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SERVICE DATE – MAY 7, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-600 (Sub-No. 1X)

YAKIMA INTERURBAN LINES ASSOCIATION—ABANDONMENT  
EXEMPTION—IN YAKIMA COUNTY, WA

Decided: May 4, 2007

Yakima Interurban Lines Association (YILA) filed a verified notice of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments to abandon a line of railroad known as the Naches Branch, from milepost 2.97 (Fruitvale, near Yakima) to milepost 14.26 (near Naches), a distance of approximately 11.29 miles in Yakima County, WA. YILA also sought exemption from the offer of financial assistance (OFA) procedures at 49 U.S.C. 10904. Additionally, a request on behalf of Yakima County (County) for issuance of a notice of interim trail use (NITU) was filed with the notice, pursuant to section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act). On January 19, 2006, notice of the exemption was served and published in the Federal Register (71 FR 3153-54).

On February 6, 2006, Oregon Pacific & Eastern Railroad Company (OP&E) late-filed a notice of intent to file an OFA. Within a few months, however, OP&E had withdrawn that notice.<sup>1</sup> By decision and notice served on April 5, 2006, a NITU was issued authorizing the County to negotiate an interim trail use/rail banking agreement with YILA for 180 days, until October 2, 2006.<sup>2</sup>

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<sup>1</sup> By decision served on February 17, 2006, the Board accepted OP&E's notice, denied YILA's request for exemption from the OFA requirements of 49 U.S.C. 10904, held in abeyance the County's request for issuance of a NITU pending completion of the OFA process, and imposed seven environmental conditions recommended by the Board's Section of Environmental Analysis (including a section 106 historic preservation condition). By letter filed on March 27, 2006, however, OP&E sought permission to withdraw its notice of intent to file an OFA.

<sup>2</sup> In the same decision, the proceeding was reopened, OP&E's request to withdraw its notice of intent to file an OFA was granted, the OFA process was terminated, and the prior abandonment authorization became effective on the April 5 service date, subject to the environmental conditions imposed in the February 17 decision.

On August 25, 2006, the County filed a motion, with YILA's consent, requesting an extension of the NITU negotiating period for an additional 180 days, until March 31, 2007. On September 5, 2006, Kershaw Sunnyside Ranches Inc. (Kershaw) filed a memorandum in opposition to the motion.<sup>3</sup> YILA's extension request was granted in a decision served on September 21, 2006.

On February 26, 2007, the County, again with YILA's consent, requested extension of the NITU negotiating period for an additional 180 days. The County argues that the extension is necessary because the Board has not yet removed a condition imposed on YILA in the February 17, 2006 notice barring alienation of covered sites or structures under section 106 of the National Historic Preservation Act, 16 U.S.C. 470(f). The County requests the extension in order for it to work on the removal of this condition. Additionally, the County argues that an extension is needed because it is continuing its efforts to achieve arrangements with lienholders to settle their remaining claims against YILA assets.

On March 5, 2007, Kershaw filed a memorandum in opposition. Therein, Kershaw specifically argues that: (1) the extension is being used to try to extract concessions from it in an unrelated state court litigation; (2) the Board should deny a second extension of time because the request is not adequately supported and the negotiations between the railroad and the potential trail sponsor are not in good faith; (3) YILA has not filed a notice of consummation as required in the January 19, 2006 notice; and (4) the Board should reopen Kershaw's original adverse abandonment proceeding.

In a status report filed on March 21, 2007, the County, City of Yakima, Town of Naches, and YILA (County, et al.) notified the Board that, on March 19, 2007, YILA and the County reached an agreement for interim trail use and the acquisition of the Naches Branch from YILA. Nonetheless, YILA and the County still request that the Board extend the negotiating period for an additional 180 days to provide time for the parties to work out four contingencies in the agreement.<sup>4</sup> The County, et al. also argue that the rail banking agreement moots Kershaw's opposition to the extension, its petition to reopen the original adverse abandonment proceeding,<sup>5</sup> and its pending petition for judicial

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<sup>3</sup> Additionally, Kershaw moved to dismiss the notice of exemption. On October 31, 2006, the Board issued a decision denying Kershaw's motion to dismiss based on its jurisdictional challenges.

<sup>4</sup> The County, et al. have attached a copy of the trail use and acquisition agreement.

<sup>5</sup> In 2004, the Board denied an adverse abandonment application filed by Kershaw regarding this same line. See Yakima Interurban Lines Association—Adverse  
(continued...)

review in the 9th Circuit Court of Appeals. See Kershaw Sunnyside Ranches v. STB, No. 05-76364 (9th Cir. filed Nov. 8, 2005).

