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SERVICE DATE – MARCH 26, 2010

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-295 (Sub-No. 7X)

THE INDIANA RAIL ROAD COMPANY—ABANDONMENT EXEMPTION—IN MARTIN  
AND LAWRENCE COUNTIES, IN

Decided: March 25, 2010

By petition filed on December 7, 2009, The Indiana Rail Road Company (INRD or petitioner) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon 22.80 miles of rail line (Line) in Martin and Lawrence Counties, IN. The Line comprises a 21.15-mile line of railroad extending from milepost 241.35 east of Crane, IN, to milepost 262.50 in Bedford, IN (Crane-Bedford Line), and a track extending from the Crane-Bedford Line at approximately milepost 262.40 and proceeding in an open counter-clockwise loop (east-north-west-south) for approximately 1.65 miles (Bedford Industrial Track). INRD also seeks an exemption from any condition imposed under 49 U.S.C. 10905 that would prohibit or delay the recovery and reuse of the Line's rail, ties, other track materials (OTM), and ballast. In addition, INRD requests immediate effectiveness of a final decision granting the petition, if such a decision is issued after February 28, 2010. Pursuant to 49 U.S.C. 10502(b), the Board served and published in the Federal Register (74 FR 68300-01) on December 23, 2009, a notice instituting an exemption proceeding.

Two requests for issuance of a notice of interim trail use (NITU) and imposition of a public use condition were filed: one by the Indiana Trails Fund, Inc. (ITF), on December 28, 2009; and the other by the Greenways Foundation, joined by the City of Bedford (Greenways/Bedford), on January 12, 2010. On December 15, 2009, a group of landowners, alleging fee simple interest in the right-of-way proposed for abandonment, submitted a petition protesting the conversion of the rail bed to a hiking trail, and claiming that any rights to the property should revert to the underlying property owners. On December 22, 2009, Citizens Against Rails-To-Trails filed a protest against the use of INRD's right-of-way as a trail, expressing, among other things, concerns regarding privacy and safety.

Radius Indiana (Radius), a multi-county economic development corporation located in Crane and serving the South Central Indiana region (including Martin and Lawrence Counties), filed a letter of protest and noted that it had requested that INRD provide copies of all required information, pursuant to 49 CFR 1152.27, for possible consideration of an offer of financial assistance (OFA).

Additional letters of protest and requests for public hearing have been filed by: The Honorable Baron Hill, United States Congressman; Eric Koch, Indiana State Representative;

Shawna Girgis, Mayor, City of Bedford, IN; and Dan Terrell, Mayor, City of Mitchell, IN. Correspondence expressing concern over the potential loss of rail service and, in one instance, requesting a hearing, has also been submitted by: Brent Steele, Indiana State Senator; Sandy Blanton, Indiana State Representative; David Bower, Mayor, City of Salem, IN; Douglas England, Mayor, City of New Albany, IN; David Branneman, Executive Director, Lawrence County Tourism Commission; Gene McCracken, Executive Director, Lawrence County Economic Growth Council; and Adele Bowden-Purlee, President, Bedford Area Chamber of Commerce (collectively, Opponents or Protestants).<sup>1</sup> Opponents express concern over the adverse impact that loss of rail service would have on economic development in the surrounding counties.<sup>2</sup>

Board staff conducted a public meeting<sup>3</sup> in Salem on March 5, 2010, to receive public comments on INRD's petition for exemption.<sup>4</sup> The speakers at the meeting included public officials, business representatives, and members of the community.<sup>5</sup> Many of the public comments at the hearing regarding the abandonment of the Line concerned the limited time parties are afforded to respond to, and participate in, the abandonment process. Mayor Terrell expressed concerns that Board regulations regarding the timeline of the abandonment make it

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<sup>1</sup> Correspondence has been placed in the public docket even if it has not been served on all parties. However, pursuant to 49 CFR 1104.12, every document filed with the Board should include a certificate showing simultaneous service on all parties of record, if the filer intends for the document to be considered in the Board's evaluation of the merits of the proceeding.

<sup>2</sup> A number of the opponents reference in their submissions the impact of both this proposed abandonment and the proposed discontinuance by CSX Transportation, Inc. (CSXT), of service over a 62.3-mile rail line on its Northern Region, Louisville Division, Hoosier Subdivision between milepost 00Q 251.7, near Bedford, and milepost 00Q 314.0, near New Albany, in STB Docket No. AB-55 (Sub-No. 698X), CSX Transportation, Inc.—Discontinuance of Service Exemption—in Clark, Floyd, Lawrence, Orange, and Washington Counties, IN.

