

LAW OFFICES OF  
**MURPHY, TAYLOR, SIEMENS & ELLIOTT P.C.**

3007 FREDERICK AVENUE  
ST. JOSEPH, MISSOURI 64506

(816) 364-6677  
FAX (816) 364-9677  
WWW.MTSELAW.COM

BENJAMIN S. CREEDY  
NANCY I. POTTER  
JENNIFER C. RAY

R. EDWARD MURPHY  
MICHAEL L. TAYLOR  
KENNETH E. SIEMENS  
JOSEPH W. ELLIOTT

December 6, 2013

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

235159



FD 35792

*RE: Thomas & Dana Tubbs vs. BNSF and Massman Construction Company*

Dear Ms. Brown:

Enclosed for filing are an original and ten copies of a Petition for Declaratory Order in the above-referenced matter. Also enclosed is a check in the amount of \$1,400.00 to address the filing fee.

Please acknowledge receipt of this Petition for filing by date-stamping the enclosed extra copy and returning it to us in the self-addressed, postage pre-paid envelope.

A Certificate of Service is attached to the Petition. Copies of the Petition and this cover letter have been mailed to BNSF, Massman Construction Company, and their counsel.

If you have any questions or require any additional information, please contact me directly.

Sincerely,

  
NANCY I. BLAKE

**FILED**

DEC - 9 2013

**SURFACE  
TRANSPORTATION BOARD**

Enclosures

**FILE RECEIVED**  
DEC - 9 2013  
SURFACE  
TRANSPORTATION BOARD

ENTERED  
Office of Proceedings  
DEC - 9 2013  
Part of  
Public Record

**FILED**  
DEC - 9 2013

**SURFACE  
TRANSPORTATION BOARD**

BEFORE THE  
SURFACE TRANSPORTATION BOARD

Docket No. FD 35792

DEC 9 2013  
11

THOMAS TUBBS, TRUSTEE OF THE THOMAS TUBBS REVOCABLE TRUST AND  
INDIVIDUALLY, AND DANA LYNN TUBBS, TRUSTEE OF THE DANA LYNN TUBBS  
REVOCABLE TRUST AND INDIVIDUALLY

v.

BNSF RAILWAY COMPANY, INC. AND MASSMAN CONSTRUCTION CO.

**PETITION FOR DECLARATORY ORDER**

Date: December 6, 2013

Communications with respect to this document should be addressed to:

R. Edward Murphy  
Michael L. Taylor  
Nancy I. Blake  
Murphy, Taylor, Siemens & Elliott, P.C.  
3007 Frederick Avenue  
St. Joseph, Missouri 64506  
Telephone: (816) 364-6677  
Facsimile: (816) 364-9677  
**Attorneys for Petitioners**

RECEIVED  
DEC - 9 2013  
Part of  
Public Record

**Defendants' Names and Addresses**

BNSF Railway Company, Inc.  
2650 Lou Menk Drive  
Fort Worth, TX 76131-2830

Massman Construction Co.  
8901 State Line  
Kansas City, MO 64114

**Defendants' Counsel**

Scott Ross  
ROSS AND THOMSON LLP  
408 N. Market St.  
P.O. Box 370  
Maryville, MO 64468-0370  
Facsimile: 660-582-8790  
[scott.rossthomson@embarqmail.com](mailto:scott.rossthomson@embarqmail.com)

Douglas R. Dalgleish  
LATHROP & GAGE LLP  
2345 Grand Blvd., Ste 2200  
Kansas City, MO 64108-2618  
Facsimile: 816-292-2001  
[ddalgleish@lathropgage.com](mailto:ddalgleish@lathropgage.com)

**RECEIVED**

DEC - 9 2013

**SURFACE  
TRANSPORTATION BOARD**

BEFORE THE  
SURFACE TRANSPORTATION BOARD

Docket No. FD 35792

THOMAS TUBBS, TRUSTEE OF THE THOMAS TUBBS REVOCABLE TRUST AND  
INDIVIDUALLY, AND DANA LYNN TUBBS, TRUSTEE OF THE DANA LYNN TUBBS  
REVOCABLE TRUST AND INDIVIDUALLY

v.

BNSF RAILWAY COMPANY, INC. AND MASSMAN CONSTRUCTION CO.

**PETITION FOR DECLARATORY ORDER**

COME NOW PETITIONERS, Thomas Tubbs, Trustee of the Thomas Tubbs Revocable Trust and Individually, and Dana Lynn Tubbs, Trustee of the Dana Lynn Tubbs Revocable Trust and Individually, and file this Petition pursuant to 5 U.S.C. § 554 and 49 U.S.C. § 721 seeking a declaratory order from the Surface Transportation Board ("Board") determining that their pending claims under Missouri law against BNSF Railway Company, Inc. ("BNSF") and Massman Construction Co. ("Massman") are not federally preempted by the Interstate Commerce Commission Termination Act ("ICCTA") (49 U.S.C. 10501(b)) and allowing said claims to go forward in the Circuit Court of Holt County, Missouri.

Nature of Proceeding

1. There is currently pending in the Circuit Court of Holt County, Missouri, a lawsuit filed by Petitioners asserting claims against Defendants in Case Number 12HO-CC00010 ("Pending Action").
2. The Petition in the Pending Action is attached hereto and made a part hereof as Exhibit A.

3. The Judge in the Pending Action has granted a stay of the Pending Action to allow Petitioners to file this Petition for Declaratory Order to allow the Board to determine whether ICCTA preempts Petitioners' claims in the Pending Action.
4. In the Pending Action, Petitioners seek only to hold BNSF and Massman liable for property damages caused by BNSF and Massman to Petitioners' property.
5. Pursuant to Missouri law, Petitioners seek damages from BNSF and Massman for causing a massive breach in BNSF's railroad track embankment that resulted in the total destruction of Petitioners' 550-acre farm.
6. Petitioners' claims in the Pending Action include counts for trespass, nuisance, negligence, inverse condemnation, and statutory trespass.
7. Petitioners' claims in the Pending Action do not attempt to alter or manage BNSF's railroad operations and would not cause BNSF to in any way change its railroad operations.
8. BNSF and Massman have filed a motion for summary judgment in the Pending Action seeking that the court dismiss the Pending Action under ICCTA preemption.

#### Factual Allegations

9. Petitioners are residents of Holt County, Missouri and owners of property located in Holt County, Missouri.
10. BNSF operates a railroad track through Holt County, Missouri, a portion of which sits atop a tall, sloping earthen embankment (the "Embankment") that extends west from Fortescue, Missouri, to the Missouri River, a distance of approximately five miles.
11. The Embankment, which dissects the Petitioners' 550 acre farm, has for many years produced a damming effect on floodwaters from the Missouri River.

