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SERVICE DATE – LATE RELEASE JULY 21, 2006

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-55 (Sub-No. 665X)

CSX TRANSPORTATION, INC.–ABANDONMENT EXEMPTION–IN HARLAN AND
LETCHER COUNTIES, KY

Decided: July 21, 2006

CSX Transportation, Inc. (CSXT), filed a notice of exemption under 49 CFR 1152 Subpart F–Exempt Abandonments to abandon a 12.99-mile line of railroad on its Southern Region, Huntington Division West, Cumberland Valley Subdivision, in Harlan and Letcher Counties, KY. The line consists of a portion of the Poor Fork Branch between milepost OWC 261.1, near Cumberland, and milepost OWC 262.3, at Cumberland Junction, and the entire Scotia Branch between milepost OWD 262.21, at Cumberland Junction, and milepost OWD 274.0, near Scotia at the end of the line. Notice of the exemption was served and published in the Federal Register on April 26, 2006 (71 FR 24772). The exemption became effective on May 26, 2006.

By decision served on May 25, 2006 (May 2006 decision), the proceeding was reopened at the request of the Board's Section of Environmental Analysis (SEA) and the exemption was made subject to the conditions that CSXT, prior to commencement of any salvage activities, consult with: (1) the U.S. Army Corps of Engineers, regarding its requirements, and, if applicable, comply with those requirements; (2) the U.S. Environmental Protection Agency (a) regarding its permit requirements and comply with its reasonable requirements, and (b) to ensure appropriate consideration of the National Pollutant Discharge Elimination System requirements and compliance with those requirements; (3) the U.S. Fish and Wildlife Service (USFWS), regarding potential impacts from salvage activities to Federally listed threatened and endangered species that may occur in the vicinity of the line, and to report the results of those consultations in writing to SEA; and (4) the National Park Service, Southeast Region, and the Kentucky Department of Parks, regarding any impacts on wildlife sanctuaries, refuges, national or state parks or forests, and to report the results of those consultations in writing to SEA; and to the conditions (5) that CSXT notify the U.S. Department of Commerce, National Geodetic Survey (NGS), at least 90 days prior to beginning salvage activities so that plans can be made for the possible relocation of the geodetic station markers identified by NGS; and (6) that, in the event that any archaeological sites, human remains, funerary items or associated artifacts are discovered during salvage activities, CSXT immediately cease all work and notify SEA, interested Federally recognized tribes, and the Kentucky Heritage Council (State Historic Preservation Officer or SHPO), after which SEA will consult with the SHPO, interested Federally recognized tribes, and CSXT to determine whether any mitigation measures are necessary.

CSXT submitted a letter to SEA that CSXT received from USFWS on June 6, 2006, in which USFWS states that no significant adverse impacts to wetlands or Federally listed endangered or threatened species are anticipated from the proposed abandonment. Based on this information, SEA now recommends that the USFWS condition be removed. Accordingly, the USFWS condition imposed in the May 2006 decision will be removed. The other environmental conditions imposed in that decision remain in effect.

On June 19, 2006, the Harlan County Fiscal Court (HCFC) late-filed a request for the issuance of a notice of interim trail use (NITU) for the line under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and 49 CFR 1152.29,¹ and for a public use condition² under 49 U.S.C. 10905, to negotiate with CSXT for acquisition of the right-of-way for use as a recreational trail. HCFC has submitted a statement of willingness to assume financial 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 CFR 1152.29, and has acknowledged that the use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation for rail service. In a response filed on June 26, 2006, CSXT indicates that it is agreeable to negotiate with HCFC for interim trail use.

Because HCFC's request complies with the requirements of 49 CFR 1152.29, and CSXT is willing to negotiate 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, CSXT may fully abandon the line, subject to any outstanding conditions imposed in this proceeding. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

As noted above, HCFC also requested a 180-day public use condition. HCFC requests that CSXT be prohibited from disposing of the corridor, other than the tracks, ties and signal equipment, except of public use on reasonable terms, and that CSXT be barred from the removal

¹ The April 26, 2006 notice of exemption provided that requests for trail use/rail banking had to be filed by May 8, 2006, and that requests for public use conditions had to be filed by May 16, 2006. However, in Aban. and Discon. of R. Lines and Transp. Under 49 U.S.C. 10903, 1 S.T.B. 894, 900 (1996) and 2 S.T.B. 311 (1997), the Board retained the policy of accepting filings after the due date when good cause is shown. Because there is no indication that HCFC's late-filed request will prejudice any party, it will be accepted. See Wheeling & Lake Erie Railway Company—Abandonment Exemption—in Starke County, OH, STB Docket No. AB-227 (Sub-No. 10X), slip op. at 1 n.1 (STB served Nov. 7, 1997).

² SEA indicated in an environmental assessment served on May 1, 2006, that the right-of-way may be suitable for other public use following abandonment.

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 authorization. HCFC states that the time period is needed to begin negotiations with CSXT and to work with state and Federal officials who have made commitments to this project.

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 Abandonments—Use of Rights-of-Way As Trails, 2 I.C.C.2d 591, 609 (1986). Under section 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 CFR 1152.28(a)(2). Because HCFC has satisfied these requirements, a 180-day public use condition will be imposed, commencing from the May 26, 2006 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 November 22, 2006, while the trail use negotiating period will run 180 days from the service date of this decision and notice (until January 17, 2007). If a trail use agreement is reached on a portion of the right-of-way, CSXT must keep the remaining portion 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, CSXT is not required to deal exclusively with HCFC, 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. HCFC's late-filed request for a NITU under 16 U.S.C. 1247(d) and a public use condition under 49 U.S.C. 10905 is accepted.
3. Upon reconsideration, the USFWS condition imposed in the May 2006 decision is removed. All other provisions and environmental conditions imposed in this proceeding will remain in effect.

4. Upon reconsideration, the notice of exemption served and published in the Federal Register on April 26, 2006, exempting the abandonment of the line described above, and the May 2006 decision, reopening the proceeding and making the exemption subject to several environmental conditions, are modified to the extent necessary to implement interim trail use/rail banking and to permit public use negotiations as set forth below. HCFC may negotiate with CSXT for trail use of the subject line, for a period of 180 days commencing from the service date of this decision and notice (until January 17, 2007), and subject to the remaining conditions imposed in the May 2006 decision.

5. Consistent with the public use and interim trail use/rail banking conditions imposed in this decision and notice, CSXT may discontinue service and salvage track and related materials. CSXT shall keep intact the right-of-way, including bridges, trestles, culverts and tunnels, for a period of 180 days from the effective date of the abandonment exemption (until November 22, 2006), 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 November 22, 2006, the public use condition will expire to the extent the trail use/rail banking agreement covers the same line.

6. 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.

7. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.

8. 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.

9. If an agreement for interim trail use/rail banking is reached by January 17, 2007, interim trail use may be implemented. If no agreement is reached by that time, CSXT may fully abandon the line, provided any outstanding conditions imposed in this proceeding are met. See 49 CFR 1152.29(d)(1).

10. This decision is effective on its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary