

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-6 (Sub-No. 428X)

BNSF RAILWAY COMPANY–ABANDONMENT EXEMPTION–IN
COLFAX COUNTY, NM

Decided: September 29, 2006

BNSF Railway Company (BNSF) filed a notice of exemption under 49 CFR 1152 Subpart F–Exempt Abandonments to abandon a 36.90-mile line of railroad between milepost 0.00 near French, and milepost 36.90 near York Canyon, in Colfax County, NM. Notice of the exemption was served and published in the Federal Register on June 21, 2005 (70 FR 35777-78).¹

¹ The exemption was scheduled to become effective on July 21, 2005, unless stayed by the Board or a formal expression of intent to file an offer of financial assistance (OFA) was filed by July 1, 2005. On June 28, 2005, Hust Brothers, Inc. (HBI), timely filed a formal expression of intent to file an OFA to purchase the line. On the same date, a request for the issuance of a notice of interim trail use (NITU) for the right-of-way was filed by MTHB, LLC (MTHB). On July 15, 2005, Colfax Land and Cattle Company, LLC (Colfax) and Vermejo Park, LLC (Vermejo) late-filed separate notices of intent to file an OFA. Subsequently, Colfax and Vermejo filed separate requests to toll the OFA filing deadline, until 15 days after BNSF provided the information prescribed in 49 CFR 1152.27(a). By decision served on July 21, 2005, Colfax's and Vermejo's late-filed notices of intent to file an OFA were accepted and BNSF was directed to notify the Board in writing when the requested information under 49 CFR 1152.27(a) was provided to Colfax and Vermejo so that the due date for filing OFAs and the effective date of the exemption could be determined.

By decision served on August 11, 2005, at the request of BNSF, the proceeding was held in abeyance for 30 days to permit the parties to continue negotiations for the possible sale of the rail corridor outside of the OFA process, BNSF was directed to report to the Board on the status of the negotiations, and the request for issuance of a NITU was held in abeyance pending completion of the OFA process. BNSF's request to hold the proceeding in abeyance was granted for an additional 30 days by decision served on September 30, 2005. In that decision, BNSF also was directed to report to the Board on the status of the negotiations. Several status reports were filed by BNSF.

On July 18, 2006, MTHB filed a motion withdrawing its request for the issuance of a NITU. On the same date, HBI filed a notice withdrawing its notice of intent to file an OFA. On July 27, 2006, Colfax and Vermejo each filed a notice withdrawing their notices of intent to file an OFA.

The Board's Section of Environmental Analysis (SEA) issued an environmental assessment (EA) in this proceeding on June 24, 2005. In the EA, SEA recommended that the following conditions be imposed on any decision granting abandonment authority.

First, SEA states in the EA that, according to BNSF, there are 29 public crossings and 31 private crossings along the line. BNSF states in its Environmental Report that precautions would be taken during salvage operations, if any may be required, to ensure public safety, and that salvage contractors would be required to satisfy all applicable health and safety laws and regulations. Therefore, SEA recommends that BNSF be required to take precautions during salvage operations as outlined in its Environmental Report.

Second, the U.S. Army Corps of Engineers (Corps) informed SEA that the rail line proposed for abandonment is located in several waterways and includes nine structures. Although BNSF's Environmental and Historic Report did not contain a specific description of the proposed salvage methods, the Corps stated that BNSF informed the Corps by telephone that the project would include the removal of bridges and culverts. According to the Corps, the removal of culverts and their surrounding earth may require reshaping of the stream bed and banks, including a discharge of dredged and fill material into waters of the United States, and that a permit may be required for the project under section 404 of the Clean Water Act. The Corps indicated that it needs additional information to determine specific permitting requirements, and that, if a section 404 permit is required, a section 401 water quality certification also would be required from the appropriate water quality authority. Therefore, SEA recommends that BNSF, prior to beginning salvage activities, consult with the Corps regarding its requirements, comply with the reasonable requirements of the Corps, and submit the results of this consultation to SEA.

