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SERVICE DATE – NOVEMBER 19, 2010

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 33 (Sub-No. 289X)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT EXEMPTION—
IN PULASKI COUNTY, ARK.

Decided: November 18, 2010

Union Pacific Railroad Company (UP) filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon a 4.04-mile portion of its Camp Robinson Spur extending from milepost 345.64 to the end of the line at milepost 349.68, in Pulaski County, Ark. Notice of the exemption was served and published in the Federal Register on October 21, 2010 (75 Fed. Reg. 65,047-48). The exemption is scheduled to become effective on November 20, 2010.

The Board's Office of Environmental Analysis (OEA) served an environmental assessment (EA) in this proceeding on October 26, 2010. In the EA, OEA states that the U.S. Army Corps of Engineers (Corps) has submitted comments stating that the Corps has authorized the proposed abandonment under the Department of Army Nationwide Permit (NWP) process. According to OEA, the Corps has authorized 4 NWPs for the proposed abandonment, provided UP meets certain conditions. The Corps indicates that one of the conditions requires UP to submit compliance certification within 30 days of completion of the project. Accordingly, OEA recommends in the EA a condition requiring that UP consult with the Corps prior to beginning any salvage activities regarding the required NWP conditions and comply with the Corps' reasonable requirements.

In the EA, OEA also states that the National Geodetic Survey (NGS) has identified 1 geodetic station marker in the area of the proposed abandonment. Accordingly, OEA recommends a condition that UP be required to consult with NGS and notify NGS at least 90 days prior to beginning salvage activities that could disturb or destroy any geodetic station markers.

Pursuant to 36 C.F.R. § 800.2, OEA notes that it conducted a search of the Native American Consultation Database (Database) at <http://home.nps.gov/nacd/> to identify Federally recognized tribes, which may have ancestral connections to the project area. According to OEA, the Database indicated that the Osage Tribe of Oklahoma and the Quapaw Tribe of Indians of Oklahoma may have knowledge regarding properties of traditional religious and cultural significance within the right-of-way of the proposed abandonment. Accordingly, OEA sent a copy of the EA to these tribes for review and comment.

Comments to the EA were due by November 9, 2010. No comments were received. Accordingly, the conditions recommended by OEA in the EA will be imposed.

In the EA, OEA states that the right-of-way might be suitable for other public use following abandonment and salvage of the line. On August 11, 2010, the City of North Little Rock (the City), a political subdivision of the State of Arkansas, filed a request for the issuance of a notice of interim trail use (NITU) for the line to negotiate with UP for acquisition of the line for use as a trail under the National Trails System Act, 16 U.S.C. § 1247(d) (Trails Act), and 49 C.F.R. § 1152.29. The City also has submitted a statement of willingness to assume full financial responsibility for the management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way, as required at 49 C.F.R. § 1152.29, and has acknowledged that the use of the right-of-way for trail purposes is subject to the user's continuing to meet the responsibilities described above and to future reconstruction and reactivation of the right-of-way for rail service. In a response filed on November 4, 2010, UP states that it is willing to negotiate with the City for interim trail use and that it supports the City's request to negotiate for a period of 180 days.

Because the City's request complies with the requirements of 49 C.F.R. § 1152.29, and UP is willing to negotiate with the City for trail use, a NITU will be issued to the City. The parties may negotiate an agreement during the 180-day period prescribed below. If the parties reach a mutually acceptable final agreement, no further Board action is necessary. If no agreement is reached within 180 days, UP may fully abandon the line, subject to any outstanding conditions. See 49 C.F.R. § 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to any future use of the property for restoration of railroad operations.

The City also has requested imposition of a public use condition under 49 U.S.C. § 10905 for the line. The City requests that UP be prohibited from disposing of the corridor, other than tracks, ties, and signal equipment, except for public use on reasonable terms, and that UP be barred from the removal or destruction of potential trail-related structures, such as base material and culverts, for a 180-day period from the effective date of the exemption. The City's justification for its request is that the rail corridor will provide a transportation corridor through a major residential area connecting with a middle school and a shopping center. The City indicates that the corridor will make an excellent recreational trail and that conversion of the property to trail use is in accordance with local plans. The City also indicates that the corridor will provide open space and that preservation as a recreational trail will be consistent with local purposes. The City states that the 180-day period is needed to review title information and to begin negotiations with UP.

As an alternative to interim trail use under the Trails Act, the right-of-way may be acquired for public use as a trail under 49 U.S.C. § 10905. See Rail Aban.—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986). Under § 10905, the Board may prohibit the disposal

of rail properties that are proposed to be abandoned and are appropriate for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment.

To justify a public use condition, a party must set forth: (i) the condition sought; (ii) the public importance of the condition; (iii) the period of time for which the condition would be effective; and (iv) justification for the imposition of the period of time requested. See 49 C.F.R. § 1152.28(a)(2). Because the City has satisfied these requirements, a 180-day public use condition will be imposed, requiring UP to keep intact the right-of-way (including base material and culverts) and to refrain from disposing of the corridor (other than tracks, ties, and signal equipment), commencing from the November 20, 2010 effective date of the exemption.

When the need for interim trail use/rail banking and public use is shown, it is the Board's policy to impose both conditions concurrently, subject to the execution of a trail use agreement. Here, however, while both conditions will be imposed at this time, the public use condition will expire on May 19, 2011, while the trail use negotiating period will run 180 days from the service date of this decision and notice (until May 18, 2011). If a trail use agreement is reached on a portion of the right-of-way prior to May 19, 2011, UP must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. Also, a public use condition is not imposed for the benefit of any one potential purchaser, but rather to provide an opportunity for any interested person to acquire the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, UP is not required to deal exclusively with the City, but may engage in negotiations with other interested persons.

As conditioned, this decision and notice will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is reopened.
2. Upon reconsideration, the notice served and published in the Federal Register on October 21, 2010, exempting the abandonment of the line described above, is modified to the extent necessary: (1) to implement interim trail use/rail banking as set forth below to permit the City to negotiate with UP for trail use for a period of 180 days from the service date of this decision and notice (until May 18, 2011); and (2) to permit public use negotiations as set forth below, for a period of 180 days commencing from the November 20, 2010 effective date of the exemption (until May 19, 2011). It is also subject to the conditions that UP shall: (1) consult with the Corps prior to beginning any salvage activities regarding the required NWP conditions and comply with the Corps' reasonable requirements; and (2) consult with NGS and notify NGS at least 90 days prior to beginning salvage activities that could disturb or destroy any geodetic station markers.

3. Consistent with the public use and interim trail use/rail banking conditions imposed in this decision and notice, UP may discontinue service over the line. UP shall keep intact the right-of-way, including base material and culverts, and shall refrain from disposing of the corridor (other than tracks, ties, and signal equipment), for a period of 180 days to enable any state or local government agency, or other interested person, to negotiate the acquisition of the right-of-way for public use. If an interim trail use/rail banking agreement is executed before expiration of the 180-day period, the public use condition will expire to the extent the trail use/rail banking agreement covers the same portion of the line.

4. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.

5. Interim trail use/rail banking is subject to any future use of the property for restoration of railroad operations and to the user's continuing to meet the financial obligations for the right-of-way.

6. If interim trail use is implemented, and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

7. If an agreement for interim trail use/rail banking is reached by May 18, 2011, interim trail use may be implemented. If no agreement is reached by that time, UP may fully abandon the line, after the conditions imposed in this proceeding are met. See 49 C.F.R. § 1152.29(d)(1).

8. This decision is effective on its service date.

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