

SERVICE DATE – JUNE 5, 2020

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 1252 (Sub-No. 1X)

EASTERN IDAHO RAILROAD, L.L.C.—ABANDONMENT EXEMPTION—
IN BONNEVILLE COUNTY, IDAHO

Decided: June 5, 2020

Eastern Idaho Railroad, L.L.C. (EIRR), filed a verified notice of exemption under 49 C.F.R. part 1152 subpart F—Exempt Abandonments to abandon an approximately 0.76-mile portion of a railroad line known generally as the Old Butte Main Line, extending between milepost 184.14 (immediately southeast of the grade crossing with Yellowstone Highway) and milepost 184.90 (north of the grade crossing with W. Broadway Street), in Idaho Falls, Bonneville County, Idaho (the Line). Notice of the exemption was served and published in the Federal Register on March 13, 2020 (85 Fed. Reg. 14,720).

On March 6, 2020, the City of Idaho Falls (the City) requested issuance of a notice of interim trail use or abandonment (NITU) to negotiate with EIRR to establish interim trail use and railbanking on the Line under the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d), and imposition of a public use condition under 49 U.S.C. § 10905 for the right-of-way. In a response filed on March 11, 2020, EIRR notified the Board that it is willing to negotiate an agreement for interim trail use with the City and stated that, although it does not believe that a public use condition is necessary, it does not object to imposition of such a condition.

The Board's Office of Environmental Analysis (OEA) served a Draft Environmental Assessment (Draft EA) on March 20, 2020. In the Draft EA, OEA recommended that three environmental mitigation conditions be imposed on any decision granting abandonment authority. First, OEA noted that the U.S. Army Corps of Engineers (Corps) submitted a letter stating that the proposed abandonment would not require a Corps permit under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, because it would not result in the discharge of dredged or fill material into waters of the United States. However, the Corps requested that EIRR contact the Corps if project plans change. Accordingly, OEA recommended a condition requiring EIRR to consult with the Corps if EIRR's plans change to include abandonment-related salvage activities that could result in the discharge of dredged or fill material into waters of the United States, including the Snake River.

Second, OEA stated that, because no salvage is planned as part of the proposed abandonment, OEA does not anticipate any adverse impacts to public lands. However, due to

the proximity of the Line to Pedersen Sportsman Park¹ and the Idaho Falls Greenbelt (a locally managed recreational trail), OEA recommended a mitigation condition requiring EIRR to consult with the City if EIRR's project plans change to include abandonment-related salvage activities that could affect these local recreational areas.

Third, in response to comments from the Idaho State Historic Preservation Office (the SHPO) identifying the Line as an historic property that may be eligible for listing in the National Register of Historic Places (the National Register), OEA recommended a mitigation condition under Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108, requiring EIRR to retain its interest in and take no steps to alter the historic integrity of all historic properties within the project right-of-way (the Area of Potential Effect) that are listed in or eligible for listing in the National Register until the Section 106 process is complete and the Board has removed the condition.

On April 6, 2020, the City filed comments in the Board's docket for this proceeding. The City alleges that EIRR omitted from its verified notice the required statement as to whether the Line contains any federally granted rights-of-way under 49 C.F.R. § 1152.50(d)(1), and requests that OEA recommend to the Board a condition that EIRR comply with that regulation. The City also requests that OEA find that the Line is suitable for public use under 49 U.S.C. § 10905 and 49 C.F.R. § 1152.28 or recommend such a finding to the Board.² Additionally, the City proposes clarifications and modifications to the historic preservation condition recommended in the Draft EA. The City asserts that the description in the Draft EA of how the condition would apply if an interim trail use agreement is reached (a statement indicating that "the Section 106 process can be paused" during interim trail use) is inconsistent with the language of the actual recommended condition.

On April 9, 2020, the Board directed EIRR to respond to the City's comments and postponed the effective date of the exemption pending further Board order.

EIRR replied on April 16, 2020. EIRR states that it inadvertently omitted from its verified notice a statement concerning whether or not, based on the information in its possession, EIRR had reason to believe that any of the Line has any federally granted rights-of-way. EIRR states that it does not dispute that much or all of the subject right-of-way may have been federally granted. EIRR further states that it has already provided such information to the City, and notes that it commits to sharing any additional information in its possession bearing on the issue with the City as soon as it can. While EIRR asserts that the Board need not order EIRR to comply with the requirements of 49 C.F.R. § 1152.50(d)(1), EIRR explains that it would not

¹ The Draft EA referred to Sportsman Park. In its comments filed on April 6, 2020, the City states that the official name is Pedersen Sportsman Park. The City also states that the Draft EA should have referred to "Porter Canal," not "Port Canal." OEA notes both corrections in the Final EA.

² The City's request for issuance of a public use condition is discussed below.

object to such an order if the Board considers it appropriate. As to the City's proposed modifications to OEA's recommended historic preservation condition, EIRR does not object to the City's requested modification, but states that it is not persuaded that such modification is necessary.

OEA issued its Final EA on June 2, 2020. With respect to the City's concern that the language of the Draft EA was inconsistent with the recommended Section 106 condition in the Draft EA, OEA states that it is adding explanatory language in the introduction to the recommended conditions in the Final EA in this case and future cases for clarity. Specifically, the Final EA includes a footnote stating that if an interim trail use agreement is reached for the Line (or a portion thereof), compliance with the proposed conditions is not required with respect to any portion of the Line covered by the interim trail use agreement for the duration of the agreement. The Final EA also recommends minor modifications to all three proposed conditions. Based on OEA's recommendations, the three conditions proposed in the Final EA will be imposed.

