015).¹ As a result, CRC has been unable to move forward toward a rail banking agreement that it plans to reach with a trail entity, Caldwell County Pathways, and thereby preserve the line for future rail use.

¹ That latter filing was made following consultation with Board staff as to the most appropriate manner in which to proceed due to CRC’s interest in entering an agreement with a trail entity under the Rails to Trails Act and the Board’s rail banking rules.

CRC understands that, based on the ICC's 1995 decision, and the Board's recent reiteration of that decision in the May 22 Decision, it could seek abandonment by providing notice to the Board, together with environmental and historic data. However, CRC does not wish to fully consummate an abandonment; it plans instead to enter an agreement to rail bank the above-described section of the Line and thereby preserve the right-of-way for future rail use. In order to receive the protections of the Rails to Trails Act, 16 U.S.C. § 1247(d), CRC should be permitted to partially revoke the current exemption it holds in order to allow it to move forward with its Verified Notice of Exempt Abandonment and the Board to process that Notice under its rules, thereby triggering the abandonment/rail banking process, including publication in the Federal Register and allowing an opportunity for the filing of a Notice of Interim Trail Use. To that end, CRC is hereby attaching a draft of an Amended Verified Notice of Exempt Abandonment to this petition that it will proceed to formally file with the Board should the Board grant this Petition.²

DISCUSSION

In assessing whether to revoke an exemption, the Board must consider the statutory standard set forth at 49 U.S.C. § 10502(d), which provides that the Board may revoke an exemption “when it finds that application in whole or in part of a provision of this part to the person, class or transportation is necessary to carry out the transportation policy of § 10101 of this title.” “The Board will revoke an exemption if a petitioner has demonstrated conduct that frustrates the [rail transportation policy] and the Board has determined that the reinstated regulatory provisions could ameliorate the alleged harms.” *Caldwell R.R.*

² The Verified Notice filed on April 13, 2015 has been modified to reflect new information that came to CRC's attention at about the same time that the Board dismissed the prior Notice as moot. Specifically, the State of North Carolina has a financial interest in the line, having provided funding to CRC at the time the line was acquired. Also, the entity that will seek to establish a trail is now Caldwell County Pathways.

Commission--Exemption from 49 U.S.C. Subtitle IV, STB Finance Docket No. 32659 (Sub-No.1), *slip op.* at 2 (served Nov. 26, 2014).

Rail banking is consistent with the rail transportation policy of 49 U.S.C. § 10101. The Rails to Trails Act states as follows:

Consistent with the purposes of [the Railroad Revitalization and Regulatory Reform Act of 1976], and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.

16 U.S.C. § 1247(d). Specifically, rail banking ensures the “development and continuation of a sound rail transportation system . . . to meet the needs of the public” by preserving railroad rights-of-way for future railroad use. 49 U.S.C. § 10101(4). An abandoned railroad right-of-way is subject to encroachment by underlying or adjoining landowners, and such claims are adjudicated pursuant to state property law. *See* H.R. Rep. No. 98-28, at 8-9 (1983) (“The concept of attempting to establish trails only after the formal abandonment of a railroad right-of-way is self-defeating; once a right-of-way is abandoned for railroad purposes there may be nothing left for trail use.”), S. Rep. No. 98-1, at 9 (1983) (same). Rail banking does not constitute abandonment, 16 U.S.C. § 1247(d), and therefore provides a higher degree of certainty in preserving rail corridors for future use as needed by the public. This certainty also reduces industry entry and exit barriers, promoting another rail transportation policy factor. 49 U.S.C. § 10101(7). Protecting railroad rights-of-way, and mandating that the trail sponsor assume liability as per the Board’s rules, enables a railroad to exit the industry when there is no present need for rail service along its line with the knowledge that it will be able to re-enter in the future.

