

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 914X

McCLOUD RAILWAY COMPANY–ABANDONMENT AND DISCONTINUANCE OF  
SERVICE EXEMPTION–IN SISKIYOU, SHASTA, AND MODOC COUNTIES, CAL.

Decided: October 3, 2011

By decision served on October 14, 2005, the Board, under 49 U.S.C. § 10502, exempted from the prior approval requirements of 49 U.S.C. § 10903 the abandonment by McCloud Railway Company (MCR) of approximately 80 miles of rail line in Siskiyou and Shasta Counties, Cal., and the discontinuance of service provided under a grant of trackage rights over a 31.4-mile line owned by BNSF Railway Company in Siskiyou and Modoc Counties, Cal.<sup>1</sup> The Board granted the exemption subject to standard employee protective conditions and several environmental conditions.<sup>2</sup> The abandonment exemption became effective on November 20, 2006.<sup>3</sup>

By decision and notice of interim trail use or abandonment (NITU) served on December 29, 2009, the proceeding was reopened and was modified to implement interim trail use/rail banking, under the National Trails System Act (Trails Act), 16 U.S.C § 1247(d), and 49 C.F.R. § 1152.29. The NITU authorized a 180-day period, until June 28, 2010, for SAVE BURNEY FALLS (SBF) to negotiate with MCR for interim trail use on the above-described rail line.

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<sup>1</sup> The 80 miles of rail line include: (1) a rail line between milepost 3.3 east of McCloud and the end of the track at milepost B-61 at or near Burney; (2) a rail line between milepost B-19 at or near Bartle and milepost B-31.4 at or near Hambone; (3) a rail line between milepost B-58 at or near Berry and milepost S-7 at or near Sierra; and (4) a rail line between milepost B-31.6 at or near Bear Flat and milepost P-3.93 at or near Pondosa.

<sup>2</sup> The Board removed an historic preservation condition in a decision served on November 6, 2009. The remaining environmental conditions involve notification and consultation requirements that relate to salvage, and, while still in effect, they are not a bar to consummating the abandonment.

<sup>3</sup> Seaside Holdings, Inc. filed an offer of financial assistance (OFA) to purchase the line, but a sale did not occur. A more complete history of the OFA process and other developments can be found in the decisions served in this proceeding on May 15, 2007, and November 6, 2009.

MCR and SBF state that, on June 17, 2010, they entered into a written Letter of Intent for SBF to acquire the right-of-way for rail banking and interim trail use. On June 28, 2010, SBF filed a request for an extension of the NITU negotiating period until December 26, 2010. SBF asserted that it needed additional time to complete negotiations with MCR.

By letter filed July 6, 2010, MCR notified the Board that it would not agree to the requested extension, on the ground that an extension was not necessary or appropriate because a trail use agreement between MCR and SBF had already been reached during the initial interim trail use negotiating period. Because interim trail use is voluntary with the carrier, and MCR had advised that it was not agreeable to an extension, the Board denied the extension request in a decision served on August 5, 2010.

On March 7, 2011, MCR and SBF jointly filed a request asking that the Board impose a new NITU on the 80 miles of rail line. The parties state that, since the Board's last decision in this case, they have fully agreed on the terms and conditions of their transaction and implemented the Letter of Intent. SBF, however, is only prepared to invest in acquiring the corridor for interim trail use and obligate itself to keep the corridor available for rail banking if it is ensured that the property is covered by an applicable NITU.

The prior NITU expired by its own terms on June 28, 2010. MCR and SBF contend, however, that the abandonment authority has not lapsed because the June 17, 2010 Letter of Intent to purchase the rail line for a trail serves as a legal barrier to consummation under 49 C.F.R. § 1152.29(e)(2).

Trail use requests may be accepted as long as the Board retains jurisdiction over the right-of-way and the carrier is willing to enter into negotiations. Given the parties' June 17, 2010 Letter of Intent to use the right-of-way for interim trail use, MCR's prior assertion that the parties had completed interim trail use negotiations shortly thereafter, and their recent confirmation of completion of the terms and condition of the transaction to implement interim trail use, no public purpose would be served by requiring MCR to file again for abandonment authority. Moreover, the record here shows that MCR has not taken any action to consummate the abandonment and remove the property from the Board's jurisdiction. To the contrary, MCR entered into the Letter of Intent with SBF, objected to the prior, timely NITU extension request as unnecessary in view of the parties' Letter of Intent and negotiations, and evidently has agreed to terms and conditions with SBF.

Under the facts and circumstances of this case an extension of the consummation deadline to the service date of this decision is warranted, and the Board will issue a NITU.<sup>4</sup> SBF has submitted a statement of willingness to assume 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, as required by 49 C.F.R. § 1152.29, and has acknowledged that the use of the right-of-way for trail purposes

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<sup>4</sup> In the future, the parties are admonished to seek proper Board authority on a timely basis to continue interim trail use negotiations, if there is any doubt as to the need to do so.

is subject to the future reactivation for rail service. MCR states that it agrees to imposition of a new trail use condition for 180 days, and that it has not consummated the abandonment.

Because MCR agrees to SBF's request for a new NITU, and SBF's request complies with the requirements of 49 C.F.R. § 1152.29, a new NITU will be issued. To the extent that additional time for the parties to enter into a final agreement is necessary, the parties may continue to negotiate a final 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, MCR may fully abandon the line because there are no other conditions that are a barrier to consummation. See 49 C.F.R. § 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to future use of the property for restoration of railroad operations.

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. The deadline for the filing of a notice of consummation of the abandonment authorization in this proceeding is extended to the service date of this decision to allow acceptance of the trail use request and issuance of a NITU in the present decision.
3. The parties' request for a new interim trail use/rail banking condition is accepted and granted.
4. Upon reconsideration, the decision served October 14, 2005, exempting the abandonment of the line described above, is modified to the extent necessary to implement interim trail use/rail banking as set forth below to permit SBF to negotiate with MCR for trail use for a period of 180 days commencing from the service date of this decision and notice April 1, 2012.
5. 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 to 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.
6. Interim trail use/rail banking is subject to any future use of the property for restoration of railroad operations and to the user's continuing to meet the financial obligations for the right-of-way.
7. 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.

8. If an agreement for interim trail use/rail banking is reached by April 1, 2012, interim trail use may be implemented. If no agreement is reached by that time, MCR may fully abandon the line, provided the conditions imposed in this proceeding are met.

9. This decision is effective on its service date.

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