

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35792

235291
ENTERED
Office of Proceedings
January 13, 2014
Part of
Public Record

**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—PETITION FOR DECLARATORY ORDER**

**REPLY OF BNSF RAILWAY COMPANY, INC. AND MASSMAN CONSTRUCTION CO. TO
PETITION FOR DECLARATORY ORDER**

David H. Coburn
Christopher Falcone
STEPTOE & JOHNSON, LLP
1330 Connecticut Ave.
Washington, DC 20036
(202) 429-8063

Attorneys for BNSF Railway Company, Inc. and
Massman Construction Co.

January 13, 2014

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 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—PETITION FOR DECLARATORY ORDER**

**REPLY OF BNSF RAILWAY COMPANY, INC. AND MASSMAN CONSTRUCTION CO. TO
PETITION FOR DECLARATORY ORDER**

BNSF Railway Company, Inc. and Massman Construction Co. (collectively “BNSF”) hereby submit their reply to the Petition for a Declaratory Order (“Petition”) filed by Thomas Tubbs and Dana Lynn Tubbs (“Petitioners”) on December 9, 2013. Petitioners request a declaratory order finding that their state law tort claims against BNSF are not preempted by section 10501(b) of the Interstate Commerce Commission Termination Act (“ICCTA”). These claims seek damages allegedly caused by BNSF in connection with the design and construction of its mainline in Missouri, and specifically in connection with BNSF’s efforts to maintain rail transportation during an historic flood event that took place during the summer of 2011.

As the Petition notes, these claims, and BNSF’s preemption defenses, are currently before the Circuit Court of Holt County, Missouri on BNSF’s motion for summary judgment in a lawsuit brought by Petitioners.¹ Following briefing and oral argument on the summary judgment motion, the court (at the request of the Petitioners) granted a stay so that Petitioners could seek a declaratory order from the Board regarding the issue of ICCTA preemption.

¹ The lawsuit is styled as *Thomas Tubbs v. BNSF Railway Company, Inc.* and hereinafter referred to as the “State Court Lawsuit.”

As explained further below, the Petition does not warrant the exercise of the Board’s discretion to initiate a new declaratory proceeding because the law is clear that state law claims seeking damages based on the manner in which a railroad has designed, constructed and maintained its rail line are preempted by ICCTA, and the court in which this matter is pending is fully competent to so find. In this setting, a full-scale proceeding is unwarranted and would unnecessarily absorb limited Board resources. Rather, the Board should dispense with the Petitioners’ request and assist the court by issuing a decision that describes the relevant ICCTA precedent. *See James Riffin—Petition for Declaratory Order*, Finance Docket No. 35245, slip op. at 4 (STB served Sept. 15, 2009) (“[T]he Board, in its discretion, may issue a declaratory order to terminate a controversy or remove uncertainty. Here, the law is clear and there is no need to institute a declaratory order proceeding to receive further information with respect to the issues Riffin raises.”); *Town of Milford, Ma—Petition for Declaratory Order*, Finance Docket No. 34444, slip op. at 1 (STB served Aug. 12, 2004) (“Milford's request for institution of a declaratory order proceeding will be denied because the application of the law to the facts described is clear.”).

FACTUAL BACKGROUND

The relevant facts of this case are simple. During the late winter and early spring of 2011, greater than average snow and rain in the Missouri River basin led to the US Army Corps of Engineers releasing unprecedented amounts of water from reservoirs which were, in some cases, hundreds of miles away from Big Lake, Missouri. In June 2011, prior to anticipated flooding caused by the upstream release of water from reservoirs as well as heavy and extended rainfall in and around Big Lake, BNSF raised its mainline track in the Big Lake area in an attempt to keep it clear of flood waters and fortified the track structure to protect it from damage

by placing rock, rip-rap, and other material trackside. Despite these efforts, flood waters that proved to be of historic proportions eventually breached portions of the structure supporting the rail line.

Petitioners' property is located adjacent to areas of the rail line breached by the flood waters. According to the deposition testimony taken in conjunction with the State Court Lawsuit, the flood was a 500-year flood event or greater.² This conclusion was confirmed in a report on the event by the Army Corps of Engineers. MISSOURI FLOOD 2011, VULNERABILITIES ASSESSMENT REPORT, VOLUME I: SUMMARY, US ARMY CORPS OF ENGINEERS at 8 (Oct. 2012) ("The flood of 2011 was an unprecedented 500-year event (based on volume) that surpassed the original system design storm by 20 percent and lasted 5 months.") (excerpt attached as Exhibit 3).³ That same report at page 3 notes that the flood caused extensive disruptions to rail transport, "requiring track sections to be raised, temporary berms to be built, and damaged tracks to be repaired." These are precisely the activities undertaken by BNSF around which the Petitioners have built their complaint. Once the flood waters breached the track structure, BNSF engaged contractors, including Massman Construction Co., to repair the track structure under emergency conditions to prevent additional property damage and preserve and protect BNSF's network. As part of the design of the repaired track structure, BNSF included additional openings in the embankment supporting the track. As discussed further below, Petitioners have claimed that

² See Deposition of Larry Schmidt, BNSF road master, at 12-13 (stating that the 2011 flood was "way worse" than previous major flood events) (attached as Exhibit 1); Deposition of Robert Boileau, BNSF Assistant Vice President of Structures, at 65-66, 149-150 (stating that the 2011 flood was a 500-year event and the largest in recorded history) (attached as Exhibit 2).

³ The full report may be found at <http://cdm16021.contentdm.oclc.org/utis/getfile/collection/p266001coll1/id/2185/filename/2186.pdf>

BNSF's original design of the track and its actions in raising the track and maintaining and repairing its track in response to the flooding resulted in damage to their property.

Petitioners' description of the facts suffers from two primary errors. First, Petitioners claim that BNSF intentionally breached its track structure (Pet. at 4). This is not true. Petitioners' intentional breach theory appears to be based upon two hearsay documents culled from thousands in Defendants' massive discovery production. One of these documents is a report from June 22, 2011, which incorrectly states that BNSF "cut 11, 40' breaches at MP 101.8 through track structure to relieve pressure." The second document is a report from a day later, which indicates that "a decision has been made to create a breach through the track structure in the vicinity of MP 101.8." However, this document goes on to state, "As of the time of this report, conditions at the site were too dangerous to initiate the breach." Thus, the June 23, 2011 report makes clear that breaches referred to in the June 22, 2011 report were planned breaches that had not yet taken place. Further, as BNSF has already noted in its court briefs and as Petitioners' own expert witness testified in the State Court Lawsuit, BNSF did not intentionally breach the track structure, which was instead breached by the flood waters. A copy of the June 22nd and June 23rd reports along with relevant portions of the deposition of Petitioners' expert witness demonstrating that there was no intentional breach of BNSF's track structure are provided at Exhibit 4 of this Reply.

Second, Petitioners allege that according to BNSF's engineering consultant, BNSF violated its internal design criteria with respect to the design and maintenance of the pre-flood embankment supporting the track because it did not have sufficient openings to accommodate the floodwaters (Pet. at 3). Again, this is not true. The BNSF engineering consultant, Mr. Daryoush Razavian, simply calculated, after the fact, the amount of openings in the embankment

that would have been necessary to accommodate the flow rate of 100 cubic feet per second present during the massive flooding event of 2011 and concluded that the rail line, as it was designed prior to the flood, did not have sufficient openings to accommodate that enormous and highly unusual flow rate. At no point does Mr. Razavian suggest that the track structure's inability to accommodate this flow rate was contrary to BNSF's internal design standards or otherwise unreasonable. Indeed, he testified that the 2011 flood event was greater than a 100-year flood contemplated by the BNSF internal standards. Relevant portions of Mr. Razavian testimony are provided at Exhibit 5 of this Reply.

PROCEDURAL BACKGROUND

On February 22, 2012, Petitioners filed a petition for damages in the Circuit Court of Holt County, Missouri against BNSF. That petition was based on claims of nuisance, negligence, inverse condemnation and trespass stemming from BNSF's alleged actions in designing, construction, maintaining and repairing its rail line in response to anticipated and actual flooding conditions in the area. In response, on April 2, 2012 BNSF filed a motion to dismiss arguing that Petitioners' claims were preempted by ICCTA. However, the court denied the motion to dismiss and ordered discovery to proceed. Following discovery, on September 13, 2013 BNSF filed a motion for summary judgment.⁴ The motion for summary judgment was fully briefed by both parties and oral argument on the motion was heard by the court on December 2, 2013.

Immediately following oral argument on the motion, Petitioners filed a motion for a stay so that they could seek a declaratory order from the Board on the ICCTA preemption issues. That motion was granted by the court on December 8, 2013. See Exhibit 7.

⁴ A copy of BNSF's suggestions in support of its motion for summary judgment is attached hereto at Exhibit 6.

ARGUMENT

Petitioners' claims boil down to allegations that BNSF improperly designed and constructed its rail line by raising the track, by not providing sufficient openings in the track structure and by engaging in construction activity to repair the track structure under emergency conditions.⁵ As discussed further below, the law on this issue is clear—claims that seek to regulate the design, construction and repair of a rail line are preempted by Section 10501(b) of ICCTA, 49 U.S.C. § 10501(b), vesting exclusive jurisdiction in the Board over “transportation by rail carriers . . . practices, routes, services, and facilities of such carriers.” *See Tex. Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525, 533 (5th Cir. 2012) (holding that regulations regarding the design and construction of railroad embankments are preempted); *Maynard v. CSX Transp., Inc.*, 360 F. Supp. 2d 836, 843 (E.D. Ky. 2004) *affd.*, No. 04-5448 (6th Cir. Feb. 7, 2005) (holding that a negligence claim related to the construction and maintenance of a track that allegedly caused water to drain onto adjacent property was preempted)⁶; *Pere Marquette Hotel Partners, L.L.C. v. U.S.*, No. 09-5921, 2010 U.S. Dist. LEXIS 36413, at *14-15 (E.D. La. March 10, 2010) (“The application of state law negligence principles to assess and evaluate the suitability of the design and construction of a railroad crossing, railroad tracks, and roadbed for railroad tracks qualifies as an attempt at state law ‘regulation’ in respect to rail transportation” and is preempted); *A&W Properties, Inc. v. Kansas City Southern Railway Co.*, 200 S.W. 3d 342

⁵ As discussed below, BNSF did not intentionally breach its own track structure. Thus, any claim based on such allegations must fail. However, even if BNSF had intentionally breached the track structure, claims based on such actions would be preempted since Petitioners allege that BNSF did so in an attempt to preserve its track and restore rail service. (Pet. at 4) (alleging that BNSF breach the track structure to save it from destruction). In other words, the alleged intentional breach would have been directly related to BNSF's rail transportation service.

⁶ A copy of the unpublished 6th Circuit decision affirming the lower court in *Maynard* is attached as Exhibit 8 of this reply.

(Tex. Ct. App. 2006) (holding that claims alleging that a railroad designed its rail line with a culvert that was too narrow to provide adequate drainage were preempted); *see also City of Cayce v. Norfolk S. Ry. Co.*, 706 S.E.2d 6, 11 (S.C. 2011) (holding that enforcement of a local nuisance ordinance requiring a railroad to clean graffiti and rust of a railroad bridge was preempted because “[b]ridges are expressly considered part of the railroad's operations under the definitional section of the ICCTA...”).

Because that the law on this issue is clear, BNSF urges the Board not to initiate a declaratory proceeding that would consume the Board’s and the parties’ time and resources. Rather, BNSF urges the Board to instead issue a decision stating that the law is clear that Petitioners’ claims are preempted and pointing to relevant precedent.

I. Petitioners’ Damage Claims Unreasonably Burden Rail Transportation and Relate to Issues within the Board’s Exclusive Jurisdiction

Petitioners argue that their claims “do not affect rail transportation” (Pet. at 5) and do not “relate to...items over which the Board has jurisdiction.” However, ICCTA defines “transportation” broadly to include “property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail...and (B) services related to that movement.” 49 U.S.C. § 10102(9). This definition obviously includes mainline track of the sort at issue here. As noted above, ICCTA grants the Board exclusive jurisdiction over “transportation by rail carriers... and facilities of such carriers” 49 U.S.C. § 10501(b). Section 10501(b) further states that “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.” Thus, according to the plain language of the statute, BNSF’s design, construction, maintenance

and repair of its rail line as needed to facilitate “rail transportation” falls within the Board’s exclusive jurisdiction and state claims that seek to regulate such activity are preempted.

Petitioners’ claims for damages arising from BNSF’s alleged failure to meet design and construction standards they seek to impose through state tort law constitute an impermissible form of state regulation under ICCTA. *See Griffioen v. Cedar Rapids & Iowa City Ry. Co.*, No. C13-0066 EJM, 2013 U.S. Dist. LEXIS 135958, at *3, 13 (N.D. Iowa Sept. 18, 2013) (dismissing claims based on allegations that the railroad intentionally placed railcars loaded with rock ballast upon tracks on various bridges causing bridges to collapse and other adverse effects because “the parking of loaded cars on tracks to prevent them from washing away was a core operational activity, with ramifications on the continued operations of the network, governed by the ICCTA.”); *Vill. of Big Lake v. BNSF Ry. Co.*, 382 S.W.3d 125, 129 (Mo. Ct. App. 2012) (claim that railroad’s intentional buildup of a roadbed prevented floodwaters from receding and violated state law was preempted because “a roadbed for tracks constitutes property related to the movement of passengers or property by rail...[and] the construction of the roadbed is necessarily intertwined with the construction of railroad tracks and relates directly to BNSF’s rail activity.”) (internal quotation marks and ellipses omitted); *Pere Marquette*, 2010 U.S. Dist. LEXIS 36413, at *15 (“[T]he design and construction of the railroad crossing, tracks, and roadbed relates directly to CSX, Inc.’s rail activity...Thus, the plaintiff’s claim that CSX, Inc. negligently designed and constructed the railroad crossing, tracks, and roadbed is preempted.”).⁷

⁷ The same result would follow even if one presumed that BNSF intentionally breached its track structure, which it did not. Petitioners allege that an intentional breach was undertaken to preserve the rail line and restore rail service. Such activities are directly related to and intertwined with the provision of BNSF’s rail service and regulation of those activities is therefore preempted.

If claims such as Petitioners are not preempted, railroads would no longer be able to apply uniform design and construction standards to a rail line crossing many jurisdictions. Any time a state or locality changes its standards, the railroad would be required to tear down its track and rebuild it in that jurisdiction in order to comply with the new standards. Such a result is contrary to the purpose of ICCTA, which sought “to prevent the development of a patchwork of local and state regulations affecting the railroad industry, as the enactment of differing standards and requirements would inevitably be detrimental to the orderly functioning of the industry as a whole.” *City of Cayce v. Norfolk S. Ry. Co.*, 706 S.E.2d 6, 11 (S.C. 2011).

While Petitioners also argue that the Board could not have approved any design, construction, drainage or maintenance activity of BNSF (Pet. at 7), the fact that Board does not directly regulate the design and construction activities at issue in this case does not mean they are outside the Board’s jurisdiction or that regulation of such activities does not interfere with rail transportation. For example, the Board explained in *Joseph R. Fox—Petition for Declaratory Order*, Finance Docket No. 35161, slip op. at 4 (STB served May 18, 2009), that although it does not have authority to regulate yard track, it nonetheless has exclusive jurisdiction over yard track under section 10501(b). “Therefore, Federal courts have uniformly held that state law tort claims such as those brought by Mr. Fox—which would interfere with rail carrier operations, including operations involving spur, industrial, team, switching, or side tracks—are preempted.” *Id.* The Board has also recognized that a court could hold a “state statute restricting a train from blocking an intersection preempted, even though there is no Board regulation of that matter.” *CSX Transportation, Inc.—Petition for Declaratory Order*, Finance Docket No. 34662, slip op. at 7, (STB served March 14, 2005).

Similarly, ICCTA preemption does not turn on whether the Board can provide a plaintiff with a remedy. *See, e.g., CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n.*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996) (“Defendants, however, read the ICC Termination Act's preemption clause to preempt state remedies only when federal remedies are provided under the Act... Defendants' argument reflects a misunderstanding not only of the plain language of section 10501(b)(2), but also of the ICC Termination Act generally.”).⁸ This conclusion is also consistent with Board and court decisions finding preemption with respect to claims regarding side tracks, rail design and construction, the blocking of streets by railroads, and pollution caused by railroads. In such cases, the Board and courts found preemption despite the fact that the Board had no authority to provide a remedy. *See e.g., Norfolk Southern Ry. Co.—Petition for Declaratory Order*, Finance Docket No. 35701 (STB served Nov. 4, 2013) (finding tort claims related to the railroad’s discharge of smoke, dust, dirt and other particulates preempted); *Maynard*, 360 F. Supp. 2d at 836 (state law claims regarding drainage issues caused by the construction and maintenance of side track preempted); *A&W Properties, Inc.*, 200 S.W. 3d 342 (state law claims related to the design of track drainage structures preempted). Thus, both court and Board precedent firmly establish that the ability of the Board to provide a remedy is not a prerequisite to a finding of preemption.⁹

⁸ Courts have come to a similar conclusion in other areas of the law dealing with preemption. *See, e.g., McLemore v. Regions Bank*, 682 F.3d 414, 427 (6th Cir. 2012) (“Plaintiffs complain that this ruling leaves them without a remedy against Regions. This might be true, but ‘the availability of a remedy under ERISA is not relevant to the preemption analysis.’”) (quoting *David P. Coidesina, D.D.S., P.C. v. Estate of Simper*, 407 F.3d 1126, 1139 (10th Cir. 2005)).

⁹ Certain cases cited by Petitioners discuss the issue of whether the Board can provide a remedy equivalent to the remedy sought under state law. *See, e.g., Fayard v. Northeast Vehicle Services, LLC*, 533 F.3d 42 (1st Cir. 2008); *Trejo v. Union Pac. R.R. Co.*, No. 3:10CV00285 JLH, 2011 U.S. Dist. LEXIS 8676, at *15-16 (E.D. Ark. Jan. 28, 2011). However, this issue is discussed in the context of determining whether “complete preemption” exists. As discussed further below,

II. ICCTA Preempts State Common Law Claims

Petitioners also claim that ICCTA does not preempt state common law claims (Pet. at 8-12). This argument flies in the face of a consistent body of precedent holding state common law claims preempted where such claims intrude on matters within the Board’s exclusive jurisdiction or unreasonably interfere with rail transportation.

Contrary to Petitioners’ contention based on a recent decision that preemption only reaches to claims that touch on economic regulation,¹⁰ the Board and courts have rejected the notion that ICCTA only preempts “economic regulation.” *See, e.g., CSX Transportation, Inc.—Petition for a Declaratory Order*, Finance Docket No. 34662, slip op. at 8, (STB served March 14, 2005) (“[A]s the courts that have examined that provision have uniformly concluded, any notion that the statutory preemption in section 10501(b) is limited to direct state and local economic regulation is contrary to the broad language of the statute and unworkable in practice.”); *Ass’n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1098 (9th Cir. 2010) (“Both we and our sister circuits have rejected the argument...that ICCTA preempts only economic regulation.”).

Moreover, a published decision from the same federal appellate court that decided *Guild* held that regulation of the design and construction of rail embankments is a form of economic regulation preempted by ICCTA. *See Tex. Cent. Bus. Lines Corp.*, 669 F.3d at 533 (5th Cir. 2012) (holding that any law that seeks to regulate the construction or design of railroad tracks

the complete preemption doctrine concerns the jurisdiction of a state versus a federal court, and not whether preemption is a valid defense on the merits. One of the requirements for a finding of complete preemption is that there be a remedy available under federal law. However, as is explained below, even if a claim is not completely preempted for jurisdictional purposes, a claim may still be preempted by ICCTA when preemption is raised as a defense on the merits.

¹⁰ *See Guild v. Kansas City Southern Ry. Co.*, No. 12-60731, 2013 U.S. App. LEXIS 18730 (Sept. 9, 2013) (“*Guild*”)

and supporting structures regulates the economic decisions of railroads and is preempted). Thus, even if ICCTA preemption were limited to “economic regulation”, Petitioners claims would be preempted since they seek to regulate the design, construction and repair of BNSF’s rail line and supporting structures.¹¹

The fact that this regulation would be accomplished through state tort law rather than a state statute or regulation is irrelevant. *See, e.g., Kurns v. R.R. Friction Prods., Inc.*, 132 S.Ct. 1261, 1269 (2012) (state law tort claims are preempted because “‘regulation can be . . . effectively exerted through an award of damages,’ and ‘[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy’”); *Pace v. CSX Transportation, Inc.*, 613 F.3d 1066, 1070 (11th Cir. 2010) (“[T]o permit monetary liability to accrue under a state nuisance claim where that liability is based on decisions the ICCTA purposefully freed from outside regulation would contradict the language and purpose of the ICCTA.”); *Maynard*, 360 F. Supp. 2d at 840 (“[A] state may regulate through an award of damages under a common law claim as effectively as it may regulate by some form of preventative relief, and thus a state common law cause of action qualifies as ‘regulation’ for purposes of section 10501(b).”).

