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SERVICE DATE – LATE RELEASE FEBRUARY 27, 2013

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 1076X

CADD VALLEY RAILROAD COMPANY—ABANDONMENT EXEMPTION—IN  
CLARK, PIKE AND MONTGOMERY COUNTIES, ARK.

Docket No. AB 1076 (Sub-No. 1X)

CADD VALLEY RAILROAD COMPANY—ABANDONMENT EXEMPTION—IN PIKE  
AND CLARK COUNTIES, ARK.

Digest:<sup>1</sup> In this decision, the Board reopens these proceedings to allow the parties to negotiate an agreement for converting a rail right-of-way into a recreational trail and to remove an environmental condition imposed in Docket No. AB 1076X. The Board also finds the West Central Arkansas Planning and Development District to be a government entity entitled to a fee waiver under the Board's regulations.

Decided: February 27, 2013

In Docket No. 1076X (the notice proceeding), Caddo Valley Railroad Company (CVRR) filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon the portion of the Norman Branch Line between milepost 447, near Antoine, and milepost 479.2, at the end of the line near Birds Mill, a distance of 32.2 miles, in Clark, Pike, and Montgomery Counties, Ark. (the notice segment). The exemption became effective on March 5, 2012. In Docket No. AB 1076 (Sub-No. 1X) (the petition proceeding), CVRR filed a petition for exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10903 to abandon the adjoining segment of the Norman Branch Line between milepost 429.45, near Gurdon, and milepost 447, near Antoine, a distance of 17.55 miles, in Pike and Clark Counties, Ark. (the petition segment).

As discussed more fully in a decision served in these dockets on February 13, 2013, the West Central Arkansas Planning and Development District, Inc. (WCAPDD) late filed on February 8, 2013, a request for the issuance of a notice of interim trail use or abandonment (NITU) in both dockets to permit WCAPDD to negotiate with CVRR for acquisition of both

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

rights-of-way (ROW) 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. WCAPDD included with its filing a letter from CVRR dated February 6, 2013, indicating that CVRR has not yet consummated the abandonment of either line segment and is willing to negotiate with WCAPDD for interim trail use/rail banking. In its filing, WCAPDD describes itself as “an entity of the State of Arkansas” eligible for a waiver of the otherwise-applicable filing fee under 49 C.F.R. § 1002.2(e)(1), and in accepting WCAPDD’s filing, the filing fee accordingly was waived.

On February 12, 2013, Betty Pennington, a landowner along the ROW, filed a comment in opposition to WCAPDD’s NITU request. Pennington seeks to assert her reversionary rights to the land underlying the ROW and opposes the late-filed NITU request. Pennington also asserts that WCAPDD is not a government entity that qualifies for a fee waiver under 49 C.F.R. § 1002.2(e)(1).

On February 19, 2013, WCAPDD replied to Pennington’s comments, maintaining that it is a government entity under the Board’s regulations and thus eligible for the fee waiver. Nevertheless, WCAPDD included with its reply a check covering the filing fee “[i]n the event that the Board concludes otherwise.”

Pennington filed additional comments on February 19, 2013, further disputing WCAPDD’s status as a government entity entitled to a fee waiver and including signatures of additional landowners along the ROW who wish to assert their reversionary rights and oppose the late-filed NITU request, and again on February 22, 2013, responding to WCAPDD’s February 19 submission.

## DISCUSSION AND CONCLUSIONS

*Late-filed NITU Request.* Requests for trail use/rail banking in the notice proceeding were to be filed by November 28, 2011. Requests for trail use/rail banking in the petition proceeding were due December 6, 2011. However, the Board typically accepts late-filed trail use requests as long as it retains jurisdiction over the right-of-way and the carrier is willing to enter into negotiations.<sup>2</sup> Here, CVRR has not abandoned the ROW, and consequently the Board retains jurisdiction to issue a NITU. Further, in Abandonment & Discontinuance Of Rail Lines & Transportation Under 49 U.S.C. § 10903, 1 S.T.B. 894, 900 (1996), the Board retained the policy of accepting requests after the due date when good cause is shown. Here, WCAPDD states that it believed that the Southwest Arkansas Regional Intermodal Authority intended to file

