

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 415 (Sub-No. 2X)

ESCANABA & LAKE SUPERIOR RAILROAD COMPANY—ABANDONMENT
EXEMPTION—IN ONTONAGON AND HOUGHTON COUNTIES, MICH.

Digest: The Escanaba & Lake Superior Railroad Company (ELS) is permitted to terminate service over, and to eliminate, a 43-mile rail line between Ontonagon and Sidaw in Michigan's Upper Peninsula. ELS has consented to negotiate with a state agency to enter into an agreement to preserve the land under the line for future rail use.¹

Decided: September 27, 2010

By petition filed on April 9, 2010, Escanaba & Lake Superior Railroad Company (ELS), a Class III railroad, seeks an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10903 to abandon approximately 42.93 miles of rail line (the Line) in Ontonagon and Houghton Counties, Mich. The Line runs from milepost 408.02 at Ontonagon to milepost 365.09 at Sidaw. On April 27, 2010, the Board served and published a notice instituting this exemption proceeding. 75 Fed. Reg. 22,174.

On May 12, 2010, the State of Michigan Department of Natural Resources & Environment (MDNRE) filed a request for a public use condition. MDNRE also requested issuance of a notice of interim trail use or abandonment (NITU) under the National Trails System Act, 16 U.S.C. § 1247(d) (Trails Act).

Letters in support of the proposed abandonment were filed by 3 customers of ELS who ship freight over the Line. They are the Louisiana-Pacific Corporation (L-P Corp.), Domtar A.W. LLC (Domtar), and McDermid Warehousing Incorporated (McDermid). A letter expressing concern over the proposed abandonment and seeking a delay of Board action was filed by the Honorable Carl Levin, United States Senate. A joint letter of protest and a request for public hearing was filed by Michigan State Senator Michael Prusi and Michigan State Representative Mike Lahti. A letter of protest and request for stay and/or public hearing was

¹ 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).

filed by James Jessup, the prosecuting attorney for Ontonagon County (Jessup), writing on behalf of Ontonagon County.² ELS replied to that letter. A letter objecting to the proposed abandonment was filed by Heartland Business Bank, f/k/a Wisconsin Business Bank, a branch of Wisconsin Community Bank (Heartland). ELS moved to reject or strike Heartland's filing. ELS also filed a substantive response to Heartland's letter to be considered by the Board if we denied the petition to reject.³

We will grant the exemption from 49 U.S.C. § 10903, subject to employee protective, public use, interim trail use/rail banking, and environmental conditions.

BACKGROUND

ELS began operating the Line in 1980 and continued to operate it as part of the 347 miles of rail line it owns and operates in northeastern Wisconsin and the upper peninsula of Michigan. The Line carries no overhead traffic. Its operations supported a paper mill (the Mill) at Ontonagon owned and operated by the Smurfit-Stone Container Corporation (Smurfit). As recently as 2005, that shipper originated as many as 5,380 annual carloads of corrugated paper, accounting for over 84% of the Line's traffic in that year. ELS says Smurfit closed the Mill in November 2008 and filed for Chapter 11 bankruptcy protection in January 2009. While Smurfit reopened the Mill for a 13-week period between June and September 2009, ELS says Smurfit relied exclusively on truck transportation to move its inbound and outbound shipments, and in December 2009, announced the Mill's permanent closure. ELS claims that it is owed in excess of \$1.2 million for the period from December 2008 to February 2009 under its transportation contract with Smurfit.⁴

ELS asserts that the only traffic that now originates on the Line is 200-250 annual carloads of pulpwood harvested by 5 shippers in forests south of Ontonagon and trucked to sidings along the Line for transfer to rail cars. L-P Corp., which manufactures pulpwood at a facility south of the Line in Sagola, Mich., shipped more than half of the 248 carloads that moved over the Line in 2009. Emphasizing that it is critical that the railroad remain viable for the shippers in the region and the remaining parts of the ELS system, L-P Corp. asserts that the abandonment is essential to ELS' financial health and ability to provide uninterrupted service to

² We have received no comment from the Ontonagon County Board of County Commissioners or any of its members.

³ Heartland has a financial interest in ELS. As such, it has a significant interest in the outcome of this proceeding. For that reason, we will accept Heartland's late-filed letter. We will deny the motion to reject or strike the letter filed by Heartland and will consider the railroad's comments in reply to the letter.

⁴ According to ELS, under the contract (which extended until February 2009), Smurfit guaranteed a minimum revenue stream, and ELS committed to providing a minimum of 3-day-per-week service to the Mill.

L-P's Sagola facility.⁵ Domtar shipped 2 carloads of pulpwood in 2009, and, as an occasional shipper on other ELS lines, states that the proposed abandonment is critical to ELS' financial health and ability to provide service on the rest of its system. McDermid, an off-line shipper located at Oconto Falls, Wis., also believes that the abandonment will greatly assist ELS' financial health, while not adversely impacting the railroad's overall service to shippers.

ELS asserts that no potential buyer has come forward to acquire the Mill and make use of the Line, notwithstanding the railroad's efforts both to find such a buyer and to inform the affected communities that it can neither retain the Line at its current traffic levels nor afford to keep the Line as an inactive property. Additionally, ELS claims that it was unsuccessful in exploring possibilities for federal and/or state funding that would allow the Line to be retained as an inactive asset. ELS maintains that there is no realistic prospect that Smurfit would reopen the Mill. Nor is there any hope that another potential shipper would assume control of the Mill for paper production or some other industrial operation that might warrant retaining the Line.

In ELS' view, the proposed abandonment, which has been occasioned by the unanticipated closure of the Mill, is necessary to avoid operating losses that would result from continued operations. The railroad says it must restore responsible debt service and a measure of liquidity. ELS claims that it incurred an operating loss of \$129,000 in 2009, and that it expects to incur a total operating loss after taxes and interest of \$82,783 in 2010, if operations continue through the end of the year.⁶

Using 2011 as the forecast year (because the 2010 financial figures would be distorted by the one-time coal movement), ELS anticipates moving 250 carloads of pulpwood, which, at a rate of \$460 per carload, would yield approximately \$115,000 in revenue. It projects forecast year track maintenance costs of \$133,083 (\$3,100 per track mile); a forecast year operating cost of \$113,678 (based on a once per week operation and other operating assumptions); and a total forecast year avoidable cost of \$246,761. Thus, ELS projects operating losses in the forecast year of \$131,761.

ELS estimates that the Line has a net liquidation value (NLV) of \$6,519,496, based on an independent assessment of track and materials performed by Antony Jewell, a railroad consultant for Indus-Rail Co.⁷ Based on that NLV, an income tax adjustment of \$2,574,517, and a pre-tax

⁵ In a supplemental letter filed on May 12, 2010, ELS submitted and served on the parties a copy of L-P Corp.'s letter, which had been included in the correspondence section of the Board's docket. Because of the "relevance and importance of [L-P Corp.'s] comments" in support of the proposed abandonment, ELS requests that the letter be made part of the formal record. None of the parties objected. Accordingly, we will grant ELS' request; its supplemental letter and L-P Corp.'s letter will be accepted into the record.

⁶ The lower 2010 operating loss figure, according to ELS, would result from the one-time movement of approximately 500 to 530 carloads of coal stockpiled at the Mill that Smurfit has sold and has made arrangements for ELS to move.

⁷ Mr. Jewell states that he did not personally inspect the Line. Instead, he completed an evaluation largely based on an inventory provided by Charles Anderson, a consultant to, and a

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cost of capital of 16.1%, ELS projects a forecast year opportunity cost of \$635,142, and a forecast year loss from operations of \$766,902.⁸

In addition to making it possible to avoid the operating losses that would result from continued operations, ELS asserts that the proposed abandonment would permit it to salvage and sell the Line's unproductive assets and to sell the underlying land that is held in fee. This, ELS maintains, would be a major step in allowing it to return its remaining operations to a sound economic basis and "is a matter of survival for the balance of the short line's system." Petition at 25.

ELS points out that alternative transportation service is readily available for the area between Ontonagon and Sidaw. It notes that the Line's pulpwood can move entirely by truck with relatively short hauls. The highways that are used to truck the pulpwood to the Line for transloading, ELS asserts, can be used to truck pulpwood to transloading points on other railroads and to ELS' transloading facilities at, or to the south of, Sidaw. Further, ELS asserts that it is trying to persuade the Line's pulpwood shippers to relocate their transload operations to these ELS-served facilities. ELS also notes that Ontonagon will retain its access to Great Lakes water transportation.

Heartland objects to the proposed abandonment, stating that it holds a first mortgage on a substantial amount of real estate owned by ELS, including rights-of-way located in Ontonagon, Houghton, and other Michigan counties. Heartland also holds a first lien on all of ELS' other assets. Asserting that ELS is substantially in default on these obligations, Heartland says it has instituted a collection action, which is now pending in the U.S. District Court. Heartland claims that ELS "has more value as a going concern in its present state," and that the proposed abandonment "would reduce the value of the Railroad as an ongoing entity and therefore [Heartland's] collateral position"

ELS responds that Heartland's assertions are "utterly specious, unsupported, and without merit." ELS Motion to Reject or Strike at 1. It acknowledges that it has defaulted on loans from Heartland due to the sudden loss of traffic on the Line. The railroad states, however, that it filed for this abandonment precisely to liquidate the Line's unproductive rail assets in order to satisfy its debt obligations to Heartland. According to ELS, Heartland's assertion that the railroad has

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former employee of, ELS. Salvage costs and track materials value were collected from George Holubar of Holubar Construction Company of Green Bay, Wis. Mr. Jewell states that Holubar is involved in track construction and removal in the area and is familiar with the Line. Petition, Exhibit F, V.S. of Antony Jewell.

⁸ ELS applied a multiplication factor of 1.37 to the most recent Board computation of the railroad industry's cost of capital of 11.75%. It should have applied the multiplier to the cost of equity only, and not to the overall cost of capital, which includes debt. The pre-tax cost of capital the Board uses, based on the 2008 cost of capital value, is 17.81%, which would have yielded a greater opportunity cost of \$702,601.

more value as a going concern in its present state is unsupported and illogical considering that the Line “has become a wasting and moribund asset.”⁹ *Id.* at 10.

Jessup objects to the proposed abandonment, claiming that: (1) Smurfit will be emerging from the Chapter 11 bankruptcy proceeding and is working with the Ontonagon community to find a purchaser for the Mill; and (2) the Ontonagon community has received “an indication from U.P. Steel, Inc. [(U.P.)], that they are interested in the mill properties.” Attached to Jessup’s statement is a letter from U.P., stating that the “former Smurfit facility lends itself well” to U.P.’s construction of a facility with a series of furnaces for the production of synthetic natural gas, and that this operation could generate 2-3 daily inbound and outbound carloads by late 2010 and 20-25 daily inbound and outbound carloads by 2011-2012.

In reply, ELS contends that the letters from Jessup and U.P. are too speculative to be accorded any weight. It notes that the letter from U.P. is neither verified nor addressed to the Board and makes no traffic commitments. Moreover, ELS asserts that it has neither heard of U.P. nor been contacted by it to discuss its alleged plans for the Mill, its rail service and rate needs, or any other arrangements that might make it financially feasible for ELS to suspend or terminate the proposed abandonment.

PROCEDURAL MATTERS

Because ELS filed this petition for exemption on April 9, 2010, we would have issued this decision on or before July 28, 2010, 110 days after the petition was filed.¹⁰ On July 12, 2010, however, ELS requested that we hold this proceeding in abeyance for 60 days. In making the request, ELS cited a request by Senator Carl Levin that the Board postpone action on its petition. ELS also cited a request by Smurfit that the Board grant a 60-day postponement to allow a prospective purchaser of the Mill, who has an interest in continuing rail service to the

⁹ To protect its interests in the collection action, which assertedly has been remanded back to state court, ELS asks the Board to issue a statement clarifying our jurisdiction in the matter. We did so in our decision served on July 21, 2010, granting ELS’ request to hold the proceeding in abeyance for 60 days. We stated that it is

settled law that the Board has exclusive jurisdiction over transportation by rail carriers and associated property, and that the remedies provided under the statutes administered by the Board preempt the remedies provided under federal and state law if such laws unreasonably interfere with railroad operations or interstate commerce. 49 U.S.C. §10501(b); *see, e.g., Norfolk S. Ry. and the Ala. Great S. R.R.—Petition for Declaratory Order*, FD 35196 (STB served March 1, 2010). *See also City of Auburn v. STB*, 154 F.3d 1025 (9th Cir. 1998).

