

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35539

JIE AO AND XIN ZHOU—PETITION FOR DECLARATORY ORDER

Digest:¹ Two landowners, Jie Ao and Xin Zhou, asked the Board to rule that federal preemption does not apply in a dispute over the ownership and use of certain property in King County, Wash. that is currently rail banked, meaning that even though it is not being used for rail service, it is still within the national rail network. This decision declares that their ownership claims to a portion of the property are preempted by federal law. The decision further explains that their claim to some use of a roadway within the rail-banked property is not necessarily preempted by federal law and that it is reasonable for the state court, applying state law, to address that claim.

Decided: June 4, 2012

Jie Ao and Xin Zhou (Petitioners or Ao-Zhou) petitioned the Board to institute a declaratory order proceeding, pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 721, to declare that a property dispute that Petitioners had brought in a Washington state court raising claims based on adverse possession and a prescriptive easement is not preempted by 49 U.S.C. § 10501(b). Petitioners allege that their property dispute with the Port of Seattle (Port) regarding the existence, size, and extent of Petitioners' property rights over two parcels known as Parcel D and Parcel E, which extend into a rail-banked railroad right-of-way (ROW), should be decided by a Washington state court. The Port replies that all of the state property law rights claimed by Petitioners are federally preempted. With regard to Parcel D, we find that Petitioners' state law adverse possession claim is federally preempted, regardless of whether this case is analyzed as "categorical" preemption (preemption that occurs when a state or local regulation is preempted on its face), or as "as applied" preemption (based on the degree of interference that a particular action would have on railroad transportation). As discussed below, Petitioners here seek to gain exclusive control of a 35-foot by 135-foot strip of railroad ROW in the national rail network, over the objections of the entities that are maintaining the ROW, that hold the right to reactivate freight rail service over it, and that assert that continued access to the entire ROW is required for rail-related activities. Based on the record here, the proposed exercise of the state's adverse

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. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

possession laws to this property would unreasonably interfere with railroad transportation. As the Port explains, continued use of Parcel D is needed to maintain the ROW for possible future rail service and address any slope stabilization issues. Loss of this land through state adverse possession regulation would also limit the capacity of the line should it be needed for potential future active rail service.

In contrast, the dispute related to Parcel E appears to involve a non-exclusive prescriptive easement under state law. Such easements are not preempted so long as they do not impede rail operations or pose undue safety risks. Here, the record does not provide enough information to allow the Board to determine whether Petitioners' state law claim related to Parcel E is preempted. Accordingly, it is appropriate for the state court to interpret any state or local property interests applicable to Parcel E and to resolve the parties' preemption dispute in the first instance applying existing Board and court precedent, as discussed below.

BACKGROUND

This proceeding involves a railroad line in King County, Wash., that was previously owned and operated by the Burlington Northern Santa Fe Railway Co. (BNSF). The line runs north-south for approximately 37 miles. In September 2008, BNSF filed a notice of exemption with the Board under 49 C.F.R. pt 1152, subpart F—Exempt Abandonments to abandon a 5.60 mile portion of the line. Because King County made a proper request for a Notice of Interim Trail Use (NITU) providing time to negotiate a rail banking/interim trail use agreement under 16 U.S.C. § 1247(d) (Trails Act) and 49 C.F.R. § 1152.29, and BNSF agreed to negotiate, the Board imposed a NITU. BNSF Ry.—Aban. Exemption—in King Cnty., Wash., AB 6 (Sub-No. 464X) (STB served Oct. 27, 2008). On December 18, 2009, BNSF consummated the donation of the real property and physical assets of the line to the Port and entered into a rail banking/interim trail use agreement with King County under the Trails Act. BNSF also transferred the line's reactivation rights to King County. As a result, the railroad ROW, while temporarily unused for railroad operations, remains part of the national rail system and available for reactivation for continued rail service by King County or another Board authorized entity at any time. 16 U.S.C. § 1247(d); 49 C.F.R. § 1152.29(d)(2).

