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SERVICE DATE - LATE RELEASE OCTOBER 16, 1998

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-547X

ROARING FORK RAILROAD HOLDING AUTHORITY--ABANDONMENT EXEMPTION--  
IN GARFIELD, EAGLE AND PITKIN COUNTIES, CO

Decided: October 15, 1998

By petition filed June 30, 1998,<sup>1</sup> Roaring Fork Railroad Holding Authority (RFRHA) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon its 33.44-mile line of railroad known as the Aspen Branch, extending from milepost 360.22 near Glenwood Springs to the end of the line at milepost 393.66 near Woody Creek, in Garfield, Eagle and Pitkin Counties, CO. RFRHA also seeks to be exempted from the offer of financial assistance (OFA) requirements of 49 U.S.C. 10904 and the public use requirements of 49 U.S.C. 10905. A request for issuance of a notice of interim trail use (NITU) was filed by RFRHA in order to rail bank the right-of-way in its own name. The Board of County Commissioners of Garfield County, CO (Garfield County Commissioners), filed a response to the petition and request for rail banking.<sup>2</sup> We will grant the exemption, subject to a NITU, an historic preservation condition, an environmental condition and standard employee protective conditions.

BACKGROUND

RFRHA is a Colorado inter-governmental entity consisting of Eagle and Pitkin Counties, and the Cities of Aspen, Snowmass, Carbondale, Basalt, and Glenwood Springs. According to RFRHA, it was formed to acquire the rail line in question in order to ensure its preservation for rail and other compatible public purposes.<sup>3</sup> A comprehensive plan for the property is to be developed and approved by the RFRHA Board of Directors. The plan will include a listing and description of possible uses for the property, which may include public trail use, as well as a public transportation system and/or access to public lands. In addition, RFRHA intends to implement an interim plan, which would use the rail corridor for a temporary trail.

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<sup>1</sup> Notice of the filing was served and published in the Federal Register on July 20, 1998 (63 FR 38878).

<sup>2</sup> In addition, Garfield County Commissioners filed a further objection to the petition by facsimile (fax) received October 12, 1998.

<sup>3</sup> See Roaring Fork Railroad Holding Authority--Acquisition and Operation Exemption--Southern Pacific Transportation Company, STB Finance Docket No. 33390 (STB served July 21, 1997).

Historically, the line had been used to transport various metal ores, hay, and agricultural products. In 1980, the portion of the line between Carbondale, CO, and Woody Creek was embargoed. The last major shipper on the Glenwood Springs to Carbondale segment, Mid-Continent Resources, ceased shipping coal in 1990, and subsequently sold its facilities. There are two remaining shippers, GMCO at Carbondale, and Orrison Distributing (Orrison) at Glenwood Springs. According to RFRHA, GMCO's and Orrison's shipments on the line consisted of 19 carloads and 1 carload, respectively, in 1996, and 1 carload and 3 carloads, respectively, in 1997. When it acquired the line in 1997, for \$8.5 million,<sup>4</sup> RFRHA states that it paid in excess of \$6,000 for insurance, equipment, and staff to move 1 carload of beer approximately 4 miles to Orrison's facility. RFRHA contends that it is clearly not economical to operate the line for such a small number of carloads per year.

RFRHA states that, in an effort to stimulate traffic, it sought proposals from the short-line industry to operate the line. According to RFRHA, it proposed to provide the rail and land without charge, but no one was interested without a subsidy for freight operations.<sup>5</sup> RFRHA states that it is actively seeking substantial federal financial assistance to reconstruct and rehabilitate the entire line for passenger rail purposes. If the line is rehabilitated, RFRHA expects again to attempt to restore freight rail service.<sup>6</sup> In the meantime, RFRHA desires to preserve the line through a NITU that would permit rail banking and interim trail use.

Included in its petition is RFRHA's statement of willingness to assume full responsibility for the management and use of the right-of-way and for the payment of taxes and other liabilities in accordance with 49 CFR 1152.29. RFRHA acknowledges that use of the right-of-way as a trail is subject to future reconstruction and reactivation for rail service.

In requesting an exemption from the OFA and public use provisions of the statute, RFRHA argues that the line is needed for a variety of public purposes. RFRHA points out that the property

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<sup>4</sup> According to RFRHA, the appraised value of the underlying real estate exceeds that amount and the estimated value of the heavy steel rail between Carbondale and Glenwood Springs exceeds \$1 million.

<sup>5</sup> RFRHA contends that the estimated subsidy required from RFRHA to continue to provide freight rail service on the line exceeds \$40,000 per year.

<sup>6</sup> In their fax, Garfield County Commissioners state that they do not believe that RFRHA intends to reestablish freight service. They base this opinion on the asserted lack of funds in RFRHA's 1999 budget for the establishment of freight service and RFRHA's failure to undertake and complete negotiations with potential freight users.

currently is being used by the public as an informal trail<sup>7</sup> and, that given the de minimis level of rail shipper interest, is not currently needed for rail freight purposes. In addition to developing the corridor for transit purposes, RFRHA notes that the Colorado Department of Transportation (CDOT) wishes to repair the Wingo Junction,<sup>8</sup> which will be facilitated if the line is temporarily severed at that point. RFRHA states that CDOT supports the relief sought in the petition and desires to commence construction of the Wingo Junction project immediately.

#### DISCUSSION AND CONCLUSIONS

Abandonment Exemption. Under 49 U.S.C. 10903, a rail line may not be abandoned without our prior approval. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will also foster sound economic conditions and encourage efficient management by relieving RFRHA of the cost of rehabilitating this line [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be affected adversely.

Regulation of the transaction does not appear to be necessary to protect shippers from an abuse of market power.<sup>9</sup> Nevertheless, to ensure that the shippers are informed of our action, we will require RFRHA to serve a copy of this decision on GMCO and Orrison within 5 days of the service date of this decision and certify to us that it has done so.

Labor Protection. Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, we will impose the employee protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979).

Environmental Conditions. RFRHA has submitted an environmental report with its petition and has notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed action. See 49 CFR

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<sup>7</sup> According to RFRHA, Pitkin County plans to develop a trail from Woody Creek to Aspen.

<sup>8</sup> Presumably Wingo Junction is located on the Aspen Branch near Wingo, CO.

<sup>9</sup> Given our market power finding, we need not determine whether the proposed abandonment is limited in scope.

1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment. SEA served an environmental assessment (EA) on September 3, 1998. In the EA, SEA indicated that the U.S. Department of Commerce, National Geodetic Survey (NGS), has identified 19 geodetic station markers that could be affected by the proposed abandonment. Accordingly, SEA recommends that a condition be imposed requiring RFRHA to notify NGS at least 90 days prior to any salvage activities that may disturb or destroy these geodetic markers so that plans can be made for their relocation. SEA also notes that the Colorado Historical Society (CHS) has determined that segments of the line are eligible for inclusion in the National Register of Historic Places. Therefore, SEA recommends that a condition be imposed requiring RFRHA to retain its interest in and take no steps to alter the historic integrity of the line in its entirety until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f, in consultation with the CHS and CDOT, and to notify SEA in writing when that process is completed.

Comments in response to the EA were filed by Garfield County Commissioners and were considered by SEA. We will impose the conditions recommended by SEA. Based on SEA's recommendations, we conclude that the proposed abandonment, as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

SEA states that, following the line's abandonment, the right-of-way may be suitable for other public use under 49 U.S.C. 10905. Requests for a public use condition were due August 10, 1998. No one has sought a public use condition, and none will be imposed.<sup>10</sup>

Trail Use. As previously noted, RFRHA seeks to rail bank the line in its own name<sup>11</sup> and has submitted a statement of willingness to assume financial responsibility for the right-of-way, acknowledging that use of the right-of-way is subject to possible future reconstruction and reactivation for rail service as required under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act) and 49 CFR 1152.29. Inasmuch as the requirements of the Trails Act and 49 CFR 1152.29 have been met, we will issue a NITU permitting interim trail use and rail banking for the described line.

Garfield County Commissioners, in their response to the request for a NITU, ask that we include a condition in the NITU requiring RFRHA to adhere to certain commitments that it made with respect to rail banking the line. These commitments are memorialized in a letter from RFRHA

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<sup>10</sup> This moots RFRHA's request for an exemption from 49 U.S.C. 10905.

