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THOMAS F. MCFARLAND

March 2, 2011

228951

By first-class mail

Ms. Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20024

ENTERED
Office of Proceedings

MAR - 7 2011

Part of
Public Record

Re: STB Docket No. AB-914X, *McCloud Railway Company -- Abandonment and Discontinuance of Service Exemption -- in Siskiyou, Shasta and Modoc Counties, CA*

Dear Ms. Brown:

Enclosed please find an original and 10 copies of Joint Request For a Notice of Interim Trail Use or Abandonment, for filing with the Board in the above referenced matter.

Also enclosed is a check in the amount of \$250 for the filing fee.

Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for McCloud Railway Company

TMcf kl enc wp8 0\1408\trstb3

cc: Charles Montange, Esq., by e-mail to *c.montange@verizon.net*
Mr. Jeff Forbis, by e-mail to *jforbismcrwy@yahoo.com*

FEE RECEIVED
MAR 7 2011
SURFACE
TRANSPORTATION BOARD

FILED

MAR 7 2011

**SURFACE
TRANSPORTATION BOARD**

BEFORE THE
SURFACE TRANSPORTATION BOARD



McCLOUD RAILWAY COMPANY --)
ABANDONMENT AND)
DISCONTINUANCE OF SERVICE)
EXEMPTION -- IN SISKIYOU, SHASTA)
AND MODOC COUNTIES, CA)

DOCKET NO. AB-914X

228951

JOINT REQUEST FOR A NOTICE OF
INTERIM TRAIL USE OR ABANDONMENT

ENTERED
Office of Proceedings

MAR - 7 2011

Part of
Public Record

SAVE BURNEY FALLS
37985 Clark Creek Road
Burney, CA 96013

Joint Requestor

FEE RECEIVED
MAR 7 2011
SURFACE
TRANSPORTATION BOARD

McCLOUD RAILWAY COMPANY
801 Industrial Way
P.O. Box 1500
McCloud, CA 96057

Joint Requestor

FILED
MAR 7 2011
SURFACE
TRANSPORTATION BOARD

CHARLES MONTANGE
426 NW 162nd Street
Seattle, WA 98177

Attorney for Joint Requestor

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1890
Chicago, IL 60604-1112
(312) 236-0204 (ph)
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mcfarland@aol.com

Attorney for Joint Requestor

DATED: March 2, 2011

BEFORE THE
SURFACE TRANSPORTATION BOARD

McCLOUD RAILWAY COMPANY --)
ABANDONMENT AND)
DISCONTINUANCE OF SERVICE) DOCKET NO. AB-914X
EXEMPTION -- IN SISKIYOU, SHASTA)
AND MODOC COUNTIES, CA)
)

**JOINT REQUEST FOR A NOTICE OF
INTERIM TRAIL USE OR ABANDONMENT**

Pursuant to 49 C.F.R. § 1152.29(a), SAVE BURNEY FALLS (SBF), as prospective trail user, and McCLOUD RAILWAY COMPANY (MRC), as authorized rail carrier, hereby jointly request a NOTICE OF INTERIM TRAIL USE OR ABANDONMENT (NITU) as to approximately 80 miles of right-of-way in Siskiyou, Shasta, and Modoc Counties, CA (the ROW), more particularly identified as follows:

- (1) between Milepost 3.3 east of McCloud, CA and the end of track at Milepost B-61 at or near Burney, CA;
- (2) between Milepost B-19 at or near Bartle, CA and Milepost B-31.4 at or near Hambone, CA;
- (3) between Milepost B-58 at or near Berry, CA and Milepost S-7 at or near Sierra, CA; and
- (4) between Milepost B-31.6 at or near Bear Flat, CA and Milepost P-3.93 at or near Pondosa, CA.

BACKGROUND

This matter has an unusual background. An exemption for abandonment of the ROW was issued in a Board decision served on October 14, 2005.^{1/} A lengthy period after that date was required for MRC to obtain a determination by the California Historic Preservation Office that the proposed abandonment would not have a material adverse effect on properties having historical significance. As a result, the historic preservation condition to approval of the abandonment was not removed until issuance of a Board decision served November 6, 2009.

On November 23, 2009, SBF filed a request for a NITU as to the entire ROW. The request contained all of the requirements of 49 C.F.R. § 1152.29(a). By letter dated December 3, 2009, MRC agreed to negotiate with SBF for railbanking and interim recreational trail use of the ROW. In a Decision and Notice of Interim Trail Use or Abandonment issued on December 29, 2009, the Board issued an NITU authorizing trail use negotiations until June 28, 2010.

On June 17, 2010, MRC and SBF entered into a written Letter of Intent for SBF to acquire the ROW for railbanking and interim recreational trail use. A copy of that Letter of Intent is attached to this Joint Request as Appendix 1.

By letter dated June 28, 2010, SBF requested an extension of the trail use negotiating period. SBF acknowledged that it had entered into a Letter of Intent to acquire the ROW, but stated that additional time was required for completion of engineering and environmental studies and a title search, and for receipt of grant funds to cover the costs of the due diligence work.

^{1/} The decision also granted an exemption for MRC's discontinuance of service pursuant to trackage rights over a 31.4-mile rail line owned by BNSF Railway Company.

By letter dated July 6, 2010, MRC declined to agree to the extension. Although not express in MRC's filing, the basis for MRC's refusal to consent was that inasmuch as the parties had reached an agreement in the Letter of Intent for acquisition of the ROW during the initial negotiating period, an extension of that period was not required.

In a decision served August 5, 2010, the Board denied SBF's request for extension of the trail use negotiating period in light of MRC's refusal to agree to the request.

In light of the fact that the parties represented that a Trails Act agreement had been reached, the Board should have indicated that no further extension of the negotiating period was necessary in that the parties represented that they had reached an agreement. However, the Board simply declined the extension, which some might construe to mean that the NITU expired on June 28, 2010, unless the Letter of Intent is an agreement for Trails Act purposes. But SBF is concerned that the Letter of Intent may be viewed as insufficient to constitute an agreement for Trails Act purposes, since among other things it does not specify price or an exact mechanism to determine price and may not be viewed as enforceable. SBF is prepared to invest in acquiring the corridor and obligating itself to keep the corridor intact only if it is ensured that the corridor is covered by 16 U.S.C. § 1247(d) and an applicable NITU. Although the relevant parties have now reached an agreement on terms and conditions (thus implementing the intent of the Letter of Intent), neither wish the transaction to be challenged on grounds that there was not a timely agreement for Trails Act purposes, and thus that the transaction was not covered by an effective NITU.

MRC hereby joins in the request for a new NITU because it acknowledges that there is some doubt about the Letter of Intent's qualification as a trail use agreement, and because it is willing to take this extra step to ensure a lawful trail use acquisition.

ARGUMENT IN SUPPORT OF REQUEST FOR NITU

Although the circumstances surrounding this Joint Request for NITU are quite unusual, the Joint Request provides all prerequisites for issuance of an NITU.

Attached as Appendix 2 to this Joint Request, in accordance with 49 C.F.R. § 1152.29(a), are the following, previously submitted by SBF:

- (1) a map depicting the ROW to be acquired; and
- (2) a statement indicating SBF's willingness to assume full responsibility for
 - (a) managing the ROW; (b) any legal liability arising out of use of the ROW; and
 - (c) payment of all taxes assessed against the ROW; and
- (3) an acknowledgment that interim trail use is subject to SBF's continuing to meet its responsibilities in number (2) above, and to possible future reconstruction and reactivation of the ROW for rail service.

MRC hereby states that (a) it is willing to negotiate with SBF for railbanking and interim recreational trail use of the ROW; and (b) it has not consummated abandonment of the rail line.

An NITU is to be issued in those circumstances. *See Aband. and Discon. of R. Lines and Transp. under 49 USC 10903*, 1 S.T.B. 894, 900 (1996), and 2 S.T.B. 311 (1997).

