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SERVICE DATE – SEPTEMBER 21, 2012

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 33 (Sub-No. 304X)

UNION PACIFIC RAILROAD COMPANY – ABANDONMENT EXEMPTION – IN
POCAHONTAS COUNTY, IOWA

Decided: September 21, 2012

Union Pacific Railroad Company (UP) filed a notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon a 1.95-mile line of railroad on the Royal Industrial Lead, extending from milepost 475.15 to milepost 477.10 near Laurens, in Pocahontas County, Iowa (the Line). Notice of the exemption was served and published in the Federal Register on August 23, 2012 (77 Fed. Reg. 51,107). The exemption is scheduled to become effective on September 22, 2012.

The Board's Office of Environmental Analysis (OEA) served an environmental assessment (EA) in this proceeding on August 28, 2012, and a Final EA on September 17, 2012. OEA states in the EA that the National Geodetic Survey (NGS) has identified two geodetic station markers that may be affected by the proposed abandonment. Therefore, OEA recommends a condition requiring UP to consult with and notify NGS at least 90 days prior to beginning any salvage activities that will disturb or destroy any geodetic station markers located in the project area.

In its review, OEA has concluded that the proposed project is not located in an area designated as critical habitat. Records of the U.S. Department of the Interior, Fish and Wildlife Service (FWS), however, indicate that the following protected species may be present in the vicinity of the proposed project: (1) Prairie bush-clover (*Lespedeza leptostachya*) – Threatened; and (2) Western prairie fringed Orchid (*Platanthera praeclara*) – Threatened. Therefore, OEA recommends a condition that UP consult with FWS regarding the potential impact of the proposed project on these or any other endangered or threatened species prior to conducting any salvage activities.

Additionally, OEA states in the EA that the U.S. Environmental Protection Agency (EPA) has submitted comments stating that the proposed project as described would not require permitting under the Clean Water Act. EPA has also stated, however, that a storm water permit from the Iowa Department of Natural Resources (IDNR) may be required for land disturbances greater than one acre. Because the proposed abandonment may, if approved, result in land disturbance beyond this threshold, OEA recommends a condition requiring UP to consult with IDNR prior to beginning any salvage activities on the Line.

OEA received comments from the Iowa Tribe of Kansas and Nebraska (Iowa Tribe) on September 5, 2012. While the Iowa Tribe indicated that it had no objection to the proposed project, it asked to be informed if any consultations are requested under Section 106 of the National Historical Preservation Act,¹ if any new historical or cultural properties are discovered during the salvage process, or if any adverse effects to such properties are reported. The Iowa Tribe further requested that UP discontinue salvage activities and notify the Iowa Tribe if skeletal human remains or any objects falling under the Native American Graves Protection and Repatriation Act² are discovered during the salvage process. Based upon these requests, OEA recommends a new condition requiring UP to cease immediately all work and notify OEA, all interested Federally recognized tribes, and the Iowa State Historic Society (or SHPO) in the event that any unanticipated archaeological sites, human remains, funerary items, or associated artifacts are discovered during salvage activities.

On August 20, 2012, the Pocahontas County Conservation Board, the City of Laurens (both public agencies), and the Iowa Natural Heritage Foundation (a non-profit corporation) (collectively, the Trail Sponsors), filed a request for the issuance of a public use condition under 49 U.S.C. § 10905 and a request for the issuance of a notice of interim trail use (NITU) under the National Trail System Act, 16 U.S.C. § 1247(d) (Trails Act) and 49 C.F.R. § 1152.29 for the entire right-of-way. The Trail Sponsors have 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, 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 acknowledged that the use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service. In a response submitted on August 31, 2012, UP consents to the issuance of a NITU.

Because the Trail Sponsors' request complies with the requirements of 49 C.F.R. § 1152.29, and UP 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 an interim trail use agreement is reached (and thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2) and (h). Nat'l Trails Sys. Act & R.R. Rights-of-Way, EP 702 (STB served Apr. 20, 2012). If no agreement is reached within 180 days, UP 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 possible future reconstruction and reactivation of the right-of-way for rail service.

As noted above, the Trail Sponsors also requested a 180-day public use condition for the right-of-way. The Trail Sponsors requested that UP be prohibited from disposing of the corridor, including tracks, ties, and signal equipment, except for public use on reasonable terms, and that

¹ 16 U.S.C. § 470f.

² 43 C.F.R. § 10.4.

UP be barred from removing or destroying potential trail-related structures, such as bridges, trestles, culverts, and tunnels, for a 180-day period from the effective date of the abandonment. The Trail Sponsors state that they seek to preserve the right-of-way for both trail conversion and natural resource protection, and that the 180-day period is needed to complete negotiations with UP.

As an alternative to interim trail use under the Trails Act, the right-of-way may be acquired 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). 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 Trail Sponsors have satisfied these requirements, a 180-day public use condition will be imposed, commencing from the September 22, 2012 effective date of the exemption.

When the need for interim rail 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 21, 2013, while the trail use negotiating period will run 180 days from the service date of this decision and notice (until March 20, 2013). If a trail use agreement is reached on a portion of the right-of-way prior to March 21, 2013, UP 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 an 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, UP is not required to deal exclusively with the Trail Sponsors, but may engage in negotiation with other interested persons.

As conditioned, this decision 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 23, 2012, 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 the

Trail Sponsors to negotiate with UP for trail use of the right-of-way for a period of 180 days from the service date of this decision and notice (until March 20, 2013); and (2) to permit public use negotiations as set forth below for that same portion of the right-of-way, for a period of 180 days commencing from the September 22, 2012 effective date of the exemption (until March 21, 2013); and subject to the conditions that, prior to the commencement of any salvage activities, UP shall: (A) consult with NGS and notify NGS at least 90 days prior to beginning salvage activities that will disturb or destroy any geodetic station markers located in the project area; (B) consult with the FWS regarding potential impacts from salvaging activities to Federally listed threatened and endangered species that may occur in the vicinity of the Line, and report the results of these consultations in writing to OEA prior to the onset of salvage operations; (C) consult with IDNR regarding its storm water permitting process and comply with all reasonable requirements; and (D) cease immediately all work and notify OEA, all interested Federally recognized tribes, and the Iowa State Historic Society (or SHPO) in the event that any unanticipated archaeological sites, human remains, funerary items, or associated artifacts are discovered during salvage activities. OEA shall then consult with the SHPO, interested Federally recognized tribes, the railroad, and 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, UP may discontinue service and salvage track, and related materials.³ UP shall keep intact the right-of-way, including bridges, trestles, culverts and tunnels, 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 March 21, 2013, the public use condition will expire to the extent the trail use/rail banking agreement covers the same line.

4. If an interim trail use/rail banking agreement is reached, it must require the trail sponsor to assume, for the term of the agreement, full responsibility for: (i) managing the right-of-way; (ii) any legal liability arising out of the transfer or use of the right-of-way (unless the sponsor is immune from liability, in which case it need only indemnify the railroad against any potential liability); and (iii) 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 possible future reconstruction and reactivation of the right-of-way for rail service and to the trail sponsor's continuing to meet the financial obligations for the right-of-way.

³ Although the Trail Sponsors have asked that tracks, ties, and signal equipment be kept intact, they have not provided a basis for departing from the Board's standard practice of excepting those materials from the disposal prohibition. Consequently, UP will not be required to keep those materials intact.

6. If an interim trail use agreement is reached, the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2) and (h).

7. If interim trail use is implemented, and subsequently the trail sponsor intends to terminate trail use on all or any portion of the rail line covered by the interim trail use agreement, 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 March 20, 2013, interim trail use may be implemented. If no agreement is reached by that time, UP may fully abandon the line. See 49 C.F.R. § 1152.29(d)(1).

9. This decision and notice is effective on its date of service.

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