

40631  
DO

SERVICE DATE – LATE RELEASE MARCH 19, 2010

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-33 (Sub-No. 248X)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT EXEMPTION—IN POLK  
COUNTY, IA

Decided: March 18, 2010

Union Pacific Railroad Company (UP) filed a verified notice of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments to abandon a portion of its line of railroad known as the Bondurant Industrial Lead, extending from milepost 225.56 near Berwick to milepost 232.80 near Bondurant, a distance of 7.24 miles, in Polk County, IA. Notice of the exemption was served and published in the Federal Register on February 18, 2010 (75 FR 7302-03). The exemption is scheduled to become effective on March 20, 2010.

The Board’s Section of Environmental Analysis (SEA) served an environmental assessment (EA) in this proceeding on February 23, 2010. In the EA, SEA recommends 3 conditions. First, SEA notes that the Iowa Department of Natural Resources (IDNR) indicated that the proposed abandonment is located in close proximity to the US Highway 65 Wildlife Management Area and therefore UP would need to obtain a “Sovereign Lands Construction Permit” from IDNR before salvaging the line. According to SEA, IDNR also indicated that Mally’s Weh-Weh-Neh-Kee Park, owned by the Polk County Conservation Board (PCCB), is within the area of the proposed abandonment and suggested that UP contact PCCB to solicit comments regarding the proposed abandonment. Accordingly, SEA recommends that a condition be imposed requiring UP to consult with IDNR regarding its permit requirement, and consult with PCCB for its comments regarding the proposed abandonment, prior to beginning any salvage activities.

Second, SEA indicates in the EA that the U.S. Army Corps of Engineers (Corps) determined that the proposed abandonment may require a section 404 permit if the project involves the placement of dredged and/or fill material in wetlands or waters of the United States. Accordingly, SEA recommends that a condition be imposed requiring UP to consult with the Corps, prior to beginning any salvage activities, regarding possible section 404 requirements.

Third, SEA states in the EA that UP submitted a historic report as required by the Board’s rules at 49 CFR 1105.8(a) and served a copy of the report on the Iowa Historic Preservation Officer (SHPO) pursuant to 49 CFR 1105.8(c). SEA states that it has not heard from the SHPO and therefore has not been able to consider the SHPO’s opinion before determining if the line might be potentially eligible for listing on the National Register of

Historic Places (National Register). Accordingly, SEA recommends that UP be required 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 are listed in the National Register (generally, 50 years old or older) until the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f (NHPA), has been completed. SEA also recommends that UP be required to report back to SEA regarding any consultations with the SHPO and the public and that UP be prohibited from filing its consummation notice or initiating any salvage activities related to abandonment (including removal of tracks and ties) until the section 106 process had been completed and the Board has removed this condition.

Pursuant to 36 CFR 800.2, SEA notes that it conducted a search of the Native American Consultation Database (database) at <http://home.nps.gov/nacd/> to identify Federally recognized tribes, which may have ancestral connections to the project area. According to SEA, the database indicated that there are 10 tribes that may have an interest in the proposed abandonment. The tribes are: the Flandreau Santee Sioux Tribe of South Dakota; the Iowa Tribe of Kansas and Nebraska; the Iowa Tribe of Oklahoma; the Lower Sioux Indian Community of Minnesota; the Prairie Island Indian Community of Minnesota; the Sac and Fox Nation of Missouri in Kansas and Nebraska; the Sac and Fox Nation of Oklahoma; the Sac and Fox Tribe of the Mississippi in Iowa; the Santee Sioux Nation of Nebraska; and the Upper Sioux Community of Minnesota. SEA states that it will send a copy of this EA to these tribes for their review and comment.

Comments to the EA were due by March 8, 2010. No comments were received. Accordingly, the conditions recommended by SEA in the EA will be imposed.

In the EA, SEA states that the right-of-way might be suitable for other public use following abandonment and salvage of the line. On February 25, 2010, the Iowa Natural Heritage Foundation, in conjunction with PCCB, the City of Bondurant, and the Iowa Trails Council (collectively, INHF), 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 49 CFR 1152.29, and for a public use condition under 49 U.S.C. 10905, to negotiate with UP for acquisition of the right-of-way for use as a recreational trail.<sup>1</sup> According to INHF, the corridor connects 2 existing regional trails and provides an important wildlife habitat. INHF also requests that UP be prohibited from disposing of the corridor, other than tracks, ties, and signal equipment, except for public use on reasonable terms, and that UP be barred from the removal or

---

<sup>1</sup> Although INHF refers to its request as a “petition for reconsideration,” it states that it does not take a position on the merits of the abandonment. Based on the content of INHF’s pleading, it will be considered a request for issuance of a NITU and a public use condition and not a petition for reconsideration.

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. INHF's justification for its request is the structures' value for trail purposes and future reactivation of rail service. INHF states that the 180-day period is needed to complete negotiations with UP.

INHF also has submitted a statement of willingness to assume full 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 the 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 has acknowledged that the use of the right-of-way for trail purposes is subject to future reconstruction and reactivation for rail service. In a response filed on March 3, 2010, UP states that it is willing to negotiate with INHF for interim trail use.

Because INHF's request complies with the requirements of 49 CFR 1152.29, and UP 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 from the effective date of the abandonment, UP may fully abandon the line, subject to any outstanding conditions. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to any future use of the property for restoration of railroad operations.

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). Because INHF has satisfied these requirements, a 180-day public use condition will be imposed, commencing from the March 20, 2010 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 September 16, 2010, while the trail use negotiating period will run 180 days from the service date of this decision and notice (until September 15, 2010). If a trail use agreement is reached on a portion of the right-of way prior to September 16, 2010, UP must keep the remaining right-of-way intact for the remainder of the 180-day 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, UP is not required to deal exclusively with INHF, 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 February 18, 2010, 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 INHF to negotiate with UP for trail use of the subject line, for a period of 180 days from the service date of this decision and notice (until September 15, 2010); and (2) to permit public use negotiations as set forth below, for a period of 180 days commencing from the March 20, 2010 effective date of the exemption (until September 16, 2010). It is also subject to the conditions that UP shall: (1) consult with IDNR regarding its permit requirement, and consult with PCCB for its comments regarding the proposed abandonment, prior to beginning any salvage activities; (2) consult with the Corps, prior to beginning any salvage activities, regarding possible section 404 requirements; and (3)(a) 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 are listed in the National Register until completion of the section 106 process of the NHPA; (b) report back to SEA regarding any consultations with the SHPO and the public; and (c) be prohibited from filing its consummation notice or initiating any salvage activities related to abandonment (including removal of tracks and ties) until the section 106 process had been completed and the Board has removed this condition.
3. Consistent with the public use and interim trail use/rail banking conditions imposed in this decision and notice, UP may discontinue service and salvage track and related materials. UP shall keep intact the right-of-way, including bridges, trestles, culverts, and tunnels, for a period of 180 days 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 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 obligations 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.

7. If an agreement for interim trail use/rail banking is reached by September 15, 2010), interim trail use may be implemented. If no agreement is reached by that time, UP may fully abandon the line, provided the conditions imposed in this proceeding are met. See 49 CFR 1152.29(d)(1).

8. This decision and notice is effective on its date of service.

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