

April 10, 2009

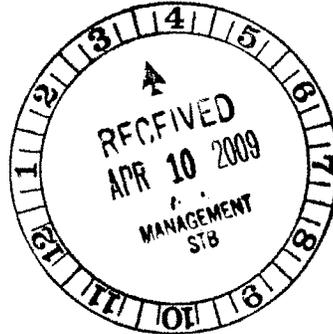
Via Hand Delivery

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423

ENTERED
Office of Proceedings

APR 13 2009

Part of
Public Record



RE: STB Finance Docket No. 35240; *Muskogee City-County Port Authority- Operation Exemption*

Docket No. AB-3 (Sub. No. 104X); *Missouri Pacific Railroad Co.—Abandonment Exemption—in Muskogee McIntosh and Haskell Counties, OK*

224877

224878

Dear Secretary Quinlan:

Enclosed please find the original and ten (10) copies of the Verified Notice of Exemption and Petition to Vacate Notice of Interim Trail Use or Abandonment, for filing in the above referenced docket. Please note that there is a color printed map in Exhibit B. A check in the amount of \$1,800.00 made payable to the Surface Transportation Board, is also enclosed to cover the related filing fee. As a courtesy, electronic copies of this filing in Adobe Acrobat are contained on the enclosed compact disk.

One additional copy of this filing is enclosed for stamping and return to our offices.

Should you have any questions regarding the foregoing, please do not hesitate to contact the undersigned.

Sincerely,

Jeffrey O. Moreno
Jennifer M. Gartlan
Counsel for Muskogee City-County Port Authority

FILED

APR 10 2009

SURFACE
TRANSPORTATION BOARD

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BEFORE THE
SURFACE TRANSPORTATION BOARD

**SURFACE
TRANSPORTATION BOARD**

MUSKOGEE CITY-COUNTY)
PORT AUTHORITY—OPERATION)
EXEMPTION)
MISSOURI PACIFIC RAILROAD COMPANY--)
ABANDONMENT EXEMPTION—)
IN MUSKOGEE, MCINTOSH AND HASKELL)
COUNTIES, OK)

224877
Finance Docket No. 35240

224878
Docket No. AB-3 (Sub-No. 104X)



FILED RECEIVED

APR 10 2009

VERIFIED NOTICE OF EXEMPTION UNDER 49 C.F.R. 1150.31

**SURFACE
TRANSPORTATION BOARD**

AND

PETITION TO VACATE NOTICE OF INTERIM
TRAIL USE OR ABANDONMENT

ENTERED
Office of Proceedings

APR 13 2009

Part of
Public Record

Pursuant to the class exemption at 49 C.F.R. § 1150.31 *et seq.*, MUSKOGEE CITY-COUNTY PORT AUTHORITY ("Port"), a non-carrier, hereby files this notice of exemption to operate a rail line that extends from Milepost 88.80, at or near Davis Field, to Milepost 93.50, at or near Shopton, OK, a distance of 4.7 miles in Muskogee County, Oklahoma ("the Rail Line").

In addition, pursuant to 49 C.F.R. § 1117.1, the Port petitions to partially vacate the Notice of Interim Trail Use ("NITU") issued in Docket No. AB-3 (Sub-No. 104X), *Missouri Pacific Railroad Co.—Aband. Exempt.—in Muskogee, McIntosh and Haskell Counties, OK*, (served Jan. 6, 1993), as it pertains to the Rail Line. A copy of the ICC decision granting the NITU is attached hereto as Exhibit A ("*NITU Decision*").

BACKGROUND

In the *NITU Decision*, the ICC issued the NITU and postponed the effective date for abandonment to allow the Missouri Pacific Railroad Company ("MP") to negotiate for rail

banking and interim trail use of MP's Midland Valley Branch between Milepost 50.50, near Kerr McGee, and Milepost 93.50, near Shopton, Oklahoma, under the National Trails System Act, 16 U.S.C. § 1247(d). On September 30, 1993, MP, the Port, and Indian Nations Recreation Trail ("INRT"), executed the Line Donation Contract ("Contract"), which divided the Midland Valley Branch into two segments, for rail banking and trail use, that MP separately conveyed to INRT and the Port through the execution of two quitclaim deeds. The INRT obtained the title, rights, and interest to the land located between Milepost 50.50 near Kerr McGee and 88.80 near Davis Field, OK. That segment is not subject to this petition before the Board. The Port obtained the title, rights, and interest to the Rail Line, the land located between Milepost 88.80, near Davis Field, and 93.50, near Shopton, OK, which is the subject of this petition before the Board. As required by 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29(d)(2), the conveyances to INRT and the Port are subject to future restoration of rail service.

