

SURFACE TRANSPORTATION BOARD<sup>1</sup>

DECISION

Docket No. AB-381 (Sub-No. 1X)<sup>2</sup>

T AND P RAILWAY--ABANDONMENT EXEMPTION--IN SHAWNEE,  
JEFFERSON AND ATCHISON COUNTIES, KS

Decided: February 7, 1997

By motion filed August 8, 1995, Daryl Becker<sup>3</sup> seeks reconsideration of the decision served in this proceeding on July 20, 1995 (July 1995 decision),<sup>4</sup> that denied his request for rescission of the ICC's decision served on April 4, 1994 (April 1994 decision), accepting a trail use request from American Trails Association, Inc. (ATA), and issuing a notice of interim trail use (NITU) under the National Trails System Act (Trails Act), 16 U.S.C. 1247(d). On August 23, 1995, ATA and T and P Railway, Inc. (TAP), replied to Mr. Becker's motion. On January 11, 1996, the Rails to Trails Conservancy (RTC) moved to reopen this proceeding and to revoke the NITU.<sup>5</sup> ATA and TAP replied to RTC's motion on January 25, 1996. We will deny all of the pending motions.

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<sup>1</sup> The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (STB), effective January 1, 1996. Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to the STB's jurisdiction pursuant to 49 U.S.C. 10903 and 16 U.S.C. 470f and 1247(d). Therefore, this decision applies the law in effect prior to the ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

<sup>2</sup> This proceeding was embraced within T and P Railway--Abandonment--In Shawnee, Jefferson and Atchison Counties, KS, Docket No. AB-381 (ICC served Apr. 27, 1993 and May 26, 1993).

<sup>3</sup> Mr. Becker is a landowner whose property is adjacent to the railroad right-of-way that is the subject of the notice of interim trail use issued in this proceeding.

<sup>4</sup> Mr. Becker also filed a petition for judicial review of the July 1995 decision in Daryl Becker v. Surface Transp. Bd. and United States, No. 95-1481 (D.C. Cir. Sept. 19, 1995). The court case is being held in abeyance pending our decision addressing the pleadings before us.

<sup>5</sup> RTC is a nationwide non-profit corporation with over 60,000 members and generally is an advocate of interim trail use proposals.

BACKGROUND

By decision served and published in the Federal Register on April 27, 1993 (April 1993 decision), the ICC authorized TAP to abandon a 41-mile rail line between Topeka (milepost 47 + 3,390 feet) and Parnell (milepost 6 + 3,182 feet), in Shawnee, Jefferson, and Atchison Counties, KS, subject to, among other conditions, a 180-day public use condition imposed under 49 U.S.C. 10906. The April 1993 decision noted that the State of Kansas and the Kansas Department of Wildlife and Parks (KDWP) had filed a request for a NITU and submitted a statement of willingness to assume financial responsibility for the right-of-way in compliance with 49 CFR 1152.29(a). TAP was directed to notify the ICC by May 7, 1993, whether it was willing to enter into negotiations for interim trail use and rail banking.

In a letter filed on May 7, 1993, TAP indicated its willingness to negotiate a trail use agreement. By decision served on May 26, 1993 (May 1993 decision), the ICC issued a NITU providing time for TAP and KDWP to negotiate a trail use agreement during a period coinciding with the remaining portion of the 180-day public use condition period that had begun on April 27, 1993.

KDWP later withdrew its request for public use and trail use conditions, and the Kansas Department of Transportation (KDOT) expressed its willingness to take KDWP's place in the trail negotiations. KDOT submitted a statement of willingness to assume financial responsibility for the right-of-way pursuant to 49 CFR 1152.29(a), as well as statements supporting a public use request pursuant to 49 CFR 1152.28(a)(2). By decision served November 1, 1993 (November 1993 decision), KDOT was authorized to negotiate with TAP during the remaining portion of the 180-day public use condition period.

