

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-6 (Sub-No. 422X)

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
–ABANDONMENT EXEMPTION–
IN SNOHOMISH COUNTY WA

Decided: August 3, 2004

The Burlington Northern and Santa Fe Railway Company (BNSF) filed a notice of exemption under 49 CFR 1152 Subpart F–Exempt Abandonments to abandon and discontinue service over a 0.99-mile line of railroad between milepost 38.01 and milepost 39.00 in Snohomish, Snohomish County, WA. Notice of the exemption was served and published in the Federal Register on July 2, 2004 (69 FR 40470-71). The exemption is scheduled to become effective on August 4, 2004.

The Board's Section of Environmental Analysis (SEA) served an environmental assessment (EA) in this proceeding on July 9, 2004. In the EA, SEA noted that the Washington Office of Archaeology and Historic Preservation (SHPO) has indicated that unanticipated archaeological materials may be located within the project area. The SHPO requested that, if any unanticipated cultural materials are discovered during salvage activities, BNSF be required to discontinue salvage operations and to notify the SHPO and any Federally recognized tribe with an interest in the project regarding the need for mitigation. Therefore, SEA recommended that a condition be imposed requiring that, if any archaeological sites, human remains, funerary items or associated artifacts are discovered during salvage activities, BNSF will immediately cease all work and notify SEA, the SHPO, and any Federally recognized tribe that may have an interest, and consult with them to determine whether any mitigation measures are necessary.

In the EA, SEA noted that the Water Quality Program at the Washington Department of Ecology (WADOE) has indicated that, when salvaging the line, BNSF may be required to apply for a National Pollutant Discharge Elimination System (NPDES) General Permit for storm water discharges because of the close proximity of the rail line proposed for abandonment and the Snohomish River, the potential for heavy Spring rains in the area, and the potential impacts from heavy equipment. To address these concerns, SEA recommended that a condition be imposed requiring that, prior to commencement of salvage activities, BNSF contact the Water Quality Program at WADOE concerning possible impacts on water quality and regarding the need for a NPDES General Permit for storm water discharges.

Comments to the EA were due by July 26, 2004. Comments were filed by the City of Snohomish (City) and the State of Washington Department of Fish and Wildlife Service

(WDFWS). The City and WDFWS are concerned that salvage operations associated with the proposed abandonment could adversely affect Chinook Salmon and Bull Trout in the Snohomish River, which have recently been listed on the Federally Endangered Species List. The City is also concerned about the project's proximity to Federally listed bald-eagle nesting sites located within 1 mile of the project area. To address the concerns raised by WDFWS and the City, SEA recommends that a condition be imposed requiring BNSF to consult with the U.S. Fish and Wildlife Service, Region 1 (USFWS), prior to the commencement of salvage activities concerning the effect of salvage on endangered species.

In the EA, SEA noted that the Washington State Department of Natural Resources (WADNR) was concerned about the future disposition of the railroad bridge that crosses the Snohomish River over state-owned aquatic lands. WADNR suggested that, if the bridge is not maintained or removed as part of the salvage operations, the bridge could someday collapse into the river and cause flooding and fish passage restrictions. WADNR requested that the railroad mitigate against any such impacts (i.e., by the removal of the bridge or other such actions). In its comments, the City also expressed concern about the structural integrity of the bridge.¹ While SEA did not recommend a condition in the EA to address these concerns, SEA now believes that a consultation condition is warranted. Thus, to address the concerns raised by WADNR and the City, SEA recommends that a condition be imposed requiring that, prior to the commencement of salvage activities, BNSF contact WADNR and the City regarding the safety and condition of the railroad bridge over the Snohomish River and the potential need for any permits in the event the bridge is demolished as part of any future salvage operations.

The environmental conditions recommended by SEA will be imposed.

On June 22, 2004, the City filed a request for issuance of a notice of interim trail use (NITU) for the entire line under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and for a public use condition under 49 U.S.C. 10905, to negotiate with BNSF for acquisition of the right-of-way (ROW). The City has submitted a statement of willingness to assume 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 payment of any and all taxes that may be levied or assessed against, the ROW, as required at 49 CFR 1152.29, and has acknowledged that the use of the ROW for trail purposes is subject to future reconstruction and reactivation for rail service.