Third, SEA states in the EA that the Colfax County Floodplain Administrator (CCFA) indicated that segments of the proposed abandonment lie in Zones A, C, and D of the floodplain designated on the Flood Insurance Rate Maps. Zone A refers to areas of the 100-year floodplain where base elevations and flood hazard factors are not determined. Zones C and D are designated as areas of minimal flooding and areas of undetermined, but possible, flood hazards. According to CCFA, further study would be necessary to determine if the proposed abandonment would affect the 100-year floodplain. Accordingly, SEA recommends that BNSF consult with CCFA prior to beginning salvage activities regarding impacts to the 100-year floodplain and comply with CCFA's reasonable requirements to mitigate any potential impacts.

Fourth, according to SEA, the New Mexico Environment Department (NMED) indicated that the U.S. Environmental Protection Agency (USEPA) requires a National Pollutant Discharge Elimination System (NPDES) Construction General Permit for projects that would result in disturbance of one or more acres of land. This permit would require that a Storm Water Pollution Prevention Plan be prepared for the site and that appropriate Best Management Practices be installed and maintained during and after salvage activities to prevent, to the extent

practicable, pollutants in storm water runoff from entering waters of the United States. Accordingly, SEA recommends that, prior to beginning salvage activities, BNSF consult with USEPA and NMED regarding NPDES requirements for BNSF's final salvage plans and report the results of this consultation to SEA.

Fifth, SEA states in the EA that the U.S. Fish and Wildlife Service (USFWS) indicated that several Federally listed endangered and threatened species and species of concern exist in Colfax County. According to SEA, USFWS recommended that: (1) if the project area has suitable habitat for the listed endangered or threatened species, species-specific surveys should be conducted at appropriate times to determine whether a listed species may be affected; (2) if any listed species may be affected, consultation with USFWS pursuant to section 7 of the Endangered Species Act, 16 U.S.C. 1536 (ESA), would be required; (3) while the species of concern have no legal protection under the ESA, these species also should be included in any surveys that may be conducted; (4) the Corps be contacted regarding permitting requirements under section 404 of the Clean Water Act if salvage activities could impact floodplains or wetlands; (5) that these habitats should be conserved through avoidance or mitigated to ensure no net loss of wetlands function and value; and (6) that salvage activities occur outside the general migratory bird nesting season of March through August to minimize the likelihood of adverse impacts to all birds protected under the Migratory Bird Treaty Act, or that areas proposed for salvage activities during the nesting season be surveyed, and when occupied, avoided until nesting is complete. In addition, USFWS suggested that the New Mexico Department of Game and Fish and the New Mexico Energy, Minerals, and Natural Resources Department, Forestry Division be contacted for information regarding fish, wildlife, and plants of state concern. Accordingly, SEA recommends that BNSF consult with USFWS regarding impacts to Federally listed threatened and endangered species prior to beginning salvage activities and conduct no abandonment or salvage activities until completion of the section 7 process of the ESA.

Sixth, the U.S. Department of Commerce, National Geodetic Survey (NGS), informed SEA that 14 geodetic station markers have been identified that may be affected by the proposed abandonment and requested 90 days' notification in advance of activities that will disturb or destroy these markers. Accordingly, SEA recommends that BNSF notify NGS 90 days prior to beginning salvage activities so plans can be made for the possible relocation of the station markers.

Seventh, in the EA, SEA notes that the New Mexico Historic Preservation Division (State Historic Preservation Officer or SHPO) indicated that the nine culverts on the line and the rail line itself are potentially eligible for listing in the National Register of Historic Places (National Register) under Criterion A of the National Register for their association with mining in York Canyon. SEA states that, on June 14, 2005, Mr. John Murphey, of the SHPO's office, informed SEA by telephone that the SHPO's comments were preliminary and that the SHPO requested additional information from BNSF. Because consultation efforts between BNSF, the SHPO, and SEA were ongoing, SEA recommended that BNSF retain its interest in and take no steps to alter

the historic integrity of the line and all sites and structures on the line until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f (NHPA).