If the Board does not re-issue a NITU as requested, then this line still may not be deemed abandoned because MRC has not filed the notice of consummation required under 49 C.F.R. § 1152.29(e)(2). MRC has not yet done so for it seeks the application of the Trails Act to this

line. But if this Board does not re-issue a NITU, or grant similar relief, then this case also presents an issue whether MRC's authority to abandon this line has expired because MRC did not file the requisite notice of consummation, nor obtain an extension of the deadline for filing a notice of consummation, of abandonment authority. In that respect, it is provided in 49 C.F.R. § 1152.29(e)(2), in pertinent part, as follows:

. . . If, after one year from the date of service of a decision permitting abandonment, consummation has not been effected by the railroad's filing of a notice of consummation, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire . . . If, however, any legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed not later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier . . .

SBF and MRC agree that no public purpose would be served by requiring MRC to file another abandonment proceeding for this line. Neither SBF nor MRC are aware of any change since the initial abandonment proceeding. Undertaking a new proceeding would be duplicative of the prior proceeding, and thus wasteful of both private and public resources. In the circumstances, the Board properly should not view the abandonment authority as having expired. There was a historic preservation condition in effect on the date one year after the date of the abandonment decision that was a regulatory barrier to consummation of abandonment on that one-year anniversary date, and until its removal in a Board decision issued on November 6, 2009. On December 29, 2009, which was within the 60-day period following removal of that regulatory barrier, the Board issued an NITU, which also constituted a regulatory barrier to consummation of abandonment.

That NITU expired by its terms on June 28, 2010, at which time that NITU no longer constituted a regulatory barrier. However, prior to that date, on June 17, 2010, MRC and SBF

signed a Letter of Intent governing SBF's acquisition of the ROW under the Trails Act.

Consummation of abandonment of the ROW would have constituted a violation of the Letter of Intent. Accordingly, that Letter of Intent became a legal barrier to consummation of abandonment of the ROW as of June 17, 2010. That legal barrier has not expired, nor has it been satisfied or removed. Consequently, the Letter of Intent continues to constitute a legal barrier to consummation of abandonment of the ROW as of the present time. Inasmuch as there was a legal barrier to consummation of abandonment of the ROW at all relevant times, authority to abandon the ROW has not expired for failure to have timely filed a notice of consummation of abandonment.

If the Board were to find that the Letter of Intent did not constitute a legal barrier to consummation of abandonment of the ROW, MRC, supported by SBF, hereby respectfully requests an extension of time to file a notice of consummation. The Board is authorized by 49 C.F.R. § 1152.29(e)(2) to grant such an extension for good cause. MRC's good faith belief that the Letter of Intent constituted an agreement for trail use and a legal barrier to consummation of abandonment satisfies the requirement of good cause. Although the cited regulation states that a request for extension of time for filing a notice of consummation should be filed prior to expiration of the period for filing the notice, a retroactive extension is justified by the unique circumstances of the present case. If this Board grants such an extension, then it will clearly continue to have jurisdiction to re-issue the NITU without requiring MRC to file a new and duplicative abandonment proceeding.

No public purpose would be served by denial of the Joint Request for NITU, nor by a determination that abandonment authority has expired. SBF wants to railbank the ROW and use

it as a recreational trail in the interim. MRC is agreeable to SBF's railbanking and interim recreational trail use. No third party would be adversely affected by a grant of the relief sought.^{2/}

The circumstances are unique, such that a grant of such relief would not be precedential.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, the Board should issue a NITU authorizing negotiations for railbanking and interim recreational trail use for a 180-day period from the service date of the Board's decision.

