

36587
DO

SERVICE DATE – JANUARY 11, 2006

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-6 (Sub-No. 434X)

BNSF RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN FERGUS
COUNTY, MT

Decided: January 10, 2006

BNSF Railway Company (BNSF) filed a notice of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments to abandon a line of railroad between milepost 9.50 near Moore, MT, and milepost 28.35 near Lewistown, MT,¹ the 1.30-mile Berg Lumber Spur (milepost 0.00 – milepost 1.30), and the Heath Spur (milepost 0.00 – milepost 1.10), a total distance of 21.25 miles in Fergus County, MT. Notice of the exemption was served and published in the Federal Register on December 14, 2005 (70 FR 74108-09). The exemption is scheduled to become effective on January 13, 2006.

The Board's Section of Environmental Analysis (SEA) served an environmental assessment (EA) in the proceeding on December 20, 2005, setting forth environmental concerns and recommending that conditions be imposed on any decision granting abandonment authority. In the EA, SEA notes that BNSF has indicated that there are known hazardous waste sites where there have been hazardous material spills on the right-of-way. Specifically, on February 9, 1995, there was a release of RP Mercaptan 5 (order agent for propane) at the Pacific Hide and Fur Depot, for which the former Montana Power Company (MPC) was responsible. MPC handled the cleanup of the site. On October 16, 1996, 100 gallons of diesel fuel were spilled near the Lewistown depot. A BNSF contractor handled the cleanup. Finally, a tarry substance was recently discovered on the Berg Lumber Spur in Lewistown. In response, approximately 500 feet of track has been removed and the right-of-way excavated to a depth of approximately twelve inches. As part of the cleanup, BNSF is currently awaiting sample results from a lab to ensure that all contamination has been removed. The railroad is working with the State of Montana Department of Environmental Quality (MT DEQ) in order to ensure that cleanup work at the site has been completed. Accordingly, SEA recommends a condition requiring that BNSF continue consultation with the MT DEQ in order to ensure that cleanup of the tarry substance discovered on the Berg Lumber Spur site in Lewistown is completed appropriately.

¹ The prior notice and Board decisions in this matter inadvertently referred to "Lewistown" as "Lewiston."

SEA also notes in the EA that the MT DEQ Water Protection Bureau in Helena is unable, based on the information submitted at this time, to determine what water quality-related permits would be necessary for the proposed project. SEA therefore recommends a condition requiring that BNSF consult with the MT DEQ Water Protection Bureau regarding Montana Water Quality Act requirements prior to the commencement of salvage activities.

SEA further indicates that the United States Department of the Interior, Fish and Wildlife Service, Montana Field Office in Helena (US FWS), has determined that three federally listed species may be present in the action area: Pallid Sturgeon (*Scaphirhynchus albus*), Bald Eagle (*Haliaeetus leucocephalus*), and the Black-footed Ferret (*Mustela nigripes*). US FWS suggests the avoidance and minimization of impacts to any wetland areas, stream channels and surrounding vegetation to the greatest extent possible. Accordingly, SEA recommends a condition requiring that BNSF consult with US FWS prior to commencement of salvage activities to determine possible impacts to species of federal concern.

SEA also states in the EA that the Montana Department of Fish, Wildlife & Parks (MT FW&P) has indicated that it owns and operates many sites in the Lewistown vicinity due to its proximity to Big Spring Creek, which is considered to be one of the most valuable fisheries resources in Montana. MT FW&P states that public access to this stream is very important to the local economy and to visiting anglers and recreationists. MT FW&P encourages BNSF to continue to provide for future public access along the proposed abandoned right-of-way wherever possible, and adds that it intends to submit additional comments regarding the proposed abandonment and its effects from local staff more knowledgeable about possible impacts. Accordingly, SEA recommends a condition requiring that BNSF consult with MT FW&P prior to commencement of salvage activities to determine possible effects on MT FW&P-owned sites in the Lewistown vicinity.

Finally, SEA has determined that the Montana Historical Society, Division of Historic Preservation, Office of Preservation Planning (SHPO), has not completed its evaluation of the potential impact of this project on historic resources. Accordingly, SEA recommends a condition requiring that BNSF retain its interest in and take no steps to alter the historic integrity of all sites and structures on the right-of-way that are 50 years old or older until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f (NHPA).

Comments to the EA were due by January 4, 2006. By letter filed on January 3, 2006, the City of Lewistown, MT (Lewistown) filed a comment. However, because the comment relates to post abandonment activities, SEA recommends no additional or revised conditions on the basis of that comment.

SEA also indicated in the EA that the right-of-way may be suitable for other public use following abandonment. On January 3, 2006, Lewistown filed a request under

the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and 49 CFR 1152.29 for issuance of a notice of interim trail use (NITU) for the right-of-way, and for a public use condition under 49 U.S.C. 10905. Lewistown requests that BNSF be prohibited from disposing of the corridor, other than the tracks, ties, and signal equipment, except for public use on reasonable terms.

Lewistown also 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 by 49 CFR 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. By letter filed on January 5, 2006, BNSF states that it does not object to the issuance of a NITU.

Because Lewistown's 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 decision and notice 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 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). Because Lewistown has met these requirements, a 180 day public use condition will be imposed, commencing from the 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 Lewistown, but may engage in negotiations with other interested persons.

As conditioned, this decision and notice 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 December 14, 2005, exempting the abandonment of the line described above is modified to the extent necessary to implement interim trail use/rail banking and to permit public use negotiations as set forth below, for a period of 180 days commencing from the January 13, 2006 effective date of the exemption (until July 12, 2006), and subject to the conditions that BNSF shall: (1) continue consultation with MT DEQ to ensure that cleanup of the tarry substance discovered on the Berg Lumber Spur site in Lewistown is completed appropriately; (2) prior to commencement of any salvage activities, consult with MT DEQ concerning Montana Water Quality Act requirements; (3) prior to commencement of any salvage activities, consult with US FWS concerning possible impacts to species of federal concern; (4) prior to commencement of any salvage activities, consult with MT FW&P concerning possible effects on MT FW&P-owned sites in the Lewistown vicinity; and (5) retain its interest in and take no steps to alter the historic integrity of all sites and structures on the right-of-way that are 50 years old or older until completion of the section 106 process of the NHPA.
3. Consistent with the conditions imposed in this decision and notice, BNSF may discontinue service and salvage track and related materials. 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 July 12, 2006, 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 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 July 12, 2006, interim trail use may be implemented. If no agreement is reached by that time, BNSF may fully abandon the line provided the other conditions imposed in this proceeding are met. See 49 CFR 1152.29(d)(1).

8. This decision is effective on its service date.

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

Vernon A. Williams
Secretary