

40068
DO

SERVICE DATE – LATE RELEASE JULY 31, 2009

BOARD OF SUPERVISORS

2009 AUG -7 A 11:45

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-33 (Sub-No. 278X)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT EXEMPTION—
IN SAN JOAQUIN AND STANISLAUS COUNTIES, CA

Decided: July 30, 2009

Union Pacific Railroad Company (UP) filed a verified notice of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments to abandon a 5.18-mile line of railroad known as the McHenry Industrial Lead extending from milepost 21.25 near Escalon to milepost 26.43 near McHenry in San Joaquin and Stanislaus Counties, CA. Notice of the exemption was served and published in the Federal Register on July 2, 2009 (74 FR 31790). The exemption is scheduled to become effective on August 1, 2009. In this decision, the Board is imposing environmental, historic preservation, interim trail use/rail banking, and public use conditions.

The Board's Section of Environmental Analysis (SEA) issued an environmental assessment (EA) in this proceeding on July 7, 2009. In the EA, SEA stated that it had not heard from the California Department of Parks and Recreation (State Historic Preservation Office or SHPO) and therefore had not been able to consider the SHPO's opinion before determining if the line might be potentially eligible for listing on the National Register of Historic Places (National Register). Accordingly, SEA recommended that UP be required to retain its interest in and take no steps to alter the historic integrity of all historic properties including sites, buildings, structures, and objects within the project right-of-way (the Area of Potential Effect) that are eligible for listing or listed in the National Register until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f (NHPA). SEA also recommended that UP be required to report back to SEA regarding any consultations with the SHPO and the public and that UP be prohibited from filing its consummation notice or initiating any salvage activities related to abandonment (including removal of tracks and ties) until the section 106 process had been completed and the Board had removed this condition.

Based upon a comment on the EA received by the July 22, 2009 due date, SEA now recommends that, in addition to the historic preservation condition, the Board also impose a new condition that requires UP to consult with the City of Modesto, CA (City), prior to initiating salvage activities and report the results of the consultations to SEA in writing. Accordingly, the condition recommended by SEA in the EA and the new condition will be imposed.

In the EA, SEA stated that the right-of-way might be suitable for other public use following abandonment and salvage of the line. On July 22, 2009, the City late-filed a request for the issuance of a notice of interim trail use (NITU) for the 5.18-mile line of railroad under the

National Trails System Act, 16 U.S.C. 1247(d) (Trails Act),¹ and 49 CFR 1152.29, and timely filed a request for a public use condition under 49 U.S.C. 10905. The City has submitted a statement of willingness to assume full 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 the payment of any and all taxes that may be levied or assessed against, the right-of-way for trail purposes, as required at 49 CFR 1152.29, and has acknowledged that the use of the right-of-way for trail purposes is subject to future reconstruction and reactivation for rail service. By letter dated July 24, 2009, UP states that it is willing to negotiate with the City for interim trail use.²

Because the City's request complies with the requirements of 49 CFR 1152.29, and UP is willing to negotiate for trail use, a NITU will be issued for the 5.18-mile 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, UP may fully abandon the line, subject to the conditions imposed below. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to any future use of the property for restoration of railroad operations.

As noted above, the City also requested the imposition of a public use condition. The City requests that UP be prohibited from disposing of the corridor, other than tracks, ties and signal equipment, except for public use on reasonable terms, and that UP be barred from the removal or destruction of potential trail-related structures, such as bridges, trestles, culverts and tunnels, for a 180-day period from the effective date of the abandonment. The City states that the time period is needed to assemble and review title information, complete a trail plan and to commence negotiations with UP for use of the right-of-way as a trail.

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 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.

¹ The July 2, 2009 notice of exemption provided that any request for trail use/rail banking filed under 49 CFR 1152.29 had to be filed by July 13, 2009. However, 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 stated that it would retain the policy of accepting filings after the due date when good cause is shown. Because the City's late-filed request has not delayed the proceeding and will not prejudice any party, the City's request will be accepted.

² By letter dated July 8, 2009, Stanislaus County, CA, also filed a request for interim trail use. The County did not submit a statement of willingness but instead has indicated that it supports the City's request. Thus, no further action will be taken on the County's request.

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). Because the City has met these requirements, a 180-day public use condition will be imposed, commencing from the August 1, 2009 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 right-of way, UP 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, UP 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 and the late-filed request by the City for interim trail use/rail banking is accepted.
2. Upon reconsideration, the notice served and published in the Federal Register on July 2, 2009, exempting the abandonment of the line described above, 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 1, 2009 effective date of the exemption (until January 28, 2010), and to make the exemption subject to the conditions that UP shall: (1) (a) retain its interest in and take no steps to alter the historic integrity of all historic properties including sites, buildings, structures, and objects within the project right-of-way (the Area of Potential Effect) that are eligible for listing or listed in the National Register until completion of the section 106 process of the NHPA, (b) report back to SEA regarding any consultations with the SHPO and the public, and (c) be prohibited from filing its consummation notice or initiating any salvage activities related to abandonment (including removal of tracks and ties) until the section 106 process has been completed and the Board has removed this condition; and (2) prior to initiating salvage activities, consult with the City and report the result of the consultations to SEA in writing.
3. Consistent with the public use and interim trail use/rail banking conditions imposed in this decision and notice, UP may discontinue service and salvage track and related materials. UP shall keep intact the right-of-way, 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 28, 2010, 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 right-of-way.

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 right-of-way.

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 28, 2010, interim trail use may be implemented. If no agreement is reached by that time, UP may fully abandon the line, provided the conditions imposed in this proceeding are met. See 49 CFR 1152.29(d)(1).

8. This decision is effective on its date of service.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Anne K. Quinlan
Acting Secretary