<sup>11</sup> The Interstate Commerce Commission permitted a railroad to rail bank its own lines where the railroad represented that the property is suitable for interim trail use and that it would assume financial responsibility for the line. See Dallas Area Rapid Transit--Abandonment Exemption--In Dallas County, TX, Docket No. AB-439X (ICC served July 3, 1995).

to Garfield County Commissioners dated July 14, 1998, which has been supplied to us. However, under the Trails Act, trail use/rail banking is voluntary and our role is ministerial. Accordingly, we will not impose Garfield County Commissioners' requested condition. In any event, such a condition appears unnecessary because RFRHA has agreed to abide by its commitments.

Other Requests. RFRHA's request for exemption from the OFA provisions of 49 U.S.C. 10904 will be denied. Exemption from these provisions are only rarely granted (i.e., there must be a compelling need to use the property for a valid public purpose and no overriding public need for continued rail service. See, e.g., Norfolk and Western Railway Company--Abandonment Exemption--In Cincinnati, Hamilton County, OH, STB Docket No. AB-290 (Sub-No. 184X), slip op. at 11 (STB served May 13, 1998). Here, while there is minimal traffic on the line, there are active shippers, and RFRHA has stated its desire for rail service to continue. While RFRHA has proposed interim trail use until service can be restored for passenger and/or freight operations, Congress in section 10904 has established a procedure to address the need for continued rail service when a carrier is authorized to abandon a line. It would be inappropriate for us to subordinate that process to a private agreement simply because interested parties find it preferable to use such a mechanism. Under section 10904, "any" financially responsible person has the right to offer financial assistance to avoid abandonment or discontinuance.<sup>12</sup> Moreover, the statute specifically contemplates that multiple offers to subsidize or purchase a rail line may be made. Accordingly, we find that RFRHA has failed to support its request for an exemption from the OFA provisions.

RFRHA should note that its trail use could be delayed, or even foreclosed, by the financial assistance process. If an OFA is timely filed under 49 CFR 1152.27(c)(1), the effective date of this decision and notice will be postponed beyond the effective date indicated here. See 49 CFR 1152.27(e)(2). In addition, the effective date may be further postponed at later stages in the OFA process. See 49 CFR 1152.27(f). Finally, if the line is sold under the OFA procedures, the petition for abandonment exemption will be dismissed and trail use precluded. Alternatively, if a sale under the OFA procedures does not occur, trail use may proceed.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903 the abandonment of the above-described line, subject to a NITU permitting interim trail use/rail banking of the line, the employee protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979), and the conditions that RFRHA shall: (1) notify NGS at least 90 days prior to any salvage activities that may disturb or destroy any geodetic markers so that plans can be made for their relocation; and (2) retain its interest in and take no steps to alter the historic integrity of the line in its entirety until completion of the section 106 process of

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<sup>12</sup> In fact, by letter filed September 22, 1998, the Avalanche Creek Marble and Alabaster, LLC has indicated interest in subsidizing the line.

the National Historic Preservation Act, 16 U.S.C. 470f, in consultation with CHS and CDOT, and notify SEA in writing when the process is completed.

2. RFRHA must serve a copy of this decision on GMCO and Orrison within 5 days after the service date of this decision and certify to the Board that it has done so.

3. The trail sponsor must assume full responsibility for management of, for any legal liability arising out of the transfer or use of, and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.

4. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.

5. If the trail sponsor intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specific date.

6. Petitioner's request for an exemption from the OFA provisions of 49 U.S.C. 10904 is denied. An OFA under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by October 26, 1998, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by a \$1,000 filing fee. See 49 CFR 1002.2(f)(25).

7. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: "**Office of Proceedings, AB-OFA.**"

8. Provided no OFA has been received, this exemption will be effective on November 15, 1998. Petitions to stay must be filed by November 2, 1998. Petitions to reopen must be filed by November 10, 1998.

9. Pursuant to the provisions of 49 CFR 1152.29(e)(2), RFRHA shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by RFRHA's filing of a notice of consummation by October 16, 1999, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier

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to consummation exists at the end of the 1-year period, the notice of consummation must be filed not later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary