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SERVICE DATE – FEBRUARY 16, 2011

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 702

NATIONAL TRAILS SYSTEM ACT AND RAILROAD RIGHTS-OF-WAY

Digest:¹ The Board clarifies, updates, and asks for comment on certain proposed aspects of its regulations pertaining to the use of railroad lines for recreational trails, subject to the possibility that rail service will be restored on such lines. Typically, the railroad would otherwise choose to end its service and operation over these lines. This decision also proposes new rules that would require parties to tell the Board when they reach an agreement about using a railroad line as a recreational trail. The new rules would also require parties to seek a new notice or certificate from the Board should their agreement cover only a portion of the railroad line covered by the original notice or certificate that allowed parties to negotiate the use of the railroad line. Lastly, the new rules clarify the requirements of a new party who assumes responsibility for the recreational trail.

Decided: February 10, 2011

AGENCY: Surface Transportation Board.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Surface Transportation Board (STB or Board) clarifies and updates some of its existing regulations and procedures regarding the use of railroad rights-of-way for railbanking and interim trail use under Section 8(d) of the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d), and asks for comments on the proposed changes and how to resolve state sovereign immunity issues. The Board also proposes to add a new rule to 49 C.F.R. § 1152.29, the Board's regulations regarding the Trails Act, that would require the railroad and the trail sponsor jointly to notify the Board when a trail use agreement has been reached, and to notify the Board of the exact location of the right-of-way subject to the interim trail use agreement, by including a map and milepost marker information. The proposed rules would also require parties to ask the Board to vacate the Certificate of Interim Trail Use (CITU) or Notice of Interim Trail Use (NITU) when an interim trail use agreement covers only a portion of the right-of-way and request a replacement CITU/NITU to cover the portion of the right-of-way subject to the trail use

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).

agreement. Lastly, the proposed rules would clarify that a substitute trail sponsor must acknowledge that interim trail use is subject to restoration and reactivation at any time.

DATES: Comments are due by April 12, 2011; replies are due by May 12, 2011.

ADDRESSES: Comments on this proposal may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the E-FILING link on the Board's website, at <http://www.stb.dot.gov>. Any person submitting a filing in the traditional paper format should send an original and 10 copies to: Surface Transportation Board, Attn: Docket No. EP 702, 395 E Street, S.W., Washington, DC 20423-0001.

Copies of written comments will be available for viewing and self-copying at the Board's Public Docket Room, Room 131, and will be posted to the Board's website.

FOR FURTHER INFORMATION CONTACT: Valerie Quinn, (202) 245-0382. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at (800) 877-8339.

SUPPLEMENTARY INFORMATION: The Board held a public hearing on July 8, 2009, to examine a number of issues pertaining to railbanking that have arisen over the last 25 years under Section 8(d) of the Trails Act. See [Twenty-Five Years of Railbanking: A Review & Look Ahead](#), EP 690 (STB served May 21, 2009). The Board sought comments on the success of the railbanking program and the future of such railbanking in an era of constrained rail infrastructure. To initiate a dialogue on these topics, the Board posed the following general questions:

- Has railbanking under Section 8(d) been a success for rail carriers and trail users?
- Have most rail corridors proposed for railbanking under Section 8(d) actually been developed into trails?
- Should the Board require notice or a copy of the Trails Act agreement to be submitted to the Board?
- What can or should the Board do to further facilitate the reactivation of rail service on railbanked lines, including addressing compensation questions regarding replacing any bridges that may have been removed during interim trail use?
- How have reversionary property owners been affected by railbanking?

After considering the oral comments at the public hearing and the written comments that were received, the Board clarifies and proposes to update certain existing Trails Act rules and procedures and asks for comments on how to resolve state sovereign immunity issues that have arisen. The Board also proposes to add a new notice requirement to 49 C.F.R. § 1152.29.

BACKGROUND

The National Trails System Act was enacted in 1968 to establish a nationwide system of nature trails. National Trails System Act, Pub. L. No. 90-543, § 8, 82 Stat. 919 (1968) (codified, as amended, at 16 U.S.C. §§ 1241-1251). As originally enacted, it did not contain any special provisions for railroad rights-of-way. In 1983, however, Congress added a rail section, codified at 16 U.S.C. § 1247(d), to advance two declared policies: preserving unused railroad rights-of-way for possible future rail use and promoting nature trails. See Preseault v. ICC, 494 U.S. 1, 5-7, 17-18 (1990).

The enactment of the “Rails-to-Trails” provision followed a history of Congressional concern about the loss of rail corridors as a national transportation resource. See id. at 5; Birt v. STB, 90 F.3d 580, 582-83 (D.C. Cir. 1996). Under 16 U.S.C. § 1247(d), the STB must “preserve established railroad rights-of-way for future reactivation of rail service” by prohibiting abandonment where a trail sponsor offers to assume managerial, tax, and legal responsibility for a right-of-way for use in the interim as a trail. Nat’l Wildlife Fed’n v. ICC, 850 F.2d 694, 699-702 (D.C. Cir. 1988). The statute provides that, if such interim use is subject to restoration or reconstruction for railroad purposes, the “interim use shall not be treated for [any] purposes . . . as an abandonment . . .” 16 U.S.C. § 1247(d). Instead, the right-of-way is “railbanked,” which means that the railroad (or any other approved rail service provider) may reassert control at any time in order to restore service on the line. 49 C.F.R. §§ 1152.29(c)(2), (d)(2); Birt, 90 F.3d at 583.² If a line is railbanked and designated for trail use, any reversionary interests that adjoining landowners might have under state law upon abandonment are postponed. Preseault, 494 U.S. at 8; Birt, 90 F.3d at 583.

To invoke the Trails Act, a prospective trail sponsor must first file a request with the STB accompanied by a statement of willingness to assume responsibility for management, legal liability, and payment of taxes, and an acknowledgement that interim trail use is subject to restoration of rail service at any time. 49 C.F.R. §§ 1152.29(a), (d). If the railroad indicates its willingness to negotiate a railbanking/interim trail use agreement, the STB will issue a CITU (in an abandonment application proceeding) or a NITU (in an abandonment exemption proceeding) for the line.³ 49 C.F.R. §§ 1152.29(c)(1), (d)(1). The CITU/NITU permits parties to negotiate for a 180-day period (which can be extended by Board order) a railbanking agreement. 49 C.F.R. §§ 1152.29(c)(1), (d)(1); Preseault, 494 U.S. at 7 n.5; Birt, 90 F.3d at 583.

² The Board, and its predecessor, the Interstate Commerce Commission, has promulgated and occasionally modified or clarified its rules to implement the Trails Act. See, e.g., Aban. & Discontinuance of Rail Lines & Rail Transp. Under 49 U.S.C. 10903, 1 S.T.B. 894 (1996); Policy Statement on Rails to Trails Conversions, EP 272 (Sub-No. 13B) (ICC served Jan. 29, 1990); Rail Abans.—Use of Rights-of-Way as Trails—Supplemental Trails Act Procedures, 4 I.C.C. 2d 152 (1987); Rail Abans.—Use of Rights-of-Way as Trails, 2 I.C.C. 2d 591 (1986).

³ There is no substantive difference between railbanking authorized under a NITU versus a CITU.

The terms of any subsequently reached trail use agreement (including compensation issues related to the potential reactivation of rail service) are the product of private negotiations between the railroad and trail sponsor. The Board has never required that trail use agreements, or notice that the parties have even reached an agreement, be submitted to the Board. Ga. Great S. Div.—Aban. & Discontinuance Exemption—Between Albany & Dawson, in Terrell, Lee, & Dougherty Counties, Ga., 6 S.T.B. 902, 907 (2003).

If the parties reach an agreement, the CITU/NITU automatically authorizes railbanking/interim trail use. Preseault, 494 U.S. at 7 n.5. Without further action from the STB, the trail sponsor may then assume management of the right-of-way, subject to the right of a railroad to reassert control of the property for restoration or reconstruction of rail service and the terms of the agreement. 49 C.F.R. §§ 1152.29(c)(2), (d)(2); Birt, 90 F.3d at 583. If, on the other hand, no railbanking/interim trail use arrangement is reached, then upon expiration of the CITU/NITU 180-day negotiation period (and any extension thereof), the CITU/NITU authorizes the railroad to “exercise its option to fully abandon” the line by consummating the abandonment, without further action by the agency, see Birt, 90 F.3d at 583, provided that there are no unmet conditions imposed on the abandonment authority that must be satisfied. See Consummation of Rail Line Abans. That Are Subject to Historic Pres. & Other Envtl. Conditions, EP 678, slip op. at 3-4 (STB served Apr. 23, 2008). During the negotiating period, the railroad is authorized to discontinue service and salvage track materials from the line, as such actions are fully consistent with railbanking/interim trail use. Preseault, 494 U.S. at 7 n.5; Birt, 90 F.3d at 583, 586.

A railbanking/interim trail use arrangement is subject to being cut off at any time for the reinstatement of rail service. 49 C.F.R. §§ 1152.29(c)(2), (d)(2). A railbanked line is not abandoned, but rather remains part of the national rail system, albeit temporarily unused for railroad operations. Thus, if and when a railroad wishes to restore rail service on all or part of the property, it may request that the CITU/NITU be vacated to permit reactivation of the line for continued rail service. See, e.g., Ga. Great S., 6 S.T.B. at 906.

