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SERVICE DATE – SEPTEMBER 7, 2010

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 295 (Sub-No. 8X)

THE INDIANA RAIL ROAD COMPANY—ABANDONMENT EXEMPTION—IN
SULLIVAN COUNTY, IND.

Decided: September 2, 2010

The Indiana Rail Road Company (INRD) filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon a 4.37-mile portion of its Kindill Lead extending from milepost 3.1 to milepost 7.47, in Sullivan County, Ind. (the line). Notice of the exemption was served and published in the Federal Register on August 9, 2010 (75 Fed. Reg. 47,879-80). The exemption is scheduled to become effective on September 8, 2010.

The Board's Office of Environmental Analysis (OEA) served an environmental assessment (EA) in this proceeding on August 13, 2010. In the EA, OEA indicates that the U.S. Fish and Wildlife Service, Bloomington Field Office (USFWS), has indicated that the line crosses Big Branch and several unnamed headwater streams, and passes through extensive tracts of forested wetlands. OEA notes in the EA that USFWS has recommended several measures to minimize adverse impacts on fish and wildlife resources. According to OEA, INRD states that INRD would perform the work subject to the measures recommended by USFWS, specifically that INRD will: minimize tree clearing and avoid disturbance in wetlands and riparian areas; avoid discharge of demolition debris, waste material, or other pollutants into streams or wetlands; contain disturbed soil to prevent runoff to waterways or wetlands if earth moving is required; and minimize disturbance of the stream channel and banks, and avoid work in Big Branch during the primary fish spawning season (April 1 – June 15) if bridges or culvert removal is proposed. OEA indicates in the EA that INRD states that: access to work areas would be from the rail line itself and should cause no disturbance of wetlands; INRD does not plan any tree clearing; there would be little or no demolition debris, waste material, or other pollutants generated by salvage activities and none would be discharged into streams or wetlands; no earth moving is contemplated but, if it becomes necessary, INRD would comply with the measures recommended by USFWS; and no bridge removal is contemplated but, if it becomes necessary, INRD or its contractors would comply with the recommendation of USFWS.

USFWS also has indicated that the proposed abandonment is within the range of the Federally endangered Indiana bat (Myotis sodalis). According to USFWS, the abandonment would not eliminate enough habitat to affect the Indiana bat but, to avoid incidental take from removal of an occupied roost tree, USFWS recommends that tree clearing be avoided between April 1 and September 30. OEA indicates in the EA that, if this measure is implemented,

USFWS concurs that the proposed project is not likely to affect adversely the Indiana bat. According to OEA, INRD states that salvage activities related to abandonment of the line would not involve tree clearing and, should tree clearing become necessary, INRD states that it would not clear trees during the period recommended by USFWS. Accordingly, OEA recommends a condition that, prior to beginning any salvage activities, INRD be required to consult with USFWS to discuss the implementation, if appropriate, of measures to minimize any adverse impacts on fish and wildlife resources.

Additionally, OEA indicates in the EA that, in the event that any unanticipated archaeological sites, human remains, funerary items, or associated artifacts are discovered during the railroad's salvage activities, INRD shall immediately cease all work and notify OEA, interested Federally recognized tribes, and the Indiana Department of Natural Resources, Division of Historic Preservation & Archaeology (SHPO) pursuant to 36 C.F.R. § 800.13(b). OEA shall then consult with the SHPO, interested Federally recognized tribes, INRD, and other consulting parties, if any, to determine whether appropriate mitigation measures are necessary.

Pursuant to 36 C.F.R. § 800.2, OEA conducted a search of the Native American Consultation Database (Database) at <http://home.nps.gov/nacd/> to identify Federally recognized tribes, which may have ancestral connections to the project area. According to OEA, the Database indicated that the Miami Tribe of Oklahoma and the Peoria Tribe of Indians of Oklahoma may have knowledge regarding properties of traditional religious and cultural significance within the right-of-way (the Area of Potential Effect) of the proposed abandonment. OEA states that it was sending a copy of the EA to these tribes for review and comment.

Comments to the EA were due by August 27, 2010. No comments were received. Accordingly, the conditions recommended by OEA in the EA 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 August 19, 2010, the Indiana Trails Fund, Inc. (ITFI), filed a request for the issuance of a notice of interim trail use (NITU) for the line to negotiate with INRD for acquisition of the line 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. ITFI 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, and 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 August 26, 2010, INRD states that it is prepared to negotiate an interim trail use agreement with ITFI.

Because ITFI's request complies with the requirements of 49 C.F.R. § 1152.29, and INRD is willing to negotiate with ITFI 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, INRD 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.

ITFI also has requested imposition of a public use condition under 49 U.S.C. § 10905 for the line. ITFI requests that INRD be prohibited from disposing of the corridor, other than tracks, ties, and signal equipment, except for public use on reasonable terms, and that INRD 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 abandonment. ITFI's justification for its request is that these structures have considerable value for recreational trail purposes. ITFI notes that the corridor is situated in a wild area near quarries and a state park, and that a trail will enhance natural redevelopment, ecological education, and hiking and bicycling ways to promote tourism to and near Shakamak State Park, Minnihaha Fish and Wildlife Area, Hilenbrand Fish and Wildlife Area, and the Green-Sullivan State Forest. ITFI states that the 180-day period is needed to complete trail plans and to negotiate terms of the acquisition.

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: (i) the condition sought; (ii) the public importance of the condition; (iii) the period of time for which the condition would be effective; and (iv) justification for the imposition of the period of time requested. See 49 C.F.R. § 1152.28(a)(2). Because ITFI has satisfied these requirements, a 180-day public use condition will be imposed, requiring INRD 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 September 8, 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 March 7, 2011, while the trail use negotiating period will run 180 days from the service date of this decision and notice (until March 7, 2011). If a trail use agreement is reached on a portion of the right-of-way prior to March 7, 2011, INRD 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, INRD is not required to deal exclusively with ITFI, 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 August 9, 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 ITFI to negotiate with INRD for trail use, for a period of 180 days from the service date of this decision and notice (until March 7, 2011; and (2) to permit public use negotiations as set forth below, for a period of 180 days commencing from the September 8, 2010 effective date of the exemption (until March 7, 2011). It is also subject to the conditions that: (3) prior to beginning any salvage activities, INRD be required to consult with USFWS to discuss the implementation, if appropriate, of measures to minimize any adverse impacts on fish and wildlife resources; and (4) in the event that any unanticipated archaeological sites, human remains, funerary items, or associated artifacts are discovered during the railroad's salvage activities, INRD shall immediately cease all work and notify OEA, interested Federally recognized tribes, and the SHPO. OEA shall then consult with the SHPO, interested Federally recognized tribes, INRD, and other consulting parties, if any, to determine whether mitigation measures are necessary.
3. Consistent with the public use and interim trail use/rail banking conditions imposed in this decision and notice, INRD may discontinue service over the line. INRD 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 right-of-way.
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 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.

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 March 7, 2011, interim trail use may be implemented. If no agreement is reached by that time, INRD may fully abandon the line, after 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, Joseph H. Dettmar, Acting Director, Office of Proceedings.