¹⁰ Under 49 U.S.C. §10904(c), offers of financial assistance may be filed up to 4 months (approximately 120 days) after an application for abandonment is filed. The Board, therefore, typically issues abandonment decisions within 110 days, to permit the filing of OFAs within 10 days after service of the Board’s decision, as contemplated by our regulations at 49 C.F.R. § 1152.27.

Mill, to express its view. The abeyance request was granted by Board order served July 21, 2010.

In a letter filed on September 13, 2010, ELS reported to the Board that there had been no material change in the circumstances surrounding the Line over the prior 60 days, and that there are still no prospects of sufficient traffic returning to the Line to return it to profitability. In support, ELS states that in response to contacts it had initiated with Smurfit and Jessup, neither entity indicated that the Mill has been purchased, nor that it was going to be purchased by an entity requiring rail service. Under these circumstances, we will not continue to hold this proceeding in abeyance.

We have received requests for a public hearing from Jessup, Senator Prusi, and Representative Lahti. We have before us, however, a substantial written record, to which interested persons have had an opportunity to contribute, which we believe is fully sufficient for us to reach an informed decision on all the material issues before us. For that reason, we conclude that a public hearing is not necessary in this case.

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 (RTP) 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 RTP in this case. By minimizing the administrative expense of the application process, an exemption will reduce regulatory barriers to exit. 49 U.S.C. § 10101(7). The Line is operating, and is projected to continue to operate, at a significant loss. Therefore, an exemption will promote adequate revenues, foster sound economic conditions, and encourage efficient management by allowing ELS to avoid the losses associated with the cost of owning and maintaining the Line and to focus on its remaining system. 49 U.S.C. § 10101(3), (5), and (9). Other aspects of the RTP will not be adversely affected.

Regulation of the proposed transaction under 49 U.S.C. § 10903 is not necessary to protect shippers from an abuse of market power. Smurfit has closed the Mill and has put it up for sale. We held this proceeding in abeyance for 60 days at Smurfit's request based on its expressed hope to have "a definitive sale agreement in place by the end of August." No such agreement has been submitted, and we have received no indication that a realistic prospect exists for the resumption of operations at the Mill. L-P Corp., the Line's primary shipper, supports the proposed abandonment. None of the Line's other shippers protested or expressed opposition. Moreover, the record indicates that alternative transportation is available to affected shippers in the form of truck-rail transload service, truck service, and water transportation. Nevertheless, to ensure that shippers are informed of our action, we will require ELS to serve a copy of this decision on the Line's shippers within 5 days of the service date of this decision, and to certify to

us contemporaneously that it has done so. In light of this market power finding, we need not determine whether the proposed abandonment is limited in scope.

Additionally, we find Heartland's objection to the proposed abandonment lacking in merit. Because the Line is operating, and is projected to operate, at a loss, it has no going concern value to ELS or anyone else. To the contrary, the Line is a burden on interstate commerce. Requiring its continued operation would serve no purpose other than to push ELS further into debt and default. Granting the proposed abandonment exemption, on the other hand, would increase the going concern value of ELS' remaining system by ending its obligation to operate this unprofitable Line. Should ELS salvage the Line, it may be able to pay down some of its debt, restore responsible debt service, and focus its efforts on the profitable parts of its system.

Employee protection. 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 this exemption, we will impose the employee protective conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Amon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979).

