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309016

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
December 16, 2024
Part of
Public Record

DOCKET NO. FD 36501

**UNION PACIFIC RAILROAD COMPANY
—CONSTRUCTION AND OPERATION EXEMPTION—
IN MARICOPA COUNTY, AZ**

**UNION PACIFIC RAILROAD COMPANY'S
OPENING SUBMISSION REGARDING SECTION 110(K) ISSUES**

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December 16, 2024

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INTRODUCTION

Union Pacific Railroad Company (“Union Pacific”) respectfully submits this response to the Board’s order requesting briefing on whether third-party ground-disturbing activity on Union Pacific’s property intended for the PIRATE project constituted “anticipatory demolition” under Section 110(k).¹ Section 110(k) applies when an applicant for federal assistance has “intentionally significantly adversely affected a historic property” to which the assistance would relate “with intent to avoid” the historic review process required by Section 106 of the National Historic Preservation Act (“NHPA”).

There was no anticipatory demolition here. Section 110(k) requires a finding of actual, subjective intent to avoid Section 106’s requirements, as confirmed by the Secretary of the Interior’s guidance to federal agencies on meeting the requirements of Section 110 of the NHPA. It is clear from the documents produced to the Board that Union Pacific did not act purposefully to avoid Section 106’s requirements. Rather, insufficient knowledge of federal environmental and historic review processes, combined with inadequate communication between Union Pacific departments, created an environment that led to third parties engaging in ground-disturbing activities on Union Pacific property, despite Union Pacific’s efforts to facilitate appropriate environmental and historic review. Indeed, Union Pacific had

¹ *Union Pac. R.R.—Constr. & Operation Exemption—In Maricopa Cnty., Ariz.*, Docket No. FD 36501 (STB served Dec. 11, 2023) (initial request for briefing); *Union Pac. R.R.—Constr. & Operation Exemption—In Maricopa Cnty., Ariz.*, Docket No. FD 36501 (STB served Nov. 14, 2024) (establishing revised schedule for briefing).

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been cooperating closely with the Board's Office of Environmental Analysis ("OEA") for over two years before it learned about the ground disturbing activities conducted by third parties.

While there was no anticipatory demolition, the ground-disturbing activities that third parties undertook on Union Pacific property during the agency's environmental and historic review of the project are *unacceptable* to Union Pacific. Union Pacific acted swiftly to respond to the ground disturbances and mitigate the harm, and as described below Union Pacific has taken steps to improve its internal processes and ensure the protection of cultural and historic resources from third-party disturbances in any future rail construction proceeding. These measures include, among other things, providing internal training to Union Pacific employees and revising the contractual language in its form contracts to prevent future third-party ground disturbances during the STB review process in future rail construction projects.

Section I briefly describes the PIRATE project's background, and Section II explains how communication failures and lack of awareness across Union Pacific departments created an environment contributing to the ground disturbances conducted by third parties on Union Pacific property. Section III explains the steps Union Pacific has taken to protect the areas of potential effects ("APE") and mitigate harm from the third-party disturbances, as well as the steps Union Pacific has taken to improve its processes to ensure the protection of historic and cultural resources going forward. Section IV explains why no anticipatory demolition

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occurred under Section 110(k). Union Pacific asks the Board to resume its environmental review and consideration of the PIRATE project and summarizes the project's public benefits in Section V.

I. PIRATE Project Background.

The purpose of the PIRATE project is to connect Union Pacific's Phoenix Subdivision with the Pecos Advanced Manufacturing Zone ("PAMZ"), a large area designated for hosting industries that require extensive infrastructure to operate.² More specifically, the six-mile branch line would provide rail service to steel micro mills operated by Commercial Metals Company and any other future facilities constructed along the line within the PAMZ.³ New construction of rail line requires the coordination of multiple Union Pacific departments, including the Railroad's Engineering, Real Estate, and Technology Departments.

Union Pacific's Engineering Department is responsible for designing, building, and maintaining the railroad's infrastructure, including track, roadway, and signals. The Engineering Department also works to secure the requisite federal, state, and local permits for construction projects with assistance from the Law Department when necessary. The process for securing the necessary permits often includes cooperation with government agencies to comply with environmental

² Union Pacific Railroad Company's Petition for Exemption at 2 (filed June 30, 2022).

³ *Id.* at 2–3. Commercial Metals Company specifically chose to construct its second mill facility within the PAMZ in anticipation of the new Union Pacific rail line that would be constructed as part of the PIRATE project. *See* Commercial Metals Company Letter at 1 (filed June 30, 2023).

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protection laws, which is why a member of the Engineering Department is specifically tasked with managing those efforts. Union Pacific's Real Estate Department manages the railroad's property and is comprised of multiple groups. Of particular relevance here, the Real Estate Department's Acquisitions group focuses on acquisitions of property and the utility relocation function, and the Department's Contracts group focuses on contracts, including contracts relating to public utilities, rights of entry, and crossings. Union Pacific's Commercial Telecom group falls under Union Pacific's Technology Department, and it interfaces with utility companies that have installations on railroad property, including both longitudinal easements in the right-of-way and crossings of rail lines.

In this proceeding, Union Pacific's Engineering Department worked closely with OEA and the Board's consultant, Jacobs, to provide the requisite information necessary for OEA and Jacobs to conduct the environmental and historical review process.⁴ The Engineering Department has been engaged in the environmental and historic review process since Union Pacific's first consultation with OEA in February 2021, well in advance of the planned filing of the petition for exemption. It is worth noting that the Engineering Department has conducted no construction or ground-disturbing work in preparation for the construction of Union Pacific's planned new rail line. The Engineering Department understood quite well that no

⁴ See, e.g., EO-3671 (Oct. 22, 2021); UP-Pirate-0008739-Highly-Confidential; UP-Pirate-0008740-Highly-Confidential.

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such work could begin until the completion of the environmental and historic review process and the Board's approval of Union Pacific's petition for exemption.

Throughout 2021, the Real Estate Department was acquiring the requisite parcels of property from various landowners for the branch line. These efforts included granting or entering into easements with those adjacent landowners for the purpose of handling drainage and other issues and working with utility companies to identify known and potential future conflicts between the planned rail line and existing in-ground installations.

II. Several Factors, Including Communication Failures and Lack of Awareness Among Union Pacific Team Members, Contributed to the Third-Party Ground-Disturbing Activities.⁵

While Union Pacific's Engineering Department, Real Estate Department, and Commercial Telecom group coordinate to some extent on construction projects, the PIRATE project was unique for Union Pacific. Most of Union Pacific's construction activities involve smaller projects, such as customer build-ins or siding extensions, which involve excepted track that is not subject to Board authorization. Regrettably, there was insufficient communication between these three departments concerning the PIRATE project timeline and the authorization process before the Board. That poor communication resulted in confusion on a number of topics, including the nature of the environmental and historical review process and

⁵ While some information in this filing must be redacted in accordance with the Protective Order in this proceeding (e.g., due to confidentiality provisions in Union Pacific's agreements with third parties), Union Pacific has endeavored to provide as much information publicly as it can.

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how the Board's ongoing review limited third parties' ability to conduct activities on property related to the future rail line. Indeed, the Real Estate Department's understanding of and engagement with the Board authorization process was generally limited to the execution of right-of-entry agreements so that OEA and Jacobs personnel could visit and inspect the various properties underlying and adjacent to the PIRATE project.⁶ And Union Pacific is not aware of any direct or indirect interactions between the Commercial Telecom group and the STB's environmental and historic review process.

Union Pacific personnel in the Real Estate Department responsible for land acquisition and agreements with third parties believed that any pre-approval prohibition on construction was limited to Union Pacific and the rail line itself. Consequently, those personnel believed the restrictions placed on Union Pacific did not restrict adjacent landowners from constructing projects that Union Pacific perceived to be for the benefit of the landowners' own businesses or from working within existing or newly granted easements across Union Pacific property. Additionally, the Real Estate Department lacked visibility into the timeline of the authorization process before the Board as they attempted to accommodate requests from adjacent landowners who were advancing construction projects that would benefit their facilities and which relied on easements over the land being sold to

⁶ See, e.g., EI-31958, Email from M. Buckley (Jacobs) to K. Rice (Union Pacific) (filed Feb. 18, 2022) (describing the types of field work Jacobs wished to do during site visits including a cultural resources survey); see also UP-Pirate-0009915-Highly-Confidential (providing the verbatim list of field work activities to adjacent landowners).

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Union Pacific for the PIRATE line. The impact of this lack of knowledge and attendant communication failures is illustrated by two categories of ground-disturbing activity that occurred within Union Pacific's right-of-way by third parties: (1) construction of drainage facilities and (2) protecting-in-place or relocating of existing utilities.

Drainage Facilities. Several landowners bargained for easement rights over property sold to Union Pacific for the PIRATE project to construct drainage facilities serving or protecting their businesses. For example, the owners of the Unbound Gateway project—the property which is located where the PIRATE lead track would turn to head straight east—conditioned their sale of the right of way to Union Pacific on the right to construct a retention basin on the property by a date certain.⁷ Similarly, the owners of the Power Industrial project immediately west of the planned wye track desired to construct a water retention basin on property sold to Union Pacific for the right of way.⁸

7 UP-Pirate-0007152-Highly-Confidential (preserving Unbound's {{
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 Confidential ({{
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 Pirate-0001520-Confidential ({{
 {{}}).

