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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-33 (Sub-No. 132X)

UNION PACIFIC RAILROAD COMPANY--ABANDONMENT  
EXEMPTION--IN RIO GRANDE AND MINERAL COUNTIES, CO

Decided: February 23, 1999

Union Pacific Railroad Company (UP) filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments and Discontinuance of Service and Trackage Rights to abandon and discontinue service over a 21.6-mile line of railroad known as the Creede Branch, extending from milepost 299.3 near Derrick to the end of the line at milepost 320.9 at Creede, in Rio Grande and Mineral Counties, CO. Notice of the exemption was served and published in the Federal Register on January 25, 1999 (64 FR 3740-41). Under 49 CFR 1152.50(d)(3), the exemption was scheduled to become effective on February 24, 1999, but formal expressions of intent to file an offer of financial assistance (OFA) were timely filed by the February 4, 1999 due date by the Denver & Rio Grande Railway Historical Foundation (DRG Historical Foundation) (to purchase or to acquire by donation the entire line), by South Fork-Creede Railway Corridor Preservation, Group Inc. (SFCR) (to purchase the entire line), and by the Rio Grande & San Juan Railroad Co. (RG&SJ) (to purchase the entire line). These filings automatically stayed the effective date of the exemption until March 6, 1999.

SFCR and RG&SJ also requested UP to provide the financial data and information prescribed in 49 CFR 1152.27(a). On February 4, 1999, and February 19, 1999, RG&SJ and SFCR, respectively, filed petitions to toll the 30-day period for submitting their OFAs. They state that counsel for UP has advised that the required information will not be available until March 12, 1999. Because prospective offerors need additional time to obtain necessary information from UP, the requests of SFCR and RG&SJ will be granted. As a result, OFAs will be due on March 26, 1999, and the effective date of the exemption will be extended to April 5, 1999.

On February 19, 1999, Bill R. Woods (Woods) late-filed a formal expression of intent to file an OFA. Woods also requested that the OFA period be tolled for 30 days. While Woods' notice of intent was not filed on time and he is thus not entitled to relief in his own right, the March 26, 1999 due date for OFAs applies to all prospective offerors, including Woods and DRG Historical Foundation.

The Board's Section of Environmental Analysis (SEA) served an environmental assessment (EA) in this proceeding on January 29, 1999, preliminarily concluding that, as currently proposed, abandonment of the line will not significantly affect the quality of the human environment.

In the EA, SEA states that the Colorado Historical Society has determined that the entire line, including six bridges, is eligible for inclusion in the National Register of Historic Places and

that the effects of the abandonment must be determined. Therefore, SEA recommends that a condition be imposed requiring UP 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.

SEA also indicates that the U.S. Department of the Army, Albuquerque District, Corps of Engineers (Corps), has indicated that, if the abandonment requires removal of bridges, a Department of the Army Permit will be required. Therefore, SEA recommends that UP be required to consult with the Corps' Albuquerque District, prior to salvaging the right-of-way to determine if permits are required under section 404 of the Clean Water Act, 33 U.S.C. 1344.

The Colorado Department of Public Health and Environment, Hazardous Materials and Waste Management Division (Department) states that the railroad right-of-way passes close to, and possibly through, mine waste materials, which may be characterized as hazardous waste or hazardous substances. The Creede Mining District, which includes areas along Willow Creek (Creek) between Creede and the Rio Grande River, has been the subject of a Preliminary Assessment and Site Inspection investigation. This investigation has been performed by the Colorado Department of Public Health & Environment under a cooperative agreement with the U.S. Environmental Protection Agency (EPA) in compliance with the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) (Superfund) pre-remedial site assessment activity, 26 U.S.C. 4611-4682. The Department also states that the flood plain deposits along the Creek between Creede and the confluence with the Rio Grande River are thought to contain elevated metal concentrations and are a continuing source of metal contamination to the Creek. On February 9, 1999, the Willow Creek Reclamation Committee (Committee) filed a comment stating that the EPA, as a result of a preliminary hazard ranking, has qualified the right-of-way for placement on the National Priorities List as a Superfund Site. The Committee also recommended that UP be required to comply with the Clean Water Act and regulations under the Colorado Department of Public Health and Environment. Therefore, SEA recommends that UP be required to consult with the Department in Grand Junction, CO, prior to salvage operations, and to report the results of its consultation to SEA.

