

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34836

ARIZONA EASTERN RAILWAY, INC.—CONSTRUCTION EXEMPTION—IN GRAHAM
COUNTY, AZ

Decided: June 12, 2009

By petition filed on August 4, 2006, Arizona Eastern Railway, Inc. (AZER), seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901 for AZER to construct a 12.1-mile rail line¹ in Graham County, AZ, beginning at MP 1133.5 at Safford, AZ, where it would connect with AZER's existing line and proceed 12.1 miles across the Gila River to the Safford Regional Airport and the Freeport-McMoRan, Inc. (Freeport), Dos Pobres Mine² (Safford Mine) in Safford.

On November 2, 2006, the Board instituted this proceeding under 49 U.S.C. 10502(b). No comments opposing the transportation merits of AZER's petition were filed.

With the assistance of SEA, the Board has analyzed the potential environmental impacts associated with AZER's construction proposal. On August 23, 2007, SEA granted AZER's request for a waiver of 49 CFR 1105.6(a), which provides that an Environmental Impact Statement (EIS) normally will be prepared for a rail line construction proposal. SEA prepared a Draft Environmental Assessment (Draft EA) discussing the relevant environmental issues and issued it for public review and comment on February 25, 2008.³ SEA then prepared and issued a Post Environmental Assessment (Post EA) on April 6, 2009. In the Post EA, SEA considered the 25 comments received on the Draft EA, set forth its further independent analysis, and set forth its final recommendations on environmental mitigation.

After considering the entire record, including both the transportation-related issues and the environmental record, we adopt SEA's analysis and conclusions, including those not

¹ In its application, AZER estimated the length of the proposed rail line to be 10 miles. According to the Board's Section of Environmental Analysis (SEA), the length is 12.1 miles. See Draft Environmental Assessment at 2-1.

² In late 2006, Freeport acquired the Phelps Dodge Corporation, which was in the process of constructing the Safford Mine at the time AZER filed its petition.

³ The Federal Railroad Administration (FRA) cooperated in the Board's environmental review process because AZER indicated that it might seek Federal funds from FRA's Railroad Rehabilitation and Improvement Financing program to construct the rail line.

specifically discussed below. We find that SEA's final recommended mitigation, with slight modifications, is adequate to address the potential environmental effects identified in the course of the environmental review. Accordingly, we will grant the requested exemption and authorize the construction of the rail line, subject to the environmental mitigation measures set forth in the Appendix.⁴

BACKGROUND

AZER is a Class III short line railroad and is controlled by Iowa Pacific Holdings, Inc., through an intermediate holding company, Permian Basin Railways, Inc. AZER currently owns and operates approximately 133 miles of railroad extending between Union Pacific's (UP) Sunset Route at milepost 1098.1 in Bowie, AZ, to the end of AZER's line at milepost 1231.3 in Miami, AZ. AZER presently operates one round trip 7 days per week, employs 32 people, and handles approximately 7,300 cars per year.

The proposed rail line would begin near Safford at AZER milepost 1133.5, known as the Lone Star Junction, and proceed north for 12.1 miles. The proposed line would cross U.S. Highway 70. This crossing would consist of a signalized at-grade crossing, including warning lights and automated gates. The proposed line would continue across agricultural and undeveloped lands and over the Gila River over a new bridge. The line would then turn in a northeast direction toward the Safford Regional Airport and terminate at the Safford Mine. A single rail track, approximately 8.5 feet in width, would be constructed within the railroad right-of-way.

The proposed line would handle freight traffic to and from the Safford Mine. The proposed rail line could also serve the Safford Regional Airport and allow AZER to provide rail service to a contemplated industrial park adjacent to the airport, although no specific details about the industrial park project are currently known. The City of Safford submitted a letter expressing support for the proposed rail line.

Rail traffic on the proposed line is anticipated to be one round trip 7 days per week, year-round. Each trip would entail 20 to 25 railcars powered by two locomotives from AZER's existing, in-service locomotive fleet.⁵ All interline traffic would be handled by AZER's daily train departing the UP interchange at Bowie. Upon reaching Safford, AZER would switch the interline traffic for the proposed rail line out of its train bound for Miami on AZER's mainline. New traffic would be combined with inbound Safford Mine traffic (tank cars carrying sulfuric acid originating at Freeport's processing facility in Miami and bound for the Safford Mine), and

⁴ While we are granting AZER an exemption from 49 U.S.C. 10901 to construct the proposed line of railroad, we are not granting AZER, nor has AZER sought, the authority to operate this line. For this reason, the mitigation conditions proposed in the Post EA pertaining to operations (mitigation condition nos. 24, 28, and 34) will not be adopted.