⁸ UP-Pirate-0000767-Confidential (§ [REDACTED]); UP-Pirate-0007134-Confidential (explaining the purpose of the water retention basin was to minimize the [REDACTED] [REDACTED]). Unlike the retention basin constructed on property owned by Unbound where the lead track turns east, which was owned by Unbound and sold to Union Pacific, the retention basin constructed by Power Industrial was purchased by Union Pacific from Trio

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Union Pacific agreed to provide easements to these third parties for drainage facilities.⁹ Although Union Pacific planned eventually to reconfigure and utilize these water retention basins for drainage from the tracks and roadbed once the line was constructed, the Real Estate Department understood the basins to be for the benefit of the adjacent landowners until that time.¹⁰ As noted above, this was especially true with respect to the Unbound Gateway project, because Unbound conditioned the sale of property to Union Pacific on the right to construct a retention basin.¹¹ The Real Estate Department also negotiated provisions in

Forest Products Inc. and Gilbert-Chandler Heights, not Power Industrial. *See* UP-Pirate-0007488-Confidential (listing the lots acquired from Trio Forest and Gilbert-Chandler); UP-Pirate-0000004-Confidential (depicting the locations of Lot 304-61-023R (Trio Forest) and Lot 304-61-023L (Gilbert-Chandler) as compared to the wye track location); UP-Pirate-0000284-Confidential (depicting the Power Industrial-constructed retention basin on portions of Lot 304-61-023R (Trio Forest) and Lot 304-61-023L (Gilbert-Chandler)).

⁹ UP-Pirate-0003622-Highly-Confidential (Power Industrial); UP-Pirate-0009742-Public (Unbound).

¹⁰ *See, e.g.*, UP-Pirate-0000767-Confidential ({});
{});
see also UP-Pirate-0003622-Highly-Confidential (Right of Entry Agreement granting Power Industrial the right to construct a detention pond for its own benefit {}
{})).

¹¹ UP-Pirate-0007152-Highly-Confidential; *see also* EI-33130, at 4–5 (filed Aug. 28, 2023) (explaining that the UP team “viewed the Unbound drainage basin work as part of Unbound’s development and unrelated to UPRR’s rail infrastructure project” because “Unbound was planning to construct drainage infrastructure, whether or not UPRR proceeded with its project”).

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agreements with landowners that imposed deadlines for completion of construction projects based on time estimates concerning the approval process that were not revisited as the proceeding before the Board unfolded.¹² This underscores Real Estate's insufficient awareness of Board processes and the lack of communication between Real Estate and Engineering.

Utilities. Union Pacific also engaged with a number of utility companies with existing installations in Union Pacific's right-of-way that could conflict with the future PIRATE lead track. Two such utilities were Kinder Morgan (natural gas) and Lumen (fiber). Both entities had installations pursuant to existing easements along Union Pacific's Phoenix Subdivision at the location of the planned wye track for the PIRATE lead.¹³ Kinder Morgan and Union Pacific communicated about Kinder Morgan's plan to lower 425 feet of pipeline by excavating below the pipe to clear the conflict with the planned track location and enable future drainage projects.¹⁴ Lumen would need to relocate its fiber line (rather than merely "protect

¹² See, e.g., UP-Pirate-0009751-Highly-Confidential ({ [REDACTED]
[REDACTED] }
[REDACTED]). Power Industrial was supposed to provide Union Pacific at least ten-days' notice { [REDACTED] } UP-Pirate-0003622-Highly-Confidential (Ex. B, Sec. 1), and Union Pacific has no record of having received such notice. See also UP-Pirate-0009841-Highly-Confidential (Contractor Right of Entry Agreement that limited Unbound's obligation to provide Union Pacific 10-days' notice of any { [REDACTED] }).

¹³ UP-Pirate-0006852-Confidential (Lumen); UP-Pirate-0006613-Confidential (Kinder Morgan).

¹⁴ UP-Pirate-0006759-Highly-Confidential; *see also* UP-Pirate-0006641-Confidential.

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in place”) because of concerns associated with [REDACTED]

[REDACTED]¹⁵

These utility protection and relocation projects demonstrate communication breakdowns and insufficient education on the environmental and historical review process. To start, Union Pacific personnel outside of the Engineering Department did not understand the timeline for Board review of the PIRATE project, which caused them to operate under accelerated timelines that were not consistent with the environmental and historic review process. For example, members of Union Pacific’s Commercial Telecom group believed that construction of the PIRATE project would begin as early as August 2023, even though the Board had not yet authorized construction or completed environmental review.¹⁶ This mistaken understanding caused the Commercial Telecom group to push companies like Lumen to complete work as quickly as possible.¹⁷ Union Pacific’s outside contractor for the PIRATE project was similarly operating on a mistaken understanding of the construction timeline, believing that construction might commence in 2023, and thus that Kinder Morgan needed to lower its pipeline by April 1, 2023.¹⁸

The information concerning the Board’s environmental and historical review process that was shared with the Real Estate Department proved to be insufficient.

¹⁵ UP-Pirate-0006852-Confidential.