On November 3, 2008, Petitioners purchased property on the eastern shore of Lake Washington, adjacent to the ROW. According to Ao-Zhou, the property consists of five parcels: (1) Parcels A, B, and C, in which Ao-Zhou holds record title;² (2) an adverse possession area (Parcel D); and (3) a prescriptive easement area (Parcel E). As pertinent here, Petitioners allege that they are entitled, based on the state property law theory of adverse possession, to a 35-foot by 135-foot portion of the ROW, which includes a retaining wall, garage, and a driveway (Parcel D). See Pet. at 2-3 and Exhibit Q (reproduced here as Appendix A), which depicts the garage and retaining wall in relation to the ROW. Petitioners also claim rights under the state property

² Those parcels are not part of the dispute before the Board.

law theory of prescriptive easement to use a private roadway within the ROW (Parcel E). According to Petitioners, Parcel E generally coincides with Hazelwood Lane, a private roadway that is used for access and utilities by Petitioners, as well as the owners of other waterfront properties. A map of Parcel E submitted by Petitioners (reproduced here as Appendix B) depicts Hazelwood Lane and the rail corridor.

On December 11, 2009, Petitioners filed a quiet title action in Washington State Superior Court for King County (Superior Court), alleging that they were entitled to Parcels D and E based on state property law theories of adverse possession and prescriptive easement. The Port moved to dismiss the lawsuit, claiming that § 10501(b) preempted Ao-Zhou's state property law action. The Superior Court determined that the Board should decide the question of federal preemption and dismissed the state property law action without prejudice. Pet., Exhibits O and P.

On September 19, 2011, Petitioners filed their petition for declaratory order. The Port filed a reply on October 11, 2011. King County also filed a reply on that date, stating that it joins the Port in opposing the request of Petitioners. The Port argues that § 10501(b) preempts all of Petitioners' state property law claims and that loss of ownership of Parcel D and Parcel E would unreasonably interfere with activities that are related to rail transportation and potential future railroad use of the property. The Port explains that the loss of Parcels D and E would raise significant track bed stabilization, drainage, and track maintenance issues that would cause undue interference with railroad operations, and limit the capacity of the line if the line were restored to service. According to the Port, there is significant downhill slope on the ROW between the track and the lake. Because the slope presents a serious erosion risk, the Port is concerned that, without the right to access Parcel D and Parcel E, it would not be able to perform slope maintenance activities or slope stabilization.

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to issue a declaratory order to eliminate a controversy or remove uncertainty. However, issues involving the federal preemption provision contained in 49 U.S.C. § 10501(b) can be decided either by the Board or the courts in the first instance.

Here, Petitioners' claim to Parcel D is preempted under either a "categorical" or "as applied" preemption analysis. We find that the application of adverse possession to this strip of rail-banked ROW would amount to regulation of rail transportation because it would confer exclusive control to the Petitioners over property that is part of the national rail network. The circumstances presented here show that, if allowed to occur, the application of state adverse possession law would unreasonably interfere with potential future railroad operations. In contrast, a prescriptive easement or other state law property interest permitting access to portions of a railroad ROW, unless exclusive, does not typically unreasonably interfere with the present or future use of the property for activities that are part of railroad transportation. Because the record does not provide enough information to allow us to determine whether Petitioners' claim

related to Parcel E is preempted, it is reasonable for the state court to interpret the threshold issue of whether Petitioners obtained a prescriptive easement for Parcel E under generally applicable state law. If, in applying state law, the court concludes, that a non-exclusive prescriptive easement exists, the court could then address the impact, if any, of § 10501(b) preemption. The Board will assist the court in doing so by summarizing existing law with regard to the reach of § 10501(b).

1. General Preemption Precedent

The Interstate Commerce Act is “among the most pervasive and comprehensive of federal regulatory schemes.” Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981). For more than a century, the Supreme Court has made it clear that under the U.S. Constitution’s Supremacy Clause (Art. VI, cl. 2), state laws or regulations that are inconsistent with the agency’s plenary authority or with the Congressional policy reflected in the Interstate Commerce Act are preempted. See id.

In the ICC Termination Act of 1995 (ICCTA), Congress further broadened the express preemption contained in the Interstate Commerce Act. See e.g., Union Pac. R.R. v. Chi. Transit Auth., 647 F.3d 675, 678 & n.1 (7th Cir. 2011) (Chicago Transit); Green Mountain R.R. v. Vermont, 404 F.3d 638, 643 (2d Cir. 2005); City of Auburn v. STB, 154 F.3d 1025, 1029-31 (9th Cir. 1998). Section 10501(b) states that “the remedies provided under [49 U.S.C. §§ 10101-11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State Law.” Section 10501(b) thus preempts other regulation that would unreasonably interfere with railroad operations that come within the Board’s jurisdiction, without regard to whether or not the Board actively regulates the particular activity involved. The statute defines rail transportation expansively to encompass any property, facility, structure or equipment “related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use.” 49 U.S.C. § 10102(9). Moreover, 49 U.S.C. § 10501(6) defines “railroad” broadly to include track, terminal facility, ground, etc., used or necessary for transportation. The Board has interpreted state or local regulation to include state property law claims brought by non-governmental entities, where such claims would have the effect of interfering with railroad operations. Mid-America Locomotive and Car Repair, Inc.—Petition for Declaratory Order, FD 34599 (STB served June 6, 2005).

While § 10501(b) is broad and far-reaching, there are, of course, limits. For example, § 10501(b) preemption does not apply to state or local actions under their retained police powers, as long as they do not interfere with railroad operations or the Board’s regulatory programs. See H.R. Rep. No. 104-311, at 95-96 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 807-808; H.R. Conf. Rep. No. 104-422, at 167 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 852.

Section 10501(b) preemption does, however, prevent states or localities from intruding into matters that are directly regulated by the Board (e.g., railroad rates, services, construction, abandonment, etc.). It also prevents states or localities from imposing requirements that, by their nature, could be used to deny a railroad’s ability to conduct rail operations or proceed with

activities that the Board has authorized, such as a construction or abandonment. Thus, state or local permitting or preclearance requirements, including building permits, zoning ordinances, and environmental and land use permitting requirements, are categorically preempted. City of Auburn, 154 F.3d at 1029-31; Norfolk S. Ry. v. City of Austell, No. 1:97-cv-1018-RLV, 1997 U.S. Dist. LEXIS 17236 (N.D. Ga. 1997).³

The agency's broad and exclusive jurisdiction over railroad operations and activities prevents application of state laws that would otherwise be available, including condemnation to take rail property for another use that would conflict with the rail use.⁴ City of Lincoln v. STB, 414 F.3d 858, 861 (8th Cir. 2005) (city's proposed use of eminent domain to acquire 20-foot strip of railroad ROW that might interfere with storage of materials by railroad on remainder of ROW preempted); Chi. Transit Authority (proposed state condemnation establishing perpetual easement over railroad ROW preempted by § 10501(b) even if the City's proposed use of the property would have been entirely coextensive with prior lease); Wis. Cent. Ltd. v. City of Marshfield, 160 F. Supp. 1009, 1014 (W.D. Wis. 2000) (condemnation of railroad property that unreasonably interferes with railroad operations and facilities constitutes "regulation" of railroads and runs afoul of § 10501(b)); Dakota, Minn. & E.R.R. v. State of South Dakota, 236 F. Supp.2d 989, 1005-08 (D. S.D. 2002), aff'd on other grounds, 362 F.3d 512 (8th Cir. 2004) (aspects of state's amended eminent domain statute that imposed new, burdensome requirements that would prevent or unreasonably interfere with a federally authorized rail project constituted "regulation" of the railroad that was preempted); Norfolk S. Ry.—Pet. for Decl. Order, FD 35196 (STB served Feb. 26, 2010) (even if property is not currently being used by a railroad, condemnation can be a form of regulation, and using state eminent domain law to condemn railroad property or facilities for another use that would conflict with potential future rail use is exercising the most extreme type of control over railroad transportation as it is defined in 49 U.S.C. § 10102(9)). Of course, after railroad property has been lawfully abandoned, state condemnation or property laws can be applied, since the agency's regulatory mission has come to an end. Hayfield N. R.R. v. Chi. & N.W. Transp. Co., 467 U.S. 622, 632-33 (1984).

For state or local actions that are not preempted on their face, § 10501(b) preemption analysis requires a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with rail transportation. See Franks Inv. Co. v. Union Pac. R.R., 593 F.3d 404, 414 (5th Cir. 2010) (en banc). Routine non-conflicting uses, such as non-exclusive easements for at-grade crossings, are not preempted, as long as they would not impede

³ Otherwise, state and local authorities could deny a railroad the right to construct or maintain its facilities or to conduct its operations, which would irreconcilably conflict with the Board's authorization of those facilities and operations. City of Auburn, 154 F.3d at 1031; CSX Transportation, Inc.—Petition for Declaratory Order, FD 34662 (STB served Mar. 14, 2005), petition for recon. denied (STB served May 3, 2005).

⁴ Adverse possession has the same legal effect on the property as condemnation—elimination of the prior ownership interest in the property.

rail operations or pose undue safety risks. See E. Ala. Ry.—Pet. for Decl. Order, FD 35583 (STB served Mar. 9, 2012); Maumee & Western R.R. and RMW Ventures, LLC—Pet. for Decl. Order, FD 34354 (STB served Mar. 3, 2004).

2. Adverse Possession Claim to Parcel D

Here, Petitioners' adverse possession claim to Parcel D is preempted by § 10501(b). Ao-Zhou seeks to claim title to a strip of rail-banked ROW that is within the national rail network system and has not been abandoned.⁵ Even if the property that Ao-Zhou allegedly possesses based on state property law is not currently being used as an active line of railroad, the record shows that loss of a 35 by 135-foot strip of this railroad ROW would unreasonably interfere with potential reactivation in the future and prevent entry onto the property for rail-related maintenance and stabilization/sloping repair activities. Because the state court adverse possession action represents regulation that has the effect of preventing or unreasonably interfering with railroad transportation, it is preempted.

The Port has explained that loss of Parcel D would reduce the amount of ROW available for proper track bed stabilization, drainage, and maintenance that would be required for any future railroad operations. Losing Parcel D would also prevent building a passing track or siding and reduce the capacity of the ROW to handle possible future traffic growth. Reply at 8-10 & Tomperi V.S. at 2-3. As Mr. Bryan Tomperi, the Port's engineering expert explains, if Petitioners were to take Parcel D (35 feet wide and on the west side of the ROW), this would leave only 15 feet on the west side of the ROW between the property line of Petitioners and the centerline of the track. If Petitioners carve Parcel D out of the ROW, slope stabilization and maintenance activities would be adversely affected,⁶ and there would be no ability to perform any rail-related construction that might be planned in the future on the affected portions of the ROW. Tomperi V.S. at 3. The fact that this ROW is rail banked, and there are currently no specific plans to reactivate this property, does not mean that the property is not within the

⁵ The Trails Act provides that, if there is interim trail use, the “interim use shall not be treated, for purposes of any law or rule of law, as an abandonment...” 16 U.S.C. § 1247(d). Instead, the ROW is “rail banked,” which means that the property remains part of the national rail system, albeit temporarily unused for active rail service. Accordingly, if and when the railroad (or any other approved rail service provider) makes a proper request to vacate a trail condition to restore service on all or part of the ROW under 49 C.F.R. § 1152.29(d)(2), the trail condition will be vacated to permit reactivation of the line for continued rail service. See Ga. Great S. Div.-Aban. & Discontinuance of Service, 6 S.T.B. 902, 906 (2003).

⁶ The Port points out that protecting against slope erosion requires programmatic maintenance and possibly slope stabilization. These track maintenance and safety functions are vital to the operation of rail lines.

Board’s jurisdiction and might not be reactivated for future rail service.⁷ See Chi. Transit Authority, 647 F.3d at 681, citing e.g., City of S. Bend v. STB, 566 F.3d 1166, 1169-71 (D.C. Cir. 2009); Norfolk S. Ry. As the court stated in City of Lincoln, 414 F.3d at 862, condemnation is a “permanent action, and it can never be stated with certainty at what time any particular part of a right-of-way may become necessary for railroad uses.”

Petitioners argue that there is no evidence in the present case that granting the relief for Parcel D sought in Ao-Zhou’s state property law action actually would result in unreasonable interference with current or future transportation uses of the ROW.⁸ But as previously noted, the record here shows that transferring ownership of Parcel D would directly affect the amount and type of maintenance that could be performed on this railroad ROW, and limit future options for reactivation. Moreover, assuming arguendo, that Ao-Zhou is correct that the application of state adverse possession law here might have little actual, practical effect on current plans for active railroad operations, circumstances can change. Ao-Zhou’s approach to preemption would permit landowners to carve off strips of railroad ROW all over the country for non-rail use, even though the Board has not authorized the ROW to be permanently removed from the nation’s rail system under Title 49. That untenable result would undermine interstate commerce and the strong federal policy in favor of retaining rail property in the national rail network, where possible. See 49 U.S.C. §§ 10904, 10907 and 16 U.S.C. § 1247(d).⁹

3. Application of Preemption Law to Parcel E

Unlike an adverse possession claim, a prescriptive easement does not take railroad property outright, and it is often possible for an easement that crosses over, under, or across a right-of-way, to co-exist with active rail operations without necessarily interfering with the latter. See Eastern Ala. Because such easements do not affect the rail network in the same way as carving out property that is part of a railroad, and because a prescriptive easement may still allow

⁷ The Board has vacated NITUs to allow rail-banked lines across the country to be reactivated. E.g., R.J. Corman R.R./Pa. Lines—Construction and Operation Exemption—In Clearfield Cnty, Pa., FD 35116, et al. (STB served May 21, 2012) (authorizing new 10-mile rail line, which, along with reactivation of an adjoining 10-mile rail-banked line, will provide rail transportation to a new waste-to-ethanol facility, quarry, industrial park, and other shippers).

⁸ Ao-Zhou notes, for example, that the embankment in the 35-foot wide adverse possession area is steeply sloped and has never been used for rail operations and that a retaining wall, garage, and driveway have been located in this area for many years.

⁹ Petitioners correctly note that issuance of a NITU did not determine BNSF’s ownership rights. The remedy for landowners who believe that they have a property interest in a part of a rail-banked ROW under state law, however, is to ask the trail sponsor to vacate the NITU pertaining to that portion of the ROW, thereby permitting immediate abandonment of the involved property; or to bring a takings case seeking just compensation under the Tucker Act. Preseault v. ICC, 494 U.S. 1 (1990).

the railroad to access the property, the Board has previously found that property disputes involving prescriptive easements are generally best addressed by state courts applying state law. See, e.g., Allegheny Valley R.R.—Petition for Declaratory Order—William Fiore, FD 35388 (STB served Apr. 25, 2011); Mid-America; Maumee.

Here, the primary dispute regarding Parcel E involves whether Petitioners hold a prescriptive easement under generally applicable state property law allowing them to use that property. As noted, that is the type of determination the state court can appropriately address. See e.g., Mid-America. If the Superior Court determines that, under state property law, Petitioners hold a prescriptive nonexclusive easement to Parcel E (or similar state law property interest), then the Superior Court could, using the precedent interpreting § 10501(b) discussed above as a guide, address whether the continued use of the easement would unduly interfere with property that is, or may later be, needed for railroad purposes.

The Port asserts that any continued use of Parcel E by Ao-Zhou would unduly interfere with rail operations, and that, as a result, the application of state property law to Parcel E is federally preempted. However, the Port has not provided sufficient evidence to demonstrate whether the prescriptive easement claim by Petitioners for Parcel E would limit or interfere with the Port's access to the property to maintain the ROW and address any sloping issues. Given the record before us, it is appropriate for the state court, applying the law and precedent discussed above, to resolve the parties' preemption dispute involving Parcel E in the first instance.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

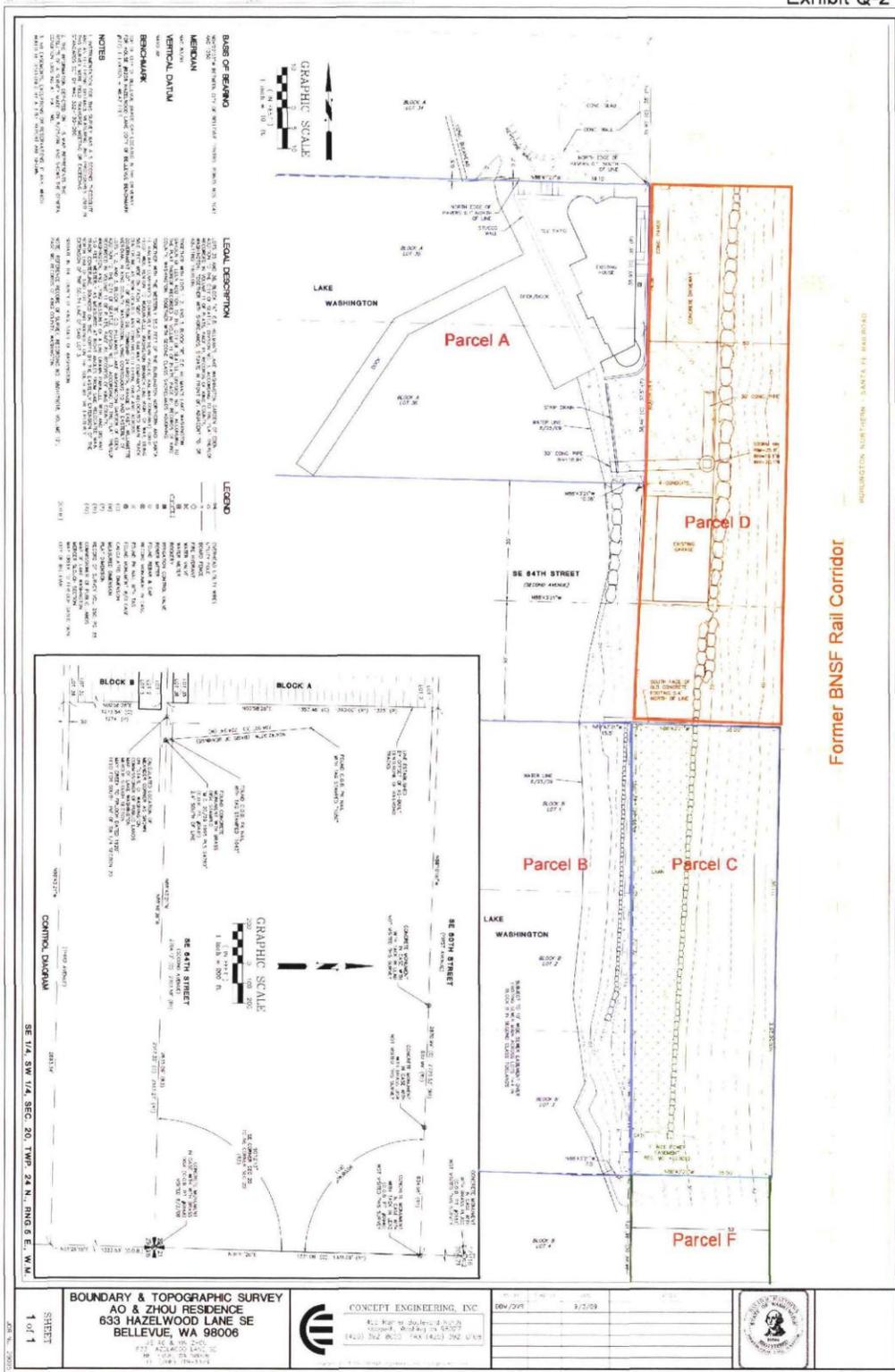
1. The petition for declaratory order is granted to the extent addressed above and this proceeding is discontinued.

2. Copies of this decision will be mailed to:

The Honorable Jay White
Superior Court of King County, Washington
401 Fourth Avenue North, Room 2D
Kent, WA 98032
Re: Case No. 09-2-44773-0

3. This decision is effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.



Map of Prescriptive Easement Area

