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SERVICE DATE - LATE RELEASE JUNE 21, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-6 (Sub-No. 395X)

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY  
COMPANY—ABANDONMENT EXEMPTION—IN CHEROKEE COUNTY, KS,  
AND JASPER COUNTY, MO

Decided: June 21, 2002

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 28.25-mile line of railroad between milepost 343.55 in Columbus, Cherokee County, KS, and milepost 315.30 in Carthage, Jasper County, MO. Notice of the exemption was served and published in the Federal Register on May 23, 2002 (67 FR 36298). The exemption is scheduled to become effective on June 22, 2002.

The Board's Section of Environmental Analysis (SEA) served an environmental assessment (EA) in this proceeding on May 28, 2002. In the EA, SEA stated that the State of Kansas Department of Wildlife and Parks (DWP) indicates that the area of the proposed abandonment contains habitat for the following state listed threatened or endangered species: the Northern Spring Peeper, the Dark-sided Salamander, the Eastern Narrowmouth Toad, the Central Newt, and the Northern Redbelly Snake. SEA also states that DWP and the U.S. Fish and Wildlife (FWS) indicate that the Spring River provides habitat for several freshwater mussel species, which are Federal species of concern, especially the threatened Neosho madtom (*Noturus placidus*). SEA indicates that DWP and FWS state that, if salvage activities are limited to the right-of-way and do not impact the stream channel or its banks, the species of concern will not be affected. Therefore, SEA recommends that, in order to prevent impacts to several Federal species of concern (several freshwater mussel species and the threatened Neosho madtom), BNSF be required to limit salvage activities to the right-of-way and avoid impacts to the stream channel and banks of the Spring River.

SEA states that the Kansas Department of Health & Environment (DHE), indicates that, if the proposed abandonment disturbs more than five acres of soil, BNSF would need to submit a Notice of Intent form to obtain coverage under the Kansas general permit for stormwater discharges. Therefore, SEA recommends that BNSF be required to consult with DHE to determine whether the salvage activities would require coverage under the Kansas general permit for stormwater discharges.

SEA states that the Missouri State Emergency Management Agency (SEMA) indicates that the City of Carthage and Jasper County, MO, are participants in the National Flood Insurance Program and that the proposed abandonment may require permits from the City and Jasper County.<sup>1</sup> SEA also states that the Jasper County Floodplain Administrator (JCFA) has indicated that, although the line proposed for abandonment would cross floodplains within the County, if salvage activities are limited to track removal, the floodplains would not be impacted. SEMA further indicates that, if the proposed abandonment “is located within a regulatory floodway, a ‘no rise’ certificate and statement as to the effects of possible flooding is required before the development can be permitted.”<sup>2</sup> Therefore, SEA recommends that, in order to minimize floodplain impacts, a condition be imposed requiring BNSF to consult with JCFA prior to conducting any salvage activities other than track removal.

SEA states that the Missouri Department of Natural Resources (DNR) indicates that a section 402 permit may be required if the proposed abandonment would involve the discharge of wastewater or stormwater into jurisdictional waters. DNR also states that the following measures could protect the quality of water in the abandoned area: (1) keeping machinery out of the waterway as much as possible; (2) not storing fuel, oil, other petroleum products, equipment and any solid waste below the ordinary high water mark at any time or in the adjacent floodway beyond normal working hours; (3) immediately cleaning up and properly disposing of petroleum products spilled into any waterbody or on the banks where the material may enter waters of the state; (4) minimizing the clearing of vegetation/trees; and (5) using best management practices to limit the amount of erosion and deposition of sediment in waters of the state. Therefore, SEA recommends that a condition be imposed requiring BNSF to consult with DNR to determine whether a section 402 permit is required. SEA states that, if a section 402 permit is required, BNSF shall not perform any salvage or abandonment activities until BNSF obtains the section 402 permit and shall then notify the Board. SEA recommends that BNSF also be required to take the following DNR recommended measures during salvage to protect the quality of water in the abandonment area: keep machinery out of the waterway as much as possible; not store fuel, oil, other petroleum products, equipment and any solid waste below the ordinary high water mark at any time or in the adjacent floodway beyond normal working hours; immediately clean up and properly dispose of petroleum products spilled into any waterbody or on the banks where the material may enter waters of the state;

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<sup>1</sup> SEA notes that the City of Carthage has submitted comments stating that the proposed abandonment does not fall within the corporate limits of the City and would not impact existing flood zones.

<sup>2</sup> SEMA states that this analysis must be performed by a licensed engineer and to Federal Emergency Management Agency standards.

minimize the clearing of vegetation/trees; and use best management practices to limit the amount of erosion and deposition of sediment in waters of the state.

