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SERVICE DATE – NOVEMBER 17, 2010

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 290 (Sub-No. 322X)

NORFOLK SOUTHERN RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN
POLK COUNTY, IOWA

Decided: November 16, 2010

Norfolk Southern Railway Company (NSR) and Iowa Interstate Railroad (IAIS) jointly filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments and Discontinuances of Service and Trackage Rights for NSR to abandon, and for IAIS to discontinue service over, a 1.70-mile line of railroad between milepost DU 353.00 and milepost DU 354.70, in Grimes, Polk County, Iowa. Notice of the exemption was served and published in the Federal Register on October 19, 2010 (75 Fed. Reg. 64,392-93) (October 2010 notice).¹ The exemption is scheduled to become effective on November 18, 2010.

The Board's Office of Environmental Analysis (OEA) served an environmental assessment (EA) in this proceeding on October 22, 2010. In the EA, OEA notes that the U.S. Environmental Protection Agency, Region 7 (EPA), commented that EPA conducted a search of its database to determine if any of its regulated industrial facilities or remediation sites in the area would have an impact on the proposed abandonment. Based on this search, EPA determined that none of its regulated sites would have an impact on the proposed abandonment. However, EPA did note that the right-of-way proposed for abandonment could contain contaminants, such as waste oils, wood preservatives, lubricants, and pesticides, from prior railroad practices that, if disturbed during salvage operations, could pose a risk to the environment through possible transport in air, water, or soil media. Therefore, EPA requests that it be contacted further to determine the need, if any, for remediation. OEA states in the EA that, although NSR has indicated that it does not intend to disturb the underlying roadbed during the salvage process, OEA recommends a condition requiring NSR, prior to commencement of any salvage activities, to consult with EPA to ensure that any concerns regarding potential contamination of the right-of-way are addressed and to report the results of these consultations in writing to OEA.

OEA also notes that the Iowa Department of Natural Resources (DNR) commented that a stormwater construction permit may be required if the salvage process results in the disturbance of one or more acres of ground. DNR also commented that the salvage process may result in fugitive dust emissions, soil erosion, and the discovery of listed species or rare communities. Accordingly, to control dust and sediment, DNR recommends the use of best management

¹ The October 2010 notice embraced Docket No. AB 414 (Sub-No. 5X), Iowa Interstate Railroad—Discontinuance of Service Exemption—in Polk County, Iowa.

practices during salvage operations, but states that further analysis may be required to determine the presence of listed species or rare communities. OEA states in the EA that, although NSR has indicated that it does not intend to disturb the underlying roadbed or undertake any in-stream work or use any fill materials during the salvage process, OEA recommends a condition requiring NSR, prior to commencement of any salvage activities, to consult with DNR regarding its listed species or rare communities, stormwater, water quality, and fugitive dust requirements and to use best management practices during salvage operations.

Pursuant to 36 C.F.R. § 800.2, OEA notes that it conducted a search of the Native American Consultation Database (Database) at <http://home.nps.gov/nacd/> to identify Federally recognized tribes that may have ancestral connections to the project. According to OEA, the Database indicated that the following tribes may have knowledge regarding properties of traditional religious and cultural significance within the project's right-of-way: the Flandreau Santee Sioux; the Iowa Tribe of Kansas and Nebraska; the Iowa Tribe of Oklahoma; the Lower Sioux Indian Community of Minnesota; the Prairie Island Indian Community; the Sac and Fox Nation of Missouri; the Sac and Fox Nation of Oklahoma; the Sac and Fox Tribe of the Mississippi in Iowa; the Santee Sioux Nation; and the Upper Sioux Community of Minnesota. Accordingly, OEA states that it is sending a copy of the EA to these tribes for review and comment.

Comments to the EA were due by November 9, 2010. OEA received one comment from the Lower Sioux Indian Community Tribal Historic Preservation Office (THPO) indicating that the area of the right-of-way proposed for abandonment is located on ancestral tribal lands that could be impacted by land disturbance activities typically associated with the salvage process. The THPO believes that such a disturbance could result in the inadvertent discovery of artifacts with possible tribal significance and requests that, if such discoveries are made, that all salvage activities stop immediately until the site can be reviewed by a professional with tribal expertise. Therefore, to address this concern, OEA recommends a new condition requiring NSR, in the event that any unanticipated archaeological sites, human remains, funerary items, or associated artifacts are discovered during its salvage activities, to immediately cease all work and to notify OEA, THPO, and other interested Federally recognized tribes, pursuant to 36 C.F.R. § 800.13(b). OEA shall then consult with THPO, interested Federally recognized tribes, NSR, and any other consulting parties, if any, to determine whether appropriate mitigation measures are necessary. Accordingly, the conditions recommended by OEA in the EA and the new condition recommended by OEA will be imposed.

In the EA, OEA states that the right-of-way may be suitable for other public use following abandonment and salvage of the line. On October 28, 2010, the City of Grimes, Iowa (the City), a municipal corporation of the State of Iowa interested in transportation and/or natural resources, filed a request for the issuance of a notice of interim trail use (NITU) for the line to negotiate with NSR for acquisition of the right-of-way for use as a trail under the National Trails System Act, 16 U.S.C. § 1247(d) (Trails Act), and 49 C.F.R. § 1152.29. The City also has submitted a statement of willingness to assume full 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 C.F.R. § 1152.29. The City has acknowledged that the use of the right-of-way for trail purposes is subject to the user's continuing to meet the responsibilities described above and to future reconstruction and reactivation of the right-of-way for rail service. In a response filed on November 5, 2010, NSR consents to the City's request for interim trail use.

Because the City's request complies with the requirements of 49 C.F.R. § 1152.29, and NSR is willing to negotiate with the City 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, NSR may fully abandon the line, subject to any outstanding conditions. See 49 C.F.R. § 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.

The City also has requested imposition of a public use condition under 49 U.S.C. § 10905 for the line. The City requests that NSR be prohibited from disposing of the corridor, other than tracks, ties, and signal equipment, except for public use on reasonable terms, and that NSR be barred from the removal or destruction of potential trail-related structures, such as bridges, trestles, culverts, and tunnels, for a 180-day period from the effective date of the exemption. The City's justification for the 180-day period is that these structures have considerable value for recreational trail purposes. The City notes that the corridor is in the heart of a historic area of the City commonly referenced as the "Governors District," which has been identified as an area of significant historic and cultural importance, and that redevelopment plans for the area are underway.

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 Aban.—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986). Under § 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: (1) the condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) justification for the imposition of the period of time requested. See 49 C.F.R. § 1152.28(a)(2). Because the City has met these requirements, a 180-day public use condition will be imposed, requiring NSR to keep intact the right-of-way (including bridges, trestles, culverts, and tunnels) and to refrain from disposing of the corridor (other than tracks, ties, and signal equipment), commencing from the November 18, 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 May 17, 2011, while the trail use negotiating period will run 180 days from the service date of this decision and notice (until May 16, 2011). If a trail use agreement is reached on a portion of the right-of-way prior to May 17, 2011, NSR 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, NSR is not required to deal exclusively with the City, but may engage in negotiations with other interested persons.

As conditioned, this decision and notice 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 October 19, 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 NSR to negotiate with the City for trail use, for a period of 180 days from the service date of this decision and notice (until May 16, 2011); and (2) to permit public use negotiations as set forth below, for a period of 180 days commencing from the November 18, 2010 effective date of the exemption (until May 17, 2011), to enable any state or local government agency, or other interested person, to negotiate the acquisition of the line for public use. It is also subject to the conditions that NSR: (1) prior to commencement of any salvage activities, consult with EPA to ensure that any concerns regarding potential contamination of the right-of-way are addressed and report the results of these consultations in writing to OEA; (2) prior to commencement of any salvage activities, consult with DNR regarding its listed species or rare communities, stormwater, water quality, and fugitive dust requirements and use best management practices during salvage operations; and (3) in the event that any unanticipated archaeological sites, human remains, funerary items, or associated artifacts are discovered during salvage activities, immediately cease all work and notify OEA, THPO, and other interested Federally recognized tribes, pursuant to 36 C.F.R. § 800.13(b). OEA shall then consult with THPO, interested Federally recognized tribes, NSR, and any other consulting parties, if any, to determine whether appropriate mitigation measures are necessary.
3. Consistent with the public use and interim trail use/rail banking conditions imposed in this decision and notice, NSR may discontinue service over the line. NSR shall keep intact the right-of-way, including bridges, trestles, culverts, and tunnels, and shall refrain from disposing of

the corridor (other than tracks, ties, and signal equipment), 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 portion of the 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 the management of, 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 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.

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 May 16, 2011, interim trail use may be implemented. If no agreement is reached by that time, NSR may fully abandon the line, provided the conditions imposed in this proceeding are met. See 49 C.F.R. § 1152.29(d)(1).

8. This decision is effective on its service date.

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