

304930

BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS
2401 PENNSYLVANIA AVENUE, NW
SUITE 300
WASHINGTON, DC 20037

TELEPHONE: (202) 663-7820
FACSIMILE: (202) 663-7849

ENTERED
Office of Proceedings
July 6, 2022
Part of
Public Record

CRYSTAL M. ZORBAUGH

(202) 663-7831 (Direct Dial)
E-Mail: czorbaugh@bakerandmiller.com

July 6, 2022

BY E-FILING

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: Red River Valley & Western Railroad Company – Abandonment
Exemption –Cass County, North Dakota, AB-391 (Sub-No. 11x)

**Notice of Consummation of Abandonment & Transfer of
Responsibility for Complying with Salvaging Conditions Resulting
from Consultation with the North Dakota Public Service Commission**

Dear Ms. Brown:

On April 20, 2022, Red River Valley & Western Railroad Company (“RRVW”) filed a verified notice of exemption under 49 C.F.R. part 1152 subpart F – Exempt Abandonments (“Notice”) to abandon an approximately 2.29-mile rail line extending from milepost 9.36 to milepost 11.65 (at Horace, N.D.) in Cass County, N.D. (the “Line”). The Notice was served and published in the Federal Register on May 10, 2022 (87 Fed. Reg. 28,097). The exemption became effective on June 9, 2022. As explained herein, the purpose of this Notice of Consummation of Abandonment & Transfer of Responsibility for Complying with Salvaging Conditions Resulting from Consultation with the North Dakota Public Service Commission is for RRVW to consummate the abandonment authority it was granted, while simultaneously ensuring that certain concerns raised by the North Dakota Public Service Commission are resolved and that the processes for remedying those concerns are agreed upon by the parties and memorialized in this filing with the Board.

As indicated in the Notice, RRVW filed for abandonment authority¹ at the request of the Metro Flood Diversion Authority (“MFDA”) to accommodate an important public project, which

¹ RRVW’s abandonment differs from a typical abandonment: when RRVW acquired the tracks, physical assets, and common carrier obligation for the Line and various other rail lines as part of

Cynthia T. Brown
July 6, 2022
Page 2

involves MFDA acquiring the railroad right-of-way and constructing a large drainage ditch facility at approximately milepost 11 (“Drainage Facility”).² The drainage ditch facility is critically important to address flooding issues facing the immediate region. For MFDA to undertake this important public project, it had to engage in a series of related transactions. These transactions include (1) getting RRVW to agree to cease operations over the Line, (2) relocating the Line’s sole shipper, and (3) negotiating with BNSF to acquire its real property interest. While MFDA is acquiring the entirety of the Line, the entirety of the Line is not necessary for the construction of the Drainage Facility, as such, MFDA envisions using the excess land it purchases from BNSF, if MFDA is able to acquire the BNSF excess land in full as further described herein, and the rail bridge (“Bridge”) it is acquiring from RRVW to establish a public trail over the corridor, however, the MFDA recognizes and acknowledges that the statutory process may not allow for the construction of public trail over the corridor.

In response to its Notice, RRVW received a letter from the North Dakota Public Service Commission on April 22, 2022, stating that the agency had several concerns about the abandonment. These concerns generally fell into two buckets: (1) concerns about compliance with *North Dakota Century Code (N.D.C.C.) Chapter 49-09 Acquiring and Transferring Utility Property* (relating to land sale prioritization of abandoned railroad corridors) and (2) concerns about salvaging and compliance with *N.D.C.C. Chapter 49-09*, which requires a railroad to remove and clear all rail, ties, materials, supplies, and debris from the railway line and *N.D.C.C. Chapter 49-11 Railroad Bridges, Crossings, Intersections, and Fences*, which requires a railroad to restore every stream of water, watercourse, street, highway, or canal across, along, or upon which such railroad may be constructed to its former state or such condition that its usefulness shall not be materially impaired.

the acquisition of 656 miles of rail line from BNSF in 1987, BNSF retained the real estate underlying the Line. See Red River Valley and W. R.R. Co.; Acquisition and Operation Exemption; Certain Lines of Burlington N. R.R. Co., FD 31071 (S.T.B. served July 22, 1987). Thus, because of the 1987 transaction, the rights for the rail line (the combined bundle of sticks, which included the common carrier obligation and real property rights), were separated into two separate and distinct rights. Post-transaction, RRVW owned the common carrier obligation and bore the responsibility under 49 U.S.C. § 10903 to seek Board authority to permanently cease operations over the Line, and BNSF owned the real property underlying the Line.

² The abandonment, which has been requested by the MFDA, is being sought to allow MFDA to move forward with a project developed by the U.S. Army Corps of Engineers and the Diversion Board Authority, which is necessary for flood control purposes. Metro Flood Diversion Authority, <https://fmdiversion.gov/about-the-project/>, accessed March 9, 2022.

Cynthia T. Brown
July 6, 2022
Page 3

On May 13, 2022, in Decision ID 51217, the Surface Transportation Board's Office of Environmental Analysis ("OEA") issued its preliminary Environmental Assessment,³ which recommended that the Board impose two conditions: Section 106 Condition to ensure compliance with the National Historic Preservation Act, 54 U.S.C. § 306108⁴ and a self-executing condition that RRVW consults with the North Dakota Public Service Commission to determine any compliance requirements related to the potential sale or transfer of the real property and the extent of salvage.