Pursuant to 49 C.F.R. § 1152.29(a), “[i]f any state, political subdivision, or qualified private organization is interested in acquiring or using a right-of-way of a rail line proposed to be abandoned for interim trail use and rail banking pursuant to 16 U.S.C. 1247(d), it must file a comment or otherwise include a request in its filing (in a regulated abandonment proceeding) or a petition (in an exemption proceeding) indicating that it would like to do so.” A Notice of Interim Trail Use must be filed by a prospective trail sponsor within the 45-day protest and comment period for an abandonment proceeding, or within 10 days after publication in the Federal Register for an exempt abandonment proceeding. *Id.* at § 1152.29(b). Therefore, in order for a railroad right-of-way to be rail banked, there must be a regular or exempt abandonment proceeding (initiated by the filing of a petition for abandonment or notice of exemption, respectively) before the Board in which a Notice of Interim Trail Use can be filed.

In granting the 1995 exemption, the ICC almost certainly did not intend to limit CRC’s ability to preserve the corridor through rail banking via the Board’s procedures implementing the Rails to Trails Act. Yet, to date the exemption has served to do precisely that. Pursuant to the Board’s May 2015 decision, CRC cannot initiate an abandonment proceeding pursuant to 49 U.S.C. § 10502 and the Board’s regulations at 49 C.F.R. § 1152.50 with respect to the Line because the 1995 decision exempted it from the provisions of this section. *Caldwell Railroad Commission—Abandonment Exemption—In Caldwell County, N.C.*, STB Docket No. AB 1112X (served May 22, 2015). Without being able to pursue a notice of exemption process for the relevant portion of the line – which has seen no rail service for more than two years and as to which the Board previously authorized discontinuance – CRC cannot enter an agreement to rail bank this portion of the Line with the level of certainty offered by the Board’s process. This frustrates the rail transportation policy goals described above, which would be furthered by rail

banking. A partial revocation of the 1995 exemption is accordingly necessary to permit CRC to file an Amended Verified Notice of Exempt Abandonment and receive the public benefits of the federal rail banking statute, consistent with the Rail Transportation Policy.

Finally, CRC is not aware of any Board precedent that would preclude the relief sought here. The two cases cited in the Board's May 22 decision in support of the finding that the Verified Notice of Exempt Abandonment was moot did not arise in a setting in which the railroad seeking to effectuate an abandonment also sought, as CRC does here, a partial revocation of the type of broad exemption previously granted to the railroad in order to allow an abandonment filing to proceed. *See L.A. Cnty. Metro. Transp. Auth.—Aban. Exemption—in L.A. Cnty., Cal.*, STB Docket No. AB 409 (Sub-No. 6X) (STB served Feb. 8, 2012) (dismissing a verified notice of exemption because the owner of the line had been granted a Subtitle IV exemption); *L.A. Cnty. Metro. Transp. Auth.—Aban. Exemption—in L.A. Cnty., Cal.*, AB 409 (Sub-No. 5X) (STB served July 17, 2008) (same). Nor is there any suggestion in either of those cases that the railroad sought, as CRC does, to preserve the rail corridor at issue through the rail banking process.

In conclusion, CRC respectfully requests that the Board partially revoke the 1995 exemption so that CRC can proceed to file the attached Amended Verified Notice of Exempt Abandonment.

Further, CRC asks that the Board act expeditiously on this matter in order that the environmental and historic information submitted with the Verified Notice does not become stale and in order that the now long-delayed rail banking plans may proceed in the public interest.



David H. Coburn
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-8063

Counsel for Caldwell Railroad Commission

June 11, 2015

ATTACHMENT

DRAFT

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket No. AB-1112X

CALDWELL RAILROAD COMMISSION – ABANDONMENT EXEMPTION – IN
CALDWELL COUNTY, NC

AMENDED VERIFIED NOTICE OF EXEMPT ABANDONMENT OF TRACKAGE
LOCATED BETWEEN MILEPOST 108.79 AND MILEPOST 112.7 IN CALDWELL
COUNTY, NORTH CAROLINA

David H. Coburn
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-8063

Counsel for Caldwell Railroad Commission

_____, 2015

DRAFT

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket No. AB-1112X

CALDWELL RAILROAD COMMISSION – ABANDONMENT EXEMPTION – IN
CALDWELL COUNTY, NC

AMENDED VERIFIED NOTICE OF EXEMPT ABANDONMENT OF TRACKAGE
LOCATED BETWEEN MILEPOST 108.79 AND MILEPOST 112.7 IN CALDWELL
COUNTY, NORTH CAROLINA

Caldwell Railroad Commission (“CRC”) files this Amended Verified Notice of Exempt Abandonment pursuant to 49 U.S.C. § 10502 and the Board’s regulations at 49 C.F.R. § 1152.50. This Amended Verified Notice concerns CRC’s planned abandonment of the 3.91 miles at the end of the 22.1-mile rail line known as the HG Line. The section to be abandoned is between milepost 108.79 and 112.7, which traverses through United States Postal Zip Code 28645 in Caldwell County, North Carolina.

In 1995, the Interstate Commerce Commission, in Finance Docket 32659, *Caldwell County Economic Development Commission – Exemption From 49 U.S.C. Subtitle IV* (served August 3, 1995) exempted CRC (which was called the Caldwell County Economic Development Commission prior to 2008) from all regulatory requirements with respect to the entire 22.1 mile HG line of which the portion now proposed for abandonment is a part. This decision expressly provided that the exemption was subject to the condition that [CRC] “(1) notify the Commission in advance of any proposed abandonment or discontinuance of service on the line; (2) submit any environmental or historic data that may be required to permit the Commission to conduct an environmental review of the abandonment or discontinuance; and (3) comply with any

conditions that might be found to be required prior to consummation of the abandonment or discontinuance.” While CRC believes that, based on the quoted language from the 1995 decision, it could seek abandonment by simply providing a notice to the Board, together with environmental and historic data, CRC has opted to file this Notice of Exempt Abandonment in conformity with the Board’s rules at section 1152.50 in order to avoid any confusion and ensure that the Board has all of the information it needs both to allow the abandonment to proceed, as well the anticipated conversion of the abandoned portion of the line to trail use as described below.

As further background, in 2007, the Board granted the operator of CRC’s line, the Caldwell County Railroad Company, a discontinuance of service exemption from milepost 107.5 to milepost 112.7 of the HG Line, which included the section of the Line for which CRC now requests an abandonment exemption. *Caldwell County Railroad Company—Discontinuance of Service Exemption—In Caldwell County, NC*, STB Docket No. AB-999X (served July 9, 2007). Thus, no local traffic has moved over the section to be abandoned for at least two years. Further, the section of the Line at issue is stub-ended and not capable of handling overhead traffic. No formal complaint filed by a user of rail service on this section (or a state or local government entity acting on behalf of such user) regarding cessation of service over this section either is pending with the Board or any U.S. District Court or has been decided in favor of the complainant within the 2-year period. As noted below, CRC anticipates that a request for interim trail use will be made pursuant to the Board’s regulations so that the section of the Line at issue here will be railbanked.

In accordance with the requirements of 49 C.F.R. § 1152.50, CRC submits the following:

1. Written notification of filing for abandonment exemption – 49 C.F.R. § 1152.50(d)(1).

Said notification was served on the appropriate parties on March 4, 2015, at least ten (10) days prior to the filing date of this exemption. *See* Exhibit No. 1.

2. Proposed consummation date – 49 C.F.R. § 1152.50(d)(2).

CRC intends to consummate the proposed abandonment of the section of the Line subject to this Notice on or after June 2, 2015.

3. Carrier certification regarding local and overhead traffic and status of no complaints required by 49 C.F.R. §§ 1152.50(b) and (d)(2).

The required Certification is attached as Exhibit No. 2.

4. Information required by 49 C.F.R. § 1152.22(a)(1)-(4), (7) and (8), and (e)(4) (incorporated by reference in 49 C.F.R. § 1152.50(d)(2)).

a. Section 1152.22(a)(1) Exact name of applicant.

Caldwell Railroad Commission

b. Section 1152.22(a)(2) Whether the applicant is a common carrier by railroad subject to 49 U.S.C. Subtitle IV, chapter 105.

CRC is a common carrier by railroad subject to 49 U.S.C. Subtitle IV, chapter 105.

c. Section 1152.22(a)(3) Relief sought (abandonment of line or discontinuance of service).

CRC seeks authority to abandon a 3.91 mile section of railroad in Caldwell County, North Carolina in order to facilitate conversion of the Line for interim trail use.

- d. Section 1152.22(a)(4) Detailed map.

See Exhibit No. 3.

- e. Section 1152.22(a)(7) Name, title, and address of representative of applicant to whom correspondence should be sent.

David H. Coburn
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
Tel: (202) 429-8063

- f. Section 1152.22(a)(8) List of all United States postal zip codes that the line proposed for abandonment traverses.

28645

- g. Section 1152.22(e)(4) Statement of whether the properties proposed to be abandoned are suitable for use for other public purposes, including roads or highways, other forms of mass transportation, conservation, energy production or transmission, or recreation. If the applicant is aware of any restriction on title to the property, including any reversionary interest, which would affect the transfer of title or the use of the property for other than rail purposes, this shall be disclosed.

The property proposed to be abandoned may be suitable for other public purposes or trail use, but may be subject to reversionary interests. Additionally, the North Carolina Department of Transportation has a contingent interest in the Line.

CRC anticipates that the section of the Line subject to this Notice will be railbanked with Caldwell County Pathways (“Pathways”). CRC understands that Pathways intends to ask the Board to issue a notice of interim trail use pursuant to 16 U.S.C. § 1247(d) and the Board’s regulations at 49 C.F.R. §1152.29.

h. Section 1152.50(d)(2) The level of labor protection.

CRC understands that in granting an exemption for the proposed abandonment, the Board does not relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, while CRC anticipates that no adverse effect to its employees will occur as the result of this abandonment, it understands that the Board will likely impose the conditions set forth in *Oregon Short Line Railroad Company – Abandonment – Goshen*, 360 I.C.C. 91 (1979), for the benefit of any carrier employee who may be adversely affected by the proposed abandonment.

i. Section 1105.7(c) Certificate of service of environmental report and historic report.

An Environmental Report and Historic Report was prepared in accordance with 49 C.F.R. Sections 1105.7 and 1105.8 and served on the Board and all relevant parties on February 12, 2015, pursuant to 49 C.F.R. Section 1105.7(b).

Applicant's certification pursuant to 49 C.F.R. Section 1105.7(c) is attached as Exhibit No. 4. The Environmental Report is attached as Exhibit No. 5. The Historic Report is attached as Exhibit No. 6. An Addendum to both the Environmental Report and the Historic Report is attached as Exhibit 7. The Addendum details recent efforts by CRC to seek further input on the Environmental and Historic Reports from the relevant federal and state agencies.

j. Section 1105.12 Publication of newspaper notice.

A notice in accordance with Section 1105.12 was published in a newspaper of general circulation in Caldwell County, North Carolina on March 11, 2015. A copy of said notice with the required Certification is attached as Exhibit No. 8.

k. Verification.

The required Verification is attached as Exhibit No. 9.

5. In accordance with 49 C.F.R. 1152.60(d), CRC hereby certifies that based on information in their possession, the subject rail line section does not contain federally-granted right-of-way. Any documentation in CRC's possession will be made available promptly to those requesting it.

Accordingly, CRC respectfully requests the Board grant an exemption for the proposed abandonment of this section of the HG Line.

David H. Coburn
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-8063

Counsel for Caldwell Railroad Commission

_____, 2015