

SERVICE DATE – DECEMBER 11, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36501

UNION PACIFIC RAILROAD COMPANY—CONSTRUCTION AND OPERATION
EXEMPTION—IN MARICOPA COUNTY, ARIZ.

Digest:¹ The Board directs Union Pacific Railroad Company (UP) to provide documents and information relating to ground disturbances that occurred within designated archaeological sites within the proposed right-of-way for a construction project in Maricopa County, Mesa, Ariz. The Board also enters a related protective order. The Board further sets a briefing schedule for submissions on the issue of whether UP has engaged in “anticipatory demolition” of historic properties in violation of Section 110(k) of the National Historic Preservation Act.

Decided: December 11, 2023

On June 30, 2022, Union Pacific Railroad Company (UP) filed a petition under 49 U.S.C. § 10502 for exemption from the prior approval requirements of 49 U.S.C. § 10901 to construct and operate approximately six miles of rail line in connection with its Pecos Industrial Rail Access and Train Extension Project (the PIRATE project or the project) in southeast Maricopa County, Mesa, Ariz. (the Line). (Pet. 2.) The Line would connect the existing Pecos Advanced Manufacturing Zone (PAMZ) to the UP main line just west of the project area, running six miles through the PAMZ with a terminus at the border between Maricopa County and Pinal County, Ariz. (*Id.*) According to UP, the PIRATE project, a public/private initiative to fund, engineer, design, and construct the Line, would provide a variety of public benefits by shifting the transportation of materials from public roadways to rail and fostering local economic growth. (*Id.* at 3-4.) The petition stated that UP was working with the Board’s Office of Environmental Analysis (OEA) and Jacobs Engineering Group Inc. (Jacobs), OEA’s independent third-party contractor, on an Environmental Assessment (EA) under the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370m-11 (NEPA), Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108 (NHPA), and related environmental laws, and requested a decision granting the exemption expeditiously upon completion of the environmental review. (Pet. 5-6.) A Draft EA was issued for public review and comment on May 31, 2023, and the comment period closed on June 30, 2023.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

As described below, in connection with the preparation of a Final EA, it was discovered that there had been significant ground disturbance and damage to National Register of Historic Places (National Register)-eligible archaeological resources within the proposed right-of-way and within the Area of Potential Effects (APE).² The Board is taking the steps described in this decision to obtain additional information about this damage, the surrounding circumstances, and whether UP engaged in anticipatory demolition of historic properties in violation of Section 110(k) of NHPA.³

BACKGROUND

As part of the EA process, OEA formally began a historic review under Section 106 of NHPA on April 6, 2022, when OEA distributed initial consultation letters to a group of potential consulting parties inviting them to participate in Section 106 consultation and soliciting comments regarding the proposed APE for cultural resources.⁴ Draft EA 5-4 & App. K (Section 106 Consultation Documentation). In May 2022, OEA distributed an informational memorandum to the Section 106 consulting parties that outlined the field and reporting methods to be employed during the cultural resources survey of the APE. Draft EA 5-4 & App. K. On September 1, 2022, UP was notified that a number of previously identified significant archaeological sites within the project's APE remained eligible for listing in the National Register, and that the proposed undertaking would have an adverse effect on historic resources. (See Jacobs Technical Memorandum, Initial Archaeological Site Damage Summary at 3 (Aug. 14, 2023) (Jacobs Technical Memorandum) (Env't Comment EO-3827).)

By decision served September 28, 2022, the Board instituted a proceeding under 49 U.S.C. § 10502(b). The environmental and historic review process continued. As pertinent here, on January 26, 2023, at a Section 106 consulting parties meeting, UP requested that

² Under 36 C.F.R. § 800.16(d) of the regulations implementing NHPA, the APE is defined as “the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist.”

³ Section 110(k) of NHPA, entitled “Anticipatory demolition,” states that each federal agency “shall ensure that the agency will not grant a loan, loan guarantee, permit, license, or other assistance to an applicant that, with intent to avoid the requirements of [Section 106 of NHPA], has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed the significant adverse effect to occur, unless the agency, after consultation with the [Advisory Council on Historic Preservation], determines that circumstances justify granting the assistance despite the adverse effect created or permitted by the applicant.” 54 U.S.C. § 306113.

⁴ Section 106 of NHPA requires federal agencies to take into account the effects of their actions on historic properties (those listed or eligible for listing in the National Register). Consulting parties include the individuals and entities specified in 36 C.F.R. § 800.2(c)(1)-(4) and may also include other individuals and organizations with a demonstrated interest in the project “due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties.” 36 C.F.R. § 800.2(c)(5).

construction be allowed to proceed outside the limits of certain specified National Register-eligible archaeological sites prior to issuance of the Board's final decision, which OEA denied. (See G. Lugnow (Jacobs) email to K. Rice (UP) and attached materials from the January 26, 2023 meeting, pdf pages 1, 4, 22, 31 (Feb. 10, 2023) (Env't Comment EO-3854).) On May 31, 2023, OEA issued a Draft EA that addressed potential environmental and historic impacts for public review and comment.⁵ The comment period for the Draft EA closed on June 30, 2023.

On July 28, 2023, OEA learned that there had been significant ground disturbance and damage to National Register-eligible archaeological resources in the APE. (See Letter from D. Gosselin (Director, OEA) to K. Rice (Sr. Manager M/W Environmental, UP) at 1 (Aug. 1, 2023) (Env't Comment EO-3825) (noting that OEA made this discovery during analysis of current aerial photography of the project area).)⁶ The August 1 letter noted that OEA had also identified additional locations on UP property where the APE may have been disturbed, and directed UP to take immediate steps to ensure that any current construction activities cease and to secure the right-of-way to prevent further damage. (Id. at 2.) UP complied with the directive and erected protective fencing and signage along the right-of-way, added security patrols in the area, and oversaw the removal of equipment, vehicles, and construction materials (owned by adjacent property owners) from UP's property.

On August 22, 2023, the Tribal Historic Preservation Officer of the Tohono O'odham Nation requested that the EA process be put on hold until a damage assessment report is completed, and potential mitigation to address the damage and any related legal issues are resolved. (See email from P. Steere to A. Tabachnick (Federal Preservation Officer, STB) (Aug. 22, 2023) (Env't Comment EI-33048).) Other affected Tribes made similar requests at OEA's meetings in the project area.⁷ Among the issues raised were concerns as to whether a

⁵ The Draft EA explained that, if the Board authorizes the PIRATE project, treatment measures to mitigate the project's adverse effects on cultural resources would be included in the project's Memorandum of Agreement (MOA) and historic properties treatment plan (HPTP), which OEA was drafting in consultation with the Arizona State Historic Preservation Officer (SHPO), Native American Tribes, and other federal, state, and local agencies; that UP had submitted voluntary mitigation agreeing to comply with the requirements of the MOA and HPTP; and that "OEA is recommending that the Board impose this condition in any decision authorizing construction and operation of PIRATE." Draft EA § 3.12.3 at 3-88 to 3-89.

⁶ OEA conducted emergency meetings with UP and Jacobs on July 28 and again on July 31. At the July 28 meeting, UP stated that it had no knowledge of the disturbance within the APE. (See Letter from D. Gosselin to K. Leonard (Ariz. SHPO) at 3 (Sept. 13, 2023) (Env't Comment EO-3833).)

⁷ Since learning of the ground disturbance and related damage to archaeological resources, OEA has been actively engaged in outreach with stakeholders, including affected Tribes and staff from the SHPO, to apprise them of information learned to date and measures OEA directed UP to take to prevent any further damage, and to initiate dialogue regarding a path forward. See Docket No. FD 36501, Environmental Comments section. UP complied with OEA's directions and took action to prevent further damage, including putting up fencing and signage and instituting security patrols.

violation of Section 110(k) of NHPA had occurred. On August 31, 2023, following these meetings and requests, OEA issued a notice stating that issuance of the Final EA would be delayed until further notice. OEA Notice, FD 36501 (STB served Aug. 31, 2023).

Five areas of site damage on UP's property in the APE have been identified to date, including sites of great significance and sensitivity to Native American Tribes. (See Letter from D. Gosselin to K. Leonard at 3-4 (Sept. 13, 2023) (Env't Comment EO-3833).) The sites in question are:

- Damage Area 1, excavation on UP-owned property resulting in damage to approximately 8.5 acres of a National Register-eligible archaeological site within the APE. UP has represented that this excavation was done by Clayco, the general contractor for an entity known as Power Industrial Owner, LLC (Power Industrial) that is developing property in the adjacent industrial park.
- Damage Area 2, excavation and grading on UP-owned property resulting in damage to approximately 6.3 acres of a National Register-eligible archaeological site within the APE. UP has represented that this excavation and grading was done by the private developer of the adjacent Unbound Gateway/Gateway Grand industrial park.
- Damage Area 3, grading disturbance on UP-owned property resulting in damage to approximately 1.9 acres of a National Register-eligible archaeological site within the APE. UP has represented that this grading disturbance is associated with the adjacent Pecos Gateway Industrial Complex development.
- Damage Area 4, grading disturbance on UP-owned property resulting in damage to approximately 0.6 acres of a National Register-eligible archaeological site within the APE. UP has represented that this grading disturbance is associated with the adjacent Pecos Pacific development.
- Damage Area 5, disturbance of surface soil resulting in damage to approximately 0.6 acres of a National Register-eligible archaeological site within the APE. UP has represented that this disturbance was caused by Pauley Construction, the general contractor for Lumen/Century Link.

(See generally id. at 3-4.)

OEA held a meeting with the Section 106 consulting parties on October 4, 2023, to discuss OEA's next steps and, consistent with the environmental and historic review process, plans to continue to meet with the consulting parties regarding the damage that occurred.

DISCUSSION AND CONCLUSIONS

As described above, on June 30, 2022, UP filed a petition under 49 U.S.C. § 10502 for exemption from the prior approval requirements of 49 U.S.C. § 10901 to construct and operate this approximately 6.0-mile rail line in Maricopa County, Ariz. Before making its decision on

whether to grant such an exemption, the Board must consider the potential environmental and historic impacts of the construction and operation of UP's proposed rail line, pursuant to NEPA, Section 106 of NHPA, the Board's environmental rules at 49 C.F.R. part 1105, and related environmental laws.

That environmental and historic review process was ongoing when, on July 28, 2023, OEA learned that there had been significant ground disturbance and damage to National Register-eligible archaeological resources in the APE, including within the proposed right-of-way. These activities should not have taken place, where the environmental and historic review process is not complete and the Board has not issued any decision granting, with whatever environmental mitigation conditions may be warranted, or denying authorization for construction and operation of the proposed rail line. The Board's regulations make clear that rail construction projects are subject to the requirements of NEPA and NHPA,⁸ and that federal agencies may not authorize a project until the required environmental and historic review process is completed.⁹ Accordingly, the Board is taking the steps detailed below to enable it to understand more fully what transpired, and to evaluate whether further action by the Board is necessary.¹⁰

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First, the Board will require UP to provide documents and information to (i) supplement the preliminary information UP has provided to OEA to date about the incidents in question¹¹ and (ii) illuminate UP's practices and procedures to comply with environmental and historic review requirements. In connection with this information request, the Board will enter the Protective Order in Appendix 1 of this decision to govern the treatment of any information designated as confidential. UP will be directed to file the documents and information specified in Appendix 2 of this decision, in accordance with the requirements specified in the Protective

⁸ See 49 C.F.R. §§ 1105.6(a), (d) & 1105.8(a).

⁹ See Oglala Sioux Tribe v. U.S. Nuclear Regul. Comm'n, 896 F.3d 520, 523 (D.C. Cir. 2018) (stating that NEPA "obligates every federal agency" to perform the necessary environmental review "*before* taking any major action"); Mid States Coal. for Progress v. STB, 345 F.3d 520, 544 (8th Cir. 2003) (explaining that NHPA issues must "be resolved by the time that the license is issued").

¹⁰ The Board also has broad authority to address issues that arise in proposed rail constructions and ensure general compliance with the Interstate Commerce Act, as amended. See, e.g., 49 U.S.C. §§ 10901, 11701, 11901.

¹¹ That preliminary information includes (1) a matrix identifying agreements between UP and third parties permitted to conduct ground-disturbing activity on UP-owned land within the APE; (2) the agreements that do not include confidentiality provisions; (3) a document titled "Union Pacific Railroad – PIRATE Project Transaction Summary – Retention Basin Construction" (Transaction Summary); and (4) various communications UP had with adjacent landowners shortly after OEA's discovery of the ground disturbances, including UP requests that no work should occur on UP's right-of-way. Items 1 through 3 and some information pertaining to Item 4 were provided on August 28, 2023. (See email and attached files from UP to OEA (Aug. 28, 2023) (Env't Comments EI-33130).) Additional information relating to Item 4 was attached to an earlier letter. (See UP Letter to OEA (Aug. 14, 2023) (Env't Comments EI-33039).)

Order, by January 25, 2024. UP will also be directed to preserve all physical and electronic records, including all correspondence, related to the matters addressed in this decision and the accompanying information and document requests.

Second, the Board sets the following schedule for submissions addressing whether UP has engaged in “anticipatory demolition” of historic properties in violation of Section 110(k) of NHPA, and on whether the Board should take any further action. Opening submissions will be due by March 11, 2024. Replies to opening submissions will be due by April 9, 2024.

It is ordered:

1. The protective order in Appendix 1 of this decision is entered and shall govern the treatment of any information designated as confidential in this proceeding.
2. UP is directed to file the information and documents specified in Appendix 2 of this decision by January 25, 2024.
3. UP is directed to preserve all physical and electronic records, including all correspondence, related to the matters addressed in this decision and the accompanying information and document requests.
4. The Board invites submissions from UP and interested parties, including all Section 106 consulting parties, in this proceeding on the issues discussed above. Submissions are due by March 11, 2024; replies are due by April 9, 2024.
5. This decision is effective on its date of service.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.

APPENDIX 1

PROTECTIVE ORDER

1. For purposes of this Protective Order:
 - a. “Confidential material” means information, data, documents or other material (hereinafter collectively referred to as “material”) designated as “CONFIDENTIAL,” and any material derived therefrom.
 - b. “Highly Confidential material” means material designated as “HIGHLY CONFIDENTIAL,” and any material derived therefrom.
 - c. “Proceeding” means the proceedings in STB Finance Docket No. 36501, Union Pacific Railroad—Construction & Operation Exemption—in Maricopa County, Ariz., and any judicial review proceeding arising therefrom.
2. Any party submitting material in pleadings or otherwise in this Proceeding that the party believes in good faith reveals confidential information may designate such material as “CONFIDENTIAL” in accordance with paragraph 4.
3. Any party submitting material in pleadings or otherwise in this Proceeding that the party believes in good faith reveals shipper-specific or railroad-specific rate, cost, quantity, routing, or other competitively sensitive or proprietary information may designate such material as “HIGHLY CONFIDENTIAL” in accordance with paragraph 4.
4. The designation of material as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” shall be made as follows:
 - a. For pleadings and other submissions, by imprinting the word(s) “Confidential” or “Highly Confidential” on the cover page of the submission.
 - b. For documents and other materials, by imprinting the word(s) “Confidential” or “Highly Confidential” on the face of each page of a document so designated or in a similarly conspicuous location for non-document materials.
 - c. For depositions, by indicating on the record at the deposition or upon review of the deposition transcript which portions of the transcript and/or responses should be treated as “Confidential” or “Highly Confidential.”
 - d. For electronically stored material, either by imprinting the word(s) “Confidential” or “Highly Confidential” on any disk or storage medium, including the word(s) “Confidential” or “Highly Confidential” in the file name of a document so designated; or imprinting the word(s) “Confidential” or “Highly Confidential” on the face of each page of a document so designated.

5. Confidential material may not be disclosed in any way, directly or indirectly, to any person or entity, except to an employee, counsel, consultant, or agent of a party to this Proceeding, or an employee of such counsel, consultant, or agent, who, before receiving access to such material, has received and read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking in the form set forth in the attached Undertaking for Confidential Material.
6. Highly Confidential material may not be disclosed in any way, directly or indirectly, to any employee of a party to this Proceeding, or to any other person or entity, except to an outside counsel or outside consultant of a party, who, before receiving access to such material, has received and read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking in the form set forth in the attached Undertaking for Highly Confidential Material.
7. Confidential material and Highly Confidential material shall be used solely for the purposes of this Proceeding, and not for any other business, commercial, operational, or competitive purposes.
8. In the event a party submits or serves material which should have been designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” and inadvertently fails to designate the material as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL,” that party may notify the Board and the other parties in writing within 10 days of discovery of its inadvertent failure to make the confidentiality designation and promptly furnish properly designated material. A party that received the material without the confidentiality designation must return the non-designated material or destroy it, as directed by the submitting party, or take such other steps as the parties agree to in writing, and must make all reasonable efforts to recover such material from any non-parties to which it may have been disclosed, and any copies made by such non-parties.
9. In the event a party inadvertently submits or serves material that is protected by the attorney-client privilege, work product doctrine, or any other privilege, that party may make a written request within a reasonable time after it discovers the inadvertent disclosure that another party return the inadvertently submitted material. A party that received the inadvertently produced material must either return the material or destroy it immediately upon receipt of the written request, as directed by the producing party. By returning or destroying the material, the receiving party is not conceding that the material is privileged and is not waiving its right to later challenge the substantive privilege claim, provided that it may not challenge the privilege claim by arguing that the inadvertent production waived the privilege.
10. Submissions to the Board that include material designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” should be made in a separate package clearly marked on the outside as “Confidential Materials Subject to Protective Order.” When confidential material is filed, redacted versions must also be filed. See 49 C.F.R. § 1104.14(a).