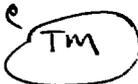
Respectfully submitted,

SAVE BURNEY FALLS
37985 Clark Creek Road
Burney, CA 96013

McCLOUD RAILWAY COMPANY
801 Industrial Way
P.O. Box 1500
McCloud, CA 96057

Joint Requestor

Joint Requestor

Charles Montange 
CHARLES MONTANGE
426 NW 162nd Street
Seattle, WA 98177

Thomas F. McFarland
THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1890
Chicago, IL 60604-1112
(312) 236-0204 (ph)
(312) 201-9695 (fax)
mcfarland@aol.com

Attorney for Joint Requestor

Attorney for Joint Requestor

DATE FILED: March 2, 2011

^{2/} The absence of adverse impact on any potential reversionary claimant is evident under any plausible legal outcome. The ROW is either railbanked now, or it would be if the Board were to require the filing of a new abandonment proceeding.

June 17, 2010

Mr. Jeff Forbis
4 Rails Inc.
McCloud Railway Company
P. O. Box 1500
McCloud, CA 96057

Re: Letter of Intent to Acquire 4 Rails Inc. (operated as
McCloud Railway Company), Right of Way

Dear Jeff:

This letter ("Letter of Intent") constitutes a proposal from Save Burney Falls, a California non-profit corporation ("SBF") to the 4 Rails Inc. operated as McCloud Railway Company, a California corporation (the "Company") for SBF (or assignee) to purchase from the Company, pursuant to the National Trails Systems Act, a contiguous corridor of land of no less than a 50-foot width within the Company's right of way between Milepost 3.3 east of McCloud, CA, and Milepost B-61 at or near Burney, CA, via Bartle, CA, except the Company would reserve timber rights on the land conveyed. This proposal supersedes any other previous written or oral proposals or communications.

1. Purchase Price, Appraisal, and Terms

The purchase price for the Property shall be negotiated by the parties following the completion of a fair market value appraisal of the Property, to be obtained by the Company at its expense. Company agrees to provide a complete copy of the appraisal to SBF promptly upon receipt. The parties anticipate that the purchase price for the property will be approximately fifty percent (50%) of the appraised value, but agree to negotiate a final purchase price in good faith and in recognition of the funding available for the Project.

The parties acknowledge that the fair market value of the Property will exceed the purchase price, and that the Property will be donated to SBF as a charitable contribution to the extent of such excess. Upon request of Company, SBF will execute and furnish to Company Internal Revenue Service Form 8283 acknowledging receipt of the Property as a charitable contribution to the extent of such excess.

The purchase price will be payable as follows:

- (i) earnest money deposit of One Thousand Dollars due within seven (7) days of execution of a purchase agreement;
- (ii) the balance of the purchase price to be paid in cash at close of escrow

2. Feasibility Studies

Company and SBF will agree to grant SBF and its representatives (including contractors, subcontractors, officers, agents and employees and others acting under its or their authority) the right to enter upon the Property for the purpose of performing studies of and tests on the Property as SBF may deem necessary to determine the physical conditions of the Property. In addition, SBF will conduct such title review and analysis as is necessary to satisfy itself as to the condition of title on the Property and to identify any defects in the title or any liens, encumbrances, covenants, rights of way, easements or other outstanding rights.

If the results of any such Studies or title review are unsatisfactory in SBF's reasonable opinion, SBF shall give Company written notice that it does not wish to pursue the purchase of the Property. In the event of such termination by SBF, then SBF shall surrender to Company copies of all Studies and any other reports prepared for SBF pertaining to the Property and said reports shall become the sole property of Company without cost or expense of Company (and the contents thereof shall be kept confidential by SBF and SBF's consultants).

The Right of Entry Agreement also will give SBF and its representatives (including contractors subcontractors, officers, agents and employees and others acting under its or their authority) the right to enter on the Property and, at SBF's expense, remove any trees, rocks or other debris that impede or otherwise restrict SBF's ability to complete the Studies.

3. Records

To assist with SBF's feasibility studies, the Company agrees to provide to SBF copies of the following in its possession:

- (i) any title documents or reports;
- (ii) railroad maps showing easements, rights of way, encumbrances, etc. affecting the property;
- (iii) special use permits
- (iv) documents showing existing utility locations and agreements;
- (v) documents showing the environmental history for the Property.
- (vi) documents showing any restrictions on the Property, conveyances, liens, or improvements;
- (vii) notices of violation from any government agency;
- (viii) lawsuit or threats of lawsuits
- (ix) any contracts or agreements affecting the Property.