¹⁶ See UP-Pirate-0007521-Confidential.

¹⁷ *Id.*

¹⁸ UP-Pirate-0006641-Confidential; see also UP-Pirate-0008561-Confidential ([REDACTED]

[REDACTED]).

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For example, the Engineering Department informed a member of the Real Estate Department that the wye area may contain cultural resources such that [REDACTED]

[REDACTED]

[REDACTED] including the lowering of Kinder Morgan's pipeline.¹⁹ The Engineering Department also conveyed that Union Pacific was [REDACTED]

[REDACTED]²⁰ The Real Estate employee conveyed this guidance to Kinder Morgan and Union Pacific's outside contractor on the PIRATE project.²¹ When Kinder Morgan nevertheless lowered the pipeline in June and July of 2023, the Real Estate employee did not understand that this work was problematic because Kinder Morgan had [REDACTED]

[REDACTED]

[REDACTED]²² In other words, this Real Estate employee lacked sufficient understanding to know the difference between the Surface Transportation Board and the State Historic Preservation Office or how those two entities interact during the NEPA and NHPA review process.

In sum, the Real Estate Department's insufficient knowledge of STB processes during an environmental and historical review, combined with inadequate communication between the Engineering Department and Real Estate Department

¹⁹ UP-Pirate-0001906-Confidential.

²⁰ UP-Pirate-0007107-Confidential.

²¹ UP-Pirate-0008561-Confidential.

²² UP-Pirate-0007068-Confidential.

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and Commercial Telecom group, created an environment that led to third parties engaging in ground-disturbing activities despite Union Pacific's demonstrated intent to facilitate the appropriate environmental and historic review.

III. Union Pacific Has Taken Swift, Proactive Steps to Protect the APE and Mitigate Damage and Has Made Changes to Ensure Historic and Cultural Resources Are Protected During Future Rail Construction Projects.

Union Pacific learned of the ground disturbances on July 28, 2023. As described below, Union Pacific immediately took steps to protect the APE, and Union Pacific remains committed to mitigating damage. Further, while Union Pacific itself did not engage in the ground-disturbing activity, Union Pacific acknowledges that insufficient knowledge of the STB review process and inadequate communication between departments contributed to some of the third-party, ground-disturbing activities that occurred. As a result, Union Pacific is also taking steps to prevent similar occurrences in future rail construction projects.

A. Union Pacific is committed to protecting the APE and mitigating damage.

Upon learning of the ground disturbances from OEA on July 28, 2023, Union Pacific fully complied with OEA recommendations and took swift mitigating and protective actions in the APE. First, Union Pacific immediately sent stop-work requests by email to all adjacent landowners on the same day it learned of the ground disturbances (July 28, 2023). On August 4, 2023, Union Pacific sent formal letters to all adjacent landowners with more details, including re-emphasizing that

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no ground-disturbing work may occur upon Union Pacific property and that all materials and equipment be relocated off Union Pacific property.²³

In coordination with OEA, Union Pacific also took actions to protect the damaged areas as soon as practically possible. These protective actions included installing silt fencing around the existing spoils pile in the wye; installing orange construction fencing and no trespassing signs at multiple locations; overseeing the demobilization of equipment and materials at Pecos Gateway; prohibiting the use of the construction access road (formerly a two-track, dirt access road that had been modified); and engaging a private security company to patrol the APE and known archeological sites and conducting ongoing bi-weekly inspections of its right-of-way in the APE to confirm that all site protection measures remain in place and no additional ground disturbances have occurred.²⁴

Union Pacific also coordinated with OEA and Jacobs (the Board's archeological expert) to facilitate site visits and analysis of spoil piles and disturbed ground. Union Pacific held frequent meetings with OEA and Jacobs to coordinate the response to the discovered ground disturbances. Relatedly, Union Pacific coordinated with third parties to identify whether (and where) any excavated material was removed from the APE. Union Pacific also conducted surveys to clearly identify Union Pacific property areas subject to environmental and historical

²³ EI-33039 (filed Aug. 14, 2023) (attaching letters to adjacent landowners).

²⁴ See EO-3859 (Nov. 8, 2023) (action item list for responding to site damage).

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review, including a topographic survey of disturbance areas related to the two retention basins and the spoils pile in the wye.²⁵

Union Pacific continues to coordinate closely with OEA and Jacobs to protect the APE. For example, in September 2024, when Union Pacific learned that an easement holder was planning to use its easement rights to install a line under the wye, Union Pacific proactively worked with OEA, Jacobs, the easement holder, and another federal agency to address the situation. The easement holder used an alternate plan that avoided construction within the APE as a result of this coordination. Union Pacific also worked with the easement holder to develop protocols that would protect the APE in future situations.

Beyond mitigation and protective measures, Union Pacific participated in meetings with OEA and consulting parties to learn about institutional controls that could be employed by Union Pacific in the future to prevent historic and cultural damage.