12. This damming effect was due to the fact that the Embankment, given its length and height, contained only ten per cent of the drainage openings necessary to allow floodwaters to flow from the north side of the Embankment to the south side.
13. According to an engineering firm retained by BNSF, as of May 2011, the Embankment should have contained more than 1300 feet of openings to adequately drain approaching floodwaters, but instead contained only 134 feet of openings in the form of a single bridge in the five mile stretch. According to BNSF's engineering consultant, the lack of openings in the Embankment violated BNSF's internal design criteria for the maintenance of the Embankment.
14. The lack of openings in the Embankment also violate the Federal Rail Safety Act provisions, including FRSA § 213.33 requiring that "drainage or other water carrying facility under or immediately adjacent to the roadbed shall be maintained and kept free from obstruction to accommodate expected water flow for the area concerned" and FRSA § 213.103(c) requiring that a railroad "provide adequate drainage for the tract."
15. In May 2011, BNSF raised the track atop the Embankment an additional four feet in anticipation of floodwaters from the Missouri River. BNSF did not widen the footprint of the Embankment to accommodate this additional height, nor did it create any drainage related to its increase of the height of the Embankment.
16. Flood waters inundated Holt County, Missouri and the area around the embankment throughout the summer of 2011.
17. By June 22, 2011, the floodwaters on the north side of the Embankment were overtopping the track.

18. Because of the severe lack of openings to allow the floodwaters to flow under the track and through the Embankment, the differential between the surface water elevations on the north and south sides of the Embankment was significant. BNSF's engineering consultant reported that the differential pressures posed the threat of a "catastrophic loss of the entire [Embankment]".
19. In an effort to save the Embankment from destruction, BNSF reported in its daily update on the flood that "the decision has been made to create a breach through the track structure in the vicinity of MP 101.8", which is the location of the Tubbs farm.
20. On June 23, 2011, BNSF issued a report stating that railroad "forces cut 11, 40' breaches at MP 101.8 through track structure to relieve pressures". BNSF's intentional breaches totaled 440 feet.
21. On July 21, 2011, railroad employees reported an additional breach of 250 feet in the Embankment at the location of the Tubbs' farm.
22. The collective breaches in the Embankment at the location of the Tubbs' farm ultimately spanned approximately 900 feet and channeled the floodwaters into a raging current across the Tubbs' farm that scoured the soil down to bedrock and deposited large piles of sand.
23. In an effort to regain control of its tracks and to close the 900 feet opening, BNSF and Massman took actions to close the opening and in the process of doing so directed additional current toward the Petitioners' farm and caused additional damage.
24. During July 2011, BNSF began to build a series of five bridges that would collectively provide the necessary openings (1300 feet) in the Embankment to allow anticipated floodwaters to drain under the track.

25. As a direct result of the breaches in the Embankment and BNSF and Massman's intentional and/or negligent actions in the summer of 2011, when the floodwaters receded and the damages to the Petitioners' farm were capable of ascertainment in January, 2012, the Tubbs' farm had been transformed from some of the most fertile and valuable farmland in the United States into a large lake surrounded by a desert wasteland. The Tubbs' farm has been rendered virtually worthless, and Petitioners have sustained approximately four million dollars in property damages resulting from BNSF and Massman's actions.
26. Petitioners have alleged claims in tort and for inverse condemnation under Missouri law to obtain compensation from BNSF and Massman for the damages caused by BNSF and Massman to Petitioners' property.
27. BNSF and Massman have asserted that Petitioners' claims under Missouri law are preempted by the ICCTA and that BNSF and Massman have no liability or responsibility for its actions that damaged Petitioners' property.
28. BNSF and Massman have further asserted that the Board has exclusive jurisdiction over the claims presented in the Pending Action.
29. Petitioners hereby request any remedy of money damages within the jurisdiction of the Board based upon the above-referenced factual allegations, however, Petitioners are unaware of any precedent for the award of money damages by the Board on claims of this nature.

#### Argument

Petitioners' claims in the Pending Action do not affect rail transportation, and ICCTA is inapplicable to Petitioners' claims. Petitioners do not seek to restrict rail transportation or the

activities required to keep the rail line operational. Petitioners are seeking damages under traditional state law remedies, including tort and inverse condemnation, for BNSF and Massman's actions that damaged Petitioners' property.

*A. ICCTA Preemption Language*

The relevant preemption language found in the ICCTA states, “except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation, are exclusive and preempt the remedies provided under Federal or State Law.” 49 U.S.C. §10501(b)(2). “Regulation of rail transportation” means laws which have the effect of managing or governing rail transportation. 49 U.S.C. § 10501(b). Such laws include the rules, practices, rates, services, and facilities of rail carriers, as well as construction, operation, abandonment, or discontinuance of rail tracks and facilities. *Id.* Congress narrowly tailored this preemption language to apply only to those state laws which may reasonably have an effect on governing rail transportation, but purposely permitted continued application of state law which had a remote or mere incidental effect on rail transportation.

There are no remedies available to Petitioners under ICCTA or through the Board for Petitioners' claims, and nor could Petitioners have requested through the Board that BNSF create additional drainage prior to the damages caused by BNSF and Massman. No permitting or preclearance requirements are involved in Petitioners' claims. Further, the Pending Action is not an intrusion into matters regulated by the Board, including the Board's regulation of facilities and the instrumentalities of transportation. The Board did not and could not have approved any design, construction, drainage, or maintenance activity of BNSF or Massman with respect to the Embankment, nor did the Board authorize or regulate in any manner the creation of openings in the Embankment, the construction of bridges, or the raising of the track. Likewise, the Board

does not provide any remedy for Petitioners for the claims brought in the Pending Action. As there is no remedy through the Board or regulation by the Board in the matters in the Pending Action, Petitioners' claims cannot be preempted and were not intended by Congress to be preempted.

"Congress narrowly tailored the ICCTA pre-emption provision to displace only 'regulation,' i.e. those state laws that may reasonably be said to have the effect of 'managing' or 'governing' rail transportation...while permitting the continued application of laws having more remote or incidental effect on rail transportation." *Franks Inv. Co. LLC v. Union Pacific R. Co.*, 593 F.3d 404, 408-10 (5th Cir. 2010); *see also Elam v. Kansas City Southern Ry. Co.*, 635 F.3d 796, 805 (5th Cir. 2011). The court in *Franks* continued that the Board has jurisdiction over "transportation by rail carriers" and that such items include establishing rates, regulating competition, and preserving national rail transportation services. *Id.* There is no aspect of Petitioners' complaint that seeks to alter the operations of BNSF or that relate to rates or other items over which the Board has jurisdiction.

As further explained in *Emerson v. Kansas City Southern Ry. Co.*, "transportation does not encompass everything touching on railroads." 503 F.3d 1126, 1129 (10th Cir. 2007). The *Emerson* court reasons that ICCTA preemption focuses on physical instrumentalities related to the movement of passengers and services related to that movement. *Id.* The court found that the landowner's complaints about the railroad's dumping of ties and failure to maintain a ditch, which caused water damage to plaintiffs' property, were not within the scope of ICCTA and that plaintiffs could proceed with state common law claims for damages. *Id.* The *Emerson* court reasoned that the state law remedy would not prevent the railroad from operating and that the Board did not regulate the activities complained of by plaintiffs. *Id.* at 1131. Likewise, the relief

requested by Petitioners under state law claims would not in any way affect BNSF's operations, and the claims asserted by Petitioners are not areas over which the Board has jurisdiction.

*B. Case Law on ICCTA Preemption*

BNSF and Massman claim that all actions taken related to the rail tracks are preempted by ICCTA and that BNSF and Massman can have no liability for any of their actions - regardless of whether those actions have damaged Petitioners' property and regardless of whether those actions were negligent or intentional. The case law indicates that BNSF and Massman are mistaken, and cases hold that railroads continue to be liable under state law actions for damages caused to neighboring property owners.

Many cases addressing ICCTA preemption focus on whether certain laws and regulations of state and local government entities are preempted. Many of those cases involved specific laws and regulations passed by state and local governments directly focused on railroads. Such is not the case here. The laws which BNSF and Massman claim to be preempted are common law and constitutional property law claims. These apply to all parties and are not specifically focused on BNSF and Massman. "Generally speaking, ICCTA does not preempt state or local laws if they are laws of general applicability that do not unreasonably interfere with interstate commerce." *Ass'n American Railroads v. S. Coast Air Quality*, 622 F.3d 1094, 1097 (9th Cir. 2010). Here, the laws Petitioners seek to enforce are laws of general applicability that apply to BNSF, Massman, and all others equally. The common law claims asserted by Petitioners do not interfere with interstate commerce and apply to all parties.

The recent decision of *Guild v. Kansas City Southern Ry. Co.* from the 5th Circuit is instructive in this analysis. ---Fed.Appx.--- (2013 WL 4780156) (5th Cir. 2013). The 5th Circuit specifically found that "the purpose of Mississippi's negligence law is not to manage or

govern rail transportation...Rather, the effects of state negligence law on rail operations are merely incidental.” *Id.* at \*4 (citations omitted). The 5th Circuit found that the plaintiff’s negligence claims resulting from the railroad’s use of a spur track during upgrades by the railroad were not preempted. The 5th Circuit went on to reason that while regulations in the area of train speed, length, and scheduling are preempted, “simple negligence claims” are not preempted. *Id.* at \*4.

The case of *Emerson v. Kansas City Southern Ry. Co.* is also similar to the situation here. 503 F.3d 1126 (10th Cir. 2007). In *Emerson*, the plaintiffs brought a suit alleging that the railroad defendant discarded rails in a drainage ditch and disposed of debris in the right-of-way, which caused flooding on plaintiff’s property. *Id.* At 1128. The plaintiffs brought state law claims for trespass, nuisance, negligence, and unjust enrichment. The court in *Emerson* found that preemption did not exist under ICCTA:

We do not think that the plain language of this statute can be read to include the conduct that the Landowners complain of here—discarding old railroad ties into a wastewater drainage ditch adjacent to the tracks and otherwise failing to maintain that ditch. These acts (or failures to act) are not instrumentalities ‘of any kind related to the movement of passengers or property’ or ‘services related to that movement.’ Rather, they are possibly tortious acts committed by a landowner who happens to be a railroad company. Because these acts or omissions are not ‘transportation’ under § 10102(9), the ICCTA does not expressly preempt the generally applicable state common law governing the Railroad’s disposal of waste and maintenance of the ditch.

*Id.* At 1129-1130.

Other recent court decisions have also specifically found that ICCTA does not preempt state common law claims. “[S]tate tort action does not manage or govern rail transportation, but rather, at most, has some incidental effect on railroad transportation.” *Trejo*, 2011 WL 309614, at \*4. Similarly, in *Allied Industrial Development Corporation v. Ohio Central Railroad, Inc.*, the court found that a trespass action was not preempted by ICCTA. 2010 WL 1524469 (N.D.

Ohio 2010). "Ohio trespass law falls outside the ICCTA's preemptive scope, which covers only 'regulation of rail transportation.'" *Id.* at \*1. In *Fayard*, the 1st Circuit held that "state nuisance law continues to apply to railroads." 533 F.3d at 48. (1st Cir. 2008). *See also Rushing v. Kansas City Southern Ry. Co.*, 194 F. Supp. 2d 493, 496 (S.D. Miss. 2001); *Irish v. Burlington Northern Santa Fe. R.R. Co.*, 632 F. Supp. 2d 871 (W.D. Wis. 2009); *Watkins v. RJ Corman R.R.*, 2010 WL 1710203 (U.S. Dist. E.D. Kentucky 2010) (unpublished); *Elam v. Kansas City Southern Ry. Co.*, 635 F.3d 796 (5th Cir. 2011).

C. *Surface Transportation Board Decisions*

Numerous Board decisions support Petitioners' position that its claims are not preempted. The Board decisions generally find that courts are in a better position to determine state law claims and to conduct fact-intensive inquiries into claims of negligence, trespass, and inverse condemnation.

The analysis reflected in the Board's decision in *Buddy & Holly Hatcher – Petition for Declaratory Order*, FD 35581 (BOARD Sept. 21, 2012) is instructive herein. There are significant parallels between Petitioners action in Missouri and the California state action in *Hatcher* in that the Board does not micromanage BNSF's acts and omissions in maintaining the Embankment. Applying the language of the *Hatcher* decision under these facts, "the state court action addresses the manner in which the Railroad Defendant conducted [maintenance] and only seeks to hold them accountable for the damage they allegedly caused to the [Tubbs'] property as a result of such [maintenance]." *Id.* \*5. Borrowing from the Board's analysis in *Hatcher*, any regulation by the Board of BNSF's track or facilities ( i.e., the Embankment) did not amount to a blanket approval to conduct maintenance operations without regard to state and local laws, or to insulate BNSF from all consequential effects arising out of maintenance activity. The Board's

authorization of the construction or maintenance of facilities and imposition of conditions on that activity is not a license for railroads to take, or neglect to take, whatever actions they wish in exercising maintenance activity. The Board cannot anticipate, and will not issue, a laundry list of all possible actions railroads cannot do or must do in the course of maintaining its facilities; such a list would inevitably be incomplete. In *Hatcher*, the Board found that plaintiffs' state law claims of unreasonable diversion of surface water, inverse condemnation, trespass, nuisance, and negligence were not preempted. *Id.* at \*3, 7. The claims in *Hatcher* were similar to Petitioners' claims here, and Petitioners' claims should also be allowed to proceed in state court.

In *Mark Lang – Petition for Declaratory Order*, the Board found that the claimant's request for monetary relief under the state's inverse condemnation statute for an alleged taking was not preempted. *Mark Lang – Petition for Declaratory Order*, Docket No. FD\_35037\_0 (BOARD January 28, 2008) \*3. In *Lange*, the Board reasoned that the state, like many states, incorporated into its eminent domain laws a provision allowing railroads to condemn property and that such authority includes the responsibility to compensate persons for property taken. *Id.* at \*4. The Board specifically held: “an award of just compensation for an alleged taking of property – assuming such compensation has not already been paid – would not unreasonably interfere with rail operations and would not be preempted.” *Id.* Similarly, in *Allegheny Valley Railroad Company – Petition for Declaratory Order – William Fiore*, the Board found that the issues in dispute relating to property ownership and eminent domain were state law property claims and properly before state court and not preempted by ICCTA. Docket No. FD 35388, \*4 (STB April 25, 2011). Petitioners' claim of inverse condemnation seeks only that BNSF pay for the land that it took and destroyed. BNSF did not have the authorization or authority to take such land, but is subject to Missouri law giving BNSF the power of eminent domain and is

required to compensation Petitioners for the property taken by BNSF. *See* V.A.M.S. Const. Art 1, § 26; RSMo § 388.370.

In another case, the Board held that where the primary issues are tortious acts and breach of contract, the claims “are better suited for adjudication before the courts.” *Boston and Maine Corporation and Springfield Terminal Railroad Company v. New England Central Railroad, Inc.*, Docket No. FD 34612, \*1 (STB February 23, 2005). *Boston and Maine* involved a derailment and alleging that the railroad failed to maintain the tract, and plaintiffs sought compensatory, incidental, and punitive damages due to the railroad’s negligence, recklessness, and willful misconduct. *Id.* at \*2. The Board held that disputes “around fact-bound issues” are best resolved by the courts and that the Board is not the proper forum to determine “negligence, recklessness, and willful misconduct, or in determining damages” due to such conduct. *Id.* at \*4.

*D. Federal Rail Safety Act*

Petitioners' claims relating to BNSF's violations of the Federal Rail Safety Act are not preempted by ICCTA. Petitioners have a right to pursue such violations by BNSF of the Federal Rail Safety Act. The Board does not have the authority to hear such claims or to award Petitioners damages for BNSF's violations of the Federal Rail Safety Act. Instead, Petitioners specifically have the statutory right to pursue such claims in state court pursuant to FRSA § 20106(b). The clarifying amendment passed in 2006 to the Federal Rail Safety Act provides that damaged parties have the right to proceed under state law for “damages for personal injury, death, or property damage alleging that a party (A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters...; (B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

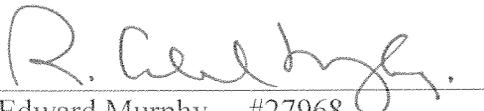
(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).” FRSA § 20106(b). Here, Petitioners claims that BNSF failed to comply with federal regulations, its own standards, and state law and have the right to pursue remedies for such violations in state court.

Conclusion

For the reasons set forth herein, Petitioners seek a declaratory order that the claims in the Pending Action are not preempted by ICCTA. Without such an order, Petitioners will be without a remedy and will be unable to pursue any damages for the great harm caused by BNSF and Massman to Petitioners' property. Such a ruling is consistent with and supported by the case law and with Board decisions in the area.

WHEREFORE, Petitioners respectfully request the Board issue its declaratory order finding that Petitioners' Pending Action in Missouri state court against BNSF and Massman is not federally preempted and for such other relief as the Board may deem proper.

**Murphy, Taylor, Siemens & Elliott, P.C.**

By 

R. Edward Murphy – #27968

Michael L. Taylor - #31948

Nancy I. Blake - #61443

3007 Frederick Avenue

St. Joseph, Missouri 64506

Telephone: (816) 364-6677

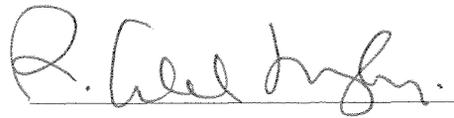
Facsimile: (816) 364-9677

**Attorneys for Plaintiffs**

VERIFICATION

I, R. Edward Murphy, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this pleading.

Executed on December 6, 2013.

A handwritten signature in cursive script, appearing to read "R. Edward Murphy", is written over a horizontal line.

R. Edward Murphy

## STATEMENT REGARDING SERVICE

The undersigned does hereby certify that on this 6th day of December, 2013, I have served Defendants in this proceeding with this document by United States pre-paid mail, return receipt requested.

Scott Ross  
ROSS AND THOMSON LLP  
408 N. Market St.  
P.O. Box 370  
Maryville, MO 64468-0370  
Facsimile: 660-582-8790  
[scott.rossthomson@embarqmail.com](mailto:scott.rossthomson@embarqmail.com)

And

Douglas R. Dalgleish  
LATHROP & GAGE LLP  
2345 Grand Blvd., Ste 2200  
Kansas City, MO 64108-2618  
Facsimile: 816-292-2001  
[ddalgleish@lathropgage.com](mailto:ddalgleish@lathropgage.com)

Attorneys for Defendants

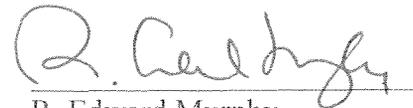
  
R. Edward Murphy

EXHIBIT A

Petition

IN THE CIRCUIT COURT OF HOLT COUNTY, MISSOURI  
DIVISION NO. I

THOMAS TUBBS, TRUSTEE OF THE )  
THOMAS TUBBS REVOCABLE )  
TRUST AND INDIVIDUALLY, )  
and )  
DANA LYNN TUBBS, TRUSTEE OF THE )  
DANA LYNN TUBBS REVOCABLE )  
TRUST AND INDIVIDUALLY, )  
Plaintiffs, )

v. )

BNSF RAILWAY COMPANY, INC., )  
Serve: Registered Agent: Springfield, Ltd. )  
1845 S. National )  
Springfield, MO 65804 )

and )

MASSMAN CONSTRUCTION CO., )  
Serve: Registered Agent: H.J. Massman, IV )  
8901 State Line )  
Kansas City, MO 64114 )  
Defendants. )

FILED

FEB 27 2012

VICKI BOOK  
CIRCUIT CLERK - DIV. I  
HOLT COUNTY, MISSOURI

Case No. 12Ho-CC00010

PETITION FOR DAMAGES

COME NOW Thomas Tubbs and Dana Lynn Tubbs, each individually and as Trustee, respectively, of the Thomas Tubbs Revocable Trust and the Dana Lynn Tubbs Revocable Trust (hereinafter sometimes "Thomas and Dana Tubbs"), Plaintiffs, by and through their attorneys at law, Gary L. Myers, Rex A. Sharp, Creath S. Thorne and Matthew L. Myers and, for their Petition for Damages against Defendants BNSF Railway Company, Inc. and Massman Construction Co., state as follows:

## COMMON ALLEGATIONS

1. At all pertinent times referred to herein, Thomas Tubbs and Dana Lynn Tubbs were and are owners of, in possession of and residing on certain tracts of land (hereinafter sometimes "the Tubbses' Farms") primarily used to produce corn and soybeans, situated in Holt County, Missouri, between the Village of Big Lake, Missouri and Fortescue, Missouri. The tracts of land are more particularly described on Exhibit A, attached hereto and made a part hereof by reference; the tracts total approximately 544.37 acres.

2. At all pertinent times referred to herein, Defendant BNSF Railway Co., Inc. (hereinafter sometimes "BNSF") has operated and maintained and continues to operate and maintain a rail line which bisects the Tubbses' Farms, approximately 157 acres more or less lying north of the rail line and 387.37 acres more or less lying south of the rail line.

3. BNSF is incorporated in Delaware, has its headquarters in Forth Worth, Texas and carries on substantial rail operations in Missouri.

4. At all pertinent times referred to herein, Defendants BNSF and Massman Construction Co. (hereinafter sometimes "Massman") built up an earthen dam, and on the top of that dam BNSF put its rail line and a railroad bridge lying along the Tubbses' Farms.

5. Massman is incorporated in Missouri, has its headquarters in Missouri and carries on substantial operations in Missouri.

6. The actions complained of herein took place and continue to take place in Holt County, Missouri, with jurisdiction and venue lying in this Court.

7. Around the first of June 2011, the area in and around the Village of Big Lake, Missouri, including the Tubbses' Farms, was flooded by the Missouri River.

8. Upon information and belief, BNSF hired Massman to construct a bridge and the earthen dam that ran through the Tubbses' Farms.

9. Upon information and belief, thereafter Massman entered upon the Tubbses' Farms before and during the flood for the purpose of building the earthen dam.

10. In performing BNSF's work, Massman built the earthen dam without culverts or other outlets for drainage, thereby creating a "bathtub effect" or reservoir, held the water there for an extended period of time, and then through acts or omissions later caused the water to be channeled and diverted resulting in the release of rapidly moving water onto the Tubbses' Farms. This irreparably damaged the Tubbses' Farms.

11. Additional damage to the Tubbses' Farms occurred during construction of the earthen dam and railroad bridge when Massman, under the supervision and direction of BNSF, dug trenches, dumped rock, and scooped soil from the Tubbses' Farms. This activity altered the topography and configuration of the Tubbses' Farms. It created channels and otherwise made use of the Tubbses' Farms without permission and extended beyond any easement or grant-of-right of way that BNSF may have.

12. BNSF and Massman performed work in the area of the railroad tracks adjacent to the Tubbses' Farms with the intent of protecting railroad property but at the resulting expense of damage to the Tubbses's property.

13. Pursuant to Mo. Rev. Stat. §§523.262 and 388.210, Defendant BNSF has certain powers of eminent domain which must be appropriately exercised, and BNSF never even sought to invoke those powers in a legal manner.

14. BNSF's and Massman's unauthorized activity on the Tubbses' Farms caused topographical changes and changes to the soil quality and amount. Substantial portions of the

top soil and sub soil washed away or were covered by deposits of sand, rendering the land unusable for farming purposes.

15. All of the foregoing acts and conduct of BNSF and Massman were done without the consent or permission of Plaintiffss Thomas Tubbs and Dana Lynn Tubbs.

16. The Tubbses' Farms, once fertile crop land, now consist of soil unusable for farming purposes with large crevasses.

17. Plaintiffs have been substantially, directly and proximately damaged and injured by the actions of BNSF and Massman.

#### **COUNT I - TRESPASS**

18. Plaintiffs incorporate by reference Paragraphs 1 - 17 and 24 - 51 as though fully set forth herein.

19. Defendants, without any right, license, permission, or consent from Plaintiffs, willfully, wantonly, intentionally and unlawfully entered onto the Tubbses' Farms.

20. Defendants BNSF and Massman unreasonably interfered with the flow of water from the Missouri River, causing the water to be held in a "bathtub effect" or reservoir on the Tubbses' Farms followed by the improper diversion and channeling of the water on the Tubbses' Farms, all to the great harm of Thomas Tubbs and Dana Lynn Tubbs.

21. The actions of BNSF and Massman in entering upon the Tubbses' Farms and, in so channeling and directing the water, were unreasonable.

22. By reason of the acts and conduct of Defendants BNSF and Massman, the Plaintiffs have suffered damages to land, future earnings, lost use of property, inconvenience and discomfort.

23. Specifically, Defendants BNSF and Massman performed construction and work on and around the dam and railroad tracks knowingly, willfully and wantonly, increasing the dam and resulting embankment's height and width; further Defendants BNSF and Massman knowingly, willfully and wantonly caused damage to Plaintiffs' farm by not seeking and obtaining Plaintiffs' permission to work on and around said farm, performing the work anyway, and not utilizing construction techniques with protection of the Plaintiffs' interests in mind; further, Defendants BNSF and Massman did nothing to minimize damage to the farm when it became apparent that there was a high risk of resulting damage to the Plaintiffs' farm as a result of the construction and work performed by Defendants BNSF and Massman. All of this was done by Defendants BNSF and Massman knowingly, willfully and wantonly, disregarding the rights and interests of Plaintiffs with a cavalier knowledge of protecting itself to the detriment of its neighbor, the Plaintiffs.

*WHEREFORE*, Plaintiffs pray for judgment against Defendants BNSF and Massman jointly and severally, and each of them, in an amount to be proven at trial that is fair and reasonable under the circumstances, for punitive damages in an amount that is fair and reasonable, attorneys' fees, for the costs of this action, and for such other and further relief as the Court shall deem just and proper, the premises considered.

#### COUNT II - NUISANCE

24. Plaintiffs incorporate by reference Paragraphs 1 - 23 and 32 - 51 as though fully set forth herein.

25. Defendants BNSF and Massman knowingly caused and diverted Missouri River flood water onto the Tubbses' Farms.

26. Plaintiffs Thomas Tubbs and Dana Lynn Tubbs are entitled to reasonable enjoyment and possession of their farms and residential property.

27. Defendants BNSF and Massman have caused direct injury to Plaintiffs' property which has substantially prevented Plaintiffs from their reasonable enjoyment and use of their personal and real property.

28. Defendants BNSF and Massman were capable of designing, constructing and maintaining a railroad earthen dam and bridge which did not capture water and which did not channel flood water directly onto Plaintiffs' property, but they did not do so. Their failure to build the earthen dam and bridge without adequate allowance for rapidly flowing water caused injury to the Tubbses' property and interfered with Plaintiffs' reasonable use and enjoyment of their property.

29. The actions of Defendants BNSF and Massman were unreasonable.

30. Plaintiffs have suffered actual loss to their personal, real property, and future earnings.

31. Defendants BNSF and Massman acted intentionally and with such willful, wanton or reckless disregard for the rights and interests of Plaintiffs and the consequences of their actions that punitive damages lie herein and should be imposed.

*WHEREFORE*, Plaintiffs pray for judgment against Defendants BNSF and Massman jointly and severally, and each of them, in an amount to be proven at trial that is fair and reasonable under the circumstances, for punitive damages in an amount to be determined at trial that is fair and reasonable, for attorneys' fees, for the costs of this action, and for such other and further relief as the Court shall deem just and proper, the premises considered.

### COUNT III - NEGLIGENCE

32. Plaintiffs incorporate by reference Paragraphs 1 - 31 and 40 - 51 as though fully set forth herein.

33. Defendants BNSF and Massman had a duty to exercise due care in the maintenance and construction of its earthen dam and railroad bridge to prevent damage to Plaintiffs' property.

34. Defendants BNSF and Massman breached their duty by digging trenches, dumping rock, and diverting rapidly flowing current water onto the Tubbses' Farms, thereby creating an earthen dam without proper outlets which held water and created a "bathtub effect", all to the great destruction of the Tubbses' Farms and the Tubbses' livelihood.

35. Defendants BNSF and Massman's acts were grossly negligent, constituting willful and wanton misconduct in that they recklessly disregarded the interests of the Plaintiffs at risk of catastrophic damage to Plaintiffs' property.

36. Defendants BNSF and Massman's acts were the actual cause of Plaintiffs' property damage in that the damage would not have occurred but for Defendants' acts of digging trenches, dumping rock, and diverting rapidly flowing current water onto the Tubbses' Farms, thereby creating an earthen dam without proper outlets which held water, created a "bathtub effect" or reservoir and then channeled and diverted rapidly moving water through the Tubbses' Farms, all to the great destruction of the Tubbses' Farms and the Tubbses' livelihood.

37. Defendants BNSF and Massman's acts were the proximate cause of Plaintiffs' property damage in that it was reasonably foreseeable that Defendants' acts of digging trenches, dumping rock, and diverting rapidly flowing current water onto the Tubbses' Farms, would

thereby create an earthen dam without proper outlets which held water, create a "bathtub effect" or reservoir, and would channel and divert rapidly moving water through the Tubbses' Farms, all to the great destruction of the Tubbses' Farms and the Tubbses' livelihood.

38. As a further proximate result of the negligence of Defendants and the destruction of Plaintiffs' property as described hereinabove, Plaintiffs are and have been unable to conduct Plaintiffs' business of farming since the time that Defendants destroyed Plaintiffs' property, thereby causing Plaintiffs to lose business profits in that Plaintiffs are no longer able to farm or grow crops from lack of top soil and sub soil, which said lack of top soil and sub soil were caused by the actions and conduct of Defendants.

39. Defendants BNSF and Massman acted intentionally and with such willful, wanton or reckless disregard for the rights and interests of Plaintiffs and the consequences of their actions that punitive damages lie herein and should be imposed.

*WHEREFORE*, Plaintiffs pray for judgment against Defendants BNSF and Massman jointly and severally, and each of them, in an amount to be proven at trial that is fair and reasonable under the circumstances, for punitive damages in an amount that is fair and reasonable, for attorneys' fees, for the costs of this action, and for such other and further relief as the Court shall deem just and proper, the premises considered.

#### COUNT IV - INVERSE CONDEMNATION

40. Plaintiffs incorporate by reference Paragraphs 1 - 39 and 46 - 51 as though fully set forth herein.

41. Pursuant to Mo. Rev. Stat. §§523.262 and 388.210, Defendant BNSF has certain powers of eminent domain which must be appropriately exercised, and BNSF failed to do so.

42. The actions of Defendant BNSF constitutes a taking of private property for public use without compliance with the aforesaid statutes and, otherwise, without just compensation.

43. Plaintiffs' properties suffered a significant diminution of value due to the actions of Defendant BNSF, its agents or assigns, from the work done on building the earthen dam and construction of the bridge.

44. The actions of Defendant BNSF for the work done on the earthen dam and construction constitute a permanent and continuing deprivation of Plaintiffs' property rights.

45. Defendant BNSF, directly or indirectly, by hiring Massman, built an earthen dam thereby taking Plaintiffs' property without any, let alone just, compensation.

*WHEREFORE*, Plaintiffs pray for judgment against Defendant BNSF in an amount to be proven at trial that is fair and reasonable under the circumstances, for just compensation, for interest as allowed by Missouri law, for attorneys' fees, for the costs of this action, and for such other and further relief as the Court shall deem just and proper, the premises considered.

#### COUNT V - STATUTORY TRESPASS

46. Plaintiffs incorporate by reference Paragraphs 1 - 45 as though fully set forth herein.

47. Defendants BNSF and Massman entered onto the land of Plaintiffs intentionally and without a bona fide mistake as to boundaries or probable cause to believe that they were authorized to enter the Plaintiffs' premises.

48. Defendants BNSF and Massman caused all of the top soil and sub soil on the Tubbses' Farms to wash away and, in places, removed the underlying clay and rock by digging trenches, dumping rock, diverting rapidly flowing current water onto the Tubbses' Farms, and by

creating an earthen dam without proper outlets which held water and created a “bathtub effect” or reservoir, all to the great destruction of the Tubbses’ Farms and the Tubbses’ livelihood.

49. Mo. Rev. Stat. §537.340 provides as follows:

If any person shall cut down, injure or destroy or carry away any tree placed or growing for use, shade or ornament, or any timber, rails or wood standing, being or growing on the land of any other person, including any governmental entity, or shall dig up, quarry or carry away any stones, ore or mineral, gravel, clay or mold, or any ice or other substance or material being a part of the realty, or any roots, fruits or plants, or cut down or carry away grass, grain, corn, flax or hemp in which such person has no interest or right, standing, lying or being on land not such person’s own, or shall knowingly break the glass or any part of it in any building not such person’s own, the person so offending shall pay to the party injured treble the value of the things so injured, broken, destroyed or carried away, with costs. Any person filing a claim for damages pursuant to this section need not prove negligence or intent.

50. In doing the acts alleged herein, Defendants BNSF and Massman have violated the provisions of Mo. Rev. Stat. §537.340.

51. Plaintiffs have been injured by the actions of Defendants BNSF and Massman and by their failure to comply with the conditions and requirements of Mo. Rev. Stat. §537.340 and by their intentional and willful, wanton or reckless disregard for the rights of Plaintiffs.

*WHEREFORE*, Plaintiffs pray for judgment against Defendants BNSF and Massman jointly and severally, and each of them, in an amount to be proven at trial that is fair and reasonable under the circumstances, for attorneys’ fees, for the costs of this action, and for such other and further relief as the Court shall deem just and proper, the premises considered.

**PLAINTIFFS DEMAND TRIAL BY JURY.**

Respectfully submitted,



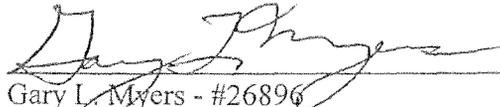
---

Creath S. Thorne - #31902  
*Creath S. Thorne, P.C.*  
400 Jules Street, Suite 345  
St. Joseph, Missouri 64501  
Telephone: (816) 676-1491  
Facsimile: (816) 676-1427  
[csthorne@ccp.com](mailto:csthorne@ccp.com)



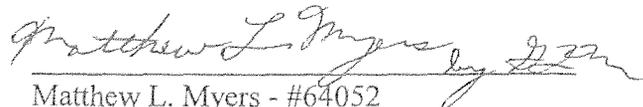
---

Rex A. Sharp - #51205  
*Gunderson Sharp & Walkie, LLP*  
5301 W. 75th Street  
Prairie Village, Kansas 66208  
Telephone: (913) 901-0500  
Facsimile: (913) 901-0419  
[rsharp@midwest-law.com](mailto:rsharp@midwest-law.com)



---

Gary L. Myers - #26896  
*Law Office of Gary L. Myers*  
4810 S. Lakewood Drive  
St. Joseph, Missouri 64506  
Telephone: (816) 294-9962  
Facsimile: (816) 689-5932  
[gmyers@garymyerslaw.com](mailto:gmyers@garymyerslaw.com)



---

Matthew L. Myers - #64052  
*Law Office of Matthew L. Myers*  
213 Delaware Street, #101  
Kansas City, Missouri 64105  
Telephone: (202) 276-4161  
Facsimile: (816) 689-5932  
[matthew.myers83@gmail.com](mailto:matthew.myers83@gmail.com)

*Attorneys for Plaintiffs Thomas Tubbs and  
Dana Lynn Tubbs, individually and  
respectively as Trustees of the Thomas  
Tubbs Revocable Trust and the Dana Lynn  
Tubbs Revocable Trust*

EXHIBIT A

Morris Farm (North of Tracks) 157 ACRES

[MORRIS]

THAT PORTION OF THE SOUTH HALF (S ½) OF LOT FOUR (4) OF SECTION THIRTY-ONE (31) LYING EAST OF THE MISSOURI HIGHWAY #111 RIGHT-OF-WAY LINE; THE SOUTH HALF (S ½) OF THE NORTHEAST QUARTER (NE ¼) OF SECTION THIRTY-ONE (31); THAT PORTION OF THE SOUTH HALF (S ½) OF THE NORTHWEST QUARTER (NW ¼) OF SECTION THIRTY-TWO (32) LYING WEST OF FARMERS DRIVE SUBJECT TO THE RIGHT-OF-WAY OF THE CHICAGO, BURLINGTON & QUINCY RAILROAD; ALL IN TOWNSHIP SIXTY-ONE (61) NORTH OF RANGE THIRTY-NINE (39), WEST OF THE FIFTH P.M.

[MORRIS]

ALL OF THE NORTH HALF (N ½) OF LOT FOUR (4) IN SECTION THIRTY-ONE (31), TOWNSHIP SIXTY-ONE (61), RANGE THIRTY-NINE (39), LYING EAST OF THE "FUNNY FARM LAKE LOTS" LOCATED IN HOLT COUNTY, MISSOURI OTHERWISE DESCRIBED AS: COMMENCING AT THE NORTHEAST CORNER OF LOT FOUR (4) IN SECTION THIRTY-ONE (31), TOWNSHIP SIXTY-ONE (61), RANGE THIRTY-NINE (39), HOLT COUNTY, MISSOURI (SAID POINT OF BEGINNING IS ALSO THE NORTHEAST CORNER OF THE NORTHWEST ¼ OF THE NORTHEAST ¼ OF SAID SECTION 31); THENCE WEST 1008.6 FEET TO A POINT ON THE EAST LINE OF THE "FUNNY FARM LAKE LOTS" THAT IS 0.5 FEET NORTHEAST OF THE NORTHEAST CORNER OF LOT 58; THENCE SOUTHERLY TO THE LEFT ON THE ARC OF A CURVE WITH A RADIUS OF 536.8 FEET AND INTERIOR ANGLE OF 50 DEGREES 00' A DISTANCE OF 359.44 FEET ALONG SAID EAST LINE OF "FUNNY FARM LAKE LOTS" TO A P.C. AT STATION 23+58.8; THENCE SOUTH 0 DEGREES 30' EAST 330.16 FEET ALONG SAID EAST LINE OF "FUNNY FARM LAKE LOTS" TO THE SOUTH LINE OF THE NORTH ½ OF SAID LOT 4; THENCE EAST 1131.0 FEET TO THE EAST LINE OF SAID LOT 4; THENCE NORTH 662.64 FEET TO THE POINT OF BEGINNING **EXCEPT:**

TRACT A:

COMMENCING AT THE SOUTHEAST CORNER OF LOT SEVENTY-THREE (73) OF FUNNY FARM LAKE LOTS, A SUBDIVISION SITUATE IN THE NORTHEAST ¼ OF SECTION 31, TOWNSHIP 61 NORTH, RANGE 39 WEST, HOLT COUNTY, MISSOURI; THENCE ALONG THE EAST LINE OF SAID ADDITION, NORTH 00 DEGREES 00 MINUTES 10 SECONDS EAST 4.00 FEET TO THE POINT OF BEGINNING; THENCE CONTINUING ALONG THE EAST LINE OF SAID ADDITION, NORTH 00 DEGREES 00 MINUTES 10 SECONDS EAST 148.02 FEET; THENCE NORTH 89 DEGREES 41 MINUTES 11 SECONDS EAST 146.19 FEET; THENCE SOUTH 01 DEGREES 25 MINUTES 31 SECONDS EAST 145.56 FEET; THENCE SOUTH 88 DEGREES 44 MINUTES 00 SECONDS WEST 149.85 FEET TO THE POINT OF BEGINNING.

HINKLE-REBEL FARM (South Of Tracks)

[HINKLE/REBEL 60]

BEGINNING AT THE SOUTHEAST CORNER OF FRACTIONAL SECTION 36, TOWNSHIP 61 NORTH, OF RANGE 40 WEST OF 5<sup>TH</sup> P.M; THENCE WEST ON THE SECTION LINE 15.175 CHAINS; THENCE NORTH TO THE SOUTH RIGHT-OF-WAY LINE OF MISSOURI STATE HIGHWAY #118; THENCE EASTERLY ALONG AND WITH SAID HIGHWAY RIGHT OF WAY LINE TO THE EAST LINE OF SAID SECTION 36; THENCE SOUTH TO THE POINT OF BEGINNING; **EXCEPTING** THEREFROM THAT PART DESCRIBED AS BEGINNING AT THE SOUTHEAST CORNER OF SAID SOUTHEAST QUARTER OF SECTION 36; THENCE WEST ON THE SECTION LINE 15.175 CHAINS; THENCE NORTH 13.413 CHAINS TO THE MEANDERS OF THE OLD EROSION BANK OF THE MISSOURI RIVER; THENCE WITH SAID MEANDERS SOUTH 88 DEGREES 5' EAST 95 LINKS; THENCE SOUTH 78 DEGREES 15' EAST 4.81 CHAINS; THENCE NORTH 82 DEGREES 35' EAST 1.23 CHAINS; THENCE NORTH 74 DEGREES 25' EAST 6.14 CHAINS; THENCE SOUTH 79 DEGREES 5' EAST 2.26 CHAINS TO A POINT IN THE SECTION LINE; THENCE SOUTH ON SAID SECTION LINE TO THE POINT OF BEGINNING.

ALSO THAT PART OF THE SOUTHWEST QUARTER OF SECTION 31, TOWNSHIP 61 NORTH, OF RANGE 39 WEST OF THE 5<sup>TH</sup> P.M. DESCRIBED AS BEGINNING AT THE SOUTHWEST CORNER OF SECTION 31; THENCE EAST ON THE SECTION LINE, 20 CHAINS TO THE SOUTHEAST CORNER OF THE WEST HALF OF THE SOUTHWEST QUARTER OF SAID SECTION 31; THENCE NORTH 39.70 CHAINS TO THE SOUTH LINE OF THE RAILROAD RIGHT-OF-WAY; THENCE WESTERLY ALONG SAID RIGHT-OF-WAY LINE TO THE WEST LINE OF SAID SECTION 31; THENCE SOUTH TO THE BEGINNING, **EXCEPTING** ALL THAT PART OF THE NORTHWEST QUARTER OF THE SOUTHWEST QUARTER OF SAID SECTION 31 LYING ON THE NORTHERLY SIDE OF MISSOURI STATE HIGHWAY 118, AND SOUTH OF THE SOUTH LINE OF THE RAILROAD RIGHT OF WAY, AND **EXCEPT** A TRACT BEGINNING AT THE SOUTHWEST CORNER OF SAID SECTION 31; THENCE NORTH 13.585 CHAINS TO THE MEANDERS OF THE OLD BANK OF THE MISSOURI RIVER; THENCE WITH SAID MEANDERS SOUTH 77 DEGREES 50' EAST 2.875 CHAINS; THENCE SOUTH 68 DEGREES 35' EAST 2.49 CHAINS; THENCE SOUTH 83 DEGREES 25' EAST 3.498 CHAINS; THENCE SOUTH 77 DEGREES 30' EAST 3.28 CHAINS; THENCE SOUTH 74 DEGREES 45' EAST 2.61 CHAINS; THENCE SOUTH 74 DEGREES 5' EAST 3.40 CHAINS; THENCE SOUTH 71 DEGREES 35' EAST 2.026 CHAINS; THENCE SOUTH 65 DEGREES 5' EAST 59.6 LINKS; THENCE SOUTH 0 DEGREES 28 1/2' EAST 8.10 CHAINS TO THE SOUTH LINE OF SAID SECTION 31; THENCE WEST ON THE SOUTH LINE OF SAID SECTION 31, 19.91 CHAINS TO THE BEGINNING CORNER, AND **EXCEPT** A TRACT BEGINNING AT A POINT 15.175 CHAINS WEST AND 34.77 CHAINS NORTH OF THE SOUTHEAST CORNER OF SECTION 36, TOWNSHIP 61, RANGE 40; THENCE SOUTH 80 DEGREES 15' WEST 4.88 CHAINS; THENCE SOUTH 63 DEGREES 25' WEST, 1.42 CHAINS; THENCE SOUTH 76 DEGREES 15' WEST 0.76 CHAINS; THENCE SOUTH 84

DEGREES 30' WEST 4.27 CHAINS; THENCE NORTH 59 DEGREES 40' WEST, 1.31 CHAINS; THENCE SOUTH 81 DEGREES 15' WEST 5.15 CHAINS; THENCE NORTH 85 DEGREES 35' WEST, 6.11 CHAINS; THENCE SOUTH 87 DEGREES 40' WEST 3.93 CHAINS; THENCE NORTH 62 DEGREES 18' WEST 4.34 CHAINS; THENCE NORTH 5.63 CHAINS TO THE SOUTH LINE OF THE CHICAGO, BURLINGTON & QUINCY RAILROAD RIGHT-OF-WAY; THENCE EAST 31.155 CHAINS; THENCE SOUTH 5.605 CHAINS TO BEGINNING, AND **ALSO EXCEPT** ALL THAT PART OF THE EAST 15.175 CHAINS OF THE SOUTHEAST QUARTER OF SECTION 36, TOWNSHIP 61, RANGE 40, LYING NORTH OF THE NORTH RIGHT-OF-WAY OF RELOCATED STATE HIGHWAY U.S. ROUTE 159, SOUTH OF THE SOUTH RIGHT-OF-WAY OF FORMER MISSOURI STATE HIGHWAY #118 AND WEST OF BIG LAKE; **ALSO EXCEPT:** A TRACT OF LAND IN THE SOUTHWEST QUARTER OF SECTION 31, TOWNSHIP 61 NORTH, RANGE 39 WEST AND THE SOUTHEAST QUARTER OF SECTION 36, TOWNSHIP 61 NORTH, RANGE 40 WEST, HOLT COUNTY, MISSOURI DESCRIBED AS FOLLOWS: BEGINNING AT A POINT ON THE WEST LINE OF SAID SOUTHWEST QUARTER THAT IS 1691.25 FEET NORTH 01 DEGREES 13' 45" EAST OF THE SOUTHWEST CORNER OF SAID SOUTHWEST QUARTER, SAID POINT BEING ON THE NORTH RIGHT-OF-WAY LINE OF RELOCATED HIGHWAY 159, THENCE ALONG SAID RIGHT-OF-WAY LINE, ON A CURVE TO THE RIGHT, HAVING A RADIUS OF 2789.79 FEET, AN ARC DISTANCE OF 66.76 FEET (CHORD = SOUTH 77 DEGREES 51' 22" WEST, 66.76 FEET) TO THE HIGH BANK OF BIG LAKE; THENCE, ALONG SAID BANK THE FOLLOWING COURSES AND DISTANCES; NORTH 70 DEGREES 13' 14" EAST, 62.47 FEET; NORTH 45 DEGREES 46' 09" EAST, 123.52 FEET; NORTH 6 DEGREES 54' 43" WEST, 85.12 FEET; NORTH 50 DEGREES 45' 47" WEST, 50.77 FEET TO THE SOUTH RIGHT-OF-WAY LINE OF OLD HIGHWAY 159; THENCE, ALONG SAID RIGHT-OF-WAY LINE, NORTH 77 DEGREES 00' 43" EAST, 988.05 FEET TO THE RIGHT-OF-WAY LINE OF RELOCATED HIGHWAY 159; THENCE, ALONG SAID RIGHT-OF-WAY LINE, SOUTH 12 DEGREES 40' 15" EAST, 56.68 FEET; THENCE SOUTH 67 DEGREES 18' 35" WEST, 597.20 FEET TO THE BEGINNING OF A CURVE TO THE RIGHT, HAVING A RADIUS OF 2789.79 FEET; THENCE ALONG SAID CURVE AN ARC DISTANCE OF 480.13 FEET TO THE POINT OF BEGINNING. SUBJECT TO PUBLIC ROADS AND HIGHWAYS.

[HINKLE/REBEL 112]

THE NORTH HALF OF THE SOUTHEAST QUARTER AND THE SOUTHEAST QUARTER OF THE SOUTHEAST QUARTER; ALL IN SECTION 31, TOWNSHIP 61, RANGE 39 IN HOLT COUNTY, MISSOURI.

[HINKLE/REBEL 155]

THE EAST HALF OF THE SOUTHWEST QUARTER OF SECTION 31; AND THE SOUTHWEST QUARTER OF THE SOUTHEAST QUARTER OF SECTION 31; ALL IN TOWNSHIP 61 NORTH, RANGE 39 WEST OF THE FIFTH PRINCIPAL MERIDIAN. THE WEST HALF OF THE EAST HALF OF FRACTIONAL SECTION 1, LYING ON THE NORTH SIDE OF BIG TARKIO; A TRACT OF LAND DESCRIBED AS BEGINNING AT THE QUARTER SECTION CORNER ON THE NORTH SIDE OF SECTION 1, THENCE

NORTH 25 LINKS, THENCE WEST 12.36 CHAINS, THENCE SOUTH 70 ½ DEGREES EAST ALONG THE OLD EROSION BANK OF THE MISSOURI RIVER 13.11 CHAINS, THENCE NORTH 4.12 CHAINS TO THE POINT OF BEGINNING, ALL IN TOWNSHIP 60 NORTH, RANGE 40 WEST OF THE FIFTH PRINCIPAL MERIDIAN.

[BINDER]

COMMENCING AT THE NORTH QUARTER CORNER OF SECTION 1, TOWNSHIP 60 NORTH, RANGE 40 WEST, HOLT COUNTY, MISSOURI; THENCE ALONG QUARTER SECTION LINE, SOUTH 03 DEGREES 43' 52" WEST 297.08 FEET TO THE POINT OF BEGINNING; THENCE CONTINUING ALONG SAID LINE, SOUTH 03 DEGREES 43' 52" WEST 771.97 FEET TO THE INTERSECTION OF THE NORTHWESTERLY TOW OF THE EXISTING LEVEE; THENCE ALONG SAID TOW, NORTH 85 DEGREES 40' 41" WEST 43.70 FEET; THENCE SOUTH 52 DEGREES 43' 00" WEST 129.36 FEET; THENCE SOUTH 39 DEGREES 08' 11" WEST 230.89 FEET; THENCE SOUTH 76 DEGREES 34' 36" WEST 220.21 FEET; THENCE SOUTH 63 DEGREES 51' 50" WEST 112.00 FEET; THENCE SOUTH 49 DEGREES 01' 16" WEST 122.31 FEET; THENCE DEPARTING FROM SAID LEVEE AND RUNNING WITH THE CENTERLINE OF AN EXISTING DITCH, NORTH 84 DEGREES 46' 27" WEST 1389.17 FEET; THENCE DUE NORTH 1427.26 FEET TO THE NORTH LINE OF SAID SECTION 1; THENCE ALONG TOWNSHIP LINE, SOUTH 88 DEGREES 36' 40" EAST 1476.74 FEET; THENCE SOUTH 64 DEGREES 31' 33" EAST 727.36 FEET TO THE POINT OF BEGINNING, CONTAINING 66.25 ACRES, MORE OR LESS.