<sup>3</sup> See Public Meeting Tr., Mar. 5, 2010.

<sup>4</sup> For administrative convenience purposes only, the public meeting participants were allowed to discuss the proposed discontinuance in STB Docket No. AB-55 (Sub-No. 698X), as well as the proposed abandonment in this case. However, the 2 proceedings are independent matters that are being addressed separately by the Board.

<sup>5</sup> The speakers at the hearing were: Mr. McCracken; Mayor Girgis; Mayor Terrell; Thomas Cooley, President, Radius; David Umpleby, legal counsel, Radius; Richard Vonnegut, ITF; Robert Armstrong, Bluespring Caverns Operating Company; Jim Dunn; Judy Gray, Partnership Executive Director, Orange County Economic Development; Spencer Wendelin, Transmark Associates; Jess Helsel, President, Washington County Economic Growth Partnership; Mayor Bower; Andrew Wright, City Attorney, Salem; Cathy Hale, City of Madison Port Authority; John Mishler, County Commissioner, Washington County; Rhonda Greene, the Farm Bureau; Robert C. Hockersmith, a former Congressional candidate; and Becky Durbin, a local resident.

difficult for localities to participate in the process. Mayor Terrell noted that many entities within the local government must meet and agree on the issues to reach a comprehensive position. Similarly, Mr. David Umpleby, speaking on behalf of Radius, stated that the OFA process does not allow parties sufficient time to make a measured decision and put together financing for the transaction. Mr. Umpleby also submitted additional correspondence that noted Radius' continued interest in pursuing an OFA and the organization's concern about the economic impact on the community should rail service in the area be terminated.

On March 16, 2010, INRD filed a written response to the statements offered at the public meeting (INRD Response to Public Meeting). In its response, INRD reiterated that the abandonment is an important part of its plan to redeploy assets to handle traffic growth on other parts of its system. INRD stated that it understands the advantages of rail service in bringing new business to an area and is willing to play its part in supporting business development efforts in the affected community. It also stated its willingness to leave the Bedford Industrial Track in place to make it available to an entity intending to provide rail service.<sup>6</sup>

For the reasons discussed below, the Board will grant the exemption from 49 U.S.C. 10903, thereby authorizing the abandonment, subject to environmental, historic preservation, trail use, public use, and standard employee protective conditions. INRD's request for a waiver of any public use condition will be denied. INRD's request to make this decision effective immediately also will be denied.

## BACKGROUND

In 2006, INRD acquired Canadian Pacific Railway (CP)'s line between Chicago, IL, and Louisville, KY (Chicago-Louisville Line). See The Indiana Rail Road Company—Acquisition—Soo Line Railroad Company, STB Finance Docket No. 34783 (STB served Apr. 11, 2006). The Crane-Bedford Line is part of the Chicago-Louisville Line east/south of Crane. This line begins east of the most easterly rail spur leading into the Crane Naval Surface Warfare Center (Crane Warfare Center) at Crane and runs easterly to Bedford, ending at the junction of the line with CSXT's line in Bedford.

According to INRD, only 3 shippers have received service on the Line since December 31, 2006, and all 3 shippers are located on the Bedford Industrial Track.<sup>7</sup> INRD asserts that its annual revenue from this traffic was \$14,234 in 2007, \$39,893 in 2008, and

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<sup>6</sup> In its response to the public meeting, INRD indicated that it has informed the City of Bedford and the City of Mitchell that it is "prepared to leave in place the Bedford Industrial Track and to make it available to the White River Port Authority or some other entity intending to maintain rail service." INRD Response to Public Meeting, p. 4.

<sup>7</sup> On December 21, 2009, INRD filed a motion for protective order under 49 CFR 1104.14(b), to protect the identity of shippers receiving service on the 22.80-mile rail line. In a decision served on December 23, 2009, the Board granted INRD's motion. Consequently, the shippers will be referred to as Shippers A, B, and C.