B. Union Pacific is taking action to ensure historic and cultural resources are protected during future rail construction projects.

Union Pacific recognizes that the lack of awareness by certain groups within the Railroad and inadequate communication between departments contributed to an environment in which the third-party ground disturbances occurred. Union Pacific is *committed* to making improvements in its internal processes to ensure

²⁵ *Id.*

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historic and cultural resources are protected in this proceeding and future construction proceedings. These improvements are summarized below.

Internal Training. One of the contributing factors that led to the ground-disturbing activity in this case was that Union Pacific's Real Estate Department and Commercial Telecom group had insufficient knowledge and awareness of STB processes during an environmental and historic review, which was exacerbated by inadequate communication with Union Pacific's Engineering Department. This led to the approval of real estate contracts with the third parties that ultimately engaged in the ground disturbing activity. It also led to members of Union Pacific's Commercial Telecomm group operating under timelines inconsistent with the environmental and historic review process.

While employees in Union Pacific's Engineering Department who perform work that may result in ground disturbing activity are provided training to promote compliance with, among other things, requirements and limitations imposed by the NHPA, such training has not historically been provided to Union Pacific employees outside of the Engineering Department. Union Pacific has developed comprehensive training on the STB environmental review process, NHPA requirements, Federal Indian Law, and tribal consultation. This training was provided to a number of Union Pacific employees on March 22, 2024, including the Assistant Vice President in charge of the Real Estate Department, all members of the Acquisitions groups within the Department, senior leaders within the Department's Contract group, all members of the Commercial Telecom group in

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Union Pacific's Technology Department, and the Maintenance of Way Environmental group within the Engineering Department. To emphasize the critical importance of the training, Union Pacific's Chief Legal Officer personally attended and joined actively in the group discussion. This training program — which will recur periodically — will ensure Union Pacific employees in these groups are aware of NHPA requirements, the scope of historic and environmental review, and the STB review process.

Third-Party Contracts. To facilitate construction of the proposed rail line, Union Pacific had to acquire a number of parcels from various third-party landowners. While some of those agreements included advance notification requirements as part of the right-of-entry agreements, those provisions proved insufficient to prevent ground disturbing activities. *See supra* n.12. To prevent future third-party ground disturbances during the federal review process in future rail construction projects, the Real Estate Department is now consulting Union Pacific's Law Department to ensure provisions that require notice *and written consent* before any ground disturbing activity can occur on Union Pacific property are included in contracts to acquire property needed for rail construction projects that are subject to Board approval.

Outside Consultants. Union Pacific relied heavily on an outside consultant to manage the many complex moving parts of the PIRATE project. However, Union Pacific's consulting contract did not include provisions specific to the historic review

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process. Union Pacific will add language that will cover historic and cultural review to its agreements for rail construction projects requiring Board approval.

Internal Project Manager Role. As set out above, Union Pacific relied heavily on an outside consultant to manage the PIRATE project. In hindsight, Union Pacific would have benefited from having an internal project manager who would oversee the consultant's activities and decisions and ensure that all known historic and cultural resources information was communicated immediately to relevant Union Pacific personnel. For future rail construction projects requiring Board approval, Union Pacific will appoint an internal project manager who is well-versed in the requirements associated with the STB regulatory review process. Union Pacific believes creating such a role will ensure effective communication and coordination among the various Union Pacific disciplines involved in rail construction projects, as well as provide needed supervision of third-party consultants/contractors.

IV. Union Pacific Has Not Engaged in Any Activity that Would Violate Section 110(k) of the NHPA or Justify Board Denial of Union Pacific's Petition.

Section 110(k) of the NHPA applies when an applicant for federal assistance "has intentionally significantly adversely affected a historic property" to which the assistance would relate "with intent to avoid" the historic review process required by NHPA. 54 U.S.C. § 306113; *see also* 36 C.F.R. § 800.9(c)(1); 16 U.S.C. § 470h-2(k).

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Union Pacific deeply regrets what occurred in this case. Insufficient awareness of the environmental and historic review process by some Union Pacific team members and inadequate communication between Union Pacific teams contributed to third parties engaging in ground disturbing activities on Union Pacific property. That insufficient awareness, however unacceptable and in need of correction, does not constitute “anticipatory demolition” within the meaning of Section 110(k).

A. Section 110(k) requires actual, subjective intent to both significantly adversely affect historic properties and to do so with the intent to avoid Section 106 review.