⁵ Earlier plans estimated that three locomotives would be required for each train. However, subsequent studies by AZER determined that only two locomotives would be necessary. See Post EA at ES-6.

the train would proceed to the end of the line. The return trip would consist of the train leaving the Safford Mine with empty tank cars for the Miami processing plant and outbound copper cathodes bound for either Miami or Bowie (for interchange with UP).

AZER asserts that an application under 49 U.S.C. 10901 for this proposed construction is not necessary to further the national transportation policy set out in 49 U.S.C. 10101. Rather, AZER asserts that granting its petition would minimize Federal regulatory control, provide a shipper lacking direct rail access the option of rail transportation, ensure the development of a sound transportation system with effective competition and coordination between railroads and other transportation modes, and foster sound economic conditions in the transportation industry. AZER also explains that transportation safety would be promoted because the proposed construction would remove numerous trucks from area highways. Lastly, AZER states that the exemption would promote energy conservation through increased use of energy efficient rail transportation.

DISCUSSION AND CONCLUSIONS

Rail Transportation Analysis

The construction of new railroad lines require prior Board authorization, either through issuance of a certificate under 49 U.S.C. 10901 or, as requested here, through an exemption under 49 U.S.C. 10502 from the formal application procedures of section 10901. Under section 10502, we must exempt a proposed rail line construction from the detailed application procedures of section 10901 when we find that: (1) those procedures are not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the proposal is of limited scope, or (b) the full application procedures are not necessary to protect shippers from an abuse of market power.

Based on the record before us, we conclude that detailed scrutiny of the proposed construction under section 10901 is not necessary to carry out the rail transportation policy, and that the proposed construction project is therefore appropriate for handling under the exemption process. The proposed rail line would provide the Safford Mine, and any future shippers associated with the development of the Safford Regional Airport area, an efficient alternative to truck shipment of materials (49 U.S.C. 10101(4) and (5)). Exempting the proposed construction project from the requirements of section 10901 would also minimize the need for Federal regulation and reduce regulatory barriers to entry (49 U.S.C. 10101(2) and (7)).

Use of the formal application process is not necessary here to protect shippers from an abuse of market power. Rather, the proposed rail line will enhance competition and provide an alternative to truck shipment of materials. Given our finding regarding the probable effect of the transaction on market power, we need not determine whether the transaction is limited in scope.

The Requirements of NEPA

The National Environmental Policy Act (NEPA), 42 U.S.C. 4321-43, requires Federal agencies to examine the environmental effects of proposed Federal actions and to inform the public concerning those effects. Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 97 (1983). Under NEPA and related environmental laws, we must consider significant potential beneficial and adverse environmental impacts in deciding whether to authorize a railroad construction as proposed, deny the proposal, or grant it with conditions (including environmental mitigation conditions). The purpose of NEPA is to focus the attention of the government and the public on the likely environmental consequences of a proposed action before it is implemented, in order to minimize or avoid potential adverse environmental impacts. Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 371 (1989). While NEPA prescribes the process that must be followed, it does not mandate a particular result. Mid States Coal. for Progress v. STB, 345 F.3d 520, 533-34 (8th Cir. 2003). Thus, once the adverse environmental effects have been adequately identified and evaluated, we may conclude that other values outweigh the environmental costs. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51 (1989).

The Environmental Review In This Case

As noted above, SEA prepared a Draft EA for public review and comment. The Draft EA analyzed the effects of AZER's proposal on traffic and safety and considered such issues as impacts related to the transportation of hazardous materials, potential flooding, and cultural and biological resources. In analyzing the impacts on traffic and safety, the Draft EA addressed concerns that had been raised by the Arizona Department of Transportation (ADOT), which had requested that the Board require a grade-separated crossing where the proposed rail line would meet U.S. Highway 70. However, SEA's analysis showed that the relatively low number of existing and projected future vehicle trips on U.S. Highway 70, along with the low frequency and short duration of the proposed train trips on the proposed rail line, did not warrant a grade-separated crossing. Rather, the Draft EA recommended a mitigation measure that would require AZER to consult with the appropriate Federal, state, and local agencies to determine the final design of an at-grade road crossing and associated warning devices. The Draft EA also included other proposed environmental mitigation measures. The Draft EA preliminarily concluded that the construction and operation of the proposed rail line would have no significant environmental impacts if the Board imposed and AZER implemented the mitigation recommendations.

