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March 10, 2015

Cynthia Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E Street, SW
Washington, DC 20423

ENTERED
Office of Proceedings
March 10, 2015
Part of
Public Record

Re: Finance Docket No. 35895, BNSF Railway Company – Lease Exemption – Union Pacific Railroad Company

Finance Docket No. 35896, Union Pacific Railroad Company – Lease Exemption – BNSF Railway Company

Dear Ms. Brown:

Attached for filing are the original and 10 copies of two Petitions for Exemption filed by BNSF Railway Company and Union Pacific Railroad Company. Also closed is a check and Payment Form to cover the respective filing fees.

If you have any questions, please call me.

Sincerely,



Karl Morell

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March 10, 2015

SURFACE

TRANSPORTATION BOARD

FILED

March 10, 2015

SURFACE

TRANSPORTATION BOARD

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35895

BNSF RAILWAY COMPANY
--LEASE EXEMPTION--
UNION PACIFIC RAILROAD COMPANY

FINANCE DOCKET NO. 35896

UNION PACIFIC RAILROAD COMPANY
--LEASE EXEMPTION--
BNSF RAILWAY COMPANY

PETITIONS FOR EXEMPTION

EXPEDITED CONSIDERATION REQUESTED

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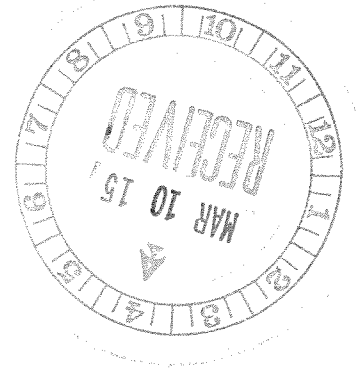
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Counsel for BNSF RAILWAY COMPANY

Dated: March 10, 2015



BEFORE THE
SURFACE TRANSPORTATION BOARD

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BNSF RAILWAY COMPANY
--LEASE EXEMPTION--
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UNION PACIFIC RAILROAD COMPANY
--LEASE EXEMPTION--
BNSF RAILWAY COMPANY

PETITIONS FOR EXEMPTION

BNSF Railway Company (“BNSF”) and Union Pacific Railroad Company (“UP”) hereby petition the Surface Transportation Board (“Board”) for separate exemptions from prior review and approval under 49 U.S.C. §§ 11323-25 of: (1) BNSF’s lease of approximately 54.12 miles of main line track owned by UP for both track and signal maintenance and 7.80 miles of UP right of way for signal maintenance; and (2) UP’s lease of approximately 14.85 miles of main line track owned by BNSF for track and signal maintenance and 1.77 miles of BNSF right of way for track maintenance only.

SUMMARY OF TRANSACTION

In 1936, one of BNSF's predecessors, The Atchison, Topeka and Santa Fe Railway Company and one of UP's predecessors, The Denver and Rio Grande Western Railroad Company ("DRGW") entered into an agreement regarding the ownership and operation, maintenance and joint use of each party's railroad tracks located between South Denver and Bragdon, CO (the "Joint Corridor").

In 1987, one of BNSF's predecessors, Burlington Northern Railroad Company and DRGW entered into an agreement regarding the ownership and operation, maintenance and joint use of each party's railroad tracks located between Prospect Junction and South Denver, CO (the "Consolidated Corridor").

BNSF and UP have entered into a new lease agreement ("New Agreement") that will modify the responsibilities that were assigned to the parties in the 1936 and 1987 agreements. Each party shall lease property of the other party in order for the lessee to maintain, construct, repair and renew the tracks and appurtenant structures and facilities located between Denver and Bragdon, CO ("Joint Trackage").

Pursuant to the New Agreement, BNSF shall grant to UP a non-exclusive lease for the following segments of BNSF-owned Joint Trackage:

- On the Joint Corridor, Main Track 2, BNSF Milepost 12.41, at or near Littleton to BNSF Milepost 25.21, at or near Sedalia;
- On the Joint Corridor, Main Track 2, BNSF Milepost 49.79, at or near Spruce to BNSF Milepost 51.84, at or near Palmer Lake; and

- On the Joint Corridor, Main Track 2, BNSF Milepost 84.36, at or near Crews, to BNSF Milepost 86.13, south of Crews (the lease of this portion of the Joint Corridor shall exclude the signal system and grade crossing warning devices).

Pursuant to the New Agreement, UP shall grant to BNSF a non-exclusive lease for the following segments of UP-owned Joint Trackage:

- On the Consolidated Corridor in Denver, Main Track 1 BNSF Milepost 0.0 to BNSF Milepost 0.85;
- On the Joint Corridor, Main Track 1, BNSF Milepost 3.92, at or near South Denver, to BNSF Milepost 25.21, at or near Sedalia (excluding: (1) Dupont Spur at approximately UP Milepost 20.6; (2) Fort Logan Spur at approximately UP Milepost 9.1; and (3) Iowa Spur No. 3 at approximately UP Milepost 5.3);
- On the Joint Corridor, Main Track 1, BNSF Milepost 48.97, at or near Spruce, to BNSF Milepost 51.99, at or near Palmer Lake;
- On the Joint Corridor, Main Track 1, BNSF Milepost 51.84 to BNSF Milepost 51.99, at or near Palmer Lake;
- On the Joint Corridor, the single track, BNSF Milepost 51.99, at or near Palmer Lake, to BNSF Milepost 78.75, at or near Kelker (excluding: (1) UP's yard in Colorado Springs between UP Milepost 74.4 and UP Milepost 75.4; (2) the Templeton Gap Spur at approximately UP Milepost 72.79; and (3) the Russina Spur at approximately UP Milepost 70.7); and
- On the Joint Corridor, Main Track 1, BNSF Milepost 84.49, at or near Crews, to BNSF Milepost 86.54, south of Crews.

In addition, UP shall grant to BNSF a non-exclusive lease of the UP owned signal system and grade crossing warning devices on the Joint Corridor, Main Track 2, BNSF Milepost 86.13, south of Crews, to BNSF Milepost 93.9, at or near Nixon.

The New Agreement is designed to bring geographic consistency to the maintenance obligations of the parties over the Joint Trackage. Currently, the maintenance obligations of the parties are disjointed making it more difficult and costly properly to maintain the Joint Trackage. Under the New Agreement, the maintenance obligations of each party will be geographically consolidated which will allow each party to more efficiently maintain the portions of the Joint Trackage for which they are responsible. These efficiencies will improve service not only to customers located along the Joint Trackage but other off-line customers as well that ship their products over the Joint Trackage. Service to customers on the line will not be affected by the New Agreement.

ARGUMENT

I. THE PROPOSED TRANSACTIONS SHOULD BE EXEMPTED FROM THE PRIOR APPROVAL REQUIREMENTS OF 49 U.S.C. §§ 11323-25.

Under 49 U.S.C. § 11323(a)(2), prior Board approval is required for a rail carrier to lease the line of another rail carrier.

Pursuant to 49 U.S.C. § 10502, however, the Board must exempt a transaction from regulation when it finds that:

- (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; and
- (2) either:
 - (a) the transaction is of limited scope, or

(b) regulation is not necessary to protect shippers from the abuse of market power.

The legislative history of Section 10502 reveals a clear Congressional intent that the Board should liberally use its exemption authority to free certain transactions from the administrative and financial costs associated with continued regulation. In enacting the Staggers Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, Congress encouraged the Board's predecessor to liberally use the exemption authority under former Section 10505:

The policy underlying this provision is that while Congress has been able to identify broad areas of commerce where reduced regulation is clearly warranted, the Commission is more capable through the administrative process of examining specific regulatory provisions and practices not yet addressed by Congress to determine where they can be deregulated consistent with the policies of Congress. The conferees expect that, consistent with the policies of this Act, the Commission will pursue partial and complete exemption from remaining regulation,

H.R. Rep. No. 1430, 96th Cong. 2d Sess. 105 (1980). *See also Exemption From Regulation – Boxcar Traffic*, 367 I.C.C. 424, 428 (1983), *vacated and remanded on other grounds, Brae Corp. v. United States*, 740 F.2d 1023 (D.C. Cir. 1984). Congress reaffirmed this policy in the conference report accompanying the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, which re-enacted the rail exemption provisions as Section 10502. H.R. Rep. No. 422, 104th Cong., 1st Sess. 168-69 (1995).

In reviewing an exemption petition under Section 10502, the Board does not undertake a broader analysis than it would apply to a transaction under the statutory provision that would apply in the absence of the exemption. *Blackstone Capital Partners – Control Exemption – CNW Corp.*, 5 I.C.C. 2d 1015, 1019 (1989)(“Blackstone”); *Vill. of Palestine v. I.C.C.*, 936 F. 2d 1335 (D.C. Cir. 1991).

The proposed transactions do not involve the merger or control of at least two Class I rail carriers. Therefore, absent an exemption, the proposed transactions would be subject to Board review under the standards set forth in 49 U.S.C. § 11324(d). Section 11324(d) provides that the Board “shall approve” the transaction unless it finds both that:

(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

49 U.S.C. § 11324(d).

In transactions subject to Section 11324(d), the primary focus is on the probable competitive effects of the proposed transaction. *See, e.g.,* Finance Docket No. 32579, *Canadian Pac. Ltd., and Soo Line R.R. Co. - Control - Davenport, Rock Island & N. W. Ry.* (served February 10, 1995), slip op. at 5; *Wilmington Terminal R.R., Inc. - Purchase & Lease - CSX Transp., Inc.*, 6 I.C.C. 2d 799, 803 (1990), *pet. for review denied sub nom., Ry. Labor Executives’ Ass’n v. ICC*, 930 F.2d 511 (6th Cir. 1991). The public interest factors are considered only where significant anticompetitive effects are found. *Id.*

A finding of competitive harm under Section 11324(d)(1) must be grounded on a showing that any adverse competitive effects are both “likely” and “substantial.” *Wisc. Cent. Transp. Corp. – Continuance in Control – Fox Valley & W. Ltd.*, 9 I.C.C. 2d 233, 238 (1992). Examples of adverse competitive impacts that would trigger the balancing of the public interest factors under Section 11324(d)(2) “would be the likelihood of significantly higher rates or significantly worsened service, or the likelihood of a combination of the two.” *Blackstone*, at 1019 (footnote omitted). Even if such showings were made, the proposed transaction may not be

disapproved unless the anticompetitive effects of the proposed transaction outweigh the public interest factors. *See* Finance Docket No. 31991, *CSX Corp., CSX Transp., Inc. and Carrollton R.R. - Control - Transkentucky Transp. R.R.* (not printed), served April 15, 1991, slip op. at 2.

The lease of a rail line by one rail carrier from another rail carrier does not result in harm to competition unless the lease creates or enhances the ability of the lessee carrier to exercise market power. The Board and its predecessor have defined market power as the ability of a carrier profitably to increase rates above competitive levels or to reduce the quality of service for a significant period of time without losing traffic to competing carriers or other sources. *See, e.g., CSX Corp. - Control - Am. Commercial Lines*, 2 I.C.C. 2d 490, 515 (1984), *pet. for review denied sub nom., Crounse Corp. v. ICC*, 781 F.2d 1176 (6th Cir.), *cert. denied*, 479 U.S. 890 (1986). In addition, only competitive harm that is directly and causally related to a proposed transaction -- and not pre-existing conditions -- are considered by the Board in determining whether a transaction will lessen competition. *Burlington N. R.R. Co. - Control and Merger - The Atchison, Topeka and Santa Fe Ry. Co.*, 10 I.C.C. 2d 661, 728 (1995).

As is demonstrated in these Petitions, there are no anticompetitive effects that flow from the proposed transactions. The proposed transactions will not lead to higher rates or worsened service. To the contrary, the proposed transactions will improve rail service provided by BNSF and UP for all of the shippers located along the Joint Trackage and those shippers using the Joint Trackage for overhead movements.