\$33,998 in 2009.<sup>8</sup> Shipper A, the only currently active shipper, receives inbound scrap metal by truck and rail and ships all of its outbound traffic by truck. INRD contends that Shipper A received an average of less than 20 cars per year in the past 3 years. Petitioner asserts that the revenue from Shipper A's traffic is approximately \$30,000 per year for traffic received in Chicago and hauled the 262 miles to Bedford. Shipper B most recently used the Line for 2 inbound cars in 2007. For Shipper C, the most recent use of the Line was a one-time movement of a single car in 2008.

INRD asserts that it made substantial efforts to develop additional traffic on the Crane-Bedford Line. INRD indicates that Shipper A receives additional volumes of inbound scrap metal from other sources and generates additional volumes of outbound material, but that it has not been able to obtain this traffic. INRD contends that its efforts to obtain Shipper B's inbound service has been unsuccessful because the shipper's product originating from Northern Indiana can move more cheaply by truck, and the product originating from Arkansas would require a 3-line haul for which INRD also cannot offer service at a competitive price. INRD states that it sought additional traffic from Shipper C, but was unsuccessful because the shipper manufactures specialized products more suitable for truck shipment rather than rail. INRD also contends that it attempted to develop new rail business with potential shippers, including inbound aluminum and plastic shipments to local industries and outbound shipments of Indiana architectural limestone and high calcium limestone for flue gas desulphurization at coal burning power plants, but its efforts have been unsuccessful.

In addition to its on-line traffic, INRD maintains that the Line has also carried overhead traffic, which has significantly decreased in the last 3 years. In 2007, there were 5,842 cars moving in overhead service across the Line. In 2008, there were 4,663 cars and, during the first 6 months of 2009, only 1,754 cars. On July 16, 2009, INRD rerouted 90% of its overhead traffic via an agreement with Louisville & Indiana Railroad Company. According to INRD, rerouting of its overhead traffic has created more consistency and efficiency by increasing service from 2 or 3 days per week to 5 days per week and by reducing fuel consumption per ton of freight. (INRD's route involves significant grade and curvature and thus requires additional locomotive power.) The other 10% of INRD's overhead traffic has been rerouted via CSXT (through Indianapolis or Terre Haute, IN), via Canadian National Railway Company (through Newton, IL), or via Norfolk Southern Railway Company (through Chicago). INRD states that these arrangements for handling overhead traffic are more efficient and will remain in place even if the Line is not abandoned.

INRD's petition discusses the impact of the abandonment on Shipper A, the only active shipper on the Line, and on service to the Crane Warfare Center. INRD notes that it has discussed several alternatives with Shipper A, including establishing a transloading arrangement elsewhere on INRD's lines or a transloading arrangement at an existing facility operated by Shipper A and located on CSXT's nearby line at Mitchell. INRD contends that, should these

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<sup>8</sup> INRD's petition notes that the 2009 traffic data is through December 1, 2009, and does not account for 2 additional carloads of scrap from Shipper A.

alternatives not prove satisfactory, the volume and nature of the shipments would be adaptable to truck transport. With respect to the Crane Warfare Center, INRD notes that service over both rail spurs leading into the facility would still be possible, and that it selected the segment for abandonment with that in mind.

According to INRD, the Line currently requires substantial maintenance and rehabilitation, which would be a significant expense for INRD. INRD states that the Crane-Bedford Line generally meets Federal Railroad Administration (FRA) Class 3 standards. However, several miles of track are classified as FRA Class 2 due to grade- and curvature-related issues. INRD estimates the cost of repairing several bridges on the Line to be approximately \$437,000. Additionally, INRD asserts that a tunnel located at milepost 242.20 needs repairs to remedy an inward bulging of tunnel walls that is creating clearance restrictions. INRD contends that short-term repairs to the tunnel would cost between \$250,000 and \$400,000 but that, should INRD continue long-term operations over the Line, the tunnel would need to undergo widening and relining at an estimated cost of between \$6 million and \$8 million. According to INRD, the Bedford Industrial Track, the location of the 3 on-line shippers, is in poor condition and is classified as FRA Excepted Track. INRD asserts that any revenue generated from future traffic on the Line would be insufficient to cover operational or rehabilitation expenses. To support its assertions that continued operations over the line would be unprofitable, INRD has submitted a verified statement from its president, Thomas G. Hoback. Following abandonment, INRD indicates its intention to recover and reuse salvageable rail, ties, OTM, and ballast for upgrade and maintenance of its active rail lines over which traffic increases are expected.

