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SERVICE DATE - MARCH 23, 2000

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-6 (Sub-No. 385X)

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY
COMPANY--ABANDONMENT EXEMPTION--IN GREENE COUNTY, MO

Decided: March 22, 2000

The Burlington Northern and Santa Fe Railway Company (BNSF) filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments to abandon a 5.82-mile line of its railroad between milepost 189.22 near Springfield and milepost 183.40 near Willard, in Greene County, MO. Notice of the exemption was served and published in the Federal Register on September 16, 1999 (64 FR 50323). The exemption became effective on October 16, 1999.

By decision served October 14, 1999, the exemption was made subject to the conditions that BNSF: (a) 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; (b) consult with National Geodetic Survey (NGS) and provide NGS with 90 days' notice prior to disturbing or destroying any geodetic markers; (c) consult the Missouri Department of Natural Resources, Water Pollution Program prior to salvage operations concerning storm water discharge; and (d) consult with the U.S. Fish and Wildlife prior to salvage operations to determine if any action is necessary to protect the Missouri bladderpod.

By petition filed March 10, 2000, Ozark Greenways, Inc. (OGI) late-filed a request for the issuance of a notice of interim trail use (NITU) for the entire line under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and for a public use condition under 49 U.S.C. 10905, in order to negotiate with BNSF for acquisition of the right-of-way for use as a recreational trail.¹ OGI requests 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 removing or destroying any trail-related structures, such as bridges, trestles, culverts and tunnels, for a 180-day period from the effective date of the abandonment exemption. OGI states that it needs the

¹ The September 16, 1999 notice provided that trail use/rail banking requests had to be filed by September 27, 1999, and that requests for public use conditions had to be filed by October 6, 1999. However, in Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903, STB Ex Parte No. 537 (STB served Dec. 24, 1996, and June 27, 1997), the Board retained the policy of accepting filings after the due date when good cause is shown. Because there is no indication that OGI's late-filed request will prejudice any party, it will be accepted. See Wheeling & Lake Erie Railway Company--Abandonment Exemption--In Starke County, OH, STB Docket No. AB-227 (Sub-No. 10X), slip op. at 1 n.1 (STB served Nov. 7, 1997).

full 180-day period to review title information, complete a trail plan, and commence negotiations with BNSF. It submitted a statement of willingness to assume 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 payment of any and all taxes that may be levied or assessed against, the right-of-way, as required at 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. By letter filed March 9, 2000, BNSF advised the Board that it is willing to negotiate with OGI for interim trail use.²

Because OGI's request complies with the requirements of 49 CFR 1152.29 and BNSF is willing to negotiate 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, provided the conditions imposed in the October 14, 1999 decision are met. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

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). OGI has satisfied these requirements and, therefore, a 180-day public use condition will be imposed commencing with the 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 condition will expire on April 13, 2000,³ while the trail use negotiations period will run from 180 days from the service date of this decision (until September 19, 2000). If a trail use agreement is reached on a portion of

² The official filing date of OGI's petition was March 10, 2000, but BNSF clearly was aware of it earlier than that, as reflected by its letter response on March 9, 2000.

³ Under 49 U.S.C. 10905, the Board may prohibit the disposal of rail properties that are proposed for abandonment and are suitable for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment.

the right-of-way, BNSF must keep the remaining portion of the right-of-way, intact for the remainder of the period for 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 OGI, but may engage in negotiations with other interested persons.

As conditioned, 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. Upon reconsideration, the notice of exemption served and published in the Federal Register on September 16, 1999, exempting the abandonment of the line described above is modified to the extent necessary to implement interim trail use/rail banking and to permit public use negotiations as set forth below.
3. Subject to the conditions imposed in the decision served October 14, 1999, and consistent with the public use and interim trail use/rail banking conditions imposed in this decision, BNSF may discontinue service, and salvage track and related materials. BNSF shall otherwise keep intact the right-of-way underlying the tracks, including bridges trestles, culverts and tunnels, for a period of 180 days from the effective date (until April 13, 2000), 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 April 13, 2000, the public use condition will expire to the extent the trail use/rail banking agreement covers the same 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 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.
5. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligation for the right-of-way.
6. 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.

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7. If an agreement for interim trail use/rail banking is reached by September 19, 2000, interim trail use may be implemented. If no agreement is reached by that time, BNSF may fully abandon the line.

8. This decision is effective on its service date.

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

Vernon A. Williams
Secretary