Comments to the EA were due by July 11, 2005. As stated above, SEA had recommended a condition in the EA requiring BNSF to retain its interest in and take no steps to alter the historic integrity of the line and all sites and structures on the line until completion of the section 106 process of the NHPA. BNSF subsequently documented the historic structures on the line and presented the documentation to the SHPO. SEA received a letter dated February 17, 2006, from the SHPO stating that BNSF's documentation outlines adequate mitigation of possible adverse effects to the historic structures on the line and fulfills the section 106 consultation. Based on the SHPO's information, SEA concludes that the section 106 process has been completed for this proceeding and recommends that the previously recommended section 106 condition in the EA need not be imposed.

By letter dated August 17, 2006 (August 17 letter), BNSF informed SEA that it had consulted with Mike Phillips, biologist and Executive Director of the Turner Endangered Species Fund, regarding potential impacts to Federally listed threatened and endangered species in the area of the proposed abandonment. BNSF states that, according to Mr. Phillips, the only Federally listed species that may occur in the area are transient wintering Bald eagles and non-indigenous Black-footed ferrets released for ultimate translocation pursuant to USFWS guidance and an ESA research permit. BNSF, therefore, contends that the proposed abandonment would have no effect on Federally listed threatened and endangered species, subject to imposition of a condition that salvage of the right-of-way should not occur during months when wintering Bald eagles may occur in the project area.²

SEA states that, by telephone on August 31, 2006, Mr. Santiago Gonzales of USFWS indicated that no further consultation with USFWS is needed at this time. Accordingly, based on the information provided by BNSF and the conversation with Mr. Gonzales, SEA believes that the ESA consultation condition need not be imposed, provided that the following two new conditions are imposed: (1) BNSF conduct no salvage activities during the months when wintering Bald eagles may occur in the project area; and (2) prior to beginning any salvage activities, BNSF consult with USFWS regarding potential impacts to the Black-footed ferrets residing in the area and comply with the reasonable recommendations of USFWS.

In light of subsequent updates and recommendations, SEA now recommends that Conditions Nos. 5 and 7 previously recommended in the EA need not be imposed. The

² In its August 17 letter, BNSF states that the abandonment will result in BNSF's subsequent conveyance of the entire right-of-way to two adjacent landowners, Vermejo and Colfax. According to BNSF, neither Vermejo nor Colfax has immediate plans to salvage or otherwise dispose of the right-of-way. However, BNSF states that, if plans to salvage develop, it presumes that either entity would consult with USFWS.

remaining conditions recommended in the EA and the two new conditions recommended by SEA will be imposed. Based on SEA's recommendations, the proposed abandonment, if implemented as conditioned, 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 exemption of the abandonment of the line described above is subject to the conditions that BNSF: (1) take precautions during salvage operations to ensure public safety, and that salvage contractors satisfy all applicable health and safety laws and regulations; (2) prior to beginning salvage activities, consult with the Corps regarding its requirements, comply with the reasonable requirements of the Corps, and submit the results of this consultation to SEA; (3) consult with CCFA prior to beginning salvage activities regarding impacts to the 100-year floodplain and comply with the reasonable requirements of CCFA to mitigate any potential impacts; (4) prior to beginning salvage activities, consult with USEPA and NMED regarding NPDES requirements for BNSF's final salvage plans and report the results of this consultation to SEA; (5) notify NGS 90 days prior to beginning salvage activities so plans can be made for the possible relocation of the station markers identified on the line; (6) conduct no salvage activities during the months when wintering Bald eagles may occur in the project area; and (7) prior to beginning salvage activities, consult with USFWS regarding potential impacts to the Black-footed ferrets residing in the area and comply with the reasonable recommendations of USFWS.

3. This decision is effective on its service date.

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

Vernon A. Williams
Secretary