A. Regulation Of The Proposed Transactions Is Not Necessary To Carry Out The Rail Transportation Policy.

Detailed scrutiny of the proposed transactions under 49 U.S.C. §§ 11323-25 is not necessary to carry out the Rail Transportation Policy (“RTP”). By minimizing the administrative

expense of considering the proposed transactions, the requested exemptions will expedite regulatory decisions and reduce barriers to entry and exit [49 U.S.C. §§ 10101(2) and (7)]. By allowing BNSF and UP to restructure their maintenance responsibilities on the Joint Trackage, the proposed transactions will create greater efficiencies in the operations of BNSF and UP over the Joint Trackage and improve service for the customers located on the Joint Trackage and those shipping their traffic over the Joint Trackage.

Consequently, the proposed transactions will help promote a safe and efficient rail transportation system [49 U.S.C. § 10101(3)], ensure the continuation of a sound rail transportation system with effective competition among rail carriers [49 U.S.C. § 10101(4)], foster sound economic conditions in transportation and ensure effective competition [49 U.S.C. § 10101(5)], encourage honest and efficient management [49 U.S.C. § 10101(9)], and promote energy conservation [49 U.S.C. § 10101(14)]. Other aspects of the RTP will not be adversely affected. *See* STB Finance Docket No. 34504, *Union Pacific Railroad Company – Lease and Operation Exemption – The Burlington Northern and Santa Fe Railway Company* (not printed), served August 26, 2004.

B. The Proposed Transaction Is Of Limited Scope.

BNSF is leasing approximately 61.92 miles of rail lines from UP and UP is leasing approximately 16.62 miles of rail lines from BNSF. The Board and its predecessor have found the acquisition and operation of vastly longer rail lines to be limited in scope. *See, e.g., Ind. R.R. Co. – Acquisition & Operation – Ill. Cent. R.R. Co.*, 6 I.C.C.2d 1004, 1011 (1990)(acquisition of 90.3 miles of rail line found limited in scope); Finance Docket No. 31482, *Mid Michigan R.R. Co. – Purchase Exemption – The St. Joseph & Grand Island R.R. Co. Line Between St. Joseph, MO and Upland, KS* (not printed), served August 7, 1989 (acquisition of 107.3 miles of rail line

found limited in scope); Finance Docket No. 32149, *Genesee & Wy. Indust., Inc. – Continuance in Control Exemption – Allegheny & E. R.R., Inc.* (not printed), served October 23, 1992 (acquisition of control of carrier operating 147.1 miles of rail line and serving 8 customers found limited in scope).

Moreover, BNSF already has long term operating rights over the UP owned rail lines and UP already has long term operating rights over the BNSF owned rail lines. Therefore, the proposed transactions will not adversely affect traffic volumes on the Joint Trackage or the routings available to customers located on the Joint Trackage or customers routing their traffic over the Joint Trackage. The proposed transactions will not have any adverse impact on the national, regional or local rail industry. Consequently, the proposed transaction is of limited scope.

C. Regulation Of The Proposed Transactions Is Not Necessary To Protect Shippers From An Abuse Of Market Power.

Even if the proposed transactions were not limited in scope, the transactions should nevertheless be exempted because the transactions will not result in any abuse of market power by BNSF or UP. The proposed transactions are designed primarily to realign the maintenance responsibilities over the Joint Trackage. BNSF will continue to operate and serve customers located on the portions of the Joint Trackage being leased to UP. Similarly, UP will continue to operate and serve customers located on the portions of the Joint Trackage being leased to BNSF. Consequently, no current or future customers will see any change in competitive rail service from BNSF and UP over the Joint Trackage nor will any service be degraded as a result of these transactions. BNSF and UP do not anticipate any material changes in operations following the consummation of these transactions. BNSF and UP trains will continue to run as they do today, although possibly faster following the improved maintenance on the Joint Trackage.

Consequently, the proposed transaction will not result in an abuse of market power. Rather, the proposed transaction, overall, will enhance competition. *See* Finance Docket No. 31469, *S.C. Cent. R.R. – Purchase – CSX Transp., Inc. Line Between E. Greenville and Laurens, SC* (not printed), served July 30, 1990, slip op. at 3 (finding no anticompetitive effect where the number of competitive alternatives available to shippers remains unchanged). As a practical matter, the proposed transactions will result only in a change in the maintenance and improved service to the customers along the Joint Trackage. There will be no adverse change in competition. Accordingly, regulation is not necessary to protect shippers from an abuse of market power.