4. Purchase Agreement

Within forty-five (45) days after Company receives an appraisal on the Property and delivers it SBF, and provided the parties have agreed to a purchase price for the Property, Company and SBF shall enter into a purchase agreement for the Property (the Agreement") which shall contain the financial terms described in this letter as well as terms and conditions mutually acceptable to the parties and that is consistent with the requirements of the National Trails System Act, 16 U.S.C. §1247(d).

Except as set forth in sections 2, and 3 above:

This non-binding Letter of Intent is intended solely as a preliminary expression of general intent and interest and is to be used for general discussions purposes only; it is neither an offer, an acceptance, nor a contract. Only upon the full and final execution and delivery of a purchase agreement will any obligations attach with respect to a purchase agreement for the Property. Without limiting the foregoing the parties may:

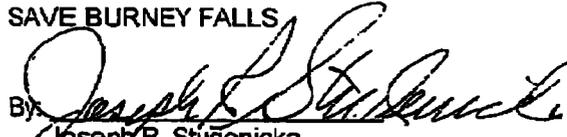
- (i) propose different or additional terms than those contained in this non-binding Letter of Intent; and
- (ii) unilaterally terminate all negotiations with the other party at any time with respect to the subject matter of this non-binding Letter of Intent without liability of any kind whatsoever, and without explanation, cause or reason

Any party who takes any actions in reliance on this non-binding Letter of Intent does so at their own costs, expense, risk and peril.

This non-binding Letter of Intent shall at all times remain, regardless of statements, writings, conduct, or otherwise, non-binding, unless and until the parties fully execute and deliver a formal purchase agreement.

Respectfully submitted,

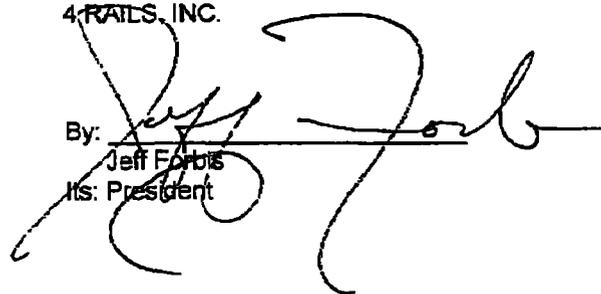
SAVE BURNEY FALLS

By: 
Joseph R. Studenicka
Its: Chief Financial Officer

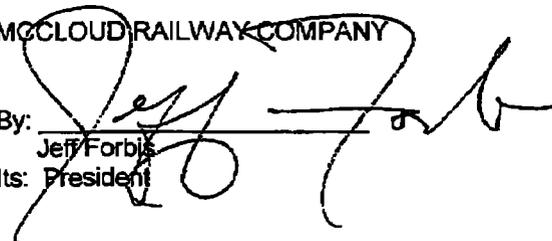
By signing below, the Company agrees to cooperate with SBF in the completion of its Feasibility Studies, as described in Sections 2 and 3 of this Letter of Intent, and to proceed with its appraisal of the Property as set forth in Section 1.

Dated. June 17th, 2010

4-RAILS, INC.