As previously noted, protests have been filed or submitted by a number of individuals and entities opposing the proposed abandonment. Congressman Hill expresses concern that 1 of the 2 rail access points to the Crane Warfare Center would be eliminated, which would reduce logistical flexibility for the warfare center. State Senator Steele, State Representative Blanton, Mayor Bower, Mayor Terrell, Mayor England, Mr. Branneman, Mr. McCracken, Ms. Bowden-Purlee, all oppose the petition for exemption, arguing that abandonment will substantially impair present and future economic and community development opportunities in the counties traversed by the Line. State Representative Koch indicated that he has proposed state legislation, House Bill 1268, the Indiana Freight Rail Infrastructure Redevelopment Act, that would provide incentives to industries utilizing rail service along lines proposed for abandonment or discontinuance. Mayor Girgis asserts that one of the key strategies for economic recovery has included growth of local industries that support the Crane Warfare Center, such as Eastgate Business and Technology Center, home to defense contractors. Further, Mayor Girgis argues that granting the proposed abandonment would negatively impact not only connectivity to the Crane Warfare Center, but also the City of Bedford's ability to attract future industry.

## DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without prior approval from the Board. Under 49 U.S.C. 10502, however, the Board must exempt a transaction or service from regulation when it finds that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

When abandonment authorization is sought, whether by application or exemption petition, the railroad must demonstrate either that there is no longer any need for service on the line or that the line in question has become a burden on interstate commerce. Typically, in an attempt to make the latter showing, the carrier submits evidence to demonstrate that the costs it incurs exceed the revenues attributable to the line. While abandonment decisions are not based solely on mathematical computations and considerations, the railroad bears the burden of showing that keeping the line in service would impose a burden on it that outweighs the harm that would befall shippers and other members of the public and the adverse impacts on rural and community development, if the rail line were abandoned. See Gauley River Railroad, LLC—Abandonment and Discontinuance of Service—in Webster and Nicholas Counties, WV, STB Docket No. AB-559 (Sub-No. 1X) et al., slip op. at 7 (STB served June 16, 1999).

The Board is mindful of the concerns raised both in filings with the Board and in appearances at the hearing held in Salem on March 5. However, in this case, INRD has stated that it would face hundreds of thousands of dollars in short-term, and millions of dollars in long-term, maintenance costs and necessary repair, as set forth above. On the income side, INRD states that its revenue on the line was \$14,234 in 2007, \$39,893 in 2008, and \$33,998 in 2009. INRD's figures have not been contested by any of the parties protesting the proposed abandonment. Given that this level of revenue would not support these anticipated maintenance expenses, the financial burden on INRD to continue to operate would be significant.

This burden must be weighed against the harm to the shipping public and community development that is alleged to result from the proposed abandonment. Although protestants anticipate that the proposed abandonment would cause job loss, restrict access to markets, and lead to decline in development of new enterprises, it is not clear from the facts here that retention of the rail line would ensure economic development opportunities in the communities traversed by the Line.<sup>9</sup> Furthermore, the loss of speculative future economic development arising from abandonment does not outweigh demonstrated harm to the carrier resulting from continued operation of a line. See San Joaquin Valley Railroad Company—Abandonment Exemption—in Tulare County, CA, STB Docket No. AB-398 (Sub-No. 7X), slip op. at 9 (STB served June 6, 2008). The Board recognizes the community's concerns and notes that, although the analysis weighs in favor of abandonment of the line, as will be discussed later, protestants have the opportunity through the OFA process to preserve rail service. In addition, we are cognizant of the fact that INRD has now stated in its most recent filing that it plans to leave in place a portion of the line, i.e., the Bedford Industrial Track, as will be discussed further below.

