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SERVICE DATE – JULY 7, 2010

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 117 (Sub-No. 7X)

ELGIN, JOLIET & EASTERN RAILWAY COMPANY—ABANDONMENT EXEMPTION—
IN LAKE COUNTY, IND.

Decided: July 7, 2010

Elgin, Joliet & Eastern Railway Company (EJ&E) filed a notice of exemption under 49 C.F.R. Part 1152 Subpart F—Exempt Abandonments to abandon its line of railroad between milepost 46.10 and milepost 48.28, a distance of 2.18 miles, in Hammond, Lake County, Ind. Notice of the exemption was served and published in the Federal Register on June 8, 2010 (75 Fed. Reg. 32,535-36). The exemption is scheduled to become effective on July 8, 2010.

The Board's Section of Environmental Analysis (SEA) served an environmental assessment (EA) in this proceeding on June 11, 2010. In the EA, SEA states that the Indiana Department of Natural Resources (IN DNR) has indicated that there are 3 state species of concern present in the project area that runs along the northern boundary of the Roxanna Marsh: the Northern leopard frog (*Rana pipiens*); the Black tern (*Chlidonias niger*); and the King rail (*Rallus elegans*). According to SEA, EJ&E states that, to the best of its ability, it will not cross the northern boundary of the Roxanna Marsh to endanger the species. However, IN DNR recommends that fish, wildlife, and botanical resources losses as a result of the proposed abandonment could be minimized through implementation of the following measures: (1) revegetating all bare and disturbed areas with a mixture of grasses (excluding all varieties of tall fescue), legumes, and native shrub and hardwood tree species as soon as possible upon completion; (2) prohibiting work in the waterway from April 1 through June 30 without the prior written approval of IN DNR's Division of Fish and Wildlife; (3) prohibiting the cutting of any trees suitable for Indiana bat roosting (living or dead, with loose hanging bark) from April 1 through September 30; (4) designing and implementing appropriate measures for controlling erosion and preventing sediment from entering streams or leaving construction sites and maintaining these measures until construction is complete and all disturbed areas are stabilized; (5) seeding and protecting all disturbed stream banks and slopes that are 3:1 or steeper with erosion control blankets (following manufacturer's recommendations for selection and installation) or an appropriate structural armament, and seeding and applying mulch on all other disturbed areas; and (6) prohibiting excavation or fill placement in any riparian wetland. Accordingly, SEA recommends in the EA a condition requiring that EJ&E consult with IN DNR prior to beginning any salvage activities regarding the possible impacts to state species of concern and to discuss the implementation, if appropriate, of measures to minimize any impacts to fish, wildlife, and botanical resources.

Additionally, SEA states in the EA that EJ&E has submitted its historic report to IN DNR's Division of Historic Preservation & Archaeology (SHPO) as required by 49 C.F.R. § 1105.8. In the EA, SEA states that the SHPO has indicated that there are no currently known archaeological resources eligible for inclusion in the National Register of Historic Places (National Register) that have been recorded within the proposed project area. Therefore, the proposed abandonment would not affect historic properties listed in or eligible for inclusion in the National Register. However, to address concerns raised by the SHPO, SEA recommends a condition requiring that, in the event that any unanticipated archaeological sites, human remains, funerary items, or associated artifacts are discovered during the railroad's salvage activities, EJ&E immediately cease all work and notify SEA, interested Federally recognized tribes, and the SHPO. SEA shall then consult with the SHPO, interested Federally recognized tribes, EJ&E, and other consulting parties, if any, to determine whether appropriate mitigation measures are necessary.

Pursuant to 36 C.F.R. § 800.2, SEA notes in the EA that it conducted a search of the Native American Consultation Database (database) at <http://home.nps.gov/nacd/> to identify Federally recognized tribes that may have ancestral connections to the project area. According to SEA, the database indicated that there are 4 tribes that may have an interest in the proposed abandonment: the Citizen Potawatomi Nation; Forest County Potawatomi Community; Hannahville Indian Community; and the Prairie Band of Potawatomi Nation. SEA states in the EA that it is sending a copy of the EA to these tribes for their review and comment.

Comments to the EA were due by June 25, 2010. No comments were received. Accordingly, the conditions recommended by SEA in the EA will be imposed.