The terms of the Contract grant the Port the right to authorize or to establish the reactivation of the Rail Line for rail use. The STB has held that an abandoning carrier may convey its right to cease interim trail use and to reinstitute rail service to a third party. *See* Docket No. AB-477 (Sub. No. 3x)—*Owensville Terminal Co., Inc.—Abandonment Exempt.—In Edwards and White Counties, IL, and Gibson and Posey Counties, IN, citing Iowa Power-Const. Exempt.-Council Bluffs, IA*, 8 I.C.C.2d 858 (1990); *N&W-Aban. St. Mary's & Minister in Auglaize County, OH*, 9 I.C.C.2d 1015 (1993). As such, the Port hereby petitions to vacate the NITU as applied to the Rail Line, to be effective as of May 11, 2009, the effective date of the Operation Exemption.

INFORMATION REQUIRED BY 1150.33

A. Applicant's full name and address:

Muskogee City-County Port Authority
4901 Harold Scoggins Drive
Muskogee, OK 74403

B. Name, address, and telephone number of Applicant's representative:

Jeffrey O. Moreno
Jennifer M. Gartlan
Thompson Hine LLP
1920 N Street, N.W.
Suite 800
Washington, DC 20036-1601
(202) 331-8800

C. Agreement:

The MP and the Port signed a Line Donation Contract on September 30, 1993, which conveyed to the Port, the title, rights, and interest in the Rail Line and the right to reinstitute rail service over the Rail Line.

D. Operator of the property:

The Port will operate the Rail Line, or engage a qualified third party contractor to do so.

E. Brief summary of the proposed transaction.

1. The name and address of the entity transferring the property:

The MP transferred the Rail Line and the right to reinstitute rail service over the Rail Line to the Port through the Line Donation Contract, dated September 30, 1993. The MP is succeeded in interest by the Union Pacific Railroad, which is located at:

Union Pacific Railroad
1400 Douglas Street
Omaha, NE 68179

2. Proposed time schedule for consummation of the transaction:

Upon the effective date of this Verified Notice of Exemption.

3. Milepost designations of the subject property:

Mile Post 88.80, near Davis Field, to Mile Post 93.50, near Shopton, Oklahoma.

4. The total route miles being acquired:

The Port has acquired 4.7 miles of rail line.

F. Map:

A map of the Line is attached hereto as Exhibit B.

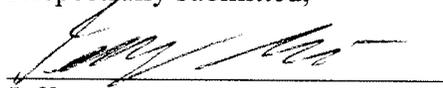
G. Projected revenue certification:

The Port's projected revenues are not expected to exceed those of a Class III railroad, or \$5 million annually, requiring notification of employees pursuant to 49 C.F.R. § 1150.32(e).

H. Environmental certification:

Since the proposed transaction will not result in significant changes in railroad operations exceeding the thresholds of 49 C.F.R. § 1105.7(e)(4) or (5), no environmental documentation is required. Similarly, since the proposed transaction will not result in the disposition or alteration of properties 50 years old or older, within the meaning of 49 C.F.R. § 1105.8(b)(1), and will not substantially change the level of maintenance of railroad property, within the meaning of 49 C.F.R. § 1105.8(b)(4), no historic report is required.