Board regulation requiring retention of the line is not necessary to protect shippers from an abuse of market power. Traffic from Shippers A, B, and C has declined dramatically since 2006, and none of the shippers has objected to the abandonment exemption. The record shows

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<sup>9</sup> Protestants contend that rail service is needed to attract industry. However, the Board notes that a business entity relocated to Salem on the condition that rail service be available for its use but subsequently failed to utilize the rail services available.

that these shippers have other transportation alternatives. In fact, 2 of the shippers have utilized other modes of transportation to the exclusion of rail service. The only current shipper on the Line uses trucks for much of its transportation needs and, given the nature and quantity of its shipments, presumably could use trucks for the remainder, should INRD's proposed alternative arrangements not prove satisfactory. Abandonment of the Line also will not adversely affect shippers whose traffic formerly moved in overhead service over the Line. There are at least 3 physical routing options for overhead traffic moving between Louisville and Indiana. Finally, rail service to the Crane Warfare Center would continue to be possible even if the Line were to be abandoned. Nevertheless, to ensure that the shippers have been informed of the Board's action, INRD will be required to serve a copy of this decision on the 3 shippers and the Crane Warfare Center so that it is received within 5 days of the service date of this decision and notice, and to certify contemporaneously to the Board that it has done so. Given the market power finding here, the Board need not determine whether the proposed transaction is limited in scope.

Furthermore, as noted by Mayor Terrell in the public meeting and confirmed by INRD in a subsequent filing,<sup>10</sup> INRD has informed the Cities of Bedford and Mitchell that it is willing to leave in place the Bedford Industrial Track—the location of the 3 on-line shippers—and to make the track available to the White River Port Authority or some other entity intending to maintain rail service. Based upon INRD's representation regarding preservation of the Bedford Industrial Track, Mayor Terrell withdrew his objection to the abandonment of the Crane-Bedford Line.<sup>11</sup>

The other exemption criterion is also satisfied here. Detailed scrutiny of this transaction under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of the abandonment process, the exemption reduces regulatory barriers to exit [49 U.S.C. 10101(7)]. The exemption fosters sound economic conditions and encourages efficient management by relieving INRD from the expense of retaining and maintaining a line that generates very little traffic and permitting INRD to recover and reuse its assets more productively elsewhere on its rail system [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be adversely affected here.

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, the Board will impose the employee protective conditions in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).

While the petition for exemption will be granted, the Board will not make this decision effective immediately as requested by INRD. Similarly, INRD's request seeking an exemption from any public use condition imposed will be denied. It is reasonable here to set the effective date 30 days after the service date of the decision, in part to allow for petitions to stay or to reopen. Requests for public use conditions temporarily requiring an abandoning carrier to leave

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<sup>10</sup> INRD Response to Public Meeting, p. 4.

<sup>11</sup> Public Meeting Tr., p. 20, Mar. 5, 2010.

intact the right-of-way are routinely granted and provide the opportunity for the right-of-way to be preserved for purposes that will benefit the public. INRD fails to show that its request for an exemption from section 10905 should be granted. However, nothing in the public use condition imposed here precludes INRD from salvaging its track, ties, and signal equipment.

The concerns of the speakers at the March 5, 2010 public meeting regarding the time limits in abandonment proceedings are noted by the Board. In particular, the Board recognizes the challenges smaller communities face in having to respond quickly when they might not have sufficient resources immediately available. However, the Board's regulations establish a particular timeline for abandonment proceedings that are based on OFA timelines set by statute. 49 U.S.C. 10904. The parties should keep in mind that they are free to negotiate a private sale of a line approved for abandonment—outside the confines of the OFA schedule—anytime before abandonment is consummated.

INRD has submitted a combined environmental and historical report with its petition and has notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed abandonment. See 49 CFR 1105.11. The Board's Section of Environmental Analysis (SEA) has examined the environmental and historical report, verified INRD's data, and analyzed the probable effects of the proposed action on the quality of the human environment. SEA issued an environmental assessment (EA) in this proceeding on February 4, 2010. In the EA, SEA recommends that 4 conditions be imposed on any decision granting abandonment authority.

First, SEA states in the EA that the U.S. Fish and Wildlife Service (FWS), submitted the following recommendations to avoid or minimize impacts to wildlife and its habitats: (1) minimize tree clearing and avoid wetland disturbance for access to work areas; (2) avoid discharge of demolition debris, waste materials, or other pollutants into streams or wetlands; (3) contain disturbed soil to prevent runoff to waterways or wetlands, if earthmoving is required; and (4) minimize disturbance of the stream channel and banks, and avoid work in stream channels during primary fish spawning season (April 1–June 15), if bridge removal is proposed. SEA also states that FWS noted the existence of karst limestone formations in the area and their importance to the local ecology. FWS recommended several measures for INRD to follow to identify and minimize adverse impacts to these karst systems. According to SEA, FWS also concluded that the proposed abandonment is within the range of the Federally endangered Indiana bat (*Myotis sodalis*), but noted that the proposed project would not eliminate enough habitat to affect the species. However, to avoid an incidental taking<sup>12</sup> due to the removal of an occupied roost tree, FWS recommended that tree clearing be avoided during the period spanning April 1 through September 30. To ensure that any reasonable concerns expressed by FWS are addressed, SEA recommends that INRD be required to consult with FWS, Bloomington Field Office, prior to the commencement of any salvage activities.

