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SERVICE DATE—LATE RELEASE OCTOBER 31, 2011

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 6 (Sub-No. 474X)

BNSF RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN WASHINGTON
COUNTY, MINN.

Decided: October 31, 2011

This decision issues a notice of interim trail use (NITU) and imposes a public use condition.

BNSF Railway Company (BNSF) filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon a 0.51-mile line of railroad between milepost 15.59 and milepost 16.10 in Washington County, Minn. Notice of the exemption was served and published in the Federal Register on July 14, 2011 (76 Fed. Reg. 41,558-59) (July 14 notice). The exemption became effective on August 13, 2011.

The Board's Office of Environmental Analysis (OEA) served an environmental assessment (EA) on July 19, 2011, recommending that no environmental conditions be imposed on any decision granting abandonment authority. By decision served on August 11, 2011, a Finding of No Significant Impact under 49 C.F.R. § 1105.10(g) was made pursuant to 49 C.F.R. § 1011.7(a)(2)(ix).

On October 3, 2011, Washington County, Minn. (the County), late filed a request for issuance of a NITU for the line under the National Trails System Act, 16 U.S.C. § 1247(d) (Trails Act), and 49 C.F.R. § 1152.29, and for a public use condition under 49 U.S.C. § 10905, to negotiate with BNSF for acquisition of the right-of-way (ROW) for other public use.¹

In support of its request for a NITU, the County submitted a statement of willingness to assume full financial responsibility for the management of, for any legal liability arising out of

¹ In the EA, OEA indicated that the ROW may be suitable for other public use following abandonment. The July 14 notice provided that trail use/rail banking requests were to be filed by July 25, 2011, and that requests for public use conditions were to be filed by August 3, 2011. However, in Abandonment & Discontinuance Of Rail Lines & Transportation Under 49 U.S.C. § 10903, 1 S.T.B. 894 (1996) and 2 S.T.B. 311 (1997), the Board retained the policy of accepting filings after the due date when good cause is shown. Because there is no indication that the County's late-filed request will prejudice any party, it will be accepted. See Wheeling & Lake Erie Ry.—Aban. Exemption—in Starke Cnty., Ohio, AB 227 (Sub-No. 10X), slip op. at 1 n.1 (STB served Nov. 7, 1997).

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 ROW, as required at 49 C.F.R. § 1152.29, and acknowledged that the use of the ROW for trail purposes is subject to possible future reconstruction and reactivation of the line for rail service. In a letter filed on October 4, 2011, BNSF states that it does not object to the issuance of a NITU.

Because the County's request complies with the requirements of 49 C.F.R. § 1152.29 and BNSF is willing to negotiate with the County for trail use, a NITU will be issued. 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. See 49 C.F.R. § 1152.29(d)(1). Use of the ROW for trail purposes is subject to any future use of the property for restoration of railroad operations.

The County also has requested imposition of a public use condition for the line pursuant to 49 U.S.C. § 10905. 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. The County's justification for the 180-day period is that the corridor is a logical extension of the County Rail Authority's existing rail corridor property immediately to the north of the abandoned ROW and that the corridor would make an excellent recreational trail and would preserve the ROW for future transit use, in accordance with longstanding local plans. The County states that the time period is needed to assemble and review title information, perform an appraisal, and commence 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 Aban.—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: (1) the condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) justification for the imposition of the period of time requested. See 49 C.F.R. § 1152.28(a)(2). Because the County has met 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 August 13, 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 February 9, 2012, while the trail use negotiating period will run 180 days from the service date of this decision and notice (until April 28, 2012). If a trail use agreement is reached on a portion of the ROW prior to February 9, 2012, BNSF must keep the remaining ROW intact for the remainder of the 180-day public use 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 ROW 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 County, 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. The County's late-filed request for a NITU under 16 U.S.C. § 1247(d) and the imposition of a public use condition under 49 U.S.C. § 10905 is granted.
3. Upon reconsideration, the July 14 notice 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 BNSF to negotiate with the County for trail use for a period of 180 days from the service date of this decision and notice (until April 28, 2012); and (2) to permit public use negotiations as set forth below for a period of 180 days commencing from the August 13, 2011 effective date of the exemption (until February 9, 2012) to enable any state or local government agency or other interested person to negotiate the acquisition of the line for public use.
4. Consistent with the public use and interim trail use/rail banking conditions imposed in this decision and notice, BNSF may discontinue service and salvage track and related materials. 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 commencing from the August 13, 2011 effective date of the exemption (until February 9, 2012) to enable any state or local government agency, or other interested person, to negotiate the acquisition of the line 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.

5. 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 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 ROW.

6. 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 ROW.

7. If interim trail use is implemented and subsequently the user 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 specified date.

8. If an agreement for interim trail use/rail banking is reached by April 28, 2012, interim trail use may be implemented. If no agreement is reached by that time, BNSF may fully abandon the line. See 49 C.F.R. § 1152.29(d)(1).

9. This decision is effective on its service date.

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