The Board has previously articulated the applicable standard for analyzing whether Section 110(k) has been violated: “Under the plain language of the statute, in evaluating an alleged violation of Section 110(k), the Board must determine if [the applicant] *both* intended to significantly adversely affect a historic property *and* did so with the intent to avoid the requirements of Section 106.” *Consol. Rail Corp.—Abandonment Exemption—In Hudson Cnty., N.J.*, Docket No. AB-167 (Sub-No. 1189X), et al., at 10 (STB served Aug. 22, 2022) (emphasis added) (hereafter “*Conrail Abandonment*”). Regardless of whether the ground disturbing activity was conducted by the applicant itself or a third party, the Board considers whether the record demonstrates that the applicant had the intent to *both* “intentionally significantly adversely affect” the historic property at issue *and* had the “intent to avoid” the historic review requirements of Section 106. *Id.* at 9–13; *see also Protect Our Parks, Inc. v. Buttigieg*, 39 F.4th 389, 402 (7th Cir. 2022) (reasoning that where

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there was no “evidence that the [applicant] intended to avoid the NHPA’s requirements,” there could be no showing of anticipatory demolition).

In *Conrail Abandonment*, Docket No. AB 167 (Sub-No. 1189X), at 10, the Board questioned whether a violation of Section 110(k) requires “an actual subjective intent or whether it also includes a reckless disregard of the facts.” While the Board did not decide the question in that case, the legislative history and the Secretary of the Interior’s guidance make clear that the statute demands actual subjective intent.

The Board correctly acknowledged that *both* “Section 110(k)’s legislative history and the Secretary of the Interior’s guidance suggest that the statute includes a requirement of actual subjective intent to both significantly adversely affect a historic property and avoid Section 106 requirements.” *Id.* The legislative history makes clear that the “purpose” of Section 110(k) is to withhold federal assistance from those who demolish historic structures before making the application for assistance “in order to avoid historic preservation review provisions.” S. Rep. No. 102-336 at 13 (1992). And the Secretary of the Interior’s Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act, which are formal guidance to each Federal agency on meeting the requirements of Section 110 of the NHPA, explain that Section 110(k) is triggered where a “historic property is destroyed or irreparably harmed *with the express purpose* of circumventing or preordaining the outcome of section 106 review . . . prior to application for [federal authorization].” 63 Fed. Reg.

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20,496, 20,503 (Apr. 24, 1998) (emphasis added). Indeed, the Advisory Council on Historic Preservation has highlighted this very guidance when evaluating the intent of an applicant's actions.²⁶

Other federal sources confirm that actual, subjective intent is required for a Section 110(k) violation. For example, when the National Oceanic and Atmospheric Association's Office for Coastal Management summarized the NHPA, including Section 110(k), it explained that "[t]his provision is designed to prevent applicants from destroying historic properties prior to seeking federal assistance *in an effort to* avoid the section 106 process."²⁷ Critically, no sources or precedent suggest that a reckless disregard standard can suffice.

Federal courts have made clear that reckless disregard is a "*lesser* form of intent." *SEC v. Steadman*, 967 F.2d 636, 638 (D.C. Cir. 1992) (emphasis added). Here, where the statutory language specifies "*intent* to avoid" and "*intentionally* significantly adversely affected," there is no basis to apply a lesser form of intent. In other contexts where "reckless disregard" has been permitted to be used as the scienter standard, courts have been able to point to clear support for that lesser

²⁶ EI-30899, Letter from J. Loichinger (ACHP) to D. Gosselin (STB), *Conrail Abandonment*, Docket No. AB 167 (Sub-No. 1189X), *et al.*, at 1 (filed June 15, 2021) ("In looking to the intent of the applicant's actions, the Secretary of the Interior's Standards and Guidelines for Federal Agency Preservation Programs pursuant to the NHPA state that Section 110(k) is applicable where 'an historic property is destroyed or irreparably harmed with the express purpose of circumventing or preordaining the outcome of [S]ection 106 review.'").

²⁷ See Summary of National Historic Preservation Act (sections 106, 110 & 402), <https://coast.noaa.gov/data/Documents/OceanLawSearch/Summary%20of%20Law%20-%20National%20Historic%20Preservation%20Act.pdf>, at 2 (emphasis added).

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form of intent. For example, in *United States v. Krizek*, 111 F.3d 934 (D.C. Cir. 1997), the D.C. Circuit agreed with the lower court that the False Claims Act’s statutory language and legislative history permitted the use of a reckless disregard standard because, among other things, the statutory language permitted liability “for false statements made with deliberate ignorance,” and — critically — “the statute explicitly state[d] that specific intent is not required.” *Id.* at 941–42. There is nothing in Section 110(k) to indicate Congress intended a lesser form of intent for the serious sanction of denial of federal assistance.

In fact, the legislative history makes clear that the “purpose” of Section 110(k) is to withhold federal assistance from those who significantly adversely affect historical properties prior to seeking federal assistance “*in order to* avoid historic preservation review provisions.” That does not describe a gross-negligence standard of “reckless disregard” but instead describes actual, subjective intent. *See, e.g., Kidd v. Thomson Reuters Corp.*, 925 F.3d 99, 104 (2d Cir. 2019) (the phrase “in order to” constitutes a specific intent requirement); *Granados v. Garland*, 17 F.4th 475, 482–83 (4th Cir. 2021) (explaining that the phrase “so as to” or “in order to” requires specific “‘intent,’ not [mere] ‘result’”).

In sum, there is no support in the language of the statute, precedent, or federal agency interpretations for the Board to graft a “reckless disregard” theory onto Section 110(k). The statute requires a finding of actual, subjective intent on Union Pacific’s part to instigate ground disturbances conducted by third parties *in order to* significantly adversely affect a historic property and *in order to* avoid the

requirements of Section 106. The facts in the present case do not support a finding — or even an inference — of actual, subjective intent on the part of Union Pacific to disturb important archeological and cultural resources. There is thus no basis under Section 110(k) to deny the petition for exemption to construct the PIRATE project.

B. Union Pacific did not have the requisite intent for a finding of anticipatory demolition under Section 110(k).

No one at Union Pacific intended to avoid the requirements of Section 106 of the NHPA, much less intended that the ground disturbing activity occur *in order to* avoid Section 106's requirements. All the evidence points in the opposite direction.

For example, Union Pacific was *already* actively working with the STB as part of the environmental and historic review processes when third parties conducted the ground-disturbing activities on Union Pacific property.²⁸ Even before Union Pacific filed its petition for exemption, it had been diligently working with OEA to ensure a thorough environmental and historic review process. By occurring *during* (as opposed to *prior to*) the Board's review process, the ground-disturbing

²⁸ Some third parties engaged in ground-disturbing activities while OEA and Jacobs representatives were visiting the PIRATE project location. *See* UP-Pirate-0001104-Confidential (

); UP-Pirate-0009646-Confidential

); UP-Pirate-0001912-Confidential

). While deeply regrettable, these events support the overwhelming evidence that Union Pacific was not trying to conceal ground disturbing activity from OEA and was not intentionally seeking to avoid the Section 106 process.

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activity could not have enabled Union Pacific to avoid Section 106’s requirements, as the review process was already ongoing and thus already subjecting Union Pacific to Section 106’s requirements.²⁹

Moreover, the extensive efforts taken by Union Pacific to quickly secure the APE, cooperate with OEA, and implement OEA’s recommendations belie any deliberate attempt to try to circumvent the Section 106 review process. *See supra* Section III.

In addition, the documents Union Pacific has produced to the STB show that the mistakes made here were ones of insufficient knowledge and inadequate communication and coordination among Union Pacific employees. For example, members of the Real Estate Department did not understand that the STB’s review

²⁹ There are strong reasons to conclude that a Section 110(k) violation is limited to instances where the adverse effect on the historic property occurred *prior* to the applicant’s submission of its application for federal assistance or authority. *See, e.g.*, S. Rep. 102-336 at 13 (1992) (explaining that the “purpose” of Section 110(k) is to “. . . eliminate so called ‘anticipatory demolition,’ where an individual seeking Federal assistance demolishes [a] historic structure *before making the application for assistance*, in order to avoid historic preservation review provisions.”) (emphasis added); *Comm. to Save Cleveland’s Hulett v. U.S. Army Corps of Eng’rs*, 163 F. Supp. 2d 776, 793 n.13 (N.D. Ohio 2001) (“[B]ecause plaintiffs have not alleged the factual predicate for an anticipatory demolition claim—application for a permit *after historic properties are impacted*— . . . plaintiffs have failed to state a claim under [section 110(k)].”) (emphasis added); 63 Fed. Reg. at 20503 (explaining that Section 110(k) is triggered where “an historic property is destroyed or irreparably harmed with the express purpose of circumventing or preordaining the outcome of section 106 review . . . *prior to application for* [federal authorization].”); *Conrail Abandonment*, Docket No. AB-167 (Sub-No. 1189X), at 9–10 (similar); *Section 106 Applicant Toolkit*, ACHP, <https://www.achp.gov/digital-library-section-106-landing/section-106-applicant-toolkit> (last visited Dec. 16, 2024) (stating on the ACHP’s website that Section 110(k) “is intended to prevent applicants from damaging a historic property *prior to Section 106 review*”) (emphasis added).

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process applied to adjoining landowners looking to [REDACTED]
[REDACTED] on Union Pacific's property prior to the construction of the PIRATE lead track.³⁰ And another Real Estate Department employee mistakenly conflated the STB with the State Historic Preservation Office (or SHPO), which in turn caused him to believe work in an existing utility easement could move forward despite earlier instructions to the contrary from the Engineering Department.³¹

As noted above, Union Pacific acknowledges that insufficient awareness and poor communication contributed to an environment where the third-party ground disturbances occurred, and Union Pacific is implementing measures to ensure cultural-resource harm does not occur in the future as a result of a rail construction project. The missteps in the present project, while unacceptable and in need of correction, do not rise to the level of a Section 110(k) violation that would justify denial of federal assistance (here, the grant of Union Pacific's petition for exemption for construction authority) under Section 110(k).

