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SERVICE DATE - MAY 24, 2004

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-6 (Sub-No 410X)

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY  
–ABANDONMENT EXEMPTION–IN THURSTON COUNTY, WA

Decided: May 19, 2004

The Burlington Northern and Santa Fe Railway Company (BNSF) filed a notice of exemption under 49 CFR 1152 Subpart F–Exempt Abandonments to abandon and discontinue service over a 5.80-mile line of railroad between milepost 3.27 in Quadlock and milepost 9.07 in Olympia, in Thurston County, WA. Notice of the exemption was served and published in the Federal Register on April 26, 2004 (69 FR 22594-95). The exemption is scheduled to become effective on May 26, 2004.

The Board's Section of Environmental Analysis (SEA) served an environmental assessment (EA) in this proceeding on April 30, 2004. In the EA, SEA states that the National Geodetic Survey (NGS) has identified ten geodetic station markers that may be affected by the proposed abandonment. Therefore, SEA recommends that BNSF be required to notify NGS at least 90 days prior to salvage activities in order to plan for the relocation of the markers.

SEA states that the U.S. Army Corps of Engineers - Seattle District (USACE) had not responded to BNSF's environmental report at the time the EA was prepared. Therefore, SEA recommends that BNSF be required to consult with the USACE - Seattle District, prior to commencement of any salvage activities, in order to determine whether a Department of the Army permit under section 404 of the Clean Water Act (33 U.S.C. 1344) would be required.

SEA states that the City of Lacey (City ) after reviewing the Federal Emergency Management Agency (FEMA) floodplain maps, has expressed concerns about possible impact on the floodplain where the line crosses Mullen Road between Pattison Lake and Long Lake. Therefore, SEA recommends that BNSF be required to consult with the City's water resources engineer, Eric Hielema, P.E., prior to salvage activities.

SEA also states that the United States Department of the Interior, Fish and Wildlife Service, Western Washington Field Office (USFWS), has advised that the proposed abandonment is within the range of two bald eagle (Haliaeetus leucocephalus) nesting territories. The USFWS states that nesting activities occur from January 1 to August 15, and that wintering bald eagles may occur in the vicinity of

the proposed project from October 31 to March 31. The USFWS also states that the mazama pocket gopher (Thomomys mazama)<sup>1</sup> is a candidate for possible listing as either a threatened or endangered species. In addition, the USFWS submitted the following list of species or habitat of concern that have been documented and could be located on or near the proposed project: California wolverine (Gulo gulo luteus); Cascades frog (Rana cascadae); Coastal cutthroat trout (Oncorhynchus clarki clarki); Long-eared myotis (Myotis evotis); Long-legged myotis (Myotis volans); Northern goshawk (Accipiter gentilis); Oregon vesper sparrow (Pooecetes gramineus affinis); Olive-sided flycatcher (Contopus cooperi); Pacific fisher (Martes pennanti pacifica); Pacific lamprey (Lampetra tridentata); Pacific Townsend's big-eared bat (Corynorhinus townsendii townsendii); River lamprey (Lampetra ayresi); Slender-billed, white breasted nuthatch (Sitta carolinensis aculeata); Tailed frog (Ascaphus truei); Valley silverspot (Speyeria zerene bremeri); Van Dyke's salamander (Plethodon vandykei); Western gray squirrel (Sciurus griseus griseus); and the Aster curtus (White-top aster). In addition, the USFWS states that the northwestern pond turtle (Clemmys marmorata marmorata) is a species of concern that has occurred within a 1-mile radius of the proposed project site. To address the concerns of the USFWS, SEA recommends that prior to salvage activities BNSF be required to consult with the USFWS in order to identify the appropriate mitigation measures that may be warranted and to determine the protected status of the mazama pocket gopher and evaluate any possible impacts on this species.

SEA further states that the State of Washington, Department of Fish and Wildlife (WDFW), submitted a Habitats and Species report and stated that the proposed project may require further field inspection. Accordingly, SEA recommends that BNSF contact WDFW Habitat Program Manager for Thurston County, Steve Kalinowski, 360-249-4628 prior to commencement of any salvage activities.

Finally, SEA states that the State of Washington's Office of Community Development, Office of Archaeology and Historic Preservation (SHPO), states that no historic properties would be affected by the project. However, if any archaeological or historical materials are discovered during the project activities, BNSF shall discontinue work in the immediate vicinity, secure the area, and notify both the SHPO and the concerned tribes.

Based on SEA's recommendations, the environmental conditions recommended in the EA will be imposed.

SEA also indicated that, following abandonment and salvage of the rail line, the right-of-way may be suitable for other public use. On April 5, 2004, the City of Lacey and the City of Olympia (Cities) filed a request for issuance of a notice of interim trail use (NITU) for that portion of the right-of-way between milepost 3.27 at Quadlock near Union Mills Road and milepost 6.73 near Fones Road in

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<sup>1</sup> This includes ssp. Couchi, glacialis, louiei, melanops, pugetenis, tumuli, and yelmensis.

Olympia, 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, in order to negotiate with BNSF for acquisition of the above-described portions of the right-of-way for use as a recreational trail. The Cities request that BNSF be prohibited from disposing of the corridor other than tracks, ties and signal equipment, except for public use on reasonable terms, and that BNSF be barred from removing or destroying any trail-related structures, such as bridges, trestles, culverts and tunnels, for a 180-day period from the effective date of the abandonment exemption.

The Cities 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 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 acknowledged that the use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation for rail service.<sup>2</sup> By letter filed on April 26, 2004, BNSF indicated its willingness to negotiate with the Cities for interim trail use.

Because the Cities' request complies with the requirements of 49 CFR 1152.29 and BNSF 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 BNSF may fully abandon the line, provided the conditions imposed in this proceeding are met. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

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-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

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<sup>2</sup> The City of Lacey states that it will assume financial responsibility for the portion of the corridor from milepost 3.27 to milepost 5.95. The City of Olympia states that it will assume financial responsibility for the portion of the corridor from milepost 5.95 to milepost 6.73.

the Cities have satisfied these requirements, a 180-day public use condition will be imposed, commencing from the May 26, 2004 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. If a trail use agreement is reached on a portion of the right-of-way, BNSF 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, BNSF is not required to deal exclusively with the Cities, but may engage in negotiations 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 April 26, 2004, exempting the abandonment of the line is modified to the extent necessary to implement interim trail use/rail banking and to permit public use negotiations as set forth below for the portion of line from milepost 3.27 in Quadlock near Union Mills Road to milepost 6.73 near Fones Road in Olympia, Thurston County, WA, for a period of 180 days commencing from the May 26, 2004 effective date of the exemption (until November 22, 2004), and subject to the conditions that BNSF shall: (1) notify NGS at least 90 days prior to salvage activities in order to plan for the relocation of the ten geodetic station markers; (2) consult with the USACE - Seattle District, prior to commencement of any salvage activities, in order to determine whether a Department of the Army permit under section 404 of the Clean Water Act (33 U.S.C. 1344) would be required; (3) consult with the City of Lacey's water resources engineer, Eric Hielema, P.E., prior to salvage activities; (4) prior to conducting any salvage activities, consult with the USFWS - Western Washington Fish and Wildlife Field Office concerning the potential impacts on the bald eagle (Haliaeetus leucocephalus), the mazama pocket gopher (Thomomys mazama) and the species of concern that have been documented in Thurston County in order to identify the appropriate mitigation measures that may be warranted and evaluate any possible impacts on the mazama pocket gopher (Thomomys mazama); (5) contact the WDFW Habitat Program Manager for Thurston County, Steve Kalinowski, 360-249-4628 prior to commencement of any salvage activities; and (6) if any archaeological or historical materials are discovered during the project activities, discontinue work in the immediate vicinity; secure the area; and notify both the SHPO and the concerned tribes.

3. Consistent with the public use and interim trail use/rail banking conditions imposed in this decision and notice, BNSF may discontinue service and salvage track and related materials. For the above-described portion of the line, BNSF 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 November 22, 2004, 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 required 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 November 22, 2004, interim trail use may be implemented. If no agreement is reached by that time, BNSF may fully abandon the line, provided the conditions imposed in this proceeding are met.

8. This decision is effective on its service date.

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

Vernon A. Williams  
Secretary