On March 30, 2007, Kershaw filed a response to the status report, in which it argues that the numerous contingencies in the parties' contract have created only an illusory agreement and do not provide the kind of certainty required by the Trails Act before the Board can approve rail banking. Additionally, Kershaw argues that the Board lacks jurisdiction over this matter because the rail line in question is no longer connected to the interstate rail system and, consequently, a de facto abandonment has occurred.<sup>6</sup>

Where, as here, the carrier has not consummated the abandonment at the end of the previously imposed negotiating period and has indicated its willingness to continue negotiations by agreeing to an extension, the Board retains jurisdiction and the NITU negotiating period may be extended.<sup>7</sup> Under the circumstances, further extension of the negotiating period is warranted. See Birt v. STB, 90 F.3d 580, 588-90 (D.C. Cir. 1996); Grantwood Village v. Missouri Pac. R.R. Co., 95 F.3d 654,659 (8th Cir. 1996). Accordingly, the NITU negotiating period will be extended for an additional 180 days from March 31, 2007.

The purpose of the Trails Act is to preserve rail corridors for possible reactivation of rail service by permitting and encouraging their interim trail use as recreational trails. See Policy Statement on Rails to Trails Conversions, Ex Parte No. 274 (Sub-No. 13B) (ICC served Feb. 5, 1990). Under the Trails Act, this agency must "preserve established railroad rights-of-way for future reactivation of rail service" by prohibiting abandonment where a trail sponsor offers to assume managerial, tax, and legal liability for the right-of-way for use in the interim as a trail. See 16 U.S.C. 1247(d); Georgia Great Southern Division, South Carolina Central Railroad Co., Inc.—Abandonment and Discontinuance Exemption—Between Albany and Dawson, in Terrell, Lee, and Dougherty Counties, GA, Docket No. AB-389 (Sub No. 1X) (STB served May 16, 2003); Citizens Against Rails to Trails v. STB, 267 F.3d 1144, 1149-50 (D.C. Cir. 2001). Thus, the agency's primary concern here is with preserving the rail line for future rail service, a purpose served by extending the NITU.

Contrary to the position of the County, et al., a rail banking agreement between the County and YILA does not moot Kershaw's arguments in opposition to the extension.

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(...continued)

Abandonment—In Yakima County, WA, STB Docket No. AB-600 (STB served Nov. 19, 2004).

<sup>6</sup> In support, Kershaw attaches a statement from Rob Conrad, president of Kershaw.

<sup>7</sup> See Rail Abandonments—Supplemental Trails Act Procedures, 4 I.C.C.2d 152, 157-58 (1987).

This is because YILA and the County still seek an extension of the NITU negotiating period in order to focus on satisfying various contingencies.

Kershaw's arguments in opposition to the extension lack merit, however. Kershaw offers no support for its claim that the County, in seeking this extension, is acting in bad faith by using the rail banking procedure to gain an advantage in a state court proceeding. Moreover, contrary to Kershaw's arguments in its March 30, 2007 response, the record indicates that the parties have reached a rail banking agreement and that the County has adequately explained its need for more time to satisfy any contingencies in the agreement.

Kershaw's argument that YILA has not filed a required notice of consummation likewise lacks merit. According to the January 19, 2006 notice, YILA was required to file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line by January 19, 2007, unless there were legal or regulatory barriers to consummation. Two such barriers continue to exist here—a trail use condition and a section 106 historic preservation condition. Consequently, YILA will not be required to submit a notice of consummation until 60 days after satisfaction, expiration, or removal of those barriers. See 49 CFR 1152.29(c)(2).

Additionally, Kershaw's claim that the line has been de facto abandoned has already been addressed by the Board and rejected in a previous decision. In its October 31, 2006 decision, the Board found that a de facto abandonment did not occur on this line because it was and still is connected to the interstate rail system.<sup>8</sup> See Yakima Interurban Lines Association—Abandonment Exemption—In Yakima County, WA, STB Docket No. AB-600 (Sub-No. 1X) (STB served Oct. 31, 2006). In its most current submission to the Board, Kershaw has not offered any additional evidence warranting a different conclusion.

Lastly, Kershaw's request to reopen the original adverse abandonment proceeding will not be addressed here, nor will the County's arguments related to that proceeding. On March 7, 2007, Kershaw filed a petition to reopen that proceeding and the Board will address that request in a separate decision.

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

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<sup>8</sup> Specifically, the Board found that YILA had established that BNSF had never abandoned the lead connecting the line at issue to the BNSF main line, and in fact, leased that lead to Central Washington Railroad Company within the past 2 years. See Central Washington Railroad Company-Lease and Operation Exemption-The Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 34640 (STB served Jan. 21, 2005).

It is ordered:

1. The County's request to extend the interim trail use negotiating period is granted.
2. The negotiating period under the NITU is extended to September 27, 2007.
3. This decision is effective on its service date.

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

Vernon A. Williams  
Secretary