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<sup>12</sup> Section 9 and regulations implementing section 4 of the Endangered Species Act prohibit any taking of (engaging in any activity or conduct that would harm) listed species without a specific permit or exemption.

Second, SEA states that the National Oceanic and Atmospheric Administration's National Geodetic Survey (NGS) has submitted comments identifying 3 geodetic survey markers that may be disturbed by the proposed abandonment. SEA recommends a condition requiring INRD to consult with and to notify NGS at least 90 days prior to beginning salvage activities so that NGS may plan for the possible relocation of the geodetic station markers.

In addition to environmental concerns, SEA has made recommendations with respect to the historical background of the land affected by the proposed abandonment. In the EA, SEA indicates that the Indiana Department of Natural Resources' Division of Historic Preservation & Archaeology (SHPO) has requested that INRD provide photographs from the railroad right-of-way with a description of work to be performed within the vicinity of the following structures: Furst-Kerber Cut Stone Co., Williams Milling Company, Lawrence County Bridge No. 126, Bedford Foundry & Machine Co., Indiana Limestone Company Office, Monon Railroad Depot, and Archaeological Sites Nos. 12Lr275, 12Lr457, and 12Mn693. The SHPO also requested a description of any access routes and staging areas with their locations. Furthermore, SEA states that, since the proposed project is in an area associated with the historic limestone industry, the SHPO recommended that detailed historic documentation be prepared to assist in its review of the potential to impact historic resources. Further, the SHPO requested information regarding whether brick pavers in the vicinity of the Milwaukee Railroad Depot would be disturbed, whether rails, ties and OTM or any part of the tunnel would be removed, and whether ballast, if removed, would be limited to a modern disturbance<sup>13</sup> area. Accordingly, SEA recommends that INRD be required to retain its interest in and take no steps to alter the historic integrity of all historic properties, including sites, buildings, structures, and objects within the project right-of-way area that are eligible for listing or are listed in the National Register of Historic Places (National Register) until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f (NHPA). SEA also recommends that INRD be required to report back to SEA regarding any consultations with the SHPO and the public. Further, SEA recommends that INRD be prohibited from filing its consummation notice or initiating any salvage activities related to abandonment (including removal of tracks and ties) until the section 106 process has been completed and the Board has removed this condition.

In the EA, SEA states that, pursuant to 36 CFR 800.2, 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 area. The Database indicated that the Miami Tribe of Oklahoma and the Peoria Tribe of Indians of Oklahoma (Tribe) may have ancestral connections to the project area. The Tribe commented that it had no objections to the proposed project, but noted that all activities should cease immediately and

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<sup>13</sup> Modern disturbance relates to the moving of any ground that has not been disturbed in the past 50 years (50 years or less).

appropriate persons, including state and tribal Native American Graves Protection and Repatriation Act (NAGPRA) representatives, be contacted should any human skeletal remains and/or other objects falling under NAGPRA be uncovered. Therefore, SEA recommends that, in the event that any traditional cultural properties, archeological sites, human remains, funerary items, or associated artifacts be discovered during INRD's salvage activities, INRD be required to cease all work immediately and to notify SEA, interested Federally recognized tribes, and the SHPO, pursuant to 36 CFR 800.13(b). SEA states that it will then consult with the SHPO, interested Federally recognized tribes, INRD, and any other consulting parties, if any, to determine whether any mitigation measures are necessary.

Comments to the EA were due by March 8, 2010. In a letter dated February 23, 2010, the SHPO stated that it has determined that the characteristics that qualify the previously identified historic properties for inclusion in the National Register would not be diminished as a result of the proposed abandonment, provided certain conditions were met. The SHPO also advised that the Board should evaluate the potentially historic properties, make a determination on the effect of the proposed abandonment, and provide documentation of its findings to the SHPO and other interested parties. SEA indicates that the historic preservation condition recommended in the EA is sufficient to address the concerns raised in this comment from the SHPO. No other comments were filed. Accordingly, SEA does not recommend any additional conditions.