TAP and KDOT did not reach an agreement for public use under section 10906 or trail use. On March 2, 1994, after the negotiation periods had expired,<sup>6</sup> ATA filed a statement of willingness to assume financial responsibility for the right-of-way in compliance with 49 CFR 1152.29(a). On March 10, 1994, TAP informed the ICC that it had negotiated a trail use agreement with ATA for ATA's acquisition of the right-of-way under the Trails Act and requested the issuance of a NITU. In the April 1994 decision, effective the same day (April 4, 1994), the ICC found that TAP had not consummated the abandonment and that it retained jurisdiction over the property. Therefore, the ICC accepted ATA's trail use request and issued another NITU. By joint statement filed April 14, 1994, TAP and ATA notified the ICC that they had reached an interim trail use/rail banking agreement.

On April 27, 1994, Mr. Becker sought administrative review of the April 1994 decision contending, among other things, that

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<sup>6</sup> The negotiation period ended for public use on November 23, 1993, and for trail use on November 27, 1993. The November 1993 decision established this slightly longer negotiation period for trail use based on TAP's expressed willingness to negotiate with KDOT until November 27, 1993; the public use negotiation period was limited to 180 days by statute. See 49 U.S.C. 10906.

TAP had consummated its abandonment of the line when the original negotiating periods expired, thus ending the ICC's jurisdiction over the right-of-way. In the July 1995 decision, the ICC denied the petition, again finding that TAP had not fully consummated its abandonment and, therefore, that jurisdiction was retained over the right-of-way.

#### DISCUSSION AND CONCLUSIONS

Both Mr. Becker and RTC seek to have the NITU involuntarily revoked. We will address their arguments in turn.

1. Mr. Becker bases his request on the decision in Fritsch v. ICC, 59 F.3d 248 (D.C. Cir. 1995), cert. denied, 116 S. Ct. 1262 (1996) (Fritsch), which Mr. Becker submits is dispositive of the issues he previously presented. TAP and ATA reply that Mr. Becker's motion is procedurally and substantively flawed. They argue that Mr. Becker's motion is procedurally defective because it is merely another attempt to have the NITU rescinded, a request that was already denied in the July 1995 decision. In addition, TAP and ATA contend that, even if the motion were viewed as a petition to reopen under 49 CFR 1115.4, Mr. Becker has failed to state in detail the respects in which the July 1995 decision involves material error, new evidence or substantially changed circumstances.<sup>7</sup> TAP and ATA argue that Fritsch is inapposite on its facts. In particular, they note that in this case, unlike Fritsch, the railroad never advised the ICC in writing that it had consummated the abandonment of its line. In the absence of such a letter, TAP and ATA argue that the line had not been fully abandoned and the ICC retained jurisdiction to issue the NITU.

We agree with TAP and ATA that the facts in Fritsch are significantly different from the facts presented in this case. In Fritsch, CSX Transportation, Inc. (CSXT), filed a notice of exemption with the ICC to abandon an out-of-service line. The Monroe County Parks and Recreation Department (Monroe County) filed a request for a public use condition and advised the ICC of its interest in negotiating a trail use agreement with the railroad. CSXT originally declined to enter into a trail use agreement. Accordingly, the ICC denied the request for a trail user condition, but imposed a 180-day public use condition under 49 U.S.C. 10906 to allow for the possibility that the parties might come to an agreement. During that 180-day period, CSXT, on more than one occasion, informed the ICC in writing that it had abandoned the line. Just before the 180 days expired, however, CSXT notified the ICC that it no longer intended to abandon the line and that it had reached an agreement with Monroe County for trail use. The ICC found that it still retained jurisdiction to impose a trail condition because the railroad could not have legally abandoned the line until the 180-day public use condition period had expired.

The court rejected the ICC's reading of section 10906, holding that a condition imposed under that provision did not

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<sup>7</sup> We view Mr. Becker's motion as a petition to reopen which asserts that, under the law stated in Fritsch, the ICC committed material error in denying his petition to rescind the NITU and reverse the July 1995 decision. Thus, the petition was filed properly under 49 CFR 1115.4 and we will consider it.

prevent consummation in the circumstances of that case. The court found that CSXT had consummated the abandonment of its line, based primarily on the letters it sent to the ICC explicitly stating that it had fully abandoned the line and removed its equipment.

Unlike the facts in Fritsch, a NITU was imposed here before TAP was authorized to effect abandonment, thus preserving the agency's jurisdiction over the right-of-way. Also, TAP never notified the ICC that it had abandoned the line. To the contrary, TAP agreed from the outset to negotiate a trail use arrangement and in a letter to Mr. Becker dated March 23, 1994, the railroad clearly stated that it had not relinquished its interest in the right-of-way and that the corridor would be used for trail purposes.

As noted in the ICC's July 1995 decision, TAP's removal of rails, ties and ballast, cancellation of tariffs, and discontinuance of service at the same time as it was negotiating a trail use agreement did not constitute consummation of the abandonment. See Birt v. STB, 90 F.3d 580, 585, reh'g denied 98 F.3d 644 (D.C. Cir. 1996) (Birt); Conrail v. STB, 93 F.3d 793 (D.C. Cir. 1996). To the contrary, as the court in Birt explained, while discontinued rail service, salvaged track, and tariff cancellation are actions often taken in connection with abandonment, they also are fully consistent with the lesser action of temporary cessation of rail operations or trail use. Thus, they are entitled to little weight where, as here, the railroad's actions demonstrate an intent not to abandon by its continued willingness to negotiate.

It is true that, if no agreement for trail use is reached within the allotted negotiation period, a NITU will convert into effective abandonment authority, permitting the railroad to fully abandon the line. See 49 CFR 1152.29(d)(1). However, that does not mean that a full abandonment occurs automatically on the day the original NITU expired, as Mr. Becker claims. Rather, the railroad must take action to exercise abandonment authority. Moreover, the Board does not lose jurisdiction over the right-of-way unless the railroad's action is to fully abandon the line, as opposed to exercising the lesser-included authority to discontinue service over the line. Here, the railroad's expressed desire and intention to continue trail use negotiations beyond the 180-day period shows that in this case, as in Birt, there was no intent to fully abandon the line.

Although ATA did not file its request for a NITU within the original 180-day negotiation period set forth in the May 1993 decision, the request was filed before TAP's consummation of the abandonment. Moreover, the fact that negotiations continued for more than 180 days is not dispositive; the courts have found that the trail use negotiation period may be extended. Birt; Grantwood Village v. Missouri Pacific Railroad, 95 F.3d 654 (8th Cir. 1996), pet. for cert. pending. See also Rail Abandonments-- Supplemental Trails Act Procedures, 4 I.C.C.2d 152, 157-58 (1987) (Supplemental Procedures). Finally, it is not unusual for us to issue a trail use condition where, as here, a new negotiating party asks to be substituted for the original prospective trail user.

In short, Mr. Becker has not shown that TAP's actions evidence an intent to consummate the abandonment. When ATA made

its request here, the ICC still retained jurisdiction to consider the request and issue a NITU. Therefore, Mr. Becker's motion for reconsideration will be denied.

2. RTC does not dispute the ICC's jurisdiction to issue the NITU. Instead, it believes that ATA is not an appropriate trail manager and argues that we should involuntarily revoke the NITU on that basis, citing language in the ICC's brief, dated June 1995, at 28-29, filed in the U.S. Court of Appeals for the D.C. Circuit in No. 94-1581, National Ass'n of Reversionary Property Owners v. ICC (petition for review denied without opinion at 70 F.3d 638 (1995)). Specifically, RTC submits the following quotation, which it states supports its motion:

[A]fter a Trails Act request is made by a trail group, landowners can submit evidence that a trail offer is a subterfuge (*i.e.*, that the right-of-way will not in fact be used as a trail), or that statutory conditions will not be met . . . . [Authorities deleted.] If a trail use arrangement is successfully negotiated and a landowner or other interested party presents evidence to call into question the continued application of the Trails Act, the ICC will reopen the abandonment proceeding to afford a trail group the opportunity to show that it continues to meet [the requirements]. If the ICC determines that the trail group does not . . . , the . . . NITU may be revoked, and the line declared fully abandoned . . . .

RTC, however, has left out pertinent portions of the quotation which do not support its position. The complete quotation is as follows with the deleted portions appearing in bold:

**NARPO repeatedly suggests that the agency fails to provide landowners with any opportunity to participate and be heard during the Trails Act process. *E.g.* Pet. Br. 2; 25-27. But that argument is not correct. The ICC's procedures allow for the submission of written evidence by landowners or other members of the public prior to any interim trail use.**

**Specifically, after a Trails Act request is made by a trail group, landowners can submit evidence that a trail offer is a subterfuge (*i.e.*, that the right-of-way will not in fact be used as a trail), or that statutory conditions will not be met (*i.e.*, a trail user lacks funding to meet the financial and liability conditions of the Trails Act). Supplemental Trails Act Procedures, 4 I.C.C.2d at 156. See Goos, 911 F.2d at 1295, *citing Iowa Southern R. Co. -- Exemption -- Aband.*, 5 I.C.C.2d 496, 503 (1989). If a trail use arrangement is successfully negotiated and a landowner or other interested party presents evidence to call into question the continued application of the Trails Act, the ICC will reopen the abandonment proceeding to afford a trail group the opportunity to show that it continues to meet the **financial and liability requirements of the statute**. If the ICC determines that the trail group does not **have the ability to meet the financial and liability conditions**, the **CITU or NITU may be revoked and the line declared fully abandoned, at which point the right-of-way would no longer be part of the national transportation system and any****

**reversionary interests in the property would vest.**

[Footnote omitted.]

By stringing together portions of the quotation, RTC has sought to create the impression that the ICC, and now the STB, would involuntarily revoke a NITU on grounds other than a failure to continue to meet the financial and liability conditions of the statute. But that simply is not the case, as can be seen by the full quotation.

The Trails Act does not grant us discretionary authority to disapprove a voluntary trail use agreement that meets the stated requirements of 16 U.S.C. 1247(d). Iowa Southern R. Co.--Exemption--Abandonment, 5 I.C.C.2d 496, 502-04 (1989), aff'd sub nom. Goos v. ICC, 911 F.2d 1283 (8th Cir. 1990). Rather, as the ICC repeatedly pointed out, our authority under the Trails Act is ministerial. See id. at 1293-96. We have no involvement in the negotiations between the railroad and the trail use proponent. Nor do we analyze, approve, or set the terms of trail use agreements. See, e.g., Rail Abandonments--Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 608 (1986); Supplemental Procedures, 4 I.C.C.2d at 156 ("We lack any discretion to decide whether rail banking and use of the right-of-way is desirable for a particular line; Congress has made that determination for all lines. In administering the statute, we need only be assured that the Trails Act has been properly invoked and that its requirements will be met").

In short, when a Trails Act request is made, we only ascertain whether the requirements of the statute have been met (i.e., whether the party wishing to negotiate with the carrier under section 1247(d) is willing to assume legal and financial responsibility for management of the right-of-way and acknowledges that use of the right-of-way as a trail is subject to restoration or reconstruction for railroad purposes). If those requirements are met (and the railroad agrees to negotiate), we issue an appropriate order allowing for the parties' Trail Act negotiations to take place. Similarly, if a trail use arrangement is successfully negotiated, and an interested party presents evidence to call into question the continued application of the Trails Act, we will reopen the abandonment proceeding to afford a trail group the opportunity to show that it continues to meet the financial and liability conditions of the statute.

RTC considers the involved right-of-way to be an excellent candidate for rail banking and interim trail use; however, it objects to ATA as trail manager. RTC does not question ATA's ability to assume financial responsibility for the line, but alleges that the NITU should be revoked because ATA is merely a holding company for TAP,<sup>8</sup> and is owned, controlled, or otherwise the alter ego of A&K Salvage (A&K), a for-profit salvage company.