SEA received 25 comments expressing concerns about the proposed construction during the public comment period on the Draft EA, including comment letters from agency officials and land owners in the vicinity of the proposed rail line, as well as a petition suggesting that the proposed construction should be denied because of potential environmental impacts. In Chapter 2 of the Post EA, SEA responded to all of the comments on the Draft EA, including concerns raised regarding the proposed U.S. Highway 70 at-grade crossing. The Post EA includes SEA's revised traffic analysis of U.S. Highway 70, based on more recent traffic data and correspondence from AZER affirming AZER's commitment to work with ADOT and its willingness to participate in the planning and funding of a fair share of the costs related to a bridge span that would eventually replace the at-grade crossing. To address the potential adverse

effects on cultural resources, SEA's final recommended mitigation in the Post EA includes a condition binding AZER to the terms of the Memorandum of Agreement, developed pursuant to 36 CFR 800.6(c), setting out the appropriate historic review process. The Post EA also includes mitigation for the transportation of hazardous materials, conditions related to biological resources, and conditions to minimize potential flooding. SEA concluded that the proposed construction would not result in any significant environmental impacts if its final recommended mitigation measures were imposed and implemented, and reaffirmed that preparation of an EIS was not warranted in this case.

In sum, in reaching our decision here, we have taken into account the potential environmental impacts associated with this construction proposal by fully considering the Draft EA, Post EA, and the entire environmental record. We are satisfied that the Draft EA and Post EA together have taken the requisite "hard look" at the potential environmental impacts associated with this construction proposal and that SEA's final recommended mitigation, with slight modifications, is adequate to address the environmental concerns raised during the course of the environmental review.

CONCLUSION

We find, after weighing the various transportation and environmental concerns and considering the entire record, that the petition for exemption should be granted, subject to compliance with the environmental mitigation listed in the Appendix to this decision. For the reasons discussed above, we adopt SEA's analysis and conclusions as set forth in the Draft EA and Post EA with respect to the potential environmental effects identified during the course of the environmental review. We further find that SEA's final recommended mitigation, as modified, is adequate to address the potential environmental effects identified during the environmental review process.

As conditioned, this action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Pursuant to the Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 193, 121 Stat. 1844 (2007), nothing in this decision authorizes the following activities at any solid waste rail transfer facility: collecting, storing, or transferring solid waste outside of its original shipping container; or separating or processing solid waste (including baling, crushing, compacting, and shredding). The term "solid waste" is defined in section 1004 of the Solid Waste Disposal Act, 42 U.S.C. 6903.

It is ordered:

1. Under 49 U.S.C. 10502, the Board exempts the construction of the above-described line from the prior approval requirements of 49 U.S.C. 10901, subject to the environmental mitigation measures set forth in the Appendix to this decision.

2. Notice will be published in the Federal Register on June 18, 2009.

3. Petitions to reopen must be filed by July 6, 2009.
4. This decision shall be effective 30 days from its date of service.

By the Board, Acting Chairman Mulvey and Vice Chairman Nottingham.

Anne K. Quinlan
Acting Secretary

APPENDIX

ENVIRONMENTAL MITIGATION CONDITIONS

Transportation/Traffic Safety

1. In order to minimize delays of vehicular traffic during construction of the road crossings, AZER shall schedule the work so that construction of the roadway approaches would be completed before construction work within the roadway occurs. AZER shall also ensure that any necessary lane closures correspond with minimum off-peak traffic volumes to reduce any delays due to construction activities.

2. AZER shall consult with appropriate Federal, state, and local transportation agencies to determine the final design and other details of the at-grade crossing and associated warning devices on U.S. Highway 70 and Airport Road. Specifically, AZER shall consult appropriate agencies regarding:

- construction in the U.S. Highway 70 right-of-way may require an encroachment permit from the Arizona Department of Transportation (ADOT);
- construction of at-grade road crossings are subject to the review and approval of the Arizona Corporation Commission; and
- at-grade crossing warning devices and queuing distances shall meet the design and operational specifications of ADOT.

3. AZER shall consider school bus schedules in planning and executing the necessary road work.

4. AZER shall make reasonable efforts to identify all utilities that are reasonably expected to be materially affected by the proposed construction within the right-of-way.

