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SERVICE DATE – OCTOBER 11, 2006

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-994X

KETTLE FALLS INTERNATIONAL RAILWAY, LLC–
ABANDONMENT EXEMPTION–IN FERRY COUNTY, WA

Decided: October 6, 2006

By petition filed on June 23, 2006, Kettle Falls International Railway, LLC (KFR), seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a line of railroad extending from milepost 48.779, near Danville, and milepost 77.14, at San Poil, a distance of 28.361 miles, in Ferry County, WA (the line). Notice of the filing was served and published in the Federal Register on July 13, 2006 (71 FR 39701). On May 30, 2006, the Ferry County Board of Commissioners (County) filed a request for imposition of a public use condition and for issuance of a notice of interim trail use (NITU). We will grant the exemption, subject to trail use, public use, environmental, and standard employee protective conditions.

BACKGROUND

KFR acquired the line, along with other lines, on December 11, 2004, from BNSF Railway Company.¹ At the time of this acquisition, only one active shipper, Pope & Talbot, Inc. (P&T), was located on the line. From December 2004 until October 2005, the only traffic on the line was 1,038 outbound carloads of finished lumber from P&T's facility near Curlew, WA. According to KFR, in October 2005, P&T dismantled the facility near Curlew and moved its operation to a different facility at Grand Forks, British Columbia, Canada, on another KFR rail line. KFR submitted a letter from P&T stating that it does not object to KFR's abandonment of the line. KFR states that the line has been dormant since October 2005. KFR further states that the line is stub-ended, and is not capable of handling overhead traffic.

KFR seeks to abandon the line to avoid maintenance and opportunity costs. KFR calculates that it incurred a loss of \$507,660 in the base year,² and that it will incur a loss of \$205,264 in the forecast year³ to operate the line. With no prospects for railroad use and no

¹ See Kettle Falls International Railway, LLC–Acquisition Exemption–The Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 34616 (STB served Dec. 28, 2004).

² KFR's base year is January 1, 2005 through December 31, 2005.

³ KFR's forecast year is June 2006 through May 2007.

customers on the line, KFR submits that it is not generating any revenue from rail operations in the forecast year, though it continues to incur costs from maintaining the line.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without our prior approval. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will also foster sound economic conditions and encourage efficient management by allowing KFR to avoid the cost of owning and maintaining a line that is not being used [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be affected adversely.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power because there are no active shippers on the line, nor is there any demand for KFR service on the line. The only shipper on the line, P&T, has ceased operations at the facility on the line and has informed KFR that it does not oppose the abandonment. Nevertheless, to ensure that P&T is informed of our action, we will require KFR to serve a copy of this decision on P&T within 5 days of the service date of this decision and notice and to certify to us that it has done so. Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting the exemption, we will impose the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).

KFR has submitted environmental and historic reports with its petition and has notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed abandonment. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment. SEA served an environmental assessment (EA) on August 8, 2006.

In the EA, SEA states that the Washington Department of Ecology (WDOE) concluded that KFR must ensure that all wastes generated from salvage operations are designated and managed in accordance with the Dangerous Waste Regulations, Chapter 173-303 WAC.

Therefore, SEA recommends that, prior to conducting any salvage activities, KFR consult with WDOE regarding proper disposal of all wastes generated from salvage activities.

SEA also states in the EA that the U.S. Environmental Protection Agency, Region 10 (USEPA), the U.S. Fish and Wildlife Service, Region 1 (USFWS), and the National Park Service, West Regional Office (NPS), have not completed their reviews of the proposed abandonment. Therefore, SEA recommends that, prior to conducting any salvage activities, KFR consult with: (1) USEPA regarding potential contamination of the right-of-way (ROW); (2) USFWS regarding potential impacts from salvage activities to federally listed threatened and endangered species that may occur in the vicinity of the line; and (3) NPS regarding any impacts on wildlife sanctuaries, refuges, national or state parks or forests.

SEA further states in the EA that KFR has identified two trestle bridges of timber pile or timber frame construction on the line that are 50 years old or older. KFR states that it does not believe the structures meet the criteria for listing in the National Register of Historic Places. However, the Washington Department of Archaeology & Historic Preservation (SHPO) states that KFR has not submitted a Historic Property Inventory Form regarding the two bridges. The SHPO states that this is necessary before the historic value of the bridges can be determined. In light of the SHPO's concerns, SEA recommends a condition requiring KFR to retain its interest in, and take no steps to alter, the historic integrity of all sites, buildings, and structures within the project ROW that are eligible for listing or listed in the National Register of Historic Places (generally, 50 years old or older) until the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f, has been completed. SEA also recommends that KFR shall be required to report back to SEA regarding any consultations with the SHPO and any other section 106 consulting parties. SEA further recommends that KFR not be permitted to file its consummation notice or initiate any salvage activities related to abandonment until the section 106 process has been completed and the Board has removed this condition.

Comments to the EA were due by September 8, 2006. Based on the comments received, SEA has recommended no changes to the conditions it previously recommended in the EA. Accordingly, we will impose the conditions recommended by SEA in the EA. Based on SEA's recommendations, we conclude that the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources

As previously noted, the County filed a request for the issuance of a NITU under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and for imposition of a public use condition under 49 U.S.C. 10905. The County has submitted a statement of willingness to assume financial responsibility for the ROW, and has acknowledged that use of the ROW is subject to possible future reconstruction and reactivation of the ROW for rail service as required under 49 CFR 1152.29. By letter filed on September 21, 2006, KFR states that it is willing to negotiate with the County for interim trail use. Because the County's request complies with the requirements of 49 CFR 1152.29, and KFR is willing to enter into trail use negotiations, we will

issue a NITU for the subject line. The parties may negotiate an agreement during the 180-day period prescribed below. If an agreement is executed, no further Board action is necessary. If no agreement is reached within 180 days, KFR may fully abandon the line, subject to the conditions imposed below. See 49 CFR 1152.29(d)(1). Use of the ROW for trail purposes is subject to restoration for railroad purposes.

Following abandonment and salvage of the line, the ROW may be suitable for other public use. The County requests imposition of a 180-day public use condition prohibiting KFR from: (1) disposing of the corridor, other than the tracks, ties and signal equipment, except for public use on reasonable terms; and (2) barring removal or destruction of trail-related structures such as bridges, trestles, culverts, and tunnels, but not removal of tracks, ties and signal equipment. The County states that the rail corridor has considerable value for public utilities and recreational trail use. According to the County, the 180-day period is needed to assemble and review title information, complete a trail/utilities plan, and begin negotiations with KFR.

We have determined that persons who file under the Trails Act may also file 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) (Trails). When the need for both conditions is established, it is our policy to impose them concurrently, subject to the execution of a trail use agreement. The County has met the public use criteria prescribed at 49 CFR 1152.28(a)(2) by specifying: (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 period of time requested. Accordingly, a 180-day public use condition will be imposed on the rail line to be abandoned, commencing from the effective date of this decision and notice, to enable any state or local government agency or other interested person to negotiate the acquisition of the line for public use. If a trail use agreement is reached on a portion of the ROW, KFR must keep the remaining ROW intact for the remainder of the 180-day period to permit public use negotiations. Also, we note that a public use condition is not imposed for the benefit of any one potential purchaser. Rather, it provides an opportunity for any interested person to acquire the ROW that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, KFR is not required to deal exclusively with the County, but may engage in negotiations with other interested persons.

The parties should note that operation of the trail use and public use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. As stated in Trails, 2 I.C.C.2d at 608, offers of financial assistance (OFA) to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trail use/rail banking and public use. Accordingly, if an OFA is timely filed under 49 CFR 1152.27(c)(1), the effective date of this decision and notice will be postponed beyond the effective date indicated here. See 49 CFR 1152.27(e)(2). In addition, the effective date may be further postponed at later stages in the OFA process. See 49 CFR 1152.27(f). Finally, if the line is sold under the OFA procedures, the petition for abandonment exemption will be dismissed and trail use and

public use precluded. Alternatively, if a sale under the OFA procedures does not occur, the trail use and public use processes may proceed.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903 the abandonment of the above-described line, subject to the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), and the conditions that KFR shall: (1) be prohibited from disposing of the corridor and removing or destroying trail-related structures such as bridges, trestles, culverts, and tunnels, but not removing tracks, ties and signal equipment for a period of 180 days from the effective date of this decision and notice to enable any State or local government agency, or other interested person, to negotiate the acquisition of the line for public use; (2) comply with the interim trail use/rail banking procedures set forth below; (3) prior to conducting any salvage activities consult with WDOE to ensure that all wastes generated from salvage operations are designated and managed in accordance with pertinent laws and regulations; (4) consult with USEPA regarding potential contamination of the ROW; (5) consult with USFWS regarding potential impacts from salvage activities to federally listed threatened and endangered species that may occur in the vicinity of the line; (6) consult with NPS regarding any impacts on wildlife sanctuaries, refuges, national or state parks or forests; and (7) retain its interest in, and take no steps to alter, the historic integrity of all sites, buildings, and structures within the project ROW that are eligible for listing or listed in the National Register of Historic Places (generally, 50 years old or older) until the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f, has been completed, report back to SEA regarding any consultations with SHPO, and seek removal of this condition before filing a consummation notice or initiating any salvage activities.

2. KFR is directed to serve a copy of this decision and notice on P&T within 5 days after the service date of this decision and notice and to certify to the Board that it has done so.

3. 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 the management of, 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 ROW.

4. 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 ROW.

5. 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.

6. If an agreement for interim trail use/rail banking is reached by the 180th day after the effective date of this decision and notice, interim trail use may be implemented. If no agreement is reached by that time, KFR may fully abandon the line, provided the conditions imposed above are met.

7. An OFA under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by October 23, 2006, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by the filing fee of \$1,300.⁴

8. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **“Office of Proceedings, AB-OFA.”**

9. Provided no OFA has been received, this exemption will be effective on November 10, 2006. Petitions to stay must be filed by October 26, 2006; petitions to reopen must be filed by November 6, 2006.

⁴ The filing fee for OFAs was increased to \$1,300 effective April 19, 2006. See Regulations Governing Fees for Services Performed in Connection with Licensing and Related Services–2006 Update, STB Ex Parte No. 542 (Sub-No. 13) (STB served Mar. 20, 2006).

10. Pursuant to the provisions of 49 CFR 1152.29(e)(2), KFR shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by KFR's filing of a notice of consummation by October 11, 2006, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Vernon A. Williams
Secretary