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<sup>8</sup> RTC also attaches a letter dated January 2, 1996, by the Secretary of an organization named American Trails alleging that ATA is using its name without authorization. American Trails attaches a certificate from the D.C. Department of Consumer and Regulatory Affairs to support its claim. We have no jurisdiction to resolve the name use issue, and it will not be discussed further.

RTC believes that the officers of ATA are officers or employees of A&K, who are also officers or employees of TAP.

RTC contends that the collective efforts of TAP, A&K, and ATA have already rendered any possible trail conversion of the right-of-way more difficult and expensive. Specifically, RTC alleges that A&K has destroyed the roadbed by removing the ballast and has rendered a 1,300 foot bridge unusable by removing all of the crossties. RTC submits that these actions are inconsistent with rail banking.<sup>9</sup> RTC also alleges that TAP and ATA have no plans to develop a trail, and that any trail use agreement between TAP and ATA is merely a "ruse and subterfuge," allegedly to hold the corridor intact to retain revenues from a utility company (Western Resources) that maintains transmission lines along the corridor.<sup>10</sup> Thus, RTC concludes that ATA is not a "qualified private organization" within the meaning of 16 U.S.C. 1247(d).<sup>11</sup>

RTC also alleges that the actions already taken have had an adverse effect on historic resources along the corridor and that this proceeding should be reopened so that we can undertake an analysis under section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. 470f. RTC attaches a May 20, 1993 letter from the Kansas State Historic Preservation Officer (SHPO) to the ICC that states that, because the right-of-way was being turned over to KDWP under the Trails Act provisions, he would not continue to insist on additional information about the history of the line. Given that the right-of-way was not converted to a trail under the management of KDWP, RTC argues that section 106 now should be applied "before there is nothing left to protect."

TAP and ATA reply that RTC is not a party to this proceeding, has not petitioned for leave to intervene, and, therefore, is without standing to petition to reopen this proceeding.<sup>12</sup> TAP and ATA further contend that RTC fails to

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<sup>9</sup> RTC, however, ignores that where, as here, a NITU has been issued, the railroad may salvage the track. See Birt.

<sup>10</sup> RTC argues that ATA acts as TAP's marketing agent and preserves revenues from Western Resources' use of the corridor for A&K.

<sup>11</sup> Section 1247(d) states, as pertinent here:

If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the [ICC or Board] shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this Act, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

<sup>12</sup> TAP and ATA maintain that RTC is not an "interested party" within the meaning of 49 U.S.C. 10327(g)(1), and, therefore, its pleading should be rejected and returned unfiled pursuant to 49 CFR 1104.10. But an "interested party" may be a  
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establish adequate grounds for reopening this case. They maintain that RTC's petition largely reiterates arguments that were already considered and rejected by the ICC in the July 1995 decision. Specifically, TAP and ATA note that there the ICC refused to revoke the NITU on the grounds that TAP and ATA were corporate affiliates. They state that RTC failed to present any statutory provisions, legislative history, or ICC or court precedent suggesting that our discretion in a Trails Act case extends to investigating the corporate character of the prospective trail user. Absent such support, they argue that the ICC's July 1995 decision was not based on material error.

TAP and ATA object to RTC's contention that ATA is not a "qualified private organization" under 16 U.S.C. 1247(d). They assert that ATA is as qualified as anyone else to rail bank a right-of-way and that RTC offers no evidence to the contrary.

TAP and ATA deny that their rail-banking agreement is a ruse or subterfuge. They explain that the ties from one of the bridges were removed as a public safety measure to prevent children from playing on the bridge and that only salvageable ballast was removed from the right-of-way. They point out that the right-of-way has not been regraded, that the berm has not been removed, and that, typically, railroad rights-of-way require resurfacing for trail use. TAP notes that ATA has fulfilled its statutory and regulatory obligation of keeping the right-of-way intact and available for reinstatement of rail service. ATA also filed the required statement of willingness to assume financial responsibility for the line. Accordingly, they ask that RTC's motion to involuntarily terminate or revoke the NITU be denied.