With respect to the requirements of 49 C.F.R. § 1152.50(d)(1), the Board notes that EIRR included the required statement related to federally granted rights-of-way in its notice to the government agencies, prior to filing its verified notice of exemption. (See Verified Notice, Ex. C.) However, EIRR first stated that, based on information in its possession, the Line does not contain any federally granted rights-of-way, while now EIRR states that much or all of the subject right-of-way may have been federally granted. Therefore, EIRR will be directed to send revised notices under 49 C.F.R. § 1152.50(d)(1) and file with the Board a certification that it has done so within five days of the service date of this decision.

The abandonment exemption will become effective on the service date of this decision.

Interim Trail Use. The City has submitted a statement of willingness to assume full responsibility for management of, legal liability for, and payment of taxes on the right-of-way, as required at 49 C.F.R. § 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. As noted above, EIRR notified the Board that it is willing to negotiate an agreement for interim trail use with the City.

Because the City's request complies with the requirements of 49 C.F.R. § 1152.29 and EIRR is willing to negotiate for trail use, a NITU will be issued. The parties may negotiate an agreement during the one-year period prescribed below. If an interim trail use agreement is reached (and thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2) & (h). If no agreement is reached within one year, EIRR may fully abandon the Line, subject to any outstanding conditions. See 49 C.F.R. § 1152.29(d)(1). Use of the right-of-way for trail

purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service.

Public Use. The City asks that EIRR be prohibited from disposing of the Line because the Line would be an important component to establishing a comprehensive and connected non-motorized transportation infrastructure in Idaho Falls. The City asks that EIRR be prohibited from disposing of the Line other than for public purposes and use for a period of 180 days after the effective date of the abandonment authorization. According to the City, the 180-day period is needed because negotiation of trail use agreements typically takes more than 180 days.

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 Abans.—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986). Under § 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. 49 C.F.R. § 1152.28(a)(2). Because the City has satisfied these requirements, a 180-day public use condition will be imposed, requiring EIRR to keep intact the right-of-way (including trail-related structures such as bridges, trestles, culverts, and tunnels) and to refrain from disposing of the corridor, commencing from June 5, 2020, the effective date of the exemption.

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, EIRR is not required to deal exclusively with the City but may engage in negotiations with other interested persons.

This decision, and the proposed abandonment if implemented as conditioned, 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. EIRR is directed to send revised notices under 49 C.F.R. § 1152.50(d)(1) and file with the Board a certification that it has done so within five days of the service date of this decision.

3. Upon reconsideration, the notice served and published in the Federal Register on March 13, 2020, 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 to permit the City to negotiate with EIRR for trail use for the Line, for a period of one year from the service date of this decision and notice, until June 5, 2021, and to permit public use negotiations as set forth below, for a period of 180 days commencing from the effective date of the exemption, until December 2, 2020. The abandonment is also subject to the following conditions:³

(1) EIRR shall consult with the City regarding potential impacts to local recreation areas, including Pedersen Sportsman Park and the Idaho Falls Greenbelt trail, prior to undertaking abandonment-related salvage activities; EIRR shall implement the reasonable recommendations of the City to minimize the impact of abandonment-related salvage activities to recreational areas;

(2) EIRR shall consult with the Corps prior to beginning any abandonment-related salvage activities that could result in the discharge of dredged or fill material into waters of the United States, including wetlands; EIRR shall follow the Corps' reasonable requirements for obtaining a Corps permit under Section 404 of the Clean Water Act, if the Corps determines that such a permit would be necessary; and

(3) EIRR shall 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 Area of Potential Effect that are eligible for listing or listed in the National Register until the Section 106 process of the National Historic Preservation Act, 54 U.S.C. § 306108, has been completed; EIRR shall report back to OEA regarding any consultations with the SHPO and the public; EIRR may not file its consummation notice or initiate 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.

4. EIRR shall keep intact the right-of-way, including potential trail-related structures such as bridges for a period of 180 days from the effective date of the exemption, until December 2, 2020, to enable any state or local government agency, or other interested person, to negotiate the acquisition of the right-of-way for public use. If an interim trail use/rail banking agreement is executed before expiration of the 180-day public use condition period, the public use condition will expire to the extent the trail use/rail banking agreement covers the same portion of the right-of-way.

5. If an interim trail use/rail banking agreement is reached, it must require the trail sponsor to assume, for the term of the agreement, full responsibility for: (i) managing the right-of-way; (ii) any legal liability arising out of the transfer or use of the right-of-way (unless the sponsor is immune from liability, in which case it need only indemnify the railroad against any

³ If an interim trail use agreement under 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29 is reached for the Line (or a portion thereof), compliance with these conditions is not required with respect to any portion of the Line covered by the interim trail use agreement for the duration of the agreement.

potential liability); and (iii) the payment of any and all taxes that may be levied or assessed against the right-of-way.

6. Interim trail use/rail banking is subject to possible future reconstruction and reactivation of the right-of-way for rail service and to the trail sponsor's continuing to meet its responsibilities for the right-of-way described in paragraph 5 above.

7. If an interim trail use agreement is reached (and thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. See 49 C.F.R. §§ 1152.29(d)(2) and (h).

8. If interim trail use is implemented, and subsequently the trail sponsor intends to terminate trail use on all or any portion of the right-of-way covered by the interim trail use agreement, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

9. If an agreement for interim trail use/rail banking is reached by June 5, 2021, for the right-of-way, interim trail use may be implemented. If no agreement is reached, EIRR may fully abandon the Line, subject to any outstanding conditions.

10. The abandonment exemption is effective on the service date of this decision.

11. This decision and notice is effective on its service date.

By the Board, Allison C. Davis, Director, Office of Proceedings.