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## SURFACE TRANSPORTATION BOARD

## DECISION

Docket No. AB 6 (Sub-No. 485X)

BNSF RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN MCKINLEY COUNTY,  
N.M.

Decided: June 25, 2013

BNSF Railway Company (BNSF) filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon 5.11 miles of rail line between milepost 14.50 and milepost 19.61, north of Defiance, in McKinley County, N.M. (the Line). Notice of the exemption was served and published in the Federal Register on September 19, 2012 (77 Fed. Reg. 58,218). The exemption became effective on October 19, 2012.

By decision served on October 18, 2012 (October 2012 decision), the Board imposed two conditions recommended by the Board's Office of Environmental Analysis (OEA): (1) an historic preservation condition under Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f (Section 106 condition),<sup>1</sup> and (2) a condition requiring BNSF, before beginning any salvage activities, to consult with the Navajo Nation Natural Heritage Program (NNNHP) regarding potential impacts from salvage activities on Federally listed threatened or endangered species that may occur in the vicinity of the Line and to report to OEA the results of these consultations (NNNHP consultation condition).<sup>2</sup>

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<sup>1</sup> The Section 106 condition provides that BNSF: (1) shall retain its interest in and take no steps to alter the historic integrity of all historic properties including sites, buildings, structures, and objects within the project right-of-way (the Area of Potential Effect) that are eligible for listing or listed in the National Register of Historic Places until the Section 106 process is complete; (2) shall report to OEA regarding any consultations with the New Mexico Historic Preservation Division of the Department of Cultural Affairs (SHPO), the Navajo Nation Historic Preservation Department (THPO), any other Section 106 consulting parties that have been identified, and the public; and (3) may not file its consummation notice or initiate any salvage activities related to abandonment (including removal of tracks and ties) until the Section 106 process has been completed and the Board has removed this condition.

<sup>2</sup> The Board also imposed a public use condition under 49 U.S.C. § 10905, which expired on April 17, 2013, and may not be renewed.

In response to the imposed conditions, BNSF has submitted new information from the SHPO, the NNNHP, and the THPO. First, by letter dated April 18, 2013, BNSF forwarded (1) the SHPO's determination that the proposed abandonment would not adversely affect any properties listed in, or eligible for listing, in the National Register, and (2) comments of the NNNHP's Department of Fish and Wildlife (NNDFW). NNDFW finds that the proposed abandonment would have no effect on Federally listed or tribally listed species of concern, including threatened and endangered species, but states that any salvage activity associated with the proposed abandonment should meet certain conditions for the protection of threatened and endangered species. In particular, NNDFW states that if the dismantling of a bridge located at milepost 16.10 should take place during the migratory bird breeding season of March 15 through August 15, then BNSF should conduct a pre-action survey of the site. If an active nest should be discovered on the bridge structure, the NNDFW states that BNSF should obtain a nest-take permit from the U.S. Fish and Wildlife Service (USFWS) for the removal of eggs, nests, and nesting birds. According to the NNDFW, any eggs or nesting birds removed from the site should be removed by a Federally permitted migratory bird rehabilitator to be raised artificially in a Federally permitted migratory bird rehabilitation facility. Second, in comments forwarded by BNSF on May 8, 2013, the THPO states that, although the Line is not of archaeological interest, should any previously unidentified or incorrectly identified cultural resources be discovered, operations should cease and BNSF should immediately notify the THPO.

Based on the information submitted by BNSF, OEA has developed a supplemental final environmental assessment dated June 13, 2013. OEA states that it concurs with the comments of the SHPO and the THPO and finds, pursuant to the Section 106 regulations of NHPA and following consultation with the SHPO, the THPO, and the public, that the proposed abandonment would not adversely affect historic properties listed in or eligible for inclusion in the National Register or any resources of cultural or archaeological interest to the Navajo Nation. Thus, OEA recommends that the Section 106 condition imposed in the Board's October 2012 decision be removed.<sup>3</sup>

Additionally, in light of NNDFW's review, OEA recommends imposing a new condition addressing NNDFW's concerns regarding the potential impacts of dismantling the bridge at milepost 16.10. This condition would provide that if the bridge should be scheduled to be dismantled between March 15 and August 15, BNSF shall, in consultation with the NNDFW, conduct a pre-action survey of the affected area prior to undertaking the dismantling of the bridge and that, if any active nests are discovered on the bridge structure, BNSF shall notify the

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<sup>3</sup> OEA also notes that the documentation that BNSF submitted to the Board on April 18, 2012, detailing the results of its consultation with NNDFW is sufficient to meet the requirements of the NNNHP consultation condition. That condition is self-executing and requires no formal action by the Board for its removal.

NNDFW and the USFWS and shall comply with those agencies' reasonable requirements for the removal of any nests, eggs, or nesting birds.

Finally, in response to the THPO's concerns regarding unanticipated discovery of archaeological resources, OEA recommends imposing a new condition providing that, if any previously unidentified or incorrectly identified cultural resources, including but not limited to archaeological deposits, human remains, and locations reportedly associated with Native American religious/traditional beliefs or practices, are discovered during salvage activities, BNSF shall immediately cease all work and notify OEA, the THPO, and the SHPO pursuant to 36 C.F.R. § 800.13(b). OEA will then consult with the THPO, the SHPO, BNSF, and other consulting parties, if any, to determine whether appropriate mitigation measures are necessary.

Accordingly, the proceeding will be reopened and the previously imposed Section 106 condition will be removed as recommended by OEA, and the two new conditions recommended by OEA will be imposed.

This decision, and the proposed abandonment if implemented as conditioned, 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 Section 106 condition imposed in the October 2012 decision is removed.
3. BNSF's abandonment exemption is further subject to the following two new environmental conditions:
  - (a) If the bridge located at milepost 16.10 should be scheduled to be dismantled between March 15 and August 15, BNSF shall, in consultation with the NNDFW, conduct a pre-action survey of the affected area prior to undertaking the dismantling of the bridge. If any active nests are discovered on the bridge structure, BNSF shall notify the NNDFW and the USFWS and shall comply with those agencies' reasonable requirements for the removal of any nests, eggs, or nesting birds; and
  - (b) In the event that any previously unidentified or incorrectly identified cultural resources, including but not limited to archaeological deposits, human remains, and locations reportedly associated with Native American religious/traditional beliefs or practices, are discovered during salvage activities, BNSF shall immediately cease all work and notify OEA, the THPO, and the SHPO pursuant to 36 C.F.R. § 800.13(b). OEA will then consult with the

THPO, the SHPO, BNSF, and other consulting parties, if any, to determine whether appropriate mitigation measures are necessary.

4. This decision is effective on its service date.

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