We agree with TAP and ATA that RTC has not established grounds for reopening and involuntarily revoking the NITU. We reject RTC's argument that ATA is not a "qualified private organization" under section 1247(d). As noted, ATA submitted a statement of willingness to assume financial responsibility in which it agreed to assume full responsibility for the management of and for any legal liability arising out of the transfer of the right-of-way. Moreover, it acknowledged that the right-of-way is subject to restoration or reconstruction for railroad purposes. These are the only requirements for invoking section 1247(d).<sup>13</sup>

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<sup>12</sup>(...continued)

person who has an interest in the proceeding regardless of whether that person is a party to the proceeding. Here, RTC is a person interested in the administration of the Trails Act. Our rules do not require that a person be a party to a proceeding in order to file a petition to reopen. See 49 CFR 1115.4, which provides: "A person at any time may file a petition to reopen any administratively final action . . . ." Accordingly, RTC's petition to reopen was properly filed.

<sup>13</sup> Congress clearly intended to preserve as many rail corridors as possible under section 1247(d). See Preseault v. ICC, 494 U.S. 1, 19 (1990) ("Congress apparently believed that every line is a potentially valuable national asset that merits preservation even if no future rail use for it is currently foreseeable"). Under the statute, a prospective trail user may acquire the right-of-way through "donation, transfer, lease, sale of otherwise" so long as the financial and rail banking requirements in the statute are met. Moreover, any "State,

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Missouri-Kansas-Texas Railroad Company--Abandonment--In St. Charles, Warren, Montgomery, Callaway, Boone, Howard, Cooper and Pettis Counties, MO, Docket No. AB-102 (Sub-No. 13) (ICC served Feb. 19, 1991), aff'd sub nom. Glosemeyer v. Missouri-Kansas-Texas RR, 879 F.2d 316 (8th Cir. 1989), cert. denied, 494 U.S. 1003 (1990); Supplemental Procedures, 4 I.C.C.2d at 156. RTC does not challenge the validity of ATA's statement of willingness and has not alleged that ATA has not assumed its financial and rail banking responsibilities.<sup>14</sup> Because ATA has met, and continues to meet, the requirements of section 1247(d), we find that it is a qualified organization within the meaning of that section.

RTC's suggestion that ATA's corporate affiliation with a for-profit salvage company somehow disqualifies it from holding a NITU is not persuasive. RTC does not explain why a railroad should have to forgo the use or sale of salvageable materials that may assist the carrier in continuing its rail operations as a condition to designating the right-of-way for interim trail use.<sup>15</sup> A&K's dismantling of the track and salvage of reusable material from the roadbed and other rail appurtenant equipment are beneficial to the railroad and are not unlawful or inconsistent with section 1247(d).<sup>16</sup>

RTC's concern that ATA, A&K, and TAP have conducted salvage operations that might make the construction of a trail more difficult or "next to impossible" is not supported. RTC's evidence does not demonstrate that a trail cannot be constructed or that ATA or TAP are actively discouraging trail use.<sup>17</sup> The

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<sup>13</sup>(...continued)  
political subdivision, or qualified private organization" can invoke section 1247(d). In these circumstances, we read the word "qualified" to mean any private organization willing to assume responsibility for the line and agree to rail banking.

<sup>14</sup> As noted, use of a rail banked right-of-way is subject to the user's continuing to meet these responsibilities. 49 CFR 1152.29(a)(3).

<sup>15</sup> We note that, in a case somewhat similar to this, the ICC authorized a railroad to salvage its track and to rail bank a right-of-way in its own name. In Dallas Area Rapid Transit--Abandonment Exemption--In Dallas County, TX, Docket No. AB-439X (ICC served July 3, 1995), the Director of the ICC's Office of Proceedings issued a NITU for the Dallas Area Rapid Transit, a regional transportation authority and a political subdivision of the State of Texas, based on its representations that the involved .74-mile right-of-way was suitable for recreational trail use and that it would retain the right-of-way, and assume responsibility for management and use of the right-of-way and for the payment of taxes and other liabilities.