5. AZER shall raise the elevation of the proposed at-grade rail crossing over U.S. Highway 70 to be consistent with the elevation of the adjacent bridge over the San Simon River to ensure that visibility will not be a concern for drivers on the roadway.

6. AZER shall install an advanced visual warning (remote flashing signals) on U.S. Highway 70 on the downslope moving away from the bridge east of the San Simon River.

7. AZER shall ensure that all maintenance and inspections are in compliance with Federal Rail Administration standards. AZER shall also ensure that its contractor uses practices recommended by American Railway Engineering and Maintenance of Way Association for project-related construction.

Utilities

8. AZER shall consult with Graham County Electric Cooperative, Inc. (GCEC), prior to construction to determine whether any underground utilities might be crossed by the proposed rail line. If warranted, AZER shall then conduct an underground service alert (USA) for the length of the proposed rail alignment prior to the start of construction. If the USA reveals that underground utilities might be crossed by the proposed rail line, AZER shall coordinate with GCEC to ensure that such conveyances are protected in place.

Land Use/Agricultural Resources

9. AZER shall work with farmers and other property owners to remedy actual damage to property caused by project-related construction.

10. AZER shall negotiate with affected property owners to minimize severance impacts, including severance impacts to drainage ditches.

11. AZER shall ensure all construction debris is removed and disposed of in a proper and legal manner consistent with all Federal, state, and local disposal procedures.

12. AZER shall limit construction activities and vegetation clearing to the proposed right-of-way, to the extent possible.

13. Where construction of the rail line would cause unavoidable property severance or damage to structures or infrastructure, AZER shall negotiate with affected landowner(s) within the 500-foot corridor⁶ and shall use its best efforts to modify the alignment, to the extent practicable, to minimize impacts to existing land uses, structures, and infrastructure, consistent with the floodplain approval process and the section 404 U.S. Army Corps of Engineers (Corps) and the section 7 USFWS regulatory permit processes.

Cultural and Paleontological Resources

14. AZER shall comply with the terms of the Memorandum of Agreement, developed pursuant to 36 CFR 800.6(c), which has been executed by all required parties and is included as Appendix G in the Post EA.

15. AZER shall comply with the recommendations of the Historic Properties Treatment Plan prepared for the project pursuant to 36 CFR 800.11.

⁶ While the right-of-way will be approximately 100 feet wide, a 500-foot corridor was established as a means to assess impacts on biological and cultural resources.

Hydrology and Water Quality

Applicable Requirements of Other Agencies

16. AZER shall obtain all Federal permits, including the Clean Water Act section 404 permit required by the Corps for project-related encroachment of jurisdictional waters of the United States prior to the initiation of any project-related construction. As part of the section 404 permit, AZER shall also obtain an individual, state-issued Clean Water Act section 401 certification for the part of the project consisting of the crossing of the Gila River.

17. Prior to project construction, AZER shall obtain an Arizona Pollutant Discharge Elimination System (AZPDES) permit from the Arizona Department of Environmental Quality. A requirement for this permit is the preparation of a stormwater pollution prevention plan, which includes best management practices to reduce soil erosion and minimize potential release of pollutants into waters of the United States.

18. Prior to project construction, AZER shall obtain a floodplain development permit from Graham County.

Construction Practices and Activities

19. AZER shall utilize the following best management practices during construction of the rail line, which include:

- implementing practices in accordance with the recommendations in the USFWS Biological Opinion (see condition no. 37) and the AZPDES permit (see condition no. 17) to reduce erosion and sedimentation that could occur as a result of construction;
- minimizing disturbance to the greatest extent possible around water resources;
- reseeding areas as soon as practicable to prevent erosion;
- using native species where practicable for revegetation;
- developing a spill prevention plan prior to construction, including measures to be taken should a spill occur;
- maintaining construction and maintenance vehicles to ensure good working order;
- conducting daily inspections of all equipment for any fuel, lube oil, hydraulic, or Freon/antifreeze leaks; and
- utilizing practices to prevent/minimize disturbance to bottom sediments during the proposed Gila River crossing.

20. As part of the construction process, AZER shall repair eroded areas on the downstream side of the track bed in order to minimize the entrance of sedimentation into waterways.

