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SERVICE DATE - APRIL 3, 2003

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-6 (Sub-No. 400X)

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY  
-ABANDONMENT EXEMPTION-  
IN FRANKLIN AND WEBSTER COUNTIES, NE

Decided: April 1, 2003

The Burlington Northern and Santa Fe Railway Company (BNSF) filed a notice of exemption under 49 CFR 1152 Subpart F-Exempt Abandonments to abandon a 19.8-mile line of railroad between milepost 216.95 near Franklin, NE, and milepost 197.15 near Red Cloud, NE, in Franklin and Webster Counties, NE. Notice of the exemption was served and published in the Federal Register on March 5, 2003 (68 FR 10575-76). The exemption is scheduled to become effective on April 4, 2003.<sup>1</sup>

The Board's Section of Environmental Analysis (SEA) served an environmental assessment (EA) in this proceeding on March 10, 2003. In the EA, SEA states that the U.S. Fish and Wildlife Service has indicated that whooping cranes (*Grus americana*), a Federally listed species, have been confirmed using wetlands adjacent to the Republican River upstream from Franklin, NE, and downstream from Red Cloud, NE. Therefore, SEA recommends that, if BNSF observes whooping cranes within 1 mile of active abandonment and salvage activities, those activities shall cease until the whooping cranes leave the area.

SEA also initially recommended a condition to any decision granting abandonment authority that would require BNSF to determine if the two archaeological resources identified by the Nebraska State Historical Society (State Historic Preservation Office or SHPO) are located within the right-of-way (ROW) proposed for abandonment and, if either or both of the archaeological resources are located within the ROW, to retain its interest in and take no steps to alter the historic integrity of the ROW until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f (NHPA). Since the EA was served, SEA was informed that BNSF had retained an archaeological

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<sup>1</sup> On March 6, 2003, a Notice to the Parties was served to show the correct due date for the filing of petitions to reopen or requests for public use conditions as March 25, 2003.

consultant to inspect the two archaeological sites noted above, verify their locations, determine if they are eligible for listing on the National Register of Historic Properties, and evaluate whether abandonment activities may result in adverse effects to the resources. During the consultant's field inspection, four sites were identified: the two already noted by the SHPO; a third previously documented archaeological site; and one newly discovered archaeological site. The consultant concluded that the three previously identified sites are not eligible for nomination to the National Register of Historic Properties, but that the newly discovered site, which is located about 50 meters from the ROW, is eligible for inclusion. BNSF has submitted the consultant's report to the SHPO for review. Pending the SHPO's review and conclusions, SEA now recommends that a historic condition be imposed requiring BNSF to retain its interest in and take no steps to alter the historic integrity of the ROW until completion of the section 106 process of the NHPA. Comments to the EA were due by March 24, 2003. No comments were received. Accordingly, the conditions recommended by SEA will be imposed.

SEA indicates that the ROW may be suitable for other public use following abandonment. By petition filed March 18, 2003, the Nebraska Trails Foundation, Inc., a non-profit organization interested in promoting trail development in the state of Nebraska, and the Lower Republican River Visionaries of Red Cloud (collectively Petitioners), late-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, in order to negotiate with BNSF for acquisition of the ROW for use as a recreational trail.<sup>2</sup> Petitioners request that BNSF be prohibited from disposing of the corridor, other than the tracks, ties, and signal equipment, except for public use on reasonable terms, and that BNSF be barred from removing or destroying any trail-related structures, such as bridges, culverts, ballast and rip/rap, for a 180-day period from the effective date of the abandonment exemption. Petitioners states that the time period is needed to coordinate efforts with local interest groups and to commence negotiations with BNSF. Petitioners have 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

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<sup>2</sup> The March 5, 2003 notice provided that trail use/rail banking requests had to be filed by March 14, 2003. In revising its abandonment rules in Aban. and Discon. of R. Lines and Transp. Under 49 U.S.C. 10903, 1 S.T.B. 894 (1996) and 2 S.T.B. 311 (1997), the Board retained the policy of accepting filings after the due date when good cause is shown. Because there is no indication that the late-filed request will prejudice any party, it will be accepted. See Wheeling & Lake Erie Railway Company—Abandonment Exemption—In Starke County, OH, STB Docket No. AB-227 (Sub-No. 10X), slip op. at 1 n.1 (STB served Nov. 7, 1997).

right-of-way for trail purposes is subject to future reactivation for rail service. By letter received on March 21, 2003, BNSF indicated its willingness to negotiate with Petitioners.

Because Petitioners' request complies with the requirements of 49 CFR 1152.29 and BNSF is willing to negotiate for trail use, a NITU will be issued. 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.

As an alternative to interim trail use under the Trails Act, the ROW may be acquired for public use as a trail under 49 U.S.C. 10905. See Rail Abandonments—Use of Rights-of-Way As Trails, 2 I.C.C.2d 591, 609 (1986). Under section 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 CFR 1152.28(a)(2). Petitioners have satisfied these requirements and, therefore, a 180-day public use condition will be imposed commencing with the 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. If a trail use agreement is reached on a portion of the ROW, BNSF must keep the remaining ROW 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 ROW 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 Petitioners, but may engage in negotiations with other interested persons.

As conditioned, this decision 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 exemption for abandonment of the line described above is subject to the condition that, if BNSF observes whooping cranes within 1 mile of active abandonment or salvage activities, it shall cease abandonment and salvage activities until the whooping cranes leave the area. BNSF shall also retain its interest in and take no steps to alter the historic integrity of the ROW until completion of the section 106 process of the NHPA.
3. The notice of exemption served and published in the Federal Register on March 5, 2003, exempting abandonment of the line described above is modified to the extent necessary to implement interim trail use/rail banking as set forth below, subject to the conditions that BNSF keep intact the ROW underlying the bridges, culverts, ballast and rip/rap, for a period of 180 days after the April 4, 2003 effective date (until October 1, 2003), to enable any state or local government agency, or other interested person to negotiate the acquisition of the line for public use.
4. If an interim trail use/rail banking agreement is executed before expiration of the 180-day period specified above, the public use condition will expire to the extent that the trail use/rail banking agreement covers the same line.
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 (if the user is immune from liability, 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.
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 ROW.
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.
8. If an agreement for interim trail use/rail banking is reached by September 30, 2003, interim trail use may be implemented. If no agreement is reached by that time, BNSF 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