Environmental conditions. ELS submitted a combined environmental and historic report with its petition and notified the appropriate federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed abandonment. 49 C.F.R. § 1105.11. In the report, ELS indicated that the right-of-way (ROW) could be suitable for alternate public use after abandonment and suggested that the ROW could be well suited for use as a recreational trail. The Board's Section of Environmental Analysis (SEA) examined the environmental and historic report, verified ELS' data, and analyzed the probable effects of the proposed abandonment on the quality of the human environment. SEA issued an environmental assessment (EA) in this proceeding on May 7, 2010.

In the EA, SEA stated that the National Geodetic Survey (NGS) has advised it that 31 geodetic station markers have been identified that may be affected by the proposed abandonment. Accordingly, SEA recommended a condition requiring ELS to notify NGS at least 90 days prior to beginning any salvage activities that would disturb or destroy the geodetic station markers.

ELS served the historic report on the Michigan State Historic Preservation Office (SHPO) pursuant to 49 C.F.R. § 1105.8(c). According to the historic report, the project area includes 51 structures that are at least 50 years old or older, including a depot, several bridges, and culverts. At the time it issued the EA, SEA had not heard from the SHPO regarding its opinion on the potential for the Line to contain properties eligible for listing in the National Register of Historic Places (National Register) pursuant to Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470 et seq. (NHPA). SEA thus recommended a condition requiring ELS to 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 ROW (the Area of Potential Effect) eligible for listing or listed on the National Register until completion of the Section 106 process.

The Line originates at the Village of Ontonagon, located on the banks of Lake Superior, and crosses 50 bodies of water including multiple crossings of the Ontonagon River. Thus, SEA recommended a condition requiring ELS to consult with the Michigan Department of Environmental Quality (MDEQ) prior to beginning any salvage activities to determine with certainty whether state coastal management consistency certification is required. If consistency certification is required, SEA recommended a condition requiring that ELS be prohibited from performing any salvage activities until it obtains consistency certification and then notify SEA, pursuant to the Coastal Zone Management Act, 16 U.S.C. § 1451 et seq. and the Board's environmental regulations at 49 C.F.R. § 1105.9.

Finally, ELS informed SEA that it does not intend to remove any bridges or culverts along the Line that span waterways. However, given the length of the Line and number of waterways crossed, SEA recommended a condition requiring that ELS consult with the U.S. Army Corps of Engineers (Corps) prior to the initiation of salvage activities to ensure that any water resources that could be impacted are appropriately considered.

Two comments were received in response to the EA. In a letter dated April 27, 2010, the SHPO stated that the abandonment will have no adverse effect to historic properties pursuant to Section 106 of NHPA. By a letter dated May 7, 2010, the Land and Water Management Division of MDNRE indicated that the proposed abandonment is located outside Michigan's coastal management boundary and that no adverse effects from the abandonment are anticipated as the project is consistent with Michigan's Coastal Management Program.

Based on the comments received, SEA now recommends that the Section 106 condition and the MDEQ consultation condition not be imposed, but that the following 2 conditions still be imposed if the Board grants the proposed abandonment exemption: (1) ELS shall notify NGS at least 90 days prior to beginning salvage activities that would disturb or destroy any geodetic station markers; and (2) ELS, prior to commencing any salvage activities, shall consult with the Corps regarding potential impacts to waters of the United States, including wetlands, and shall comply with the reasonable requirements of the Corps.

The conditions recommended by SEA will be imposed. Accordingly, based on SEA's recommendation, the Board concludes 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.

Trail use. As previously noted, MDNRE filed a request for issuance of a NITU under the Trails Act and 49 C.F.R. § 1152.29 to enable it to negotiate with ELS for interim trail use/rail banking of the ROW. MDNRE 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 Line for rail service, as required under 49 C.F.R. § 1152.29. On June 17, 2010, ELS submitted a letter stating that it is willing to negotiate with MDNRE for interim trail use.

