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SERVICE DATE – LATE RELEASE SEPTEMBER 7, 2011

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1073X

ALABAMA & FLORIDA RAILWAY CO., INC.—ABANDONMENT EXEMPTION—IN  
GENEVA, COFFEE AND COVINGTON COUNTIES, ALA.

Decided: September 7, 2011

This decision reopens the proceeding to impose an environmental condition, deny a request for issuance of a notice of interim trail use/rail banking (NITU), and grant a request for imposition of a public use condition.

Alabama & Florida Railway Co., Inc. (A&F) filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon its line of railroad (which constitutes A&F's entire rail system) between milepost 581.3 at Andalusia, Ala., and milepost 624.2 at Geneva, Ala., a distance of 42.9 miles, in Geneva, Coffee and Covington Counties, Ala. (the line). Notice of the exemption was served and published in the Federal Register on August 9, 2011 (76 Fed. Reg. 48,941-42). The exemption is scheduled to become effective on September 8, 2011.

The Board's Office of Environmental Analysis (OEA) served an environmental assessment (EA) on August 12, 2011. In the EA, OEA indicated that A&F served a copy of the historic report on the Alabama Historical Commission (State Historic Preservation Office, or SHPO), pursuant to 49 C.F.R. § 1105.8(c). OEA stated that it had not heard from the SHPO and therefore had not been able to consider the SHPO's opinion before determining if the line may be eligible for listing in the National Register of Historic Places (National Register). According to OEA, A&F has determined that there are 7 structures along the line, all of which are trestles or bridges, that may be 50 years old or older. Accordingly, OEA recommended that a condition be imposed requiring that A&F (1) 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 are listed in the National Register until the Section 106 process of the National Historic Preservation Act, 16 U.S.C. § 470f (NHPA), has been completed, (2) report back to OEA regarding any consultations with the SHPO and any other Section 106 consulting parties, and (3) refrain from filing its consummation notice or initiating 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.

Pursuant to 36 C.F.R. § 800.2, OEA 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 OEA, the Database indicated that the Eastern Band of Cherokee Indians of North Carolina and the Muscogee (Creek) Nation, Oklahoma, may have knowledge regarding properties of traditional religious and cultural significance within the right-of-way of the proposed abandonment. Accordingly, OEA sent a copy of the EA to these tribes for their review and comment.

Comments to the EA were due by August 26, 2011. OEA received 1 comment from the U.S. Fish and Wildlife Service (USFWS), indicating that the rail line proposed for abandonment crosses the Pea River near Samson, Ala., which is designated as Critical Habitat for the threatened Gulf sturgeon. USFWS recommends that, if A&F plans to remove the bridge and in-stream work would occur, A&F contact USFWS to determine whether formal consultation under Section 7 of the Endangered Species Act of 1973 would be needed because removal of the bridge could impact the Gulf Sturgeon or its habitat. However, if the bridge is left in place, USFWS states that consultation would not be necessary. A&F responded stating that it does not intend to dismantle or remove any bridge along the rail line, including the Pea River bridge. Therefore, OEA states that no mitigation measure regarding the bridge is recommended. Accordingly, none will be imposed.

In addition, OEA states that, upon further independent review, it recommends that the Section 106 condition recommended in the EA be modified to include consultation with “the public” in addition to consultation with the SHPO and other Section 106 consulting parties. Accordingly, the condition recommended by OEA in the EA will be imposed, as modified to include “the public.”

In the EA, OEA states that the right-of-way may be suitable for other public use following abandonment and salvage of the line. On August 17, 2011, the Alabama Trails Commission (ATC), a government agency interested in the development of recreational trails, filed a request for the issuance of a NITU to permit negotiation for acquisition of the line for use as a trail under the National Trails System Act, 16 U.S.C. § 1247(d) (Trails Act), and 49 C.F.R. § 1152.29. By letter filed on August 25, 2011, and corrected on August 26, 2011, A&F stated that it was not interested at this time in negotiating with ATC for interim trail use. On August 26, 2011, CSXT filed a letter stating that it agrees to negotiate with ATC for interim trail use/rail banking.

ATC’s request will not be granted. A&F, the carrier seeking abandonment authority, is the appropriate party to conduct negotiations for interim trail use/rail banking. See Union Pac. R.R.—Aban. Exemption—in Comanche Cnty, Okla., AB 33 (Sub-No. 267X), slip op. at 1 (STB served May 20, 2009) (finding that Union Pacific Railroad Company was the appropriate party to negotiate for interim trail use/rail banking regarding a line UP leased from the State of Oklahoma). A&F, however, has indicated that it is not willing to negotiate with ATC for interim trail use. Under the Trails Act, only voluntary interim trail use is permitted between the railroad and the trail user. The Board’s authority to impose trail use conditions is limited because the

Board's role under the Trails Act is largely ministerial, see Citizens Against Rails-to-Trails v. STB, 267 F.3d 1144, 1151-52 (D.C. Cir. 2001), and the trail use program is voluntary and consensual between the railroad and the trail user, see Rail Abans.—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 598 (1986). Because A&F does not consent to interim trail use/rail banking negotiations, the Board cannot issue a NITU in this proceeding.<sup>1</sup>

ATC also has requested imposition of a public use condition under 49 U.S.C. § 10905 for the line. ATC requests that A&F be prohibited from disposing of the corridor, other than tracks, ties, and signal equipment, except for public use on reasonable terms, and that A&F 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 exemption. ATC's justification for its request is that the rail corridor would make an excellent recreational trail and that conversion of the property to trail use is in accordance with state and local plans. ATC states that the 180-day period is needed to complete a detailed trail plan and to begin negotiations with A&F.

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 § 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 ATC has satisfied these requirements, a 180-day public use condition will be imposed, requiring A&F to keep intact the right-of-way (including bridges, trestles, culverts and tunnels) and to refrain from disposing of the corridor (other than tracks, ties, and signal equipment), commencing from the September 8, 2011 effective date of the exemption. 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, A&F is not required to deal exclusively with ATC, 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.

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<sup>1</sup> Once A&F consummates its abandonment, CSXT can, if appropriate, choose to negotiate with ATC or any other entity for use of the right-of-way as a trail outside the provisions of the Trails Act.

It is ordered:

1. This proceeding is reopened.
2. ATC's request for issuance of a notice of interim trail use is denied.
3. ATC's request for imposition of a public use condition is granted. Consistent with the public use condition imposed in this decision, A&F may discontinue service and salvage track and related materials. A&F shall keep intact the right-of-way, including bridges, trestles, culverts and tunnels, for a period of 180 days commencing from the September 8, 2011 effective date of the exemption (until March 6, 2012), to enable any state or local government agency, or other interested person, to negotiate the acquisition of the line for public use.
4. A&F's exemption is also subject to the condition that A&F shall (a) 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 that are eligible for listing or are listed in the National Register until the Section 106 process of the NHPA has been completed, (b) report back to OEA regarding any consultations with the SHPO, any other Section 106 consulting parties, and the public, and (c) refrain from filing its consummation notice or initiating 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.
5. This decision is effective on its service date.

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