The conditions recommended by SEA in the EA will be imposed. Based on SEA's recommendation, the Board concludes that the proposed abandonment as conditioned will not significantly affect either the quality of the human environment or the conservation of energy resources.

As previously noted, ITF and Greenways/Bedford have filed requests for issuance of a NITU under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act) and 49 CFR 1152.29, to enable them to negotiate with INRD for rail banking and interim trail use of the right-of-way. Each entity has submitted a statement of willingness to assume financial responsibility for the right-of-way and has acknowledged that use of the right-of-way is subject to possible future reconstruction and reactivation of the right-of-way for rail service, as required under 49 CFR 1152.29.<sup>14</sup> On March 10, 2010, INRD submitted a letter stating that it is willing to negotiate with both ITF and Greenways/Bedford. As noted, Citizens Against Rails-to-Trails and individual landowners oppose the conversion of the right-of-way for trail use.

Under the Trails Act and the Board's implementing rules, if a prospective trail user requests a trail condition and the carrier indicates its willingness to negotiate a trail agreement, the Board's role under the Trails Act is largely ministerial. Goos v. ICC, 911 F.2d 1283, 1295

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<sup>14</sup> INRD indicates that CP quitclaimed its interest in the Line to INRD in 2006 when INRD purchased CP's Chicago-Louisville Line. INRD asserts that organizations will have an opportunity to gain use of the right-of-way under the Trails Act if INRD's title consists only of rail use easement. However, INRD maintains that it will review its options for disposition of the property in the event it has a fee simple interest in any segment of the Line.

(8th Cir. 1990) (Goos). To invoke the Trails Act, a prospective trail sponsor only needs to file a request accompanied by the necessary statement of willingness to assume liability and acknowledgment that interim trail use is subject to possible reinstatement of rail service. See National Ass'n of Reversionary Property Owners v. STB, 158 F.3d 135, 138 (D.C. Cir 1998); 49 CFR 1152.29(a) and (d). If the railroad indicates its willingness to negotiate, the Board must then issue a NITU. Goos, 911 F.2d at 1295. Because these conditions have been met, the Board will issue a NITU.<sup>15</sup> If a landowner believes that trail use has resulted in a taking of his or her property, the landowner can seek compensation in the Court of Federal Claims under the Tucker Act, 28 U.S.C. 1491, which has a 6-year statute of limitations. Preseault v. ICC, 494 U.S. 1 (1990).

INRD may reach an agreement with either ITF or Greenways/Bedford, or both, for trail use/rail banking of the Line. The parties may negotiate an agreement for interim trail use/rail banking during the 180-day period prescribed below. If an agreement is executed, no further Board action is necessary. If no agreement is reached within 180 days, INRD may fully abandon the line under the conditions in this decision. See 49 CFR 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.

SEA has indicated in its EA that the right-of-way may be appropriate for other public use after abandonment. In its petition, INRD states that it will cooperate with any qualified organization seeking trail use for the Line. Although INRD points out that part of the Line runs through the Crane Warfare Center and security requirements may limit the availability of the right-of-way in that location, no comment on the matter has been filed by a representative of the warfare center. As noted, ITF and Greenways/Bedford have each filed a request for a public use condition under 49 U.S.C. 10905, precluding INRD, for 180 days, from: (1) disposing of the corridor, other than track, ties, and signal equipment, except for public use on reasonable terms; and (2) removing or destroying potential trail-related structures, such as bridges, trestles, culverts, and tunnels. The filers note that the area is scenic and the Line, including its bridges, would be well-suited for use as a recreational trail. ITF states that it needs the time to assemble and carry out a business plan. Greenways/Bedford states that it needs the time to review title information and begin negotiations with INRD.

The Board has determined that persons who file under the Trails Act may also file for public use under 49 U.S.C. 10905. See Rail Abandonments—Use of Rights-of-Way as Trails, 2 I.C.C. 2d 591, 609 (1986) (Trails). When the need for both conditions is established, it is the Board's policy to impose them concurrently, subject to the execution of a trail use agreement. ITF and Greenways/Bedford have each met the public use criteria prescribed at 49 CFR

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<sup>15</sup> On February 12, 2010, INRD submitted a filing, soliciting the informal assistance from the Board and/or DNR to help determine which organization would be more successful in assuming the responsibilities under a trail use agreement. As explained above, the Board's role in rail banking/interim trail use is essentially ministerial. Because INRD has agreed to negotiate with both parties, it can evaluate the organizations during the NITU negotiation period.

