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SERVICE DATE – DECEMBER 19, 2011

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 6 (Sub-No. 478X)

BNSF RAILWAY COMPANY—ABANDONMENT
EXEMPTION—IN CASS COUNTY, N.D.

Decided: December 16, 2011

BNSF Railway Company (BNSF) filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon 7.40 miles of rail line extending between milepost 68.10 at Arthur and milepost 75.50 at Hunter, in Cass County, N.D. Notice of the exemption was served and published in the Federal Register on November 22, 2011 (76 Fed. Reg. 72,241). The exemption is scheduled to become effective on December 22, 2011.

The Board's Office of Environmental Analysis (OEA) served an environmental assessment (EA) in this proceeding on November 25, 2011. In the EA, OEA states that the U.S. Environmental Protection Agency, Region 8, has submitted comments stating that a permit under Section 402 of the Clean Water Act, 33 U.S.C. § 1342, would be required from the North Dakota Department of Health (NDDOH) if construction activities would disturb one or more acres. Therefore, OEA recommends that, prior to beginning any salvage activities, BNSF be required to consult with NDDOH, Division of Water Quality, to identify any permitting requirements under Section 402 of the Clean Water Act.

OEA notes that the National Geodetic Survey (NGS) has identified one geodetic station marker in the area of the proposed abandonment. Accordingly, OEA recommends that BNSF be required to consult with NGS and notify NGS at least 90 days prior to beginning salvage activities that could disturb or destroy any geodetic station marker.

In its final EA dated December 15, 2011, OEA states that, as a result of the comments received, the conclusions and the recommended environmental conditions in the EA remain unchanged. Therefore, OEA recommends that the conditions previously recommended in the EA be imposed upon any decision granting abandonment authority.

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 December 2, 2011, the City of Arthur Park Board and the City of Hunter Park Board (the Cities) jointly filed a request for the issuance of a notice of interim trail use (NITU) for the entire 7.40-mile line of railroad 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. The Cities have also submitted a statement of willingness to assume full financial responsibility for the management of, for any legal liability

arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way, as required under 49 C.F.R. § 1152.29, and have acknowledged that the use of the right-of-way for trail purposes is subject to the user's continuing to meet its responsibilities described above and subject to possible future reconstruction and reactivation of the right-of-way for rail service. In a response filed on December 13, 2011, BNSF states that it does not object to the issuance of a NITU for the 7.40-mile rail line.

Because the Cities' request complies with the requirements of 49 C.F.R. § 1152.29, and BNSF is willing to negotiate with the Cities for trail use, a NITU will be issued to the Cities. The parties may negotiate an agreement during the 180-day period prescribed below. If the parties reach a mutually acceptable final agreement, no further Board action is necessary. If no agreement is reached within 180 days, BNSF may fully abandon the line, subject to any outstanding conditions. See 49 C.F.R. § 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to any future use of the property for restoration of railroad operations.

The Cities also have requested the imposition of a public use condition under 49 U.S.C. § 10905 for the 7.40-mile line. The Cities request that BNSF be prohibited from disposing of the corridor, other than the 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. The Cities state that the 180-day period is needed to prepare a trail plan and to negotiate with BNSF on the terms and conditions of interim trail use.

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—Supplemental Trails Act Procedures, 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 Cities have satisfied these requirements, a 180-day public use condition will be imposed, requiring BNSF 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 December 22, 2011 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 both conditions will be imposed at this time, the public use condition will expire on June 19, 2012, while the trail use negotiating period will run 180 days from the service date of this decision and notice (until June 16, 2012). If a trail use agreement is reached on a

portion of the right-of-way prior to June 19, 2012, BNSF must keep the remaining right-of-way intact for the remainder of the 180-day 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, BNSF is not required to deal exclusively with the Cities, but may engage in negotiations with other interested persons.

As conditioned, this decision and notice 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. Upon reconsideration, the notice served and published in the Federal Register on November 22, 2011, exempting the abandonment of the line described above, is modified to the extent necessary: (1) to implement interim trail use/rail banking as set forth below to permit the Cities to negotiate with BNSF for trail use for a period of 180 days from the service date of this decision and notice (until June 16, 2012); (2) to permit public use negotiations as set forth below, for a period of 180 days commencing from the December 22, 2011 effective date of the exemption (until June 19, 2012). It is also subject to the conditions that BNSF shall: (1) prior to beginning any salvage activities, consult with NDDOH, Division of Water Quality, to identify any permitting requirements under Section 402 of the Clean Water Act; and (2) consult with NGS and notify NGS at least 90 days prior to beginning salvage activities that could disturb or destroy any geodetic station marker.
3. Consistent with the public use and interim trail use/rail banking conditions imposed in this decision and notice, BNSF may discontinue service over the line. BNSF shall keep intact the right-of-way, including potential trail-related structures, such as bridges, trestles, culverts and tunnels, and shall refrain from disposing of the corridor (other than the 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 right-of-way for public use. If an interim trail use/rail banking agreement is executed before expiration of the 180-day period, the public use condition will expire to the extent the trail use/rail banking agreement covers the same portion of the line.
4. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the owner against any potential liability), and for 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 any future use of the property for restoration of railroad operations and to the user's continuing to meet the financial obligations for the right-of-way.

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

7. If an agreement for interim trail use/rail banking is reached by June 16, 2012, interim trail use may be implemented. If no agreement is reached by that time, BNSF may fully abandon the line, after the conditions imposed in this proceeding are met. See 49 C.F.R. § 1152.29(d)(1).

8. This decision and notice is effective on its date of service.

By the Board, Joseph H. Dettmar, Acting Director, Office of Proceedings.