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SERVICE DATE – FEBRUARY 24, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 541 (Sub No. 3X)

PORTLAND & WESTERN RAILROAD, INC.—ABANDONMENT EXEMPTION—
IN WASHINGTON COUNTY, OR.

Decided: February 24, 2023

On January 6, 2023, Portland & Western Railroad, Inc. (PNWR), filed a verified notice of exemption under 49 C.F.R. part 1152 subpart F—Exempt Abandonments to abandon the rail line extending between milepost 10.28 in Forest Grove, Or., and milepost 4.68 in Hillsboro, Or. (the Line).¹ Notice of the exemption was served and published in the Federal Register on January 26, 2023 (88 Fed. Reg. 5060). The exemption is scheduled to become effective on February 25, 2023.²

The Board’s Office of Environmental Analysis (OEA) served a Draft Environmental Assessment (Draft EA) on January 31, 2023. OEA recommended that three conditions be imposed on any decision granting abandonment authority.

First, OEA stated that the U.S. Army Corps of Engineers Portland District (the Corps) commented that, if there is any discharge of fill material into waters of the United States or adjacent wetlands, ditches, swales, creeks, or rivers, then a U.S. Army Corps of Engineers permit, pursuant to Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899, may be necessary. To ensure appropriate consideration of these potential permit requirements, OEA recommended that PNWR be required to consult with the Corps prior to beginning any abandonment-related salvage activities that could result in the discharge of fill material into waters of the United States and comply with any reasonable requirements for obtaining a permit if the Corps determines that such a permit is necessary.

¹ PNWR supplemented its verified notice on January 20, 2023.

² On January 26, 2023, the National Association of Reversionary Property Owners (NARPO) filed a comment in which it claims that PNWR should have sought discontinuance authority because PNWR owns only a freight rail easement over the Line, and that the State of Oregon (Oregon), which NARPO claims “owns the rail line,” would need abandonment authority should it wish to abandon the Line in the future. However, according to the verified notice, Oregon owns only the underlying property, (see Verified Notice 2), and the Board has “never held that passive ownership of underlying real estate confers a common carrier obligation.” Ga. Cent. Ry.—Aban. Exemption—in Chatham Cnty., Ga., AB 367 (Sub No. 2X), slip op. at 2 n.3 (STB served Sept. 17, 1997).

Second, OEA stated that, because it had not heard from the Oregon State Historic Preservation Office (SHPO) in response to PNWR's Revised Environmental and Historic Report, OEA had not been able to consider the SHPO's opinion before determining if the Line may be potentially eligible for listing in the National Register of Historic Places (the National Register). Accordingly, OEA recommended a condition requiring that PNWR 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 project right-of way eligible for listing or listed in the National Register until completion of the Section 106 process.

Third, OEA stated that the Oregon Department of Environmental Quality (ODEQ) informed OEA via telephone that ODEQ permitting may be required. Therefore, OEA recommended that any decision granting abandonment authority be conditioned to include consultation with ODEQ to confirm whether permitting is necessary.³

OEA issued its Final Environmental Assessment (Final EA) on February 21, 2023, indicating that new comments were received. OEA states that, on January 31, 2023, PNWR filed a letter enclosing an email from the SHPO stating that the project may proceed if the SHPO did not respond within 30 calendar days. According to PNWR, no response was received from the SHPO before the response period closed on January 5, 2023. OEA further states that, following consultation with the SHPO and the public, OEA has determined that the proposed abandonment would not adversely affect historic properties listed in or eligible for listing in the National Register. Accordingly, OEA is no longer recommending that the Section 106 condition be imposed.

Lastly, OEA states that ODEQ responded via telephone that no permitting would be required. Therefore, OEA is no longer recommending a condition requiring that PNWR consult with ODEQ.

OEA continues to recommend that the condition requiring consultation with the Corps be imposed. Accordingly, the one condition recommended by OEA in the Final EA will be imposed.

This action, as conditioned, will not significantly impact the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is reopened.
2. The notice served and published in the Federal Register on January 26, 2023, exempting the abandonment of the Line described above is subject to the condition that PNWR consult with the Corps prior to beginning any abandonment-related salvage activities that could result in the discharge of fill material into waters of the United States, including wetlands,

³ This recommended consultation condition was inadvertently omitted from the enumerated conditions in the Draft EA but was included in the text. (See Draft EA 4.)

ditches, swales, creeks or rivers, and follow the Corps' reasonable requirements for obtaining a Corps permit, if the Corps determines that such a permit would be necessary.⁴

3. This decision is effective on its service date.

By the Board, Mai T. Dinh, Director, Office of Proceedings.

⁴ 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 the conditions set forth below is not required with respect to any portion of the Line covered by the interim trail use agreement for the duration of the agreement.