Under the Trails Act and the Board's implementing rules, if a prospective trail user requests a trail condition and the carrier indicates its willingness to negotiate a trail agreement, the Board's role under the Trails Act is largely ministerial. Goos v. ICC, 911 F.2d 1283, 1295 (8th Cir. 1990) (Goos). To invoke the Trails Act, a prospective trail user only needs to file a request accompanied by the necessary statement of willingness to assume liability and acknowledge that interim trail use is subject to possible reinstatement of rail service. National 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. Because these conditions have been met, the Board will issue a NITU for the 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, ELS may fully abandon the line, subject to the conditions imposed below. 49 C.F.R. § 1152.29(d)(1). Use of the ROW for trail purposes is subject to restoration for railroad purposes.

Public use. SEA has indicated in its EA that, following abandonment and salvage of the Line, the ROW may be suitable for other public use. As noted, MDNRE also filed a request for a public use condition under 49 U.S.C. § 10905, precluding ELS for 180 days from: (1) disposing of the corridor, other than track, ties, and signal equipment, except for public use on reasonable terms; and (2) removing or destroying potential trail-related structures, such as bridges, trestles, culverts, and tunnels. MDNRE notes that the corridor would make an excellent recreational trail and would provide an opportunity to connect to 2 other rail corridors already developed by it for trail use. MDNRE states that it needs the time to conduct appraisal and title reviews and to begin negotiations with ELS.

We have determined that persons who file under the Trails Act may also file for public use under 49 U.S.C. § 10905. Rail Abans.—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986). 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. MDNRE has met the public use criteria prescribed at 49 C.F.R. § 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 Line, 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, ELS 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 a ROW that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, ELS is not required to deal exclusively with MDNRE, but may engage in negotiations with other interested persons.

Offers of financial assistance. 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. 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. 2 I.C.C. 2d at 608. Accordingly, if an OFA is timely filed under 49 C.F.R. § 1152.27(c)(1), the effective date of this decision and notice will be postponed beyond the effective date indicated here. 49 C.F.R. § 1152.27(e)(2). In addition, the effective date may be further postponed at later stages in the OFA process. 49 C.F.R. § 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. ELS' supplemental letter and L-P Corp.'s letter are accepted into the record.
2. ELS' motion to reject or strike the letter filed by Heartland is denied.
3. Under 49 U.S.C. § 10502, we exempt from the prior approval requirements of 49 U.S.C. § 10903 the abandonment by ELS of the above-described Line, subject to the employee protective conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Amon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979); and subject to the conditions that ELS shall: (1) leave intact all of the ROW, including bridges, trestles, culverts, tunnels, and other potential trail-related structures (except track, 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 any 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) notify NGS at least 90 days prior to beginning salvage activities that would disturb or destroy geodetic station markers; and (4) consult with the Corps prior to commencing any salvage activities regarding potential impacts to waters of the United States, including wetlands, and comply with the reasonable requirements of the Corps.
4. ELS is directed to serve a copy of this decision and notice on the Line's shippers within 5 days of its service date, and to certify contemporaneously to the Board that it has done so.
5. 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.
6. Interim trail use/rail banking is subject to the future restoration of rail service and to the user continuing to meet the financial obligations for the ROW.

7. 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.

8. If an agreement for interim trail use/rail banking is reached by March 28, 2011, interim trail use may be implemented. If no agreement is reached by that time, ELS may fully abandon the Line, provided the conditions imposed above are met. 49 C.F.R. § 1152.29 (d) (1). If an interim trail use/rail banking agreement is executed before March 28, 2011, the public use condition will expire to the extent the trail use/rail banking agreement covers the same line.

9. An OFA under 49 C.F.R. § 1152.27(c)(1) to allow rail service to continue must be received by ELS and the Board by October 7, 2010, subject to time extensions authorized under 49 C.F.R. § 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27(c)(1). Each OFA must be accompanied by the filing fee, which currently is set at \$1,500. 49 C.F.R. § 1002.2(f)(25).

10. 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.”**

11. Provided no OFA has been received, this exemption will be effective on October 27, 2010. Petitions to stay must be filed by October 12, 2010, and petitions to reopen must be filed by October 22, 2010.

12. In the absence of a successful OFA, ELS 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 ELS’ filing of a notice of consummation by September 27, 2011, of this decision and notice, 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 Elliott, Vice Chairman Mulvey, and Commissioner Nottingham.