Respectfully submitted,



Jeffrey O. Moreno
Jennifer M. Gartlan
Thompson Hine LLP
1920 N Street, N.W.
Suite 800
Washington, DC 20036-1601
(202) 331-8800

Counsel for Muskogee City-County Port Authority

Dated: April 10, 2009

VERIFICATION

I, J. Scott Robinson, Port Director of Muskogee City-County Port Authority, declare under penalty of perjury, under the laws of the United States of America, that I have read the foregoing Verified Notice of Exemption and that its statements are true and correct to the best of my knowledge, information and belief. I further declare that I am qualified and authorized to submit this verification on behalf of Muskogee City-County Port Authority. I know that willful misstatements or omissions of material facts constitute Federal criminal violations punishable under 18 U.S.C. § 1001 by imprisonment up to five years and fines up to \$10,000 for each offense. Additionally, these misstatements are punishable as perjury under 18 U.S.C. § 1621, which provides for fines up to \$2,000 or imprisonment up to five years for each offense.

Dated at Muskogee, Oklahoma this 9 day of April 2009.

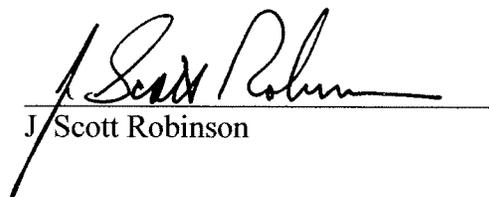

J. Scott Robinson

EXHIBIT A



LEXSEE 1992 ICC LEXIS 294

MISSOURI PACIFIC RAILROAD COMPANY -- ABANDONMENT EXEMPTION
-- IN MUSKOGEE, MCINTOSH AND HASKELL COUNTIES, OK

Docket No. AB-3 (Sub-No. 104X)

INTERSTATE COMMERCE COMMISSION

1992 ICC LEXIS 294

SERVICE DATE: January 6, 1993

December 28, 1992

PANEL:

[*1]

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Chairman Philbin, Vice Chairman McDonald, Commissioners Simmons and Phillips.

OPINIONBY: By the Commission

OPINION:

Missouri Pacific Railroad Company (MP) seeks an exemption under 49 U.S.C. 10505 from the prior approval requirements of 49 U.S.C. 10903-10904, to abandon its Midland Valley Branch, a 43.0-mile rail line extending from milepost 93.50 near Shopton to the end of the line at milepost 50.50, near Kerr McGee, in Muskogee, McIntosh, and Haskell Counties, OK. The Railway Labor Executives' Association and the United Transportation Union seek imposition of labor protective conditions.

The city of Muskogee (Muskogee) requests that we find the rail property suitable for other public use, specifically trail use, and issue a notice of interim trail use (NITU). The city of Stigler (Stigler) protests the proposed abandonment, stating that it needs the rail service in the not too distant future and recently spent a large sum of money preparing its industrial park for new business. Alternatively, Stigler joins with Muskogee in requesting interim trail use and public use conditions in the hope that at least the rail corridor will be preserved. n1 [*2] MP has advised of its willingness to negotiate with both parties. n2 We will grant the exemption petition and issue an NITU, subject to environmental, historic protection, public use, and standard employee protective conditions.

n1 The Stigler Chamber of Commerce filed a letter expressing concern about the proposed abandonment.

n2 We note that on December 1, 1992, Ronald Crawford, an individual

interested in acquiring the line segment between Muskogee and Stigler, requested that we delay processing this proceeding and/or assist him to obtain the financial information necessary for him to complete a feasibility study of the line. His request is premature; MP is under no obligation at this time to furnish the requested data. However, this decision establishes a procedural schedule for the offer of financial assistance (OFA) process. Mr. Crawford may file a formal expression of intent to file an OFA and request the financial data as specified in the rules at 49 CFR 1152.27(a). This will obligate MP to furnish these data in a timely manner.

The last traffic on the line moved in 1990. In that year, MP moved a total of 200 car loads of coal for four shippers: International Chemical; [*3] KR Coal; Marine Coal Sales; and Spencer Coal. MP states that the line has no active shippers, no overhead traffic, and no reasonable prospect of sufficient future traffic to justify continued operation and maintenance.

Except for two small segments, the line's maximum train speed is 25 mph. The track does not require rehabilitation to be maintained at FRA class 1. There are a total of 71 road crossings on the line, three with pairs of flashing lights. MP notes that these flashing lights are particularly expensive to maintain and that the other road crossings must be regularly maintained as well. MP projects normalized maintenance costs for the line of \$ 2,897 per mile per year, for a total of \$ 124,577. Assertedly, abandonment would enable petitioner to use these resources more efficiently elsewhere on its system.

Under 49 U.S.C. 10903-10904, service on a rail line may not be abandoned without prior Commission approval. However, under 49 U.S.C. 10505, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a; and (2) either (a) the transaction or service [*4] is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny under 49 U.S.C. 10903-10904 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of abandonment, an exemption will expedite regulatory decisions and reduce regulatory barriers to exit [49 U.S.C. 10101a(2) and (7)]. An exemption will also foster sound economic conditions and encourage efficient management because MP will be able to reallocate the funds and materials needed to maintain and operate the line to other railroad purposes [49 U.S.C. 10101a(3), (5), and (10)]. Other aspects of the rail transportation policy are not affected adversely. For example, competition and the continuation of a sound rail transportation system are not affected, because there are no active or prospective shippers on the line.

The transaction is limited in scope; the proposed abandonment involves only 43.0 miles of rail line in a limited geographic area. Moreover, regulation is not necessary to protect shippers from the abuse of market power. Notwithstanding Stigler's wish to retain rail service, there are no active or prospective [*5] shippers, and motor transportation alternatives are available should new shippers locate in the area. However, to ensure that the shippers who used the line in 1990 are informed of our action, we will require MP to serve a copy of this decision on each of them within 5 days of the service date of this decision and to certify to us that it has done so.

Under 49 U.S.C. 10505(g), we may not use our exemption authority to relieve a carrier of its obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, we will impose the labor protective conditions in Oregon Short Line R. Co. - Abandonment - Goshen, 360 I.C.C. 91 (1979).

MP has submitted an environmental report with its petition and has notified the appropriate Oklahoma agencies of the opportunity to submit information concerning the energy and environmental impact of the proposed action. See 49 CFR 1105.11. Our Section of Energy and Environment (SEE) has examined MP's environmental report, verified the data it contains, and analyzed the probable effect of the proposed action on the quality of the human environment. Based on SEE's recommendations, we conclude that the proposed [*6] abandonment, if implemented subject to the conditions discussed below, will not significantly affect either the quality of the human environment or the conservation of energy resources. The right-of-way may be suitable for other public uses.

The Oklahoma State Historic Preservation Officer has informed SEE that bridges located on the rail corridor may be eligible for listing in the National Record of Historic Properties. SEE recommends that a condition be imposed requiring MP to retain its interest in and take no steps, nor permit any steps to be taken, to alter the historic integrity of the bridges on the line until completion of the Section 106 process of the National Historic Preservation Act, 16 U.S.C. 470. The condition will be imposed.

The United States Fish and Wildlife Service (FWS) states that the least tern (*Sterna antillarum*), an endangered species, nests in the structures over the Canadian River. SEE recommends that salvage activities involving the Canadian River structures be prohibited between May 15th and August 15th until completion of consultation with FWS in accordance with Section 7 of the Endangered Species Act, 16 U.S.C. 1531. This condition will be imposed [*7] as well.

Trail use. Both Muskogee and Stigler request the imposition of interim trail use and rail banking under 16 U.S.C. 1247(d) and have submitted statements of willingness to assume financial responsibility for the trail in compliance with 49 CFR 1152.29. MP has indicated its willingness to negotiate with the proposed trail users. While a petition containing an interim trail use statement need not be filed until 10 days after the date the notice of exemption is published in the Federal Register [49 CFR 1152.29(b)(2)], the provisions of 16 U.S.C. 1247(d) (Trails Act) are applicable, and all of the criteria for imposing trail use and rail banking have been met.

Accordingly, we will accept the trail use requests and MP's responses to them and issue an NITU covering the entire line. The parties may negotiate an agreement during the 180-day period prescribed below. If the parties reach a mutually acceptable final agreement, further Commission approval is not necessary. If no agreement is reached within 180 days, MP may fully abandon the line, subject to the conditions imposed here. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration [*8] for railroad purposes.

Our approval of trails use does not preclude other parties from filing interim trail use requests within 10 days after the publication of the notice of exemption in the Federal Register. 49 CFR 1152.29(a). Nor does it preclude MP from negotiating with other parties in addition to Muskogee and Stigler during

the NITU period. If, within the 10-day period following publication of the notice of exemption, additional trail use requests are filed, MP is directed to respond to them.

The parties should note that operation of the trail use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10905. As stated in Rail Abandonments -- Use of Rights-of-Way as Trails, 2 I.C.C.2d 591 (1986) (Trails), offers of financial assistance (OFA) to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trails use conditions. n3 Accordingly, if a formal expression of intent to file an OFA is timely filed under 49 CFR 1152.27(c)(2), the effective date of this decision and notice will be postponed 10 days beyond the effective date indicated here. In addition, the effective date may [*9] be further postponed at later stages in the OFA process. See 49 CFR 1152.27(e)(2) and (f). Finally, if the line is sold under the OFA procedures, the petition for abandonment exemption will be dismissed and trails use precluded. Alternatively, if a sale under the OFA procedures does not occur, trails use may proceed.

n3 Our statement in Trails that section 10905 does not apply to abandonment or discontinuance exemptions has since been superseded by our adoption of rules allowing OFA's in these exemption proceedings. See 49 CFR 1152.27.

Public use condition. Both Stigler and Muskogee request imposition of a 180-day public use condition precluding the railroad from disposing of structures (e.g. bridges, trestles, culverts, and tunnels) on the right-of-way that are suitable for trail use. They submit that 180 days is required to prevent actions inconsistent with trail use while they develop trail use plans and commence negotiations.

We have determined that persons who file under the Trails Act may also file for public use under 49 U.S.C. 10906. When the need for both conditions is established, it is our policy to impose them concurrently, subject to the execution of a trail [*10] use agreement. See Trails, 2 I.C.C.2d at 609. A request for a public use condition must conform with 49 CFR 1152.28(a)(2) and, as specified there, it must set forth: (1) the condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) justification for the time period. Because the potential trail users have met these criteria, a 180-day public use condition will also be imposed. If a trail use agreement is reached on a portion of the right-of-way, MP must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. Also, we note that 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.

It is ordered:

1. The requests for interim trail use and rail banking under 16 U.S.C. 1247(d) and for a public use condition under 49 U.S.C. 10906 are accepted.
2. Under 49 U.S.C. 10505, we exempt from the prior approval requirements of 49 U.S.C. 10903-10904, the abandonment [*11] of the above-described line, subject to: (1) the employee protective conditions in Oregon Short Line R. Co. -

Abandonment - Goshen, 360 I.C.C. 91 (1979); (2) the condition that MP retain its interest in and take no steps, nor permit any steps to be taken, to alter the historic integrity of the bridges on the line until completion of the Section 106 process of the National Historic Preservation Act, 16 U.S.C. 470; (3) the condition that MP not engage in any salvage activities involving Canadian River structures between May 15th and August 15th until the completion of consultations with FWS in accordance with Section 7 of the Endangered Species Act, 16 U.S.C. 1531; (4) the condition that MP leave intact all of the right-of-way underlying the track, including bridges, trestles, culverts, and tunnels (but not track or track materials), for a period of 180 days from the effective date of this decision, to enable any State or local government agency or other interested person to negotiate the acquisition of the line for public use; and (5) the requirement that MP comply with terms and conditions for implementing interim trail use and rail banking, set forth below. If an interim trail use [*12] and rail banking agreement is executed prior to the 180-day period noted above, the public use condition will expire to the extent the trails use and rail banking agreement covers the same line segment.

3. Subject to the conditions set forth above, MP may discontinue service, cancel tariffs for the line on not less than 10 days' notice to the Commission, and salvage track and material consistent with interim trail use/rail banking after the effective date of this decision and notice. Tariff cancellations must refer to this decision and notice by date and docket number.

4. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad from any potential liability), and for the payment of any and all taxes that may be levied or assessed against the right-of-way.

5. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way. [*13]

6. If interim trail use is implemented and subsequently the user intends to terminate trail use, it must send the Commission a copy of this decision and notice and request that it be vacated on a specified date.

7. If an agreement for interim trail use/rail banking is reached by the 180th day after service of this decision and notice, interim trail use may be implemented. If no agreement is reached by that time, MP may fully abandon the line, provided the conditions imposed in this proceeding are met.

8. Petitioner must serve a copy of this decision on each shipper that used the line in 1990 within 5 days after service of this decision and certify to this Commission that service has been effected.

9. Notice will be published in the Federal Register on January 6, 1993.

10. Provided no formal expression of intent to file an offer of financial assistance has been received, this exemption will be effective on February 5, 1993.

11. Formal expressions of intent to file an offer n4 of financial assistance

under 49 CFR 1152.27(c)(2) must be filed by January 16, 1993, petitions to stay must be filed by January 19, 1993, and petitions to reopen must be filed by February 1, 1993. [*14]

n4 See Exempt. of Rail Abandonment -- Offers of Finan. Assist., 4 I.C.C.2d 164 (1987).

12. If a formal expression of intent to file an offer of financial assistance has been timely submitted, an offer of financial assistance to allow rail service to continue must be received by the railroad and the Commission within 30 days after publication, subject to time extensions authorized under 49 CFR 1152.27(c)(2)(ii)(C) and (D). The offeror must comply with 49 U.S.C. 10905 and 49 CFR 1152.27(c)(2).

13. Offers of financial assistance and related correspondence to the Commission must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: "Section of Legal Counsel, AB-OFA."

EXHIBIT B

EXHIBIT C

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

MUSKOGEE CITY-COUNTY)	Finance Docket No. 35240
PORT AUTHORITY—OPERATION)	
EXEMPTION)	
)	
MISSOURI PACIFIC RAILROAD COMPANY—)	Docket No. AB-3 (Sub-No.104X)
ABANDONMENT EXEMPTION—)	
IN MUSKOGEE, MCINTOSH AND HASKELL)	
COUNTIES, OK)	

**MUSKOGEE CITY-COUNTY PORT AUTHORITY
— OPERATION EXEMPTION —**

Muskogee City-County Port Authority (“Port”), a non-carrier, has filed a Verified Notice of Exemption to operate approximately 4.7 miles of railroad line in Muskogee County, Oklahoma (“Rail Line”). The Rail Line currently is subject to a Notice of Interim Trail Use (“NITU”), which the Interstate Commerce Commission issued in Docket No. AB-3 (Sub-No. 104X), *Missouri Pacific Railroad Co.—Aband. Exempt.—in Muskogee, McIntosh and Haskell Counties, OK*, (served Jan. 6, 1993), pursuant to the National Trails System Act, 16 U.S.C. § 1247(d). The Port has simultaneously petitioned the Board to vacate the NITU in that docket.

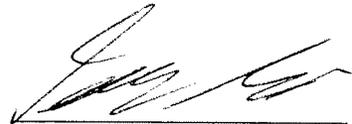
The Missouri Pacific Railroad Company (“MP”) sold the Rail Line to the Port for rail banking and interim trail use, and also conveyed its right to reinstate rail use over the Rail Line to the Port, on September 30, 1993. The Port now seeks to reactivate rail service on the Rail Line. The milepost designations for the Rail Line are as follows: Mile Post 88.80, near Davis Field, to Mile Post 93.50, near Shopton, Oklahoma.

Comments must be filed with the Board and served on Jeffrey O. Moreno, Esq., Thompson Hine LLP, 1920 N Street, N.W., Suite 800, Washington, D.C. 20036 (tel. 202-331-8800). The Verified Notice of Exemption is filed pursuant to 49 U.S.C. § 10502 and 49 C.F.R. § 1150.31(a). If the Notice contains false or misleading information, then the exemption is void *ab initio*. Petitions to revoke the exemption, pursuant to 49 U.S.C. § 10502(d), may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Verified Notice of Exemption, under 49 C.F.R. § 1150.31, and Petition to Vacate Notice of Interim Trail Use, was served by overnight carrier, on April 10, 2009, upon the following:

J. Michael Hemmer
General Counsel
Union Pacific Railroad Company
1400 Douglas Street
Omaha, NE 68179



Jeffrey O. Moreno