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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 6 (Sub-No. 485X)

BNSF RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN MCKINLEY
COUNTY, N.M.

Decided: October 18, 2012

This decision reopens the proceeding to impose environmental, historic preservation, and public use conditions.

BNSF Railway Company (BNSF) filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon 5.11 miles of rail line between milepost 14.50 and milepost 19.61, north of Defiance, in McKinley County, N.M. (the Line). Notice of the exemption was served and published in the Federal Register on September 19, 2012 (77 Fed. Reg. 58,218) (September 2012 notice). The exemption is scheduled to become effective on October 19, 2012.

The Board's Office of Environmental Analysis (OEA) served an environmental assessment (EA) on September 24, 2012. In the EA, OEA states that the Bureau of Land Management (BLM) states that there is no designated critical or potential habitat located within the portion of the project area on BLM managed lands. However, BLM states that a review of the project by the Navajo Nation Natural Heritage Program would be required to determine potential impacts to biological resources on tribal lands. Accordingly, OEA recommends that a condition be imposed requiring BNSF to consult with the Navajo Nation Natural Heritage Program regarding potential impacts from salvaging activities upon Federally listed threatened and endangered species and to report the results of these consultations in writing to OEA prior to beginning any salvage activities.

Further, OEA conducted research in the National Register of Historic Places Online Database, and its analysis it did not identify any historic places that would potentially be affected by the proposed abandonment. However, OEA states in its review that BNSF failed to notify the New Mexico Historic Preservation Division of the Department of Cultural Affairs (State Historic Preservation Office or SHPO) of the proposed abandonment as required under 49 C.F.R. § 1105.8(c). Because the SHPO has not had the opportunity to offer its comments, OEA is unable to make an official determination of the potential impacts of the abandonment on places listed in or eligible for listing in the National Register of Historic Places (National Register). In addition, OEA notes that The Navajo Nation Historic Preservation Department (Tribal Historic Preservation Office, or THPO) also has not submitted comments regarding the potential impact

of the proposed projects on historic and cultural resources on tribal lands.¹ Therefore, OEA recommends that a condition be imposed requiring BNSF to 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 (ROW) (the Area of Potential Effect) that are eligible for listing in or listed in the National Register until the Section 106 process of the National Historic Preservation Act, 16 U.S.C. § 470f (NHPA), has been completed. OEA recommends that BNSF be required to report back to OEA regarding any consultations with the SHPO, the THPO, any other Section 106 consulting parties that have been identified, and the public, and be prohibited from filing its consummation notice or initiating 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.

Pursuant to 36 C.F.R. § 800.2, OEA conducted a search of the Native American Consultation Database to identify Federally recognized tribes that may have ancestral connections to the project area. In addition to the Navajo Nation, that database indicated that the following Federally recognized tribes may have knowledge regarding properties of traditional religious and cultural significance within the ROW of the proposed abandonment: Pueblo of Acoma in New Mexico; Pueblo of Laguna in New Mexico; Ramah Navajo Chapter; and Zuni Tribe of the Zuni Reservation in New Mexico. Accordingly, OEA states that it is sending a copy of the EA to these tribes for review and comment.

Comments on the EA were due October 9, 2012. None were received. Therefore, based on OEA's recommendation, the conditions proposed in the EA will be imposed.

In the EA, OEA states that the ROW may be suitable for other public use following abandonment and salvage of the Line. On September 27, 2012, the County of McKinley, N.M. (the County), filed a request for the issuance of a notice of interim trail use (NITU) for the Line to negotiate with BNSF for acquisition of the Line for use as a trail under the National Trails System Act, 16 U.S.C. § 1247(d) (Trails Act), and 49 C.F.R. § 1152.29.

Pursuant to 49 C.F.R. § 1152.29, the County submitted a statement of its willingness to assume financial responsibility for the Line and has acknowledged that the use of the ROW for trail purposes is subject to possible future reconstruction and reactivation of the ROW for rail service. In a response filed on October 15, 2012, however, BNSF states that it is not agreeable to rail banking this line and objects to the issuance of a NITU.

¹ THPOs are designated by the U.S. Department of the Interior to oversee the historic review process on tribal lands. As the tribal counterpart to the SHPO, the THPO may assume some or all of the duties for historic preservation on tribal lands that a SHPO performs on private, state, or Federal lands.

The Board's authority to impose trail use conditions is limited because the Board's role under the Trails Act is largely ministerial, see Citizens Against Rails-to Trails v. STB, 267 F.3d 1144, 1151-52 (D.C. Cir. 2001), and the interim trail use program is voluntary and consensual between the railroad and the trail sponsor, see Rail Abans.—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 598 (1986). Therefore, because BNSF does not agree to negotiate for interim trail use, a NITU will not be issued.

The County also has requested imposition of a public use condition under 49 U.S.C. § 10905 for the Line. The County requests that BNSF be prohibited from disposing of the corridor, other than tracks, ties, and signal equipment, except for public use on reasonable terms, and that BNSF 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 exemption.

In support of that request, the County states that the rail corridor provides a strategic connection and infrastructure, including a bridge over a scenic wash and underpass across State Highway 264, to connect area residents and users from Navajo Nation population centers and possibly employees at Navajo Nation Division of Transportation headquarters to fitness and recreation opportunities, as well as future connections to major recreational destinations such as the High Desert Trail System, Gallup Shooting Range, and Mentmore Rock Climbing Area. In addition, the County states that the corridor would make an excellent multi-use recreational trail and that conversion of the property to trail use is in accordance with the County's Comprehensive Plan. The County also explains that the corridor provides important wildlife habitat and green space and that its preservation as a recreational trail is consistent with the County's multi-use approach to open space. Finally, the County notes that having access to affordable exercise trails and recreational opportunities is an important goal consistent with the Health Element in the County's Comprehensive Plan. The County states that the 180-day period is needed because it and other affected parties have not had an opportunity to assemble or review title information, complete a trail plan, or begin negotiations with BNSF.

As an alternative to interim trail use under the Trails Act, the ROW 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. See 49 C.F.R. § 1152.28(a)(2).

Because the County has satisfied these requirements, a 180-day public use condition will be imposed, requiring BNSF to keep intact the ROW (including bridges, trestles, culverts, and tunnels) and to refrain from disposing of the corridor (other than tracks, ties, and signal equipment), commencing from the October 19, 2012 effective date of the exemption. 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 ROW that has been found suitable for public use purposes, including trail use. Therefore, with respect to the public use condition, BNSF is not required to deal exclusively with the County, but may engage in negotiations with other interested persons.²

This decision, and the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is reopened.
2. The request for issuance of a notice of interim trail use is denied.

3. Upon reconsideration, the September 2012 notice exempting the abandonment of the Line described above is modified to the extent necessary to permit public use negotiations as set forth below for the ROW for a period of 180 days commencing from the October 19, 2012 effective date of the exemption (until April 17, 2013). Additionally, BNSF's abandonment exemption is further subject to the following conditions: (1) BNSF 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 (the Area of Potential Effect) that are eligible for listing or listed in the National Register until the Section 106 process of the NHPA has been completed. BNSF shall report to OEA regarding any consultations with the SHPO, the THPO, any other Section 106 consulting parties that have been identified, and the public. BNSF 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

² On September 27, 2012, Adventure Gallup & Beyond (Adventure Gallup), a nonprofit corporation, filed, on behalf of the Greater Gallup Economic Development Corporation (GGEDC), a request for a public use condition and issuance of a NITU. For the reasons discussed above, a NITU will not be issued. However, Adventure Gallup/GGEDC are free to negotiate with BNSF for public use of the ROW under the public use condition imposed in this decision.

Board has removed this condition. (2) Prior to commencement of any salvage activities, BNSF shall consult with the Navajo Nation Natural Heritage Program regarding potential impacts from salvage activities on Federally listed threatened or endangered species that may occur in the vicinity of the Line. BNSF shall report the results of these consultations in writing to OEA before beginning salvage operations.

4. Consistent with the public use condition imposed in this decision, BNSF may discontinue service over the Line. BNSF shall keep intact the ROW, including bridges, trestles, culverts, and tunnels, and shall refrain from disposing of the corridor (other than tracks, ties, and signal equipment), for a period of 180 days to enable any state or local government agency or other interested person to negotiate the acquisition of the Line for public use.

5. This decision is effective on its service date.

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