Alternatively, railbanking/interim trail use may be terminated by the trail sponsor, pursuant to any applicable terms of the privately negotiated trail use agreement. In that instance, upon notice from the trail sponsor that it is terminating interim trail use, the Board will issue a decision vacating the CITU/NITU and permitting immediate abandonment for the involved portion of the right-of-way, thereby allowing, but not requiring, the railroad to consummate abandonment, subject to compliance with any conditions that must be satisfied. Id.; 49 C.F.R. § 1152.29(e)(2).

Railbanking/interim trail use authorization also may be transferred from one trail sponsor to another. 49 C.F.R. § 1152.29(f). To effect a transfer, the existing and proposed trail sponsors jointly submit to the Board a copy of the governing CITU/NITU, a statement of the proposed trail sponsor’s willingness to assume the management, liability, and tax responsibilities for the trail, and the date on which responsibility for the right-of-way is to transfer to the new trail sponsor. Id. The Board will then reopen the abandonment proceeding to vacate the existing CITU/NITU and replace it with a new CITU/NITU reflecting the new trail sponsor. Id.

The STB's role under the Trails Act is limited and largely ministerial. Citizens Against Rails-to-Trails v. STB, 267 F.3d 1144, 1151-52 (D.C. Cir. 2001) (CART); Goos v. ICC, 911 F.2d 1283, 1295 (8th Cir. 1990) (agency has "little, if any, discretion to forestall a voluntary agreement to effect a conversion to trail use"). The STB plays no part in the negotiations between trail sponsors and railroads. Goos, 911 F.2d at 1295. Nor does it analyze, approve, or set the terms of railbanking/interim trail use agreements. See Nat'l Wildlife, 850 F.2d at 700; Ga. Great S., 6 S.T.B. at 907; Use of Rights-of-Way as Trails, 2 I.C.C. 2d at 608. The Board does not "regulate activities over the actual trail, and [has] no involvement in the type, level, or condition of the trail. . . ." Ga. Great S., 6 S.T.B. at 907. Moreover, the Board has no specific fitness or qualification test for trail sponsors; it requires only the statement of willingness from the trail sponsor and the acquiescence of the railroad in railbanking. Jost v. STB, 194 F.3d 79, 89 (D.C. Cir. 1999) (rebuttable presumption of trail sponsor's financial fitness). The Board has the authority to terminate railbanking/interim trail use if it determines that the trail sponsor does not have the ability to continue to meet the management, tax, and liability conditions of interim trail use. See 49 C.F.R. § 1152.29(a)(3); Jost, 194 F.3d at 89-90.

The STB retains jurisdiction over a rail line throughout the CITU/NITU negotiating period, any period of railbanking/interim trail use, and any period during which rail service is restored. It is only upon a railroad's lawful consummation of abandonment authority that the Board's jurisdiction ends. See 16 U.S.C. § 1247(d); Hayfield N. R.R. v. Chi. & N. W. Transp. Co., 467 U.S. 622, 633 (1984). At that point, the right-of-way may revert to reversionary landowner interests, if any, pursuant to state law. Preseault, 494 U.S. at 5, 8.

CLARIFICATION OF THE BOARD'S EXISTING RULES AND PROCEDURES

1. Requesting an Extension of Time for Filing a Notice of Abandonment Consummation: Our rules at 49 C.F.R. § 1152.29(e) currently require railroads to file a notice of consummation of abandonment of a rail line. Such notices are deemed conclusive evidence of consummation at the time of filing if there are no legal or regulatory barriers to consummation, such as an historic preservation condition under section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f, or a CITU/NITU (but not including salvage conditions).⁴ Our rules specify further that, if a rail carrier fails to file a notice of consummation within 1 year of the date of service of a decision permitting abandonment, then, absent some legal or regulatory barrier to consummation, the authority to abandon will automatically expire. 49 C.F.R. § 1152.29(e)(2).

Our rules also allow a railroad to file a request for an extension of time to file a notice of consummation for good cause shown. Id. Although we are not proposing an amendment to our current notice-of-consummation rule, we clarify here that there is no need to file a request to extend the time for filing this notice when legal or regulatory conditions (including a CITU/NITU) remain in effect that bar consummation of abandonment until these conditions have been satisfied or removed. See Consummation of Rail Line Abans., slip op. at 3-4. Under our notice-of-consummation rule, the rail carrier has 60 days from the date of satisfaction, expiration,

⁴ Salvage conditions are not considered a barrier to consummation. See Consummation of Rail Line Abans., slip op. at 4.

or removal of the legal or regulatory barrier to consummation in which to file a notice of consummation. 49 C.F.R. § 1152.29(e)(2). Thus, when historic preservation (or other imposed conditions that do not relate to salvage) have not yet been satisfied, there is no need for a rail carrier to request an extension of the 1-year notice-of-consummation requirement just to ensure that the abandonment authority will not expire.

2. State Sovereign Immunity Issues: Concerns have been raised regarding the ability of some states to assume liability and legal and financial responsibility for a right-of-way during the interim trail use period. Congress has imposed a requirement in the Trails Act that states and political subdivisions, as well as qualified private organizations, “assume responsibility for . . . any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied against such rights-of-way.” 16 U.S.C. § 1247(d); see CART, 267 F.3d at 1149. Although the Trails Act thus expressly contemplates that states and political subdivisions may be trail sponsors, it does not directly address the fact that many states have some form of legal immunity from liability. The Board’s current rules permit an entity with legal immunity to serve as a trail sponsor if it agrees to indemnify the railroad against any potential liability.⁵

In individual cases, some state entity trail sponsors have argued, based on their particular state laws, that they need to qualify their statements of willingness to indemnify the railroad. We request comments from the public on what, if any, change in our Trails Act rules could accommodate these concerns, given the plain language of 16 U.S.C. § 1247(d). We note that states interested in further railbanking have the option to revise their sovereign immunity laws to accommodate the Trails Act, or could designate trail sponsors other than the state itself who would not be limited by the state sovereign immunity laws. State entities also have the ability to acquire railroad rights-of-way for use as recreational trails outside the framework of the Trails Act, either through negotiations with the railroad after the line has been abandoned or through their power of eminent domain if it authorizes the state to acquire the necessary property interests on lines that have been abandoned. See e.g., Consol. Rail Corp.—Aban. Exemption—in Lancaster & Chester Cntys., Pa., AB 167 (Sub-No. 1095X), slip op. at 4 (STB served Jan. 19, 2005).

3. Reactivation of Rail Lines and Compensation Issues: The agency has addressed issues involving the reactivation of active rail service on railbanked lines in R.J. Corman Railroad Co./Pennsylvania Lines Inc.—Construction & Operation Exemption—in Clearfield County, Pennsylvania, FD 35116 (served July 28, 2009); Georgia Great Southern, 6 S.T.B. at 906-08; and Iowa Power, Inc.—Construction Exemption—Council Bluffs, Iowa, 8 I.C.C. 2d 858 (1990). The

⁵ 49 C.F.R. § 1152.29(a)(3) provides a Statement of Willingness to Assume Financial Responsibility, which currently requires (in relevant part) the following commitment: “In order to establish interim trail use and rail banking under 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29, _____ (Interim Trail User) is willing to assume 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. . . .” (emphasis added).

Board will not revisit or expand on any of the analysis set forth in those decisions at this time. Issues such as who should bear the cost to restore rail service are best addressed as they arise in the context of an individual case.

4. Actual Notice to Landowners: Following the hearing, the National Association of Reversionary Property Owners (NARPO) submitted proposed rules. One proposed rule change would have the Board require the railroad to give direct notice to adjoining landowners following the issuance of a CITU or NITU.⁶ NARPO asserts that due process requires that direct notice via mail be given to adjoining landowners at the time that a CITU or NITU is issued, because the courts have found that the 6-year statute of limitations for bringing a compensation claim under the Tucker Act, 28 U.S.C. § 2501, begins to run at that time. See Caldwell v. United States, 391 F.3d 1226, 1233 (Fed. Cir. 2004); Preseault v. United States, 100 F.3d 1525, 1552 (Fed. Cir. 1996). Without direct notice via mail, NARPO asserts, a landowner might not know to exercise its due process rights and inadvertently could let the statute of limitations expire.

When a rail carrier intends to abandon a line, it must provide notice to appropriate federal, state and local agencies, government entities, and local communities. 49 C.F.R. §§ 1152.20(a)(2), 1152.50(d), and 1152.60(d); see also 49 C.F.R. § 1105.7(b). In every abandonment case where an exemption from the requirements of 49 U.S.C. § 10903 is sought under 49 U.S.C. § 10502, the railroad must certify that it has published in a newspaper of general circulation in each county through which the line passes a notice that alerts the public to the proposed abandonment, to available reuse alternatives including the Trails Act, and to how it may participate in the Board proceeding.⁷ 49 C.F.R. § 1105.12. Federal Register notice also is provided in every abandonment case. 49 C.F.R. §§ 1152.22(i), 1152.50(d)(3), 1152.60(c).

The Board and its predecessor, the ICC, previously declined to adopt an actual notice rule, finding that actual notice would be time-consuming, burdensome, and unnecessary. Nat'l Ass'n of Reversionary Property Owners v. STB, 158 F.3d 135 (D.C. Cir. 1998); see Rail Abans.—Use of Rights-of-Way as Trails—Supplemental Trails Act Procedures, EP 274 (Sub-No. 13) (ICC served July 28, 1994). The agency has explained that interested parties may contact either the railroad or trail sponsor to find out whether the railroad has consummated abandonment or obtain information on the status of any interim trail use negotiations. Because local public hearings on trail proposals are “the norm rather than the exception,” property owners have the opportunity to learn who is acquiring and operating a trail “in virtually every case.” Rail Abans.—Use of Rights-of-Way as Trails—Supplemental Trails Act Procedures, EP 274 (Sub-No. 13) (ICC served May 26, 1989).

⁶ NARPO also proposed to set a 2-year time limitation in which to finalize a trail use agreement and to require notice to the Board once a trail use agreement is reached. The Board's proposed rule would require the filing of a notice when a trail use agreement is reached, but the Board does not intend to set any limit on the negotiation period because the amount of time required for negotiations depends on the circumstances of each case.

⁷ Newspaper notice also is required in abandonment applications filed under 49 U.S.C. § 10903.

We continue to believe that actual notice to individual landowners is not practical. Accordingly, we do not propose to adopt NARPO's suggested approach here. Moreover, we also believe that our proposed rule requiring railroads to notify the Board when a trail use agreement has been reached will give landowners more information about the status of lines eligible for railbanking. However, we are interested in receiving comments on whether the current method of newspaper notice can be augmented by additional methods of indirect notification that take advantage of advances in technology but do not create an undue burden on rail carriers.

5. Clarification and Updating of Language in § 1152.29: In Appendix A, the Board is proposing slight modifications to the language in § 1152.29. Specifically, the Board proposes modifications to the language in 49 C.F.R. §§ 1152.29(a)(2), (a)(3), (c)(2), and (d)(2), so that the wording more closely conforms to the language of the Trails Act. The Board also proposes minor modifications to the language of the Statement of Willingness to Assume Financial Responsibility (49 C.F.R. § 1152.29(a)(3)) to describe more accurately the responsibilities of an interim trail sponsor. Also, the Board proposes to eliminate the reference to "NERSA abandonment proceedings" in 49 C.F.R. § 1152.29(c), because NERSA is no longer in effect.⁸ The Board also proposes to modify the language in 49 C.F.R. §§ 1152.29(c)(1) and (d)(1), to clarify that the Board will issue a CITU/NITU for the portion of the right-of-way that both parties are willing to negotiate interim trail use on, rather than the portion "to be covered by the agreement," as what the agreement may ultimately cover is unknown at that time. Lastly, the Board proposes to modify the language in 49 C.F.R. § 1152.29(c)(2) to make clear that a trail sponsor may choose to terminate interim trail use over only a portion of the right-of-way covered by the trail use agreement, while continuing interim trail use over the remaining portion of the right-of-way covered by the trail use agreement.

PROPOSED RULES

1. Notice of Trail Use Agreements: Under the Board's current rules, when a timely trail use offer is made containing the information required in the Board's rules, the Board issues a CITU/NITU. As explained above, CITU/NITUs are self-executing. They authorize the parties to negotiate an interim trail use agreement and the railroad to abandon the line fully if an agreement is not reached within 180 days from their issuance, subject to compliance with any other conditions, typically labor protection conditions and historic preservation and environmental conditions (that are not related to salvage), imposed by the Board. See Consummation of Rail Line Abans., slip op. at 3-4. Once these conditions have been satisfied, and if a trail use agreement is not reached, the railroad files a notice of consummation with the Board to signify that it has exercised the authority granted and has fully abandoned the line. 49 C.F.R. § 1152.29(e)(2).

⁸ The Northeast Rail Services Act of 1981 (NERSA) provided a window (ending in 1985) during which Consolidated Rail Corporation could qualify for streamlined abandonment procedures for its lines.

The Board's current rules, however, provide no formal means of determining whether an actual interim trail use agreement is reached after the issuance of a CITU or NITU, and, if so, whether the agreement applies to the entire right-of-way at issue. Several parties at the hearing noted the difficulty in determining the status of lines authorized for abandonment after CITUs/NITUs are issued. Some commenters suggested that the Board should require the filing of the actual trail use agreements, while others objected to the public dissemination of the terms in a private agreement and thought it sufficient that the Board require a notice to be filed once an interim trail use agreement is reached, given the Board's ministerial role under the Trails Act.

The Board agrees that it would be useful to require parties to notify the Board when an interim trail use agreement has been reached. Accordingly, as set forth in Appendix A, the Board proposes to require a notice that would include a map and specific description, by milepost markers, of the right-of-way covered by the trail use agreement, a certification that the trail use agreement requires the user to fulfill the obligations set forth at 49 C.F.R. § 1152.29(a)(2) pertaining to trail management, liability, and payment of taxes, and a statement as to whether that agreement covers the entire right-of-way under the CITU/NITU or only a portion of that right-of-way. The notice, which would be filed jointly by the railroad and the trail sponsor, would ensure that the agency and the public have accurate information on the status of property where a CITU/NITU has been issued.

The Board will not propose requiring submission of the actual trail use agreement, however. These private agreements may contain commercially sensitive terms, and the Board does not administer or supervise the agreements. We believe the notice requirement that the Board is proposing is sufficient to keep the Board and the public apprised of the status of railbanked lines and that there would be no added value in requiring submission of the actual agreements to the Board or subjecting them to public dissemination.

2. Need to Petition the Board to Modify or Vacate a CITU/NITU: As explained above, the Board's Trails Act rules make CITU/NITUs self executing, and the rules contemplate that petitions to vacate or modify the CITU/NITU will be filed if rail service is to be reactivated, interim trail use ceases in whole or in part, or there is a change in trail sponsors. When an interim trail use/railbanking agreement covers only a portion of the right-of-way that was proposed to be abandoned, the Board's regulations are unclear whether the CITU/NITU that was issued for the right-of-way could nonetheless continue in effect indefinitely, precluding the abandonment of the remainder of the right-of-way for which the CITU/NITU was issued. Accordingly, our new proposed rule, as set forth in Appendix A, clarifies that, if a trail sponsor and rail carrier reach an interim trail use agreement that applies to less of the right-of-way than is covered by the CITU/NITU, the notice of trail use agreement, in addition to the provisions described above, must also include: (1) a request to vacate the CITU/NITU, thus permitting abandonment of the portion of the right-of-way not subject to the interim trail use agreement; and (2) a request for a replacement CITU/NITU that covers only the portion of the right-of-way subject to the interim trail use agreement.

3. Substitute Sponsor Requirements: The Board also proposes to clarify the substitute sponsor requirements. The Board's rules at § 1152.29(f)(1) currently require that, when a trail sponsor intends to terminate trail use and another person intends to become the trail sponsor, the

substitute trail sponsor must acknowledge its willingness to assume financial responsibility for the right-of-way; but the rules are silent with regard to any acknowledgment that continued interim trail use remains subject to possible rail service restoration. Accordingly, as set forth in Appendix A, the Board clarifies that the substitute trail sponsor (like § 1152.29(a)(3) requires of the original trail sponsor) must affirmatively acknowledge that the continued interim trail use is subject to possible future restoration of the right-of-way and reactivation of rail service.

4. Applicability: The Board proposes to make the new rules applicable both to new CITUs/NITUs and cases where the CITU/NITU negotiating period has not yet expired when the rules become effective. Requiring a notice of trail use agreement to be filed in cases where the CITU/NITU negotiating period has not yet expired should not be unduly burdensome and would eliminate for these cases the difficulty parties have had in determining the status of lines authorized for abandonment after CITUs/NITUs are issued.

CONCLUSION

The proposed revisions to 49 C.F.R. § 1152.29 are intended to assist the Board and the public in determining the status of railbanked lines, and to clarify that a substitute trail sponsor must acknowledge that continued interim trail use is subject to the future restoration of the right-of-way and reactivation of rail service. We also provide clarification of some of our existing Trails Act rules and procedures and seek comments on the state sovereign immunity issues and additional indirect notification methods.

The Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-612, generally requires a description and analysis of rules that would have significant economic impact on a substantial number of small entities. In drafting a rule an agency is required to: (1) assess the effect that its regulation would have on small entities; (2) analyze effective alternatives that might minimize a regulation's impact; and (3) make the analysis available for public comment. 5 U.S.C. §§ 601-604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, 5 U.S.C. § 603(a), or certify that the proposed rule will not have a "significant impact on a substantial number of small entities," 5 U.S.C. § 605(b). The impact must be a direct impact on small entities "whose conduct is circumscribed or mandated" by the proposed rule. White Eagle Coop. Ass'n v. Conner, 553 F.3d 467, 480 (7th Cir. 2009).

The Board certifies under 49 U.S.C. § 605(b) that this proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. The proposed notice requirement would require trail sponsors and railroads to file a notice with the Board when they have reached an interim trail use agreement. Some trail sponsors may qualify as a small entity, in that they may be a "small organization" within the meaning of 5 U.S.C. § 601(4) or a "small governmental jurisdiction" within the meaning of 5 U.S.C. § 601(5). Some railroads may qualify as a "small business" within the meaning of 5 U.S.C. § 601(3). However, the proposed notice that would be required here should involve little time and expense to draft and file, and thus should have little economic impact on a small-entity filer. The requirement is limited to only those small entities or small businesses who might be parties to interim trail use agreements. It therefore will not impact a substantial number of small entities.

Pursuant to the Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3519, and Office of Management and Budget (OMB) regulations at 5 C.F.R. § 1320.8(d)(3), the Board also seeks comments regarding: (1) whether the particular collection of information described below is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate. Information pertinent to these issues is included in Appendix B. These proposed rules are being submitted to OMB for review as required under the PRA, 44 U.S.C. § 3507(d) and 5 C.F.R. § 1320.11. Comments on the four questions prescribed above should be submitted to the Board, in accordance with the comment period described below.

This decision will be served upon the Chief Counsel for Advocacy, Offices of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

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

It is ordered:

1. Comments are due by April 12, 2011; replies are due by May 12, 2011.
2. Notice of this decision will be published in the Federal Register.
3. This decision is effective on its service date.

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

APPENDIX A

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend part 1152 of title 49, chapter X, of the Code of Federal Regulations as follows:

PART 1152—ABANDONMENT AND DISCONTINUANCE OF RAIL LINES AND RAIL TRANSPORTATION UNDER 49 U.S.C. 10903

1. The authority citation for Part 1152 continues to read as follows: 11 U.S.C. 1170; 16 U.S.C 1247(d) and 1248; 45 U.S.C. 744; and 49 U.S.C. 701 note (1995) (section 204 of the ICC Termination Act of 1995), 721(a), 10502, 10903-10905, and 11161.

2. Revise § 1152.29 by revising paragraphs (a)(2), (a)(3), (c), (c)(1), (c)(2), (c)(2)(ii), (c)(2)(iii), (d)(1), (d)(2), and (d)(2)(iii) and by adding paragraphs (f)(1)(iii) and (h) to read as follows:

§ 1152.29 Prospective use of rights-of-way for interim trail use and rail banking.

(a) * * *

* * * * *

(2) A statement indicating the trail sponsor’s willingness to assume full responsibility for: (i) managing the right-of-way; (ii) any legal liability arising out of the transfer or use of the right-of-way (unless the user 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 right-of-way; and

(3) An acknowledgment that interim trail use is subject to the sponsor's continuing to meet its responsibilities described in paragraph (a)(2) of this section, and subject to possible future reconstruction and reactivation of the right-of-way for rail service. The statement must be in the following form:

Statement of Willingness To Assume Financial Responsibility

In order to establish interim trail use and rail banking under 16 U.S.C. 1247(d) and 49 CFR 1152.29 with respect to the right-of-way owned by ----- (Railroad) and operated by ----- (Railroad), ----- (Interim Trail Sponsor) is willing to assume full responsibility for: (1) managing the right-of-way, (2) any legal liability arising out of the transfer or use of the right-of-way (unless the sponsor is immune from liability, in which case it need only indemnify the railroad against any potential liability), and (3) the payment of any and all taxes that may be levied or assessed against the right of way. The property, known as ----- (Name of Branch Line), extends from railroad milepost ----- near ----- (Station Name), to railroad milepost -----, near ----- (Station name), a distance of ----- miles in [County(ies), (State(s))]. The right-of-way is part of a line of railroad proposed for abandonment in Docket No. STB AB-- ----- (Sub-No. -----).

A map of the property depicting the right-of-way is attached.

----- (Interim Trail Sponsor) acknowledges that use of the right-of-way is subject to the user's continuing to meet its responsibilities described above and subject to possible future reconstruction and reactivation of the right-of-way for rail service. A copy of this statement is being served on the railroad(s) on the same date it is being served on the Board.

(b) * * *

* * * * *

(c) Regular abandonment proceedings. (1) If continued rail service does not occur pursuant to 49 U.S.C. 10904 and Sec. 1152.27, and a railroad agrees to negotiate an interim trail use/rail banking agreement, then the Board will issue a CITU to the railroad and to the interim trail sponsor for that portion of the right-of-way as to which both parties are willing to negotiate.

The CITU will: Permit the railroad to discontinue service, cancel any applicable tariffs, and salvage track and material consistent with interim trail use and rail banking, as long as it is consistent with any other Board order, 30 days after the date it is issued; and permit the railroad to fully abandon the line if no trail use agreement is reached 180 days after it is issued, subject to appropriate conditions, including labor protection and environmental matters.

(2) The CITU will indicate that any interim trail use is subject to future restoration of rail service and to the sponsor's continuing to meet its responsibilities described in paragraph (a)(2) of this section. The CITU will also provide that, if an interim trail use agreement is reached (and thus interim trail use established), the parties shall file the notice described in subsection (h) of this section. Additionally, the CITU will provide that if the sponsor intends to terminate interim trail use on all or any portion of the right-of-way covered by the interim trail use agreement, it must send the Board a copy of the CITU and request that it be vacated on a specified date. If a party requests that the CITU be vacated for only a portion of the right-of-way, the Board will issue an appropriate replacement CITU covering the remaining portion of the right-of-way subject to the interim trail use agreement. The Board will reopen the abandonment proceeding, vacate the CITU, and issue a decision permitting immediate abandonment for the involved portion of the right-of-way. Copies of the decision will be sent to:

(i) * * *

(ii) The owner of the right-of-way; and

(iii) The current trail sponsor.

(3) * * *

(d) Exempt abandonment proceedings. (1) If continued rail service does not occur under 49 U.S.C. 10904 and Sec. 1152.27 and a railroad agrees to negotiate an interim trail use/rail

banking agreement, then the Board will issue a Notice of Interim Trail Use or Abandonment (NITU) to the railroad and to the interim trail sponsor for the portion of the right-of-way as to which both parties are willing to negotiate. The NITU will: permit the railroad to discontinue service, cancel any applicable tariffs, and salvage track and materials, consistent with interim trail use and rail banking, as long as it is consistent with any other Board order, 30 days after the date it is issued; and permit the railroad to fully abandon the line if no agreement is reached 180 days after it is issued, subject to appropriate conditions, including labor protection and environmental matters.

(2) The NITU will indicate that interim trail use is subject to future restoration of rail service and to the sponsor's continuing to meet its responsibilities described in paragraph (a)(2) of this section. The NITU will also provide that, if an interim trail use agreement is reached (and thus interim trail use established), the parties shall file the notice described in subsection (h) of this section. Additionally, the NITU will provide that if the sponsor intends to terminate interim trail use on all or any portion of the right-of-way covered by the interim trail use agreement, it must send the Board a copy of the NITU and request that it be vacated on a specific date. If a party requests that the NITU be vacated for only a portion of the right-of-way, the Board will issue an appropriate replacement NITU covering the remaining portion of the right-of-way subject to the interim trail use agreement. The Board will reopen the exemption proceeding, vacate the NITU, and issue a decision reinstating the exemption for that portion of the right-of-way. Copies of the decision will be sent to:

(i) * * *

(ii) * * *

(iii) The current trail sponsor.

(3) * * *

(e) * * *

* * * * *

(f) * * *

(i) * * *

(ii) * * *

(iii) An acknowledgement that interim trail use is subject to possible future reconstruction and reactivation of the right-of-way for rail service.

(2) * * *

(g) * * *

(h) When the parties negotiating for railbanking/interim trail use reach an agreement, the trail sponsor and railroad shall jointly notify the Board within 10 days that the agreement has been reached. The notice shall include a map depicting, and an accurate description of, the involved right-of-way or portion thereof (including mileposts) that is subject to the parties' interim trail use agreement and a certification that the interim trail use agreement includes provisions requiring the sponsor to fulfill the responsibilities described in paragraph (a)(2) of this section. Additionally, if the interim trail use agreement establishes interim trail use over less of the right-of-way than is covered by the CITU or NITU, the notice shall also include a request that the Board vacate the CITU or NITU and issue a replacement CITU/NITU for only the portion of the right-of-way covered by the interim trail use agreement. The Board will reopen the abandonment proceeding, vacate the CITU or NITU, issue an appropriate replacement CITU or NITU for only the portion of the right-of-way covered by the interim trail use agreement, and

issue a decision permitting immediate abandonment of the portion of the right-of-way not subject to the interim trail use agreement. Copies of the decision will be sent to:

- (i) The rail carrier that sought abandonment authorization;
- (ii) The owner of the right-of-way; and
- (iii) The current trail sponsor.

APPENDIX B

The additional information below is included to assist those who may wish to submit comments pertinent to review under the Paperwork Reduction Act:

DESCRIPTION OF COLLECTION

Title: New submissions under the Board's Trails Act regulations

OMB Control Number: 2140-XXXX

STB Form Number: None

Type of Review: New collection

Respondents: Parties to an interim trail use agreement; substitute trail sponsors

Number of Respondents: 40 (potentially)

Estimated Time Per Response: 1 hour or less

Frequency: On occasion

Total Burden Hours (annually including all potential respondents): 40 hours

Total "Non-hour Burden" Cost: None identified

Needs and Uses: The new rule proposes to require parties to notify the Board when a trail use agreement has been reached, and to notify the Board of the exact location of the right-of-way subject to the agreement, including a map and milepost marker information. This submission will ensure that the agency and the public have accurate information on the status of property after interim trail use conditions have been issued. As is already required for an original trail sponsor, the proposed rule would also clarify that a substitute trail sponsor must acknowledge that interim trail use is subject to restoration and reactivation at any time.

Retention Period: These records are retained indefinitely.