11. To the extent that material reflecting the terms of contracts, shipper-specific traffic data, other traffic data, or other proprietary information is produced or otherwise disclosed by a party in this Proceeding and is held and used by the receiving person in compliance with this Protective Order, such production, disclosure, and use of the material and of the data the material contains shall be deemed essential for the disposition of this and any related proceedings and shall not be deemed a violation of 49 U.S.C. §§ 11323, 11904, or any other relevant provision of the ICC Termination Act of 1995.
12. If any party intends to use Confidential material or Highly Confidential material at a Board hearing or mediation in this Proceeding, or in any judicial review proceeding arising herefrom, that party shall submit any proposed exhibits or other documents setting forth or revealing such Confidential or Highly Confidential material to the Board, the mediator, or the court, as appropriate, with a written request that the Board, the mediator, or the court: (a) restrict attendance at the hearings or mediation sessions during discussion of such Confidential material or Highly Confidential material; and (b) restrict access to the portion of the record or briefs reflecting discussion of such Confidential material or Highly Confidential material in accordance with the terms of this Protective Order.
13. If any party intends to use Confidential material or Highly Confidential material in the course of any deposition in this Proceeding, that party shall so advise counsel for the party producing the materials, counsel for the deponent, and all other counsel attending the deposition, and all portions of the deposition at which any such Confidential material or Highly Confidential material is used shall be restricted to persons who may review the material under this Protective Order. All portions of deposition transcripts and/or exhibits that consist of or disclose Confidential material or Highly Confidential material shall be kept under seal and treated as Confidential material or Highly Confidential material in accordance with the terms of this Protective Order.
14. Except for this Proceeding, the parties agree that if a party is required by law or order of a governmental or judicial body to release “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material or copies or notes thereof as to which it obtained access pursuant to this Protective Order, the party so required shall notify the producing party in writing within three business days of the determination that such material is to be released, or within three business days prior to such release, whichever is soonest, to permit the producing party the opportunity to contest the release.
15. Material that is publicly available or obtained outside of this proceeding from a person with a right to disclose it publicly shall not be subject to this Protective Order even if the same information is produced and designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in this Proceeding.
16. A “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” designation may be removed by consent of the party who asserts the confidential, proprietary, or commercially sensitive interest, or absent such consent, by appropriate decision of the Board upon application of a party seeking to remove such designation.

17. Each party has a right to view its own material (i.e., material originally generated or compiled by or for that party, or if generated or compiled by another party, the material was disclosed by the producing party in the ordinary course of business to the other party), even if that material has been designated as “HIGHLY CONFIDENTIAL” by a producing party, without securing prior permission from the producing Party.
18. If a party (the “submitting party”) files and serves upon other parties (the “reviewing parties”) a pleading or other item containing “HIGHLY CONFIDENTIAL” material of the submitting party, the submitting party shall also contemporaneously provide to outside counsel for the reviewing parties a “CONFIDENTIAL” version of such material that redacts any “HIGHLY CONFIDENTIAL” information of the submitting party that cannot be reviewed by the in-house personnel of the reviewing parties. Such “CONFIDENTIAL” version may be provided in a pdf or other electronic format.
19. Any Confidential material or Highly Confidential material received by a party that is not the party’s own material, and any material derived therefrom, must be destroyed by the receiving party, its employees, counsel, and agents at the completion of this Proceeding, except that (a) outside counsel and consultants for each party may retain file copies of all pleadings and evidence filed with the Board; and (b) in-house counsel for each party may retain file copies of all pleadings and evidence that they were authorized to review under this Protective Order.
20. Any party filing with the Board a pleading or other item containing “HIGHLY CONFIDENTIAL” material must simultaneously submit (i) a “CONFIDENTIAL” version that redacts the material designated as “HIGHLY CONFIDENTIAL,” and (ii) a public version that redacts both the “CONFIDENTIAL” and “HIGHLY CONFIDENTIAL” material.
21. Any party filing with the Board a pleading or other item containing “CONFIDENTIAL” material must simultaneously submit a public version that redacts the “CONFIDENTIAL” material.

UNDERTAKING

CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served on _____, 2023, governing the production of confidential material in STB Docket No. FD 36501, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any information, data, documents or other material (collectively, “material”) obtained under this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such material, for any purposes other than the preparation and presentation of evidence and argument in STB Docket No. FD 36501 or any judicial review proceeding arising herefrom. I further agree not to disclose any material obtained under this Protective Order to any person who has not executed an Undertaking in the form hereof. At the conclusion of this proceeding and any judicial review proceeding arising herefrom, I will promptly destroy any copies of such designated material obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that counsel may retain copies of pleadings and evidence that they were authorized to review under the Protective Order.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential material shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Signed: _____

Dated: _____

UNDERTAKING

HIGHLY CONFIDENTIAL MATERIAL

As outside [counsel] [consultant] for _____, for which I am acting in this proceeding, I have read the Protective Order served on _____, 2023, governing the production of confidential material in STB Docket No. FD 36501, understand the same, and agree to be bound by its terms. I further agree not to disclose any information, data, documents or other material (collectively, "material") designated "HIGHLY CONFIDENTIAL" to any person or entity who: (i) is not eligible for access to "HIGHLY CONFIDENTIAL" material under the terms of the Protective Order, or (ii) has not executed a "HIGHLY CONFIDENTIAL" undertaking in the form hereof. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any material designated "HIGHLY CONFIDENTIAL," that I will limit my use of that material and the information contained therein to this proceeding and any judicial review proceeding arising herefrom, that I will take all necessary steps to assure that said material will be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said material by personnel of my client, its subsidiaries, affiliates, or owners, and that at the conclusion of this proceeding and any judicial review proceeding arising herefrom, I will promptly destroy any copies of such designated material obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel and consultants may retain file copies of pleadings and evidence filed with the Board. I further understand that I must destroy all notes or other material containing such highly confidential information in compliance with the terms of the Protective Order. Under no circumstances will I permit access to material designated "HIGHLY CONFIDENTIAL" by, or disclose any information contained therein to, any persons or entities for which I am not acting in this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential material shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Signed: _____