V. The Board Should Resume Its Consideration of the PIRATE Project, Which Will Offer Significant Public Benefits.

As demonstrated above, there is no basis for denial of federal assistance. Moreover, there are compelling reasons that the Board should grant Union Pacific's petition for exemption, subject to appropriate environmental mitigation measures.

³⁰ UP-Pirate-0000767-Confidential.

³¹ Compare UP-Pirate-0001906-Confidential with UP-Pirate-0007068-Confidential.

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Under the STB’s governing statute, there is a statutory presumption that rail construction projects are in the public interest and are to be approved. *See* 49 U.S.C. § 10901; *see also* *Mid States Coal. for Progress v. STB*, 345 F.3d 520, 552 (8th Cir. 2003); *Alaska R.R.—Constr. & Operation Exemption—Rail Line Extension to Port MacKenzie, Alaska*, Docket No. FD 35095 (STB served Nov. 21, 2011), *aff’d sub nom. Alaska Survival v. STB*, 705 F.3d 1073 (9th Cir. 2013). The Board is also guided by the rail transportation policy at 49 U.S.C. § 10101, which establishes a federal policy to ensure the development and continuation of a sound rail transportation system to meet the needs of the public. 49 U.S.C. § 10101(4).

There have been few Class I rail construction projects before the Board in the last decade. The proposed PIRATE project is a notable exception to that trend. It is a public/private initiative on which Union Pacific and the City of Mesa (and others) have collaborated for many years. The project, which involves the construction and operation of six miles of new rail line, is expected to provide significant public benefits for current and future rail customers, the environment, and the local economy and communities in Maricopa County. For this very reason, a bipartisan group of the members of the Arizona Congressional delegation wrote to the Board to emphasize the “important and unique value” of this project and urging the Board to prioritize decisions relating to it.³²

Another proponent of the project is Commercial Metals Company, a rail customer that specifically chose to construct its second mill facility within the

³² Arizona Congressional Delegation Letter (filed Sept. 27, 2024).

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PAMZ in anticipation of the new Union Pacific rail line that would be constructed as part of the PIRATE project.³³ Commercial Metals Company has also submitted letters to the Board explaining the benefits of the project to its employees, the public interest, and the surrounding community.³⁴

Union Pacific has explained the public benefits in its petition for exemption and will only briefly restate them here. The PIRATE project will provide new rail access to existing and future customers that currently have no option but to ship by truck. In so doing, the PIRATE project will divert thousands of trucks from public roadways, thus reducing greenhouse gas emissions, local air pollution, highway maintenance costs, and congestion. In the Draft Environmental Assessment, OEA estimated that, in the project's first year of operation, approximately 30,000 truck trips would be removed from public roadways, leading to reductions in greenhouse gas emissions.³⁵ The project will also drive economic growth and generate thousands of new jobs in Maricopa County. The PIRATE project has been the subject of three applications by the City of Mesa for federal funding, and it has received support from various levels of state and local government throughout the process.

³³ Commercial Metals Company Letter at 1 (filed June 30, 2023).

³⁴ *Id.*; see also Commercial Metals Company Letter at 1–2 (filed June 26, 2024).

³⁵ Pecos Industrial Rail Access and Train Extension (PIRATE) Project, Draft Environmental Assessment, Docket No. FD 36501 (STB served May 31, 2023), at 3–15.

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While Union Pacific takes very seriously the third-party ground disturbance activity at issue and has taken steps to ensure nothing similar occurs in the future, this record provides no basis for denying the PIRATE petition for exemption in this case under Section 110(k). Given the statutory presumption that rail construction projects are in the public interest, the specific public benefits associated with the PIRATE project, and the years of planning efforts and project approvals on the part of stakeholders other than Union Pacific, Union Pacific respectfully urges the Board to proceed with its environmental and historic review process and grant Union Pacific's petition for exemption subject to appropriate environmental mitigation measures.

CONCLUSION

Union Pacific *deeply* regrets the harm to historic and cultural resources that occurred here due to the third-party ground disturbances and is committed to cooperating with the Board and reforming its internal processes to ensure such disturbances do not occur in the future. The missteps that happened here did not violate Section 110(k) of the NHPA, however. Union Pacific had no intention to avoid Section 106 and had been actively participating in the Section 106 process for over two years before the third-party ground disturbances occurred. Because there has been no violation of Section 110(k), Union Pacific respectfully urges the Board to resume its environmental and historic review of the PIRATE project and approve Union Pacific's petition for exemption in this proceeding with appropriate environmental mitigation measures.

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Respectfully submitted,

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December 16, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December 2024, the foregoing Opening Submission Regarding Section 110(k) Issues in Docket No. FD 36501 was served by first-class mail or more expeditious means on all parties of record in this proceeding.

/s/ Stephen S. Laudone
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