SEA states that the Missouri Department of Natural Resources State Historic Preservation Office (SHPO), indicates that, although there are no archaeological concerns associated with the proposed abandonment, it recommends that an architectural survey be performed prior to salvage to evaluate all the bridges, trestles and railroad structures along the route, including interchanges with other rail alignments.<sup>3</sup> Therefore, SEA recommends that a condition be imposed requiring BNSF to take no steps to alter the historic integrity of the bridges, trestles and railroad structures along the route, including interchanges with other rail alignments, within the state of Missouri, until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f (NHPA).

Finally, SEA states that the U.S. Army Corps of Engineers (Corps) indicates that it requires further information to determine whether the proposed abandonment would affect waters of the United States with the State of Kansas. Therefore, SEA recommends that a condition be imposed requiring BNSF to consult with Mr. Kenny Edgecomb at the Corps' Pomona Regulatory Field Office prior to conducting any salvage activities within the State of Kansas to determine whether any Corps permits would be required.

SEA states that the right-of-way may be suitable for other public use following abandonment. By petition filed May 10, 2002, the City of Carl Junction and the Joplin Trail Coalition (collectively commenters) jointly filed a request for the issuance of a notice of interim trail use/rail banking (NITU) under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), for the Missouri portion of the right-of-way between milepost 331.23 at the State line and milepost 315.30 near Carthage, a distance of 15.93 miles. On May 29, 2002, the Joplin Trail Coalition (1) filed a request for the issuance of a NITU for the Kansas portion of the right-of-way between milepost 343.55 at Columbus and milepost 331.23 at the State line, a distance of 12.32 miles, and (2) for a public use condition under 49 U.S.C. 10905.

Commenters request that BNSF be barred from disposing of rail bridges, trestles, culverts or roadbed materials, except for public use as a trail or other compatible purposes, for a 180-day period from the effective date of the exemption. Commenters submitted statements of willingness to assume

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<sup>3</sup> The Kansas State Historical Society submitted comments stating that the proposed abandonment would not affect any property of historic significance. BNSF indicates that it "is seeking requests for proposals from qualified architectural historians to perform a survey for the three bridges located along the alignment in Jasper County. BNSF states that all other structures on the route are located in Cherokee County, KS.

financial responsibility for management of, for any legal liability arising out of the transfer 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 CFR 1152.29, and acknowledged that the use of the right-of-way for trail purposes is subject to future reactivation for rail service. In responses filed on May 16, 2002, and June 12, 2002, BNSF states that it is agreeable to the requests.

Because Commenters' requests comply with the requirement 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 right-of-way for trail purposes is subject to restoration for railroad purposes.

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 Abandonment—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). Commenters 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 are 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 right-of-way, 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 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 Commenters, 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 exemption of the abandonment of the line described above is subject to the conditions that BNSF shall: (1) limit activities to the right-of-way and avoid impacts to the stream channel and banks of the Spring River; (2) consult with DHE to determine whether the salvage activities would require coverage under the Kansas general permit for stormwater discharges; (3) consult with the JCFA prior to conducting any salvage activities other than track removal; (4) consult with DNR to determine whether a section 402 permit is required, and if so, BNSF shall be prohibited from performing any salvage or abandonment activities until BNSF obtains the section 402 permit and shall then notify the Board. BNSF shall also take the following DNR recommended measures during salvage to protect the quality of water in the abandonment area; keep machinery out of the waterway as much as possible; not store fuel, oil, other petroleum products, equipment and any solid waste below the ordinary high water mark at any time or in the adjacent floodway beyond normal working hours; immediately clean up and properly dispose of petroleum products spilled into any waterbody or on the banks where the material may enter waters of the state; minimize the clearing of vegetation/trees; and use best management practices to limit the amount of erosion and deposition of sediment in waters of the state; (5) take no steps to alter the historic integrity of the bridges, trestles, and railroad structures along the route, including interchanges with other rail alignments, within the State of Missouri, until completion of the section 106 process of the NHPA; and (6) consult with Mr. Kenny Edgecomb at the Corps' Pomona Regulatory Field Office prior to conducting any salvage activities within the State of Kansas to determine whether any Corps permits would be required.

3. The notice served and published in the Federal Register on May 23, 2002, 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, subject to the conditions that BNSF keep intact the right-of-way underlying the tracks, including bridges, trestles, culverts and tunnels, for a period of 180 days from the effective date (until December 19, 2002), 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 the 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.

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 (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 right-of-way.

5. 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.

6. If an agreement for interim trail use/rail banking is reached by December 19, 2002, interim trail use may be implemented. If no agreement is reached by that time, BNSF may fully abandon the line.

7. This decision is effective on its service date.

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

Vernon A. Williams  
Secretary