1152.28(a)(2) by specifying: (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 period of time requested. Accordingly, a 180-day public use condition also will be imposed, commencing from the effective date of this decision and notice, to enable any state or local government agency or other interested person to negotiate the acquisition of the line for public use. If a trail use agreement is reached on a portion of the right-of-way, INRD must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. Also, it should be noted that a public use condition is not imposed for the benefit of any one potential purchaser. Rather, it provides an opportunity for any interested person to negotiate to acquire a right-of-way that has been found suitable for public purposes, including trail use. With respect to the public use condition, INRD is not required to deal exclusively with ITF or Greenways/Bedford, but may engage in negotiations with other interested persons.

Parties should note that operation of the trail use and public use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. As stated in Trails, 2 I.C.C. 2d at 608, offers of financial assistance to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trail use/rail banking and public use. Accordingly, if an OFA is timely filed under 49 CFR 1152.27(c)(1), the effective date of this decision and notice will be postponed. See 49 CFR 1152.27(e)(2); see also 49 CFR 1152.27(f). Finally, if the line is sold under the OFA procedures, the petition for abandonment exemption will be dismissed and trail use and public use precluded. Alternatively, if a sale under the OFA procedures does not occur, the trail use and public use processes may proceed.

It is ordered:

1. Under 49 U.S.C. 10502, INRD is exempted from the prior approval requirements of 49 U.S.C. 10903 for the abandonment of the above-described line, subject to the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), and subject to the conditions that INRD shall: (1) consult with FWS' Bloomington Field Office prior to commencement of any salvage activities; (2) consult with and notify NGS at least 90 days prior to beginning salvage activities so that NGS may plan for the possible relocation of the geodetic station markers; (3)(a) retain its interest in and take no steps to alter the historic integrity of all historic properties, including sites, buildings, structures, and objects within the project right-of-way that are eligible for listing or are listed in the National Register until the section 106 process of the NHPA, 16 U.S.C. 470f, has been completed; (b) report back to SEA regarding any consultations with the SHPO and the public; and (c) not file its consummation notice or initiate any salvage activities related to abandonment (including removal of tracks and ties) until the section 106 process has been completed and the Board has removed this condition; (4) immediately cease all work and notify SEA, interested Federally recognized tribes, and the SHPO, pursuant to 36 CFR 800.13(b), if any traditional cultural properties, archeological sites, human remains, funerary items, or associated artifacts be discovered during INRD's salvage activities; (5) leave intact the right-of-way, including bridges, trestles, culverts, and tunnels (except track, ties, and signal equipment) for a period of 180 days from the effective date of this decision and notice, to enable any state or local government

agency or any other interested person, to negotiate the acquisition of the line for public use; and (6) comply with the interim trail use/rail banking procedures set forth below.

2. INRD's request seeking an exemption from any condition imposed under 49 U.S.C. 10905 is denied.

3. INRD's request to make this decision effective immediately is denied.

4. INRD is directed to serve a copy of this decision on Shippers A, B, and C, and on the Crane Warfare Center so that it is received within 5 days of the service date of this decision and notice, and to certify contemporaneously to the Board that it has done so.

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 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 September 22, 2010, interim trail use may be implemented. If no agreement is reached by that time, INRD may fully abandon the line. See 49 CFR 1152.29(d)(1). If an interim trail use/rail banking agreement is executed before September 22, 2010, the public use condition will expire to the extent the trail use/rail banking agreement covers the same line.

9. An OFA under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by April 5, 2010, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by the filing fee, which currently is set at \$1,500. See 49 CFR 1002.2(f)(25).

10. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **"Office of Proceedings, AB-OFA."**

11. Provided no OFA has been received, this exemption will be effective on April 25, 2010. Petitions to stay must be filed by April 12, 2010, and petitions to reopen must be filed by April 20, 2010.

12. Pursuant to the provisions of 49 CFR 1152.29(e)(2), INRD shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by INRD's filing of a notice of consummation by March 26, 2011, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Nottingham.