

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 1068 (Sub-No. 1X)

MISSOURI CENTRAL RAILROAD COMPANY—ABANDONMENT EXEMPTION—IN  
CASS, HENRY, JOHNSON, AND PETTIS COUNTIES, MO.

Decided: July 8, 2013

Missouri Central Railroad Company (MCRR) filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon approximately 42 miles of rail line between milepost 257.283 near Wingate, in Cass County, Mo., and milepost 215.325 near Windsor, in Pettis County, Mo.<sup>1</sup> Notice of the exemption was served and published in the Federal Register on June 7, 2013 (78 Fed. Reg. 34,428). The exemption is scheduled to become effective on July 9, 2013.

The Board's Office of Environmental Analysis (OEA) served an environmental assessment (EA) in this proceeding on June 14, 2013. In the EA, OEA states that the U.S. Fish and Wildlife Service (USFWS) initially commented that no federally listed species, candidate species, or designated critical habitats were known to exist within the project area. USFWS has since determined that the Indiana bat, a federally listed endangered species, may now occur in the project area. While no Indiana bats or threatened or other endangered species have been observed to date, four areas of potential Indiana bat habitat were observed in the project corridor. USFWS believes that more information is warranted and seeks input from OEA through the Section 7 process of the Endangered Species Act. OEA has acknowledged USFWS' request, and, in a letter to USFWS dated May 2, 2013, OEA designated MCRR and their representatives as "non-federal representatives" for purposes of Section 7 consultation. MCRR is authorized to conduct informal consultations with USFWS, prepare a biological assessment, and/or provide information for a formal consultation, pursuant to the interagency regulations at 50 C.F.R. § 402.8. MCRR may also contact and work with the appropriate USFWS office to ensure that any effects on federally listed or proposed threatened or endangered species or their critical habitats are identified and evaluated during the Board's environmental review process. Accordingly, OEA recommends that a condition be imposed precluding MCRR from initiating salvage activities (including removal of tracks and ties) and/or filing its notice of consummation until OEA and USFWS have completed the Section 7 consultation process.

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<sup>1</sup> Central Midland Railway Company (CMR) joined in filing this notice of exemption to obtain Board authorization to discontinue service over the same line. Central Midland Ry., Co.—Discontinuance of Service Exemption—in Cass, Henry, Johnson, and Pettis Counties, Mo., AB 1070 (Sub-No. 1X).

OEA states that the National Geodetic Survey (NGS) initially commented that 12 geodetic survey markers were located inside the right-of-way. OEA states that this number has since been reduced to four survey markers inside the right-of-way and one survey marker outside the right-of-way. NGS notes that the marker outside the right-of-way (NGS Point JD 1933) is located approximately 15 feet from the right-of-way near the Highway 52 crossing near Windsor, and may be disturbed during salvage activities. NGS does not believe that any of the markers inside the right-of-way would be disturbed during salvage, but requests that it be notified as to the marker outside the right-of-way. Accordingly, OEA recommends that a condition be imposed requiring MCRR to notify NGS at least 90 days prior to beginning any salvage activities that would disturb or destroy any geodetic station markers.

Additionally, OEA states that MCRR submitted its historic report to the Missouri Department of Natural Resources State Historic Preservation Office (SHPO), as required by 49 C.F.R. § 1105.8. OEA notes that the line is part of the former Rock Island Line which became the first rail line to connect Chicago, Ill., with the Mississippi River, and is significant in Missouri railroad history because the Rock Island Railroad acquired the St. Louis, Kansas City & Colorado Railroad Line as part of a plan to connect Kansas City, Mo., with St. Louis, Mo. As a result, the SHPO submitted comments stating that the rail corridor, bridges, and culverts are eligible for inclusion in the National Register of Historic Places (National Register), and that its determination potentially includes other rail related properties, such as the three Rock Island Lakes located in and near the project area. OEA states that MCRR has provided the SHPO's office with an inventory of all structures in the right-of-way and is working with the SHPO concerning any other documentation that may be needed. Accordingly, OEA recommends that a condition be imposed requiring MCRR to retain its interest in and take no steps to alter the historic integrity of all historic properties, including sites, buildings, structures, and objects, within the project right-of-way that are eligible for listing or listed in the National Register until completion of the Section 106 process.

Comments to the EA were due July 1, 2013, but no comments were received. Accordingly, the conditions recommended by OEA in the EA will be imposed. Based on OEA's recommendation, the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

In the EA, OEA also stated that the right-of-way may be suitable for other public use following abandonment and salvage of the line. On June 14, 2013, the Missouri Department of Natural Resources (MDNR) filed a request for the issuance of a notice of interim trail use (NITU) to negotiate with MCRR for acquisition of the line for use as a trail under the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d), and 49 C.F.R. § 1152.29. Pursuant to 49 C.F.R. § 1152.29, MDNR has submitted a statement of its willingness to assume financial responsibility for the right-of-way, and has acknowledged that the use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service. By response filed on June 19, 2013, MCRR has indicated its willingness to negotiate with MDNR for interim trail use.

