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SERVICE DATE - MARCH 9, 1998

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB-433X

IDAHO NORTHERN & PACIFIC RAILROAD COMPANY--ABANDONMENT  
EXEMPTION--IN WALLOWA AND UNION COUNTIES, OR

Decided: March 3, 1998

By decision served March 12, 1997, the Board granted, subject to conditions, a petition filed by Idaho Northern & Pacific Railroad Company (IN&P) for an exemption under former 49 U.S.C. 10505 from the prior approval requirements of former 49 U.S.C. 10903-04 to abandon a 60.58-mile portion of its Joseph Branch between milepost 23.0 near Elgin and milepost 83.58 at Joseph, in Wallowa and Union Counties, OR (the line). The decision provided that the exemption would become effective on April 17, 1997.

On April 7, 1997, the Oregon Parks and Recreation Department (Oregon) filed a request for the issuance of a notice of interim trail use (NITU) pursuant to section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and 49 CFR 1152.29. Alternatively, Oregon sought a 180-day public use condition so that it could negotiate with IN&P for use of the line as a recreational trail. IN&P refused to negotiate with Oregon for interim trail use and, because section 1247(d) permits only voluntary interim trail use, the request for a NITU was denied by decision served May 16, 1997. However, because Oregon's submission met the requirements for a public use condition pursuant to 49 CFR 1152.28(a)(2), the request for a public use condition was granted in the same decision. The public use condition expired on October 14, 1997.

By petition filed December 12, 1997, Oregon once again filed a request for the issuance of a NITU pursuant to section 8(d) of the Trails Act.<sup>1</sup> By letter filed November 14, 1997, IN&P, after acknowledging that the public use condition cannot be extended, states that it is now willing to enter into trail use negotiations with Oregon. In addition, IN&P contends that it "has taken no actions inconsistent with the Board's various decisions in this proceeding, and it has not consummated its abandonment of the subject rail line."

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<sup>1</sup> On November 10, 1997, Oregon filed a letter stating that it was involved in negotiations with IN&P for use of the right-of-way for trail use purposes and, accordingly, sought a 4-month extension of the public use condition. When informed by staff that the 180-day public use negotiating period was statutory and cannot be extended, Oregon, on November 26, 1997, filed a letter seeking the issuance of a NITU. This was followed by its formal petition.

Trail use requests may be accepted as long as the Board retains jurisdiction over the involved railroad right-of-way.<sup>2</sup> Here, however, the railroad's actions have terminated our jurisdiction. Because the railroad had previously refused to negotiate for interim trail use, the line must be considered abandoned when the public use condition expired. Thus, the Board lost jurisdiction over the line at that point, and the railroad's subsequent expression of willingness to negotiate with Oregon does not resurrect that jurisdiction. See Becker v. Surface Transp. Bd., 132 F.3d 60 (D.C. Cir. 1997).<sup>3</sup>

Because the Board no longer has jurisdiction over the right-of way, it cannot issue a NITU. Accordingly, the Trails Act is not available and the request for issuance of a NITU will be denied.<sup>4</sup>

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The request for issuance of a notice of interim trail use is denied.
2. The decision is effective on the service date.

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

Vernon A. Williams  
Secretary

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<sup>2</sup> See Rail Abandonments--Supplemental Trails Act Procedures, 4 I.C.C.2d 152, 157-58 (1987).

<sup>3</sup> The present case is different from Birt v. Surface Transp. Bd., 90 F.3d 580 (D.C. Cir.), reh'g denied, 98 F.3d 644 (D.C. Cir. 1996), where evidence indicative of abandonment was accompanied by contemporaneous evidence suggesting that the railroad intended to retain control over the line.

<sup>4</sup> Given the railroad's current willingness to negotiate, it may be that the parties can work out an arrangement for interim trail use and/or rail banking outside the auspices of the Trails Act.