Additionally, on February 8, 1999, the Colorado Department of Natural Resources, Division of Wildlife (DNR) filed a motion raising several environmental issues concerning future use of the right-of-way for public use and a tourist train, specifically use of chemical herbicides to control vegetation in close proximity to tourist trains. DNR also states that tourist trains would be powered with an historical coal-fired engine that could impact wildlife, especially wintering and migrating elk, deer and big horn sheep. Finally, DNR states that a trail would cause numerous direct and indirect conflicts with existing fishing and hunting use of the Division's Wildlife's Collier State Wildlife area, National Forest and some private lands. Because the Board's role is strictly ministerial in administering the National Trails System Act, 16 U.S.C. 1247 (Trails Act), and imposing public use conditions and offers of financial assistance, the requirements of the National Environmental Policy Act (NEPA) are not triggered. The Board exercises no discretion in these instances. Therefore, there is no federal undertaking under NEPA. Consequently, the Board does

not assess the potential environmental impacts of subsequent reuse of a rail line following abandonment. See Goos v. ICC, 911 F.2d 1283 (8th Cir. 1990). The Board does evaluate potential environmental impacts of discontinuance of service over the line, if appropriate, and salvage activities.

On February 16, 1999, the USDA Forest Service (Forest Service) filed a comment requesting the following conditions: (a) all hazardous materials, including materials with elevated metal concentrations are to be removed from the National Forest (Forest) and properly disposed of; (b) during salvage operations, the stream channels on the Forest are to be fully protected by preventing the discharge of material from entering the stream channels. Stream channels are to look and function like the natural channel above the disturbed area; (c) prior to salvage operations work through Palisade Campground (campground), UP must notify the Forest Service at least one or two days prior, so that the campers are notified; and (d) the removal of tracks and ties from the campground entrance road, will require that the length and width of the roadbed be filled with road base, to the original road level. SEA recommends that the salvage conditions be imposed.

SEA also indicates that the right-of-way may be suitable for other public use following abandonment. On February 5, 1999, Representatives of Colorado States Parks (CSP) timely filed a request for issuance of a notice of interim trail use (NITU) under the Trails Act and for a public use condition under 49 U.S.C. 10905, in order to negotiate with UP for acquisition of the right-of-way for use as a trail.

CSP requests that UP be barred from disposing of the real estate, bridges, culverts and roadbed, for a 180-day period from the effective date of abandonment exemption. CSP submitted a statement of willingness to assume financial responsibility for interim trail use and rail banking in compliance with 49 CFR 1152.29, and acknowledged that the use of the right-of-way for trail purposes is subject to future reactivation for rail service. CSP states that it needs the full 180-day period because of the OFA filings and that discussions with UP are unlikely to begin until after the OFA process has been completed. By facsimile dated February 17, 1999, UP stated that it is agreeable to entering into negotiations for a NITU, subject to possible conveyance of the rail line pursuant to a successful OFA to continue rail service.

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 Abandonments--Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986). Under section 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 CFR 1152.28(a)(2). CSP has satisfied the requirements for both a public use condition and a NITU and,

therefore, imposition of both would be appropriate, commencing with the effective date of the exemption. However, an OFA takes priority over any requests for a NITU or for a public use condition. Therefore, issuance and effectiveness of a NITU and a public use condition will be delayed until the OFA process has been completed. If agreement is reached on sale or subsidy of the line, public use and trail use conditions would be unnecessary and unavailable. If no OFA is filed or if no agreement is reached on the OFA, the appropriate decision and notice of interim trail use or abandonment will be issued.

This decision 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. DNR's comment will be accepted into the record and placed in the public docket.
3. Upon reconsideration, the exemption of the abandonment of the rail line described above is subject to the conditions that UP: (a) retain its interest in and take no steps to alter the historic integrity of the line in its entirety until completion of the 106 process of the National Historic Preservation Act, 16 U.S.C. 470f; (b) consult with the Army Corps of Engineers, Albuquerque District, prior to salvaging the right-of-way to determine if permits are required under section 404 of the Clear Water Act, 33 U.S.C. 2344; (c) consult with the Colorado Department of Public Health and Environment, Hazardous Materials Waste and Management Division, Grand Junction, CO, prior to salvage operations and report the results of consultation to SEA; and (d) comply with the recommendations of the USDA Forest Service.
4. The requests for issuance of a notice of interim trail use and for issuance of a public use condition are held in abeyance pending completion of the OFA process.
5. If the OFA process terminates, a decision effective on its service date will be issued to issue the notice of interim trail use and impose the public use condition.
6. The time for offerors to file an offer of financial assistance is tolled until March 26, 1999, and the effective date of the exemption is further postponed until April 5, 1999.
7. This decision is effective on its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams  
Secretary