Because MDNR's request complies with the requirements of 49 C.F.R. § 1152.29 and MCRR is willing to negotiate for trail use, a NITU will be issued. The parties may negotiate an agreement for the right-of-way during the 180-day period prescribed below. If an interim trail use agreement is reached (and thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2) and (h); Nat'l Trails Sys. Act & R.R. Rights-of-Way, EP 702 (STB served Apr. 30, 2012). If no agreement is reached within 180 days, MCRR may fully abandon the line. 49 C.F.R. § 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service.

MDNR also has requested imposition of a public use condition under 49 U.S.C. § 10905 for the right-of-way. MDNR asks that MCRR be prohibited from disposing of the corridor, other than tracks, ties, and signal equipment, except for public use on reasonable terms, and that MCRR 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 authorization. MDNR's justification for its request is that these structures have considerable value for recreational trail purposes. MDNR states that the 180-day period is needed to complete a trail plan and to commence negotiations with MCRR.

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, 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. 49 C.F.R. § 1152.28(a)(2). Because MDNR has satisfied these requirements, a 180-day public use condition will be imposed, requiring MCRR 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 July 9, 2013 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 January 5, 2014, while the trail use negotiating period will run 180 days from the service date of this decision and notice, until January 4, 2014. If a trail use agreement is reached on a portion of the right-of-way prior to January 4, 2014, MCRR must keep the remaining right-of-way intact for the remainder of the 180-day public use condition 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, MCRR is not required to deal exclusively with MDNR, but may engage in negotiations with other interested persons.

As conditioned, this action 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 June 7, 2013, exempting the abandonment of the line described above is modified to the extent necessary to implement interim trail use/rail banking as set forth below to permit MDNR to negotiate with MCRR for trail use for the rail line, for a period of 180 days from the service date of this decision and notice, until January 4, 2014, and to permit public use negotiations as set forth below, for a period of 180 days commencing from the July 9, 2013 effective date of the exemption, until January 5, 2014. The abandonment is also subject to the conditions that: (1) pursuant to Section 7 of the Endangered Species Act, 16 U.S.C. § 1535, MCRR shall consult with OEA and USFWS to determine if the proposed abandonment would adversely impact the Indiana bat, a federally listed endangered species, or Indiana bat habitat. If the Indiana bat or Indiana bat habitat is located within the right-of-way, USFWS may recommend avoidance and impact measures in order to develop appropriate mitigation measures, if necessary. MCRR may not file its consummation notice or initiate any salvage activities related to abandonment (including removal of tracks and ties) until the Section 7 consultation process has been completed and the Board has removed the condition; (2) MCRR shall consult with NGS and notify NGS at least 90 days prior to beginning any salvage activities that could disturb or destroy any geodetic station markers; and (3) MCRR shall retain its interest in and take no steps to alter the historic integrity of all historic properties including sites, buildings, structures, and objects within the project right-of-way (the Area of Potential Effect) that are eligible for listing or listed in the National Register of Historic Places until the Section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f, has been completed. MCRR shall report to OEA regarding any consultations with the State Historic Preservation Office and the public. MCRR may not file its consummation notice or initiate any salvage activities related to abandonment (including removal of tracks and ties) until the Section 106 process has been completed and the Board has removed the condition.
3. Consistent with the public use and interim trail/rail banking conditions imposed in this decision and notice, MCRR may discontinue service and salvage track and related materials. MCRR shall otherwise keep intact the right-of-way, including potential trail-related structures such as bridges, trestles, culverts, and tunnels, for a period of 180 days until January 5, 2014, 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 public use condition period, the public use condition will expire to the extent the trail use/rail banking agreement covers the same portion of the right-of-way.

4. If an interim trail use/rail banking agreement is reached, it must require the trail sponsor to assume, for the term of the agreement, full responsibility for: (i) managing the right-of-way; (ii) any legal liability arising out of the transfer or use of the right-of-way (unless the sponsor is immune from liability, in which case it need only indemnify the railroad against any potential liability); and (iii) 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 possible future reconstruction and reactivation of the right-of-way for rail service and to the trail sponsor's continuing to meet its responsibilities for the right-of-way described in ordering paragraph 4 above.

6. If an interim trail use agreement is reached (and thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2) and (h).

7. If interim trail use is implemented, and subsequently the trail sponsor intends to terminate trail use on all or any portion of the right-of-way covered by the interim trail use agreement, 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 January 4, 2014, for the right-of-way, interim trail use may be implemented. If no agreement is reached, MCRR may fully abandon the line.

9. This decision and notice is effective on its service date.

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