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SERVICE DATE - LATE RELEASE NOVEMBER 29, 2000

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-471 (Sub-No. 4X)

SOUTH KANSAS AND OKLAHOMA RAILROAD COMPANY--
ABANDONMENT EXEMPTION--IN CRAWFORD, WILSON, ELK AND GREENWOOD
COUNTIES, KS AND OSAGE AND TULSA COUNTIES, OK

Decided: November 28, 2000

South Kansas and Oklahoma Railroad Company (SKO) filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments to abandon: (1) a 35-mile line of railroad between milepost 153.0 near Tulsa and milepost 188.0 near Barnsdall, in Osage and Tulsa Counties, OK; (2) a 6-mile line of railroad between milepost 359.0 at Pittsburg and milepost 365.0 at Cherokee, in Crawford County, KS; and (3) a 23.5-mile line of railroad between milepost 438.5 at Severy and milepost 415.0 at Fredonia, in Wilson, Elk, and Greenwood Counties, KS. Notice of the exemption was served and published in the Federal Register on October 6, 2000 (65 FR 59891-92). The exemption was scheduled to become effective on November 7, 2000, provided no formal expression of intent to file an offer of financial assistance (OFA) was filed.

SEA concluded that the right-of-way may be suitable for public use following abandonment. By petition filed October 3, 2000, the City of Pittsburg (City) filed a request for issuance of a notice of interim trail use (NITU), under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and for a public use condition under 49 U.S.C. 10905 for the portion of the right-of-way between milepost 359.0 near Pittsburg and milepost 365.0 near Cherokee, in Crawford County, KS, a distance of 6 miles, in order to negotiate with SKO for acquisition of the right-of-way for use as a recreational trail. The Board's Section of Environmental Analysis (SEA) issued an Environmental Assessment (EA) in this proceeding served October 13, 2000. By facsimile filed November 1, 2000, SKO indicated its agreement to a trail use condition on the line.

On October 10, 2000, Zephyr Capital Corporation (Zephyr) timely filed a notice of intent to file an OFA to purchase the 6-mile portion of the right-of-way between milepost 359.0 and milepost 365.0 in Crawford County, KS. The filing of the notice of intent automatically stayed the effective date of the exemption until November 17, 2000. Zephyr also requested SKO to provide it with the financial data and information prescribed in 49 CFR 1152.27(a), which SKO provided on November 1, 2000. Zephyr filed a request for a 60-day extension of time to file its OFA, which was opposed by SKO. By decision served November 3, 2000, the proceeding was reopened and the deadline for Zephyr to file its OFA was extended to November 20, 2000, the effective date of the exemption was further postponed to November 30, 2000, and the requests

for issuance of a NITU and for issuance of a public use condition were held in abeyance pending completion of the OFA process for the 6-mile portion of the right-of-way. SKO was also authorized by the November 3 decision to fully abandon the line segments between: (a) milepost 153.0 near Tulsa and milepost 188.0 near Barnsdall, in Osage and Tulsa Counties, OK; and (b) between milepost 438.5 at Severy and milepost 415.0, at Fredonia, in Wilson, Elk, and Greenwood Counties, KS.¹

On November 22, 2000, the Trust for Public Land (TPL), a new negotiation party, filed a request for a NITU and for a public use condition for the 35-mile portion of the right-of-way between milepost 153.0 near Tulsa and milepost 188.0 near Barnsdall, in order to negotiate with SKO for use of that line as a recreational trail.² TPL states that the rail corridor is a scenic route from downtown Tulsa through residential neighborhoods in north Tulsa, meandering along the banks of Bird Creek, and terminating near Birch Lake, on the Osage Reservation. TPL also states that the corridor would connect and serve many neighborhoods and schools and would provide recreational and transportation opportunities. In addition, TPL indicates that acquisition of the corridor could provide important wildlife habitat and greenspace. TPL requests that SKO be prohibited from disposing of the corridor, other than the tracks, ties and signal equipment, except for public use on reasonable terms, and that SKO be barred from removing any trail-related structures, such as bridges, trestles, culverts and tunnels for a 180-day period from the effective date of the abandonment exemption. TPL submitted a statement indicating its willingness to assume full 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 payment of any and all taxes that may be levied against, the right-of-way, as required at 49 CFR 1152.29, and acknowledged that the use of the right-of-way for trail purposes is subject to future reactivation for rail service. By facsimile submitted on November 27, 2000, SKO has advised the Board that it has not consummated the abandonment of the 35-mile line and that it is willing to negotiate for trail use with TPL.

¹ The November 3 decision also imposed several environmental and a historic preservation condition.

² The October 6 notice provided that trail use/rail banking requests had to be filed by October 16, 2000, and that requests for public use conditions had to be filed by October 26, 2000. However, in Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 59 U.S.C. 10903, STB Ex Parte No. 537 (STB served Dec. 24, 1996, and June 27, 1997), it was stated that the Board would retain the policy of accepting filings after the due date when good cause is shown. Because there is no indication that the TPL'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).

Because TPL's request complies with the requirements of 49 CFR 1152.29 and SKO has not abandoned the line and is willing to negotiate for trail use, a NITU will be issued for the portion of the right-of-way: (a) between milepost 153.0 near Tulsa and milepost 188.0 near Barnsdall, in Tulsa and Osage Counties, OK.

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). TPL has satisfied the requirements for both a public use condition and a NITU for the 35-mile line in Osage and Tulsa Counties, OK.

The November 3 decision held the requests for issuance of a notice of interim trail use and a public use condition in abeyance pending completion of the OFA process for the 6-mile portion of the right-of-way in Crawford County, KS. As previously indicated, Zephyr's OFA was due November 20, 2000. No OFA filing has been received from Zephyr and the OFA process is therefore terminated. With the termination of the OFA process, it is now appropriate to issue a NITU and to impose a public use condition for this segment. Therefore, a NITU and public use condition will be imposed both for the 6-mile portion of the right-of-way between milepost 359.0 near Pittsburg and milepost 365.0 near Cherokee, and for the 35-mile portion of the right-of-way between milepost 153.0 near Tulsa and milepost 188.0 near Barnsdall.

This decision does not significantly affect either the quality of the human environment or conservation of energy resources.

It is ordered:

1. This proceeding is reopened.
2. Upon reconsideration, the exemption of the abandonment described above is subject to the condition that SKO keep intact the right-of-way underlying the track, including bridges, trestles, culverts and tunnels (but not track or track materials) for: (a) the 35-mile portion of the right-of-way between milepost 153.0 near Tulsa and milepost 188.0 near Barnsdall, in Tulsa and Osage Counties, OK; and (b) the 6-mile portion of the right-of-way between milepost 359.0 near Pittsburg and milepost 365.0 near Cherokee, for a period of 180 days from November 30, 2000 (until May 29, 2001), 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 the expiration of the 180-day period specified above, the public use condition will expire to the extent the trail use/rail banking agreement covers the same line.

3. A Notice of Interim Trail Use or Abandonment under 49 CFR 1152.29(d) is issued authorizing interim trail use/rail banking between: (a) milepost 153.0 near Tulsa and milepost 188.0 near Barnsdall, in Tulsa and Osage Counties, OK; and (b) between milepost 359.0 in Pittsburg and milepost 365.0 near Cherokee for a period of 180 days from November 30, 2000 (until May 29, 2001).

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 the future restoration of rail service 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 29, 2001, interim trail use may be implemented. If no agreement is reached by that time, SKO may fully abandon the line.

8. Subject to the public use and trail use provisions above, and subject to the conditions previously imposed in the October 6 and November 3 decisions, SKO's abandonment exemption will become effective on November 30, 2000.

9. This decision is effective on its service date.

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

Vernon A. Williams
Secretary