By: 
Jeff Forbis
Its: President

MC CLOUD RAILWAY COMPANY

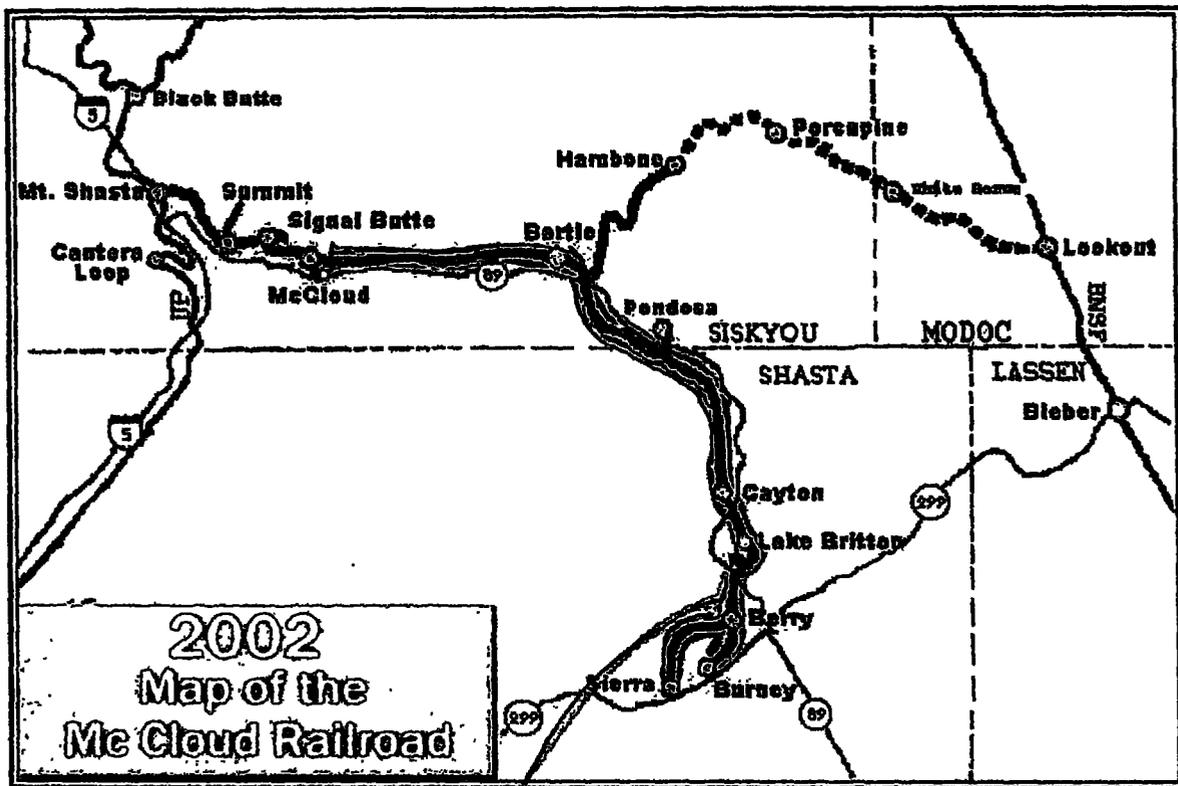
By: 
Jeff Forbis
Its: President

STATEMENT OF WILLINGNESS TO ASSUME FINANCIAL RESPONSIBILITY

In order to establish interim trail use and railbanking under Section 8(d) of the National Trails System Act, 16 U.S.C. § 1247(d), and 49 C.F.R. § 1152.29, SAVE BURNEY FALLS (SBF), 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 owned by and operated by McCloud Railway Company.

The property, known as McCloud Railway Company, includes the entire 80 miles of rail line and extends from: (1) a rail line between milepost 3.3 east of McCloud and the end of the track at milepost B-61 at or near Burney; (2) a rail line between milepost B-19 at or near Bartle and milepost B-31.4 at or near Hambone; (3) a rail line between milepost B-58 at or near Berry and milepost S-7 at or near Sierra; and (4) a rail line between milepost B-31.6 at or near Bear Flat and milepost P-3.93 at or near Pondosa. A map depicting the right-of-way is attached.

SBF acknowledges that use of the right-of-way is subject to the user's continuance to meet its responsibilities described above and subject to possible future reconstruction and reactivation of the right-of-way for rail service.



Proposed trail

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Joint Request for a Notice of Interim Trail Use or Abandonment was sent by first-class, U.S. mail, postage prepaid, on March 2, 2011 to Jeffrey J. Swanson, Esq., 2515 Park Marina Drive, Suite 102, Redding, CA 96001, and to Mr. Joseph R. Studenicka, 37985 Clark Creek Road, Burney, CA 96013.



Thomas F. McFarland