II. EXPEDITED CONSIDERATION REQUESTED

BNSF and UP respectfully urge the Board to process these Petitions as expeditiously as possible. The parties have reached mutual agreement on the terms of the agreement, which will have mutual benefit to their respective engineering teams, while having no effect on competitive service to customers. As previously noted, the main purpose of the transactions is to geographically consolidate BNSF's and UP's track and signal maintenance obligations on the Joint Trackage, improving coordination between the railroads by removing the patchwork of responsibilities created over a century ago.

The transactions will enable both parties to more efficiently maintain the portions of the Joint Trackage for which they are responsible. The line currently suffers from multiple slow orders (ballast issues, tie issues, broken frogs, etc.) for which materials have been ordered and are ready to be placed in service but are in a holding pattern pending approval of the proposed transactions. The north-south route that includes the Joint Trackage connects coal sources with energy-producers across the western United States. Reducing the number of slow orders will

have a direct effect on the speed and reliability of the route ensuring energy producers have sufficient stockpiles on hand to supply customer needs when unexpected weather conditions occur. Ultimately, the more contiguously aligned track and signal maintenance obligations will reduce the number and frequency of maintenance windows and outages, resulting in improved operations for customers along the route. The improved operations will, in turn, improve regional efficiencies, directly affecting the flow of traffic on the national rail system, as a whole. The improved maintenance will enable BNSF and UP to improve their respective operations over the Joint Trackage which, in turn, will improve operations over other portions of their networks.

III. LABOR PROTECTION

Under 49 U.S.C. § 10502(g), the Board may not use its exemption power to relieve a rail carrier of its statutory obligation to protect the interests of employees. Therefore, as a condition to granting the exemption, BNSF and UP have no objection to the Board imposing the employee protective conditions set forth in *Mendocino Coast Ry. Inc. – Lease and Operate*, 354 I.C.C. 732 (1978) and 360 I.C.C. 653 (1980).

IV. ENVIRONMENTAL AND HISTORIC IMPACTS.

BNSF and UP are leasing sections of the Joint Trackage for continued rail operations. Further Board approval is required for BNSF and UP to abandon or discontinue any service and there are no plans to dispose of or alter properties subject to Board jurisdiction that are 50 years old or older. Hence, these Petitions for Exemption do not require an historic report under 49 C.F.R. § 1105.8(b)(1).

BNSF's and UP's leases will not result in significant changes in carrier operations. There will not be a diversion of: (1) more than 1,000 rail carloads a year to motor carriage; or (2) an

average of 50 carloads per mile per year for any part of this line to motor carriage. These transactions will not result in: (1) an increase in rail traffic of at least 100 percent or an increase of at least eight trains a day on any segment of the line; (2) an increase of rail yard activity of at least 100 percent; or (3) an average increase in truck traffic of more than 10 percent of the average daily traffic or 50 vehicles a day. BNSF's and UP's leases of segments of the Joint Trackage will not affect a Class I or nonattainment area under the Clean Air Act. In any event, the thresholds of 49 C.F.R. § 1105.7(e)(5)(ii) will not be exceeded. Finally, the transportation of ozone depleting materials is not contemplated. Therefore, no environmental documentation is required under 49 C.F.R. § 1105.6(c)(2).

This action will not significantly affect either the quality of the human environment or energy conservation.

CONCLUSION

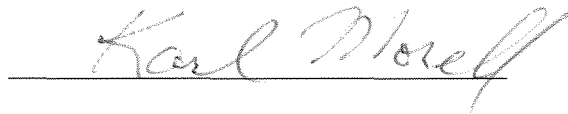
Regulation of the proposed transactions is not necessary to carry out the RTP. Also, the proposed transactions are limited in scope. Furthermore, regulation of the proposed transactions is not necessary to protect shippers from the abuse of market power. Consequently, BNSF and UP respectfully request that the Board exempt from the prior approval requirement the proposed leases by BNSF and UP of segments of the Joint Trackage.

Respectfully submitted,



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Dated: March 10, 2015

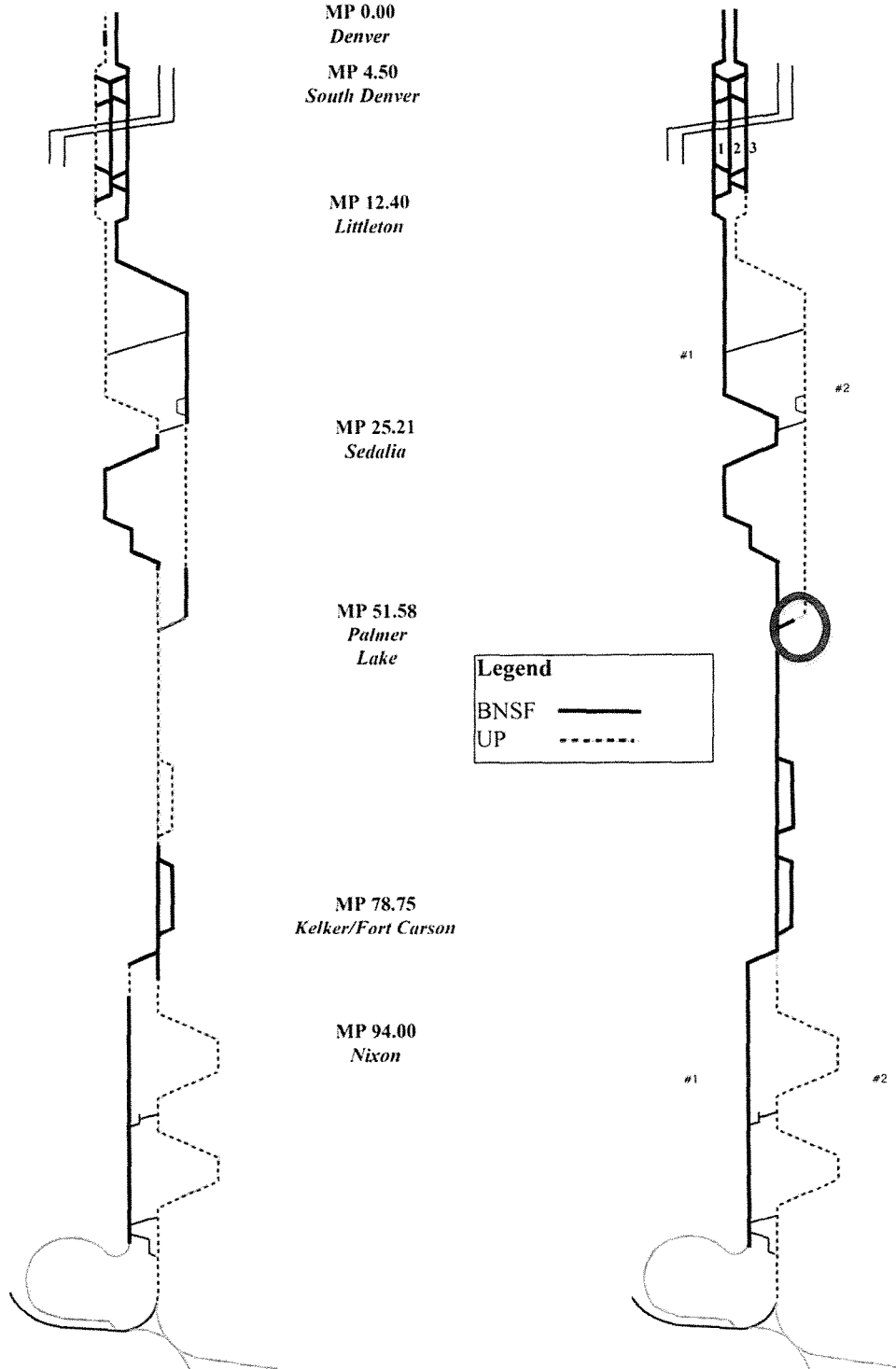
EXHIBIT 1

MAP

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Current

Proposed



Current

Proposed