¹ The City also stated that BNSF may be required to obtain permits from the U.S. Army Corps of Engineers, State of Washington (Corps) and Snohomish County associated with removing the railroad bridge over the Snohomish River. However, SEA notes that the Corps has received information regarding the abandonment and has indicated that no Corps permit is necessary.

In a response submitted on July 15, 2004, BNSF states its willingness to negotiate with the City for interim trail use.

Because, the City's request complies with the requirements of 49 CFR 1152.29 and BNSF is willing to negotiate for trail use, a NITU will be issued for the subject line. 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, BNSF may fully abandon the line. See 49 CFR 1152.29(d)(1). Use of the ROW for trail purposes is subject to restoration for railroad purposes.²

SEA has indicated in the EA that the ROW may be suitable for other public use following abandonment. As noted above, the City has also requested a 180-day public use condition to negotiate with BNSF for use of the ROW as a recreational trail. The City requests that BNSF be barred from disposing of any interest in the property for a 180-day period from the effective date of the abandonment exemption.³ The City states that the time period is needed to negotiate a corridor acquisition with BNSF or to prepare for the filing of any necessary eminent domain proceedings.

The Board has determined that persons who file under the Trails Act may also file for public use under 49 U.S.C. 10905. See Rail Abandonments—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 the Board's policy to impose them concurrently, subject to the execution of a trail use agreement. The City has met the public use criteria prescribed at 49 CFR 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 imposition of the period of time requested. Accordingly, a 180-day public use condition will be imposed commencing with the effective date of the exemption. If a trail use agreement is reached on a portion of the ROW, BNSF 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

² In a comment filed on June 28, 2004, the National Association of Reversionary Property Owners (NARPO) notes that the bridge over the Snohomish River is needed to link the ROW to the National Rail System for rail service to be restored. The City's request for interim trail use/rail banking, however, is for the entire line, including the portion that runs over the bridge, and the Board will not speculate on the effect of the possible, future loss of the bridge on trail use authorized by this decision.

³ As part of its public use request, the City had requested special conditions pertaining to the structural integrity of the railroad bridge. However, the City withdrew its request for special conditions on July 20, 2004, because BNSF agreed to hire a third party expert to address the City's concerns.

the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, BNSF is not required to deal exclusively with the City, but may engage in negotiations with other interested persons.

As conditioned, this action 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 July 2, 2004, exempting the abandonment of the line is modified to the extent necessary to implement interim trail use/rail banking and to permit public use negotiations, as set forth below, for a period of 180 days commencing from the August 4, 2004 effective date of the exemption (until January 31, 2005), and subject to the conditions that BNSF shall: (1) in the event that any archaeological sites, human remains, funerary items or associated artifacts are discovered during its salvage activities, immediately cease all work and notify SEA, interested Federally recognized tribes, and the SHPO, and BNSF shall then consult with SEA, the SHPO, and interested Federally recognized tribes to determine whether any mitigation measures are necessary; (2) prior to commencement of any salvage activities, contact the Water Quality Program at WADOE concerning possible impacts on water quality and regarding the need for a NPDES General Permit for storm water discharges; (3) prior to commencement of salvage activities, consult with USFWS, Region 1, concerning the effect of salvage on endangered species; and (4) prior to the commencement of salvage activities, contact WADNR and the City regarding the safety and condition of the railroad bridge over the Snohomish River and the potential need for any permits in the event the bridge is demolished as part of any future salvage operations.
3. Consistent with the public use and interim trail use/rail banking conditions imposed in this decision and notice, BNSF may discontinue service and salvage track and related materials. BNSF shall keep intact the ROW, including bridges, trestles, culverts and tunnels, for a period of 180 days to enable any state or local government agency, or other interested person, to negotiate the acquisition of the line for public use. If an interim trail use/rail banking agreement is executed before January 31, 2005, the public use condition will expire to the extent the trail use/rail banking agreement covers the same 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 ROW.

5. 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 ROW.

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 January 31, 2005, interim trail use may be implemented. If no agreement is reached by that time, BNSF may fully abandon the line, provided the conditions imposed in this proceeding are met.

8. This decision is effective on its service date.

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

Vernon A. Williams
Secretary