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<sup>2</sup> See, e.g., N.Y. Cent. Lines, LLC—Aban. Exemption—in Dutchess Cnty., N.Y., AB 565 (Sub-No. 17X) (STB served Jan. 23, 2012); CSX Transp., Inc.—Aban. Exemption—in Lucas & Wood Cntys., Ohio, AB 55 (Sub-No. 501X) (STB served July 2, 2010).

an offer of financial assistance under 49 U.S.C. § 10904 to purchase the line.<sup>3</sup> WCAPDD later learned that no such offer was forthcoming and incorrectly assumed that the abandonment processes had been completed. Upon learning that the abandonments had not yet been consummated, WCAPDD then submitted its late-filed request. Finally (and significantly), CVRR itself, the party seeking abandonment authority, concurs with the NITU request and agrees to negotiate with WCAPDD. For these reasons, the late-filed request will be accepted.

Pennington opposes the NITU request on a number of grounds, including the need for the underlying land for agricultural purposes, the hardship a NITU would cause to reversionary landowners, the lack of need for a trail, and safety concerns. Despite these concerns, however, under the Trails Act and our implementing rules, if a prospective trail user requests a trail condition and the carrier indicates its willingness to negotiate a trail agreement, the Board has a limited ministerial role. See Goos v. ICC, 911 F.2d 1283 (8th Cir. 1990). To invoke the Trails Act, a prospective trail sponsor needs only to file a request accompanied by the necessary statement of willingness to assume liability and acknowledgment that interim trail use is subject to possible reinstatement of rail service. See Nat'l Ass'n of Reversionary Property Owners v. STB, 158 F.3d 135, 138 (D.C. Cir 1998); 49 C.F.R. § 1152.29(a) and (d). If the railroad indicates its willingness to negotiate, the Board must then issue a NITU. Goos, 911 F.2d at 1295; see Cent. Mich. Ry.—Aban. Exemption—in Kent Cnty., Mich., AB 308 (Sub-No. 4X) (STB served Nov. 24, 2010).

Because WCAPDD's request for a NITU complies with the requirements of 49 C.F.R. § 1152.29 and CVRR agrees to that request, a NITU will be issued. The parties may negotiate an agreement for the ROW during the 180-day period prescribed below. If an interim trail use agreement is reached (and thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2) and (h). If no agreement is reached within 180 days, CVRR may fully abandon the notice and petition segments, subject to applicable previously imposed conditions. 49 C.F.R. § 1152.29(d)(1). Use of the ROW for trail purposes is subject to possible future reconstruction and reactivation of the ROW for rail service.

*Removal of the Section 7 Condition.* By decision served on February 23, 2012 (February 2012 decision), the notice proceeding was reopened and the abandonment exemption was made subject to two environmental conditions, including a condition (the Section 7 condition) that CVRR consult with the Board's Office of Environmental Analysis (OEA) and the U.S. Fish and Wildlife Service, Arkansas Ecological Services Office (USFWS), to develop appropriate mitigation measures, if necessary, and refrain from filing its consummation notice or initiating

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<sup>3</sup> See Notices of Intent filed by Southwest Arkansas Regional Intermodal Authority in Docket Nos. AB 1076X and AB 1076 (Sub-No. 1X) (filed Nov. 28, 2011).

any salvage activities related to abandonment (including removal of tracks and ties) until the consultation process under Section 7 of the Endangered Species Act, 16 U.S.C. § 1535, is complete and the Board has removed this condition.

CVRR subsequently submitted new information from USFWS indicating that the proposed salvage operations would not likely have an adverse effect on the federally threatened and endangered species in the proposed abandonment area.<sup>4</sup> Therefore, based on the information provided, OEA recommends, in a Supplemental Environmental Assessment dated February 14, 2013, that the Section 7 condition imposed in the February 2012 decision be removed. Based on OEA's recommendation, the notice proceeding will be reopened and the previously imposed Section 7 condition will be removed.

*Filing Fee Waiver.* While it is unclear whether Pennington or other third parties have standing to challenge the fee waiver,<sup>5</sup> assuming *arguendo* that Pennington does have standing, we find that it was appropriate and consistent with Board practices for the Director of Proceedings to have waived the filing fee for WCAPDD under 49 C.F.R. § 1002.2(e)(1). Pennington states that WCAPDD is not among the "state agencies" listed on the State of Arkansas' web site and that WCAPDD does not operate out of any facility owned, operated or furnished by the State of Arkansas, but those facts are not dispositive.<sup>6</sup> According to WCAPDD, it is a nonprofit entity established and recognized by Arkansas statute that exists for the purpose of benefitting the interests of the public. It is one of eight planning and development districts recognized by the Arkansas General Assembly. Ark. Code Ann. § 14-166-202(a)(7). WCAPDD's purpose is "to promote economic development, to assist local governments and private organizations in obtaining federal grants and loans, to prepare comprehensive regional plans for economic development and improved government services, to enlist private support for these activities, and to coordinate private and public programs in the multi-county districts."

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<sup>4</sup> CVRR included this information in an email originally submitted to OEA on April 13, 2012. However, the portion containing USFWS's concurrence did not transfer to a printed copy that was later scanned to the Board's website as environmental correspondence and subsequently used as a basis to determine project status. CVRR notified OEA of this oversight on February 14, 2013.

<sup>5</sup> See Byers v. Intuit, Inc., 564 F. Supp. 2d 385, 417-19 (E.D. Pa. 2008) (finding no private right of action to enforce the Independent Offices Appropriations Act, 31 U.S.C. § 9701, which regulates fees collected by government agencies).

<sup>6</sup> Pennington also argues that WCAPDD's web site includes "no claim of affiliation with any state, county or federal agencies." WCAPDD's web site, however, lists ten Arkansas counties and numerous cities as "area members." See West Central Arkansas Planning and Development District, <http://wcapdd.dina.org/economic/aremem/default.html> (last visited Feb. 21, 2013).

Ark. Code Ann. § 14-166-201(a)(1). Further, Arkansas state law requires that WCAPDD be governed by a board of directors, the majority of which must be elected officials of local governments.<sup>7</sup> Ark. Code Ann. § 14-166-203(b). In light of these facts, we find WCAPDD to be a state entity eligible for the filing fee waiver under 49 C.F.R. § 1002.2(e)(1), and the filing fee check WCAPDD submitted on February 19 will be returned.

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. These proceedings are reopened.
2. WCAPDD's late-filed request for a NITU under 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29 for the notice and petition segments is granted in both Dockets AB 1076X and AB 1076 (Sub-No. 1X).
3. If an interim trail use/rail banking agreement is reached, it must require the trail sponsor to assume, for the term of the agreement, full responsibility for: (i) managing the ROW; (ii) any legal liability arising out of the transfer or use of the ROW (unless the trail sponsor is immune from liability, in which case it need only indemnify the railroad against any potential liability); and (iii) 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 possible future reconstruction and reactivation of the ROW for rail service and to the trail sponsor's continuing to meet its responsibilities described in ordering paragraph 3 above.
5. If an interim trail use agreement is reached, the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2) and (h).
6. If interim trail use is implemented, and subsequently the trail sponsor intends to terminate trail use on all or any portion of the ROW covered by the interim trail use agreement, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

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<sup>7</sup> See Regulations Governing Fees for Servs. Performed in Connection with Licensing & Related Servs.—Policy Statement, EP 542 (Sub-No. 6X) (STB served Dec. 6, 2000) (distinguishing private and quasi-public corporations from “true” public corporations based on the former acting in the interests of stockholders).

7. If an agreement for interim trail use/rail banking is reached by August 26, 2013, interim trail use may be implemented. If no agreement is reached, CVRR may abandon the notice and petition segments, subject to applicable previously imposed conditions.

8. The condition imposed in the February 2012 decision in Docket No. 1076X to implement the Section 7 process of the Endangered Species Act is removed.

9. The appeal of WCAPDD's fee waiver is denied.

10. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.