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SERVICE DATE – FEBRUARY 12, 2020

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 6 (Sub-No. 495X)

BNSF RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN FLATHEAD  
COUNTY, MONT.

Decided: February 11, 2020

By decision and notice of interim trail use or abandonment (NITU) served on August 14, 2017, the Board, under 49 U.S.C. § 10502, exempted from the prior approval requirements of 49 U.S.C. § 10903 the abandonment by BNSF Railway Company (BNSF) of 2.7 miles of rail line extending from milepost 1225.19 to the south end of the line at milepost 1227.58 and to the west end of the line at Engineering Station 189+36 (milepost 1227.10), in Kalispell, Flathead County, Mont. (the Line), subject to conditions.

In that decision, the Board issued a NITU under the National Trails System Act, 16 U.S.C. § 1247(d), and 49 C.F.R. § 1152.29, authorizing a 180-day period for the City of Kalispell (the City) and BNSF to negotiate an interim trail use/rail banking agreement over a portion of the Line from milepost 1225.19 to milepost 1226.79.<sup>1</sup> The negotiating period under the NITU has been extended twice (each time for one year) and is currently scheduled to expire on February 10, 2020. By request filed on January 10, 2020, the City seeks to extend the negotiating period to February 10, 2021. On January 15, 2020, BNSF filed a reply agreeing to the extension request.

Where, as here, the carrier has not consummated the abandonment and is willing to continue trail use negotiations, the Board retains jurisdiction and the NITU negotiating period may be extended. See Rail Abans.—Use of Rights-of-Way as Trails—Supplemental Trails Act

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<sup>1</sup> The August 2017 decision did not specify the portion of the Line over which the City and BNSF agreed to negotiate for trail use. See also BNSF Ry.—Aban. Exemption—in Flathead Cty., Mont., AB 6 (Sub-No. 495X) (STB served Mar. 22, 2018). However, all extension requests by the City have requested extensions to negotiate regarding the portion of the Line from milepost 1225.19 to milepost 1226.79. See, e.g., BNSF Ry.—Aban. Exemption—in Flathead Cty., Mont., AB 6 (Sub-No. 495X) (STB served Feb. 22, 2019). Therefore, it is noted here that the NITU applies to the portion of the Line from milepost 1225.19 to milepost 1226.79. Following removal of the historic preservation condition on the portion of the Line from milepost 1226.79 to mileposts 1227.58 and 1227.10 in a decision served on November 19, 2018, a request for a one-year extension of the consummation deadline over that portion of the Line was granted. BNSF Ry.—Aban. Exemption—in Flathead Cty., Mont., AB 6 (Sub-No. 495X) (STB served July 12, 2019).

Procedures, 4 I.C.C.2d 152, 157-58 (1987); see also Birt v. STB, 90 F.3d 580, 588-90 (D.C. Cir. 1996); Grantwood Vill. v. Mo. Pac. R.R., 95 F.3d 654, 659 (8th Cir. 1996). Accordingly, because these requirements have been met, the NITU negotiating period will be extended for an additional year, to February 10, 2021.

On December 4, 2019, the Board issued a final rule in Limiting Extensions of Trail Use Negotiating Periods, Docket No. EP 749 (Sub-No. 1) et al., modifying the Board's regulations regarding the number and duration of, and standard for granting, extensions of the NITU negotiating period (as well as the duration of the initial NITU negotiating period). Those changes became effective on February 2, 2020. The City and BNSF should note that the changes adopted in the final rule will apply to all future extension requests in this proceeding. In particular, any further extension requests must be for one-year periods pursuant to 49 C.F.R. § 1152.29(d)(1)(ii). Additionally, because this is the third one-year extension of the NITU, further extensions may be granted only if extraordinary circumstances are shown. See Limiting Extensions of Trail Use Negotiating Periods, EP 749 (Sub-No. 1) et al., slip op. at 11 (STB served Dec. 4, 2019) (for NITUs in effect at the time the rule becomes effective, "a showing of extraordinary circumstances will be required for any request that would extend the interim trail use/railbanking negotiating period to a date after the four-year anniversary of the issuance" of the NITU).

It is ordered:

1. The City's request for an extension of the NITU negotiating period is granted; the NITU negotiating period is extended until February 10, 2021.
2. This decision is effective on its service date.

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