RRVW began consultation with the North Dakota Public Service Commission in early May 2022, formally responded to the North Dakota Public Service Commission's letter on May 27, 2022, and helped the North Dakota Public Service Commission facilitate a multi-party call with representatives of RRVW, BNSF, MFDA, the North Dakota Public Service Commission, and the Surface Transportation Board on June 6.

The June 6 call resolved the North Dakota Public Service Commission's concerns about RRVW abandonment. To summarize the developments and representations made by the parties on the June 6 call:

- RRVW confirmed it intends to remove and properly dispose of physical infrastructure comprising the Line such as track, ties, etc. RRVW also confirmed that it is working with local roadway authorities on the closing of and paving over impacted crossings. RRVW stated it planned to sell the Bridge and the Line's ballast in place to MFDA to be used in the possible establishment of a trail after BNSF complies with *North Dakota Century Code (N.D.C.C.) Chapter 49-09 Acquiring and Transferring Utility Property* (relating to land sale prioritization of abandoned railroad corridors).
- BNSF confirmed it intended to comply with the state statute above related to the land sale of prior abandoned railroad corridors.
- MFDA confirmed that it would accept full legal and financial responsibility for salvage of the sole Bridge and removal of the ballast should establishing a trail later be determined not possible because adjacent landowners acquired parcels that were essential to establishing the trail under *North Dakota Century Code (N.D.C.C.) Chapter 49-09 Acquiring and Transferring Utility Property*.

³ OEA affirmed its recommended conditions in its Final EA issued June 3, 2022 (Decision ID 51218), and the Board via a Director's Condition imposed the conditions in Decision ID 51248 on June 8, 2022.

⁴ RRVW provided the Board with a copy of a letter dated May 17, 2022, from the State Historical Society of North Dakota confirming that "No Historic Properties [were] Affected." On June 14, 2022, OEA recommended that the Section 106 condition be removed. Accordingly, the Board removed the Section 106 condition in a decision served July 5, 2022.

Cynthia T. Brown

July 6, 2022

Page 4

- RRVW, MFDA, and the North Dakota Public Service Commission agreed to file this document with the Board memorializing RRVW's and MFDA's agreed resolution of the North Dakota Public Service Commission's concerns.

Under existing precedent, a condition imposed under the National Environmental Policy Act ("NEPA") that is related to salvage activities is not a regulatory barrier to the consummation of abandonment authority.⁵ As explained by the Board in its Consummation Decision and OEA's Decision 51218 (noting that consultation with the North Dakota Public Service Commission involves a self-executing condition), "a notice of consummation may be filed prior to satisfying ... salvage condition[s];" however, "filing a notice of consummation in that situation does not remove the condition, which must still be satisfied if and when salvage activities are conducted." *Id.* Moreover, when the consummation of a line subject to NEPA conditions is sold prior to the owner satisfying the salvaging conditions imposed, the successor interest must show that it agrees to abide by the salvage conditions.

Because MFDA will acquire the Line prior to salvage of the sole Bridge and ballast, MFDA hereby confirms that it will abide by and comply with the provisions of *N.D.C.C. Chapter 49-11 Railroad Bridges, Crossings, Intersections, and Fences* should it be determined that establishment of a trail not be possible.

By signing in the space below, RRVW and MFDA agree that effective the filing of this Notice of Consummation of Abandonment & Transfer of Responsibility for Complying with Salvaging Conditions Resulting from Consultation with the North Dakota Public Service Commission, MFDA will be solely responsible for any liabilities or obligations arising from the salvage of the Line's ballast and the Bridge or failure to properly perform such salvage.

By: 	By: 
Printed Name: Victor Meyers	Printed Name: Joel Paulsen
Title: President	Title: Executive Director
Company: Red River Valley & Western Railroad Company	Company: Metro Flood Diversion Authority
Address: P.O. Box 608, Wahpeton, ND 58074-0608	Address: 4784 Amber Valley Parkway South, Suite 100, Fargo, ND 58104
Executed this <u>6th</u> day of July 2022	Executed this <u>6th</u> day of July 2022

⁵ See Consummation of Rail Line Abandonments that are Subject to Historic Preservation and Other Environmental Conditions, EP 678, FN 1 (April 23, 2008) ("Consummation Decision"), discussing Santa Clara Valley Transportation Authority – Abandonment Exemption—In Santa Clara and Alameda Counties, CA, AB-980X (Consummation Notice filed on May 8, 2007).

Cynthia T. Brown

July 6, 2022

Page 5

Lastly, RRVW hereby consummates its abandonment authority and transfers its interest in the Line to MFDA. RRVW hereby notifies the Board that in accordance with the provisions of 49 C.F.R. § 1152.29(e)(2) and the Board's May 10, 2022, June 8, 2022, and July 5, 2022 Decisions, RRVW has exercised the authority granted and fully abandoned the Line. Responsibility for complying with the salvage discussed above is hereby transferred from RRVW to MFDA as of the filing of this notice.

Should you have any questions concerning this Notice of Consummation & Transfer of Responsibility for Complying with Salvaging Conditions, please contact the undersigned counsel for RRVW.

Sincerely,



Crystal M. Zorbaugh
Counsel for Red River Valley & Western Railroad
Company

cc: Parties of Record
Victor Meyers (RRVW)
Joel Paulsen (MFDA)
Konrad Crockford, Public Service Commission State of North Dakota
North Dakota Department of Transportation