Plaintiffs next cite *Emerson v. Kansas City Southern Ry. Co.*, 503 F.3d 1126 (10th Cir. 2007), (Pet. at 9) a case in which the court held that state law claims seeking damages for flooding caused by a railroad’s disposal of old rail ties in a drainage ditch were not preempted. The court reasoned that the discarding of railroad ties did not constitute “transportation” as

¹¹ The *Guild* case on which Petitioners rely involved very different facts, namely damage to a private spur track due to the placement of heavy cars. The Court appropriately found that the damage claim was not preempted under ICCTA because the activity at issue did not impair, or even relate to, any rail transportation subject to the Board’s jurisdiction. *See Guild*, 2013 U.S. App. LEXIS 18730, at *13-14.

defined by ICCTA because it was not directly related to the movement of passengers or property or to services related to that movement. *Id.* at 1130. Unlike the railroad's acts in *Emerson*, BNSF's actions in the present case were integrally related to the movement of property over its rail lines. *See Pere Marquette*, 2010 U.S. Dist. LEXIS 36413, at *18 (Unlike the railroad's acts in *Emerson*, CSX, Inc.'s allegedly negligent acts, i.e., the design and construction of a railroad crossing, roadbed, and railroad tracks, is integrally related to 'transportation.' The claim is preempted."); *In re Katrina Canal Breaches Consol. Litigation*, Nos. 07-4551, et al., No. 05-4182, 2009 U.S. Dist. LEXIS 14460, at *285 (E.D. La. Jan. 26, 2009) (same); *Griffioen v. Cedar Rapids & Iowa City Ry. Co.*, No. C13-0066 EJM, 2013 U.S. Dist. LEXIS 135958, at *4-5 ("[I]n *Emerson*, the railroad was accused of improperly disposing of waste, and in *Franks Inv. Co.*, the railroad was accused of refusing to provide access to a neighboring land owner, both not core railroad operational activities.").

Petitioners also cite *Rushing v Kansas City Southern Ry. Co.*, 194 F. Supp. 2d 493 (S.D. Miss. 2001). However, *Rushing* actually supports BNSF's position regarding the scope of ICCTA preemption. In that case, homeowners brought common law nuisance and negligence claims against the railroad for noise and vibrations from a switch yard operated by the railroad. *Id.* at 496-97. They also brought claims based on the manner in which the railroad constructed an earthen berm adjacent to their property. *Id.* at 497. The homeowners claimed that the berm caused rainwater to pool, which caused damage to their property. *Id.* at 496. The court found that the claims regarding the noise and vibrations from the switch yard were preempted because such claims sought to regulate switching operations, which were activities that ICCTA placed within the exclusive jurisdiction of the STB. *Id.* at 499. The *Rushing* court, however, did not dismiss the claim aimed at construction of an earthen berm at the edges of the rail yard because it

found that the claim did not directly relate to rail transportation and thus did not fall within the scope of the ICCTA's preemption clause. *Id.* at 501. The earthen berm was constructed to block noise for the benefit of the surrounding landowners— *not* in connection with railroad operations. In the present case, the Petitioners' claims would regulate BNSF's rail line, which is directly related to BNSF's rail transportation.

Petitioners further cite several cases that they claim stand for the proposition that ICCTA preemption is not a valid defense to state tort actions (Pet. at 9-10). However, these decisions all deal with the different issue of "complete preemption." *Trejo v. Union Pac. R.R. Co.*, No. 3:10CV00285 JLH, 2011 U.S. Dist. LEXIS 8676, at *15-16 (E.D. Ark. Jan. 28, 2011) (addressing the issue of complete preemption); *Allied Indus. Dev. Corp. v. Ohio Cent. R.R., Inc.*, No. 4:09-CV-01904, 2010 U.S. Dist. LEXIS 23994 (N.D. Ohio March 15, 2010) (same); *Fayard v. Northeast Vehicle Services, LLC*, 533 F.3d 42 (1st Cir. 2008) (same); *Irish v. Burlington Northern Santa Fe. R.R. Co.*, 194 F. Supp. 2d 493 (S.D. Miss. 2001) (same); *Watkins v. RJ Corman R.R.*, No. 7:09-114-KKC, 2010 U.S. Dist. LEXIS 41244 (E.D. Ky. 2010) (same); *Elam v. Kansas City Southern Ry. Co.*, 635 F.3d 796 (5th Cir. 2011) (same). As discussed above, and as discussed in the very cases Petitioners cite, the fact that a claim is not completely preempted for jurisdictional purposes does not mean that the claims will not be found to be preempted when ICCTA preemption is raised as a defense. For example, in *Fayard*, the court explained, "Exclusive federal regulation alone might preempt state claims; but it is the further presence of a counterpart federal cause of action that allows the state claim to be transformed into a federal one." *Fayard*, 533 F.3d at 46. It went on find a lack of "complete preemption" because there was no cause of action under federal law. However, it explained that the claims may nonetheless be preempted when ICCTA preemption is raised as a defense in state court. It said:

[T]he lack of complete preemption does not suggest that a state court could, on a nuisance claim, grant the relief sought by the Fayards...[T]he grant of relief arguably would interfere directly with operations that have been authorized by the Board under the ICCTA. If this is so, the ICCTA, backed by the Supremacy Clause, would likely preclude any such action by a state court. Damages claims based on the alleged nuisance could meet the same fate... In sum, preemption may well be a defense to the Fayards' nuisance claims, but the conditions have not been met to authorize removal through the extreme and unusual outcome of complete preemption. *Id.* at 49.

Petitioners cite *Buddy & Holly Hatcher—Petition for Declaratory Order*, Finance Docket 35581 (STB served Sept. 21, 2012) (Pet. at 10). The petitioners in that case claimed that the railroad's track salvage activities were causing their property to flood. *Id.* at 3. The Board held that petitioners' state tort claims were not preempted. It reasoned that the claims did "not intrude upon the Board's exclusive jurisdiction over rail transportation" because the claims were only "incidentally relate[d] to railroad tracks and property." *Id.* Further, the Board found that the claims did not unreasonably interfere with rail transportation because (1) the railroad had made no effort to explain how the claims would interfere with rail transportation and (2) the rail line in question had been abandoned and rail operations were therefore no longer occurring on the line. *Id.* at 7. In contrast, Petitioners' claims are more than incidentally related to railroad tracks and property; the claims seek to impose design and construction requirements on the rail line itself, and to sanction BNSF for efforts it took to repair its line and restore or maintain transportation. And, unlike in *Buddy & Holly Hatcher*, the rail line in question is an active mainline.

Petitioners next cite *Mark Lange—Petition for Declaratory Order*, Finance Docket No. 35037 (STB served Jan. 28, 2008) (Pet. at 11). There, the railroad had physically taken a portion of Mr. Lange's property by erecting a fence around it and using it for rail operations such as rail maintenance and switching operations. *Id.* at 1-2. The railroad had been using this property for rail operations for years before Mr. Lange petitioned the Board and even prior to Mr. Lange's

acquisition of the property. *Id.* at 1. The petitioner sought damages under state common law theories such as trespass, nuisance and negligence. *Id.* at 4. The Board found all of the state common law claims for damages to be preempted because “the remedies afforded under [ICCTA] concerning rail transportation are ‘exclusive and preempt’ all other remedies.” *Id.* The Board went on, however, to note that Lange’s state court complaint could be construed as raising an inverse condemnation claim and that such a claim would not necessarily be preempted because it would not “interfere with rail operations.” *Id.* Thus, the distinction in *Mark Lange* between preempted and non-preempted claims was based on the fact that the preempted claims sought damages for the act of conducting “rail transportation” whereas the non-preempted inverse condemnation claim sought compensation for actions that were, at most, incidental to “rail transportation,” which is far from the situation here.

In a recent subsequent decision, the Board made clear that inverse condemnation claims based on damage to property caused by rail operations are preempted. *Norfolk Southern Ry. Co.—Petition for Declaratory Order*, Finance Docket No. 35701, slip op. at 6 (STB served Nov. 4, 2013). Rejecting the idea that *Mark Lange* stands for the proposition that inverse condemnation claims are beyond the scope of ICCTA preemption, the Board held that such claims are preempted where they would regulate rail transportation. *Id.* at 5-6. The Board reasoned that if property owners bring “state law claims for alleged damages caused by the byproducts of conventional rail operations” they are preempted regardless of whether they were brought as nuisance claims or inverse condemnation claims. *Id.* at 6. To hold otherwise would allow “states to make an end run around the well-settled federal preemption of nuisance claims involving the effects of normal rail operations” and to “circumvent the purpose and intent of § 10501(b).” *Id.*

The inverse condemnation claim in the present case also does not involve a physical taking of property of the sort at issue in *Mark Lange*, but instead arises from “rail transportation” activities engaged in by BNSF and its co-defendant to maintain the rail line and restore service. Thus, if Plaintiffs’ nuisance and negligence claims in the present case are preempted, allowing the inverse condemnation claim to proceed would allow Plaintiffs to perform an end run around well-settled preemption precedent and to “circumvent the purpose and intent of § 10501(b).” *Id.*¹²

III. The Board Should Not Address Petitioners’ Arguments Regarding the Federal Rail Safety Act

Petitioners argue that a section of the Federal Rail Safety Act (“FRSA”), codified at 49 U.S.C. § 20106, prohibits the preemption of their claims by ICCTA (Pet. at 12-13). Specifically, Petitioners claim that the so-called “Clarifying Amendment” to the FRSA (49 U.S.C. § 20106(b)) prevents their claims from being preempted by ICCTA.

Petitioners’ FRSA arguments are wide of the mark, and not an appropriate basis on which the Board might initiate a declaratory order. First, because this matter does not

¹² Petitioners cite *Allegheny Valley R.R. Co.—Petition for Declaratory Order—William Fiore*, Finance Docket No. 35388 (STB served, April 25, 2011), in support of their argument that inverse condemnation claims are not preempted by ICCTA (Pet. at 11). However, that case simply held that ICCTA does not grant the Board exclusive jurisdiction over determinations under state law regarding property boundaries and whether a railroad owns a property in fee simple or has only an easement. Nothing in *Allegheny Valley* suggests that claims based on damages stemming from rail construction or other actions essential to maintain rail operations are exempt from preemption.

Petitioners also cite *Boston and Maine Corp. and Springfield Terminal R.R. Co. v. New England Central R.R., Inc.*, Finance Docket No. 34612 (STB served Feb. 24, 2005) for the proposition that the Board believes that claims based on tortious acts should be decided by courts (Pet. at 12). Of course, it is Petitioners who have now brought this matter to the Board. In any event, the issue in that case was whether certain claims were prohibited by a contractual agreement. No party in that case argued that the claims at issue were preempted by ICCTA and thus the Board never addressed the issue of ICCTA preemption in that case.

implicate rail safety issues, BNSF did not raise an FRSA preemption defense in the court.¹³ Rather, BNSF throughout has relied exclusively on ICCTA-derived preemption. Second, the Missouri Circuit Court granted a stay so that the Board could offer its views on the issue of ICCTA preemption. The court’s order, attached as Exhibit 7, says nothing regarding FRSA preemption.

Moreover, while the Board has not issued declaratory orders on the scope of FRSA preemption, the Board has held that the reach of ICCTA preemption is not restricted by the FRSA even in cases involving issues related to safety:

“[S]ection 10501(b) applies even though other federal agencies have primary responsibility over rail safety and national security matters... [T]he reach of the Board's jurisdiction over rail transportation, and the preemption of state and local ability to regulate that transportation, is the same regardless of the commodity at issue...[T]he fact that the preemption contained in section 10501(b) overlaps with the preemptions contained in FRSA and HMTA does not lessen the preemptive effect of section 10501(b)...” *CSX Transportation, Inc.—Petition for a Declaratory Order*, Finance Docket No. 34662, slip op. at 10 (STB served March 14, 2005).

Because the state court here did not stay the proceedings before it in order to provide the Board an opportunity to offer its views on FRSA, and because the FRSA “does not lessen the

¹³ Petitioners’ claims in the instant case are not centered on rail safety. Rather, Petitioners claims focus on allegations that BNSF could have designed and constructed its track in a way that resulted in less flood damage to their property. A similar situation arose in *Maynard*. In that case, plaintiffs argued that a state law claim alleging that a railroad’s side tracks were designed and maintained in way that caused water to diffuse onto their property could not be preempted because preemption was prohibited by the FRSA. In rejecting that argument, the Court stated as follows in terms fully applicable here:

Plaintiffs’ reliance on the provisions of the FRSA, and more specifically, 49 U.S.C. § 20106, are misplaced. First, the ICCTA is a separate and distinct statute from the FRSA. Second, the common law remedies implicated in this case are not ‘related to railroad safety’ for purposes are [sic] section 20106. . . . Given the plain language of the ICCTA, even if the Plaintiffs were able to satisfy the savings provisions of the FRSA, the express preemption set forth in [ICCTA] 49 U.S.C. § 10501(b)(2) would still be controlling. 360 F. Supp. 2d at 843.

preemptive effect of section 10501(b)”, the Board should refrain from addressing the FRSA arguments raised in the Petition.¹⁴ If the court before which Petitioners brought their lawsuit feels that the FRSA issues need to be addressed, it is perfectly capable of addressing those issues itself.

¹⁴ Although not necessary for the Board’s ICCTA preemption determination in this case, BNSF notes that Petitioners’ FRSA arguments are flawed in several respects. First, the “Clarifying Amendment” by its terms, only applies to the issue of whether a claim is preempted by the FRSA and does not speak to ICCTA preemption. 49 U.S.C. § 20106(b)(1) (“Nothing in *this section* shall be construed to preempt an action under State law...”) (emphasis added). Second, for the “Clarifying Amendment” to apply in the FRSA preemption context, it must be shown that a railroad violated a federal rail safety regulation, an internal standard created pursuant to a federal rail safety regulation, or a state rail safety law that is not incompatible with federal law and does not unreasonably burden rail transportation. *Id.* There was no such violation in the present case. Petitioners claim that BNSF violated an internal standard, but as discussed above this is not accurate. Petitioners also cite two federal rail safety regulations that BNSF allegedly violated: 49 CFR 213.33 and 49 CFR 213.103(c). The former states that railroads must keep existing drainage structures free from obstruction and the latter requires that the ballast used in roadbeds provide adequate drainage. Petitioners have not claimed that failure to keep drainage structures free from obstruction or BNSF’s choice of ballast was the cause of the damage to their property. Thus, Petitioners have not pointed to any federal safety regulation that BNSF’s alleged actions would have violated.

CONCLUSION

For the reasons discussed above, BNSF respectfully requests that the Board decline to initiate a new proceeding and issue a decision explaining that existing precedent establishes that Petitioners' claims are preempted by ICCTA.

Respectfully submitted,



David H. Coburn
Christopher Falcone
STEPTOE & JOHNSON, LLP
1330 Connecticut Ave.
Washington, DC 20036
(202) 429-8063

Attorneys for BNSF Railway Company, Inc. and
Massman Construction Co.

January 13, 2014

Exhibit 1

Page 1

1 .

2 IN THE CIRCUIT COURT OF HOLT COUNTY, MISSOURI,

3 DIVISION NO. 1

4 .

5 THOMAS TUBBS, TRUSTEE OF THE) NO. 12 HO-CC00010

6 THOMAS TUBBS REVOCABLE TRUST)

7 AND INDIVIDUALLY,)

8 AND)

9 DANA LYNN TUBBS, TRUSTEE OF)

10 THE DANA LYNN TUBBS REVOCABLE)

11 TRUST AND INDIVIDUALLY,) DEPOSITION OF

12 PLAINTIFFS,) LARRY SCHMITT

13 VS.) TAKEN ON BEHALF

14 BNSF RAILWAY COMPANY, INC.,) OF PLAINTIFFS

15 AND)

16 MASSMAN CONSTRUCTION COMPANY,)

17 DEFENDANTS.)

18 -----

19 DEPOSITION OF LARRY SCHMITT, taken before

20 Chelsey A. Horak, Court Reporter, General Notary

21 Public within and for the State of Nebraska,

22 beginning at 8:39 a.m., on January 23, 2013, at

23 the Law Offices of Sattler & Bogen, LLP, 701 P

24 Street, Suite 301, Lincoln, Nebraska.

25 .

Page 3

1 INDEX

2 CASE CAPTION Page 1

3 APPEARANCES Page 2

4 INDEX Page 3

5 TESTIMONY Page 4

6 REPORTER CERTIFICATE Page 49

7 .

8 DIRECT EXAMINATION:

9 By Mr. Sharp Page 4

10 .

11 .

12 .

13 .

14 .

15 .

16 .

17 .

18 .

19 .

20 .

21 .

22 .

23 .

24 .

25 .

Page 2

1 APPEARANCES

2 .

3 FOR THE PLAINTIFFS:

4 MR. REX A. SHARP

5 GUNDERSON, SHARP & WALKE, LLP

6 5301 West 75th Street

7 Prairie Village, Kansas 66208

8 913-901-0500 FAX 913-901-0419

9 rsharp@midwest-law.com

10 .

11 FOR THE DEFENDANTS:

12 MR. DOUGLAS R. DALGLEISH

13 LATHROP & GAGE LLP

14 2345 Grand Boulevard, Suite 2200

15 Kansas City, Missouri 64108

16 816-292-2000 FAX 816-292-2001

17 ddalgleish@lathropgage.com

18 .

19 .

20 .

21 .

22 .

23 .

24 .

25 .

Page 4

1 (Whereupon, the following proceedings

2 were had, to-wit:)

3 LARRY SCHMITT,

4 having been first duly sworn,

5 was examined and testified as follows:

6 DIRECT EXAMINATION

7 BY MR. SHARP:

8 Q. Would you state your full name, please.

9 A. Larry Dean Schmitt.

10 Q. And Mr. Schmitt, where do you live?

11 A. Wymore, Nebraska.

12 Q. And how long have you lived there,

13 approximately?

14 A. About 27 years.

15 Q. I want to get a rundown on your education

16 and your job history, and I know that's probably

17 going to be extensive, but we'll just hit the high

18 points and move on. Why don't you start with

19 where you went to high school.

20 A. Went to high school at Wymore, graduated

21 in 1974. From there, I went to UNL, went to

22 school there for about three years. Went to work

23 for the railroad in 1977 and been here ever since.

24 Q. So you started work at BNSF in '77?

25 A. Yes, I did.



(Main Office)
Topeka, KS
785.273.3063

Reporting Service, Inc.
Technology Specialist in Today's Litigation
Toll Free: 888.273.3063
www.appinobiggs.com

(Metro Kansas City)
Overland Park, KS
913.383.1131

Page 5

1 Q. And what was your entry-level job there?
 2 A. I was a section laborer, trackman.
 3 Q. And what does that -- what's the section
 4 laborer, trackman do generally?
 5 A. Basically, just works on maintaining the
 6 track structure itself, maintaining the rails and
 7 the bowls and the ties. I started out on a steel
 8 gang -- new steel.
 9 Q. Hard labor outdoors, right?
 10 A. Yeah.
 11 Q. Okay. How long did you do that?
 12 A. Traveled around with the gangs for about
 13 three years, got my foreman rights started, and
 14 came back to the Nebraska division and St. Joe
 15 subdivision working as a section foreman,
 16 sometimes a track inspector.
 17 Q. What does a section foreman do?
 18 A. Section foreman is usually in charge of a
 19 two- to three-man gang, usually a foreman, a truck
 20 driver, a laborer. And basically, you have your
 21 own little territory that's anywhere from 25 to 30
 22 miles long that you take care of the maintenance
 23 on, maintaining the rails and the ties and the
 24 track surface, just various different aspects of
 25 track maintenance and the track structure itself.

Page 6

1 Q. When you say "track maintenance," does
 2 that include deciding how much things cost and
 3 what to buy and that kind of stuff, or is that
 4 provided?
 5 A. That's usually taken care of at upper
 6 levels.
 7 Q. Okay. How long were you a section
 8 foreman approximately?
 9 A. Oh, from '81 to 2001, so I guess 20
 10 years.
 11 Q. Okay. And then what'd you do?
 12 A. I took a promotion to an assistant road
 13 master's job in 2001. I held that position
 14 until 2006, when I took the position that I'm
 15 currently on as a road master.
 16 Q. Who was the road master when you were the
 17 assistant?
 18 A. Actually, I worked for several different
 19 road masters. I worked for Eldon Ficke here in
 20 Lincoln and Gary Sheets in St. Joe and Don
 21 Schibbelhut in Kansas City, Murray Yards.
 22 Q. So in this general vicinity, you worked
 23 as an assistant road master?
 24 A. Yes.
 25 Q. And then in 2006, you became the road

Page 7

1 master. How would you describe your job as a road
 2 master?
 3 A. Well, I'm responsible for planning and
 4 carrying out and supervising all the
 5 maintenance -- track maintenance from Lincoln all
 6 the way to Napier, Missouri. I have four
 7 sections -- four three-man sections, three track
 8 inspectors, a surfacing gang, a welding gang, a
 9 backhoe, a front-end loader. Roughly about 25
 10 to 28 people work for me on a regular basis.
 11 Q. Do they all directly report to you?
 12 A. Yeah, all 28 report to me.
 13 Q. Who are the people just under the rung?
 14 Do you have an assistant road master?
 15 A. I do. He's mainly in an administrative-
 16 type role. I mean, if I'm gone on vacation, he
 17 comes out and oversees everything. But mainly he
 18 works for myself and the road master towards the
 19 south end of the St. Joe sub, and mainly doing
 20 administrative-type stuff for us.
 21 Q. Who is the other road master that he is
 22 an assistant for?
 23 A. Martin Eador.
 24 Q. What area does he cover?
 25 A. He has from Napier, Missouri, down to

Page 8

1 Clark, which is just a couple of miles north of
 2 Kansas City -- north Kansas City.
 3 Q. Have you ever been deposed before?
 4 A. No.
 5 Q. You're lucky. But you're doing fine,
 6 continuing to answer out loud so she can get our
 7 answers together. Sometimes we begin to talk,
 8 either with our hands or nods of the head, and she
 9 can't get that down. Is that all right?
 10 A. Yep.
 11 Q. If at any time you don't understand one
 12 of my questions, just tell me that you don't
 13 understand, and I'll try to put a better question
 14 to you.
 15 A. All right.
 16 Q. If at any time you need to take a break
 17 for any reason, I don't really care what it is,
 18 just tell me you need to take a break, and we'll
 19 do that.
 20 A. All right.
 21 Q. Okay. I want to talk with you -- you've
 22 been road master since about 2006, and part of
 23 your job is planning. What goes into the planning
 24 aspect of your job?
 25 A. Basically, it's just having a general



(Main Office)
 Topeka, KS
 785.273.3063

Reporting Service, Inc.
 Technology Specialist in Today's Litigation
 Toll Free: 888.273.3063
 www.appinobiggs.com

(Metro Kansas City)
 Overland Park, KS
 913.383.1131

Page 9

1 knowledge of your entire territory. Like I said,
 2 I have three track inspectors that are out there.
 3 They cover the territory on a daily basis. They
 4 report back to me anything they find. We have our
 5 engineering standards, plus FRA standards, that we
 6 have to maintain our track, specifications. So we
 7 use that as a guideline. We have a geometry car
 8 that makes a regular run across the territory and
 9 tells us exactly what we have out there as far as
 10 the geometry of the track. We have rail detectors
 11 that go across the track and test the rail itself.
 12 Basically, just put all that together and
 13 prioritize our work -- our efforts, where we need
 14 to be, whether it be undercutting -- mud spots is
 15 our biggest enemy out there right now in the
 16 track. Rail, when it gets warm out, you know, you
 17 have to change that out and replace it. Ties get
 18 worn out. Basically, those types of things, and
 19 it's just gather all your resources in and
 20 prioritize it and try to plan it all out.
 21 **Q. Do you have any responsibility for**
 22 **planning for disasters, such as floods?**
 23 A. Probably in the preliminary work of it,
 24 preventative-type stuff. You know, if you foresee
 25 something coming, then yes. But usually, once it

Page 11

1 filtering down the instructions on how they want
 2 to try to attack it or approach it.
 3 **Q. Were you notified of this particular**
 4 **flood before it occurred, that there was a**
 5 **problem?**
 6 MR. DALGLEISH: Can you specify what you
 7 mean by "this flood"?
 8 BY MR. SHARP:
 9 **Q. Do you know the flood that we're talking**
 10 **about here in this lawsuit?**
 11 A. 2011?
 12 **Q. Yes. Were you notified, before the**
 13 **actual flood overtops the tracks, that we've got a**
 14 **problem?**
 15 A. Yes. We were told that there were
 16 excessive amounts of water being held back and the
 17 potential is pretty imminent that we were going to
 18 suffer some kind of damage.
 19 **Q. Any idea how long you had that kind of**
 20 **notice before it actually overtopped your tracks?**
 21 A. You never know. Mother Nature is too
 22 unpredictable.
 23 **Q. Were you -- in terms of the tracks that**
 24 **BNSF operates, is there anything north of this**
 25 **area that was getting flooded out?**

Page 10

1 happens, once it has started, then it escalates up
 2 the food chain, and we just pretty much do what
 3 we're told to do.
 4 **Q. All right. In terms of preventative,**
 5 **what kind of preventative measures would be taken**
 6 **before a flood happens?**
 7 A. In the event of a flood, I mean, there's
 8 imminent damage coming. About the only thing I
 9 can do is go out and, what we call, armor the
 10 track structure itself with riprap, a big, huge
 11 piece of a rock that we haul out there with rotary
 12 dump trucks. We'll haul it out there and dump it
 13 over the sides and just place it, basically, just
 14 shielding it, armoring it so that it minimizes any
 15 potential damage.
 16 **Q. How do you get information that there is**
 17 **a potential flood incident coming your way?**
 18 A. It could be a lot of just your word of
 19 mouth or myself watching the radar, so to speak.
 20 And then the company when something like that
 21 starts coming along -- the upper echelons' always
 22 got their eye on things. If they see something
 23 that could be potentially hazardous or dangerous,
 24 they're always watching. And once it's imminent
 25 that something is happening, then they'll start

Page 12

1 A. No, not on my territory.
 2 **Q. Did you talk with any other road masters**
 3 **that were north of here?**
 4 MR. DALGLEISH: Let me clarify. Do you
 5 mean the tracks?
 6 MR. SHARP: Yes, the tracks that flooded
 7 out. Sorry.
 8 THE WITNESS: No. I didn't speak with
 9 anybody else. I mean, I've been through enough
 10 floods in my career out here that I pretty much
 11 know -- you get a general idea of what to expect,
 12 but you never know what to really expect.
 13 BY MR. SHARP:
 14 **Q. What other floods have you weathered the**
 15 **storm of?**
 16 A. We had what they told us was a 100-year
 17 flood, and it was in 1984. And in 1993, we had
 18 one that was even worse. They said it was a 500-
 19 year flood. And then it was 2007, 2008, 2010, and
 20 then 2011, the big one.
 21 **Q. The 2007, 2008 flood, was that a 100-**
 22 **year, or did you hear anything about it?**
 23 A. No. The damage wasn't anything like what
 24 we've experienced in 2011 or '84 or '93.
 25 **Q. The one that you referred to as a 500-**



Reporting Service, Inc.

Technology Specialist in Today's Litigation

Toll Free: 888.273.3063

www.appinobiggs.com

(Main Office)
 Topeka, KS
 785.273.3063

(Metro Kansas City)
 Overland Park, KS
 913.383.1131

Page 13

1 year flood in 1993, was the one in 2011 more or
 2 worse -- worse or the same?
 3 A. Way worse. Way worse.
 4 Q. And do you have any idea why?
 5 A. Not really, other than --
 6 Q. Just more water?
 7 A. Just way more water. They held back so
 8 much water on the dams up above that we were
 9 dealing with a lot of more water than we ever had
 10 before.
 11 Q. What dams were holding back the water?
 12 Do you know?
 13 A. I don't know all of them. I know there
 14 are seven dams on upper reaches of the Missouri
 15 River. I couldn't name any of them.
 16 Q. Who operates those dams?
 17 A. I believe the corps of engineers.
 18 Q. The federal government decides how much
 19 water they're going to let out and when?
 20 A. That's pretty much what they told us.
 21 Q. Did the federal government or the Army
 22 Corps of Engineers, in particular, warn the
 23 railroad that, "This is what's coming. We're
 24 letting a lot of water out. Are you ready?" Or
 25 do you know?

Page 14

1 A. I, myself, didn't have any kind of
 2 contact with them, but I know the upper echelon in
 3 Fort Worth stayed in contact with them and got
 4 their information from them so we knew how to
 5 plan.
 6 Q. Is there somebody within the BNSF that
 7 keeps in contact with the Army Corps of Engineers
 8 with respect to the water that's let out of those
 9 dams, if you know? And if you don't, just let me
 10 know.
 11 A. I'm not aware of anybody, but I don't get
 12 into the dealings much down there at Fort Worth.
 13 Q. Okay. In all likelihood, anybody that's
 14 higher up that would be talking with the Army
 15 Corps of Engineers would be down at the Fort Worth
 16 office?
 17 A. Right.
 18 Q. Okay. Let's talk about, then, this
 19 particular flood in 2011. Do you have any
 20 documentation as to when you would have first
 21 learned, "We're going to have a problem. Brace
 22 yourself. Brace your tracks"?
 23 A. Not really. I mean, there might have
 24 been a few emails going back and forth, but I
 25 don't keep that kind of stuff. I keep my computer

Page 15

1 cleaned out pretty good. Basically, it was just
 2 an email here and there from my supervisor or
 3 filtered down from Fort Worth saying, "This is
 4 what we're expecting," and that's about the extent
 5 of it.
 6 Q. When -- let me talk with you a little bit
 7 about your emails. You say you keep them fairly
 8 cleaned out. Do you clean out your inbox, your
 9 sent box, both?
 10 A. Yeah.
 11 Q. Is there a company policy on what you're
 12 supposed to do, or do you need to do it based on
 13 what you think is right?
 14 A. No. It's left up to us to maintain it
 15 however we see fit.
 16 Q. And what's your usual practice?
 17 A. Oh, I don't know. I'd say maybe once a
 18 month, I'll go in there and clean it out because I
 19 can amass quite a load of emails and stuff in a
 20 month's time. I just go in and clean it out and
 21 get rid of it.
 22 Q. A lot of business is done by email now.
 23 Who do you usually have emails with? Is that with
 24 people under you, people above you, both?
 25 A. I maintain regular correspondence with

Page 16

1 all my direct reports below me. Plus, I get stuff
 2 constantly from my supervisor and his supervisor,
 3 and then there's always the corporate stuff that
 4 comes out.
 5 Q. I probably should have asked you, but I
 6 didn't, I don't think. Who do you report to?
 7 A. Paul Farley.
 8 Q. What's his title?
 9 A. He's the division engineer.
 10 Q. And who does he report to?
 11 A. Tim Knapp.
 12 Q. And what's his title?
 13 A. He's the general director of maintenance.
 14 K-N-A-P-P.
 15 Q. And who does the general director report
 16 to?
 17 A. He reports to the general manager of the
 18 Nebraska division, for one, and then he also
 19 answers to the AVP in Fort Worth.
 20 Q. The people that you would regularly have
 21 correspondence with, would that be Paul and Tim,
 22 or would you go above that?
 23 A. Very seldom do I go any higher than that.
 24 I'm not even familiar -- or not even acquainted
 25 with some of them people.

(Main Office)
 Topeka, KS
 785.273.3063

Appino & Biggs
 Reporting Service, Inc.
 Technology Specialists in Today's Litigation
 Toll Free: 888.273.3063
 www.appinobiggs.com

(Metro Kansas City)
 Overland Park, KS
 913.383.1131

Exhibit 2

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE CIRCUIT COURT OF HOLT COUNTY, MISSOURI
DIVISION NO. 1

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,)	CIVIL ACTION NO.12 HO-CC00010
)	
vs.)	
)	
BNSF RAILWAY COMPANY, INC.,)	
)	
and)	
)	
MASSMAN CONSTRUCTION CO.,)	
)	
Defendants.)	

ORAL DEPOSITION OF

ROBERT BOILEAU

March 27, 2013

ANSWERS AND DEPOSITION of ROBERT BOILEAU,

1 ROBERT BOILEAU,
2 having been first duly sworn, testified as follows:

3 EXAMINATION

4 BY MR. SHARP:

5 Q. Sir, would you state your full name, please?

6 A. Robert John Boileau.

7 Q. And where do you live?

8 A. Keller, Texas.

9 Q. If at any time you need to take a break or
10 anything like that, just let me know, and we'll do
11 that.

12 All right?

13 A. Okay. That sounds good. Thank you.

14 Q. Have you been deposed before?

15 A. I have.

16 Q. How many times?

17 A. Oh, maybe three.

18 Q. Any of them recent?

19 A. Last one was probably ten years ago.

20 Q. That's not terribly recent.

21 A. That's not recent.

22 Q. Have you ever been deposed in a flooding case
23 before?

24 A. I have not.

25 Q. All right. You remember the ground rules.

1 Just want to make sure that our communication is clear,
2 so if you don't understand my question, just tell me
3 you don't understand it. I'll try to put better
4 question to you.

5 All right?

6 A. Okay.

7 Q. Continue to answer out loud for the court
8 reporter. She doesn't get the nod of our heads and the
9 uh-huh or huh-uh very well. And I will try to do the
10 same. Though I'll probably slip into it, and you can
11 catch me occasionally.

12 A. Okay. Sounds good.

13 Q. If at any time, like I said, you want to take
14 a break for any reason -- I don't care really what it
15 is -- just tell me you'd like to take a break, and
16 we'll do that.

17 Okay?

18 A. Okay.

19 Q. Now, what's your job now?

20 A. My title is assistant vice-president of
21 structures.

22 Q. What does assistant vice-president of
23 structures do?

24 A. Our group is responsible for the maintenance
25 and reconstruction of structures, bridges on the BNSF

1 system.

2 Q. How long have you been assistant VP of
3 structures?

4 A. Since August of 2012.

5 Q. What were you before -- well, let me -- let me
6 start at the beginning and go forward. I want to get a
7 little bit of history on you in terms of education and
8 then job.

9 A. Okay.

10 Q. And you don't have get into too much detail.
11 I'll stop if I don't want too much more detail.

12 Q. Where did you go to high school?

13 A. I went to Park High School in Cottage Grove,
14 Minnesota.

15 Q. Okay. Where -- did you go to college?

16 A. Yes, I did.

17 Q. Where at?

18 A. University of Minnesota.

19 Q. Did you graduate from there?

20 A. I did.

21 Q. What with?

22 A. Bachelor's degree in civil engineering.

23 Q. All right. Did you go on to further school
24 after that?

25 A. Yes.

1 What created the flood event was not the
2 snow. It was the rain.

3 Q. Okay.

4 A. It was record rain falls in May, June and July
5 which created the flood event.

6 Q. The snow added to it?

7 A. I mean, it's a factor, but that was in my
8 opinion a very small reason why or amount of run-off
9 that ended up coming down to Big Lake out of Gavin's
10 Point.

11 Q. Okay.

12 A. In fact, it probably says it in here. Yeah.
13 June was the highest month recorded. May third and
14 July the fifth on record.

15 So three months in a row, the first,
16 third and fifth most rainfall in the upper Missouri
17 River basin occurred, which is just unprecedented.

18 That's why this is the biggest event in
19 recorded history. And I think the history goes back to
20 1998.

21 Q. You don't believe the history goes back before
22 1998?

23 A. That's what I saw was 1998.

24 Q. All right.

25 A. Well, it says 113 years so that would be --

1 Q. A lot farther back than that.

2 A. That would be 1999. Right? Or 8 -- '18.

3 Q. '18.

4 A. I'm sorry. You're right. Thanks for
5 correcting me. 1898.

6 Q. And you're still looking in that second
7 paragraph, where it mentions that the total annual
8 run-off -- it was higher than the total annual run-off
9 in 102 of the 113 years of recorded history?

10 A. Just those three months, right.

11 Q. So there was only nine years out of 113 in
12 which there was more, from what you know of.

13 Is that correct?

14 A. I would say 11 years, but yeah, very few
15 years.

16 Q. 11 years. You're right. Your math is better
17 than mine.

18 A. Pretty sure we're talking a three-month, May
19 through July, versus 12 months in all the other years.
20 It's the full-year comparison. So yeah. It's a huge
21 amount of rain.

22 Q. You think you're comparing May through July
23 versus an entire year in the others?

24 A. Well, this is all Corps of Engineer
25 information, but yeah, that's what the comparison is is

1 against it. So whatever water it's trying to retain
2 back in the reservoir or whatever it is it's able to do
3 so over a long period of time.

4 So I think that's a --

5 Q. A distinction?

6 A. -- a significantly different distinction,
7 yeah.

8 Q. Have you seen a dam that has been overtopped
9 with water and how it gets scoured out and eroded?

10 A. I haven't. I mean, I think normally they have
11 spill ways and stuff like that. So, you know, they
12 wouldn't scour out. You know, you have to protect the
13 integrity, structural integrity, or you'd want to
14 construct it so it does have integrity over a very long
15 period of time.

16 Q. The earth and embankment that the track sits
17 on top of would not have been scoured out if there was
18 sufficient drainage underneath the track, correct?

19 MR. DALGLEISH: Objection, foundation,
20 speculation.

21 A. Well, that word sufficient is a key word.

22 Q. (By Mr. Sharp) Indeed it is.

23 A. I mean, in this case we had a 500-year event
24 with half of Missouri -- upwards half of the Missouri
25 River flowing through our track for a really, really

1 long period of time.

2 As we talked about earlier, we design our
3 stuff for a hundred-year event, and this was
4 substantially greater than that.

5 Q. So if it had been a 150-year event in terms of
6 the way the railroad is designed, you would have
7 anticipated there would be some places where the
8 railroad would be overtopped?

9 MR. DALGLEISH: Same objection. Go
10 ahead.

11 A. Yeah. I think that would be likely.

12 I mean, one never knows for sure. I
13 mean, you don't know how much water is coming and how
14 it's really going to react. And that's a complicated
15 area with all the roads and the levees. You just
16 really don't know how things are going to react in a
17 flood event like that.

18 I think if there was an event
19 substantially more than what we're designed for, we'd
20 very likely have potential issues.

21 Q. (By Mr. Sharp) Okay. No. 13, all matters
22 regarding the impact of the 2011 raising of the
23 railroad bed and construction of dams on plaintiff's
24 property.

25 What do you think the impact was of the

Exhibit 3

**Missouri River Flood 2011
Vulnerabilities Assessment Report
Volume I: Summary**

**Northwestern Division
US Army Corps of Engineers**

October 2012



**US Army Corps
of Engineers®**

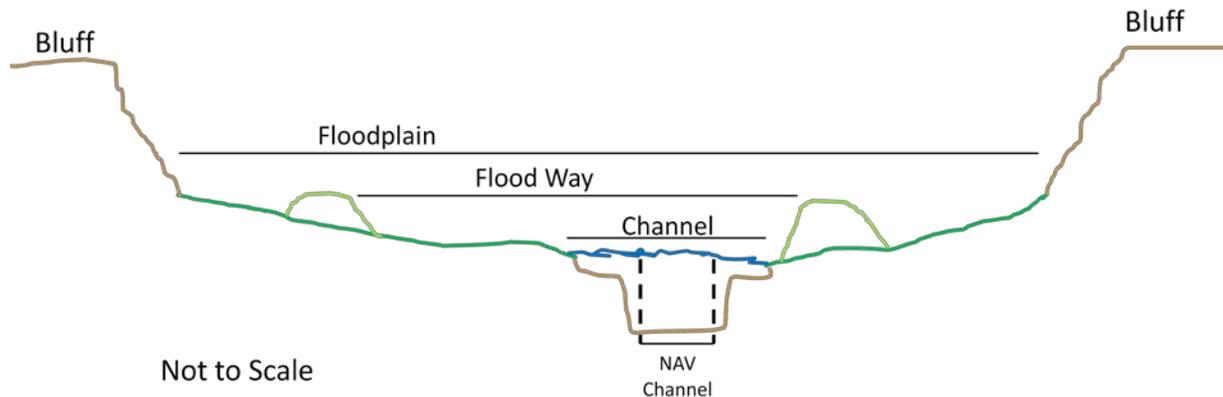


Figure 2. The floodplain is the relatively flat land bordering a river. When a river overflows, the floodplain is covered with water. The Missouri River floodplain stretches between the bluffs of the enclosing valley walls. The floodway, river channel, and navigation channel are also shown.

homeowners, farmers, and business owners to evacuate. (Figure 3) Several Missouri River bridges as well as long stretches of interstates, highway, and roads were closed for weeks or months at a time. Approximately 250 miles of railroad tracks were in the flood area, requiring track sections to be raised, temporary berms to be built, and damaged tracks to be repaired. Many road and rail shipments were delayed and rerouted through other states. The upper navigable portion of Missouri River— itself a vital part of the transportation network—was closed to all navigation for several months. All along the river homes were destroyed, agricultural lands were damaged, public and private facilities were impacted, and much pain was suffered. While it is beyond the scope of this report to assess direct or indirect flood damages to non-Corps assets, when computed they are likely to amount to billions of dollars.

The unprecedented volume of runoff during the spring of 2011 led to the following record peak releases (given in cubic feet per second, or cfs) from the Corps’ mainstem dams: 65,900 cfs at Fort Peck; 150,000 cfs at Garrison; 160,000 cfs at Oahe; 166,000 cfs at Big Bend; 166,000 cfs at Fort Randall; and 160,000 cfs at Gavins Point. During the prolonged and unparalleled flooding event from May through mid October, impacted Corps-owned infrastructure was stressed as never before. Of particular concern was the condition of emergency and service spillways and tunnels, gate systems, operating controls, embankments, and stilling basins. (Figure 4) Aging infrastructure and prior years of constrained operation and maintenance funding meant that some system components were operating beyond their design life and others were deemed high risk due to known performance deficiencies. Uncontrolled releases pose an unacceptable risk to life and property. Dam condition was constantly monitored and repairs made as necessary and feasible during the heat of operation. Fortunately, the dams and appurtenant structures performed as designed, notwithstanding considerable wear and tear that will require repair prior to the next flood season and beyond. It should also be noted, several flood control components were not used during the flood event to avoid the potential of operating to failure or creating the need for expensive repairs. While preferential uses did not impact flood damages in this case, they did reduce the flexibility and resiliency of the system and do not represent the way the system is intended to be operated and maintained.

“I look forward to working with you to better understand the risks and improve flood control...” SEN Tim Johnson, South Dakota

“I encourage the committee to very closely examine this year’s flooding and to help develop the necessary procedures so that future events will be less destructive.” SEN Ben Nelson, Nebraska

In truth, the Corps cannot attest to the public, stakeholders, and leaders, including Congress that floods such as the 2011 event can be prevented from occurring in the future. The flood of 2011 was an unprecedented 500-year event (based on volume) that surpassed the original system design storm by 20 percent and lasted 5 months. Even if completely repaired, the existing system would still be vulnerable to flooding during extreme events. Nevertheless, the Corps and others can learn from this experience and apply our knowledge and resources toward reducing those vulnerabilities by improving and more effectively managing the system in the years ahead.

e. Repair-Restore-Enhance Framework

The Corps has been working to expeditiously repair the damaged flood reduction system back to pre-flood conditions. However, completing damage assessments and determining required repairs has highlighted vulnerabilities that will remain even after the system has been repaired to pre-flood conditions. Accordingly, as we move to correct flood damages and identify additional opportunities to improve the system structures and their operation, we will use a framework of “REPAIR-RESTORE-ENHANCE” to describe the measures that will return the system to its pre-flood 2011 condition, bring it back to its original design capacity, or take it beyond its original design and construction to increase performance, lower risk, and improve resiliency. Some recommended work presented in this report could involve a combination of repairs, restoration, and enhancement. The recommendations are listed in a single category based on the predominant actions and results.

While there are no formal operating restrictions for the reservoir system in place at this time, there are many operational constraints and/or considerations that water managers incorporate

Table 2. Definitions of Repair, Restore, and Enhance Actions

Action	Objectives	Requirements
Repair	Fix damages caused by 2011 flood, ensuring condition and functionality are re-established.	Use existing authorities and funding. May require additional funding.
Restore	Renovate system to original design intent and performance criteria to ensure resilience and reliability.	Use existing authorities. May require detailed analyses and studies to justify work. Will require additional appropriations.
Enhance	Improve system capacity and capability beyond original design to lower risk and improve performance and durability.	May require additional authorities. Will require detailed analyses and studies to justify work. Will require additional appropriations.

Exhibit 4

From: Schaefer, Michael D
Sent: Thursday, June 23, 2011 6:16 AM
To: Scherwinski, Chad L; Schaefer, Michael D; Palomino, Miguel; Hostler, Lee J; Amos, Silver S; Tomlin, Bentley W; Palomino, Miguel; Hostler, Lee J; Olson, Rusty G; Anderson, Mark S (Engineering); Gerald J Maczuga; Norris, Tim L; Pueppke, Diana S; Ferguson, Edward O; Fullen, Paul S; Lovelace, William E; Neville, James P; Stephanie E Swanson; Welte, Louis D; Athey, Robert M; Engel, Chris M; Fitzgerald, Danny R; Watson, William E; Harvey, Michael A; James, Nicole L; Landon, Jack N; Lehman, Stanley E; Wright, Gregory D; Mero, Cory W; Nystul, Randy A; Savidge, Lorri F; Seiter, Nick; Shea, Michelle L; Van Norman, Chris M; Vest, Rick W; Amato, Scott J; Bainter, John M; Bell, Allen M; Farley Jr, Paul J; Ficke, Eldon D; Hammond, Matthew S; Hill, Jeremy W; Hoyle, Lloyd A; Huss, Richard E; Johnston, Jeffrey P; Kingston, Mark J; Kirkpatrick, Daniel L; Knapp, Timothy D; Kriley, Mark S; Manson, David P; Marcellus, Gary G; Marget, Don A; Matthews, James K; Mendoza, Dennis F; Miller, Adam L; Mitchell, Kevin A; Palmer, Daryl J; Paz, Michael A; Rogman, John D; Schmidt, Larry D; Shearer, Andrew L; Smith, Melissa A; Gall, Todd W; Gandara, Gary L; Greisen, Chris P; Grogan, Tom; Hofpar, Jerry L; Kuhns, Matt L; Lulow, Bob L; Mahoney, Joseph P; Yonker, James F; Alstatt, Brett; Apa, Nick W; Bailey, Stephen D; Bakulski, John N; Bales, James R; Beenblossom, Alisha J; Boehmer, Michael E; Brown, George M; Caldwell, Timothy; Carter, Archie L; Centz, David P; Christian, Ty D; Clark, Ryan J; Compton, Darren R; Danielson, David S (Operations); Dixon, Thurston D; Duncan, Richard E; Gambrell, Jess M; Gengler, Dennis J; Gray, Stephen M; Harrison, Timothy P; Hastings, Mark T; Henderson, Rick; Henry, Dustin A; Hughes, Melissa M; James, Kyle E; Jessop, Greg L; Klatt, Michael C; Knutstrom, Jared D; Kreger, P L; Lococo, Lawrence A; Masur, Michael F; Munson, Daniel S; Musgrove, Chris E; Oliver, James K (Beardstown); Russell, Kirk E; Sharpe, Benjamin H; Sickler, Ryan; Smith, Eric O; Thiellen, Michael J; Torre, Luis B; Tresnak, Ron J; Tudor, Randy E; Tylick, James; Warnke, Todd W; Wetta, Jeffrey R; Williams, Ryan; Wright, Timothy L; Zerfas, Tobin A; Bertelsen, Jerry L; Chapp, Daniel B; Dale, Jerry W; Marr, Joe K; Niemi, W. Niel; Brady, Owen L; Chmiel, Ray G; Devries, Forrest R; Heiser, Matthew M; Jarman, Jeffrey J; Mullins, David H; Stethem, Corey L; Sweet, Russell E; Wehland, Timothy N; Erickson, Brian H; Mitchell, Byron K; Cunningham, James M; Munguia, Roberto F; Boileau, Robert J; Schmidt, Thomas B; Woodley, Larry D; Johnson, Mark L (KC); Clark, Kit L; Wright, Jeffrey B; Fox, Gregory C; Sexhus, Sanford C; Freeman, David L; VanHook, William E; Millsap, Steve A; LeVere, James G; Anderson, Steve M; Andrew, Boyd D; Brooks, John J; Renschler, Jim L; Siddiqui, Noorul H (Sidd); Thompson, Scott J; Bond, David W; Morrison, Steve A; Stanley, James R; Saleem, Shahzad; LeVere, James G; Wright, Thomas W; Daise, Jeffrie L; Crisler, John J; Wagner, Tim J; Lee, Mike W; Ghanchi, Asim; Sauer, Stacy J; Smith, Ben W; Brooks, John J; Rogers, Samantha K; Hudak, Trent M; ENGR DL Budget Team; OPR DL Maintenance-Desk; OPR DL All Nebraska Chiefs; Swanson, Gary L; Smith, Terry D; Mcbeth, Amy G; Williams, Andy; Maczuga, Gerald J; Ringelman, Ryan E; Boileau, Robert J; Hudak, Trent M; Piggott, Julie A; Jimison, Scott J; Brooks, John J; Williams, Felicia L (Finance); Ammon, Anastasia M; Lacey, Sherri L; Norris, Cathy J; Dodge, Gary W

Subject: FW: Nebraska Division Command Center Daily Update - 0600 6/23/11



Nebraska Division Command Center

Operating daylight hours
0600 Report

06-22-11

Conference call at 06:30
877-247-7353 pass code: 2294473678

St Joseph Sub Flooding

- Water currently 21.5 inches over TOR
- Water reported over top of rail entire location
- Water Elevation South Side of rail 862.66 ft
- Water Elevation North Side 864.62 ft
- Differential of 23.5 inches between North and South—water has not equalized
- Forces cut 11, 40' breaches at MP 101.8 through track structure to relieve pressures.
- Hauled rip rap through the night to continue to armor around openings in the track
- River gage shows 26.9 feet @0130, projected to 26.6 feet by Monday

Creston Sub Flooding

- River gage at Omaha 34.8 @ 0430. Projected to hold steady through next Tuesday.
- River is currently .70 feet below top of levee.

Dike Construction: (started 6/7)

- 90% of wind damage to plastic liner has been repaired.
- 75% of plastic installed east of MP 0 on the outside
- B&B started placing large sand bags on top of levee at 180th Rd with derrick. Will continue Thurs.
- Track Dept to raise through 190th Rd Thurs, then all track east of the river should be at final elevation.
- MPM loaded with large sand bags to be placed on top of levee west of 180th Rd.

Work windows Wednesday 6/22:

Work window – 10:15am – 4:30pm
Final surface from MP 0.0 – MP 1.1
Surfaced M2 from MP 5.6 – MP 6.2, raised out of water
Dumped rock, MP 8.2 MT 1 & 2, no track raise.
Unloaded rip rap with the MPM, MP 6.6 – 7.1.

Work window Thursday 6/23:

Anticipate a 4 hour window today

Contractors on site:

Hulcher – Contract BF58209
Ames – Contract BF1000033

Contact List:

Ames	Shawn	303-882-7231
Hulcher	Mike Renfro	901-619-6494
Transystems	Gary Bellus	913-915-4403
Transystems	Rick Worley	806-290-0181
BNSF Railway	Mike Schaefer	402-304-1437 (6/22, 6/23)
BNSF Railway	Gerald Maczuga	206-265-2427 (6/24)
BNSF Railway	Bentley Tomlin	817-343-0849 (6/25 – 6/27)
BNSF Railway	Mark Anderson	816-536-3253 (6/28 – 6/30)



Creston Flood
Contact List 6-2...

Standby Equipment List:

Ames Const will have 2 dozers, 2 excavators, and 4 skid steers on site, along with two foremen and 8 to 10 laborers. Ames and Kiewit Const will have an approx 40 employees installing the plastic membrane and sand bags on the new levee Sunday.

Flooding AFE's

Operating - **2469610** – System Flood Tracking
Creston Raise Track – **A112794** – Raise Track out of Face 4 to 5 feet
Construct dirt dike – **A112795** – Any dirt dike that will remain for more than 1 year.
St Joseph Track Raise – **A112936** – Prelim Flood Prevention – St Joe.

Report Update
June 23, 2011 1500

Missouri River - Council Bluffs to Kansas City

The flood model for the Missouri River was ran for the peak flow projected in five days (currently the USGS gauge stations are not projecting out to seven days). The flood model was also ran for current flows and the models were compared to identify potential problems within the next five days. These areas are listed below:

MP 5.8, Creston Sub- Near Plattsmouth, NE, the Missouri River is currently at 0.54 feet below top of levee and is projected to drop to 0.65 feet below the top of levee on June 24, 2011.

MP 168.7, Napier Sub- The Missouri River is currently 3.5 feet above top of rail and 2.4 feet above top of levee. The river is projected to be 3.2 feet above top of rail and 2.1 feet above top of levee through June 24, 2011.

MP 164.73, Napier Sub- BNSF tracks were removed from service at 1400 on 06/17. The town of Bartlett will be constructing a levee across the tracks to protect the town from a potential levee breach approximately 1 mile north.

MP 143.2, Napier Sub- Levee has failed in this area and survey is taking place. Track is under water at this location.

MP 138.5, Napier Sub- The Missouri River is currently 3.3 feet above top of rail and 0.7 feet above top of levee. The river is projected to rise to 5.4 feet above top of rail and 2.8 feet above top of levee on June 25, 2011.

MP 115, Napier Sub- Levee has breached in this area. Tracks are lower than levee top and project to be approximately 5.0 feet under water.

MP 113.2, Napier Sub- The Missouri River is currently on the 0.3 feet below the top of rail and 1.6 feet above top of levee. The river is projected to rise to 0.4 feet above top of rail and 2.3 feet above top of levee on June 24, 2011.

MP 111, Napier Sub- The Missouri River is currently 3.5 feet above top of rail and 2.3 feet above top of levee. The river is projected to stay 4+ feet above the top of rail over the next 5 days.

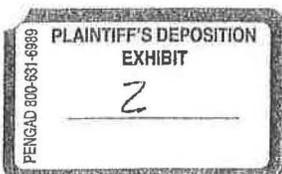
MP 104.6, Napier Sub- The Missouri River is currently 2.0 feet above top of rail and 1.1 feet above top of levee. The river is projected to rise to 2.7 feet above top of rail and 1.8 feet above top of levee on June 24, 2011.

Brookfield Sub- Survey of top of rail has been completed and forecast water surface elevations are within one foot of the top of rail elevations, but the rail will not overtop based on the flows projected by USACE.

Marceline Sub- Survey of the top of rail has been completed. The rail is 7 to 8 feet above the highest water level forecast by the USACE throughout the areas of concern, and we expect no impact on the Marceline from the Missouri River.

Rulo/Big Lake-

Numerous breaches and overtoppings exist in the Big Lake area resulting in high flows through the bridge structure at MP 102+ and across the tracks. The decision has been made to create a breach through the track structure in the vicinity of MP 101.8. RR forces will armor the slopes in this area, and



Confidential

BNSF-00006008

once armored will pull a plug out of the track embankment of about 150 feet in length. This will allow flood waters to start to flow through this area and should relieve stress on the structures as well as facilitate equalization of the flood waters, especially now that Levee District #10 made a cut in their levee system downstream. As of the time of this report, conditions at the site were too dangerous to initiate the breach.

2

INDEX

1	WITNESS: DR. CHARLES D. MORRIS, PE	PAGE
2		
3	Direct Examination by Mr. Day	6
4	Cross-Examination by Mr. Murphy	137
5		
6	Reporter's Certificate	139
7		
8		
9		
10	EXHIBITS	
11	EXHIBIT DESCRIPTION IDENTIFIED	
12	1 File 21	
13	2 Documents 51	
14	3 Curriculum Vitae 8	
15	4 List of Cases 89	
16	5 Information from Files & Disks 83	
17	6 Notes 23	
18	7 E-Mail 40	
19	8 CD 88	
20	9 CD 88	
21	10 Acts & Omissions of BNSF 66	
22	11 Aerial Photograph 70	
23	12 Group of 10 CDs 84	
24		
25		

4

IN THE CIRCUIT COURT OF HOLT COUNTY
STATE OF MISSOURI

THOMAS TUBBS, TRUSTEE OF THE)
THOMAS TUBBS REVOCABLE TRUST)
AND INDIVIDUALLY, et al.,)
)
Plaintiff,)
)
vs) Case No. 12HO-CC00010
)
BNSF RAILWAY COMPANY, INC.,)
et al.,)
)
Defendants)

THE DEPOSITION OF DR. CHARLES D. MORRIS, PE,

produced, sworn, and examined on Thursday, August 15, 2013, at
9 00 a.m. of that day, pursuant to Notice to Take Deposition
at the Holiday Inn Express, 1610 Old Wire Outer Road, in the
City of Rolla, County of Phelps, State of Missouri, before
Monnie S. Mealy, Certified Shorthand Reporter, Registered
Professional Reporter, Certified Court Reporter #0538, and
Notary Public, in a certain cause now pending in the Circuit
Court of Holt County, Missouri, wherein the parties are as
above set forth, taken on behalf of the Defendants.

3

EXHIBITS (CONTINUED)

1	EXHIBIT DESCRIPTION IDENTIFIED
2	
3	13 MoDOT CD 85
4	14 MDNR CD 86
5	15 CD of 2012 Contures 87
6	16 CD 87
7	17 CD 87
8	18 Corp. of Engineers Modeling 88
9	19 BNSF Documents 89
10	20 Bates Documents 89
11	21 Invoices 105
12	22 Contract 107
13	23 E-Mail 108
14	24 E-Mail 110
15	25 12-page Document/Graphs 118
16	26 Handwritten Notes 134
17	27 BNSF Documents 134
18	28 Additional Documents 135
19	
20	(Copies of the original exhibits were attached to the original transcript.)
21	
22	
23	
24	
25	

5

APPEARANCES

For Plaintiff:

Mr. R. Edward Murphy
Murphy, Taylor, Siemens & Elliott, PC
3007 Frederick Avenue
St. Joseph, MO 64506
(816) 364-6677

For Defendants:

Mr. Kenneth Day
Lathrop & Gage, LLP
2345 Grand Boulevard, Suite 2200
Kansas City, MO 64108-2618
(816) 292-2000

SIGNATURE INSTRUCTIONS: Read and sign, waive presentment.
EXHIBIT INSTRUCTIONS: Copies of original exhibits were
attached to the original transcript. Original exhibits were
returned to Mr. Murphy to be returned to Dr. Morris.

Court Reporter:
Monnie S. Mealy, Missouri CCR #0538, RPR, CSR
Midwest Litigation Services
3432 W. Truman Boulevard, Suite 207
Jefferson City, MO 65109
(573) 636-7551

6

1 IT IS HEREBY STIPULATED AND AGREED by and between
 2 counsel for the Plaintiff and counsel for the Defendants that
 3 this deposition may be taken in shorthand by Monnie S. Mealy,
 4 CCR #0538, CSR, RPR, a Certified Court Reporter, Certified
 5 Shorthand Reporter, and Registered Professional Reporter, and
 6 afterwards transcribed into typewriting; and the signature of
 7 the witness is expressly retained.
 8 * * * * *

9 DR. CHARLES D. MORRIS, PE,
 10 being first duly sworn to testify the truth, the whole truth,
 11 and nothing but the truth, testified as follows:
 12 DIRECT EXAMINATION
 13 BY MR. DAY:
 14 Q Dr. Morris, would you state your full name
 15 for the record, please?
 16 A Charles Darwin Morris.
 17 Q And, Dr. Morris, what is your current home
 18 address here in Rolla?
 19 A 730 Oak Knoll Road. Two separate words,
 20 Oak and Knoll. K-n-o-l-l.
 21 Q Oh, Oak as in the tree?
 22 A Yes. And Knoll is, I guess, a rise in the
 23 ground or whatever that means.
 24 Q Right.
 25 A Topography.

7

1 Q So it's 730 Oak Knoll Road?
 2 A Correct.
 3 Q All right. And that's Rolla, Missouri,
 4 correct?
 5 A Yes.
 6 Q And what is your mailing zip code here in
 7 Rolla?
 8 A 65401.
 9 Q And I think you've lived here in the Rolla
 10 area for a number of years; is that correct?
 11 A Yes. I believe about 30, 35 years.
 12 Q Has it always been at this Oak Knoll
 13 address?
 14 A No, sir.
 15 Q How many different addresses have you had
 16 here in Rolla?
 17 A Actually, two.
 18 Q And the previous home address, what was
 19 that?
 20 A 180 -- I'm trying to remember. It's been
 21 a while. It was on Ind -- Shirts -- not Shirts.
 22 That was in Illinois. Grant Circle. Sorry. I
 23 think it was 1807 Grant Circle.
 24 Q How long did you live at Grant Circle
 25 before moving to the Oak Knoll Drive?

8

1 A Eleven years.
 2 Q So 11 years on Grant Circle, and then the
 3 next 24 years at the Oak Knoll address, correct?
 4 A Yes, sir.
 5 Q All right. You've given depositions
 6 before; is that right?
 7 A Yes, I have.
 8 Q All right. So I won't go through all the
 9 rules. But we're already kind of starting to talk
 10 over each other, so let me get my question out
 11 before you jump in. Would you do that?
 12 A Yes.
 13 Q It's because, of course, the court
 14 reporter can't take down us both talking over each
 15 other. Okay?
 16 A Yes.
 17 Q All right. Let me hand you what I've had
 18 marked as Exhibit 3 to your deposition. Is this a
 19 copy of your current CV?
 20 A Yes, it is.
 21 Q All right. And are you -- are you
 22 currently retired from your academic profession?
 23 A Yes, I am.
 24 Q And based on your CV, it looks like you
 25 retired in about -- in 2012; is that correct?

9

1 A Yes.
 2 Q Last year?
 3 A Yes.
 4 Q All right. And according to your CV,
 5 you're a Professor Emeritus at the University of
 6 Missouri; is that right?
 7 A Well, it's -- they've changed the name of
 8 it now. It's Missouri University of Science and
 9 Technology. It used to be University of
 10 Missouri-Rolla.
 11 Q Okay. I'm not going to go through your
 12 whole academic career. But you taught for a number
 13 of years down here at the University of Missouri in
 14 Rolla, correct?
 15 A Yes, I did.
 16 Q And the University here of Missouri in
 17 Rolla is a part of the big University of Missouri
 18 system; is that right?
 19 A That is correct. Yes.
 20 Q So there's some relationship between the
 21 University up in Columbia and down here at Rolla
 22 correct?
 23 A Yes. We're under the same umbrella
 24 structure.
 25 Q Right. And at least according to your CV,

10	<p>1 since about 1982, you were a Professor at the 2 University of Missouri here in Rolla, correct? 3 A I believe I came here in '78 as an 4 Assistant Professor. 5 Q Okay. I'm sorry. I misread your CV. 6 That's right. 1978. And the point of all this, 7 I'm trying to find out what it means to be a 8 Professor Emeritus at the University of Missouri 9 here in Rolla. 10 A As I envision it, it's an honorary status. 11 I believe it allows you to use some University 12 facilities as Emeritus faculty. You have to be 13 voted on by the Department and by the University to 14 get that position. So there are some people, I 15 assume, that don't get that distinction. 16 Q Okay. That was kind of my point. I'm 17 trying to figure out what the procedure was after 18 you retired in 2012 to get the title Professor 19 Emeritus. Is it something you apply for? Is it 20 bestowed on you by the University without an 21 application? How does that work? 22 A Well, basically, it has to come from the 23 Department Chair. And my particular Department 24 Chair asked me -- or I believe I requested it of 25 him to seek that status, and he -- then he</p>	12	<p>1 Q All right. So is there any professional 2 affiliation that you have at this point with the 3 University other than the title Professor Emeritus? 4 A No. Other than contacts and colleagues 5 that I occasionally -- 6 Q Fair enough. Fair enough. Also listed on 7 your CV, which is Exhibit 3, you list a series of 8 professional engineering experiences, correct? 9 A Yes. 10 Q Looks like it dates back to about 1968 11 through the present date; is that accurate? 12 A That -- yes. I believe so. 13 Q All right. It -- it appears that you 14 currently have a business that -- that you call 15 Hydro Engineers, TLC; is that correct? 16 A That's correct. Yes, sir. 17 Q And did you also have a business called 18 Hydro Engineers back in 2000? 19 A I don't remember the exact dates, but, 20 yes. It did have a previous -- I was -- had it for 21 a period of time, and then I -- it was sort of 22 inactive. And then I activated it again. 23 Q Okay. Your CV states that from 2000 to 24 2007, you were the owner of Hydro Engineers, LLC, 25 in Rolla, Missouri, and then from 2011 to the</p>
11	<p>1 proceeded to convene a committee of the faculty. 2 And then they vote on it, and it goes up 3 the chain. And, finally, I participated -- when I 4 received it, I participated in graduation 5 ceremonies and was recognized as Professor Emeritus 6 by the Chancellor of the University. 7 Q I see. In the 2013 graduation ceremonies, 8 you would have been a participant and recognized 9 for the Emeritus status? 10 A Yes. And I have a -- something that looks 11 like a diploma with that title. 12 Q I've got you. Do you still maintain an 13 office at the University? 14 A I do not. 15 Q Okay. Do you still have any teaching 16 responsibilities at the University? 17 A I do not. 18 Q All right. Do you have any advisory 19 responsibilities vis-a-vis the students at the 20 University? In other words, do you act as an 21 advisor to any of the students? 22 A I do not at the present time. But I did 23 after I retired for some period. The students I'd 24 already made a commitment or I was on their 25 committee, I wrapped that up before.</p>	13	<p>1 present, you have some affiliation with Hydro 2 Engineers, LLC; is that correct? 3 A That's correct. Yes. 4 Q Are those different LLCs? 5 A No. They're the same. 6 Q All right. In 2007, did the LLC expire 7 and then you renewed it in 2011? How did that 8 work? 9 A What happened was I had Hydro Engineers 10 initially, and I did engineering and forensic work. 11 And then I formed a company with Dr. Paul Munger, 12 and it was called Munger and -- Morris & Munger. 13 And we operated that, I think, for like three or 14 four years. 15 And we merged with a larger firm, Benton 16 and Associates, in Jacksonville, Illinois. And at 17 the time we merged, I separated out the forensic 18 work, and that's now in Hydro Engineers. 19 And my engineering part is continued with 20 Barton. Or excuse me. Benton. Not Barton. 21 Q Thank you for that explanation. That's 22 kind of where I'm trying to get here. What I'm 23 trying to do is determine which of these businesses 24 deal with the forensics side of things and which 25 businesses deal with just pure engineering things.</p>

4 (Pages 10 to 13)

14	<p>1 A It would have been --</p> <p>2 Q Do you understand that question?</p> <p>3 A Yes, sir. It would have been Morris &</p> <p>4 Munger, when that company formed, I did both</p> <p>5 together.</p> <p>6 Once we merged with Benton, I separated</p> <p>7 the two. So now the forensic work is with Hydro</p> <p>8 Engineers.</p> <p>9 Q All right. And in 2000 -- the Hydro</p> <p>10 Engineers that you have listed here as an LLC, from</p> <p>11 2000 to 2007, did that deal with both forensic work</p> <p>12 as well as the engineering -- pure engineering</p> <p>13 consulting work?</p> <p>14 A Yes. Until we started Morris & Munger, it</p> <p>15 was all together.</p> <p>16 Q Okay. And now I think I understand what</p> <p>17 you mean by forensic work. But tell me, what --</p> <p>18 what's the difference between -- between forensic</p> <p>19 work and the pure engineering work that we've been</p> <p>20 talking about?</p> <p>21 A Forensic work, I am asked by usually an</p> <p>22 attorney to investigate a particular circumstance.</p> <p>23 And depending on the request of the attorney, I</p> <p>24 either produce a report or verbally convey my</p> <p>25 findings to them.</p>	16	<p>1 different expertise for forensic work across the --</p> <p>2 like medical, accounting, engineering.</p> <p>3 And they do provide, I think, reference --</p> <p>4 or I have had attorneys contact me that they have</p> <p>5 said, you know, they -- my name has been presented</p> <p>6 as a possible individual for doing that kind of</p> <p>7 work.</p> <p>8 Q SEEK is an Internet type search business</p> <p>9 where attorneys can go and look for experts on</p> <p>10 particular things?</p> <p>11 A I believe so. Yes.</p> <p>12 Q Yeah. There is a -- well, who is Sue</p> <p>13 Ellen?</p> <p>14 A That's my wife and my assistant.</p> <p>15 Q All right. Sue Ellen Morris is your wife</p> <p>16 and assistant; is that correct?</p> <p>17 A Yes.</p> <p>18 Q There is actually an e-mail in your file</p> <p>19 from me --</p> <p>20 A Yes.</p> <p>21 Q -- is that correct?</p> <p>22 A That's correct.</p> <p>23 Q And it's dated October 29th, 2012; is that</p> <p>24 correct?</p> <p>25 A Yes.</p>
15	<p>1 Q All right. So the -- the pure engineering</p> <p>2 work, that would be -- give me an example of what</p> <p>3 kind of consulting work would that be? Would that</p> <p>4 be like on wastewater plants or --</p> <p>5 A That's correct. Water, drainage. It</p> <p>6 would be involved with engineering design.</p> <p>7 Q All right. And the forensic work is when</p> <p>8 you're hired by an attorney and there is litigation</p> <p>9 or potential litigation to look at some situation,</p> <p>10 correct?</p> <p>11 A Correct.</p> <p>12 Q All right. So how long have you been</p> <p>13 doing the forensic work for attorneys?</p> <p>14 A I would say probably around 30 years off</p> <p>15 and on.</p> <p>16 Q And do you advertise those services at</p> <p>17 all?</p> <p>18 A I -- I belong to some organizations that</p> <p>19 listed -- the one that comes to mind is SEEK.</p> <p>20 There's a number of others. My assistant takes</p> <p>21 care of most of that, is directly involved in it.</p> <p>22 Q What is SEEK?</p> <p>23 A I can't -- I don't even know what the --</p> <p>24 it's an acronym, I'm sure, for something. But they</p> <p>25 -- they have programs -- they have -- they cover</p>	17	<p>1 Q And I think maybe you and I had a very</p> <p>2 brief conversation on the phone about this case.</p> <p>3 Do you recall that?</p> <p>4 A I do. It wasn't clear to me at the time</p> <p>5 exactly what the case was, but it sounded very</p> <p>6 similar, if not the same.</p> <p>7 Q All right. And the -- did you and I ever</p> <p>8 -- have we ever discussed the substance of this</p> <p>9 lawsuit, what it was about, that type of thing?</p> <p>10 A No, sir.</p> <p>11 Q Okay. Our contact, as I recall, was</p> <p>12 limited to I called you to see if you were</p> <p>13 available to consult on the case, and you informed</p> <p>14 me that you had already been hired by the</p> <p>15 Plaintiffs. And that was the end of the</p> <p>16 conversation; is that -- is that accurate?</p> <p>17 A That is correct. Yes.</p> <p>18 Q Okay. Other than the SEEK web site, do</p> <p>19 you do any other advertising?</p> <p>20 A Probably one of the major ones that I've</p> <p>21 done for a long time is in the Missouri Bar</p> <p>22 magazine -- or publication.</p> <p>23 Q And is that one of those little ads at the</p> <p>24 back of the Bar magazine?</p> <p>25 A Yes.</p>

50

1 your opinions in this case without reviewing that
2 modeling?
3 A Yes.
4 Q Okay. So you didn't specifically rely on
5 that modeling to reach your opinions; is that
6 accurate?
7 A It supported my opinions.
8 Q Okay. In what way did those models
9 support your opinions?
10 A That there were inadequate openings
11 through the railroad embankment.
12 Q So it's your opinion that the -- that
13 prior to the flood of 2011 the tracks were designed
14 and constructed with inadequate openings?
15 A Yes.
16 Q Okay. Is it your opinion that -- well,
17 strike that.
18 MR. DAY: Could you read back the
19 question?
20 (The previous question was read
21 back.)
22 MR. DAY: And the answer was yes,
23 correct?
24 THE COURT REPORTER: Yes.
25 Q (By Mr. Day) Okay. Exhibit 2. Have you

51

1 seen Exhibit 2 before today?
2 A I think I have. It's -- I've looked at a
3 lot of documents, but I believe I have.
4 Q All right. I'm going to ask you about --
5 well, does Exhibit 2 contain a complete list of all
6 the opinions that prepared to offer the Court and
7 the jury in this case? Do you see them listed
8 there, A, B, C?
9 A And I would have to read them again.
10 Q Well, why don't you review those?
11 A Okay.
12 Q I'm going to ask you some general
13 questions a little bit later, but there's a
14 specific one I want to ask you about. Have you had
15 a chance to --
16 A Yes.
17 Q Why don't we take a short break and you
18 take a look at that. Okay? And if you need to use
19 rest room, we can do that. Let's take a very short
20 five-minute break. We've been going about an hour.
21 (Break in proceedings.)
22 Q (By Mr. Day) Dr. Morris, do you have
23 Exhibit 2 there in front of you?
24 A Yes, I do.
25 Q Have you ever seen Exhibit 2 prior to

52

1 today?
2 A Yes.
3 Q Was it sent to you prior to its filing
4 with the Court, if you know?
5 A I think so. Yes.
6 Q So you had a chance to review it before it
7 was signed off by the lawyers and filed with the
8 Court?
9 A Yes.
10 Q The date on it is June 17th of 2013,
11 correct, the last page?
12 A Yes.
13 Q All right. I want to -- I'm going to ask
14 you a lot of questions about this document,
15 Exhibit 2. But for right now, I want to ask you
16 specifically about paragraph C. Do you see that?
17 A Yes, sir.
18 Q It states here, The location of the breach
19 in the track bed generally coincides with the
20 location where BNSF had decided to create a breach
21 through the track by pulling a plug out of the
22 track embankment. Do you see that sentence?
23 A Yes, sir.
24 Q Did you write that sentence?
25 A I don't believe so.

53

1 Q Did one of the lawyers write that
2 sentence, presumably?
3 A I reviewed it.
4 Q Okay.
5 A And at that time, I thought that was a
6 fact.
7 Q All right. Do you still believe that to
8 be a fact today?
9 A No.
10 Q Just so we have a clear record, you are
11 not of the opinion that BNSF intentionally breached
12 its right-of-way at the 101.4 location, are you?
13 MR. MURPHY: Objection. That's
14 vague.
15 A I'm aware that they had discussed
16 breaching it, and I believe that was one of the
17 sites that they had discussed breaching it.
18 Q (By Mr. Day) Okay. Let me make sure I
19 got an answer to my question. Are you of the
20 opinion that BNSF intentionally breached the
21 right-of-way at the 101.4 location by whatever
22 method, pulling a plug as it's described here on
23 Exhibit 2?
24 A I don't believe so because I saw some
25 subsequent correspondence that said we don't need

54

1 to do that anymore because it's breached itself.

2 Q Could you find for me in your file, the

3 e-mail or the document that you reviewed where you

4 think that BNSF was discussing a potential breach

5 at this location?

6 A I don't know that I have a copy of it. I

7 didn't copy everything, obviously, that I looked

8 at. But I could look through what I do have with

9 me and see if there -- it's there.

10 Q Before you do that, do you remember who

11 the e-mail was from?

12 A I do not remember precisely. I remember

13 there was a name on it. I looked at it. It was a

14 responsible person, as I interpreted, for the

15 railroad making that statement.

16 Q Why don't you look through your file and

17 try to find that e-mail?

18 A Okay.

19 MR. MURPHY: While he's doing that,

20 I'm going to run and go get something.

21 MR. DAY: Okay.

22 A It doesn't appear that I made a copy of it

23 or printed it off.

24 MR. DAY: Let's wait for Mr. Murphy

25 to get back.

55

1 DR. MORRIS: Okay.

2 (Break in proceedings.)

3 Q (By Mr. Day) Are you ready?

4 A I've looked through my documents, and I

5 haven't been able to find the e-mails that I was

6 referring to.

7 Q Okay. So at least as far as the documents

8 you've printed off in your file, you were unable to

9 locate the e-mails that you were relying on to form

10 the basis for Opinion No. -- or letter number C on

11 Exhibit 2, correct?

12 A Correct.

13 Q All right. Just so the record's clear,

14 you no longer believe that there was an intentional

15 breach of the right-of-way at the 101.4 location;

16 is that correct?

17 A That's correct.

18 MR. MURPHY: Objection. That's

19 vague.

20 A I'm basing that on the fact that I recall

21 seeing an e-mail that said there was no longer any

22 need to breach because it had breached.

23 Q (By Mr. Day) All right. Based on your

24 review of the documents, did BNSF intentionally

25 breach its right-of-way anywhere between Fortescue

56

1 and Rulo during the flood of 2011?

2 A No. Again, it was similar to what I

3 testified to before, that I believe they were

4 talking about some locations, but there were

5 natural -- or there were breaches that occurred in

6 the railroad embankment. So they didn't feel any

7 longer it was necessary.

8 Q All of the breaches, based on your review

9 of the file, that occurred between Fortescue and

10 Rulo during the flood of 2011 occurred naturally

11 from flood waters, correct?

12 MR. MURPHY: Objection. That

13 misstates the record in the case.

14 Q (By Mr. Day) Is that true?

15 MR. MURPHY: You can answer.

16 Q (By Mr. Day) Is that your understanding?

17 A No.

18 Q What breaches in the right-of-way between

19 Fortescue and Rulo did not occur naturally?

20 A Well, naturally has implications to me

21 that there was no reasons for them other than

22 natural events. And I believe there were low

23 places in the track. There was other situations

24 that existed which caused the breaches to occur in

25 the location that these occurred at.

57

1 Q Okay. But to your knowledge, there never

2 was an intentional act on the part of BNSF or

3 Massman to breach this right-of-way at any

4 location, let me finish, between Fortescue and Rulo

5 during the 2011 flood? Would that be accurate?

6 MR. MURPHY: Same objection. And

7 you're familiar with that? I know you're not

8 trying to intentionally misstate the record. Maybe

9 you're just not familiar with that document.

10 Q (By Mr. Day) You can answer.

11 A Would you repeat the question?

12 (The previous question was read

13 back.)

14 A That's true based on the documents I have

15 reviewed. I haven't reviewed all of them yet.

16 Q (By Mr. Day) Okay. None of your opinions

17 are based on the assumption that anybody

18 intentionally breached the right-of-way, correct?

19 A Correct.

20 Q So with regard to Exhibit No. 2, can we

21 simply eliminate paragraph C, remove it?

22 MR. MURPHY: Objection. That's

23 argumentative. Also misstates the record.

24 Q (By Mr. Day) Well, Doctor, I'm not trying

25 to be argumentative, and I'm not trying to misstate

Exhibit 5

Transcript
of the Testimony of
Daryoush Razavian, PE, PH, D.WRE

Date: October 2, 2013
Volume: I

Case: Thomas Tubbs, Trustee, et al. v. BNSF Railway
Company, Inc., et al.

Lyman Reporting Services

3312 Newport Road
St. Joseph, Missouri 64505-1852
Phone: (816) 233-5585
Fax: (816) 233-4390
e-mail: beachgirl67@earthlink.net
or lymanreporting@yahoo.com

IN THE CIRCUIT COURT OF HOLT COUNTY
4TH JUDICIAL CIRCUIT
STATE OF MISSOURI

THOMAS TUBBS, TRUSTEE OF THE)	
THOMAS TUBBS REVOCABLE TRUST,)	
AND INDIVIDUALLY,)	
AND)	
DANA LYNN TUBBS, TRUSTEE OF THE)	
DANA LYNN TUBBS REVOCABLE TRUST,)	Case No.
AND INDIVIDUALLY,)	12HO-CC00010
Plaintiffs,)	
VS)	
BNSF RAILWAY COMPANY, INC.,)	
AND)	
MASSMAN CONSTRUCTION COMPANY,)	
Defendants.)	

DEPOSITION OF DARYOUSH RAZAVIAN, PE, PH, D.WRE produced, sworn, and examined on behalf of the Plaintiffs on Wednesday, October 2, 2013, at 11:00 a.m., at the law offices of Sattler & Bogen, 701 P Street, Suite 301, Lincoln, Nebraska, pursuant to Notice in accordance with the applicable Missouri Rules of Civil Procedure before Karen J. Lyman, RPR, CSR, CCR, and a Notary Public for the State of Missouri.

A P P E A R A N C E S

For the Plaintiffs:

MR. R. EDWARD MURPHY

AND

MR. MICHAEL L. TAYLOR

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

3007 Frederick Avenue

St. Joseph, MO 64506

For the Defendant BNSF Railway Company:

MR. K. PAUL DAY

Lathrop & Gage, LLP

2345 Grand Boulevard

Suite 2200

2

INDEX

1 WITNESS: DARYOUSH RAZAVIAN, PE, PH, D.WRE PAGE

2 Direct Examination By Mr. Murphy 4

EXHIBITS

5

6 PLAINTIFFS' MARKED

7 No. 1 - Proposal to BNSF, August 5, 2011 4

8 No. 2 - Report Update; June 23, 2011 4

9 No. 3 - E-mail; June 23, 2011 4

10 No. 4 - E-mail; Sept 10, 2011 43

11 No. 5 - BNSF Track Chart 52

12 No. 6 - BNSF Track Chart 59

13 No. 7 - E-mail; July 21, 2011 63

14 No. 8 - BNSF Chart of Proposed Bridges 71

15 No. 9 - Letter; July 13, 2011 85

16 No. 10 - Google Map 94

17 No. 11 - Google Map 94

18 No. 12 - Big Lake & Napier 102

Water Elevation Chart

19 No. 13 - Memorandum; June 7, 2012 104

20 No. 14 - Letter of Intent, Permit Documents 104

and Maps

21 No. 15 - USGS Stream Gage No. 06813500 107

22 No. 16 - Aerial Photographs with Index 108

23 No. 17 - Curriculum Vitae + Other Documents 109

in Witness' File

24 (Exhibits are attached.)

25

4

PROCEEDINGS

(Deposition commenced at 11:00 a.m.)

(Plaintiff's Exhibit Nos. 1 through 3, inclusive were marked for identification by Mr. Murphy.)

DARYOUSH RAZAVIAN, PE, PH, D.WRE

called as a witness herein, being first duly sworn by the Reporter, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. MURPHY:

Q Would you state your full name for the record, please.

A Daryoush Razavian. First name is spelled D-A-R-Y-O-U-S-H, and last name is spelled R-A-Z-A-V-I-A-N.

Q Mr. Razavian, have you ever had your deposition taken before?

A Yes.

Q When most recently, when was that?

A I do not recall exactly. Four or five years ago.

Q All right. Tell me what -- Well, you're a professional engineer; is that correct?

A That is correct.

Q All right. Tell me a little bit about your

3

STIPULATIONS

It is hereby stipulated and agreed by and between the parties that presentment of this deposition to the witness is expressly waived.

It is hereby further stipulated and agreed by and between the respective parties hereto that said deposition shall be signed by the witness before the time of trial of this case, and if not signed, may be used as if signed.

5

educational background, if you would, please.

A Certainly. I graduated with a bachelor's degree in civil engineering in 1979, and a master's in civil/ water resources engineering in 1981.

Q Where?

A Both at the University of Nebraska.

Q Okay. And tell me about your employment history.

A From 1981 until 1988, I was employed at the University of Nebraska. From '88 until '97 I was employed at EA Engineering, Science and Technology, and since June of 1997 until present at Olsson Associates.

Q Okay. What is your current position at Olsson?

A I am program leader for rail services.

Q And is Burlington Northern Railroad one of your principal clients?

A Yes, it is.

Q How long have you been doing work for Burlington Northern Railroad either at Olsson or even previously at EA?

A 21 or -- 20 or 21 years ago.

Q Okay. And during that 20 or 21 years, have you had the occasion prior to 2011 to do any work in connection with the segment of the Burlington Northern track that exists between Fortescue,

74	<p>1 Q Have you ever seen any reports indicating that that</p> <p>2 embankment was built from dirt that existed in the</p> <p>3 valley that was scraped up and formed into the</p> <p>4 embankment? Have you ever seen anything like that?</p> <p>5 A No, I have not.</p> <p>6 Q Okay. Is there any reason for you to believe that</p> <p>7 the soil in the embankment in the vicinity of 101.4</p> <p>8 was different than the soil that you actually</p> <p>9 studied in 2012 closer to the Missouri River?</p> <p>10 MR. DAY: Speculation, conjecture. Lack of</p> <p>11 foundation.</p> <p>12 A My recollection is that the material was likely not</p> <p>13 removed within the floodplain and instead the</p> <p>14 material was brought in from high ground.</p> <p>15 Q And why do you have that understanding?</p> <p>16 A Based on the geotechnical investigation we've done</p> <p>17 in 2012.</p> <p>18 Q And where would I get a copy of that report? Is</p> <p>19 that something you keep in your records?</p> <p>20 A We do, but I provided it to BNSF and I'm -- I'm</p> <p>21 guessing that you may request BNSF for that.</p> <p>22 Q All right. Who made the decision to create</p> <p>23 additional openings in the line between Fortescue</p> <p>24 and Rulo?</p> <p>25 A I made the technical recommendation for bridges.</p>	76	<p>1 examined U.S. Geological quadripod map and other</p> <p>2 information, and I came up with a general location</p> <p>3 plan for these bridges; and finally we consulted</p> <p>4 with a gentleman associated with the Levee District</p> <p>5 10 to get a sense of local's perspective on the</p> <p>6 locations. That's how the locations were selected.</p> <p>7 Q Okay. Why the number of new bridges?</p> <p>8 A I just stated that.</p> <p>9 Q Well, you told me why locations, but previously</p> <p>10 there had only been two bridges in that entire --</p> <p>11 A Right.</p> <p>12 Q -- expense. There were roads that have existed</p> <p>13 there for years and decades, so why now in 2011 is</p> <p>14 the railroad going to put multiple bridges at these</p> <p>15 specific locations? You're saying it's just because</p> <p>16 of the highways, trying to move the water to</p> <p>17 avoid --</p> <p>18 A No, the reason was it was -- it was apparent that</p> <p>19 the railroad did not have enough bridges, number</p> <p>20 and/or length to accommodate the flows being</p> <p>21 experienced in that area in order to continue their</p> <p>22 freight service.</p> <p>23 Q Okay. The flows that were historically experienced</p> <p>24 there?</p> <p>25 A Yes.</p>
75	<p>1 Who made the decision, that happened at BNSF. I</p> <p>2 have no knowledge of that.</p> <p>3 Q Do you know if BNSF was considering the construction</p> <p>4 of additional bridges in this line of track prior to</p> <p>5 the time that your firm was hired?</p> <p>6 A No, I do not believe that.</p> <p>7 Q Why do you say that?</p> <p>8 A Because I was never told.</p> <p>9 Q Who within your firm made the calculations to</p> <p>10 determine the number of bridges or openings that</p> <p>11 were going to be made in that embankment?</p> <p>12 A Ultimately it was under my direction.</p> <p>13 Q All right.</p> <p>14 A I did.</p> <p>15 Q Okay. And why did you choose to construct four new</p> <p>16 bridges and then expand the Big Lake bridge, as</p> <p>17 opposed to one long bridge or something else?</p> <p>18 A The floodplain of the Missouri River is clustered</p> <p>19 with north, south, east, west roadways that act like</p> <p>20 ice-cube like trays, and depending on which roadway</p> <p>21 would be breached or allow water to go through</p> <p>22 indicated to me that you wanted to disperse the</p> <p>23 number of bridges along the floodplain. That was</p> <p>24 also in part based on my aerial observations from</p> <p>25 the helicopter ride that I -- I had. And also I</p>	77	<p>1 Q Okay. So if I'm understanding you, more openings</p> <p>2 were needed to move water from the north side of the</p> <p>3 embankment to the south side of the embankment and</p> <p>4 preserve the stability of the embankment itself?</p> <p>5 A That is correct.</p> <p>6 Q Okay. And did you do a calculation as to the volume</p> <p>7 of water -- Let's see. You told me it's not volume;</p> <p>8 you told me it's rate of flow.</p> <p>9 A Rate of flow.</p> <p>10 Q Did you do a calculation to determine the rate of</p> <p>11 flow that could be accommodated with the new bridges</p> <p>12 that were constructed as well as the existing one at</p> <p>13 the Little Tarkio?</p> <p>14 A It was based on almost weekly measurements of</p> <p>15 overflow the U.S. Geological Survey was making, and</p> <p>16 for at least five weeks the left overbank, the area</p> <p>17 we are discussing, was measured to have around</p> <p>18 100,000 CFS. That was one of the three criteria for</p> <p>19 sizing those bridges, to accommodate 100,000 CFS in</p> <p>20 future floods.</p> <p>21 Q All right. So you were -- your opinion is that now</p> <p>22 with the aid of these additional bridges that were</p> <p>23 constructed, the area there from Fortescue to Rulo</p> <p>24 can now accommodate a rate of flow of 100,000 CFS?</p> <p>25 A That is correct.</p>

78	<p>1 Q Okay. Whereas before it was 60,000?</p> <p>2 A No, 60,000 was based on my estimation of flow, rate</p> <p>3 of flow going through the bridges.</p> <p>4 Q Okay. And again, I'm sorry if I'm being dense on</p> <p>5 this point. I'm trying to make sure I understand</p> <p>6 your wording here.</p> <p>7 A I understand.</p> <p>8 Q I'm trying to understand what you're telling me. I</p> <p>9 thought you told me a little while ago that you had</p> <p>10 done a calculation to determine the rate of flow</p> <p>11 that could be accommodated by the existing bridges</p> <p>12 prior to the construction of new bridges, and it was</p> <p>13 60,000 CFS?</p> <p>14 A No, that is not correct.</p> <p>15 Q Okay. I missed that?</p> <p>16 A What I said was in designing for bridges, before the</p> <p>17 information from Geological Survey was available, I</p> <p>18 was trying to make an attempt at how much flow was</p> <p>19 going through the floodplain, and for that I needed</p> <p>20 the dimensions for bridges to make that</p> <p>21 determination, and that's how that 60,000 was</p> <p>22 estimated.</p> <p>23 Q I gotcha. Okay. Well, let's go back to that</p> <p>24 portion again.</p> <p>25 A Uh-huh.</p>	80	
79	<p>1 Q Okay. So if we had prior to June of 2011 these two</p> <p>2 bridges, one at Little Tarkio and one at Big Lake,</p> <p>3 did you make a calculation as to the water that</p> <p>4 could move from the north side of the embankment to</p> <p>5 the south side of the embankment just through those</p> <p>6 two openings or in addition these corrugated steel</p> <p>7 pipes?</p> <p>8 A I did not make a calculation. I would point out the</p> <p>9 Little Tarkio bridge is not a part of the Missouri</p> <p>10 River floodplain. That's just on the fringe of it.</p> <p>11 Q It's on the -- kind of on the other side of the</p> <p>12 levee?</p> <p>13 A Exactly.</p> <p>14 Q Okay. So if we exclude that, then, we say how much</p> <p>15 water could have been accommodated or the flow that</p> <p>16 could have been accommodated with just the Big Lake</p> <p>17 bridge, did you do a calculation of that?</p> <p>18 A No, I didn't.</p> <p>19 Q Okay. Do you have an estimate of what that would</p> <p>20 have been?</p> <p>21 A The estimate would have been in the Corps model and</p> <p>22 I -- again, I conjecture it's a fraction of what was</p> <p>23 flowing during the flood of 2011.</p> <p>24 Q It would have been a fraction of what the flow would</p> <p>25 be through these new bridges, wouldn't it?</p>	<p>1 A Correct.</p> <p>2 Q Okay. Would it be fair to estimate that if the --</p> <p>3 if the opening there at Big Lake was 150 feet,</p> <p>4 roughly, prior to June 2011 and the new bridges had</p> <p>5 openings of 1,300 feet, roughly, that the water that</p> <p>6 could flow through there would have been roughly 10</p> <p>7 percent of what now it can do? Is that about --</p> <p>8 A In general sense probably. In fact, because it was</p> <p>9 a small portion, you mentioned 10 percent, give or</p> <p>10 take a few percentage, that's why all the breaches</p> <p>11 occurred, because the entire flow could not have</p> <p>12 been accommodated through that particular bridge.</p> <p>13 Q Okay. Because the -- there was too much water on</p> <p>14 the north side and only this opening here basically</p> <p>15 to move it to the south, the stabilization of the</p> <p>16 embankment was in jeopardy?</p> <p>17 A That is correct.</p> <p>18 Q Okay. And in order to stabilize the embankment, it</p> <p>19 actually needed these series of bridges that your</p> <p>20 firm designed?</p> <p>21 A When?</p> <p>22 Q In times of a flood.</p> <p>23 A Probably, yes.</p> <p>24 Q Okay. Did you mention three criteria for the</p> <p>25 bridges, the 100,000 rate of flow, and then what are</p>	81

82	<p>1 A Yes, you are, and I would qualify that answer by</p> <p>2 stating that it all depends on the state of the</p> <p>3 levee, District 10 levee along the Missouri River.</p> <p>4 If the Missouri River levee withstands the</p> <p>5 flood, then very little floodwater would reach this</p> <p>6 area and the frequency of levee failure is not</p> <p>7 known. It's hard to predict to say what would be</p> <p>8 the corresponding frequency of -- of that particular</p> <p>9 bridge. It all depends on how much water is</p> <p>10 reaching the track.</p> <p>11 Q If we have levee failures upstream of Big Lake,</p> <p>12 what -- what type of a flood are we looking at that</p> <p>13 would result in 10,000 CFS at Big Lake? Or would</p> <p>14 you still need more data?</p> <p>15 A You need more data.</p> <p>16 Q Do you know if the 2010 flood would have resulted in</p> <p>17 more than 10 or 15,000 CFS through the Big Lake</p> <p>18 floodplain?</p> <p>19 A I don't have first-hand knowledge of it. Simply</p> <p>20 again because I know in general terms what, you</p> <p>21 know, how much flood was measured, but I don't know</p> <p>22 how the levees withstood that flood.</p> <p>23 Q Okay. As part of your design work in recommending</p> <p>24 these new bridges, did you go back and look at</p> <p>25 historic flood data in the Big Lake area to</p>	84	<p>1 lengthen or shrunken the length basically to -- to</p> <p>2 meet the three criteria that I just talked about.</p> <p>3 Q Okay. And so would I be right that in thinking that</p> <p>4 if we were to add up the length of these bridges and</p> <p>5 it comes out to I think something like 1,300 feet,</p> <p>6 linear feet, we needed that size of collective</p> <p>7 opening in order to accomplish this 100,000 rate of</p> <p>8 flow?</p> <p>9 A This is correct.</p> <p>10 Q So once we know how big the opening has to be, now</p> <p>11 we can start thinking in terms of chopping that up</p> <p>12 into different bridges; is that right?</p> <p>13 A That is correct.</p> <p>14 Q And then you get to the issue of, okay, well, where</p> <p>15 should we put one and how big should it be?</p> <p>16 A That is correct.</p> <p>17 Q All right. Was there anything about the specific</p> <p>18 grade level of these -- of the different areas of</p> <p>19 the floodplain there that drove the location</p> <p>20 process? In other words, if one particular area is</p> <p>21 lower than another area two miles away, do we know</p> <p>22 we're going to have to have a bridge there?</p> <p>23 A Well, it was collectively implied or included in the</p> <p>24 model, and as an example, bridge 104.4 as shown on</p> <p>25 Exhibit 8 is a higher ground than other bridges.</p>
83	<p>1 determine what years would have produced more water</p> <p>2 than could have been accommodated by the existing</p> <p>3 Big Lake bridge?</p> <p>4 A No, I didn't go back, but at the time we were making</p> <p>5 this recommendation, we knew that the Missouri River</p> <p>6 gauge was measured larger than a hundred-year flood</p> <p>7 event, and again, since one of the criteria was to</p> <p>8 accommodate a hundred-year flood and, in fact, a</p> <p>9 larger than a hundred-year flood was experienced,</p> <p>10 plus the very reliable measurement of the left</p> <p>11 floodplain was available to us, there was no need to</p> <p>12 go back, and that was the basis for -- for design.</p> <p>13 Q Okay. Once you began working on this project in</p> <p>14 2011, did anyone ever ask you how long you thought</p> <p>15 it would take for the water elevations to equalize</p> <p>16 there on that section between Fortescue and Rulo?</p> <p>17 A No, I don't recall that.</p> <p>18 Q Okay. Now, we've talked about the number of bridges</p> <p>19 in 2011 that were built, and you've told us about</p> <p>20 location, the strategy behind that. What about the</p> <p>21 length of those bridges? Was there any formula that</p> <p>22 drove the determination of how long each specific</p> <p>23 bridge would be?</p> <p>24 A No, not necessarily. Based on the model that we</p> <p>25 had, and we, you know, locations we determined, we'd</p>	85	<p>1 Therefore, for a given height of floodwater, less</p> <p>2 water would go through that bridge compared to the</p> <p>3 other bridges.</p> <p>4 Q All right.</p> <p>5 A But collectively the impact of bridges, the length</p> <p>6 and location, yielded the final length that we</p> <p>7 needed to accommodate 100,000 CFS.</p> <p>8 Q Okay. Did you provide a written recommendation to</p> <p>9 the railroad to construct these new bridges?</p> <p>10 A In the form of e-mail.</p> <p>11 Q Do you happen to have that with you today?</p> <p>12 A No, I don't.</p> <p>13 Q What have you brought with you today to the</p> <p>14 deposition?</p> <p>15 A I'm sorry?</p> <p>16 Q What have you brought with you today to the</p> <p>17 deposition?</p> <p>18 MR. DAY: Ed, before you start going</p> <p>19 through his file, could we just take a short</p> <p>20 bathroom break?</p> <p>21 MR. MURPHY: Sure. Yeah. That will help</p> <p>22 me catch up on my notes anyway.</p> <p>23 (Off the record.)</p> <p>24 (Plaintiff's Exhibit No. 9 was marked</p> <p>25 for identification by Mr. Murphy.)</p>

Exhibit 6

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.,)
and)
MASSMAN CONSTRUCTION CO.,)
Defendants.)

FILED

SEP 13 2013

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

Case No. 12 HO-CC00010

**SUGGESTIONS IN SUPPORT OF DEFENDANTS' JOINT MOTION
FOR SUMMARY JUDGMENT**

After months of discovery in this case, the uncontroverted facts now confirm what Defendants argued at the outset. Plaintiffs are seeking compensation for flooding damages they claim were caused by the design, construction and maintenance of BNSF's adjacent (and preexisting) transcontinental rail line. Those claims are preempted as a matter of federal law by the Interstate Commerce Termination Act. Discovery has further revealed that the allegations Plaintiffs made within their Petition that Defendants took materials from and damaged their property are false and unsupported. Consequently, BNSF and Massman are entitled to summary judgment as a matter of law.

TABLE OF CONTENTS

THE NATURE OF PLAINTIFFS' ALLEGATIONS 1

QUESTIONS PRESENTED..... 2

ARGUMENT AND AUTHORITIES..... 3

I. LEGAL STANDARDS 3

II. PLAINTIFFS' CLAIMS ARE PREEMPTED AS A MATTER OF LAW BY THE INTERSTATE COMMERCE TERMINATION ACT 4

 A. Plaintiffs' Damage Claims Stem from Their Allegations Concerning the Design, Construction and Maintenance of the BNSF Rail Track 4

 B. The ICCTA Applies to Preempt the Type of Rail Regulation that Plaintiffs Seek to Impose Through Their Claims 6

 1. The ICCTA Grants Exclusive Jurisdiction Over the Regulation of Railroad Facilities, Including the Design, Construction and Maintenance of Tracks and Facilities, to the STB 6

 2. Private Tort Claims, Such as Plaintiffs' Here, That Attack the Design and Construction of Railway Facilities are an Impermissible Form of Regulation and are Thus Preempted Under the ICCTA, as Confirmed by Controlling Federal Law 8

 C. Preemption Likewise Applies to Bar Plaintiffs' Claims Against Massman 12

 1. Plaintiffs Have Alleged Only that Massman Acted as a Contractor on BNSF's Behalf, and They Have Not and Cannot Assert that Massman Committed any Independent Tort..... 12

 2. Preemption Applies Regardless of Whether Massman is a Railroad because Massman Acted on Behalf of BNSF for Rail Transportation Activities 12

III. AFTER PREEMPTION IS APPLIED, PLAINTIFFS' REMAINING CLAIMS FAIL AS A MATTER OF LAW 14

 A. The Nuisance (Count I) Negligence (Count II), and Inverse Condemnation (Count IV) Claims Fail for Lack of the Essential Element of Damages 14

 B. Plaintiffs' Trespass Claims Fail for Lack of Proof and Damages 16

 1. Plaintiffs' Common Law Trespass Claim has No Identifiable Damages..... 17

2.	Plaintiffs Have Not Articulated a Claim for Statutory Trespass.....	18
IV.	THE COURT SHOULD GRANT SUMMARY JUDGMENT ON PLAINTIFFS' CLAIMS FOR INCREASED OR PUNITIVE DAMAGES BECAUSE THERE IS NO EVIDENCE OF WANTON, WILLFUL, OR OUTRAGEOUS CONDUCT OR INVOLVING A CONSCIOUS DISREGARD FOR THE SAFETY OF OTHERS BY CLEAR AND CONVINCING EVIDENCE	19
	CONCLUSION.....	21
	CERTIFICATE OF SERVICE	23

THE NATURE OF PLAINTIFFS' ALLEGATIONS

Plaintiffs have asserted two species of claims. First, Plaintiffs claim they have water/flooding-related damages because BNSF and Massman built up an “earthen dam” and constructed a bridge on the rail line which bisects their farms. (Pls.’ Pet. ¶¶ 4, 8.) “Upon information and belief” Plaintiffs plead that Massman entered onto Plaintiff’s property to build the “dam,” and thus created a “bathtub effect” which channeled and diverted water onto their realty because, as they allege, the track structure design did not have sufficient “culverts or other outlets for drainage” (*Id.* at ¶ 10.)

Second, within their Petition Plaintiffs assert additional damages incurred when, in connection with the above track repair efforts, “Massman, under the supervision and direction of BNSF,” dug trenches, dumped rock, and scooped soil from the Tubbeses’ Farms” which created “channels” and otherwise constituted a use of Plaintiffs’ realty without their permission (*Id.* at ¶ 11.)

Both types of claims fail as a matter of law. Plaintiffs’ water and flooding-related claims are preempted as a matter of federal law under the ICCTA because they are explicitly premised upon criticisms of the nature, design, construction and maintenance of BNSF’s main line railroad tracks and structures. Plaintiffs’ second species of claims, which are essentially premised upon trespass theories, likewise fail because Plaintiffs cannot demonstrate any viable damages or interference with a property right to sustain their burden of proof.

Plaintiffs have no viable causes of action because: 1) Plaintiffs testified under oath that *all of their complaints and damages* stem from the design, construction and maintenance of BNSF’s railroad track structures, and all such claims are preempted as a matter of law, 2) the physical damages on Plaintiffs’ realty are related to water flow that Plaintiffs likewise attribute to track design, which are equally preempted, 3) Plaintiffs have confessed that, contrary to the

allegations made within their Petition, neither BNSF nor Massman ever took soil, rocks or anything else from their property, and 4) although Plaintiffs claim that while their property was submerged under water, they saw a repair barge become stuck over what they believe to be their property for about two days, they cannot specify any interference with their property rights and they cannot identify any damages, quantitative or otherwise, which resulted from that brief event.

QUESTIONS PRESENTED

1. Whether Plaintiffs' claims against BNSF for damages relating to transportation provided by BNSF, including BNSF's rail track and structures, are preempted by Section 10501(b) of the ICCTA;
2. Whether Plaintiffs' parallel claims against Massman for damages allegedly caused by construction related to BNSF's track structures are likewise preempted by Section 10501(b) of the ICCTA;
3. Whether the Court should grant summary judgment in Defendants' favor on Plaintiffs' common law and statutory tort claims given that those claims are premised upon preempted issues and have in many instances been confessed to be false by Plaintiffs;
4. Whether the Court should grant summary judgment in Defendants' favor on Plaintiffs' unsupported claims for punitive damages.

ARGUMENT AND AUTHORITIES

I. LEGAL STANDARDS

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Mo. R. Civ. P. 74.04.

The party moving for summary judgment bears the initial burden of establishing that there are no genuine issues of material fact. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 380-81 (Mo. 1993) (citation omitted). If this burden is met, the opposing party must then come forward with specific facts showing that there is a genuine issue for trial. *Id.* In particular, the opposing party “must demonstrate the existence of a factual question that would permit a reasonable jury to return a verdict” for that party. *Martin v. City of Washington*, 848 S.W.2d 487, 492 (Mo. 1993) (citation omitted). Such a question exists if evidentiary issues “are actually contested, are subject to conflicting interpretations, or if reasonable persons might differ as to their significance.” *Id.* (citation omitted). However, mere doubt and speculation do not and will not create a genuine issue of material fact. *Id.* (citation omitted).

Where a defending party will not bear the burden of persuasion at trial, that party “need not controvert each element of the non-movant’s claim in order to establish a right to summary judgment.” *ITT Commercial*, 854 S.W.2d at 381; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). A defending party, rather, may establish a right to judgment by showing “1) facts that negate any one of the claimant’s elements facts, 2) that the non-movant, after an adequate period of discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of any one of the claimant’s elements, or

(3) that there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly-pleaded affirmative defense." *ITT Commercial*, 854 S.W.2d at 381; *Celotex*, 477 U.S. at 325 (holding that a moving party may make its prima facie demonstration of the absence of a genuine issue of material fact merely by pointing to a lack of evidence for the non-movant on an essential element of its claim).

II. PLAINTIFFS' CLAIMS ARE PREEMPTED AS A MATTER OF LAW BY THE INTERSTATE COMMERCE TERMINATION ACT

Section 10501(b) of the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. § 10501(b) ("ICCTA"), plainly and expressly preempts any state or local law that regulates railroad transportation, including property and facilities. The ICCTA's preemption applies to bar any and all claims based on BNSF's construction, design and maintenance of its rail lines.

The scope of this preemption was unanimously affirmed by the Missouri Court of Appeals for the Western District in *Village of Big Lake v. BNSF*, 382 S.W.3d 125, 130 (Mo. App. W.D. 2012).¹ Citing the ICCTA, the Western District affirmed dismissal of all claims asserted by the Village of Big Lake seeking to control the design and construction of BNSF's major east-west main line, the same tracks as involved in this case. *Id.*

A. Plaintiffs' Damage Claims Stem from Their Allegations Concerning the Design, Construction and Maintenance of the BNSF Rail Track

Now that discovery has concluded, the record establishes that Plaintiffs' true complaints and purported damages in this lawsuit all relate to the 2011 Missouri River flooding which they blame on the design and construction of BNSF's rail line and work to restore service to allow trains to resume service. Plaintiffs allege in their Petition that Defendants "built up an earthen

¹ On November 20, 2012, Big Lake's motion seeking transfer to the Missouri Supreme Court was denied. See Docket Entry for Case No. SC 92896.

dam,” which lacked proper drainage, causing damage to Plaintiffs’ property. (Defs.’ Statement of Uncontroverted Facts (“SOF”) ¶¶ 14, 15.) During his deposition, Plaintiff Thomas Tubbs admitted that he is “upset about the design of the railroad tracks,” that the structure supporting BNSF’s railway is a dam, and that his “main contention is they’re continuously piling that rock along that [sic] tracks, bottling the water up, and I happened to be the unlucky guy it busted through on.” (*Id.* at ¶¶ 17, 21, 24.)

Mr. Tubbs specifically testified that “all of the damage” which Plaintiffs are claiming occurred to their property was incurred “because of the railroad track design”:

Q. Do you think all the damage to your land is because of the railroad track design?

A. Yes, I do.

Q. And what basis do you have for that?

A. Because all previous flood [sic] there’s never been any damage on it.

(*Id.* at ¶ 22, emphasis added.) Tubbs further testified that all of the damages alleged by Plaintiffs were caused by Defendants’ elevation of the railroad, which Plaintiffs claim created drainage issues that magnified the harm caused by the 2011 flooding. (*Id.* at ¶ 23.)

The uncontroverted material facts thus establish that Plaintiffs’ claims in this lawsuit go directly to what they believe was the negligent design, construction and maintenance of BNSF’s railway. Because the design, construction and maintenance of the rail line are matters within exclusive jurisdiction of the United States Surface Transportation Board (“STB”), any claims based upon such allegations are expressly preempted as a matter of law. Accordingly, all tort claims and associated damages based upon Plaintiffs’ allegations that the design and construction of the BNSF railway created the flooding damages to their property must be dismissed on summary judgment.

B. The ICCTA Applies to Preempt the Type of Rail Regulation that Plaintiffs Seek to Impose Through Their Claims

1. The ICCTA Grants Exclusive Jurisdiction Over the Regulation of Railroad Facilities, Including the Design, Construction and Maintenance of Tracks and Facilities, to the STB

Due to the inherently interstate nature of railroad operations, and the need to avoid a multiplicity of intrusive and potentially conflicting state and local regulations that would effectively make it impossible for railroads to conduct business, the United States Congress enacted a broad and express preemption statute, codified at 49 U.S.C. § 10501(b). That statute, enacted as part of the ICCTA, grants the STB exclusive jurisdiction over the regulation of railroad facilities and operations. In particular, it provides that the jurisdiction of the STB over “(1) transportation by rail carriers . . . and (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching or side tracks, or facilities . . . is exclusive.” 49 U.S.C. § 10501(b) (emphasis added). The Act preempts any conflicting federal or state law as follows:

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.

Id. (emphasis added).

The ICCTA provides the strongest and most straightforward type of preemption—express statutory preemption. *See, e.g., English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (holding that “when Congress has made its intent known through explicit statutory language, the courts’ task is an easy one”). Express preemption occurs where “Congress has explicitly indicated its intention to preempt state law in the text of the statute.” *Pace v. CSX Transp., Inc.*, 613 F.3d 1066 (11th Cir. 2010) (finding that 49 U.S.C. § 10501(b) expressly preempts state law).

The ICCTA was developed “to prevent the development of a patchwork of local and state regulations affecting the railroad industry, as the enactment of differing standards and requirements would inevitably be detrimental to the orderly functioning of the industry as a whole.” *City of Cayce v. Norfolk S. Ry. Co.*, 706 S.E.2d 6, 11 (S.C. 2011). This intent is evident in the broad language of 49 U.S.C. § 10501(b).

The ICCTA defines “transportation” expansively and, as noted above, provides that the STB has exclusive and preemptive jurisdiction under Section 10501(b). Specifically, the Act defines “transportation” to include “(A) a . . . **property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property**, or both, by rail . . . and (B) services related to that movement” 49 U.S.C. § 10102(9) (emphasis added). Hence, any rail property related to the movement of passengers or goods, such as the track, embankment, and rail bridge at issue here, is “transportation” within the exclusive jurisdiction of the STB. See *Tex. Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525, 534 (5th Cir. 2012) (holding that roads for a railroad transloading facility fall within the definition of “transportation”).

Any state or local regulation of matters that the ICCTA expressly defines as being within the exclusive jurisdiction of the STB, such as rail transportation (including rail property and facilities), as well as the construction, operation, and abandonment of rail lines, is expressly or *per se* preempted. *Pere Marquette Hotel Partners, L.L.C. v. U.S.*, No. 09-5921, 2010 WL 925297 (E.D. La. March 10, 2010) (holding that claims regarding the design and construction of a roadbed and rail crossing were facially preempted because the ICCTA expressly provides for exclusive STB jurisdiction over rail construction); *Friberg v. Kan. City S. Ry.*, 267 F.3d 439, 443-44 (5th Cir. 2001) (holding that negligence claims regarding a side track were preempted based on the plain language of the statute because the ICCTA clearly provided for exclusive STB

jurisdiction over the construction and operation of the side track); *Tex. Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525, 533 (5th Cir. 2012) (“If the Board directly regulates the activity, as it does the construction of rail lines, state and local regulation is prohibited. Thus, the ordinances that would apply to the slope or other features of the embankments for the railroad tracks themselves are expressly preempted...” (citations omitted).

Plaintiffs’ claims for flooding damage are all preempted because they are based on actions taken by Defendants in connection with the maintenance and construction of a federally-regulated rail line that falls within the STB’s exclusive jurisdiction.

2. Private Tort Claims, Such as Plaintiffs’ Here, That Attack the Design and Construction of Railway Facilities are an Impermissible Form of Regulation and are Thus Preempted Under the ICCTA, as Confirmed by Controlling Federal Law

The doctrine of preemption applies to bar not only government actions, but also state tort claims. It is a generally-accepted principle of federal preemption law that private claims that seek to regulate matters under the STB’s jurisdiction, like Plaintiffs’ claims regarding the design of BNSF’s railway, are preempted as a matter of law under the ICCTA. *See A&W Props., Inc. v. Kan. City S. Ry. Co.*, 200 S.W.3d 342, 351 (Tex. Ct. App. 2006) (holding that nuisance, negligence, and trespass claims relating to the design and construction of a culvert that ran under a railroad bridge were preempted because they attempted to regulate “rail transportation” as defined by the ICCTA); *see also Maynard v. CSX Transp., Inc.*, 360 F. Supp. 2d 836, 842-43 (E.D. Ky. 2004), *aff’d*, No. 04-5448 (6th Cir. Feb. 7, 2005) (holding that the plaintiffs’ claims that the construction and maintenance of certain track and its “foundation” blocked natural drainage and caused water to diffuse onto their property were expressly preempted by the ICCTA, regardless of whether they had any effect on interstate commerce because the construction and maintenance of the track was within the exclusive jurisdiction of the STB).

The United States Supreme Court recently reiterated that private tort claims cannot escape the rule of preemption. In *Kurns v. R.R. Friction Prods., Inc.*, 132 S. Ct. 1261, 1269 (2012), the Court reaffirmed that “‘regulation can be . . . effectively exerted through an award of damages,’ and ‘[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.’” *Id.* (emphasis added) (citations omitted).

At issue in the case was preemption under the Locomotive Inspection Act, 49 U.S.C. § 20101, *et seq.* (“LIA”), of state laws regulating locomotive equipment. The plaintiff argued that the statute’s “preemptive scope does not extend to state common-law claims, as opposed to state legislation or regulation.” *Id.* In rejecting that argument, the Court explained that where the preempted field is a physical subject matter or type of activity, preemption turns on whether the state law affects that physical subject matter or activity, not who is sued or whether the suit seeks common-law damages. *Id.* at 1268 (citation omitted). The Supreme Court held that “state common-law duties and standards of care directed to the subject of locomotive equipment are pre-empted by the LIA.” *Id.* at 1270.

The point was also underscored by the United States Court of Appeals for the Eleventh Circuit in *Pace v. CSX Transportation, Inc.*, 613 F.3d 1066 (11th Cir. 2010), which specifically held that tort claims, such as the ones brought in this case by Plaintiffs, amount to a proscribed form of regulation of rail transportation under the ICCTA. In *Pace*, the landowners filed a state law nuisance claim stemming from the railroad’s construction and operation of a side track adjacent to their property. *Id.* at 1067-68. They conceded that the construction and operation of a sidetrack is covered by the ICCTA, but they urged the court to make “a remedy-centered exception” where the requested remedy is money damages. *Id.* at 1069. The Eleventh Circuit flatly rejected that argument, explaining that “to permit monetary liability to accrue under a state nuisance claim where that liability is based on decisions the ICCTA purposefully freed from

outside regulation would contradict the language and purpose of the ICCTA.” *Id.* at 1070. The court declared, “[W]e will not permit landowners to circumvent that Congressional decision through state law nuisance claims.” *Id.*

Numerous other courts have reached the same conclusion and thus rejected attempts to sidestep the ICCTA through tort claims for damages. *See, e.g., Maynard*, 360 F. Supp. 2d at 840 (“[A] state may regulate through an award of damages under a common law claim as effectively as it may regulate by some form of preventative relief, and thus a state common law cause of action qualifies as ‘regulation’ for purposes of section 10501(b).”); *Guckenberg v. Wis. Cent. Ltd.*, 178 F. Supp. 2d 954, 958 (E.D. Wis. 2001) (holding that “state regulation can be as effectively exerted through an award of damages as through some preventive relief”).

“[W]hen a state requires a railroad to pay damages to a civil litigant for a claim related to the railroad’s operations, that claim is the equivalent of state regulation of the railroad.” *A&W Props.*, 200 S.W. 3d at 349; *see also Pere Marquette*, 2010 WL 925297, at *7 (granting a motion to dismiss negligence claims and stating, “The application of state law negligence principles to assess and evaluate the suitability of the design and construction of a railroad crossing, railroad tracks, and roadbed for railroad tracks qualifies as an attempt at state law ‘regulation’ in respect to rail transportation.”). Applying this principle, the court in *Jacobs v. Elk Run Coal Co.*, Circuit Court of Boone County, West Virginia, Civil Action Nos. 97-C-200, *et al.*, at 6 (Oct. 7, 2003), disallowed tort claims and determined that “[u]nder the plain terms of Section 10501(b), West Virginia cannot provide its citizens with ‘remedies,’ such as a suit at common law, to redress the effect of [the railroad’s] construction and operation of its side tracks because the remedies provided under the [ICCTA] are ‘exclusive and preempt’ all other remedies.”

The rule of preemption is also the law of the State of Missouri. In the recent *Big Lake* decision, the Western District of Missouri embraced the holdings of three cases cited herein:

Pere Marquette, 2010 WL 925297, *Maynard*, 360 F. Supp. 2d 836, and *A&W Props.*, 200 S.W. 3d 342. 382 S.W.3d at 130. Each of those cases involved private tort claims based upon the design, construction or maintenance of rail tracks, just as Plaintiffs are claiming here. See *Pere Marquette*, 2010 WL 925297, at *5-6 (involving state law negligence claims alleging that the design and construction of a roadbed and rail crossing caused flooding); *Maynard*, 360 F. Supp. 2d at 842-43 (involving nuisance claims alleging that drainage of the railroad side tracks and foundation was inadequate); *A&W Props.*, 200 S.W. 3d at 349 (involving claims, premised partially on a state statute, to compel a railroad to rebuild a culvert to prevent flooding). And in all of them, the respective courts ruled that ICCTA preemption barred the claims. *Id.*

Plaintiffs' sworn deposition testimony makes it clear they are asking to apply state tort law principles "to assess and evaluate the suitability of the design and construction of . . . railroad tracks . . . and roadbed for railroad tracks," which has been held to constitute "an attempt at state law 'regulation' in respect to rail transportation" and, therefore, preempted by the ICCTA. See *Pere Marquette*, 2010 WL 925297, at *5. Any state tort liability imposed upon BNSF for these actions would be an impermissible form of state regulation, directing that BNSF must take other action concerning the construction, maintenance and operation of its transcontinental main rail line.

The Tubbses seek damages because of the way Defendants designed and constructed BNSF's rail line near their property. (See SOF ¶¶ 14-15, 17-24.) As a matter of law, however, Plaintiffs cannot bring civil claims challenging the manner in which BNSF designs, constructs and maintains its rail system. Such state regulation is expressly prohibited under the ICCTA and federal law. The Court should therefore grant summary judgment to BNSF.

C. Preemption Likewise Applies to Bar Plaintiffs' Claims Against Massman

Federal preemption of Plaintiffs' claims applies not only to the claims against BNSF, but also to the claims asserted against Massman, BNSF's construction contractor. Although Massman is not a railroad, Massman was acting solely on behalf, and under the supervision and direction, of BNSF to perform work on BNSF's railroad track structures. Plaintiffs allege that the wrongful actions were taken by both Defendants together. (*Id.* at ¶ 11.) Thus, under well-established precedent, Plaintiffs' claims against Massman are equally preempted under the ICCTA.

1. Plaintiffs Have Alleged Only that Massman Acted as a Contractor on BNSF's Behalf, and They Have Not and Cannot Assert that Massman Committed any Independent Tort

Plaintiffs allege that Massman acted solely as a contractor for BNSF performing rail-related activities. (*Id.* at ¶ 10.) Discovery has not revealed any new facts or allegations that Massman took any independent action that could allow separate liability for Plaintiffs' alleged flooding damages. Plaintiffs have not challenged, nor could they challenge, that Massman's actions in the project were undertaken as part of BNSF's plans for continuing rail service in the area. (*Id.* at ¶ 11.) BNSF and Massman entered into a contract for the purpose of repairing and modifying the BNSF rail line to restore and allow uninterrupted rail service. (*Id.* at ¶ 8.) The uncontroverted facts leave no doubt that Massman was acting at all times as BNSF's contractor. As such, the ICCTA's preemption applies to prohibit any claims against Massman in the same manner that it prohibits claims against BNSF.

2. Preemption Applies Regardless of Whether Massman is a Railroad because Massman Acted on Behalf of BNSF for Rail Transportation Activities

The fact that Massman is not itself a railroad is not pertinent to the application of ICCTA preemption. Plaintiffs' claims are focused on the design, construction, and maintenance of

portions of the BNSF rail line. (*Id.* at ¶¶ 17-24.) If Massman were subjected to state law and regulation for those actions by virtue of Plaintiffs' claims in this lawsuit, states and localities could regulate railroads indirectly by dictating the specifications of rail line maintenance and construction whenever such maintenance and construction is performed by a contractor acting under the railroad's direction, rather than by the railroad itself. This result, of course, would undermine the entire purpose of federal preemption, *i.e.*, to ensure that a single set of standards is applied to interstate railroad activities that would otherwise be faced with an innumerable number of potentially conflicting state and local obligations. *Elam v. Kan. City S. Ry.*, 635 F.3d 796, 804 (5th Cir. 2011) ("With respect to rail transportation, the ICCTA seeks to implement a federal scheme of minimal regulation for this intrinsically interstate form of transportation, and to retain only regulations that are necessary to maintain a safety net or backstop of remedies to address problems of rates, access to facilities, and industry restructuring."); *City of Cayce v. Norfolk S. Ry. Co.*, 706 S.E.2d 6, 11 (S.C. 2011) ("The purpose of the ICCTA is to prevent the development of a patchwork of local and state regulations affecting the railroad industry, as the enactment of differing standards and requirements would inevitably be detrimental to the orderly functioning of the industry as a whole.")

To avoid this result, numerous courts have recognized that a contractor or agent providing services integrally related to rail transportation is working under the control or direction of a railroad, and they have deemed such work to be that of a "rail carrier" and subject to ICCTA preemption. *See, e.g., Tex. Cent. Bus. Lines Corp.*, 669 F.3d at 530-533 (holding that a trucking company working under railroad guidelines at a rail facility was operating within STB jurisdiction and therefore entitled to preemption); *Coastal Distrib., LLC v. Town of Babylon*, No. CV 05-2032, 2005 U.S. Dist. LEXIS 40795, at *49-50 (E.D.N.Y. July 15, 2005) ("[W]hen the ICCTA granted the Surface Transportation Board exclusive jurisdiction over transportation by

rail carriers, it intended that the term ‘rail carrier’ include any entity or person providing ‘service and equipment’ related to the movement of freight by rail, pursuant to contract with a rail carrier.”); *Canadian Nat’l Ry. Co. v. City of Rockwood*, No. 04-40323, 2005 U.S. Dist. LEXIS 40131, at *18 (E.D. Mich. June 1, 2005) (“Here, the relationship of IWG to CN is not one of a shipper to a carrier, but one of a contractor working ‘under the auspices of a rail carrier.’ . . . IWG provides transloading services so that CN may complete its obligations under CN’s transportation agreements with its shippers [T]he activities occurring at the Rockwood transload facility appear to be ‘integrally related to the provision of interstate rail service,’ and are therefore subject to the STB’s jurisdiction and federal preemption.”) (citations omitted).

Massman’s construction of BNSF’s track and the structures supporting that track was no less “integrally related” to rail transportation and construction than were the activities of the contractors in the cited cases, or the activities of BNSF itself. Therefore, Plaintiffs’ claims against Massman fall within the STB’s exclusive jurisdiction, and the Court should also grant summary judgment to Massman.

III. AFTER PREEMPTION IS APPLIED, PLAINTIFFS’ REMAINING CLAIMS FAIL AS A MATTER OF LAW

Plaintiffs have advanced five causes of action to attempt to state a claim against BNSF and Massman: Count I- Trespass, Count II- Nuisance, Count III- Negligence, Count IV- Inverse Condemnation, and Count V- Statutory Trespass. These various causes of action simply repackage the same two species of damage and liability claims: flooding damages and undefined trespass. As demonstrated below, each of these Counts fails as a matter of law.

A. The Nuisance (Count I) Negligence (Count II) and Inverse Condemnation (Count IV) Claims Fail for Lack of the Essential Element of Damages

Plaintiffs’ claims for nuisance (Count I), negligence (Count II), and inverse condemnation (Count IV) are based on the same flooding-related theme, *viz.*, Defendants

“caused and diverted Missouri flood water” onto their farms (Pls.’ Pet. at ¶ 25) because BNSF and Massman did not “design, construct and maintain” the railroad track structures (*Id.* at ¶¶ 28, 34, 36, 37) in accord with Plaintiffs’ desires.² As discussed in great detail above, tort claims for damages that arise from the design, construction and maintenance of the BNSF rail line are preempted as a matter of law. *Supra*, Section 11.

Plaintiffs have also alleged that, during the repair process, BNSF and Massman “dug trenches and dumped rock” on the Tubbses’ property. (Pls. Pet. at ¶ 11.) During their depositions, however, Plaintiffs confessed these allegations are not true. (SOF ¶¶ 31-34.)

Under Missouri law, both claims for nuisance and for negligence require that a plaintiff must prove that plaintiff sustained damages as a result of the alleged nuisance or negligence. *See Fuchs v. Curran Carbonizing & Engineering Co.*, 279 S.W.2d 211, 217 (Mo. App. 1955) (essential elements that are required for recovery on the basis of nuisance are injury, damage, and causation); *Finocchio v. Mahler*, 37 S.W.3d 300, 302 (Mo. App. E.D. 2000) (to prevail on a negligence theory, the plaintiff must show: 1) the defendant owed a duty of care to the decedent; 2) the defendant breached that duty; 3) plaintiff suffered damages; and 4) the breach was the cause in fact and proximate cause of those damages).

The Tubbses cannot sustain any claim for nuisance or negligence because, as confessed during their depositions, all damages sought are premised upon the design of the track structure, and the flooding they believe resulted from that track design (SOF ¶ 22), which claims are preempted by the ICCTA. Without any non-preempted damages, neither Count can survive. Therefore, Plaintiffs’ nuisance and negligence claims fail as a matter of law.

² For example, plaintiffs repeatedly complain that BNSF and Massman should have included “proper outlets” into the main line track structure. (Pls.’ Pet. ¶¶ 34, 37.) The inclusion, size and efficacy of “outlets,” culverts or any other such devices is an inherent part of the track design and structure, which is expressly preempted from state law regulation under the ICCTA.

The claim for inverse condemnation (Count IV) is similarly deficient. Plaintiffs assert that BNSF has powers of eminent domain under Missouri law which it could have exercised to take Plaintiffs' property for public use. The glaring flaw in that Count is the fact that Plaintiffs have not alleged that BNSF or Massman took any property from the Plaintiffs, or that the complained-of structures were built on Plaintiffs' property. (Pls.' Pet. pp. 8-9.) In fact, BNSF simply rebuilt its own track structures on its own property which it has owned and operated long before the Tubbses acquired the adjacent realty.

As with the other counts, the focus of Count IV is the same complaint about the design and construction of the BNSF track structures and bridge allegedly causing Plaintiffs' property to flood. (*Id.* at ¶¶ 43, 45.) "Inverse condemnation is the exclusive remedy when private property is damaged by a nuisance operated by an entity having the power of eminent domain." *Christ v. Metro. St. Louis Sewer Dist.*, 287 S.W.3d 709, 711-12 (Mo. Ct. App. 2009). "Injury, damage, and causation are essential elements required for recovery...." *Id.* at 712. Without an actionable damage claim, Count IV also fails as a matter of Missouri law.

B. Plaintiffs' Trespass Claims Fail for Lack of Proof and Damages

In Counts I and V of their Petition, Plaintiffs claim they are the victims of common law and statutory trespass. Plaintiffs' factual bases for these two counts are the same. Just as is the case for Plaintiffs' other tort actions, Plaintiffs' complain that the Defendants built the main railroad tracks in ways that "channeled water" onto the Tubbs farms (Pls.' Pet. ¶¶ 23, 20). All such claims are preempted by the ICCTA. *See supra*

Plaintiffs also plead a second category of trespass, that BNSF and Massman "entered onto the Tubbses' Farms" (Pls.' Pet. ¶¶ 19, 46) without permission. When it came time to back up these allegations up during their depositions, however, the Tubbses faltered.

The massive construction project Defendants undertook during the summer of 2011 to restore transcontinental rail traffic serving millions of Americans, and to reopen Highway 159 which serves all of Holt County, were all conducted under emergency flooding conditions. These repair efforts consumed months of time and entailed an enormous number of labor hours by hundreds of workers. Despite this massive influx of activity in the area near the Tubbses' farms, plaintiff Tom Tubbs could only testify to one instance where anyone or anything allegedly came onto his land.

Tom Tubbs testified that, after the Missouri River flood waters breached Highway 159 and the BNSF rail line, he witnessed two repair barges floating over what he believed to be the south portion his land, attempting to reach the highway and the railroad line to make repairs. (SOF ¶ 25.) According to Tubbs, one barge appeared to be stuck on the land and it remained stuck there, on the south side of the tracks, for about two days. (*Id.* at ¶¶ 27, 28.) Tubbs testified that he witnessed an excavator lowering its boom in front of the barge to attempt to free the barge. (*Id.* at ¶ 26.) Other than this incident, Tubbs never witnessed the Defendants enter his land. (*Id.* at ¶¶ 27, 28.) The "trespass" about which Plaintiffs complain is thus the efforts Defendants made to free this barge so it could continue the emergency repair work.

1. Plaintiffs' Common Law Trespass Claim has No Identifiable Damages

Under Missouri law, a common law trespass is defined as the direct physical interference with another's property. *Doyle v. Fluor Corp.*, 199 S.W.3d 784, 789 (Mo. Ct. App. 2006). No such interference ever occurred. Plaintiffs' land was underwater for months, and during the time in question when a barge became stuck, the water flowing over plaintiffs' land was moving at high velocity. Plaintiffs apparently contend that a *de minimus* touching of a point within their 500-acre farm, during an emergency when the entire region was under water, amounts to an actionable trespass. Such is not the law.

Plaintiffs were asked in discovery to identify any damages that they believed they incurred because of this alleged trespass. Despite these inquiries, Plaintiffs have not quantified any damages that they can associate with these supposedly wrongful actions. (SOF ¶¶ 29-30.) Thomas Tubbs admitted in his deposition that he knows of no permanent damages caused by the barges, and that after the flood waters receded, there was no evidence of their presence on his property. (*Id.*)

These allegations cannot support or be linked to the millions of dollars of damages that Plaintiffs are claiming in this case, or to any quantifiable damages at all. A barge stuck for two days during a raging flood did not interfere in any way with plaintiffs' use or enjoyment of their land. Because Plaintiffs have no claim for trespass outside of their preempted flooding claims, Count I of the Petition should be dismissed as a matter of law.

2. Plaintiffs Have Not Articulated a Claim for Statutory Trespass

Plaintiffs' claim for statutory trespass under Mo. Rev. Stat. § 537.340 is also unsupported by the summary judgment record. This statute provides that a defendant may be liable for damages to the aesthetics of real property, including the removal of trees, rocks, soil, or crops:

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.

Mo. Rev. Stat. § 537.340.

Here, Plaintiffs admit that Defendants did not physically remove trees, timber or other vegetation. (SOF ¶ 31.) Defendants did not "scoop up" or physically carry away rocks, soil, or

other materials. (*Id.* ¶¶ 31, 32.) Plaintiffs have not identified any damages of things “injured, broken, destroyed, or carried away.” Plaintiffs are simply not alleging the type of activities or damages that can make up a claim for statutory trespass.

Further, Section 537.340 states that the defendant shall pay treble damages for the “things” damaged, which inherently requires that the plaintiff must suffer some measurable damage. As set forth above, Plaintiffs have not identified any damages associated with a trespass claim. Without an actionable damage, a claim for statutory trespass under Section 537.340 does not lie as a matter of Missouri law. Accordingly, Count V should also be dismissed.

IV. THE COURT SHOULD GRANT SUMMARY JUDGMENT ON PLAINTIFFS’ CLAIMS FOR INCREASED OR PUNITIVE DAMAGES BECAUSE THERE IS NO EVIDENCE OF WANTON, WILLFUL OR OUTRAGEOUS CONDUCT, OR INVOLVING A CONSCIOUS DISREGARD FOR THE SAFETY OF OTHERS, BY CLEAR AND CONVINCING EVIDENCE

“Justified as punishment and intended to make an example of a defendant on account of his outrageous conduct, punitive damages require a showing of a culpable mental state on the part of the defendant, either by a wanton, willful or outrageous act or reckless disregard (from which evil motive is inferred) for an act’s consequences.” *Burnett v. Griffith*, 769 S.W.2d 780, 787 (Mo. 1989) (en banc). “Punitive damages may be awarded for conduct that is outrageous, because of the defendant’s evil motive or reckless indifference to the rights of others.” *Id.* (citation omitted).

Notably, the party “must know that the act is wrongful, and must do it intentionally without just cause or excuse.” *Franta v. Hodge*, 302 S.W.2d 291, 294 (Mo. App. 1957) (citation omitted). “If he acts in good faith and in the honest belief that his act is lawful, he is not liable for punitive damages even though he may be mistaken as to the legality of his act.” *Id.* (citation omitted).

To make a submissible case for punitive damages, there must be “clear and convincing proof of [a defendant’s] culpable mental state.” *Drury v. Mo. Youth Soccer Ass’n*, 259 S.W.3d 558, 573 (Mo. App. E.D. 2008). “The test for punitive damages is a strict one, and many cases have been reversed because of a punitive damage award.” *See Jone v. Coleman Corp.*, 183 S.W.3d 600, 610 (Mo. App. E.D. 2005) (affirming the trial court’s decision granting summary judgment on the plaintiffs’ claims for punitive damages) (citation omitted).

Here, Plaintiffs’ claims for punitive damages are preempted along with their state tort claims. Summary judgment is also appropriate because Plaintiffs have failed to come forward with any of the facts required for submitting an instruction regarding punitive damages.

There simply are no facts amounting to intentional wrongdoing, and after an adequate period of discovery, Plaintiffs have not produced, nor can they produce, evidence sufficient to allow the trier of fact to award punitive damages. (*See* SOF ¶ 40.) In fact, Plaintiffs have admitted that their property “would have flooded” in 2011 even if BNSF had taken no action with regard to its rail line. (*Id.* at ¶ 39.) And they have acknowledged that the Missouri River flooding in 2011 was “unprecedented” and that their property gets flooded because “[i]t’s an act of God.” (*Id.* at ¶¶ 36, 37, 39.)

Moreover, Plaintiffs have conceded that Defendants’ actions were “not personal” and that they “understood [BNSF and Massman] had to get the tracks open.” (*Id.* at ¶ 38.) Plaintiffs have further admitted that Defendants were dealing with “an emergency situation” and that they needed to act quickly to repair BNSF’s transcontinental main rail line. (*Id.* at ¶¶ 37.)

These facts demonstrate there was no “evil motive or reckless indifference to the rights of others.” *Burnett*, 769 S.W.2d at 787. Instead, BNSF acted in good faith and, as admitted by Plaintiffs, with just cause and excuse. *Franta*, 302 S.W.2d at 294.

Furthermore, because Plaintiffs have demonstrated no basis for any actual damages, their claims for punitive damages likewise fail. *Roth v. Equitable Life Assur. Soc. of U.S.*, 210 S.W.3d 253, 262 (Mo. App. E.D. 2006); *see also Boshers v. Humane Soc. of Mo., Inc.*, 929 S.W.2d 250, 256 (Mo. App. S.D. 1996) (“Since we have affirmed the entry of summary judgment as to the claims for actual damages in this suit, there is no basis for punitive damages.”); *Imperial Premium Finance, Inc. v. Northland Ins. Co.*, 861 S.W.2d 596, 600 (Mo. App. W.D. 1993) (“There can be no recovery for punitive damages without an award for actual damages.”) (citation omitted).

This Court should therefore determine that no claim for punitive damages can be submitted to the jury and grant summary judgment precluding Plaintiffs from seeking any increased or punitive damages at trial.

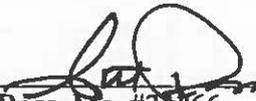
CONCLUSION

Defendants’ motion for summary judgment on all claims against BNSF and Massman should be sustained. Section 10501(b) of the ICCTA plainly and expressly preempts any state or local law that regulates railroad transportation, including property and facilities, and precludes claims based on such laws. Accordingly, the ICCTA preempts Plaintiffs’ state law tort claims against BNSF and Massman, which are an impermissible attempt to regulate the design and construction of railroad tracks and supporting structures, and summary judgment is warranted on that basis. Even if any of plaintiffs’ state law claims survived ICCTA, which they do not, all such claims fail because Plaintiffs cannot demonstrate they sustained any damages, and consequently have no evidence to sustain all elements of their *prima facie* burden of proof. Without viable claims or damages, punitive damages are not viable even if wanton conduct were shown, which has not occurred.

Therefore, BNSF and Massman move that summary judgment be entered in their favor, that this action be dismissed With Prejudice, that defendants be awarded their costs, attorneys' fees and expenses incurred herein, and that this Court render such other and further relief it deems just and proper.

Respectfully submitted,

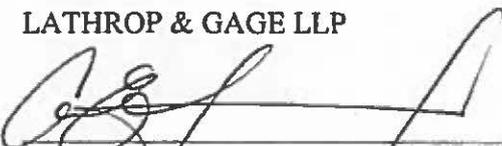
ROSS AND THOMSON LLP



Scott Ross, Mo. #25266
scott.rossthomson@embarqmail.com
408 North Market Street
P.O. Box 370
Maryville, Missouri 64468-0370
Telephone: (660) 582-7468
Facsimile: (660) 582-8790

and

LATHROP & GAGE LLP



Douglas R. Dagleish, Mo. #35203
ddagleish@lathropgage.com
J. A. Felton, Mo. #39549
jfelton@lathropgage.com
Carrie E. Jossierand, Mo #50692
cjossierand@lathropgage.com
2345 Grand Boulevard, Suite 2200
Kansas City, Missouri 64108-2618
Telephone: (816) 292-2000
Facsimile: (816) 292-2001

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of September 2013, I served the foregoing by electronic mail and also by U.S. Mail, first-class postage prepaid, to:

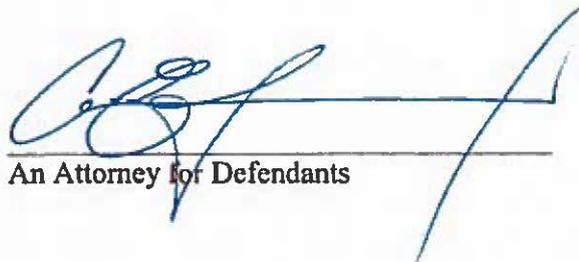
Gary L. Myers
Law Office of Gary L. Myers
4810 S. Lakewood Drive
St. Joseph, MO 64506,

Matthew L. Meyers
Law Office of Matthew L. Meyers
213 Delaware Street, #101
Kansas City, MO 64105,

and

R. Edward Murphy
Nancy J. Potter
Murphy, Taylor, Siemens & Elliott P.C.
3007 Frederick Avenue
St. Joseph, Missouri 64506

ATTORNEYS FOR PLAINTIFFS.



An Attorney for Defendants

Exhibit 7

IN THE CIRCUIT COURT OF HOLT COUNTY, MISSOURI
DIVISION NO. 1

THOMAS TUBBS, et al.)
)
 Plaintiffs,)
)
 vs.)
)
 BNSF RAILWAY COMPANY, INC.,)
 et al.)
)
 Defendants)

Case No. 12HO-CC00010

FILED

DEC 9 2013

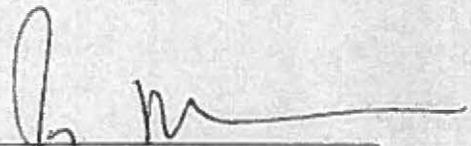
VICKI BOOK
CIRCUIT CLERK - DIV. I
HOLT COUNTY, MISSOURI

ORDER GRANTING PLAINTIFFS' MOTION TO STAY

ON Plaintiffs' Motion to Stay this litigation pending the outcome of its Petition for Declaratory Order filed with the Surface Transportation Board ("STB") seeking a determination as to whether Plaintiffs' claims under Missouri law are preempted by the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. 10501(b), the Court finds that it would be in the best interest of the parties to seek the declaratory order.

IT IS THEREFORE ORDERED that Plaintiffs' Motion to Stay is granted and that all pending motions, pre-trial filings, and the scheduled trial herein are stayed pending a ruling by the STB on Plaintiffs Petition for Declaratory Order.

SO ORDERED this 8~~th~~ day of December, 2013.



Roger M. Prokes, Judge

NOTICE OF ENTRY
(SUPREME COURT RULE 74.03)

In The 4th Judicial Circuit Court, Holt County, Missouri
102 WEST NODAWAY, PO BOX 318, OREGON, MISSOURI

THOMAS TUBBS ET UX V BNSF RAILWAY CO INC ET AL

CASE NO : 12HO-CC00010

To: SCOTT W ROSS
ROSS & THOMSON
PO BOX 370
MARYVILLE MO 64468

YOU ARE HEREBY NOTIFIED that the court duly entered the following:

<u>Filing Date</u>	<u>Description</u>
09-Dec-2013	Order ORDER GRANTING PLAINTIFFS' MOTION TO STAY Filed By: ROGER M PROKES



Clerk of Court

CC: File
BENJAMIN SPENCER CREEDY
CARRIE ELIZABETH JOSSERAND
DOUGLAS ROYCE DALGLEISH
GARY LEE MYERS
MATTHEW LEE MYERS
MICHAEL LESLIE TAYLOR
NANCY IRENE BLAKE
ROBERT EDWARD MURPHY
SCOTT W ROSS

ECC:

Date Printed : 09-Dec-2013

Exhibit 8

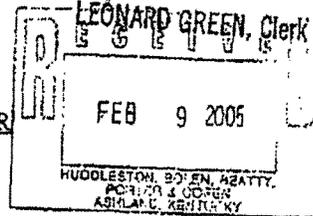
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

FEB - 7 2005

PATSY C. MAYNARD; MARY COLEMAN,)
)
 Plaintiffs-Appellants,)
)
 v.)
)
 CSX TRANSPORTATION CORPORATION,)
 CSX Transportation, Inc.,)
)
 Defendant-Appellee.)
)
 AEP KENTUCKY COAL, LLC,)
)
 Third Party Defendant-Appellee.)

ORDER



NOT RECOMMENDED FOR FULL-TEXT
 PUBLICATION
 Sixth Circuit Rule 28(g) limits citation to specific situations.
 Please see Rule 28(g) before citing in a proceeding in a court
 in the Sixth Circuit. If cited, a copy must be served on other
 parties and the Court.
 This notice is to be prominently displayed if this decision
 is reproduced.

Before: GIBBONS and SUTTON, Circuit Judges; EDGAR, District Judge.*

Plaintiffs Patsy C. Maynard and Mary Coleman appeal a district court judgment granting summary judgment in favor of the defendants. The parties have expressly waived oral argument. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

One of the defendants in this case is a railroad company (CSX or Railroad). The plaintiffs are landowners whose property lies adjacent to the Railroad's main line track and a side track owned by the Railroad. The landowners' predecessors in title were granted a railroad crossing across the Railroad's main line track many years before this litigation. Thereafter, a side track was constructed so that a coal processing plant and a coal loading operation could be conducted. A coal company (AEP or Coal Company) was added as a defendant in the suit by way of a third party complaint.

*The Honorable R. Allan Edgar, United States Chief District Judge for the Eastern District of Tennessee, sitting by designation.

Seeking monetary damages and equitable relief the plaintiffs brought suit in state court alleging that CSX wrongfully, negligently, and carelessly permitted the side track to be blocked by trains, denying landowners' ingress and egress. The landowners also alleged that drainage from the main and side tracks damaged their property. CSX removed the case to federal district court based on diversity of citizenship and subsequently moved the court for summary judgment.

The district court concluded that § 10501(b) of the Interstate Commerce Commission Termination Act of 1995 (ICCTA), 49 U.S.C. § 10101, expressly preempts plaintiffs' claims and granted defendants' motion for summary judgment.

On appeal, plaintiffs contend that their claims are not preempted by federal legislation because their claims are brought in contract, not common law negligence or nuisance. The parties have filed briefs in which they expressly waive oral argument.

In reviewing a district court's grant of summary judgment, this court applies a de novo standard. *E.I. Du Pont de Nemours & Co. v. Okuley*, 344 F.3d 578, 584 (6th Cir. 2003), cert. denied, 124 S. Ct. 2071 (2004). Summary judgment is proper only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). The proper inquiry is whether the evidence is such that a reasonable jury could return a verdict for the plaintiff. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

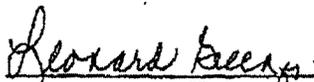
Upon review, we conclude that the district court properly granted summary judgment in favor of the defendants. The defendants are entitled to judgment as a matter of law because the plaintiffs' claims are preempted by federal legislation. The allegations set forth in plaintiffs' complaint and their discovery responses sound in common law negligence and nuisance law. Such claims are preempted by the ICCTA. See *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 443 (5th Cir. 2001). Under the Supremacy Clause, U.S. Const. art. 6, cl. 2, federal law preempts state or local law in various ways: 1) express preemption where the intent of Congress to preempt state law is clear and explicit; 2) field preemption where Congress' regulation of a field is so pervasive or the federal interest is so dominant that an intent can be inferred for federal law to occupy the field exclusively; and 3) conflict preemption, where federal and state law so conflict that it is impossible

for a party to comply with both simultaneously, or where enforcement of state law prevents the accomplishment of the full purposes and objectives of federal law. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *Friberg*, 267 F.3d at 442. If the statute contains an express preemption clause, the plain wording of the clause necessarily contains the best evidence of Congress' preemptive intent. *CSX Transp. Inc. v. Easterwood*, 507 U.S. 658, 664 (1993).

Title 49 U.S.C. § 10501(b) contains an express preemption clause. See *Railroad Ventures, Inc. v. Surface Transp. Bd.*, 299 F.3d 523, 563 (6th Cir. 2002). It provides that: "(b) The jurisdiction of the [Surface Transportation] Board over-- (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. 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). The authority of the Board under this subchapter is exclusive. *City of Auburn v. United States Gov't*, 154 F.3d 1025, 1030 (9th Cir. 1998). Therefore, because the plaintiffs' claims are preempted by federal legislation, the district court properly granted summary judgment in favor of the defendants because defendants were entitled to judgment as a matter of law.

Accordingly, we hereby affirm the district court's judgment for the reasons set forth in the district court's March 15, 2004, memorandum opinion and order.

ENTERED BY ORDER OF THE COURT


Clerk

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of January 2014, I have caused a copy of the foregoing to be served by first-class mail, postage prepaid, on each of the parties of record in STB Finance Docket No. 35792.

A handwritten signature in cursive script that reads "David H. Coburn". The signature is written in black ink and is positioned above a horizontal line.

David H. Coburn