In the EA, SEA states that the right-of-way might be suitable for other public use following abandonment of the line. On June 16, 2010, the Indiana Trails Fund, Inc. (ITFI), filed a request for a public use condition under 49 U.S.C. § 10905 and for the issuance of a notice of interim trail use (NITU) for the entire line under the National Trails System Act, 16 U.S.C. § 1247(d) (Trails Act), and 49 C.F.R. § 1152.29, to negotiate with EJ&E for acquisition of the right-of-way for use as a trail. ITFI requests that EJ&E be prohibited from disposing of the corridor, other than tracks, ties, and signal equipment, except for public use on reasonable terms, and that EJ&E 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 the corridor, set in a mature urban area, will provide a calm refuge and needed walkway and bikeway transportation for people without cars, and would connect a residential area on its eastside with business and industry on the west end. According to ITFI, this corridor will provide some habitat for wildflower and other native plants and animals. ITFI states that the 180-day period is needed to assemble and review title information, to complete a trail plan, and to negotiate with EJ&E.

ITFI also has submitted a statement of 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 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 future reconstruction and reactivation for rail service.

On June 17, 2010, the Northwest Indiana Railroad Preservation Society (NIRPS), filed a request for a public use condition under 49 U.S.C. § 10905 and for the issuance of a NITU for the entire line under the Trails Act, and 49 C.F.R. § 1152.29, to negotiate with EJ&E for acquisition of the right-of-way for use as an educational facility and recreational trail. NIRPS requests that EJ&E be prohibited from disposing of the corridor including, but not limited to, tracks, ties, and signal equipment, and that EJ&E be barred from the removal or destruction of trail-related structures, such as bridges, trestles, culverts, and tunnels, for a 180-day period from the effective date of the abandonment. NIRPS states that imposition of this condition would allow it to continue with the planning and development of a new railroad training facility to provide education and training of emergency personnel with regard to railroad emergencies and other railroad-related activities. According to NIRPS, the facility would promote the restoration, replication, preservation, and demonstration of railroading activity and heritage within Hammond and Northwestern Indiana. NIRPS maintains that the existing trail-related structures would have considerable value for the facility's intended purposes. NIRPS also states that the facility would include a recreational trail to connect to a public park, in accordance with local plans. NIRPS states that the 180-day period is needed to assemble and review title information, complete planning, and negotiate with EJ&E.

NIRPS has submitted a statement of 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 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 future reconstruction and reactivation for rail service.

In a response filed on June 30, 2010, EJ&E states that it is willing to negotiate with ITFI and NIRPS for interim trail use.

Because ITFI's and NIRPS's requests comply with the requirements of 49 C.F.R. § 1152.29, and EJ&E is willing to negotiate with ITFI and NIRPS for trail use, NITUs will be issued to ITFI and NIRPS. 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 from the effective date of the abandonment, EJ&E 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.

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 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 C.F.R. § 1152.28(a)(2). Because ITFI and NIRPS each have satisfied these requirements, a 180-day public use condition requiring EJ&E to keep intact the right-of-way (including bridges, trestles, culverts, tunnels, track, ties, and signal equipment) will be imposed, commencing from the July 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 January 4, 2011, while the trail use negotiating period will run 180 days from the service date of this decision and notice (until January 3, 2011). If a trail use agreement is reached on a portion of the right-of-way prior to January 4, 2011, EJ&E 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, EJ&E is not required to deal exclusively with ITFI and NIRPS, but may engage in negotiations with other interested persons.

As conditioned, this action 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 June 8, 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 and NIRPS to negotiate with EJ&E for trail use of the subject line, for a period of 180 days from the service date of this decision and notice (until January 3, 2011); and (2) to permit public use negotiations as set forth below, for a period of 180 days commencing from the July 8, 2010 effective date of the exemption (until January 4, 2011). It is also subject to the conditions that

EJ&E shall: (1) prior to beginning any salvage activities, consult with IN DNR to address IN DNR's concerns about possible impacts to state species of concern and the implementation, if appropriate, of measures to minimize any impacts to fish, wildlife, and botanical resources; and (2) immediately cease all work and notify SEA, interested Federally recognized tribes, and the SHPO, in the event that any unanticipated archaeological sites, human remains, funerary items, or associated artifacts are discovered during the railroad's salvage activities. SEA shall then consult with the SHPO, interested Federally recognized tribes, EJ&E, 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, EJ&E may discontinue service over the line. EJ&E shall keep intact the right-of-way, including bridges, trestles, culverts, tunnels, track, 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. Because of the terms of the public use condition imposed herein, EJ&E may not salvage track and related materials while the public use condition remains in effect. 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 line.

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 January 3, 2011, interim trail use may be implemented. If no agreement is reached by that time, EJ&E 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 and notice is effective on its date of service.

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