OUTSIDE [COUNSEL] [CONSULTANT]

Dated: _____

APPENDIX 2

Pursuant to 49 U.S.C. §§ 1321(b) and 11145(a), UP is directed to submit the following documents¹² and information.

Instructions and Definitions

The term “including” is all-encompassing and means “including without limitation.”

Terms defined in the body of the decision shall have the same meaning in these requests.

Requests referring to third parties (whether specific or general) include representatives, agents, and affiliates acting on their behalf, including the general contractors that performed on-site excavation, grading, and/or removal work.

Requests referring to UP personnel include agents or contractors acting on UP’s behalf.

Requests for documents that “reflect or refer to communications” include both communications between UP personnel and third parties and communications among UP personnel.

Unless otherwise specified, provide responsive documents and information for the time period from April 1, 2021, to the present.

If any responsive documents are withheld under a claim of attorney-client, work product, or other privilege or immunity, UP shall submit a log that, for each such document, (a) identifies (i) the privilege or immunity invoked; (ii) the date of the document; and (iii) the author(s), sender(s), and recipient(s) of the document; and (b) describes the nature, purpose, and contents of the document with sufficient specificity to demonstrate that the privilege or immunity was properly invoked.

All information provided in response to these requests shall be provided under oath.

UP shall also provide an affidavit affirming that a reasonable search was made to locate all documents and information requested. The affidavit shall also certify whether the production is complete in accordance with the Board’s request.

¹² Document pages must be numbered and an index must be provided that includes a description/title of each document. Documents must be provided in native format (e.g., Microsoft Word, Microsoft PowerPoint, Microsoft Excel, etc.) to the maximum extent practicable. To the extent production in native format is not practicable, documents must be provided in a searchable format with optical character recognition applied to all Portable Document Format (“PDF”) files.

Information Requests

1. (a) Identify the UP personnel involved in the environmental and historic review process in this proceeding, including personnel responsible for coordination and communications between and among departments within UP and with adjacent landowners; (b) state each person's position; and (c) describe their role and responsibilities.

To the extent any UP personnel had specific responsibilities for conducting, overseeing, or ensuring compliance with Section 106 of NHPA, identify those individuals and describe their specific responsibilities.

2. Identify each third party with which UP discussed, negotiated, and/or entered into an agreement at any time allowing that party (or an agent or affiliate on its behalf) to conduct ground-disturbing activity on land within the five Damage Areas identified on page 4, supra. For each such party,

- (a) identify (i) the date the issue was first discussed with UP; (ii) the time period over which negotiations were held; and (iii) the titles and dates of any related letters of intent, agreements, and/or understandings.
- (b) identify and describe all communications, oral and written, that took place (among UP personnel and between UP and the third party) about the environmental and historic review and/or the NHPA Section 106 consultation processes for the PIRATE project, including the dates, the persons involved (by name, title, and affiliation), and the subject(s) and information discussed.
- (c) identify and describe all communications, oral and written, that took place (among UP personnel and between UP and the third party) relating to the commencement, conduct, and completion of the activity for which right of entry was sought, including the dates, persons involved (by name, title, and affiliation), and subject(s) and information discussed.
- (d) state whether notice of commencement of activities was provided to UP and identify (i) the date, (ii) the persons who provided and received the notice (by name, title, and affiliation), and (iii) how the notice was conveyed (e.g., in-person, telephonic, email, letter).

3. Identify the UP personnel (by name and title) who (i) handled on a daily basis and/or (ii) had ultimate responsibility for negotiating, authorizing, approving, and/or overseeing rights of entry and related activities by third parties on UP-owned property associated with the PIRATE project.

To the extent different UP personnel handled or had ultimate responsibility for different third parties or at different times, identify which personnel were involved for each such third party or time.

4. Identify (a) by name and position the UP personnel from the environmental and real estate departments and from the PIRATE project management team (including legal staff) who visited the PIRATE project site between December 1, 2022, and July 28, 2023; (b) the date and purpose of each visit; and (c) the specific locations visited.

5. Identify all manuals, policies, procedures, and/or guidance in effect from January 2018 to the present used to educate UP personnel and/or promote compliance with requirements and limitations imposed by NHPA to protect cultural and archaeological resources at sites subject to federal licensing requirements under 49 U.S.C. Chapter 109. For each item identified,

- (a) state (i) its full title; (ii) the date it was adopted; (iii) the time period it was or has been in effect; and (iv) the date(s) of any amendments (if applicable).
- (b) describe how UP used and disseminated the items to relevant UP personnel involved in the PIRATE project.

6. Identify the UP personnel (by name and title) who had any responsibility for and/or duties related to oversight and/or monitoring of activity on UP-owned property associated with the PIRATE project, and for each such person, describe their responsibilities and/or duties.

7. Identify and describe in detail all manuals, policies, procedures, and/or guidance in effect at UP from January 2018 to the present relating to oversight and/or monitoring of sites subject to federal licensing requirements under 49 U.S.C. Chapter 109. For each item identified,

- (a) state (i) its full title; (ii) the date it was adopted; (iii) the time period it was or has been in effect; and (iv) the date(s) of any amendments (if applicable).
- (b) describe how UP used and disseminated the item to relevant UP personnel involved in the PIRATE project.

8. Identify and describe in detail any other manuals, policies, procedures, and/or guidance in UP's possession that relate to oversight and/or monitoring of sites subject to federal licensing requirements under 49 U.S.C. Chapter 109. For each item identified,

- (a) state (i) its full title; (ii) its author; and (iii) when the item was created or obtained by UP.
- (b) describe whether and if so how UP used and disseminated the item to relevant UP personnel involved in the PIRATE project and/or other projects subject to federal licensing requirements under 49 U.S.C. Chapter 109.

Document Requests

1. All agreements identified in response to Information Request 2 between UP and any third party permitted to conduct ground-disturbing activity on UP-owned land within the APE, including the agreements listed in the matrix file submitted by UP on August 28, 2023. (See Env't Comment EI-33130, pdf pages 1-2.)¹³

¹³ UP is directed to re-file the agreements and other documents submitted to OEA on August 28, 2023, (see Env't Comment EI-33130), together with the documents and information provided pursuant to this decision.

2. The drafts of the proposed right of entry agreement exchanged between UP and Power Industrial during the negotiations referenced on page 1 of the document titled “Union Pacific Railroad – PIRATE Project: Transaction Summary – Retention Basin Construction”¹⁴ (Transaction Summary) submitted by UP on August 28, 2023. (See Env’t Comment EI-33130, pdf pages 3-5.)
3. The drafts of the Option Agreement and the Letter of Intent exchanged between UP and Unbound Phase I Property Owner, LLC (Unbound), and the final version of the Letter of Intent executed by the parties on October 14, 2022, referenced on page 2 of the Transaction Summary. (Also produce a final version of the Option Agreement, if one was executed.)
4. All Contractor Right of Entry Agreements (CROE, as described in Section E of the UP-Unbound Easement Agreement) executed in connection with the PIRATE project. If, in any instance, a CROE was not executed in connection with the ground-disturbing activity that occurred on land within the five Damage Areas identified on page 4, supra, state why.
5. All documents that reflect or refer to communications between UP personnel and Power Industrial about:
 - the terms and conditions of, and/or considerations pertinent to, Power Industrial’s ability to access and commence activity on UP-owned land within the APE.
 - activities conducted or to be conducted by Power Industrial within the APE, including the nature of these activities and the timing of, and commencement date for, the activities.
 - the environmental and historic review and/or NHPA Section 106 processes applicable to the PIRATE project, including requirements and limitations imposed by applicable laws to protect cultural resources and expected timetables for completion of the Section 106 process.
 - UP’s need or potential need for, or future use of, the drainage basin, including the contemplated “use by Railroad” referenced in the UP-Power Industrial Right of Entry Agreement (ROE Agreement), Ex. B, Section 10, that UP submitted to OEA on August 28, 2023.
 - when work in the area encompassed by Damage Area 1 commenced; when it was completed; and the precise location where the material that was excavated or removed was placed.
6. All documents that reflect or refer to communications between UP personnel and Unbound about:
 - the terms and conditions of, and/or considerations pertinent to, Unbound’s ability to access and commence activity on UP-owned land within the APE.

¹⁴ The terms “retention basin” and “drainage basin” are used interchangeably in this decision (and have been so used by UP) to refer to the excavation and related ground disturbance activity that took place in Damage Area 1 and Damage Area 2 identified on page 4, supra.

- activities conducted or to be conducted by Unbound within the APE, including the nature of these activities and the timing of, and commencement date for, the activities.
- the environmental and historic review and/or NHPA Section 106 processes applicable to the PIRATE project, including requirements and limitations imposed by applicable laws to protect cultural resources and expected timetables for completion of the Section 106 process.
- UP's need or potential need for, or future use of, the drainage basin.
- when work in the area encompassed by Damage Area 2 commenced; when it was completed; and the precise location where the material that was excavated or removed was placed.

7. All documents that reflect or refer to communications between UP personnel and other adjacent landowners to which UP granted rights of entry (including Sunbelt Land Holdings, The Cubes, and Lumen/Century Link) about:

- the terms and conditions of, and/or considerations pertinent to, their ability to access and commence activity on UP-owned land within the APE.
- activities conducted or to be conducted by them within the APE, including the nature of these activities and the timing of, and commencement date for, the activities.
- the environmental and historic review and/or NHPA Section 106 processes applicable to the PIRATE project, including requirements and limitations imposed by applicable laws and expected timetables for completion of the Section 106 process.
- UP's need or potential need for, or future use of, the work that was performed.
- when work was or would be commenced; when it was or would be completed; and the precise location where any material that was excavated or removed was placed.

8. All documents reflecting or referring to communications within UP, and/or between UP and any contractor or other agent of UP, about the matters listed in the bullet points under Document Requests 5 through 7.

9. All documents that reflect or refer to the following matters, referenced on page 1 of the Transaction Summary:

- Power Industrial's inquiry to UP on or about December 1, 2021, about using a portion of the wye track property for temporary drainage to support the development on their property.
- the call between UP and Power Industrial that took place on January 31, 2022 (including subjects discussed and related communications between the parties and/or UP personnel).
- UP's continued review and assessment of Power Industrial's proposed drainage plans during the spring and summer of 2022.
- the work that was reportedly started on December 19, 2022, and completed approximately a week later.

- the notice provision in the ROE Agreement (including without limitation its development, content, intended purpose, use, and any alleged failure by Power Industrial to comply with its terms).¹⁵

10. All documents that reflect or refer to the following matters, referenced on page 2 of the Transaction Summary:

- Unbound’s request to construct a retention basin on the 24-acre property that UP purchased from Unbound.
- UP’s responses on the type and location of a retention basin that could be constructed.
- the drainage basin proposals that Unbound presented to UP on May 6, 2022, and June 10, 2022.
- discussions between the parties, and among UP personnel, regarding the timing, scope, and/or related considerations involving the “first phase of initial development” in Unbound’s construction plan.
- Unbound’s June 28, 2022 communication to UP that it expected to incur additional expenses to construct the drainage basin, so would require additional compensation from UP.
- the discussions “focused on drainage and potential impacts to their respective properties” that occurred between UP personnel and Unbound during 2022, including those that did not involve the design teams.
- which UP personnel viewed the drainage basin work to be undertaken on the 24-acre site as unrelated to UP’s construction project and which UP personnel viewed the work as related to the project.

11. All documents that reflect or refer to the following matters, referenced on page 3 of the Transaction Summary:

- the “mistaken belief that [UP’s] application process would be concluded before Unbound would ultimately proceed with its drainage basin work” held by some members of the UP team.
- the “long-resolved drainage terms” that should have been revisited “in light of the updated timeline for [UP’s] application process.”

¹⁵ UP’s response must include all documents (including communications within UP, between UP and any contractor or agent of UP, and subsequent communications with Power Industrial) relating to the statements in the August 4, 2023 letter from UP’s G. Brigham (General Director-Real Estate) to Power Industrial asserting that Power Industrial failed to comply with the notice provision and that UP expects to hold Power Industrial responsible for its failure to comply with the terms of the ROE Agreement. (See Env’t Comment EI-33039 (attaching, inter alia, the referenced letter).)

12. All documents that reflect or refer to Unbound's construction activity relating to the retention basin in May 2023.¹⁶
13. For each Damage Area identified on page 4, supra, all documents that reflect or refer to when UP's real estate department first became aware of ground-disturbing activities within that area.
14. For each Damage Area identified on page 4, supra, all documents that reflect or refer to when the department within UP responsible for the environmental and historic review and NHPA Section 106 processes first became aware of ground-disturbing activities within that area.
15. All manuals, policies, procedures, and/or guidance identified in response to Information Requests 7 and 8.
16. Any documents not encompassed by other requests that reflect or refer to when UP's real estate department first became aware that ground-disturbing activity could not occur within the APE until the Board had completed its review of the proposed transaction or otherwise approved the work.
17. Any documents not encompassed by other requests that discuss limitations, requirements, obligations, and/or responsibilities arising under NHPA with respect to the conduct of ground-disturbing activities within the APE.

¹⁶ (See Env't Comment EI-33130, pdf pages 54-56 (August 2023 email exchanges between S. Tingley (UP) and John Parnell (Graystar) referencing construction of basin between May 8-26, 2023).)