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SERVICE DATE - FEBRUARY 2, 1998

SURFACE TRANSPORTATION BOARD<sup>1</sup>

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB-33 (Sub-No. 94X)<sup>2</sup>

UNION PACIFIC RAILROAD COMPANY--ABANDONMENT EXEMPTION--  
MAGNOLIA TOWER-MELROSE LINE IN ALAMEDA COUNTY, CA

Decided: January 29, 1998

Union Pacific Railroad Company (UPRR) filed a notice of exemption under 49 CFR Subpart F--Exempt Abandonments and Discontinuances to abandon approximately 4.9 miles of the Magnolia Tower-Melrose line (portion of the Canyon Subdivision) from milepost 5.8 near Magnolia Tower to milepost 10.7 near Melrose, in Alameda County, CA. Notice of the exemption was served and published in the Federal Register on August 13, 1996 (61 FR 41827-28). A 180-day public use condition was imposed under 49 U.S.C. 10906 at the request of San Francisco Bay Trail (San Francisco) for a portion of the line from milepost 7.6 to milepost 7.1. The condition required that UPRR keep the right-of-way intact, including bridges, culverts, and similar structures, for a period of 180 days after the September 11, 1996 effective date of the exemption to permit San Francisco and any other state or local government agency, or other interested person to negotiate for acquisition of the line for public use.<sup>3</sup> On January 22, 1997, a decision and notice of interim trail use or abandonment was served authorizing a 180-day period for the City of Oakland (City) to negotiate an interim trail use/rail banking agreement with UPRR for the portion of the right-of-way

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<sup>1</sup> The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), enacted on December 29, 1995, and effective on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204 (b) (1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This proceeding was pending with the ICC prior to January 1, 1996, and relates to functions retained under Board jurisdiction pursuant to new 49 U.S.C. 10903. Citations are to the former sections of the statute, unless otherwise indicated.

<sup>2</sup> This proceeding is related to Finance Docket No. 32760, Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company (UP/SP).

<sup>3</sup> The public use condition expired on March 10, 1997.

from milepost 7.6 to milepost 7.1. The 180-day period was scheduled to expire on July 21, 1997, but was extended through February 8, 1998, by decision served on February 10, 1997.

On January 14, 1998, the City filed a request for a 180-day extension of the NITU and the public use condition for the .5-mile portion of the right-of-way from milepost 7.6 to milepost 7.1. The City also requested a NITU pursuant to section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and a 180-day public use condition under 49 U.S.C. 10905, in order to negotiate with UPRR for the 3.6-mile portion of the right-of-way from milepost 7.1 at Oak Street to milepost 10.7 at Calhoun and 49th Avenue. The City submitted a statement of willingness to assume financial responsibility for management of, for any legal liability arising out of the transfer or use of, and for payment of taxes for, the right-of-way, as required at 49 CFR 1152.29, and acknowledged that use of the right-of-way for trail purposes is subject to future reactivation for rail service. The City states that it needs the full 180-day period to undertake negotiations with UPRR.

Under 49 U.S.C. 10906, the Board's public use jurisdiction expires 180 days from the effective date of the decision approving or exempting the abandonment.<sup>4</sup> The public use condition imposed in the August 12, 1996 decision was for the maximum period permitted by statute. Therefore, the requested extension of the public use condition for the .5-mile portion of the right-of-way from milepost 7.6 to milepost 7.1 and the request to impose a public use condition on the 3.6-mile portion of the right-of-way from milepost 7.1 at Oak Street to milepost 10.7 at Calhoun and 49th Avenue are not permitted by the law and will be denied.

By letter filed January 27, 1998, UPRR states that it is not willing to negotiate with the City for interim trail use for the right-of-way between milepost 5.8 and milepost 7.1 and between milepost 9.0 and milepost 10.7 and, indeed, that it had previously advised the Board that it had abandoned the segment between milepost 5.8 and milepost 7.1.<sup>5</sup> UPRR also states that it is willing to negotiate interim trail use on the right-of-way from milepost 7.1 to milepost 9.0, and is willing to continue negotiations with the City until August 8, 1998.

The City's request complies with the requirements of 49 CFR 1152.29 and UPRR is willing to negotiate. Because 16 U.S.C. 1247(d) permits only voluntary interim trail use, the Board cannot issue a NITU for the portion of the right-of-way from milepost 9.0 to milepost 10.7. See Rail Abandonment--Use of Rights-of-Way as Trails, 2 I.C.C.2d 591 (1986) (Trails). Therefore, the NITU will be extended for the portion of the right-of-way between milepost 7.1 and 7.6, and a

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<sup>4</sup> See 49 CFR 1152.28(b); and Rail Abandonment--Public Use Conditions--Revision, 8 I.C.C.2d 392, 395-98 (1992).

<sup>5</sup> The City's request for a NITU did not embrace the segment of the line between milepost 5.8 to milepost 7.1. In any event, the Board lost jurisdiction over that segment (between milepost 5.8 to milepost 7.1) when UPRR abandoned it.

NITU will be issued for the portion of the right-of-way from milepost 7.6 to milepost 9.0 until August 8, 1998.

A further extension of the NITU negotiation period is warranted. The requested extension will promote the establishment of trail use and rail banking consistent with the Trails Act. The purpose of the Trails Act is to preserve rail corridors for possible reactivation of rail service by permitting and encouraging their interim trail use as recreational trails. See Policy Statement on Rails to Trails Conversions, Ex Parte No. 274 (Sub-No. 13B) (ICC served Feb. 5, 1990).

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

It is ordered:

1. This proceeding is reopened.
2. The request of the City to extend the public use condition on the .5-mile line of railroad from milepost 7.6 to milepost 7.1 and for the issuance of a public use condition on the remaining 3.6-mile line of railroad from milepost 7.1 at Oak Street to milepost 10.7 at Calhoun and 49th Avenue are denied.
3. The negotiation period under the NITU for the right-of-way between milepost 7.1 and milepost 7.6 is extended to August 8, 1998, and a NITU, also extending through August 8, 1998, is issued for the right-of-way between milepost 7.6 and milepost 9.0.
4. Upon reconsideration, the notice of exemption served and published in the Federal Register on August 12, 1996, exempting the abandonment of the line described above is modified to the extent necessary to implement interim trail use/rail banking as set forth below, for the portion of the right-of-way from milepost 7.1 at Oak Street to milepost 9.0 until August 8, 1998.
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 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.
6. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.
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.

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8. If an agreement for interim trail use/rail banking is reached by August 8, 1998, interim trail use may be implemented. If no agreement is reached by that time, UPRR may fully abandon the line.

9. This decision is effective on its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams  
Secretary

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