21. AZER shall develop and construct crossings of waterways and drainages in the following manner:

- bridges supported on conventional spread footings shall be used where the rail line alignment crosses the Montezuma Canal, Union Canal south of the Gila River, and an unnamed aqueduct north of the Gila River;
- the bridge over the Gila River shall be supported on deep foundations due to potential scour erosion from the river. Deep foundations could include piles or cast-in-place drilled shafts. The depths of the foundations would be established based upon bridge loading, scour predictions, and other factors. As it is anticipated that scour erosion could extend to significant depths, AZER shall consult with an expert in scour effects in designing the plans for this crossing; and
- concrete box culverts shall be used for drainage crossings other than the Gila River and irrigation canals.

22. AZER shall ensure that erosion control measures for culvert crossings shall remain in place until the construction process is completed and the immediate area has been stabilized with a non-erosive cover.

23. For wells located within the proposed right-of-way but outside the grading limits, AZER shall cap or otherwise close the wells in accordance with state regulations.

Vegetation Control and Herbicide Spraying

24. AZER shall require that appropriate vegetation control measures are followed and that herbicides applied during right-of-way vegetation control procedures are approved by the U.S. Environmental Protection Agency for such purposes.

25. AZER shall ensure that the company conducting vegetation control is appropriately licensed.

26. AZER shall require that herbicide spraying not be undertaken on days with high winds and that, on marginally windy days, an additive may be used to minimize any potential unwanted overspray.

Geology and Soils

27. AZER shall vegetate/reclaim disturbed areas as soon as practicable after project related construction ends along a particular stretch of rail line. The goal of the reclamation shall be the permanent (re)establishment of native ground cover on disturbed areas.

28. AZER shall conduct a preconstruction survey of the area to identify areas that have a history of landslides. Project plans shall be revised to incorporate features in appropriate locations to reduce the potential for landslides to impede operations at various points of the rail line.

29. AZER shall ensure that for the duration of trenching activities, all excavations are safely sloped and/or include an adequately constructed and braced shoring system, in compliance with Occupational Safety and Health Administration regulations for employees working in an excavation that may expose employees to the danger of moving ground. If material is stored or equipment is operated near an excavation, stronger shoring shall be used to resist the extra pressure due to superimposed loads.

30. Prior to construction, AZER shall consult with utility companies in the project area to determine the location of any surface or subsurface utilities existing in the project area. AZER shall then document (with photographs, video, official documentation, etc.) the pre-construction condition of all such utilities that may be impacted by construction of the proposed rail line.

Hazardous Materials

31. Prior to initiating any project-related construction activities, AZER shall develop a spill prevention plan for hazardous materials for the construction and operation of the rail line. At a minimum, the spill prevention plan shall address the following items:

- the definition of what constitutes a reportable spill;
- the requirements and procedures for reporting spills to appropriate government agencies;
- the methods for containing, recovering, and cleaning up spilled material;
- the equipment available to respond to spills and the location of such equipment;
- the training of personnel and training records; and
- a list of government agencies and AZER personnel to be contacted in the event of a spill.

32. In the event that construction activities encroach upon abandoned fire/trash pits, abandoned septic tanks, abandoned wells, and areas where spent ammunition from the firing range is found at or near the top of the ground surface, AZER shall provide appropriate corrective action. Corrective actions for these matters shall include abandoning wells in accordance with Arizona Department of Water Resources guidance, removal and landfilling of trash from trash pits (and backfilling as appropriate), and abandoning septic systems in accordance with county or other applicable regulations.

Air Quality

33. AZER shall implement standard construction mitigation measures (best management practices) to reduce fugitive dust emissions during construction. These mitigation strategies include watering all active construction areas (including unpaved access roads and parking and storage areas) at least twice daily; covering all trucks hauling soil, sand, and other loose materials; and applying soil binders on unpaved roads and employee/equipment parking areas.

Biological Resources

34. AZER shall comply with all measures required by USFWS during the section 7 consultation process of the Endangered Species Act, including all measures within the Final USFWS Biological Opinion (see Appendix C of the Post EA).

35. AZER shall coordinate with the Corps regarding possible section 404 of the Clean Water Act permitting requirements.

36. In order to mitigate impacts to designated critical habitats, AZER shall ensure equipment staging and storage areas are situated outside of the river bed. Additionally, all construction equipment shall be removed from the river channel prior to onset of storm events.

37. AZER shall notify the Arizona Department of Agriculture 20 to 60 days prior to plant destruction to allow for the opportunity to salvage native vegetation. The Arizona Native Plant Law prevents the sale and transport of native vegetation without first obtaining a permit from Arizona Department of Agriculture. Those salvaging the plants shall obtain the necessary salvage permit.