<sup>16</sup> Similarly, the fact that ATA may receive revenues from Western Resources merely means that ATA has a ready source of funds for maintenance of the right-of-way and for liabilities and taxes.

<sup>17</sup> RTC notes in passing that other entities have expressed an interest in establishing a trail here and avers that "valid" trail use offers have been rejected. But section 1247(d) does  
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removal of ties from one of the bridges to prevent its becoming a public nuisance is not inconsistent with rail banking or with interim trail use.<sup>18</sup> The other actions affecting the roadbed appear to be limited to effects of the salvage operations, rather than any active attempt to discourage potential trail developers from succeeding ATA as the manager of the right-of-way and developing a trail.

Finally, the fact that ATA may not be the one to actually make this right-of-way available for recreational use is not dispositive. We frequently grant requests to substitute one prospective trail user for another. Furthermore, section 1247(d) sets no time limit for how quickly a trail must be developed to its intended level of use. In Missouri Pacific Railroad Company--Abandonment in Okmulgee, Okfuskee, Hughes, Pontotoc, Coal, Johnston, Atoka, and Bryan Counties, OK, Docket No. AB-3 (Sub-No. 63), slip op. at 4 (ICC served Jan. 4, 1991), the ICC stated:

[S]ection 1247(d) does not require the trail to be 'developed' for advanced recreational uses. There can be differing types or levels of trail use, and we will not become involved in determining the type or level of trail for a particular right-of-way. Moreover, there is no time limit on how quickly a trail must be developed to its intended level of use.<sup>19</sup>

Accordingly, we do not believe that ATA, A&K, or TAP are actively engaged in a "ruse." RTC has not disproved ATA's stated intention to hold the corridor intact for another entity to fully develop the right-of-way as a trail. In the meantime, the NITU and ATA's commitment to maintain and assume financial responsibility for the line assures that the right-of-way will remain available for rail banking. As we noted in SF&L Railway, Inc.--Abandonment Exemption--In Ellis and Hill Counties, TX, Docket No. AB-448 (Sub-No. 1X), slip op. at 8 (STB served July

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<sup>17</sup>(...continued)

not require an interim trail use arrangement to be entered into with any particular trail user because such arrangements are voluntary. See National Wildlife Fed'n v. ICC, 850 F.2d 694, 699 (D.C. Cir. 1988). Moreover, the record in this proceeding does not explain why these other offers were not successful. Accordingly, we attach no weight to these allegations.

<sup>18</sup> This is the only action cited by RTC to justify its request to now require TAP to undergo the section 106 process of the NHPA. The application of NHPA was considered by the ICC when it granted the abandonment exemption, and the section 106 process was found not to be required based on the information provided by the railroad and the SHPO. Moreover, the SHPO knew -- or should have known -- that trail use under 16 U.S.C. 1247(d) is voluntary, and that therefore, KDWP might never enter into a trail use agreement. In these circumstances, RTC's request for reopening of this proceeding to complete the section 106 process will be denied.

<sup>19</sup> Compare, Consolidated Rail Corporation--Abandonment Exemption--Lancaster and Chester Counties, PA, Docket No. AB-167 (Sub-No. 1095X) (ICC served Mar. 5, 1993), in which the ICC denied the National Association of Reversionary Property Owners' petition for reconsideration of a NITU that had been extended for a total period of 3 years.

30, 1996), and as ATA states here, ATA has donated other rights-of-way that it has held to public entities that subsequently have established trails. And, as RTC itself points out, the right-of-way in question is an excellent candidate for rail banking and interim trail use. For all of these reasons, RTC's motion to reopen this proceeding and involuntarily revoke the NITU will be denied.

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

It is ordered:

1. Mr. Becker's motion for reconsideration of the July 20, 1995 decision or, in the alternative, for rescission of the April 4, 1994 decision is denied.
2. The Rails to Trails Conservancy's motion to reopen this proceeding and to revoke the NITU is denied.
3. The Rails to Trails Conservancy's motion to reopen this proceeding to complete the section 106 of the National Historic Preservation Act, 16 U.S.C. 470f, is denied.
4. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary